

AN
INSTITUTE
OF THE
LAW OF SCOTLAND,
IN FOUR BOOKS,

IN THE ORDER OF SIR GEORGE MACKENZIE'S
INSTITUTIONS OF THAT LAW.

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TO

THE RIGHT HONOURABLE

ROBERT DUNDAS OF ARNISTON,

LORD PRESIDENT OF THE COURT OF SESSION,

THE FOLLOWING SHEETS

ARE

RESPECTFULLY INSCRIBED,

BY

HIS LORDSHIP'S

MOST OBEDIENT, AND

MOST HUMBLE SERVANT,

THE EDITOR.

AN
INSTITUTE
OF THE
LAW OF SCOTLAND.

BOOK III.

TIT. I.

Of Obligations and Contracts in general, and of Contracts to be perfected re.

THE general method proposed to be observed in this institute, was, to treat, *first*, Of persons; *2dly*, Of things or rights; and, *3dly*, Of actions. The law of persons hath been handled in the first book; and that of heritable rights in the second. Moveable rights fall now to be explained, the doctrine of which depends chiefly on obligations.

2. An obligation may be defined in our law, as it was by the Roman, a legal tie, by which one is bound to pay or perform something to another. The debtor in the obligation is commonly called with us *the obligant* or *granter*; and the creditor, *the receiver*, or *grantee*. In the English law, the debtor gets the name of *the obligor*; and the creditor, of *the obligee*. Every obligation on the debtor implies an opposite right in the creditor, who is entitled to demand performance; so that what is an obligation or burden in regard of the one, is a right with respect to the other. From the above definition, the essential difference may be perceived between rights that affect a subject itself, which are called *real*, and those which are founded in obligation, or, as they are generally styled, *personal*. A real right, or *jus in re*, whether of property, or of an inferior kind, as servitude, entitles the person vested with it to possess the subject as his own; or, if it be possessed by another, to demand it from the possessor, in consequence of the right which he hath in the subject itself: whereas the creditor in a personal right or obligation has only a *jus ad rem*, or a right of action against the debtor or his representatives, by which they may be compelled to fulfil that obligation, but without any right in the subject which the debtor is obliged to transfer to him.

3. It is said in the definition, to pay or perform. The first, to pay, relates properly to subjects which the debtor is bound to deliver to the creditor; and is restricted, in the common use of the word, to sums of money. The other alternative, to perform, includes all articles to which a debtor may be obliged, consisting in

TITLE I.
Moveable rights.

Definition of obligations.

To what subject they relate.

Book III.

Obligations are either merely natural, merely civil, or mixed. Of natural obligations.

Of civil and mixed obligations.

Obligations are either pure, *in diem*, or conditional.

fact; as an obligation to do, or to procure something to be done, in favour of the creditor; *ex. gr.* an obligation to grant a conveyance, a lease, &c. or to procure one to be granted by another. One cannot oblige himself, but by a present act of the will, conferring upon another a right to demand performance. A bare resolution, therefore, or purpose, to be obliged, infers no obligation; for a resolution, though it be an act of the will, is only with itself, which can have no operation in favour of others; and consequently may be altered at the pleasure of the resolver, *Stair, Feb. 27. 1673, Kincaid, (DICT. p. 12143).*

4. The division of obligations, stated by civilians, into merely natural, merely civil, and mixed, is also applicable to the law of Scotland. Obligations merely natural, are those by which one person is bound to another, by the law of nature, or equity only; but which positive law does not support by any action that may render them effectual. Such obligations arise either, *first*, From the nature of the act or writing by which the debtor is bound. Thus, one who binds himself by writing to pay or perform, is naturally bound to fulfil his engagement, though the written obligation should be civilly null for want of some legal solemnity. *2dly*, Natural obligations may arise from the condition of the person obliged. Thus, parents are brought under a natural obligation to provide their children in reasonable patrimonies, though they cannot be compelled to it by the civil judge: A woman is, on her widowhood, naturally bound to fulfil the obligations under which she laid herself *stante matrimonio*, though no action lies against her for performance: And, in like manner, a minor *pubes*, who binds himself without the consent of his curators, though the law declares his obligation void, stands naturally bound by it, if no fraud or violence has been used against him by the creditor. This kind had, by the Roman law, all the effects of full obligations, except the right of producing an action. Hence a debtor in a full obligation, who was creditor to the same person in a natural one, might compensate the one debt with the other, *L. 6. De compens.*; and a debtor in a natural obligation, who had discharged it by payment, could not again recover it by a *condictio indebiti*, *L. 13. De condict. ind. L. 10. De obl. et act.* Hence also a cautioner might be interposed in natural obligations, who would be effectually bound by his cautionary engagement, though the principal debtor could not be sued, *L. 6. § 2. L. 7. De fidej.* The effects given by the usage of Scotland to natural obligations, shall be explained under their proper heads.

5. An obligation merely civil, is that tie of positive law by which one is bound without any foundation in equity; and consequently the action which it produces may be rendered ineffectual by a perpetual exception in equity. Thus, an action upon an obligation extorted *vi aut metu*, being founded only in positive law, may be elided by the remedy of an exception or reduction.—Mixed obligations are those which, at the same time that they are grounded in equity, have the support of the civil sanction, which authorises actions for enforcing their performance; and they get that name, because they are not founded barely in natural law, but are confirmed by positive. These full or perfect obligations are the only proper ones; for in strict speech he alone is debtor, *a quo invito aliquid exigi potest.*

6. Obligations are either pure, or to a certain day, or conditional. Obligations are called *pure*, to which neither day nor condition is adjected: And debts of this kind may be exacted immediately,
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L. 41. § 1. De verb. obl.; for in an obligation entered into simply, without the encumbrance of any future condition, or future day of performance, the debtor is obliged to immediate performance; and the creditor, who is not limited, may demand it when he pleases. Obligations *in diem*, or, as they are sometimes called, *ex die*, *L. 44. De obl. et act.* are those in which the performance is deferred to a determinate day. In this kind, *dies statim cedit, sed non venit, d. L. 44.*; *L. 213. pr. De verb. signif.*; or, in other words, a debt becomes properly due from the very date of the obligation, because it is certain that the day will exist; but its effect or execution is suspended till the day be elapsed. A conditional obligation, or an obligation granted under a condition the existence of which is uncertain, has no obligatory force till the condition be purified; because it is in that event only that the party declares his intention to be bound, and consequently no proper debt arises against him till it actually exist; so that the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself. Upon this ground, an obligation granted to a wife, the condition of which did not exist till after the dissolution of the marriage by her death, was adjudged not to fall under the *jus mariti*, *Fount. Dec. 18. 1694, Fotheringham*, (*Dict. p. 5765.*), because the husband's right ceased before it could be said that a debt became truly due. Such obligation is therefore said in the Roman law to create only the hope of a debt. Yet the granter is in so far obliged, that he hath no right to revoke or withdraw that hope from the creditor which he had once given him: And hence diligence is competent to creditors in conditional debts, and they transmit their right to their heirs, in case they should die before the existence of the condition, § 4. *Inst. de verb. obl.*

7. An obligation to which a day is adjected that may possibly never exist, though in the form of words it be an obligation *in diem*, is truly conditional, *L. 21. pr. Quand. dies leg.*; because all uncertain events are of the nature of conditions. Thus, if a father should grant a bond of provision to his child payable at his age of sixteen years, the obligation, because it is uncertain whether the term of payment shall ever exist, implies a condition, that the child so provided shall live to that term; and consequently, if the child should die before sixteen, the provision falls, *Stair, Feb. 16. 1677, Belsches*, (*Dict. p. 6327*)*. Articles which one of the parties to an obligation or contract undertakes to perform, though they should be conceived in the style of provisions, are most improperly called *conditions*. A provision, *ex. gr.* in a lease, that the lessee should inclose his grounds within a certain time, though in the form of words

Obligations *in diem incertum* are conditions.

Articles to which one party is bound, are not conditions.

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* This doctrine is confirmed by later decisions, and is held equally applicable to legacies as to bonds of provision, *Feb. 1. 1749, Executors of Bell*, reported by *Kames, Rem. Decis. No. 102*, and by *Falc. ii. 52. Dict. 6332; Fac. Coll. Nov. 19. 1788, Omey*, *Dict. p. 6340; Ibid. Nov. 15. 1792, Sempills*, *Dict. p. 8108.* In a prior decision, where the legacy was in these terms: "To A. B. I leave £. 500 Sterling, to be paid when he is sixteen years of age;" the legatee having died before arriving at that age, the Court sustained the legacy, holding it to have vested *a morte testatoris*, and that the age of the legatee was merely to be considered as fixing the term of payment; *Ibid. Dec. 9. 1783, Burnetts*, *Dict. p. 8105.* But in later practice, this case has not been regarded as a precedent.

¹ See also *Grindlay, 1st July 1814, Fac. Coll.* In some cases, from the peculiar mode of expression, it is a very nice question, whether the day adjected to the legacy is to be held as a proper condition, or as inserted *morandæ tantum solutionis gratia*. The purpose and intention of the testator in giving the legacy affords perhaps the surest rule for decision. See farther on this subject, *infr. t. 8. § 46. and t. 9. § 9.*

Book III.

Obligations in favour of third parties and *sub modo*.

Obediential or natural obligations.

Obligations arising from the natural duty of restitution.

a condition or provision, is truly one of the obligations he enters into by the contract, the non-performance of which is so far from suspending the diligence competent to the landlord, that it is itself a ground of diligence. The different nature of the conditions that may be adjected to obligations, will be explained below, *T. 3. § 85*.

8. An obligation may be effectually constituted in favour of third parties, though they should be not only absent, but ignorant of the granting of it: and even in favour of children yet to be born; in which last case it is in effect conditional, being suspended till the birth of the child. Obligations granted *sub modo*, or for certain uses or purposes, are not, like conditional ones, suspended until performance by the creditors in them; for their obvious meaning is, that the creditors shall first get the right, and afterwards perform the granter's will, *L. 41. pr. De contr. emp.*

9. It is universally affirmed by the Roman lawyers, that all proper obligations must be grounded on some anterior cause; either, *first*, express contract; *2dly*, something resembling a contract; or, in other words, some deed which creates an obligation without express covenant; *3dly*, delinquency; or, *4thly*, some fact resembling delinquency. But this division of obligations is not adequate to the thing divided; for there are many instances of obligations, even proper, which are grounded neither on contract, nor delinquency, nor any fact resembling either of them. These are called by Lord Stair, *obediential* or *natural obligations*, in opposition to *conventional*. One of the most noted examples of natural obligations, is that which lies upon parents, not from contract or delinquency, but merely from the condition in which God has placed them, to maintain their children; of which above, *B. 1. T. 6. § 56*.

10. Under this class may be also reckoned those obligations which arise from the natural duty of restitution. In consequence of this, whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him: And though the possessor should have purchased the subject for a price *bona fide*, still the owner must have it restored to him, in consequence of his property, without the burden of repaying that price to the possessor*. As this obligation is founded on the power which the possessor hath by his possession over the property of another, therefore if he shall cease to possess, by sale, donation, &c. the obligation to restore ceaseth also †. But, *first*, if he has given up the possession fraudulently, he continues bound; for *is qui dolo malo desit possidere, pro possessore habetur*, *L. 25. § 2, 9. De hæc. pet.*; *L. 131. De reg. jur.* *2dly*, Though the possessor should have sold it *bona fide* to another, yet if he has received an higher price for it than he purchased it at, he must restore the surplus price to the owner towards his indemnification; because, as to that, the possessor, if he did not restore it, would turn out a gainer to his neighbour's cost, contrary to the rule prescribed

* This rule is not applicable to the case of money, or bank-notes which pass for money. The property of these is transferred with the possession; *Bankton, B. 1. t. 8. § 34.*; *Feb. 24. 1749, Crawford* against *Royal Bank*, *DICT. p. 875*, and *Fac. Coll. June 21. 1799, Swinton*, *DICT. p. 10105.*²

† *Pr. Dalr. June 15. 1704, Scot, DICT. p. 9123*; *Fac. Coll. Nov. 13. 1765, Walker*, *DICT. p. 12802*.

² On the same principle it has been found, that the onerous and *bona fide* holder of a stolen bill, *blank indorsed*, is entitled to payment from the drawer; *Fac. Coll. Lambton & Co. 21st June 1799, DICT. v. BILL OF EXCHANGE*; *Ibid. Scott. & Co. 27th Feb. 1812*; *Bayley on Bills, 106. (4th edit.) App. No. 8.* As to the ordinary case of stolen goods, *vid. supr. B. 2. t. 1. § 3. not.*³

prescribed by L. 206. *De reg. jur.* From this duty of restitution it ariseth, that things given in the special view of a certain event, *ex. gr.* in the contemplation of marriage, must, if the event, in the view of which they were given, shall not afterwards exist, be restored by the grantee, who may be sued for restitution by personal action, styled in the Roman law, *Condictio causa data, causa non secuta*, L. 3. § 2. &c. *De cond. caus. dat.* If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it, when it was in his power to perform, before that accident happened, L. 5. § 4. *eod. tit.* Thus also, what is given *ob turpem causam* must be restored if the turpitude was in the receiver, and not in the giver, whether the cause of giving was performed or not, L. 1. § 2. *De cond. ob turp. caus.* If, for instance, one accused of a crime should give money to another, that that other might not bear false witness against him, he may recover the sum so given, by a *condictio ob turpem causam*³ *.

11. Another kind of obediencial obligations mentioned by Stair, is that of recompence, by which a person who is made richer through the occasion, or by the act of another, without any purpose of donation, is bound to indemnify that other, either of his whole expence, or at least in so far as he himself is a gainer. As this obligation is strongly founded in natural equity, the laws of all civilized nations have adopted it, even in the case of pupils, though they cannot be bound by any contract. It is on this principle, that though a house built *bona fide* upon ground not the builder's own, accrues to the proprietor of the ground, and not to the builder ;
supr.

Obligation of
recompence.

* It is almost unnecessary to add, that obligations granted *ob turpem causam* are not actionable. See *Durie*, July 20. 1622, *Weir*, Dict. p. 9469; *Fac. Coll. June 26. 1765*, *Hamilton*, Dict. p. 9471⁴.

³ Where both parties are involved in the turpitude, *e. g.* in the case of obligations granted as the price of prostitution,—though action will not lie to enforce implement, yet, on the other hand, where performance of the obligation has already been made, neither will action lie for restitution; *A. v. B.* 21st May 1816, *Fac. Coll.* A farther distinction is admitted, between bonds given as the price of prostitution, and bonds granted subsequent to such a connection, as a provision due in honour and justice to a young woman who has been ruined. On a bond of the former description no action will lie; on one of the latter description the claim is admissible. But the favour indulged to bonds of the latter description is withheld, where the grantee is a prostitute, or where she knew the granter to be married at the time of their connection; 1. *Bell Comm.* 232. The cases referred to in *not. h. p.* fall under this latter description. In that of *Hamilton*, while action was denied on a bond to the adulteress, it was, by a sound distinction, though contrary to the judgment in the case of *Weir*, sustained on another bond to the innocent issue of the connexion.

⁴ Action was refused on a bill granted for smuggled goods; *Fac. Coll. Duncan*, 8th Feb. 1776, Dict. v. PACT. ILLICIT., App. No. I.—Again, on a *pactum illicitum* connected with the grant of an office; *Thomson*, 16th Feb. 1811, *Fac. Coll.* Wagers also, as *sensiones ludicrae*, are not actionable in Scotland; *Fac. Coll. Bruce*, 26th Jan. 1787, affirmed on appeal 14th April 1788, Dict. p. 9523.; *Ibid. Wordsworth*, 15th May 1799, Dict. p. 9524.; *Ibid. Cumming Gordon*, 16th Nov. 1804, Dict. v. PACT. ILLICIT., App. No. 3.; 1. *Bell Comm.* 233.

As to *pacta illicita* in reference to the discharge of bankrupts, composition contracts, &c. under the bankrupt statute, see 54. *Geo. III. c.* 137, § 60.; *Arroll*, 29th May 1810, noticed 2. *Bell Comm.* 597; *Mack*, 25th Nov. 1814, *Fac. Coll.*; *Deuchar*, &c. 15th May 1819, *Ibid.*, compared with *Junnor*, &c. 15th Feb. 1822, (*S. & B.*); *Riddell*, &c. 20th Nov. 1821, (*S. & B.*); 2. *Bell Comm.* 477, 504, 597, &c. &c.

As to *pacta illicita* in procuring election to an office, &c. see *Fac. Coll. Campbell*, 28th Nov. 1778, Dict. p. 9530.; *Ibid. Dalrymple*, 1st Feb. 1786, Dict. p. 9531.; *Thomson*, 16th Feb. 1811, *Fac. Coll.*; *Haldane*, 6th March 1812, *Ibid.*; 1. *Bell Comm.* 72.

And see, generally, on the subject “of obligations considered as legal or illegal,” 1. *Bell Comm.* 232, *et seq.*

supr. B. 2. Tit. 1. § 15.; yet, by the civil law, the proprietor claiming the house, whether he was a gainer or not by the building, was liable to restore to the builder the full expence of the materials and workmanship bestowed upon it, L. 7. § 12. *De adq. rer. dom.* ⁵. By the usage of Scotland, the claim of recompence is, in the case of repairing an house by a liferenter or adjudger, restricted to such expences as are profitable to the owner, by bringing a higher rent to him for the house than it gave formerly, *Stair, Feb. 23. 1665, Jack, (Dict. p. 3213.); Ibid. Jan. 24. 1672, Halket, (Dict. p. 13412.)**; which is also conformable to the Roman law; L. 48. *De rei vind.* Lord Stair affirms, B. 1. Tit. 8. § 6., on the authority of L. 38. *De hered. pet.*, that this obligation of recompence obtains, in so far as the owner is *lucratus*, even in favour of a builder *mala fide* upon another man's ground: But whether this is, or ought to be held as the law of Scotland, may be doubted. One who has only a temporary right in a subject, as a church-beneficiary, or a tacksman, has no claim of recompence against his successor in the benefice, or his landlord, for the expence laid out on the manse, or the lease-grounds; for he is presumed to have incurred that expence from the sole view of the pleasure, profit or convenience, that it might bring to himself while his right subsisted †. The extent of the recompence arising from *negotiorum gestio*, the *lex Rhodia de jactu*, &c. will be explained in their proper places.

Obligations from delinquency,

so far as they bind to indemnification of the injured party.

1st, With respect to the nature of the delinquency.

12. Obligations arising from delinquency are also obediencial. And though the consideration of crimes and delicts, in so far as they draw after them the resentment of public justice, falls under Tit. *Crimes*, it may be proper to mention, in this place, some rules concerning the obligation under which a delinquent is brought, to indemnify the private party, or make up to him the damage he suffered by the wrong, with respect, *first*, to the nature of the delinquency; *2dly*, to the extent of the damage; and, *3dly*, to those who are liable to repair it.

13. *Alterum non lædere* is one of the three general precepts laid down by Justinian, which it has been the chief purpose of all civil enactments to enforce. In consequence of this rule, every one who has the exercise of reason, and so can distinguish between right and

* *Fac. Coll. Feb. 28. 1782, Rutherford, Dict. p. 13422. See Ibid. June 5. 1795, Selby, &c. Dict. p. 18438. 6.*

† See *Stair, B. ii. t. 1. § 40.*

⁵ Where, in consequence of buildings erected *bona fide* on ground not the builder's own, great changes and commixtion of property have taken place, so that the subject cannot be vindicated *in forma specifica* without serious injury and devastation, it has been decided that the proprietor must accept an equivalent in money; *Fac. Coll. Macnair, 18th May 1802, Dict. p. 12832.*

⁶ It was found in this case, that a person holding a property in trust, and having a right of retention over it for debts owing to him by the proprietor, is not liable to tradesmen employed by the proprietor, for the price of meliorations made under such employment. The view of the Court is stated to have been, that "as the pursuers are not *creditores hypothecarii*, the defender could only be subjected on the principle, *Nemo debet locupletari aliena jactura*. But to apply this rule here would be extending its operation too far; for in this way persons would be brought under it, whose *lucrum* (if it can be so called) reached only to recovery of a just debt; and a claim of recompence lie against every heritable creditor, whose security was rendered broader by meliorations made at desire of the proprietor."

Where a subject burdened with a liferent comes, on the bankruptcy and sequestration of the original fiar, into the possession of creditors, and is by their trustee sold to a third party, who proceeds to build upon it, such third party "is to be considered as a *bona fide* possessor, and is entitled to the annual interest of the meliorations made by him on the said subject, under which burden the pursuer (liferenter) must take the right of liferent;" *Fac. Coll. Laird, 10th Feb. 1807, Dict. voce LIFERENTER, App. No. 3.*

and wrong, is naturally obliged to make up the damage befalling his neighbour from a wrong committed by himself. Wherefore, every fraudulent contrivance, or unwarrantable act, by which another suffers damage, or runs the hazard of it, subjects the delinquent to reparation.⁷ Thus a party resiling after subscribing a marriage-contract, without giving a good reason for it, was condemned to the payment of the expence disbursed by the other party in wedding-clothes, and other preparations for the marriage, *Fount. Jan. 2. 1685, Græme*, (DICT. p. 8472.)⁸ *. Wrong may arise, not only from positive acts of trespass or injury, but from blameable omission or neglect of duty. Thus a jailor by whose negligence a prisoner for debt is suffered to escape, becomes liable to the creditor in the sum due, though the creditor receives no immediate damage by that omission, and only loses one of the chances which he had before of recovering the debt by the *squalor carceris*.¹⁰ Thus also a clerk of court who has through carelessness lost the writings of a party which were produced in process, must make up to the sufferer his damage¹¹. This obligation to repair the loss of another, supposes some wrong committed by the party obliged; for no person ought to be subjected to the reparation of damage, who has not by some culpable act or omission been the occasion of it, *L. 151. De reg. jur.* One draining marshy grounds, will not be obliged to repair the damage the proprietor of an inferior tenement may there-

by

* Thus also, action lies to a husband for damages against the seducer of his wife; *June 17. 1743, Steedman*, reported by Clerk *Home* and by *Kilkerran*, DICT. p. 7397. And the action is competent, although the husband have not previously raised an action of divorce against his wife; *Fac. Coll. March 7. 1787, Maxwell*, DICT. p. 13919.² The seduction of an unmarried woman founds a similar claim of damages against her seducer; *Fount. July 15. 1696, Hislop*, DICT. p. 13908; *Dec. 1. 1749, Lining*, reported by *Kilkerran, Kames*, and *Falconer*, DICT. p. 13909; *Fac. Coll. June 16. 1785, Buchanan*, DICT. p. 13918.

⁷ For example, damages were awarded for oppressive use of diligence abroad, pending an action in this country; *Fac. Coll. 13th Dec. 1803, DICT. v. LIS ALIBI PENDENS, No. 1.*;—for retaining a collier known to be under engagement to another coal-pit, *Dickson*, 1st Nov. 1816, (*Murray's Reports*);—against one company of merchants for intercepting and executing orders addressed to another; *Dicksons Brothers, 18th March 1816, (Ibid.)*—&c. &c.

As to damage for slander and defamation, *vid. infr. B. 4. t. 4. § 81.*;—for wrongous imprisonment, *infr. Ibid. § 81.*;—for breach of contract, *infr. B. 3. t. 3. § 86.*;—for negligence, disobedience of orders, &c. in the discharge of duty as an agent, messenger, &c. &c. *infr. Ibid. § 16. & 37.*

⁸ As to damage for breach of promise of marriage, *vid. supr. B. 1. t. 6. § 3. in not.*

⁹ So found again, *Fac. Coll. Paterson, 10th Dec. 1803, DICT. p. 13920.* On the other hand, it has been “found unanimously, that a party had no claim to damages “for adultery, who continued to *cohabit* with his wife after he had discovered her “guilt; the pursuer’s wife appearing also to have been a person of a loose character, “before the defender got acquainted with her;” *Aitken, 6th Feb. 1810, Fac. Coll.*

¹⁰ *Vid. infr. B. 4. t. 3. § 14.*

¹¹ Thus also, the owner of a coal-pit improperly fenced, and situate close by the side of a highway, was found liable in damages to the family of a man who had been killed by falling into it; *Fac. Coll. Black, 9th Feb. 1804, DICT. p. 13905.*; affirmed on appeal. So also, if the proprietor of a house having a common stair, makes a hole or opening in the wall of the stair, and neglects to fence it, he is liable for any injury which may happen; and the workmen employed about the house, and who are daily making use of the opening, are in like manner liable; but not those who have for some time left the premises, having either finished or discontinued their work, although at first the opening should have been made by themselves, or at their suggestion; *Smith, 8th March 1810, Fac. Coll.*; as reversed on appeal, 2. *Dow, 390. Magistrates*, also, as guardians of the public police, seem to be liable for injury sustained by falling into unfenced holes in the streets; *Fac. Coll. Innes, 6th Feb. 1798, DICT. p. 13189.*

Partly on the same principle, and partly from an obligation arising *ex contractu*, the proprietors of stage coaches, &c. are liable for injury sustained through the overturning of the coach by the driver’s fault or negligence; *Brown, 26th Feb. 1813, Fac. Coll.*

2dly, With respect to the extent of the damage.

by sustain, by having a greater quantity of water thrown upon his grounds, because that is a lawful act of property. And, on the same ground, if what has brought on the damage be merely accidental, the person suffering has no remedy.

14. As to the second head, Every thing by which a man's estate is lessened, is damage or loss. Damage therefore includes costs of suit, and all sums expended by the sufferer towards obtaining reparation; but it never ought to rise higher than the loss truly sustained. Thus, suppose a bond for L.1000 to be lost by the negligence of a clerk or doer, the creditor in the bond cannot insist against him who hath lost it for the whole sum contained in it, if it shall appear that the debtor's funds were not fully sufficient for the payment of his debts, but must content himself with that sum which he could have made effectual in a competition with the other creditors had the bond been still extant, *June 20. 1710, Hamilton*, (DICT. p. 3153.)*. Where the party injured can be restored precisely to his former state, that method ought to be followed, both as the most natural, and the completest reparation. Thus, where goods are carried off from a person wrongfully, he receives full indemnification, by having the goods again put into his possession, and being reimbursed fully of the loss he has sustained by being deprived of the use of them, and of his expence in recovering them. But where, through the extinction or deterioration of the subject, that method of reparation cannot be effected, the value of the damage in money must be ascertained by the judge; instances of which daily occur, where a subject is either destroyed or made worse, by an accident in any degree imputable to another. All are agreed, that the extent of the damage, where the delinquency is not attended with fraud, ought to be estimated by its real worth, and not by the *pretium affectionis*, or imaginary value that the sufferer is pleased to set upon it; agreeably to the rule of the *lex Aquilia*, L. 33. pr. *Ad leg. Aquil.*; see *Fount. Jan. 25. 1687, Spence*, (DICT. p. 3153). In special cases, however, the judge ought to estimate the loss of the party higher than the subject destroyed or damaged would have been worth to any other; *ex. gr.* where trees near a gentleman's seat are cut down or hurt, which served for policy or shelter¹³ †. Where a delinquent is subjected by statute to a determinate penalty, without any mention of reparation to be made to the private party, his claim of damage, which arises

* See *Fac. Coll. Dec. 7. 1780, Gray*, DICT. p. 11754.¹²

† See as to the extent of damages allowed to the husband for seduction of his wife, *Kilkerran and Clerk Home, June 17. 1743, Steedman*, DICT. p. 7337. (Reported also by *Elchies, v. ADULTERY*, No. 1.)

¹² It was here found, contrary to the principle laid down in the text, that Magistrates refusing to receive and incarcerate a prisoner for debt, were liable for the full amount, notwithstanding the prisoner was notour bankrupt. And the Court have, in repeated instances since, refused to enter into any investigation, in the view of modifying damage, according to the proof of actual loss; *M'Millan, 2d March 1820, Fac. Coll.*; *Chatto, 17th Jan. 1811, Ibid.*; *Lillie, 13th Dec. 1816, Ibid.*; affirmed on appeal, 1. *Bligh, 315*; 1. *Bell Comm. 279, & 369; infr. t. 3. § 16. & 37.*

¹³ *Solatium* for wounded feelings is allowed in cases of breach of promise of marriage; *supr. B. 1. t. 6. § 3.* So also where damages are sought for the loss of a father, husband, &c., through the improper negligence or misconduct of a party, they are not to be estimated merely by the pecuniary advantages which the family derived from his exertions in business; but a *solatium* will be given, even where "the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit, on account of his bankruptcy and dissipated habits;" *Brown, 26th Feb. 1813; Black, 9th Feb. 1804; supr. not.*¹¹

arises from the common law, is not, from the silence of the statute, construed to be cut off; for no statute ought by implication to be interpreted into so glaring injustice, as to deprive the party injured of the means of redress that was formerly competent to him, especially where the enactment appears to have been made *in odium* of the delinquency¹⁴.

15. As to the persons liable to repair the damage, it is he who does the wrong that must repair it; and whoever gives a mandate or order for doing it, is held as the doer, *L. 169. De reg. jur.*¹⁵. Where two or more persons have been culpable, either as principals, or some of them only as accessories, each of them may be sued for the whole damage; because both of them concurred in committing the wrong: But as soon as the damage is repaired or made up to the party hurt by any one of them, the obligation is extinguished as to the rest; for an obligation founded solely upon damage, cannot possibly continue after the damage ceaseth to exist. A presumption of guilt is sometimes fixed by statute, against certain societies or bodies of men, without the least circumstance of suspicion against any individual, other than what arises from his vicinity to the place where the wrong was committed. Thus, where trees are cut down, the inhabitants of the next parish, because they are presumed capable of discovering the offenders upon proper pains, are subjected to the damage, if they do not get them convicted within six months, *1° Geo. I. sess. 2. C. 48.* If the delinquent should die, an action of damages lies against his heirs or representatives; for though penalties are not transmissible against a delinquent's heirs, yet as the reparation of damages is grounded on an obligation merely civil, the heir of the person obliged must be subjected to it¹⁶.

Sdly, Rules with respect to those who are liable to repair the damage.

16. A contract is the voluntary agreement of two or more persons, by which something is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part. If the consent of parties be implied in the agreement, such as are incapable of consent, as idiots, pupils, &c. cannot contract. Upon this supposed incapacity, both the Roman law, *L. 10. C. Qui test.*, and the usage of Scotland, *Stair, July 9. 1663, Hamilton*, (*Dict. p. 6300.*), have disabled all from contracting who have been deaf and dumb from the birth: But there are instances of such now alive, who not only are endued with strong natural parts, but can apply them to all the affairs of life, and who even act in the character of freeholder, &c. in the more public concerns of the kingdom or county. Persons, while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract; *Stair, July 29. 1672, Lord Hatton*, (*Dict. p. 13384.*) Those who lie under a

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¹⁴ As to penalties adjoined to obligations, by the special contract of parties, *vid. infr. t. 3. § 86.*

¹⁵ A master was in one case found liable for damage done by his servants, though he was at a distance, and they were acting against his express orders; *L. Keith, 10th June 1812, Fac. Coll.* But this decision has since been reprobated; *Linwood, &c. 14th May 1817, Fac. Coll.* See also *Thorburn, 24th May 1811, Ibid.*

¹⁶ That penal actions do not transmit was found, *Fac. Coll. Graham, 6th March 1798, Mor. p. 5599; sed contra*, as to actions for civil reparation and damages, *Fac. Coll. Macnaughton, 17th Feb. 1809; Ibid. Morrison, 25th May 1809; and Mackenzie's Trustees*, observed in a note to this last case. See also, *infr. B. 4. t. 1. § 14. & 70.*

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legal incapacity, *ex. gr.* by attainder, if they come under an obligation, cannot object their incapacity against the creditor, being excluded *personali objectione*, *Kames*, 64, (*Serra* against *Earl of Carnwath*, Dec 24. 1725, Dict. p. 10449.); for as attainder is designed, not as a benefit, but as a punishment to the person attainted, it cannot be pleaded by him as a pretence to be released from his just engagements. This consent, which is necessary to every contract, is excluded, *first*, by error in the essentials of it; for those who err cannot be said to agree. This obtains, whether the error regards the person of the other contracting party, as if one became bound to James when he had reason to believe he was contracting with John, *arg. L. 15. De jurisd.*; or the subject-matter of the contract, as if one contracting to sell a piece of gold-plate, should deliver to the purchaser one of brass, *L. 9. § 2. De contr. empt.* But if the error lies only in the accidental qualities of the subject, the contract is valid, *ex. gr.* if the gold has a greater mixture of alloy than it ought to have had, *L. 10. eod. tit.* *2dly*, There can be no consent, where the words or writings by which it is said to be expressed, are drawn from either of the parties by fraud, against his real inclination. Fraud or *dole* is defined a machination or contrivance to deceive; and where it appears that the party would not have entered into the contract, had he not been fraudulently led into it, or, as it is expressed in the Roman law, *ubi dolus dedit causam contractui*, he is justly said not to have contracted, but to be deceived. Hence, if he who is guilty of the fraud shall sue for performance, the other party may be relieved by an exception of *dole*; or though no suit shall be brought against him, he himself may sue for setting aside the contract *ex capite doli*. Consent is also excluded by violence, or even by the menace of violence, *L. 116. De reg. jur.*; for violence, whether used, or barely threatened, is a necessity laid on a man to act contrary to his will, *L. 1. Quod met. caus.*; so that it is only in appearance, in the form of words, that a person forced or menaced gives his consent; his will hath truly no part in the contract.

Division of contracts by the Roman law.

Real contracts.

17. Contracts were, by the Roman law, divided into those that were perfected by the intervention of things, by words, by writing, and by sole consent; *re, verbis, literis, consensu*. It was essential to real contracts, that beside the consent of parties, something should be actually paid or performed by one of them, in order to constitute an obligation against the other. Thus, to form the contract of *mutuum*, or of *pignus*, it was not enough that one agreed to give a thing in loan or in pledge; the subject must have been actually lent or impignorated. If there was barely an obligation to give, it resolved into a *nudum pactum*; which, with the Romans, was not productive of an action. But, by the law of Scotland, one who obliges himself to give in loan, or in pawn, may be compelled by an action to perform; though indeed, before the subject be lent or impignorated, it does not form the special contract of *mutuum* or *pignus*.—The real contracts of the Roman law are, loan, commodate, depositeion and pledge.

Mutuum or loan, proper subjects.

18. Loan, when it is taken in its full extent, as it commonly is in our language, includes all moveables of whatever kind, the use of which may be given by one to another: And when the signification of the word is thus unlimited, it is capable of forming, according to the different natures of the subject given in loan, either the

the contract of *mutuum*, or of commodate ; which two have properties and effects quite different from one another, and are in themselves distinct contracts. Where a thing is lent which cannot be used without either its extinction or its alienation, the property of it must needs be transferred to the borrower, who cannot otherwise have a right from the proprietor to make the proper use of it. Thus, corn, wine, &c. cannot be put to use without the destruction of the subject. From this necessity has arisen the contract of *mutuum* ; by which the borrower becomes the proprietor of the subject given in loan. As money or coin cannot be used, unless the property be transferred, except perhaps in consignations, money therefore is a proper subject of *mutuum*. And in the loan of money, it is not its intrinsic value that is to be considered, which indeed was our old law, 1467, C. 19., &c. but that which is stamped on it by public authority. It is not in the borrower's power, who, in consequence of the property transferred to him by the contract, has lawfully destroyed the subject by using it, to restore that self-same subject to the lender : His obligation, therefore, is fully satisfied, by restoring to him, as much of the same kind, and of the same good quality, as he borrowed. Hence those things only can be the subject of *mutuum*, which consists *pondere, numero, et mensura* ; which may be estimated generically by weight, number, and measure ; otherwise called fungibles, *quæ functionem recipiunt*. By this description, pictures, horses, jewels, are not fungibles ; for as their values differ in almost every individual, each must be rated by itself : But grain and coin are fungibles ; because one guinea, or one bushel or boll of sufficient merchantable wheat, precisely supplies the place of another. It is true, that some subjects which are not of their nature fungible, are converted into fungibles, or held for such, in the contract of steelbow, explained *supr. B. 2. T. 6. § 12.* ; which is undoubtedly a species of *mutuum*, the property of the steelbow goods being thereby transferred to the tenant ; and yet those goods consist frequently, not only of corns, and other fungibles, but of horses, cows, and most of the implements of tillage. But the reason of this specialty is obvious. It would be a most unequal bargain for the landlord, if the tenant should have it in his power to discharge his obligation to him by the redelivery of the steelbow horses, carts, &c. after they had, by a use of perhaps a dozen or twenty years, been rendered quite unfit for service.

19. The borrower, to whom the property of the subject is transferred, must alone suffer the loss arising either from its destruction or from its deterioration, according to the rule, *Res unaquæque perit suo domino* ; which is a rule so evidently established in nature, that it admits of no illustration. Hence, if the thing lent shall afterwards perish, or be damaged, the borrower, who is the *dominus*, continues bound to restore its value to the lender. Where the borrower fails to restore at the time and place agreed on, the estimation must be made according to the price the subject would have given at that time and in that place ; because it would have been worth so much to the lender, had delivery been made in the terms of the contract. A debtor, therefore, in a quantity of wheat, who has not delivered it precisely upon the day, and at the place prefixed, will not get free from his obligation, if the price of wheat should afterwards fall, by offering to deliver the precise number of bolls borrowed : He must pay also the difference between

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the borrower.

tween the price which wheat gave at that day and place, and what it gives when he offers the delivery. If there be no time and place expressed in the contract, the general rule is, that the thing should be valued according to the price it bears at the time and place at which the demand is made, because it is then and there that the borrower ought to have delivered it, *L. 22. De reb. cred.; L. 3. De cond. tritic.* The contract of *mutuum* is obligatory only on one part; the lender is subjected to no obligation: The only action therefore arising from it, is directed against the borrower, that he may restore as much as he borrowed, and of as good quality, together with the damage the lender may have suffered by the borrower failing to perform at the time and place agreed on.

Commodate.

20. Commodate, is a species of loan, gratuitous on the part of the lender, by which the borrower is obliged to restore to him the same individual subject which was lent, and not barely the equivalent, in the same condition it stood in at the time of the contract. Nothing can be the subject of this contract, but what may be used, without either its destruction or alienation, *L. 3. § 6. Comm.*: The property, therefore, as it need not be transferred to the borrower, remains with the former owner; the use of it is the only right competent to the borrower; who, after that use, is bound to restore the *ipsum corpus* of the loan to the lender, *§ 2. Inst. Quib. mod. re.* Hence, if the thing lent in commodate perish, or become worse, while in the borrower's possession, the loss falls on the lender in consequence of his property, *L. 18. pr. Comm.* Yet where the blame is chargeable on the borrower, he must make up the loss, *L. 5. § 4. Comm.*

What degree of negligence is sufficient to subject the party in damages.

21. This distinction naturally introduces the question, What degree of negligence throws the blame upon any party contracting, so as to make him liable for the damage sustained by the other party? This the Romans have settled by the following general rules, Where the contract is entered into for the benefit of both parties, each contractor is bound to employ a middle sort of diligence, such as a man of ordinary discretion uses in his affairs; the opposite of which is called *culpa levis*, or simply *culpa*. Where only one of the parties is benefited by it, such party is bound in that degree of diligence by which one of the most consummate prudence conducts himself; the neglect of which is called *culpa levissima*; and the other party, who is no gainer by the contract, is not accountable for any proper diligence; he is liable only *de dolo, vel lata culpa, i. e.* for dole, *L. 5. § 2. L. 18. pr. Comm.*; or for gross omissions, which the law construes to be dole, *L. 226. De verb. sign.* Where one bestows less care on the subject of any contract which requires an exuberant trust, than he is known to employ in his own concerns, it is accounted dole, though the diligence he hath actually employed be as exact as a man of ordinary prudence would have used, *L. 32. Depos.* These equitable rules have been adopted by us, and by most other civilized states; and agreeably thereto the borrower in commodate must be exactly careful of the subject lent, while in his possession, since he alone has the whole profit arising from the contract. Cases are figured in the Roman law, where that contract may be formed for the sole advantage of the lender; in all which the borrower is liable barely *de dolo, L. 5. § 10. Comm. &c.*: But most of the cases there stated do not constitute the proper contract of commodate, which is always gratuitous on the part of the lender, *§ 2. vers. Commodata, Inst. Quib. mod. re.*

22. The subject in commodate must be lent, either for a determinate time, or for a special use, which implies a reasonable time for putting it to that use: It is not therefore in the lender's power to redemand it arbitrarily from the borrower; who is entitled to hold it till the time limited by the contract be elapsed, or the purpose of the loan be served, *L. 17. § 3. Comm.* But if he fail to restore it when he ought, or if he shall put it to another use than that for which it was lent, and if after such delay it shall perish, even by mere accident, he is bound to pay the value; because in this at least he was to blame, that he did not restore the subject at the time fixed by the contract, or that he put it to an use to which he had no authority to apply it, *L. 18. pr. Comm.*

23. The lender is bound to pay to the borrower a certain part of the expence disbursed by him on the subject while it was in his hands. In this question Mackenzie, § 9. *h. t.* distinguishes between the considerable and inconsiderable expence; but it ought to be judged of, as it was in the Roman law, not from the extent, but from the nature of the disbursements. If, for instance, one shall lend his horse for a journey, the expence laid out by the borrower while he is travelling, for the horse's maintenance, or getting him shod, must not be placed to the lender's account, because that is a burden which naturally attends the use of the horse, *L. 18. § 2. Comm.*: But if he should be seized with a distemper, the curing of which might cost money to a farrier, that expence, because it is casual, must be replaced by the lender to the borrower. The lender is also liable to the borrower for the damage arising to him from the latent insufficiency of the thing lent, if it was known to the lender, *L. 18. § 3.*, or from his taking it back wrongfully from the borrower, before that use could be made of it for which it was lent, *L. 17. § 3. Comm.*

24. The action competent to the lender against the borrower, for compelling him to the performance of his part of the contract, is called *actio directa commodati*; and that which is competent to the borrower, *actio contraria*. And it may be here observed, that in all contracts the strongest obligation, or that which is essential to the contract, produces the direct action; and the weaker, which is only accidental to it, produces the *actio contraria*: so called because it is designed to enforce the counter part of the essential obligation. Thus, in the contract of commodate, the restitution of the thing lent is quite essential, and to this the borrower is bound from the beginning under certain qualifications: It is therefore productive of the direct action. The obligations on the lender are not essential to the contract, but arise from incidents which might never have happened; so that the contract may subsist without them.

25. The contract of *precarium* is a gratuitous loan, in which the lender either gives the use of the subject in express words, revocable at pleasure, *L. 1. pr. De prec.*; or gives it in general terms to be used by the borrower, without specifying any determinate time or use, *L. 2. § 3. L. 4. § 4. eod. tit.* In either case, it may be redemanded by the owner when he thinks fit; for no loan ought to be so interpreted as to give the borrower a more extensive or ample right of use in the subject than the lender hath expressed. As a precarious loan may be recalled at the lender's pleasure, even at a time that may prove hurtful to the borrower, the borrower is liable only *de dolo et culpa lata*, *L. 8. § 3, 6, eod. tit.* But after he is in

TITLE I.

The subject in commodate is lent for a certain time and purpose.

When the lender is bound to pay to the borrower what he has disbursed on the subject.

Actio commodati directa, et contraria.

Precarium.

Deposition, its
nature and obli-
gations.

*Actio depositi
directa et con-
traria.*

mora, that is, if he retain the subject after it is redemanded, he is accountable for the slightest omissions, and even though the subject perish by accident, *d. § 6*. As a precarious loan is granted from a personal regard to the borrower himself, it ceaseth by his death, *L. 12. § 1. eod. tit.*, and consequently his heir is obliged to account to the lender for the fruits of the subject during his possession. One might also conclude, that it ought to cease on the death of the lender, because its continuance depends on his pleasure, which must end with his life: Yet it has obtained, that till the lender's heir redemand the subject, his consent is presumed for continuing the contract, *d. L. 12. § 1*.

26. Deposition is a contract, by which one who has the custody of a subject intrusted to him is obliged to restore it to the owner when demanded¹⁷. He who intrusts is called *the depositor*, and the trustee the *depository*. This contract is also perfected *re*; for it is the delivery of the subject deposited which founds the obligation upon the depository to restore. The property of the thing deposited remains with the depositor; and therefore, if the thing be lost, it is lost to him. Deposition is a gratuitous contract on the part of the depository. If any consideration is to be given him for his pains in keeping it, the contract resolves into a *locatio operarum*, *L. 1. § 8. Depos.* As the consequence of this, the depository is liable only *de lata culpa*, for gross negligence, *L. 20. eod. tit.*; but after the deposit is demanded by the owner, the depository is bound in the most exact diligence. Nay, if the subject should perish thereafter, though by mere misfortune, *casu fortuito*, he is liable for the value, *L. 12. § 3. eod. tit.*; unless it shall appear that it would have also perished, or have had the same chances of perishing, though it had been redelivered to the owner when he called for it, *L. 14. § 1. eod. tit.* Where a chest or other repository under lock and key is deposited, without delivering to the depository the key, and shewing him the goods contained in it, he is answerable only for the repository itself, and not for its contents, of which he could not be said to have undertaken the charge, *March 18. 1626, E. Cassilis*, (*DICT. p. 3452*). And though the key should be delivered to him, he ought to be liable only for the consequences of gross neglect or omission, according to the rule of diligence already explained. Where a subject is committed to the keeping of two or more depositories, each of them is liable for the whole, or *in solidum*, *L. 1. § 43. Depos.*

27. By this contract, the depository is bound to restore the subject to the depositor *cum omni causa*, with all its fruits and accessories, which obligation is enforced by the *actio directa*: But if a third party shall claim the property of it, the depository ought to hold it in his custody till the question of right be discussed, *L. 31. § 1. eod. tit.* The *actio contraria* of deposition is competent to the depository, that the owner, for whose sole benefit the deposit was made, may indemnify him of all the loss he has sustained through occasion of the contract, and reimburse him of the whole expence laid out by him on the subject while it was in his custody. The special engagement under which the depository lies, to redeliver the deposite when called for, and the exuberant trust implied in that contract, were by the Roman law so interpreted, as to exclude all right of retaining the subject towards the payment or security of
any

¹⁷ See Logan, 27th Feb. 1823, (*S. & D.*)

any debt that might be due by the depositor to himself, *L. 11. C. Depos.* And indeed, where the ground of such debt has no relation to the deposite, which was perhaps the only case the Roman lawyer had in his eye, the practice of Scotland is agreeable to this doctrine, *Fount. Feb. 23. 1697, Scot.* (Dict. p. 2628.); *Forbes, July 16. 1709, Cred. of Stewart*, (Dict. p. 2629). But where the claim arises from the depositary's damage, or from the expence disbursed by him on the subject, the depositary who has undertaken the office gratuitously, may retain that subject till he be fully indemnified, *Stair, Feb. 18. 1662, E. Bedford*, (Dict. p. 9135). If, on the depositary's death, his heir, ignorant of the deposite, and believing himself true owner of the subject, sell it *bona fide*, he is accountable to the depositor only for the price he received, though that should be less than its true value; and if he has not yet received the price, he will be discharged of his obligation, by assigning the price to the depositor, *L. 1. § 47. L. 2. Depos.* The Roman lawyer applies this doctrine also to the contract of commodate.

28. There are several special kinds of deposite which deserve our particular notice, in so far as they differ in their nature from the common contract now explained. By an edict of the Roman Prætor, called *Nautæ, caupones, stabularii*, which is with some variations adopted into the law of Scotland, an obligation is induced by a traveller's entering into an inn, ship, or stable, and there depositing his goods, or putting up his horses, by which the innkeeper, shipmaster, or stabler, is bound to preserve for the owner whatever is entrusted to his care. This obligation is formed by the law itself; for the bare act of receiving goods lays them under it without covenant, *L. 1. § 8. Naut., caup.* It is limited to what is done in the ship, inn, or stable; for if the goods be stolen or damaged after they are carried off from thence, and so no longer under the depositary's eye, he is not accountable, *L. 7. pr. eod. tit.* But till then he must use exact diligence, and is answerable, not only for his own facts, and those of his servants, *d. L. 7. pr.*, which is an obligation implied in the exercise of these employments, but for the facts of the other guests and passengers, *d. L. 1. § 8¹⁸*. Nay, it would seem that the shipmaster is bound to make up the damage arising to the owner of the goods from unskilful stowage, or their being loaded upon the ship's deck without his consent, *Laws of Wisby, art. 23.*; *Ordon. de Louis XIV. C. 16. § 11.*; and that the master is also accountable for the condition of his ship, and the skill of himself and his crew. If therefore the ship should be crazy or unskilfully navigated, or if the master should sail up a river without a pilot, where pilots are ordinarily employed, and if through that omission any goods belonging to freighters or passengers should be lost or rendered useless, he would be chargeable with the consequences. In these cases, a certain degree of blame may be imputed to the master; and the law is express, that if the goods perish, even without his fault, he is liable, unless the loss has happened *damno fatali*, by an accident which could be neither foreseen nor withstood; if, *ex. gr.* they have been lost by storm, or carried

The edict, *Nautæ, caupones, stabularii.*

¹⁸ An innkeeper is not liable for money contained in a parcel addressed to his care, when the person to whom it is addressed is not a guest in his house; when no notice is given that the parcel is to be sent; and when it is not marked as of particular value; *Meikle, 16th Feb. 1819, Fac. Coll.* But he is liable for such parcel delivered to him, for the purpose of being transmitted by a carrier, whose quarters were at his inn;—where, instead of being committed to the carrier, it was lost or amissing for several months, and when recovered was found to contain nothing; *Williamson, 21st June 1810, Fac. Coll.*

BOOK III.

How the damage is ascertained.

What persons are included under the law.

carried off forcibly by pirates or house-breakers, *L. 3. § 1. eod. tit.*¹⁹. The engagements thus formed are grounded entirely on positive institution; and strike against common rules, by which depositaries are bound only for themselves and servants, and are liable in no more than a middle degree of diligence: But the security of travellers against the frequent thefts committed by that set of men and their associates, forced the Romans upon this edict, *ad reprimendam improbitatem hoc genus hominum, d. L. 3. § 1.*

29. The extent of the damage may be ascertained against the innkeeper, &c. by the oath *in litem* of the party suffering, *Stair, Dec. 4. 1661, White, (Dict. p. 9233.)*²⁰. Yet this oath will not be admitted, upon his allegation that money was taken out of his pocket or trunk while he continued in the inn, unless it shall appear in proof, that his clothes have been carried away, or that the trunk has been unlocked, or otherwise broke open; see *Forbes, June 5. 1707, Brewster, (Dict. p. 9239.)*. This edict is, by the usage of Scotland, extended to vintners in boroughs though they be not innkeepers, *Fount. Feb. 17. 1687, Master of Forbes, (Dict. p. 9233.)*; and to householders who take in lodgers, *Fount. July 5. 1694, May (Dict. p. 9236.)*; and would possibly, from the parity of reason, be also applied against carriers²¹ *. Not only masters of ships are

* The decisions of the Court have extended this edict to carriers and the owners of stage coaches²¹; but these are not liable for the safe conveyance of money, unless the parcel

¹⁹ Contrary to the example here given, Mr Bell is of opinion, that "a loss by robbery is not to be received as an inevitable accident;" and the rule certainly appears to be so interpreted in England; 1. *Bell Comm.* 378. That theft is not to be so received has never been doubted; *Ibid.* 379. *Fount. &c. Master of Forbes, 17th Feb. 1687, Dict. p. 9233.; Ibid. Gooden, 19th Jan. 1700, Dict. p. 9237.; Ibid. Brewster, 5th June 1707, Dict. p. 9239.; Dalr. Chisholm, 10th Dec. 1714, Dict. p. 9241.; Harc. Ewing, July 1687, Dict. p. 9235.* Mr Bell also lays down that fire is not in this question to be regarded as "an inevitable accident;" but in a late case, where action was brought for the value of horses lodged in a stable, it was held that an accidental fire, whereby both stables and horses were destroyed, was a *damnum fatale*, and within the exception of the edict; *Macdonell, 15th Dec. 1809, Fac. Coll.* In one class of cases there can be no doubt: By *Stat. 26. Geo. III. c. 86. § 2.*, it is enacted, "That no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good, to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever, which, from and after the 1st day of September 1786, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel." This statute, however, "relates only to ships usually occupied in sea voyages, and not to small craft, lighters, and boats concerned in inland navigation;" 1. *Bligh, 573., Hunter & Co. 12th July 1819, in Dom. Proc., reversing a decision of the Court of Session, 16th May 1811, Fac. Coll.*

Where the accident from which loss arises is in the slightest degree attributable to negligence, it affords no defence; a defender was accordingly subjected, in a recent instance, where "a majority of the Court thought there was at least *culpa levissima*;" *Fac. Coll. Hay, 13th Feb. 1801, Dict. v. Nautæ, &c. App. No. 1.*

²⁰ Mr Bell speaks of this mode of proof, as "a very clumsy and dangerous remedy," which "formerly prevailed in Scotland;" and adds, "I should have no doubt that reasonable evidence would now be required of the nature and value of the thing lost, fortified by the oath of the employer;" 1. *Comm.* 379. 380.; and see *Fac. Coll. Williamson, 21st June 1810.*—The Court have fixed a general rule, on the subject of grain, whereby, if the inlake is "not more than one per cent.," the shipmaster is not held liable; *Stein, 2d Feb. 1811, Fac. Coll.*

²¹ Mr Bell says, "that all sorts of land carriers, holding themselves out as public carriers, are under it; and that no distinction ought to be made on account of the vehicle, whether a waggon; a cart; or a mail-coach, or stage-coach." "Hackney coachmen, however, seem to be in a different situation, as neither employed in the carriage of goods, nor in such journeys as make the carriage of luggage necessary; and as responsible for goods only by contract when received expressly and paid for;" 1. *Comm.* 376.

As to the limitation of liability, by notices in newspapers, placards, &c., *Vid. Ibid.* 380, *et seq.*

are included under it, but their *exercitores* or employers, whether they be themselves the owners, or have freighted the ship from the owner, *L. 1. § 2. eod. tit.*; not indeed *in solidum*, but each for the share or interest he hath in the ship, *L. 7. § 5. eod. tit.* And by a statute 7° *Geo. II. c. 15.*, owners of ships are no farther bound for embezzlement by the master or crew, without their knowledge, than to the amount of the value of the ship, and the freight due upon

parcel containing it has been explained to be such at delivery; *Fac. Coll. Feb. 6. 1787, Macausland, Dict. p. 9246*; nor for the safety of any article whatever, beyond the place to which they had engaged to carry it; *Ibid. Jan. 15. 1791, Denniston, Dict. p. 9247*²².

Attempts have been made to establish a similar obligation on the Postmaster-General, and those employed under him; but it seems quite a settled point that they are not liable for the loss of money or other articles transmitted by post, unless individual negligence can be imputed; *Fac. Coll. June 21. 1799, Farries, Dict. 10103*, contrary to an older decision *Edgar, July 28. 1724, Short, Dict. p. 10091*. The same rule is completely established in England, *Blackstone, B. 1. c. 8. § 4.* (Note to p. 323, edit. Lond. 1800.)

The Postmaster-General and his deputies have the exclusive right of carrying all letters and packets, which shall be sent to and from every part of Great Britain, Ireland, the colonies, and places beyond seas, where he shall settle, or cause to be settled, posts or running messengers for that purpose. This was first established by the Scots statute 1695, *c. 20.*, and, after the union of the two kingdoms, was confirmed by 9. *Ann. c. 10.*, which (§ 2.) removed the General Post-Office to London, and allowed the following exceptions: 1st, Letters concerning goods sent by common carriers, and delivered with the goods free of any charge on account of the letters; 2dly, Letters of merchants and masters, owners of trading vessels, delivered according to the address by the master of such vessels, or those employed by him, without fee or reward; 3dly, Commissions, or the return thereof, affidavits, writs, process, or proceedings, or returns thereof, issuing out of any court;—[But it would seem that this will not exempt correspondence along with such proceedings; for by stat. 26. *Geo. II. c. 13. § 7.*, every writ, and every proceeding at law, sent inclosed in a letter, or written upon one and the same piece of paper with a letter, shall be rated as a several and distinct letter]; 4thly, Letters sent by a private friend, or by a messenger on purpose, concerning private affairs; and, 5thly, Letters carried to or from any place, to or from the next post-road or stage, above six miles from the General Post-Office, or the chief offices of Edinburgh and Dublin.

The act (§ 3.) contains strict prohibitions against the conveying of letters by common carriers, owners or drivers of stage coaches, owners, &c. of passage-boats between England or Ireland and foreign parts, or the passengers therein, and the owners or watermen in boats upon rivers, (although no hire be received); and the penalties are, by § 17, L. 5 Sterling for every several offence, besides L. 100 more for every week that the offender shall continue to transgress the statute; to be recovered (§ 19.) in any of her Majesty's courts of record, and paid, the one moiety to the Sovereign, and the other, with full costs of suit, to the informer. It has been found that offences against this act may be competently proved by reference to the oath of the accused; *June 28. 1787, Procurator-Fiscal of Edinburghshire contra Margaret Murray and others*, (not reported.)

The privilege, allowed to members of Parliament, of sending and receiving their letters free from postage, which originally depended upon custom, had first the authority of statute, by 4. *Geo. III. c. 24.* It has since been regulated and restricted by 24. *Geo. III. sess. 2. c. 37.* and 35. *Geo. III. c. 53.* See *Blackstone*, vol. i. p. 323.²³

²² So also, *Bain, 17th May 1821, (S. & B.)*

²³ The rates of postage have been from time to time altered, and the law as to the carriage of letters regulated by a variety of statutes. See 6. *Geo. I. c. 21.*; 26. *Geo. II. c. 13.*; 5. *Geo. III. c. 15.*; 7. *Geo. III. c. 50.*; 28. *Geo. III. c. 9.*; 39. *Geo. III. c. 76.*; 41. *Geo. III. (U. K.) c. 7.*; 42. *Geo. III. c. 81. & 101.*; 45. *Geo. III. c. 11.*; 46. *Geo. III. c. 73. & 92.*; 48. *Geo. III. c. 116.*; 52. *Geo. III. c. 88.*; 55. *Geo. III. c. 87.*, &c. &c.

"Many attempts were made by Postmasters in country towns, to charge $\frac{1}{2}d.$ and $1d.$ a letter on delivery, at the houses in the town, above the Parliamentary rates; under the pretence that they were not obliged to carry the letters out of the office gratis. But it was repeatedly decided that such a demand is illegal, and that they are bound to deliver the letters to the inhabitants, within the usual and established limits of the town, without any addition to the rate of postage;" *Tomlin's Law Dictionary, v. Post-Office*, where the following authorities are referred to; 3. *Wills, 443.*; 2. *Black. Rep. 906.*; 5. *Burr. 2709.*; 2. *Roll. Rep. 906.*; *Cowp. 182.*

BOOK III.

Sequestration.

upon that voyage in the course of which the goods were embezzled²⁴. By the present custom of trading nations, no goods brought into a ship fall under this edict, unless they have been delivered to the master or mate, or have been entered into the ship books, or specified in the bills of lading*.

30. Sequestration is likewise a kind of deposit, by which a subject laid claim to by two or more different competitors is deposited in the hands of a neutral person, to be delivered to him who shall be declared to have the best right to it. Sequestration of lands hath been already considered. Moveables may be also sequestered, either by the consent of parties, or by the order of a judge. The first is styled a *voluntary*, the other, a *judicial* sequestration. In this, sequestration differs from a common deposit, that it is not a gratuitous office, especially if it be undertaken by the warrant of a judge, in which case a salary to the sequestree for his trouble is either expressed or implied. Since therefore he reaps a benefit by the contract, as well as the claimants upon the subject, he cannot, like a common depositary, throw up his office at pleasure; and, for the same reason, he is liable in a middle degree of diligence †.

Consignation of money.

31. Consignation of money is a species of sequestration, by which a sum that is claimed by different competitors is consigned or deposited in the hands of a neutral person, to be delivered up by him to that claimant to whom it shall be adjudged by decree. An instance of a conventional consignation has been already given, in the case of wadsets, where the consignatory is named by the parties. Legal consignations are most frequently made in suspensions of a charge, in which the validity of the debt demanded is called in question by the debtor who suspends, and who is sometimes laid under the necessity of consigning the sum charged for, till the issue of the suspension²⁵. The risk, or *periculum*, of the consigned money

On whom lies the risk.

* See ABBOT'S *Treatise of the Law relative to Merchant Ships and Seamen*.

† The sequestrations which occur the most frequently, are those which are awarded over the bankrupt estates of persons engaged in trade, manufactures, &c. A separate code of laws has been enacted for the management and distribution of such estates by several temporary statutes. The first was 12. *Geo. III. c. 72*. Many improvements were made, and particularly the competency of sequestration extended to the real as well as the personal estate, by 23. *Geo. III. c. 18.*, continued by 30. *Geo. III. c. 5.*, and greatly amended and enlarged by 33. *Geo. III. c. 74.*; which last has been continued by subsequent statutes, [The present regulating statute is 54. *Geo. III. c. 137.*] It is impossible, in the compass of a note, to enter into any detail of the provisions contained in these statutes. They are amply discussed in "*Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence in relation to Bankruptcy,*" &c. by GEORGE JOSEPH BELL, Esq. advocate.

²⁴ See also 26. *Geo. III. c. 86. § 1.*; 53. *Geo. III. c. 159. § 1.*; by the latter of which it is enacted, that owners shall not be liable beyond the value of ship and freight, "for any loss or damage arising or taking place by reason of any act, neglect, matter, or thing, done, omitted, or occasioned without the fault or privity of such owner or owners." It has also been enacted, that "no master, owner, or owners of any ship or vessel, shall be subject or liable to answer for, or make good to any one or more person, or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which from and after the passing of this act shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, or making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner, or owners of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds, &c.," 26. *Geo. III. c. 86. § 3.*

See the responsibility of ship-owners under the edict, &c. fully discussed; 1. *Bell Comm.* 469, *et seq.*

²⁵ *Vid. infra. B. 4. t. 3. § 19.*;—Also, as to consignation in multiplepointings; *Ibid.* § 23.

ney lies on the consigner in the following cases: *First*, If he had no good reason to consign; if, *ex. gr.* the reverser in a wadset consigns, without being ready to perform his part of the contract; for in such case the wadsetter cannot in equity be compelled to accept of the consigned money. *2dly*, If the consignment hath been irregular; if, for instance, the order of redemption has not been duly used, or if part only of the sums due have been consigned. *3dly*, The consignment is upon the consigner's risk, if he has not chosen a proper person for consignatory. All are proper consignatories, who are either authorised by law, or named by the parties. If, therefore, consignment be made by a supender to the clerk of the bills, *Stair, Feb. 15. 1673, Mowat, (Dict. p. 10118.)*, or by a judicial purchaser to the magistrates of Edinburgh, in the terms of act 1695, C. 6., or by a reverser to the person named in the wadset-right, the consigner cannot suffer on account of an improper choice. Where no consignatory is named in the contract of wadset, the consignment ought to be made, either to one of entire credit, or whose public office seems to authorise him to receive consigned money, as the clerk of the bills, or a clerk of session, at least if his credit be not suspected. If, on the other hand, the debtor has just ground for consigning, and if the consignment has been used regularly, and made to a proper consignatory, the loss arising from the consignatory's supervening bankruptcy must fall on the wadsetter, seller, or other creditor, who ought to have prevented the consignment by accepting the money offered to him, *L. 19. C. de usur. ; Stair, July 28. 1665, Scot, (Dict. p. 10118.)*. The fee due to the consignatory ought also, in this case, to be charged on the creditor, who, by his groundless refusal of the money, hath made the consignment necessary. It is the office of a consignatory to keep the sum consigned in safe custody till it be called for: If, therefore, in the view of gain to himself, he shall put it out at interest, the debtor's bankruptcy, though at the time of borrowing he had been of the most undoubted credit, must be charged to his account. But the interest arising from the loan of consigned money can in no case be claimed by the consigner; for money is consigned, not to raise any annual profit to the consigner, but merely for custody; and as the consignatory runs the whole risk, he is, on the other part, entitled to all the profits, *Br. MS. July 20. 1716, Barclay, (Dict. p. 555.)*²⁶.

32. A trust is also of the nature of deposition, by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it may be applied to certain uses for the behoof of a third party. As trust-deeds were frequently granted in the form of absolute rights, without any defeasance or back-bond from the trustee, presumptions, and the testimony of witnesses, were in special cases admitted against the trustee, or his heir, in proof of the trust, *Stair, Feb. 22. 1665, Visc. Kingston, (Dict. p. 12749.) ; ibid. Jan. 12. 1666, Exec. of Stevenson, (Dict. p. 12750.)*; but singular successors acquiring from the trustee were secure.

Trust.

²⁶ The same had previously been decided, *Durie, 31st Jan. 1621, Douglas, Dict. p. 555*. See also *2. Ross, 367*, where the rule of the text is implicitly adopted;—likewise *infra. T. 9. § 41. ad fin.*, where a similar rule is again laid down in the case of executors. But see *contra, Wallace, Feb. 1728, Dict. p. 558*;—which, however, does not seem to have been a pure case of consignment. Where consignment is made, as now frequently happens, in a banking-house, a different principle comes in; and such interest would seem to be payable by the bank, to the party having ultimate right, as the bank is in use to pay on ordinary deposite accounts.

Book III.

secure²⁷. To prevent the many law-suits pursued on this question, it was enacted by 1696, C. 25. that no action for declaring a trust should be received, except upon the oath of the trustee, or a declaration signed by him acknowledging it²⁸. Since which time, trust-deeds have been seldom granted, without either a clause in the deed expressing the uses, or a back-bond by the trustee declaring them*.

Pledge.

33. *Pignus*, or pledge, sometimes denotes the subject pledged, and sometimes the contract of impignoration. This contract, when opposed to a right of wadset, or of an heritable pledge, is that by which a debtor puts into the hands of his creditor a moveable subject, in security of the debt, to be redelivered upon payment²⁹. As it is entered into for the benefit both of the giver and receiver, the one being concerned to get money, and the other to lay out a sum upon good security, the creditor who receives the pledge is liable in the middle degree of diligence for preserving it; *præstat culpam levem*. Because the special subject pledged continues the debtor's property; therefore if it perishes during the impignoration, it perishes to the debtor, according to the rule stated above, § 20. The creditor is entitled to an action against the debtor for the recovery of the expences which he has disbursed profitably on the subject while in his hands, L. 25. *De pign. act.* The *pactum legis commissoriæ* in moveable pledges, has no stronger effects than in wadsets of land, as to which see B. 2. T. 8. § 14.; and the same equity of redemption is indulged to the debtor in both cases. By the Roman law, a creditor whose debt was secured by a pledge, might, after intimation made to the debtor, sell it, if the power of selling was not expressly denied to the creditor; and even where it was, the creditor might sell it for his payment after three intimations, L. 4. *eod. tit.*; such prohibition being accounted in some degree destructive of the nature and intention of the contract. But, by the usage of Scotland, moveables pledged cannot be sold without the order of a judge, more than lands hypothecated for a debt. Some creditors have attempted to make a pledge effectual for their payment, by assigning the debt to a trustee; who, upon that conveyance, may arrest the pledge in the hand of his cedent, the original creditor, and then pursue a forthcoming against him. But in this way the original creditor may, by a prior arrestment of the pledge used by another creditor, lose his right of impignoration; which, from the nature of all real contracts, cannot subsist but where he who

* It has been found, that where a trust arises not from any deed or disposition of the truster, but from the voluntary interposition of the trustee as *negotiorum gestor*, the statute referred to by the learned author does not apply; *Kilk. No. 1. voce TRUST, Spreul, July 16. 1741, Dict. p. 16201.* But the contrary has since been decided; *Fac. Coll. March 2. 1797, Duggan*; affirmed in the House of Lords, *Dict. p. 12761.* See *Fac. Coll. Dec. 22. 1790, Ferrier, Dict. p. 8772.*

²⁷ In the case of a *jus incorporale*, the Court of Session decided otherwise; *Fac. Coll. Redfearn, 22d Nov. 1805, Dict. v. PERS. AND REAL, App. No. 3*: But the judgment was reversed on appeal, *1st June 1813, 1. Dow, 50.*; and the rule of law held to be that a latent equity cannot prevail against the special right of a purchaser, or of an onerous and *bona fide* assignee. It is different in a question with "general creditors, who are neither purchasers nor special assignees;" such creditors taking the right of the bankrupt trustee *tantum et tale* as it stood in his person; *Gordon, 5th Feb. 1824, S. & D. 675.* See also, *Elchies on Stair, p. 69, et seq.*; *1. Bell Comm. 221. et seq.*

²⁸ A letter from the executor of a deceased trustee, accompanied with other circumstances of real evidence, held sufficient to instruct trust; *Montgomery's Executors, 7th Feb. 1811, Fac. Coll.*

²⁹ As to the pledging of title-deeds, and of documents of debt, and other *jura incorporalia*, *vid. 2. Bell Comm. 27. et seq.*

who is in the right of the debt is also in possession of the pledge. The least exceptionable method for the creditor is, to apply to the judge-ordinary for a warrant to dispose of the pledge by a public sale, to which sale the debtor must be made a party. As in a pledge of moveables the creditor who quits the possession of the subject loses the real right he had upon it, so a creditor secured on land, by infestment upon his bond, or other ground of debt, if he gives up his old bond, which made part of his real security, and accepts of a new, loses the *jus pignoris* he had upon the land: Neither will the *ignorantia juris* avail such creditor, though he should be a foreigner, and so presumed unacquainted with the laws of this country; for no equity can revive a real right once lost, *Fac. Coll.* i. 16. (*Norfolk against York-buildings Company, June 30. 1752, Dict.* p. 7062).—The right of retention, which bears a near resemblance to pledge, is to be explained below, *T.* 4. § 20, 21.

34. A tacit hypothec is a species of pledge, constituted without paction, in which the debtor himself retains the possession of the subject impignorated; *vid. supr. B. 2. T. 6. § 56.* The Romans admitted a variety of tacit or legal hypothecs upon moveables, most of which we have rejected, because the impignoration of moveable goods without their delivery to the creditor, cannot but prove a heavy weight on the free currency of trade, it being impracticable to keep a record for moveables, by which purchasers may be ascertained of their danger. But upon this very account, the encouragement of trade, we have adopted into our law several tacit hypothecs relating to navigation, that are generally received by commercial states. Thus, mariners may not only recover their wages by a personal action against the owners of the ship with whom they contract, but they have a tacit hypothec, for security of these wages, upon the freight which is due by the merchant to the owners, *Jan. 6. 1708, Sands, (Dict.* p. 6261). Thus also the owners of a ship are secured in their freight, not only by the merchant's personal obligation, but by an hypothec on the cargo which belongs to that merchant, *Home, Dec. 1683, Mure, (Dict.* p. 6260)³⁰. Creditors who lent their money towards the building or fitting out a ship, though they had, by the Roman law, no hypothec upon the ship, unless it was constituted by paction, were nevertheless preferable upon it to all the creditors except the fisk, *L. 26. 34. De reb. auct. jud.* By our customs, the repairers of a ship have an hypothec upon the ship, in security of the expence of reparation, *Forbes, Nov. 16. 1711, Watson, (Dict.* p. 6262.); *Fac. Coll.* iii. 28. (*Glasgow Rope-work, March 4. 1761, Dict.* p. 6268.); which is introduced *ex necessitate*, because without it the ship would be frequently disabled from prosecuting her voyage, as no shipmaster can be presumed to have personal credit at every port where he may be forced to put in: But there is no such necessity for an hypothec in favour of the builder of a ship, *Kames, 68. (Maxwell,*

Tacit hypothec.

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³⁰ This is more properly a right of *lien* or *retention* over the cargo while yet undelivered. "Delivery of the goods divests the shipmaster of his lien; for it subsists only by possession;" 2. *Bell Comm.* 107. But the lien extends over whatever part remains undelivered, for the freight of the whole; *Malcolm, 15th Nov. 1814, Fac. Coll.*; 2. *Bell Comm.* 106. Where the merchant to whom the goods belong has become bankrupt, and delivery is made to the trustee, or other administrator of the bankrupt estate, the estate in such case becomes debtor for the freight, and the shipowner has preference on his whole claim, over the other creditors; *Malcolm, 24th June 1813, and 15th Nov. 1814, Fac. Coll.* compared with 1. *Bell Comm.* 371.

Book III.

Innominate contracts.

Jan. 18. 1726, *DICT.* p. 6266.) *³¹. The expence of repairing houses within borough, when it is authorised by a warrant of the dean of guild, is secured by an hypothec on the house repaired, *ne urbs ruinis deformatur* †: But he who repairs without such warrant, and relies on the faith of his employer, hath no security on the subject itself, *Home*, 3. (*Laurie*, *Dec.* 3. 1735, *DICT.* p. 6240.); *Fac. Coll.* ii. 86. (*Donaldson*, *Jan.* 13. 1758, *DICT.* p. 6242.)³³.

35. To conclude the doctrine of real contracts, it may be observed, that there is a great variety of them, effectual both by the Roman law and ours, which, because they have not been distinguished by special names, are styled *innominate*. These are by civilians reduced into four general heads; *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*. In all innominate contracts, something must have been actually given or performed by one of the contractors, in order to form the contract. If the agreement was barely *dabo ut des*, that certain things should be afterwards given or performed, it resolved into a simple convention, or *nudum pactum*, which, it has already been observed, produced no action by that law. The party who gave or performed had an option, either to resile from the contract, or to sue the other party for performance, by an action, *præscriptis verbis*. By our law, all contracts, even innominate, are equally obligatory on both parties from the date, so that neither party can resile, even though the one has, and the other has not performed his part of the contract.

TIT. II.

Of Obligations by Word and by Writing.

Our verbal obligations different from the *verborum obligatio* of the Romans.

WE now proceed, according to the order of the Roman law, to explain the nature of contracts perfected by word, which is the second branch of the division of contracts stated in the preceding title, § 17. Though, by that law, the greatest part both of real and consensual contracts might be formed verbally, yet neither of them fell under the appellation of contracts perfected *verbis* in the

* And it has been solemnly decided, that, even as to repairs, the hypothec applies only to such as are executed in a foreign port³¹; those who repair and furnish a ship in Scotland, where the owner resides, having no such right; *Fac. Coll.* July 29. 1788, *Hamilton*, *DICT.* p. 6269³². The Court of Session gave a similar judgment in several other cases at the same time with that of *Hamilton*. See *Abbot*, Part 2. c. 3. (2. *Bell Comm.* 49. *et seq.*)

† See as to the nature and extent of this right, *Fac. Coll.* July 19. 1788, *Gregory*, *DICT.* p. 13186.

³¹ "There is no *hypothec* on a ship for home repairs; but a shipwright employed to make or to repair a vessel, has, like any other manufacturer to whom moveables are delivered, and who is employed to bestow on them his labour, skill, and materials as an artisan, a *lien* on a ship, provided he has taken her into his dock, or entirely within his own possession; and this *lien* subsists while the ship continues in his possession;" 2. *Bell Comm.* 104. Repairs performed "in open harbour, or in a roadstead, are not secured by *lien*, the carpenter working on the ship without taking possession;" *Ibid.*; *Abbot*, 134.; 1. *Holt*, 391. See also *infr.* t. 4. § 21.

³² Affirmed on appeal, 15th June 1789.

³³ See on the subject of hypothecs, both tacit and conventional; 2. *Bell Comm.* 29. *et seq.*

the sense of the Roman law, but constituted different branches of the same general division of contracts, and are accordingly explained under different titles. The only contract of the Romans that can be properly said to be perfected *verbis*, was their *verborum obligatio*, to the forming of which it behoved both parties to utter certain *verba solennia*, or words of style. All other verbal obligations, in which that precise form of words was neglected, were accounted *nuda pacta*. As there is nothing in the law of Scotland analogous to the *verborum obligatio*, we may, without impropriety, apply the appellation of verbal obligations to such as have no special name to distinguish them by. Of this kind are, *first*, promises, where nothing is to be given or performed but upon one part, and which are therefore always gratuitous; *2dly*, verbal agreements, (so called in contradistinction to promises), which require the intervention of two different persons at least, who come under mutual obligations to one another; for these two are in this manner distinguished by the Roman law, *L. 3. De pollicit.*, where *pacta*, or verbal agreements are said to be formed by the mutual consent of two persons, but promises to be the sole act of the promiser; and they differ chiefly in the different manners of proof which are required by the usage of Scotland to support them, explained below, *B. 4. T. 2. § 20*. The effect given by our law to verbal obligations is, by *Stair, B. 1. T. 10. § 7.*, ascribed to an act of sederunt, *Nov. 27. 1592*, which, as he recites it, declares all pactions and promises to be effectual: But that act says no more than that *all irritant clauses in contracts, infestments, bonds and other writings, shall be judged of, precisely according to the words and meaning of the said clauses*, without the least mention of pactions or promises. The obvious reason why all verbal agreements and promises must be obligatory, in every nation where no special exception is made by positive institution, is, that by a common rule of law, every agreement in a lawful matter, though constituted only verbally, induces a full or proper obligation.

2. From this general rule, That every lawful agreement, even verbal, is obligatory, the custom of Scotland has excepted all obligations relating to heritable rights, which are utterly ineffectual if they are barely verbal: For in the transmission of heritage, which is justly accounted of the greatest importance to society, parties are not to be caught by rash expressions, but continue free, till they have discovered their deliberate and final resolution concerning it by writing. This exception therefore takes place in obligations concerning land-rights, *first*, where the obligation arises from the contract of sale, in consideration of a price to be paid; notwithstanding that sale, being a consensual contract, may, when the subject is moveable, be perfected without writing. It holds, *2dly*, even where the heritable right is only temporary, as in a lease, which, when constituted without writing, hath no force but for one year, though the parties should have verbally agreed, that it was to last for a number of years, *Durie, July 15. 1637, Skene, (Dict. p. 8401.)*; and though the tenant should, in consequence of the bargain, have entered into, and continued in the possession of the farm for two years, *Durie, July 16. 1636, Keith, (Dict. p. 8400)*³⁴*. *3dly*, No verbal agreement in relation to heritage is binding, though it should be referred to the oath of the party himself, that he had agreed

All agreements relating to heritable rights, must be perfected by writing.

* *Fac. Coll. Dec. 15. 1773, Buchanan, Dict. p. 8478.*

³⁴ *Vid. supr. B. 2. t. 6. § 24. and 30.*

Book III.

In such rights there is a *locus pœnitentiæ* before writing *ubi res sunt integræ*, except in *pacta liberatoria*.

Writing necessary when it is a condition of the contract.

Difference between the *literarum obligatio* of the Romans and our written obligations.

greed to it; for so long as writing is not adhibited, both parties are considered to have a right of resiling, as from an unfinished bargain *. *4thly*, Where an agreement concerning heritage is executed in the form of mutual missives, both missives must be probative; otherwise either party may resile, as in the case of an incomplete minute or contract; and of consequence a written offer verbally accepted may be resiled from, *St. B. 1. T. 10. § 3. & 9.*; *Fac. Coll. iii. 24. (Fulton, Feb. 26. 1761, Dict. p. 8446) †*.

3. The right competent to a party to resile from a bargain concerning land, before he has bound himself by writing, is called in our law *locus pœnitentiæ*; and it obtains, though one of the parties had written to the other, that he was not to pass from the bargain; because these words serve merely to express his present intention, and at the same time cannot possibly bind him to whom the missive is directed, *Stair, Jan. 28. 1663, Montgomery, (Dict. p. 8411)*. 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 leaves no room for resiling, *Fount. Dec. 23. 1697, Laury, (Dict. p. 8425)*. And, in general, wherever *res non est integra*, the *locus pœnitentiæ* is excluded, *Stair, July 23. 1674, E. Kinghorn, (Dict. p. 8414.)*; *Ibid. Dec. 1. 1674, Gordon, (Dict. p. 8415.)*; *Fount. Dec. 5. 1699, Thomson, (Dict. p. 8426) †³⁵*. As freedom from obligation is favourable; therefore, in bargains called *liberatoria*, by which a real right is either passed from or restricted, there is no *locus pœnitentiæ*, though the agreement be barely verbal, as in the case of an annualrenter who has agreed verbally to restrict an universal infestment which he had over a debtor's whole estate, to a certain part of his lands; see *Stair, Feb. 8. 1666, Ker, (Dict. p. 8465)*. And indeed the purpose of those agreements is, not to form any new obligation, but either to extinguish an old one, or to bring it within narrower bounds.

4. Writing is also required in all bargains where it is a special condition, or *pars contractus*, that they should be reduced into writing; for there, both parties, by the express tenor of the agreement, reserve a right of resiling until writing be adhibited, *Stair, Jan. 12. 1676, Campbell, (Dict. p. 8470) †*. Testaments, or last wills, must be, in like manner, committed to writing; see below, *T. 9. § 5. 7.*

5. Contracts perfected *literis*, or by writing, make the third branch of the Roman division. Their *obligatio literarum* was constituted by a writing, in which the granter acknowledged that he had

* It has been found, after the most mature and deliberate discussion, that the same rule must be observed where the agreement has been reduced to writing, if that writing be defective in any of the solemnities required by law; *Fac. Coll. May 22. 1790, Macfarlane, Dict. p. 8459.*

† This also is a point completely settled; *Fac. Coll. Jan. 23. 1794, Barron, Dict. p. 8469.*

‡ The rule by which it is to be judged *an res sit integra*, is this: Wherever any thing has happened on the faith of the agreement, which cannot be recalled, and parties put in the same situation as before, then it is understood *quod res non est integra*, and there is no longer *locus pœnitentiæ*; *Kilk. Falc. July 5. 1745, Moodie against Moodie, Dict. p. 8489.* See judgment of the House of Lords in the case, *July 23. 1772, Countess-Dowager of Moray, Dict. p. 4392²³*.

‖ *Fac. Coll. June 13. 1766, Wallace, &c. Dict. p. 8475.*

³⁵ As to the effect of *rei interventus* in questions of lease, *vid. supr. B. 2. t. 6. § 21*: A debtor's delivery from the hands of a messenger found to be a sufficient *rei interventus* to validate an informal cautionary obligation; *Dunsmore Coal Company, 1st Feb. 1811, Fac. Coll.*

had received a sum of money, and bound himself to repay it to the creditor : And because those obligations were frequently granted *spe numerandæ pecuniæ*, the granter might elide the creditor's demand, by putting in a plea within two years from the date of the obligation, that he truly received no money, called *exceptio non numeratæ pecuniæ*, unless the creditor brought a positive proof that it was paid to the debtor. By the usage of Scotland, all written obligations, and particularly bonds for sums of money, are founded on prior contracts, and so have a cause antecedent to and distinct from the obligations themselves, and are therefore effectual from their dates. By the usual style of bonds, the debtor renounces the exception of not numerated money ; which clause hath been first introduced, from an apprehension, that without it that exception would be admitted in our law, as it was in the Roman ; but it is merely a clause of style, which takes nothing from the force or effect of the obligation.

6. All obligations reduced into writing, though grounded on contracts which are effectual without writing, require, by the law of Scotland, certain solemnities to give them legal effects, which it is necessary to explain at some length. On this head it may be premised, that in every deed, the parties to it, the granter and the grantee, must not only be mentioned by their names, but designed by proper additions ; not barely as a solemnity, but because no deed can have effect unless the parties be so described in it as to be distinguished from all others. And as this is the only purpose of those designations or additions, the deed will be supported if they be such as sufficiently mark out who the parties are, (*si constet de persona*), in whatever way they may be expressed, *Forbes, Dec. 22. 1710, Dickson*, (DICT. p. 16918.). Bonds, however, were, by our former practice, frequently executed without filling up the name of the creditor. These got the name of *blank bonds*, and passed from hand to hand, like notes payable to the bearer. They were introduced under pretence of shunning the trouble and expence of conveyances. They had the effect to cut off from the debtor any ground of compensation he might have pleaded against the bearer, upon debts due to himself, by him to whom he first delivered the bond, *Stair, Feb. 27. 1668, Henderson*, (DICT. p. 1653.); and they were looked on with an unfavourable eye, even while they had the countenance of law ; because though the possessor of a blank bond should be known, yet as it was in his power to transfer it to another, barely by delivering it, his creditors could not, by any diligence, secure the sum for their payment. All deeds, therefore, in which the creditor's name is left blank, are now declared null, as covers to fraud, by 1696, C. 25. But as the nullity in this act strikes only against writings which are both subscribed and delivered blank in the creditor's name, bonds and other deeds are sustained by our practice, though it should appear from ocular inspection, that the creditor's name was not inserted by the writer of the deed, if evidence be not brought that the deed was delivered before filling up the blank, *June 13. 1746, Sinclair*, (DICT. p. 11559.) ; *Falc. July 30. 1746, Ruddiman*, (DICT. p. 11562.). From this statute are excepted the notes of trading companies, and the indorsations of bills³⁶.

7. Anciently, when writing was little used, except either by the clergy, or by persons bred to the study of law, or of securities, deeds were never subscribed by the granter ; the appending of his seal to them was a full proof of his consent, without subscription,

Solemnities of written obligations by our law.

Blank bonds.

Sealing of deeds.

³⁶ *Vid. infr. § 28. h. t.*

Book III.

Subscription by the party or by a notary for him.

Reg. Maj. L. 3. C. 8.; and even without witnesses to the sealing. For though we learn both from *Reg. Maj. L. 2. C. 38. § 1.*; from *Craig, Lib. 2. Dieg. 2. § 17.*; and from several of the most ancient writings yet extant, that witnesses were generally called to the sealing in our earliest times; that solemnity was not judged essential by the Court of Session, *Durie, March 11. 1630, T. of Edinburgh, (Dict. p. 14500.)*. To prevent the frauds frequently practised by the counterfeiting of seals, and by the appending of one's seal after his death to false deeds, it was enacted, by 1540, *C. 117.*, That no faith should be given to any writing under a seal, without the subscription of him who owned it, and witnesses, and if the granter could not write, a notary was to subscribe for him. But still the sealing of deeds continued necessary: It was expressly required as a solemnity by 1579, *C. 80.*, and was only dispensed with in the case of deeds which contained a clause of registration, by *Aug. 1584, C. 4.* Yet soon after the last-quoted act, it fell quite into disuse. As the statute 1540 prescribed no plain rules about inserting the names and designations of the witnesses in the deed, or about their subscribing as witnesses, the subsequent practice was far from uniform. In a few instances, the witnesses subjoined their subscriptions to the deed, without having their names inserted in the body of it; and more frequently their names were inserted without their subscribing. But this last practice affording no degree of evidence, that the witnesses inserted were truly present at the granter's subscription, since it was in the power of the writer, even where the deed was truly signed, *remotis testibus*, to name any persons whom he pleased as witnesses, this inaccuracy was rectified by two posterior statutes; by 1579, *C. 80.*, more imperfectly; and afterwards fully, by 1681, *C. 5.*; *vid. infr. § 11. & 13.*

Signing by initials, or by a mark.

8. Mackenzie, § 4. *h. t.* affirms, that where the granter is in use to sign by two initial letters, *i. e.* by the first letters of his name and surname, such subscription ought to be sustained. But it is seldom admitted as a ground sufficient by itself for supporting a subscription by initials, that the granter usually signed in that way; a proof by the instrumentary witnesses is also required, that the granter did *de facto* sign the deed under challenge, *Stair, June 21. 1681, Coutts, (Dict. p. 6842.)*; at least a proof of this is judged necessary, if the deed be questioned during the life of the instrumentary witnesses, *Harc. 894. (Galloway, Nov. 1683, Dict. p. 16805.)*; *July 1729, Thomson, (Dict. p. 16810.)*³⁷. And, setting aside authority, the admitting of initials in place of a full subscription, in any case, seems to be contrary to both the words and the spirit of the statute; the words, for one cannot be said to write who is only taught to scrawl a couple of letters; and the spirit of it, for that doctrine would open a wide door to fraud, as the signing by initials is much easier counterfeited than a full proper subscription. These reasons strike with still greater force against a subscription by a cross or mark, which bears not the least resemblance to any letter in the subscriber's name³⁸.

In deeds of importance, where the granter cannot sign, two notaries must sign for him before four witnesses.

9. As a farther guard against falsehood, it was provided by 1579, *C. 80.*, That all deeds importing heritable titles, or other obligations of great importance, should be subscribed or sealed by the granter,

³⁷ A subscription by initials, with the attestation of one notary, that the party could not write otherwise, and the production of another writing by the same party subscribed in a similar way, was found good; *Weirs, 22d June 1813, Fac. Coll.*

³⁸ As to the subscription of bills, by initials, or marks, *vid. infr. § 26. h. t. in not.*

granter, if he could subscribe³⁹; or otherwise by two notaries, before four witnesses, denominated by their dwelling-houses, or by some other distinguishing characters. The two notaries must sign for the granter *unico contextu*, at the same time and place; for as they subscribe at the desire and in the name of a single person, the two subscriptions are accounted in law one individual act, *Durie, March 20. 1633, Cow, (Dict. p. 16833.)*⁴⁰. And as a consequence of this, all the four witnesses must attest the subscriptions of both notaries, *Forbes, Dec. 24. 1709, Anderson, (Dict. p. 16840.); Ibid. Dec. 27. 1711, White, (Dict. p. 16841.)*. The attestation or doquet of the notaries must express the special fact, that the granter authorised them to sign; nor can this omission be supplied by mentioning it in the body of the deed, *Falc. June 18. 1745, Burrel, (Dict. p. 16846.)*⁴¹ *.

10.

* It is farther necessary, in the case of deeds executed by blind persons³⁹, that they be read over to the granters at the time, and in presence of the notaries and witnesses; *Fac. Coll. July 9. 1792, Ross, Dict. p. 16853*; though it is not necessary, *de solemnitate*, that the notarial doquet bear attestation of this fact; *Ibid. Dec. 2. 1794, Yorkstoun, &c. Dict. p. 16856*⁴².

³⁹ A blind man, able to subscribe his name *de facto*, is not in law excluded from doing so; nor is it either necessary or proper, "according to the true intent and meaning of the statute," that he should have recourse to notaries. *Vid. infr. not.*⁴².

⁴⁰ "It was objected against a writ attested by notaries, that the notaries had not subscribed their attestations. Answered, The names of the notaries are at length in the attestations, in their own handwriting, which is sufficient.—The Lords repelled the objection;" 2. *Fol. Dict. 536. Cullen, Dec. 1731, Dict. p. 16842.*

⁴¹ Where two parties execute a deed, and one subscribes it himself, and notaries subscribe for the other, if it is done *unico contextu*, there is no occasion for separate witnesses; "the witnesses having signed at the side, and not above the notary's doquet;" *Hardie, 6th Dec. 1810, Fac. Coll.*

⁴² The law as to the execution of deeds by blind persons has of late received the most solemn consideration, both here and in the House of Lords, in an important question as to the validity of certain deeds executed by the late James, Earl of Fife. The pleadings, both in our courts and in that of the last resort, with the very valuable and luminous opinions delivered by the Judges, are highly deserving of study. And as peculiar pains were bestowed in framing the judgment of the House of Lords, reversing that of the Court below, (*E. Fife, 30th Nov. 1819, Fac. Coll.*), with the view of finally settling the different points which had been raised, and on some of which much variance of opinion had existed, it may not be improper to give here the more important part of its findings:—(17th July 1823.) "The Lords Spiritual and Temporal in Parliament assembled, Find, That under the circumstances of this case, notwithstanding the defect in sight of the Earl of Fife, proved upon the issues formerly tried in this cause, the signature of the instruments in question by notaries was not required by the statute of 1579, and that the signature of the Earl of Fife was the proper signature to give effect to those instruments, according to the true intent and meaning of the statute: That the signature of the Earl of Fife appearing on the face of the said instruments, and the instruments being apparently attested by two witnesses, the instruments apparently so signed and attested are in law probative deeds; and that to impeach such instruments as probative deeds of the Earl of Fife, the pursuer (i. e. the party challenging the deeds) was bound to prove, that the witnesses, or one of them, did not see the Earl of Fife subscribe the said instruments respectively, or hear him acknowledge his subscription thereto: THAT to impeach the said instruments respectively, though in law probative instruments, as the deeds of the Earl of Fife, on the ground that the Earl of Fife did not know the contents of such instruments respectively, when he subscribed the same respectively, and that therefore the same were not respectively the deeds of the Earl of Fife, the pursuer was bound to prove that the Earl did not know the contents of such instruments respectively, when he subscribed the same respectively: THAT it is not a solemnity required by law that the said instruments respectively should have been read over to the Earl of Fife, at the times of the execution thereof respectively, or at any other time or times; and that if such instruments respectively were duly executed and attested by the Earl, and in law probative instruments, the knowledge of the Earl of the contents thereof respectively must be presumed, until the contrary should be shown: But that proof that the said instruments respectively were not read over to the Earl of Fife at the time of the execution thereof, is evidence to be received that he did not know the contents of such instruments respectively, but that such evidence is not conclusive evidence that he did not know the contents of such instruments respectively, in as much as his knowledge of the contents of such instruments may be proved by other evidence, from which such knowledge may be inferred," &c. &c.

BOOK III.

What understood by obligations of importance in this sense.

10. By obligations of great importance in this act, are understood obligations granted for a sum or subject exceeding in value L. 100 Scots; for so the expression hath been uniformly explained by decisions. A deed which, without laying any new obligation upon the granter, is executed merely in corroboration or satisfaction of a former, is not deemed a writing of importance, though the first obligation should have exceeded that sum, *Gosf. Dec. 13. 1671, Jack, (Dict. p. 12975.)*. The importance of the deed must be determined, with respect to the debtor in it who comes under the obligation. A deed, therefore, by which the granter is obliged to pay a sum exceeding L. 100 to several of his creditors, falls under the act, though not any one of those creditors should be entitled to so high a sum, *Dirl. 135. (Anderson, Jan. 16. 1668, Dict. p. 16836.)*; for it is but one obligation in regard of the debtor. In an obligation which is in its nature divisible, *ex. gr.* a bond for a sum of money, the subscription of one notary is sufficient, though the sum should be above L. 100, if the creditor shall restrict his claim to the L. 100, *Durie, Dec. 19. 1629, Elliot, (Dict. p. 6841.)*. But an indivisible obligation, *ex. gr.* for the performance of a fact, which may be the ground of a claim exceeding L. 100, is incapable of such a restriction. Yet the damage arising to the party from the non-performance is, in this case, divisible; and therefore the party who has not fulfilled his obligation may be condemned in damages, to the extent of L. 100, *Fac. Coll. ii. 113. (Ferguson, June 30. 1758, Dict. p. 16848.)*. Though by the act formerly cited, 1540, witnesses were to attest every deed without exception; yet, since this last act 1579, they have been seldom called to obligations for less than L. 100.

The witnesses must be specially designed both in deeds signed by the granter, and by notaries.

11. Though the words of the act 1579, in so far as relates to the designation of the witnesses, seem, if strictly taken, to be limited to the case where the party cannot write, it can hardly be doubted, but that the law intended it should reach to all deeds even where the granter signed by himself. The words are capable of that construction; and if they were to be expounded otherwise, the enactment, as to the first branch of the statute, would have been but an unnecessary, and indeed an imperfect repetition of what had been before enacted by the act 1540. According to this plain intendment of the statute, the witnesses were, by the common practice subsequent to it, specially designed even in deeds subscribed by the granter himself; and where they were not so designed, or perhaps not so much as named, the omission was accounted a sufficient objection against the validity of the deed: But because the words of the act were not clear with respect to that nullity, the grantee was, by the indulgence of the court, allowed to point out by a special note, or, as it is called in law, a *condescence*, expressing who the witnesses were; which condescence was to be supported by the testimony of the witnesses themselves, if they were still alive; or, if they were dead, and had subscribed as witnesses, by comparing their handwriting in other deeds with their subscription as it appeared in the deed under challenge, *Stair, July 15. 1664, Colvill, (Dict. p. 16882.)*; *Ibid. Feb. 3. 1665, Falconer, (Dict. p. 16883.)*; *Forbes, July 21. 1711, Ogilvy, (Dict. p. 16896.)*; *Falc. i. 156. (Douglas, 1747, Dict. p. 17035.)*; *Fac. Coll. i. 84. (Urquhart, July 28. 1753, Dict. p. 9919.)*. And this practice of admitting a condescence continued till the act 1681, C. 5., to be immediately explained.

12. By 1593, C. 175., all original charters, contracts, and others whatever, which do not mention the name, dwelling-place, and other denomination of the writer, are declared null: But notwithstanding the copulative *and* in the statute, a deed is accounted valid, if the writer be designed by his dwelling-place, though he be not also distinguished by a more special designation from others of that name residing in the same borough or parish, *Forbes, Feb. 15. 1706, Duncan, (Dict. p. 16914.)*, unless he who objects to the deed shall bring positive evidence that it was written by another. Though the words of this act comprehend, in their literal signification, all original writings without exception; yet it hath not been for above a century past extended to those more inconsiderable deeds which have not, by our practice, required witnesses. And even in obligations of importance, that part of the act, enjoining the writer's name and designation to be inserted in the body of the deed before inserting the instrumentary witnesses, seems to have lost its authority; for by a decision, *Dalr. 158. (Dronnan, July 26. 1716, Dict. p. 16869.)*, it was adjudged sufficient for supporting a testament, that the writer, who was also an instrumentary witness, adjoined to his subscription these words, *witness and writer hereof*⁴³.

13. To assist the memory of witnesses, who when they did not subscribe the deed, were apt, through forgetfulness, after some distance of time, to disown their having been witnesses, it was enacted by 1681, C. 5., that no witness, though inserted in the deed, should be received as evidence, if he did not also subscribe as witness. And whereas, by our former custom, the neglecting to design the witnesses might be supplied by an after-condescence, pointing out their designations, that act declares all writings to be subscribed for the future, in which the writer and witnesses are not designed, null, and that this defect may not be supplied by any condescence*⁴⁴. The words in the act, requiring the designations of the writer and witnesses to all deeds without exception, must, by

* As to the consequence of inaccuracy in the names and designations of witnesses, see *Fac. Coll. Nov. 17. 1787, Archibalds, Dict. p. 16907; Ibid. Nov. 28. 1787, Douglas, Heron and Company, Dict. p. 16908*⁴⁵.

As to the examination of the instrumentary witnesses, see *Fac. Coll. July 19. 1793, Frank, Dict. p. 16822; see also Ibid. March 3. 1795, Frank, Dict. p. 16824. Vid. infr. not.*⁴⁷.

⁴³ The Court reduced a disposition, which was entirely silent as to who was the writer, though there was ground for presuming who he was from the terms of the testing clause; *Lockhart, 16th Feb. 1815, Fac. Coll.*

⁴⁴ It seems to be no objection, that the subscribing witnesses are not specially said to be witnesses in the body of the testing clause, provided their designations be otherwise complete, and that they adject the word "witness" to their respective subscriptions; *C. Home, Doig, 9th Jan. 1741, Dict. p. 16900; Wemyss, 5th June 1821, (S. & B.)*

⁴⁵ Compare these cases, in which the mistake was held fatal to the deeds, with *Stewart, &c. 2d March 1815, Fac. Coll.*, where the objection founded on it was overruled, apparently on the plea, that "to found such an objection, the discrepancy must be such as to mislead, which is surely not the case here, where there is nothing but a difference in the mode of spelling the same name;"—the witnesses had been named "Moor," and "Garvock," whereas their subscriptions were "Moir" and "Garrock." It may be doubted, whether the Court did not go too far in repelling this objection; and the decision was not unanimous. An authority which seems attended with still greater difficulty is, *Fac. Coll. Bank of Scotland, 17th Feb. 1790, Dict. p. 16909*. It was here found, that an error in the testing clause, which had named one of the witnesses "Gibson" in place of "Dickson," might *ex intervallo*, and after the taking of a notarial copy, and the bankruptcy of one of the principal parties, be corrected. It is said "the Lords were unanimously of opinion, that the objection was *ill founded*;" but it is doubted extremely how far the precedent would be now fol-

TITLE II.

By act 1593,
the writer's
name and de-
signation must
be mentioned
in all deeds.

Statute 1681,
regarding the
witnessing of
deeds.

Book III.

All deeds may
now be written
book-wise.

by the just rules of interpretation, be limited to writings of importance to which these solemnities had been in use to be adhibited, in consequence of the acts 1579 and 1593, and so make no alteration in our law with regard to the deeds of lesser moment; which, by the practice prior to the 1681, required neither writer nor witnesses⁴⁶. The same statute enacts, that no person shall sign as witness to the subscription of any party, unless he knew him when he subscribed, and either saw him sign, or heard him give warrant to the notary to sign for him; or at least, unless he heard him own the subscription to be his; and the transgressor of this enactment is declared punishable, as accessory to forgery^{* 47}.

14. Where any security was to be executed, consisting of several sheets of paper, the sheets were, by the former custom, pasted together by the ends, and the granter signed upon all the joinings. But this custom of signing at the joinings was not so universal as to acquire the strength of proper law; for it never affected cautioners, *Stair, Jan. 14. 1674, Ogilvie, (Dict. p. 16804.)*; it was sometimes neglected even by the principal debtor, or other granter; and it had received no confirmation from statute. Our supreme court, therefore, thought themselves at liberty to repel the objection, That the granter had not signed at the joinings, as well as at the end of the deed, where the special circumstances of the deed left no room to suspect fraud; where, *ex. gr.* all the obligations upon the granter's part were contained in the last sheet, *Forbes, Nov. 23. 1708, Sime, (Dict. p. 16713.)*. For obviating the inconvenience of rolling down a number of sheets in a deed, before one could come at the particular clause upon which he was to ground his plea, all contracts, decrees, dispositions, and other securities, are allowed, by 1696, C. 15., to be written book-wise, provided each page be marked by its number, *First, Second, &c.* and signed by the party, and it be mentioned at the end of the last page how many

* See *Fac. Coll. iii. No. 13, Young against Ritchie, Feb. 2. 1761, Dict. p. 17047*⁴⁷.

lowed. Where the deed has been put on record, or made the ground of judicial claim, it is clear that no correction can afterwards be made; *Brown, 11th March 1809, Fac. Coll.*

⁴⁶ As to privileged writings, *vid. infr. h. t. § 22. et seq.* As to decrees arbitral, and other proceedings in submissions, *vid. B. 4. t. 2. § 29. in not.* As to seisis *propriis manibus, vid. supr. B. 2. t. 3. § 38. not.*⁵¹.

⁴⁷ It has been laid down, that "The act 1681 does not require, in point of solemnity, that the instrumentary witnesses should subscribe in presence of the granter, or that they should not lose sight of the deed in the interval betwixt his and their own subscription; nor has it been so understood in practice. The presumption of law is, that witnesses will not subscribe a deed unless they are satisfied of its identity; and although there never ought to be any considerable interval, yet when such a case occurs, it must be judged of on its whole circumstances;" *Fac. Coll. Frank, 3d March 1795, Dict. p. 16824.* Where the party does not subscribe till after the subscription of the instrumentary witnesses, and not in their presence, the deed is not valid; *Young, not. * h. p.* The instrumentary witnesses may be examined as to the fact of their having seen the granter subscribe, or heard him acknowledge his subscription; *Ibid.; Fac. Coll. Frank, 9th July 1793, Dict. p. 16822.*; and *3d March 1795, supr.; Fac. Coll. Swany, 12th Dec. 1807, Dict. v. WRIT, App. No. 7.* Where, however, a deed is regularly executed *ex facie*, it will be sustained, notwithstanding one of the instrumentary witnesses, when examined *ex intervallo*, depones that he did not see the granter subscribe, nor hear him acknowledge his subscription; *Fac. Coll. Sibbald, 18th Jan. 1776, Dict. p. 16906; Frank, 3d March 1795, supr.* Nay, even where both witnesses concur to this effect, it would still appear not to be conclusive against the deed, it being competent to redargue their parole testimony, and to support the presumption of law founded on their subscriptions, by other evidence; *Swany, supr.; Richardson, 28th Feb. 1811, Fac. Coll.; Condie, 26th June 1823, (S. & D.)*

"It is not necessary that a deed be subscribed by the witnesses at one and the same time;" *Robertson, 1st Dec. 1824, (S. & D.)*

many pages the deed consists of; which last page is the only one which it necessarily behoves the witnesses to subscribe*.

15. After having explained the solemnities required in deeds subscribed by private parties, or by notaries for them, those that are essential to instruments or attestations signed by the public officers of the law, as notaries or messengers, may be considered. Instruments of seisin, though of the most extensive land-estates, are, by *Aug. 1584, C. 4.*, declared valid, if signed by one notary, with a reasonable number of witnesses, though the act 1579 had required two notaries to all obligations of importance; which specialty arises from this, that the superior, prior to his giving seisin, had virtually bound himself to it, by signing the charter or precept; so that the subsequent seisin is no more than the accomplishment or fulfilling of a former obligation. The words of the act 1584, *with a reasonable number of witnesses*, are, in practice, understood of two, which is deemed a sufficient number for every deed that can be executed by one notary, *Stair, July 15. 1680, Bish. of Aberdeen, (DICT. p. 3011.)*. This enactment of the statute 1584, relating to seisins, has been, from the parity of reason, extended by custom to instruments of resignation. That clause of the before-cited act 1681, *C. 5.*, which requires witnesses to subscribe their attestations, and their names and designations to be inserted in the body of the deed, expressly comprehends instruments of seisin, of resignation *ad remanentiam*, of intimation of assignations, translations, and retrocessions.

16. All seisins were, by the old custom, extended on a single sheet of parchment; and when, from the long description of the lands contained in the seisin, or the variety of other matter, a sheet larger than the common size was necessary, it became hard either for the writer or reader to manage it. By 1686, *C. 17.*, therefore, seisins were allowed to be written book-wise, provided that the notary and witnesses signed each leaf⁴⁸, and that the notary mentioned in his attestation the number of leaves, of which the seisin consisted; the last of which provisos, requiring the attestation of the notary to the number of leaves, appears to have been seldom or never complied with; *Fac. Coll. i. 2. (Clark against Waddel, Feb. 7. 1752, DICT. p. 14333., and App. 1. voce SASINE, No. 1.)*; but is now made necessary by act of sederunt, *Jan. 17. 1756*⁵⁰. The act 1686 has not the least relation to a posterior one already explained, 1696, *C. 15.*, which authorises contracts, &c. to be written book-wise.

* This is not extended in practice to the case of deeds written on one sheet of paper; *Kilk. No. 7. voce WRIT, Robertson, Jan. 7. 1742, DICT. p. 16955.; Fac. Coll. Feb. 14. 1778, Macdonald, DICT. p. 16956*⁴⁸.

⁴⁸ In these cases it was found not to be necessary *de solemnitate*, that deeds written "on one sheet only" should make mention in the end "how many pages were therein contained." So also the objection to a deed, "that it did not mention the number of pages," was repelled; "because it bore, that it was written on three sheets of paper, and that the eleven first sides were signed by the granters, and the last by the grantor and witnesses;" *Fac. Coll. Henderson, 31st Jan. 1797, DICT. p. 15444, and 17059*. On similar grounds, it has been held that the last page of a deed contained on one sheet, being duly subscribed, it is not indispensable that the preceding pages be subscribed; *Kilk. Williamson, 21st Dec. 1742, DICT. p. 16955, Smith, &c. 4th July 1816, Fac. Coll.*

⁴⁹ A seisin, though omitted to be signed on the 2d, 4th, 6th, and 8th pages, is valid; the statute not requiring each page, but each sheet to be signed; *Lindsay Carnegie, not. 51. infr.*

⁵⁰ A seisin written "on three pages of a single sheet of parchment," sustained, notwithstanding the number of pages was not mentioned in the doquet; *Kirkham, 21st May 1822, (S. & B.)*

TITLE II.

Solemnities requisite to notarial instruments.

Act 1686, respecting seisins, whether it is repealed by act 1669.

Book III.

Solemnities of
executions by
messengers.

wise. The first confessedly treats of nothing but seisin; and the last is confined, both by the preamble and statutory words, to such contracts and other securities as by the former custom had been extended on several sheets of paper pasted together, which seisins never were, such at least as flowed from the crown; and the whole of the enactment specially refers to that former custom, without once using the word *seisin*, or giving the remotest hint that the statute was correctory. Yet the court of session seem to have explained the last act 1696, into a repeal of the former, *first*, by a decision, *Jan. 1725, E. Buchan*, (see *DICT.* p. 16955.), repelling an objection against a seisin, That each page was not attested by witnesses in the terms of the act 1686, because the posterior act 1696 required the witnesses to sign only the last page⁵⁰; *2dly*, by act of sederunt *Jan. 17. 1756*, ordaining all seisins to be marked in every page by the numbers, *First, Second, &c.* according to the directions of the act 1696, under the certification of nullity, though the act 1686 prescribed no such rule*.

17. All executions, or as they are called in our statutes, *indorsations*, of summonses and diligences, were by the ancient usage valid, without the messenger's subscription, barely by affixing his stamp to them, 1540, *C. 74*. After writing came to be used more universally, his subscription was required to all copies of summonses delivered by him to defenders or parties, 1592, *C. 139*. At last, by 1686, *C. 4.*, the necessity of sealing executions is abolished, and all executions and citations before any judge, civil or criminal, must be subscribed by the witnesses as well as the messenger; but their names and designations need not be inserted in them by that statute †. The designation of the witnesses is, by a prior act, formerly cited, 1681, *C. 5.*, required in certain executions of messengers, *viz.* in those of inhibition, interdiction, horning, and arrestment; and it having been objected against the execution of a summons, That the witnesses were not designed according to the directions of that act, the objection was repelled, because it would have been incongruous for the legislature to mention any particular species of executions, if it had not been intended that these, and these only, should fall under the act; *enumeratio unius est exclusio alterius*, *Dec. 8. 1736, Napier*, (*DICT.* p. 16899). It is not necessary for the witnesses to a notarial instrument, or to an execution, to see the notary or messenger sign in the terms of the act 1681; for as the witnesses to these are not accounted witnesses to the subscription of the notary or messenger who attests, but to the transaction attested, on which the instrument or execution proceeds, the presence of the witnesses at the transaction supports the instrument or execution, *Forbes, July 5. 1710, Lord Gray*, (*DICT.* p. 16892.) ‡. As the act 1593, *C. 175.*, by which the inserting of the

* See *Fac. Coll. Feb. 26. 1796, Lindsay Carnegie*, *DICT.* p. 8858.; also *Election Cases*, p. 67. (*Vid. supr. not. 49.*)

† See *Fac. Coll. Feb. 19. 1795, Peter*, *DICT.* p. 16957. ⁵¹.

‡ See *Fac. Coll. Jan. 16. 1784, Paterson*, *DICT.* p. 3807. ⁵².

⁵⁰ This decision was reversed on appeal, *Robertson's Appeal Cases*, p. 525; *Bankt. B. 2. t. 3. § 40.*

⁵¹ This is an analogous decision, in the case of executions, to that of *Lindsay Carnegie*, *supr. not. 49.*, in the case of seisins.

⁵² It was here found, that an execution of inhibition containing the names and designations of the witnesses, but without mentioning that they were "witnesses to the premises," was good; the witnesses having subscribed the execution, and added the word "witness" to their names. *Vid. supr. § 13. not. 44.*

the name and designation of the writer is made essential to deeds, expresses only original charters, contracts, obligations, &c. the enactment has not been extended by usage to notarial instruments or executions of messengers, which are the mere attestations of facts by public officers, and cannot be called original writings.

18. The inserting of the time and place of subscribing, may, in many cases, be a strong guard against forgery; for which reason it is by Stair accounted a solemnity essential to deeds, *B. 4. T. 42.*

§ 19. But as solemnities are not to be multiplied without a warrant either from statute or universal custom, deeds have been adjudged valid, without the mention either of the place, *Forbes, Feb. 15. 1706, Duncan, (Dict. p. 16914.)*; or of the time of signing, *Ibid. July 21. 1711, Ogilvie, (Dict. p. 16896.)*, unless where the validity or the preference of the deed depends on its date⁵³; of which afterwards, § 22.

19. The acts 1579, 1593, and 1681, declare expressly that all deeds which are destitute of the solemnities thereby required, *shall bear no faith in judgment; or that they shall be null, and not supplyable by any condescendence*; the natural import of which expression is, that they cannot produce an action against the granter, or be pleaded as evidence before any court to his prejudice. Agreeably to this interpretation, it has been adjudged by sundry decisions, that such deeds could not be supported by the most pregnant proof that could be offered in their favour, *Fount. Nov. 21. 1704, Kirkpatrick, (Dict. p. 12061); Jan. 25. 1738, Low, (Dict. p. 16899)*; nor even by referring the verity of the subscription, and the subsistence of the debt, to the oath of the granter's representative, *Forbes, Jan. 4. 1710, Logie, (Dict. p. 17026.)*⁵⁴. But by other decisions a condescendence hath been admitted for supplying the defect of the deed, not only where the witnesses to a party's subscription have not been designed, in which case a condescendence was uniformly allowed till the year 1681, on account of the doubtful meaning of the act 1579, but even where the writer's name and designation were omitted, though that is declared a nullity in the most express words by the act 1593, *Stair, Dec. 5. 1665, Cunningham, (Dict. p. 17019.)*; *Dirl. 343.*; (*Feb. 22. 1676, Ogilvie against Buckie, Dict. p. 16860.*); *Fount. Feb. 25. 1710, Maxwell, (Dict. p. 17027.)*.

20. From the observance of the solemnities above explained, a presumptive evidence arises for the genuineness of a deed, without which it has no legal force. Where therefore a deed is vitiated,

Whether it is necessary to insert in deeds the time and place of subscribing.

How far the omission of these statutory requisites may be supplied by proof.

Erasures, interlineations, and marginal notes.

⁵³ So held, where both the place and date of signing were wanting; *Wemyss, 5th June 1821, Fac. Coll. and S. & B.*

⁵⁴ *Vid. supr. § 2. not. * p. 608.* Where the verity of the subscription was admitted, it is said to have been considered as not a relevant ground of reduction, under the act 1681, that the instrumentary witnesses did neither see the subscription adhibited, nor hear it acknowledged; a majority of the judges having "concurr'd in opinion, that the forms in question are not among the solemnities prescribed by the statute, under the sanction of nullity;" *Smith, &c. 25th Jan. 1821, Fac. Coll.* The written judgment of the Court, however, bore no positive reference to such a principle; and it may be doubted how far it can yet be held to be law. The Court, indeed, must have been greatly influenced by the imperfect character of the evidence brought in support of the challenge; and, accordingly, when the case was carried to appeal, the judgment was affirmed on this special ground; Lord Gifford, as appears from the shorthand notes, 4th June 1824, expressly waving consideration of the general principle, until a question should occur, rendering it necessary to decide it. In this way, the case seems naturally to fall under the same class with those noticed *supr. § 13. ad fin. and not. 47.*

ted, by erasing certain words, and superinducing others in their place, or by interlineations, such additions or alterations cannot bind the granter, because they are destitute of that evidence; the presumption is, that they have been made after the granter and witnesses had signed the deed, since no person is presumed to sign a blotted or vitiated writing⁵⁵. But if it be either mentioned in the deed itself, or acknowledged by the granter upon oath, that those alterations were made before his subscription, they are obligatory on the granter*. In some special cases, the instrumentary witnesses are admitted to prove this fact, *Feb. 1730, Arrot*, (DICT. p. 12285.); but more frequently that manner of proof is rejected, *Colvil, March 14. 1579, Nairn*, (DICT. p. 12270.), *Stair, Nov. 22. 1671, Pattullo*, (DICT. p. 11536.). Marginal notes, though signed by the granter, are in like manner presumed to have been added after signing the deed, if it be not expressed in the testing clause, that the witnesses to the deed were also witnesses to these additions. In mutual contracts, a marginal note upon one of the duplicates is probative against the party who is possessed of, and founds on that duplicate, though there should be no such note upon the other duplicate; but if the note shall contain any thing in favour of that party, it is not binding on the adverse party, unless it be supported either by his oath, or by posterior relative writings, or in special cases by the testimony of the instrumentary witnesses.

Certain deeds must be written on stamped paper.

21. A new requisite has been added, since the union of the two kingdoms, to certain deeds, for the benefit of the revenue, that they shall be signed on stamped paper or parchment, paying a stated duty to the crown. Charters, retours, precepts of *Clare constat*, and seisins of lands holden burgage, or of any subject, must, by 10. *Ann. C. 19.*, made perpetual by 3. *Geo. I. C. 7.*, be written on parchment or paper paying 2s. 3d. By 12. *Ann. sess. 2. C. 9. § 21.*, all bonds, indentures, leases, and, in general, all deeds not charged by the former act, are to be written on paper paying 6d.; and upon the deeds charged by the last of those statutes, an additional duty has since been imposed of 1s. by 30. *Geo. II. C. 19.* Bail-bonds are expressly excepted from the act 12. *Ann.*; and sundry other writings are in practice not charged with any duty, as testaments, discharges of rent or of interest, bills of exchange⁵⁶; and all judicial deeds, as notarial instruments, bonds of cautionry in suspensions, loosings

* *Vide Fac. Coll. August 3. 1774, Laidlaw*, DICT. p. 16941.; *Ibid. Feb. 20. 1802, Henderson*, DICT. p. 17059. (*Vid. infr. § 26. h. t. not.*)

⁵⁵ Where the vitiation occurs *in substantialibus*, it will be fatal to the deed:—*e. g.* where the subscription of an instrumentary witness is written on an erasure, and the word "witness," added in a different handwriting; *Gibson, 16th June 1809, Fac. Coll.* affirmed on appeal, 20th April 1814, 2. *Dow*, 270. Where it occurs in a less material part, there being no fraudulent intention, and the essentials of the deed being left still intelligible and capable of being carried into effect, the vitiated word or clause is merely held *pro non scripto*; *Fac. Coll. Kemps, 2d March 1802*, DICT. p. 16949; *Adam, 12th June 1810, Fac. Coll.*; *E. Traquair, &c. 26th June 1822, (S. & B.)*

As to erasures occurring in the registration of seisins, *vid. supr. B. 2. t. 3. § 42, not. 59.* As to the vitiation of bills of exchange, *vid. infr. § 26. h. t. not.*

⁵⁶ The indorsation of an open account requires no stamp; *Lawrie, 6th Feb. 1810, Fac. Coll.* Neither does a mandate addressed to an agent, authorising him to raise an action; *Ellis, 26th June 1822, (S. and B.)*. A cautionary obligation for payment of the several sums respectively due to the creditors of a common debtor, may, like a bond for payment of a composition, be executed on a single stamp, whatever the number of creditors; *Fac. Coll. Johnston & Co. &c. 7th March 1801, DICT. v. WRIT, App. No. 5.*

loosings of arrestment, and others of a like nature. No more than one deed can be written on the same piece of parchment or paper, § 24. ; and no deed written upon parchment or paper not stamped, shall be available, till it be stamped, and a receipt produced for L. 5 paid to the Crown, over and above the stamp-duties, § 25 *.

22. Sundry obligations, even of the greatest importance, are in so far privileged, that they have the support of law, though they be destitute of some of the solemnities which are essential to other deeds. *First*, Holograph deeds, *i. e.* deeds written with the grant-er's own hand, are valid without witnesses, because one's handwriting through a whole deed is harder to be counterfeited, and therefore less exposed to forgery, than the bare subscription of his name and surname. This privilege is extended to obligations, the substantial of which are written by the granter himself, *Stair, Jan. 23. 1675, Vanse, (Dict. p. 16885.)*; see *Forbes, Nov. 30. 1711, Cred. of Spot, (Dict. p. 16868.)*⁵⁹. Holograph writings ought regularly to mention, that they are written by the granter; in which case they are presumed holograph, unless the contrary be proved, *Durie, Dec. 9. 1635, E. Rothes, (Dict. p. 12605.)*. But though this should be neglected, a proof of holograph will be admitted, either *comparatione literarum*, or by witnesses who saw the deed written and signed, *Forbes, June 11. 1711, Donaldson, (Dict. p. 11511.)*. It is a rule, That no holograph writing, without witnesses, can prove its own date; or, in other words, the date of a holograph deed is not proved, barely by the granter's assertion in the body of it, that it was signed upon such a day; otherwise he might, when he is not controlled by witnesses, antedate writings, by which his heirs might be cut off from the plea of deathbed, creditors-inhibitors from the benefit of legal diligence, or a husband from the defence, That his wife had granted the obligation sued upon after she was *vestita viro*. In questions therefore with the granter's husband, *Durie, Jan. 20. 1636, Temple, (Dict. p. 12490.)*, or his heir, *Stair, June 24. 1681, Dows, (Dict. p. 11477.)*, or creditor-inhibiter, *Ibid. June 21. 1665, Braidy, (Dict. p. 12275.)*, or arrester, *Fount. July 22. 1708, E. Selkirk,*

Privileged deeds which require not the usual solemnities:
1st, Holograph deeds.

* In the Appendix (No. II.) to Mr Erskine's "PRINCIPLES of the LAW of SCOTLAND," (edit. 1802), there is a progressive account of the stamp-duties applicable to this part of the united kingdom, from their first institution in the reign of Queen Anne down to the date of that publication. Some additions and alterations have been made by subsequent statutes, particularly by Stat. 42. *Geo. III. c. 99.*; 42. *Geo. III. c. 116.*, § 68, 81, 107, 173.; 43. *Geo. III. c. 118.*, § 3.; 43. *Geo. III. c. 126.* & 127. By this last act, the different stamp-duties imposed by previous statutes are consolidated. It is unnecessary to detail any of these late statutes, as by 44. *Geo. III. c. 98.*, (passed 28th July 1804), it is enacted, that, from and after 10th October 1804, all duties granted by prior enactments shall cease and determine, except in relation to arrears of duty then remaining unpaid, or to fines, penalties or forfeitures, then or previously incurred. By § 8. all the provisions in former stamp-acts, not expressly altered by this act, are declared to extend to the new duties, commencing 11th Oct. 1804. As it is not improbable that the stamp laws may still undergo some alteration, it is considered unnecessary to load this work with a specification of these duties. The reader is referred to the act itself, and to a Table, bearing date, "Stamp-office, Edinburgh, 11th October 1804," framed by the Deputy Solicitor of Stamp-duties for Scotland, whose intimate acquaintance with that branch of the public revenue is well known and universally acknowledged⁵⁷.

⁵⁷ The present stamp act 55. *Geo. III. c. 184.*, bears reference to certain appended schedules; which alone it is safe to consult.

⁵⁸ A codicil was sustained, though in no part holograph, because in an addition to it, which immediately followed the subscription, and which was holograph, the testator appeared distinctly to adopt its contents; *Macintyre, 1st March 1621, Fac. Coll.*

BOOK III.

2d, Deeds, subscribed by a number of persons.

3d, Testaments.

4th, Discharges to tenants.

5th, Missive letters *in re mercatoria*, merchants' accounts, and promissory-notes.

kirk, (DICT. p. 4453.), the date of holograph deeds must be supported *aliunde* by adminicles; which adminicles must be pregnant where there is any suspicion of fraud.

23. A deed subscribed by a number of persons, members of a corporate body, or even by a number of private persons, has been once and again adjudged effectual without witnesses; the parties in the obligation being presumed to have been witnesses to each other's subscribing, *Stair, July 19. 1676, Forrest*, (DICT. p. 16970.); *Jan. 7. 1732, Sea-box of Queensferry*, (DICT. p. 16899.). Testamentary deeds are so much favoured, that if the testator's intention appear sufficiently, they are sustained, though not quite formal, especially if they be executed where men of skill in business cannot be had, *Fount. Jan. 1. 1708, Kerr*, (DICT. p. 16968.); *Jan. 20. 1709, Pennycuick*, (DICT. p. 16970.). And let the subject of a testament be ever so valuable, one notary signing for the testator, with two witnesses, is sufficient, *Hadd. Jan. 18. 1623, (Bog against Hepburn, DICT. p. 16960.)*, though two notaries are required by statute to all deeds of importance. It was not unusual for clergymen to enter notaries before the Reformation; but ministers (by which are meant parochial presbyters) are, by 1584, C. 133., disabled from exercising any civil office, as of judge, advocate, or notary, except in the case of testaments. The power which was continued to ministers by this act, in the special matter of testaments, was originally intended for the single purpose of authorising the attestation of testaments by such churchmen as had regularly entered notaries; but custom has long extended it, without distinction, to all ministers, because they are obliged, by their office, to be frequently with dying persons, where notaries cannot easily be got⁵⁹.—Though slighter informalities are not sufficient to set aside testamentary deeds, yet more essential defects are fatal to them. Hence it was adjudged a good objection against a testament, that the witnesses did not hear the deceased give orders to the notary for signing, or see him touch the pen in token of his approbation of the contents, *Fac. Coll. ii. 222., (Farmers, June 25. 1760, DICT. p. 16849)* *⁶⁰. Receipts and discharges granted to tenants for rent need not, by the usage of Scotland, be attested by witnesses, let the sum be ever so considerable; which hath been introduced in favour of tenants, on account of their rusticity, as lawyers express it, or their little skill in business, *Stair, Nov. 7. 1674, Boyd*, (DICT. p. 16968 and 12456.).

24. Sundry kinds of writings used among merchants and trading people in commercial affairs, have been also sustained by our usage, after the example of the most civilized states, for the encouragement of trade, though not executed with all the formalities essential to common deeds. Missive letters *in re mercatoria* are valid, though they be not holograph, *Durie, July 12. 1632, Ramsay*, (DICT.

P.

* It proved also fatal to a testament, that it contained neither the name of the writer, nor the designation of the witnesses; *Fac. Coll. Jan. 12. 1802, Crichton*, DICT. p. 15952⁵⁷.

⁵⁹ A testament was sustained, which a minister, at the request of the testator, who could not write, had subscribed with the testator's name in place of his own; upon the minister's afterwards annexing an attestation of the fact, in the character of a notary; *Fac. Coll. Trail, 27th Feb. 1805, DICT. p. 15955*.

⁶⁰ So also a codicil was found not effectual, where neither holograph nor attested by witnesses; *Fac. Coll. Dundas, 13th May 1807, DICT. v. WRIT, App. No. 6*.

p. 16963.)⁶¹*; and commissions from merchant to merchant, though they be signed without witnesses, *Stair, Jan. 11. 1676, Thomson, (Dict. p. 16968.)*. Neither do fitted accounts among merchants require writer's name or witnesses, *Forbes, MS. Jan. 27. 1714, Leslie, (Dict. p. 16978.)*. Yet if the subject of the fitted account appears to be in no degree mercantile, it is not sustained without the ordinary solemnities⁶². Promissory-notes, or notes of hand, signed in other countries, particularly in France and England, require fewer solemnities than other writings. They were adjudged null by our supreme court where the writer's name and witnesses were not inserted, *Forbes, Jan. 29. 1708, Arbuthnot, (Dict. p. 12255.)*. It was afterwards the opinion of the Court, that they were valid without witnesses, even where they were not holograph, *Fount. Dec. 7. 1711, King, (Dict. p. 12256.)* †.

25. Of all obligations, bills of exchange, on the account of commerce, are the most favoured. A bill of exchange is an obligation in the form of a mandate, by which the mandant, or person who signs the draught in one country, orders his correspondent in another, to whom the bill is addressed, to pay, either upon its being presented, or within a time specified in it, a certain sum of money, to a third party, or to any to whom that third party shall direct payment to be made. They were introduced, to make payment in distant places safe and easy; and they have got the name of *bills of exchange*, because it is the exchange, or the value of money in one place compared with its value in another, which chiefly ascertains the precise extent of the sum contained in the bill. He who purchases it, and sends it to the creditor, is called the *remitter*; and the creditor to whom it is sent, is called *the possessor* or *porteur* of the bill. As parties to bills of exchange are of different kingdoms or states, questions relating to them are not to be decided by the laws of any particular state, unless where special statute interposes, but ought to be decided according to their general nature and properties, as fixed by the received custom of trading nations. Bills therefore have not that limited effect by the laws of Scotland, which other privileged deeds have, that want some of the legal solemnities; but are complete *in suo genere*, though they are destitute of some statutory forms. Holograph deeds, for instance, not attested by witnesses, are, without doubt, valid, but they prove not their own dates; whereas bills, though their form admits not of witnesses, prove their own dates, whether they be holograph of the drawer or not, as effectually as a bond with witnesses, *Kames, 57, (Kennedy, Feb.*

6th, Bills of exchange.

* *Fac. Coll. Dec. 5. 1765, Henderson, Dict. p. 16986.* But they must be *in re mercatoria*; (*Fac. Coll. Crichton, &c. 21st July 1772, Dict. p. 17047.*)

† By a temporary stat. 12. *Geo. III. c. 72.*, rendered perpetual by 23. *Geo. III. c. 18. § 55.* it is enacted, (§ 36.) "That from and after *May 15. 1772*, 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*; that promissory-notes shall bear interest as bills, and shall pass by indorsement; and that indorsees of promissory-notes shall have the same privileges as indorsees of bills in all points." *Vide § 41, 42, & 43.* of the statute, which contain several regulations as to the issuing of summary diligence against the drawers, indorsers, &c. of bills and promissory-notes.

⁶¹ *Fac. Coll. Brebner, 18th Jan. 1803, Dict. p. 17060; Paterson, 31st Jan. 1811, Fac. Coll., affirmed on appeal, 4th July 1814; Robertson and Co., 11th Dec. 1821, (S. & B.); 1. Bell Comm. 247; Tait on Evidence, 111. et seq.*

⁶² See *Campbell, 30th May 1822, (S. & B.)*



Creditor in a bill need not be designed. Bills wanting dates.

Feb. 1725, DICT. p. 12615). But though this doctrine be necessary for the security of merchants, when they are transacting proper bills of exchange, in questions with either the heir or creditors of the drawer, it seems doubtful how far, for the reasons already assigned in the case of holograph deeds, § 22, it ought to be extended to such inland bills as are made payable to the drawer himself, and where, consequently, the only persons concerned in them are the drawer and acceptor, *Bankt. B. 1, T. 13, § 20*; see *Feb.* 1734, *Christiesons*⁶³.

26. Though other deeds require not only the names, but the designations, both of the granter and receiver, to be inserted in them, it is sufficient to fix an obligation on the drawer of a bill, if the subscription appear to be his^{*64}; and as for the designation of the creditor,

* Action was refused on a bill signed by notaries, there being no witnesses to the subscription of these notaries; *Fac. Coll. June 27. 1765, Buchanan*, DICT. p. 1451. As to subscription by initials, *vide Ibid. Nov. 19. 1760, Shepherd*, DICT. p. 589⁶⁴.

⁶³ It is thought that the distinction here taken would not now be entertained; but that equal effect, in point of privilege, would be extended to every class of bills, whether inland or foreign, and whether payable to the drawer or a third party. See *Kennedy, 8th July 1725*, DICT. p. 1477, and 12615; *Johnston, 12th Feb. 1731, 2. Fol. DICT. p. 259*. The doubt thrown out by Erakine has, however, been repeated in two late publications; *Tait on Evidence*, p. 105; *Glen on Bills, (2d. edit.) p. 235*. It is not supported by the case of *Christiesons*, referred to; the point there decided being, that "a bill granted on deathbed does not prove its onerous cause;" DICT. p. 12599, and *Elchies, v. DEATHBED, No. 5*.

⁶⁴ A bill subscribed by initials, or by a mark, or otherwise than by the proper subscription of the party, will not authorise summary diligence; *Cockburn, 8th Dec. 1815, Fac. Coll.*; *Stewarts, 11th July 1815, Ibid.*; *Kennedy, 25th May 1816, Ibid.*; 1. *Bell Comm. 303*; *Tait on Evidence*, p. 64, and 107; *Glen, p. 75*; but where the subscription is admitted, it will support an ordinary action of debt; *Cockburn, supr.*; *Shepherd, not. * h. p.*; and will be received as an adminicle of proof, even where no such admission is made; *Thomson, July 1729, DICT. p. 16810*; *M'Ilwraith, 23d June 1785, Ibid. p. 16820*; *Bell, Tait, and Glen, ubi supr.* To support action on such a bill, where the subscription is denied, "there is no general rule as to the evidence which would be sufficient;"—"but that, as in other cases where an imperfect voucher is produced, would depend on the special circumstances of the case;" *per Lord Glenlee, in Kennedy, 25th May 1816, Fac. Coll.* In an action upon a bill for L.5, signed by a mark without subscribing witnesses, parole proof, (as in the case of an obligation below L.100 Scots,) was allowed before answer, that it was truly signed by the party; *Kennedy, supr.* "In the case of *Lindsay, 18th Feb. 1815, (not reported),* which was an indorsation of a bank receipt for L.50, by a mark, before two witnesses, whose names were adhibited; the Court allowed a proof before answer, that "these witnesses saw the mark adhibited;" *Ibid.*; *per Lord Justice-Clerk (Boyle.)* In general, it would seem, that to let in parole proof, in the case of bills beyond L.100 Scots, "there must appear, on the face of the instrument, sufficient legal evidence that "the writing was signed before witnesses;" *per eund. in Stewarts, supr.*—and, perhaps, it may be further necessary to prove, "that the party was in use to subscribe in such "a manner;" *per eund. in Kennedy, supr.*; 1. *Bell Comm. 303*.

It is essential to the validity of bills drawn within the united kingdom, that they be written on the *ad valorem* stamps pointed out by statute; and such stamps cannot be affixed, nor, where a lower than the statutory rate has erroneously been used, corrected, after the document is written. Where a stamp, of higher value, however, is used, provided it be of the same denomination, the bill is good; *Fac. Coll, Bowack, 21st June 1804, DICT. v. Bill of Exch. App. No. 16*; 43. *Geo. III. c. 127., § 6*. So also, though the stamp be of a different denomination, unless specially appropriated to another instrument, by having the name of such instrument marked on its face; 55. *Geo. III. c. 184. § 10*; and even where the stamp is thus appropriated, it is thought, (notwithstanding the apparent inference from the enactment just cited,) that the mistake may still be corrected, and the proper bill stamp affixed, on paying the duty, with a penalty of 40s. if the bill be not yet due, or with a penalty of L.10 if after due; 37. *Geo. III. c. 136, § 5, 6*; 48. *Geo. III. c. 149, § 3, 8*; *Bayley, (4th edit.) p. 81*.

The vitiation of a bill by alteration or erasure in a material part, *e. g.* in the date, term of payment, &c. is fatal, where done without the consent or acquiescence of parties, as altering their intended contract; *Fac. Coll. Murchie, 1st July 1796, DICT. p. 1458*; *Ib. Allan, 5th March 1800, DICT. v. BILL OF EXCH. App. No. 10.*; *Russell, 14th Dec. 1822, (S. & D.)*; *Murdoch, Robertson & Co., as reversed on appeal, 26th Dec. 1801, noticed 1. Bell. Comm. 304*; *Bryce, 16th Nov. 1810, Fac. Coll. (sed vid. infr.)*; *Callander,*

ditor, that has been thought unnecessary; because the being possessed of a bill supplies the designation, and distinguishes him to be the true creditor, if he bear the name given in the bill to the creditor. The want of a special address or direction in a bill is supplied by acceptance; for the address serves merely to mark out him to whom it is to be presented for acceptance; and when an acceptor appears, even though the address be wanting, he is presumed to be the person whom the drawer had in his eye, *Kames*, 96, (*Grierson*, June 28. 1727, *DICT.* p. 1447). By the general custom of trading states, the want of a date makes a nullity in a bill; for which this reason is given by some writers, that the possessor, if he uses not exact diligence in the case of non-acceptance or non-payment, can have no recourse against the drawer; and in most bills it is by the date only that the fact of using exact diligence, or not, can be fixed. But though this may be a good reason why the possessor of a bill without a date can have no recourse against the drawer, it can be none why the bill ought not to be effectual against the acceptor, who is directly liable in payment. Our usage also rejects bills which have no date⁶⁵; the true ground of which appears to be, that our legislature intended to restrict the privilege conferred by our statutes on bills, to those which were used for the more easy carrying on of commerce, foreign or inland; that bills drawn without a date, contrary to the practice of other states, cannot bear that construction, but are always designed by the parties as lasting securities for sums of money; and that therefore they are entitled to none of those privileges, but are to be judged of by the common rules of law; and so null, if they have not all the solemnities required by our usage to other obligations; see *Fac. Coll.* ii. 57, (*Douglas*, Nov. 15. 1757, *DICT.* p. 1429)⁶⁶.

27. The creditor in a bill may transmit, or, in the proper style, indorse it to another; which is done, either by an order signed by the creditor on the back of it, in these words, *Pay the contents to A B*; or barely by his subscription, leaving a blank above it, which the creditor or porteur may fill up at pleasure. Some foreign writers have maintained, that a bill which is taken payable only to the creditor, and not also to his order, is not indorsable; but if all rights,

Indorsation of bills.

Callander, 10th Dec. 1812, *Ibid.*; *Macara*, 3d June 1823, (*S. & D.*); *Fleming*, &c. 1st July 1823, (*Ibid.*); *Hamilton*, 1st Dec. 1824, (*Ibid.*) Where a bill has once issued, alteration, even of consent of parties, in a material part, is fatal under the stamp laws, the bill being thus substantially made a new document, and therefore requiring a new stamp; *Fleming*, &c. *supr.*; 1 *Bell Comm.* 302. But it is otherwise, where the alteration does not occur in a material part;—and even where in a material part, (though not to the effect of supporting summary diligence,) if it distinctly appears to have been made before subscription, “to correct a mere blunder or mistake,” and truly in furtherance of the original contract and intention of parties; *Macara*, *supr.* *Fac. Coll.* *Henderson*, 20th Feb. 1802, *DICT.* p. 17059; *Mill*, 16th Jan. 1810, *Fac. Coll.*; *Fairweather*, 12th Feb. 1817, *Ibid.*; *Sutherland*, 26th June 1822, and 1st July 1823, (*S. & D.*); *Beattie*, 18th Feb. 1823, (*Ibid.*) On this ground doubts have been entertained, and apparently with justice, of the soundness of the decision in *Bryce*, *supr.*: 1 *Bell Comm.* 305; *Tait on Evidence*, p. 143; *Glen*, (2d edit.) p. 101.

As to the effect of alterations, not capable of detection on the face of the bill, in questions with *bona fide* third parties, *vid. infr.*, § 28 not⁶⁹.

⁶⁵ Want of date, in the sense here employed, seems, from the reasoning in the context, not to have reference to the mere want of the day and place of drawing; but rather to mean, the want of a fixed term of payment; and, indeed, where the bill specifically bears a fixed term *in græmia*, it is thought, that (unless perhaps in questions which may arise under the stamp act,) the want of a date, in any other sense, is immaterial.

⁶⁶ The case here referred to does not at all touch the question, as to the essential character of a date; see it again alluded to, *infr.* § 38.

Bills blank in the creditor's name, and such as are unsigned by the drawer.

rights, though they should not specially bear to assignees, pass by assignation, which is at least a general rule in commercial states, bills by the same rule, though they do not bear *to order*, must be transmissible by indorsation, *Kames*, 78, (*Crichton*, Jan. 1726, Dict. p. 1446). It is presumed, that an indorser has received value from the indorsee, though that should not be mentioned in the indorsation, *Br.* 67,⁶⁷ (*Auchenleck*, Feb. 15. 1715, Dict. p. 1537); and therefore, if the indorsee cannot make good his payment from the acceptor, he hath recourse not only against the drawer, but against the indorser, for the recovery of that value; and if there are several indorsers, one after another, he may insist for his full relief against any one of them. Where therefore the indorser of a bill wants to be free from such recourse, he ought to subjoin to his indorsation the words *without recourse*⁶⁸.

28. A bill drawn blank in the creditor's name is null, *first*, Because bills are not drawn in that form by the custom of any trading nation. *2dly*, A bill so drawn falls under the act 1696, *C.* 25; for though that act excepts indorsations of bills, which may therefore be taken blank in the name of the indorsee, agreeably to the general custom of other countries, bills themselves are not excepted from it, *Forbes*, Feb. 13. 1711, *Brand*, (Dict. p. 1679)⁶⁹. As bills are truly mandates, a bill, even when the creditor's name is mentioned, can infer no obligation till it be signed, not only by the mandatary, who accepts the mandate, but by the mandant, who gives it, *Dec.* 6. 1738, *Macraith*, (Dict. p. 1436). Yet it is in practice sufficient, that bills kept in the drawer's custody be signed by him at any time before they are produced in judgment, though it should be after the death both of the acceptor, and of the creditor, when

⁶⁷ *Vid. infr.* § 31, not ⁷⁶.

⁶⁸ A party signing as indorser, in circumstances which do not admit of proper indorsement, makes himself liable as a collateral obligant. Thus, one indorsing a promissory-note, not previously indorsed by the payee, was held a joint obligant with the grantor; *Don*, 26th May 1812, *Fac. Coll.* So also, one indorsing a bill of exchange, where there was no previous indorsation by the drawer, was held an acceptor; *Waters*, 7th March 1818, *Ibid.*; and see 1 *Bell Comm.* 312 and 315.

⁶⁹ A bill must be signed by the drawer, to authorise summary diligence; but it is sufficient, without the drawer's subscription, to found "an action for payment of the debt," at the instance of any party having right; *Fair, infr.* p. 625. *not*, †; *Ogilvie, Ibid.* So perfectly settled, indeed, was this held in a recent case, that the Court "would not order answers to the petition against the Lord Ordinary's judgment sustaining action, lest it might be conceived that they entertained a doubt on the point;" *Macdonald's Trustees*, 19th June 1817, *Fac. Coll.* It has been said, that a blank bill "found in the repositories of a defunct (drawer) may be filled up by his representative, and diligence may proceed in his name;" *Fair, infr.*; 1 *Bell Comm.* 304, 307; but this, with deference, may be doubted, and, at all events, the safer course will be to proceed by action.

A person signing a blank bill stamp, or skeleton bill, will be liable to a *bona fide* onerous indorsee in whatever sum, (covered by the stamp,) the bill may afterwards be filled up for; 1 *Bell Comm.* 303, and, among other authorities there referred to, *Little & Co.*, 29d Feb. 1803.

This seems to rest substantially on the same principle with that class of cases, in which bills, though altered so as to bear a different date, or an amount beyond what was contained in the original document, have been sustained in favour of *bona fide* third parties, wherever the document had, by carelessness or otherwise, been left liable to such alteration without detection; *Fac. Coll. Pagan*, 19th June 1793, Dict. p. 1660; *Graham*, 27th Jan. 1795, *Ibid.* p. 1453; *Stewart*, 14th Nov. 1822, (*S. & D.*) Where the vitiation is apparent *ex facie*, and such as not to deceive a person of ordinary vigilance, *bona fides* cannot be pleaded, and the original parties will not be responsible; *Bell, ubi supr.*; *Graham, supr.*

when he is a different person from the drawer, *Falc.* ii. 15, (*Cathcart*, Nov. 1748, (DICT. p. 1439); *Fac. Coll.* ii. 130, (*Ferguson*, July 31. 1758, DICT. p. 1443.). But if a bill appear in judgment without the drawer's subscription, though it should be indorsed by the creditor, it is null, *Tinw.* Feb. 15. 1749, *Grant**; for the bill and indorsation are different deeds; the bill constitutes the obligation, the indorsation only transmits it, and conveys the bill as it stands at that time; but cannot make a good bill of a bad one †.

29. After a bill is signed by the drawer, he becomes liable for the value to the creditor, if he on whom the draught is made shall either not accept it, or after acceptance shall not pay; for the law presumes, that the drawer hath received value from the remitter when he made the draught⁷⁰, and therefore he ought to refund that value with all the consequential damages, if he hath drawn on a person not able to pay. And this presumption holds, though the bill should not have the words, *for value received*, *Forbes*, March 19. 1707, *Scot*, (DICT. p. 1535). But if he to whom the bill is made payable was creditor to the drawer before making the draught, the bill is presumed to have been granted, not for present value, but towards the payment of that anterior debt, unless it expressly bear for value, *Forbes*, July 18. 1712, *Cheap*, (DICT. p. 1537). If the person to whom the bill is addressed refuse to accept⁷¹, while he is possessed of the drawer's effects, he is justly liable in all the damages which the drawer shall suffer by that refusal, since he was truly debtor to him previously to the draught. And at the same time he becomes properly debtor to the creditor in the bill; for the draught, taken payable to the creditor, implies an assignment of the effects to him, and the protest for non-acceptance supplies the want of an intimation, *Forbes*, Dec. 9. 1712, *Gordon*, (DICT. p. 1490)⁷². But, in that case, summary diligence cannot be used against the person drawn upon; he must be sued in an ordinary action.

Obligations on the drawer and on the person drawn upon.

30. Payment of a bill, when made by the acceptor, extinguishes the obligation of *mutuum* that lay both on the drawer and him, with respect to the creditor in the bill: But it brings the drawer under a new obligation, arising from mandate to the acceptor, who has made the payment at his desire: For if the acceptor was debtor to the drawer, the payment affords him a good ground of compensation

Effects of payment by the acceptor.

* (This seems to be the same case with) *Falc.* Feb. 14. 1749, *Bonnar* against *Grant*, DICT. p. 1441.

† The whole of the doctrine laid down in this section is at variance with the course of later decisions; see *Fac. Coll.* *Drummond*, Feb. 8. 1785, DICT. p. 1445; *Hare*, Nov. 22. 1786, DICT. p. 1446; *June* 28. 1804, *Ogilvie*, DICT. App. v. BILL OF EXCHANGE, No. 17. The Court gave judgment to the same purpose, *July* 11. 1801, in *Fair contra Cranstoun*, DICT. p. 1677, where the doctrine in the text, and earlier decisions in support of it, particularly the case, *July* 25. 1777, *Robertson*, DICT. p. 1676, and App. v. BILL OF EXCHANGE, No. 5. were disregarded, (*Vid. supr. not.* 69.)

⁷⁰ *Vid. infr.* § 31. *not.* 76.

⁷¹ An acceptance *qua* cautioner has no effect in restricting the acceptor's liability. "The judges were clearly of opinion, that cautionary obligations in bills of exchange could have no other effect than that of settling the question of relief;" *Fac. Coll.* *Macdougall*, 19th Feb. 1810; *Ibid.* *Sharp*, 24th June 1808, DICT. v. BILL OF EXCHANGE, App. No. 22.; 1 *Bell Comm.* 310.

An acceptance, by several parties, of a bill drawn on them "conjunctly," raises the same liability against each, as if they had accepted "conjunctly and severally;" *Fac. Coll.* *M. Kellar*, 7th June 1811.

⁷² So found, and the creditor in the bill preferred to a posterior arrester; *Fac. Coll.* *Campbell, Thomson & Co.*, 28th May 1803, DICT. v. IMPLIED ASSIGNATION, App. No. 2.

tion against the drawer. If he was not, an action lies at his instance for the recovery of the sum he hath disbursed in consequence of the drawer's mandate, over and above a reward for his trouble, which is called *commission-money*. Where the bill does not expressly bear value in the hand of the person drawn upon, a presumption seems to be received by our practice, that he is not the drawer's debtor; and consequently an action of recourse, or *ex mandato*, is competent to him against the drawer for repayment, *Forbes, July 4. 1711, Cunningham, (Dict. p. 1531), * 73*. But few persons drawn upon, who are not possessed of the drawer's effects, adventure, upon the faith of this presumption, to accept any draught of his, till they have suffered it to be protested against themselves for non-acceptance; after which they may accept it *supra* protest, for the honour of the drawer, without any danger of losing their recourse against him.

Bills after indorsation are considered as cash.

31. A bill, after it is indorsed or assigned, is considered as so much cash delivered to the onerous assignee or indorsee; and therefore carries right to the sums contained in it, free from all burdens but those that are marked on the bill itself⁷⁴. Hence no receipt or discharge by the original creditor in the bill, if it be written on a paper apart, can defend the debtor from paying a second time to the indorsee, though the indorsation should be posterior in date to the receipt or discharge, *Forbes, Dec. 12. 1711, Erskine, (Dict. p. 1501); Dalr. 109, (Fairholme, June 24. 1714, (Dict. p. 1506.)*. Hence also, though the bill should have been granted without value paid for it, or though the acceptor should have a ground of compensation against the original creditor who indorses the bill, by which he might have extinguished the debt, had it continued in his person, or though he should be interpellated by arrestment used at the instance of the indorser's creditor; neither of these pleas would be good against the indorsee, whose right cannot be hurt but by what appears on the face of the bill, *Dalr. 13, 93, (Stewart, Dec. 31. 1699, Dict. p. 1497; Smith, 5th Dec. 1812, Dict. p. 1502⁷⁵); Fac. Coll. ii. 8, (Douglas, Jan. 7. 1759, Dict. p. 1515)*. But if the debtor shall prove, by the indorsee's oath, either that the bill was indorsed to him for the indorser's own behoof, or that he the indorsee had not paid value for the indorsation, the indorsee is justly accounted but as a name; and the common rule which holds in other obligations, obtains, sustaining all exceptions

* But where the bill bears value in the drawee's hands, the presumption thence arising can only be removed by writ or oath of the drawer; *Fac. Coll. Nov. 29. 1793, Wallaces, Dict. p. 1484⁷³*.

⁷³ It is thought that the presumption would now be held against the acceptor, whether the bill bore value in his hands or not. In the case of *Wallaces, not. **, the bill gave a false description of the value, yet, without any proof that value of a different kind had been given, the Court decided in favour of the drawer; and it was observed unqualifiedly, that "the law presumes that the acceptor got value for the bill; and "this presumption can only be taken off by writ or oath of party." The view taken in the text is called in question, *Tait on Evidence, p. 477; Glen, (2d edition,) p. 124*.

⁷⁴ Accordingly the onerous and *bona fide* holder of a stolen bill, blank indorsed, is entitled to payment from the drawer; *vid. supr. t. 1. § 10. not. 2*. So, also, a bill having been granted as a consideration to induce the drawer to accede to a composition under the acceptor's sequestration, this, (though rendering the bill a nullity against the party immediately concerned,) does not constitute a *vitium reale*, so as to affect it in the hands of a *bona fide* onerous indorsee; *Craig, &c. 15th Dec. 1809, Fac. Coll.*

⁷⁵ In last edition, an erroneous reference was here made to *Naughton, Dec. 10. 1712, Dict. p. 1490*.

exceptions against the assignee that are pleadable against the cedent, or original creditor⁷⁶. One who had accepted of an indorsed bill from his debtor, not *in solutum*, but in security of his debt, was construed to take it *tantum et tale* as it stood in his debtor, and so not to have the privilege of an onerous indorsee, *Forbes, Jan. 15. 1708, Crawford, (Dict. p. 1524)*. But by *Fac. Coll. ii, 8, (Douglas, Jan. 7. 1757, Dict. p. 1515)*, that distinction was disregarded; and a creditor who had accepted of an indorsation simply in security of a just debt, was found not to be affected with a backbond of the indorser, more than if he had taken the bill *in solutum*, or in full payment. Yet if the bill should stand in the person of the indorsee, as trustee likewise for the indorser's other creditors, whose debts were contracted before the trust, a backbond granted by the indorser to the acceptor will affect these; because creditors cannot be said to lend their money, on the faith of a bill, which was not indorsed for their behoof till after the debts were contracted. A protested bill after registration, must be transmitted to others, not by indorsation but assignation; for no decrees are transmissible by indorsement, and registration is in the judgment of law a decree⁷⁷. But the inference drawn from thence by some writers, *Bankt. B. 1, T. 13, § 17*, that the assignee is afterwards subjected to all exceptions competent against the original creditor, can hardly be admitted; for though a creditor, by using diligence on his debt, frequently acquires a new right, or an additional preference, he can, by no rule of law or equity, forfeit any privilege that was before competent to him, merely because he hath, in the course of legal diligence, recovered a decree upon registration of it; and if the right remain entire in his own person after obtaining such decree, surely a conveyance from him, made according to the proper legal form, must, by the common nature of all conveyances, vest that whole right in his indorsee, or assignee, which was formerly in himself.

32.

⁷⁶ This doctrine has been confirmed in a long series of cases; so that now there is no point more completely settled, than that in all questions with a bill-holder, non-onerosity, *mala fides*, collusive indorsation, &c. are proveable only by the holder's writ or oath; *Wallaces, supr. § 30. not. **; *Wight, 24th June 1809, Fac. Coll. ; Scot, 19th Dec. 1809, Ibid. ; Arroll, 14th June 1821, (S. & B.) ; Dennistoun, & Co., 2d Feb. 1822, Ibid. ; Munro, 8th Feb. 1822, Ibid. ; Ferrie, 24th June 1824, Ibid.* In *Campbell, 25th Nov. 1824, Ibid.*, the Court decided, on certain specialties, (without positive evidence, by writ or oath) against an indorsee, as having acted merely in the character of agent for the previous indorser; but they "considered that the special nature of the case took it from under the general rule of law, that non-onerosity can only be proved by writ or oath; which rule, they thought, would not be affected by this decision."

It is not necessary to support the character of a *bona fide* onerous holder, that value have been paid from the outset. An indorser, who merely lends his name to enable a previous party to get his bill discounted, if afterwards obliged, at whatever stage, to retire the bill, thereby acquires all the privileges of onerosity; *Kidston, 21st Jan. 1809, Fac. Coll.*

⁷⁷ It is true that indorsation will not carry either the protest or the decree implied in its registration; but the bill itself may be transferred as well after as before registration. If, however, the indorsee be aware of the previous dishonour, he will be exposed to all exceptions pleadable against his indorser; but otherwise, and where there are no marks of dishonour on the face of the bill, the mere fact of his taking the indorsation, after elapse of the day of payment, will not deprive him of the privilege of an onerous and *bona fide* holder; *Fac. Coll. Macadam, 14th June 1787, Dict. p. 1613; Freer, &c. 18th Nov. 1806, Dict. v. BILL OF EXCHANGE, App. No. 19; Wilkie, 30th Nov. 1811, Fac. Coll. ; Crawford, 30th June 1814, Ibid. ; 1 Bell Comm. 315, 2. Ibid. 24.*

Where bills have been ranked on a sequestrated estate, the dividends payable thereon are not afterwards transmissible by indorsation of the bills, but by assignation only; *Fac. Coll. Wallace, Hamilton & Co., 8th June 1821, (S. & B.) ; 2 Bell Comm. 24.*

Book III.

Bills must be negotiated by the possessor within a determinate time.

32. Bills must be negotiated by the possessor, against those upon whom they are drawn, within a determinate time, which if he neglect he loses his recourse against the drawer. But some bills require a more precise negotiation than others. It might be thought, that the creditor in a bill payable so many days after sight, ought, immediately after his being possessed of it, to present it to him on whom it is drawn for acceptance, and in case of a refusal, protest it for non-acceptance; because the least delay in the presenting of such bills for acceptance prolongs the term of payment, which the possessor ought not to do to the prejudice of the drawer. But in practice, the creditor in bills drawn payable so many days after sight, has a discretionary power to fix the payment somewhat sooner or later as his exigencies shall require, *Feb. 7. 1735, Gordon*, (DICT. p. 1562.); *Fac. Coll. ii. 199, (Andrew, Nov. 21. 1759, DICT. p. 1584.)*⁷⁸. It is a fixed point, that bills payable so many days after date, or on a certain day or month therein mentioned, need not be presented before the term of payment; because that term being precisely fixed by the bill, can be neither prolonged nor shortened by the time of acceptance, *Kames 93, (Ferguson, Feb. 16. 1727, DICT. p. 1558.)*; *Falc. ii. 75, (Jamieson, June 28. 1749. DICT. p. 1569.)*; and as the debtor ought at that term to pay, and not simply to accept, a bill presented upon the day of payment was, upon the report of merchants, adjudged to be duly negotiated, where the possessor, upon the debtor's refusal to pay, protested it for not payment, without taking a previous protest for non-acceptance, *Tinw. June 28. 1749, Jamieson **⁷⁹. For a like reason, it is unnecessary to date the acceptance of a bill payable so many days after date; because the date of the acceptance has no connection with, or influence on the term of payment; whereas in bills payable so many days after sight, or, in other words, so many days after they are presented, the acceptance must be dated; because the term of payment depends, in that case, on the date of the acceptance; for the bill is presumed to be presented of the same date with its acceptance, unless the contrary shall be proved by an instrument.

33. All bills, in whatever form they may be taken payable, must be protested for non-payment if they are not duly paid. Though bills are, in strict law, due the very day on which they are made payable, and may therefore be protested on the day after; yet three days immediately ensuing the date of payment are indulged to the creditor in the bill, upon any of which he may, without losing his recourse

* This is the same case as that mentioned immediately before; *Falc. ii, 75, DICT. p. 1579.* (It is reported also, *Kilk. v. BILL OF EXCHANGE, No. 23, DICT. p. 1494,* and *Elchies, Ibid. No. 44.*)

⁷⁸ On this point, it has been observed, "That where the draft is within a limited time after sight, the recourse will be lost by a neglect to make presentment within a reasonable time. What is a reasonable time, will depend on the custom, with all the circumstances; as that the delay was occasioned by the draft being kept in circulation, &c. It is not a proper jury question, as some have imagined, but a point of law to be inferred by the judge from the facts found by the jury. The bill must be put in circulation, not locked up for any length of time. But both a foreign and an inland bill may be put into circulation before acceptance, and kept in circulation without acceptance, as long as the convenience of the successive holders requires;" 1 *Bell Comm. 320.*

⁷⁹ But "where the draft has been sent to an agent to be negotiated, or where the payee is directed expressly to present it; the payee or agent must present it" (for acceptance), "otherwise be answerable for the debt;" 1 *Bell Comm. 320; Dunlop, 16th Jan. 1810, Fac. Coll.*

Days of grace. Notification to the drawer, in case of dishonour.

recourse against the drawer and indorser, protest the bill; which are therefore called *the days of grace*: But if the creditor shall delay protesting, till the day after the last day of grace, he loses his recourse, *Kames, Rem. Dec. 42, (Ramsay, July 6. 1743, Dict. p. 1564.)*; *Jan. 29. 1751, Cruickshanks, (Dict. p. 1576.)*; *Fac. Coll. ii, 123, (Tod, July 12. 1758, Dict. p. 1583.)*⁷⁹. If Sunday be the last day of grace, the protest must be taken on the Saturday preceding⁸⁰. Where a bill is protested, either for non-acceptance or non-payment, the dishonour must be notified to the drawer or indorser within three posts at farthest; and in this notification the bill protested must be specially distinguished by its date, sum, and other essential marks, *Tinw. July 21. 1747, Johnston* *⁸¹. Protests for non-acceptance may be taken by any person who holds the bill in his hand, against him upon whom it is drawn, either at his dwelling-house, or, if he be dead, at the house where he last resided: But protests for non-payment must be taken at

* This case is also reported by *Kilkerran and Falconer, Dict. p. 1570*; (likewise by *Elchies, v. BILL OF EXCHANGE, No. 37.*) The doctrine of requiring notification within three posts is now held to have been laid down without authority; *Fac. Coll. May 23. 1790, Carrick, Dict. p. 1614*; (*1. Bell Comm. 328.*) The rule is, with regard to foreign bills, that notice be given without any undue delay; and as to inland bills, within fourteen days after the protest is taken; *12. Geo. III. C. 72*⁸¹.

⁷⁹ *Fac. Coll. Jarron, 17th June 1803, Dict. v. BILL OF EXCHANGE, App. No. 14.*

⁸⁰ Noting the bill is sufficient, though the instrument of protest be not extended until afterwards; *Fac. Coll. Brown & Co., 8th Dec. 1807, Dict. v. BILL OF EXCHANGE, App. No. 21*; *Glen, p. 194.*

⁸¹ "In the case of *foreign bills*, it is expressly declared by statute, 'that notification of dishonour is to be made within such time as is required by the usage and custom of merchants' (*12. Geo. III. c. 72. § 41.*) In England, it has been considered as matter of law for the Court to determine what is reasonable. So far as any rule of law appears to be fixed, it would seem,—1. That to such of the parties as reside in the same place, the notice must be given at farthest by the expiration of the following day. 2. That, in successive notices, in the same circumstances, each should have a day to give notice; and that a bill-holder, placing his bill with his banker to recover payment, in effect augments the number of persons from whom notice must pass, by one; and in a question with the drawer and indorsers, time will accordingly be allowed. 3. That to those who reside elsewhere, notice should be given by the next post, unless that should be so early after the dishonour as to make this impossible, or inconvenient, as a general rule of trade. 4. That if the proper day of notice be a day of public rest, or of similar sanctity according to the religion of the person bound to give notice, it will be sufficient on the following day." *1. Bell Comm. 327.* Mr Bell adds, that "probably these rules would be followed in Scotland, as grounded in sound discretion and mercantile usage:" and that the rule laid down in the text "is not law;" *Ibid. 328.* See to the same effect, *Glen, p. 204, et seq.*

As to *inland bills*, the period of fourteen days is expressly allowed by the statute. A bill drawn from England on Scotland, or *vice versa*, is in this question held to be a *foreign bill*; *Fac. Coll. Reynolds, 4th Feb. 1774, Dict. p. 1598*; *Ibid. Fergusson & Co. 17th June 1803, Dict. v. BILL OF EXCHANGE, App. No. 13.* It is said in one case to have been decided, that "in a question among *indorsers*, notification of dishonour, seventeen days after the bill was protested, was found sufficient and due negotiation, though the parties lived in the neighbourhood of each other;" *Andrew, 2d June 1812, Fac. Coll.* But there would seem to be no ground of distinction between the case of indorsers and the ordinary case; *Batchin, June 1792, Dict. p. 1619*; and a sounder basis for the judgment may be gathered from the report, viz.—that "the holder of the bill gave notification of its dishonour as soon as she learned who the prior indorser was," and therefore there was "no reason for saying there was unnecessary or undue delay."

It is not essential that there be written notice: it is competent to notify the dishonour *quomodocunque*, and the fact may be proved *prout de jure*; *Syme, 25th June 1813, Fac. Coll.*; *1. Bell Comm. 326.* Sending notice by the post is sufficient, though it be not received; *Bayley, p. 227*, and see *Fac. Coll. Henderson, 19th Jan. 1799, Dict. v. BILL OF EXCHANGE, App. No. 7.*; *Stewart, 13th Dec. 1821, (S. & B.)*

The possessor of a bill neglecting due negotiation, loses his recourse against the drawer, unless the person drawn on was not debtor.

at the place where the bill is made payable⁸², if any place be specified in it; and by none other than the creditor. The strict negotiation of bills is confined to such as are in a capacity of being protested on the last day of grace. When therefore the days of grace are expired before diligence can be used against the debtor, *ex. gr.* where bills are indorsed after that period, the indorsee is left more at liberty, and is not tied to any precise form of negotiation. He ought indeed to present the bill for payment; but though he should not formally protest it for non-payment, he preserves his recourse, if he shall, within a reasonable time, give notice to the indorser that the acceptor hath refused to make payment, *Falc.* ii. 76, (*Young*, June 29. 1749, *Dict.* p. 1580.). As one to whom a right is assigned, not *in solutum*, but simply in security of a debt, is not bound to use diligence, *infr.* *Tit.* 5, § 8, neither is an indorsee in security; and consequently he preserves his recourse against the indorser, though he should entirely neglect all the rules of diligence required in the negotiation of bills, *Fac. Coll.* ii. 82, (*Alexander*, Jan. 9. 1758, *Dict.* p. 1582.)⁸³.

34. It is a most equitable rule, That the possessor of a bill who has not used exact diligence, should lose his recourse against the drawer, if the person drawn upon become afterwards insolvent; for since the drawer transfers by the draught the whole right he had to demand payment, from himself to the creditor, to whom it is made payable, that creditor, if he shall suffer the debtor to fail, when he might by a due negotiation have recovered payment, ought to suffer for his negligence; and not the drawer, whose hands were bound up by the draught. But even where the debtor continues solvent, the law is the same: For in that case the possessor can suffer nothing by losing his recourse against the drawer; he may recover the sum from the proper debtor, and therefore is not to be indulged in any unnecessary action of recourse against the drawer, which he is accounted to have renounced, by neglecting the due negotiation of the bill, *Tinw.*, Dec. 1744, *Littlejohn* *. In the special case where he to whom the bill is addressed hath no effects of the drawer in his hands, the possessor's recourse against him is preserved, though he should have used no diligence; for there the drawer, who cannot allege that he hath suffered the least damage by the possessor's negligence, ought not to have drawn upon one who owed him nothing †. — As to the extinction of bills by prescription or taciturnity, see below, *Tit.* 7, § 29.

35.

* Also reported by *Kilkerran* and *D. Falconer*, *Dict.* p. 1569.

† See case of *Littlejohn* before mentioned; *Langley*, June 17. 1748, *Dict.* p. 1574; and *Fac. Coll.* June 14. 1787, *Macadam*, *Dict.* p. 1613.⁸⁴

⁸² It is not necessary to state in the protest that the bill was protested at the place of payment, provided it bear to be duly protested; *Commercial Bank*, 24th Feb. 1818, *Fac. Coll.*

⁸³ Contrary to this decision, it has been found, by two judgments of the House of Lords, that a bill indorsed in security does require negotiation; *Murray*, 16th Feb. 1762, as reversed on appeal, 17th March 1763, *Dict.* p. 1592; *Reid & Co.* as decided in the House of Lords, 21st Feb. 1794, *Dict.* 1620, 3. *Fol. Dict.* 89; 1. *Bell, Comm.* 335.

⁸⁴ So also, *Fac. Coll. Hill*, 5th June 1805, *Dict.* v. *BILL OF EXCHANGE*, App. No. 18. So also, notification is not necessary to preserve recourse against the drawer, where the bill has been accepted for his accommodation; *Goldsmid and Moxon*, 26th May 1814, *Fac. Coll.* Neither is it necessary "among co-cautioners to a debt constituted by "bill, the recourse being preserved against each other by the bond of caution;" *Fac. Coll. Jarron*, 17th June 1803, *Dict.* v. *BILL OF EXCHANGE*, App. No. 14. But in the ordinary

35. Hitherto of the general nature of bills of exchange in so far as they are regulated by the *jus gentium*;—they may be now considered with respect to the special privileges established in their favour by statute. It has been already observed, *B. 2, Tit. 5, § 54*, that debts proceeding on written obligations, let them be ever so clear, cannot be the foundation of summary execution, without a clause of registration; and though they have that clause, horning cannot proceed in less than fifteen days, unless a shorter time be expressed in it. But as bills of exchange ought, out of favour to commerce, to have the most ready execution, notorial protests of them, either for non-acceptance or non-payment, having a copy of the bill prefixed to them, are, by 1681, *C. 20*, registrable within six months after the date of the bill, in the case of non-acceptance, and six months after its falling due, in the case of non-payment: And on the bill thus registered, horning upon six days may pass at the suit of the creditor, either against the drawer or indorser, in the case of non-acceptance, or against the acceptor in the case of non-payment⁸⁵. This statute is extended in all points by 1696, *C. 36*, to inland bills, *i. e.* bills both drawn and taken payable in Scotland*.

36. By the aforesaid act 1681, the creditor in a bill hath summary recourse by horning, against the drawer and indorsers, even before the term of payment, if he who is drawn upon shall not accept the bill; because the creditor in a bill frequently consents to a distant term of payment, in consideration of the additional security he acquires by the solvency of the person drawn upon; and it were hard, if upon his refusal to accept the bill, the creditor should be both disappointed of that security, and be also obliged to wait the long term of payment, to which he agreed merely in the view of that security †. But after a bill is accepted, the statute authorises no summary diligence against any other than the acceptor: The creditor, if the acceptor should fail, must insist by way of ordinary action against the drawer and indorsers. The reason of this may be, that the acceptor is accounted the principal debtor, from the first intention of the parties to have the sum paid by him; and the drawer and indorsers only cautioners, who consequently ought not to be made liable till the proper debtor be discussed ‡. It is only the principal sum in the bill, with the interest, that can be charged for summarily. The exchange, when it is not included in the bill, the re-exchange, which is incurred by suffering the bill to be protested and returned, and the expense of diligence, must be recovered by an ordinary action; because these not being liquid debts, must be previously constituted by the sentence of a judge, that the quantum of them may be legally ascertained.

37. Though

* See *Stat. 5. Geo. III. c. 49*, as to bank notes.

† *Fac. Coll. June 20. 1795, Cowan, Dicr. p. 1621.*

‡ Summary diligence may now proceed against drawers and indorsers as well as against acceptors. See act 12. *Geo. III, c. 72.*

ordinary case, strict negotiation is necessary notwithstanding the acceptor's bankruptcy at the date of dishonour; nor does "the drawer's knowledge of the bankruptcy supersede the necessity of due notification;" *Langley, supr. not **. (p. 630.) *Fergusson & Co. supr. not 81*; *Calder, 22d Dec. 1808, Fac. Coll.*; *Thomson, Still & Co. 20th Jan. 1808, Ibid. in not.*; 1. *Bell Comm. 391*. In like manner, "the bankruptcy or insolvency of the drawer is no excuse for not giving notice to him, or to the trustee, &c. on his estate;" 1. *Bell Comm. 392*.

⁸⁵ *Vid. § 36. not. †.*

TITLE II.

Statutory privileges of bills after protest and registration.

Summary diligence against the drawer and indorsers in case of non-acceptance.

Book III.

The omission of protest and registration, does not deprive a bill of its ordinary privileges.

Certain bills have no privileges.

37. Though bills, when they are not protested and registered within the six months limited by this act, lose the statutory privilege of summary diligence; yet as they continue to be the necessary vehicles of commerce for a longer time, they do not, immediately after the elapsing of the six months, lose the other privileges of bills,—of not being affectable, either by compensation, arrestment, or the separate receipts of the original creditor,—stated above, § 31. What length of silence or taciturnity in the creditor or indorsee is required, to extinguish all the extraordinary privileges of bills, seems to depend much on the custom of trading nations. By two decisions of our supreme court in 1715, bills, on which no diligence had been used for five years after their dates, were declared to have lost their extraordinary privileges, *Br. 80, 82, (Murray, Feb. 18. 1715, Dict. p. 1623, and Douglas, same date, Dict. p. 1397)*; and by the two later judgments, *Feb. 6. 1719, Farquharson, (Dict. p. 1626)*, compared with *Feb. 1728, Grierson, (Dict. p. 1626)*, these privileges were restricted to the shorter term of three years; since which time it has been received as a rule, that bills which lie over for three years lose the peculiar privileges of excluding arrestment, compensation, separate receipts of payment, &c. *

38. It is not to every thing in the form of a bill that the law indulges the privileges of a bill of exchange; for these privileges, having been introduced merely for the encouragement of commerce, ought not to be applied to writings intended to lie in the hands of creditors, like bonds, as common money securities. Inland bills, therefore, where they are drawn payable at a distant term, lose the nature, and consequently the privileges, of bills of exchange. Bills not payable till three years after date enjoy no privilege by our practice, *Kames, 55. ad fin.; (Leslie, Jan. 1725, Dict. p. 5766)*; but a bill payable one year after date does, *June 21. 1748, Tudhope, (Dict. p. 1510)*⁸⁷. For a like reason, no extrinsic stipulation or clause ought to be inserted in a bill which deviates from the proper nature of bills: And hence a bill bearing a penalty is null; see *Kames, 99; (Henderson, Dec. 1727, Dict. p. 1418)*; *Kames, Rem. Dec. 46. (Drummond, Nov. 9. 1743, Dict. p. 1424.)* Bills containing a clause of interest from the term of payment, are not null; because they carry interest from that term *ex lege*, though no such clause had been inserted; but a clause of interest from the date is inconsistent with the nature of a bill, and so infers a nullity, *Falc. ii, 228, (Moncrief, July 30. 1751, Dict. p. 1428)*; *Fac. Coll. ii. 57, (Douglas, Nov. 15. 1757, Dict. p. 1429)* †. Yet a bill, though

* By *stat. 12. Geo. III. c. 72*, rendered perpetual by *23. Geo. III. c. 18. § 55*, bills and promissory-notes are made to prescribe in six years from the term of payment; and they now retain their extraordinary privileges during that period; *Fac. Coll. Feb. 6. 1787, Robertson, &c. Dict. p. 11129*⁸⁶.

† *Kilkerran* reports two cases to the same purpose, No. 5. and 26. *voce* BILLS OF EXCHANGE, *Paterson, Feb. 25. 1741, Dict. p. 1422*, and *Lockhart, Dec. 11. 1750, Dict. p. 1427*. But the Court seems now inclined to depart from this rule, and to sustain bills with such clauses; *Fac. Coll. June 28. 1790, Sword, Dict. p. 1433*, (as corrected in the errata at the end of the volume, *Fac. Coll. 1787-1792, Dict. p. 1435.*)⁸⁸.

⁸⁶ As to the prescription of bills, *vid. infr. t. 7. § 29.*

⁸⁷ In this case, the objection taken against the distant term seems to have been repelled on general grounds. And it is not doubted, but that now, whether in the case of foreign or inland bills, the rule recognised by the English law would be adopted. "If a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill;" *per Willes, C. J., in Colehan v. Cooke, cited by Chitty, p. 79, (5th edit.)*

⁸⁸ Mr Bell accordingly lays down, that "a clause of interest does not vitiate the bill;" *1. Comm. 301, not. 4.*

Pine, Feb. 14. 1721, (Dict. p. 4451) *⁹⁰. And this holds, even in such obligations as bind the granter to convey subjects within Scotland; for where one becomes bound by a lawful obligation, he cannot cease to be bound by changing places, *Forbes*, July 5. 1706, *Cunningham*, (Dict. p. 4462). But though obligations to convey, if they be perfected, *secundum legem domicilii*, are binding here; yet conveyances themselves of subjects within Scotland are not always effectual, if they are not executed according to the solemnities of our law: As to which the following distinction appears to be observed. In the conveyance of an immoveable subject, or of any right affecting heritage, the granter must follow the solemnities established by the law, not of the country where he signs the deed, but of the state in which the heritage lies, and from which it is impossible to remove it: For though he be subject, with respect to his person, to the *lex domicilii*, that law can have no authority over property which hath its fixed seat in another territory, and which cannot be tried but before the courts, and according to the laws of that state where it is situated. And this rule is so strictly adhered to in practice, that a disposition of an heritable jurisdiction in Scotland, executed in England after the English form, was not sustained, even as an obligation to compel the granter to execute a more formal conveyance, Feb. 1729, *E. Dalkeith*, (Dict. p. 4464)⁹¹. But in the case of a moveable subject lying in Scotland, the deed of transmission, if perfected according to the *lex domicilii*, is effectual to carry the property, *Durie*, July 16. 1636, *Sinclair*, (Dict. p. 4501); *Dirl.* 390, (*Scot.* Nov. 28. 1676, Dict. p. 4502); for moveables have no permanent situation, but may, at the pleasure of the proprietor, be brought from any other place to his own domicile, and therefore are considered as lying in that territory where the deed is signed, according to the rule, *Mobilia sequuntur personam*⁹².

41. It

* *Fac. Coll.* Jan. 31. 1783, *York-Buildings Company*, Dict. p. 4472.

⁹⁰ Interest *secundum legem loci contractus*, may be recovered in this country, though beyond the legal rate sanctioned by our law; *Campbell*, 15th Feb. 1809, *Fac. Coll.*; *Wilkinson*, 28th June 1821, *Ibid.* and *S. and B.*; 1. *Bell Comm.* 237. And, *vice versa*, where the *locus contractus* allows no interest, or only a lower rate, effect will equally be given to it; *Gillow and Co.*, 21st May 1824, (*S. & D.*)

⁹¹ On the other hand, an English deed, if so executed, in point of form, as validly to carry Scots heritage, will be given effect to in regard to such heritage, agreeably to the law of Scotland, notwithstanding the same deed would, by the English law, be, under similar circumstances, unavailable against heritage situate in England; *Laing Weir*, 6th Dec. 1821, (*S. and B.*)

A foreign lady, marrying a Scotsman abroad, and, under an antenuptial contract, drawn in a foreign form, accepting a certain jointure in lieu of her legal provisions, was held thereby to have validly renounced all right to any terce, locality, or aliment, out of her husband's estate situate in Scotland; *Countess of Findlater*, 8th Feb. 1814, *Fac. Coll.*

⁹² Upon this principle,—that moveables follow the law of the owner's domicile,—it has been decided, that an English commission of bankrupt carries the whole moveable estate of the bankrupt in Scotland,—whether in competition with a subsequent arrester; *Fac. Coll.* *Struther*, 1st July 1803, *Dict. v. FORUM COMPETENS*, App. No. 4;—or with a sequestration under the Scots bankrupt statute; *Royal Bank of Scotland*, 20th Jan. 1813, *Fac. Coll.* No. 28; *Falconer*, 18th Nov. 1814, *Ibid.* (No. 10.) The same was decided, as to an American commission of bankrupt; *Fac. Coll.* *Maitland*, 4th March 1807, *Dict. v. BANKRUPT*, App. No. 26. Following out the principle, it is held, that the certificate obtained by the bankrupt must operate, in Scotland, a discharge of all claims which might have been proved under the commission; *Royal Bank of Scotland*, 20th Jan. 1813, *Fac. Coll.*, (No. 29.); *Dickie*, 20th Dec. 1811, *Ibid. not.* p. 453. So long, however, as no certificate is issued, the mere existence of an English commission has been found not to protect the bankrupt, in Scotland, from imprisonment as being

41. It would be absurd to give the smallest effect to a foreign deed perfected according to the law of the place where it was made out, which would not be effectual here, though it had been perfected with all the solemnities required by our own law. Hence a testament made by a bastard in England, has no effect as to moveables in Scotland; because by the law of Scotland no testament made by a bastard is valid, let it be ever so formal, *Had. Feb. 1. 1611, Purves*, (DICT. p. 4494). Hence also a foreign testament, bequeathing heritable subjects situated in Scotland, is not sustained in Scotland, though by the law of the country where the testament was made, heritage might have been settled by testament, because by our law no heritable subject can be disposed of in that form, *Durie, Dec. 9. 1623, Hendersons*, (DICT. p. 4481); *Ibid. July 3. 1634, Melvill*, (DICT. p. 4483)*⁹³. This rule is also applicable to verbal obligations or settlements: Thus, nuncupative or verbal settlements made in England, though they have the same legal force by that law as written testaments, cannot carry moveables lying in Scotland; because by our law no proper testament can be made, or executor appointed, without writing, *Stair, Jan. 19. 1665, Shaw*, (DICT. p. 4494).

42. On a similar principle, where a foreign ground of debt, perfected *secundum legem domicilii*, is sustained by our supreme court, the diligence which is to proceed upon it, and the other judicial steps necessary for giving it full effect, must be governed by the law of Scotland; because these previous steps are required to deeds of the same kind, even supposing them perfected in the Scottish form; and that judge within whose territory the debt is situated, and under whose authority it is to be recovered, must necessarily determine all questions of diligence and competition concerning it, according to the laws of his own country, and not according to those of a foreign state, which may be utterly unknown to him, and which have no authority, nor were ever designed to bind the Judges of any state which is not subject to the legislature who enacted

TITLE II.

No foreign deed can receive effect, if by its nature contrary to the law of this country.

Diligence upon foreign grounds of debt, must proceed according to the forms of the law of Scotland.

* The same was found, *Fac. Coll. iii. 127, Burgess, Jan. 18. 1764*, DICT. p. 4484; *Ibid. Jan. 14. 1774, Younger Children of Crawford*, DICT. p. 4486.

in meditatione fugæ; *Dickie, supr.*;—or from personal diligence; *Robinson, 15th June 1811, Fac. Coll.* But the soundness of this latter decision, in so far as regards the diligence of creditors who had previously claimed and taken under the commission, (which, by the law of England is a discharge of all separate proceedings at their instance,) seems not unjustly to be called in question; 2. *Bell Comm. 604*; and see *Gordon and Paton, infr. not.*⁹⁴. It may be doubted, whether the same difficulty does not extend to the case of *Dickie*, where the creditor had “produced his interest under the commission.” Indeed, that case was otherwise attended with such specialties,—in the strong allegations of fraud urged against the bankrupt, and in the circumstance of the bankrupt being a native Scotsman, while the incarcerator was a Scots creditor,—that, perhaps, it is scarce to be regarded as fixing any general point.

In bankruptcy, however, as in every thing else, the *lex loci rei sitæ* is uniformly adhered to, in regard to the heritable estate. Accordingly, notwithstanding a prior commission of bankrupt in England, the heritage of the bankrupt may be affected by adjudication, or other real diligence, at the instance of separate creditors, or vested in the trustee under a posterior Scots sequestration, so long as the right of the English assignees has not been validly perfected either by seisin on a special conveyance from the bankrupt, or by complete real diligence; *Falconer, 18th Nov. 1814, Fac. Coll. (No. 9)*; *Weston, &c. 17th Dec. 1817, ibid.*; 2. *Bell Comm. 690*.

⁹³ On this principle, a Scots personal bond taken to heirs and assignees, but “excluding executors,” cannot be carried by a foreign testament; *Ross, 4th July 1809, Fac. Coll.*; *Vid. supr. B. 2, t. 2, § 12*. But in all questions touching heritable subjects situate abroad, the foreign testament will be given effect to, according to the *lex loci*; *Fac. Coll. Wightman, 16th June 1802, DICT. p. 4479*.

Deeds are not
obligatory on
the granter till
they are deliver-
ed.

acted them⁹⁴. Thus, because no assignation is, by the law of Scotland, effectual against an arrester, if it has not been intimated previously to the arrestment; neither is a foreign assignment, not intimated, effectual against him, though the *lex loci* should not require assignations to be intimated, *Fount. July 22. 1708, E. Selkirk*, (DICT. p. 4453)⁹⁵. And, on the same ground, no executor named in a testament signed in England, hath any legal title to sue for the moveables lying in Scotland, till he be confirmed executor in the Scottish form, though the testament should have been proved before the proper ecclesiastical court in England; *arg. July 18. 1666, Brown*, (DICT. p. 4498.) As the law of one country is in most cases matter of fact to the judges of every other country, the proper way of proving it, in points which carry the least degree of doubtfulness, is by a written opinion of the foreign judges, which is readily granted *ex comitate*, upon a recommendation from the court before whom the question which gave rise to the doubt has been brought; see *Stair, Jan. 18. 1676, Cunningham*, (DICT. p. 12323).

43. A writing, while it is in the granter's own custody, is not obligatory; for as long as it is in his own power, he cannot be said to have come to a final resolution of obliging himself by it. And because one may hold the custody of his writings, either by himself or his doer, a deed which appears in the hands of the granter's doer has as little force against him as if he had retained the custody of it by himself⁹⁶. When the granter of a deed puts it into the hands of a third party, he is sometimes understood to deposit it with him, not to be delivered to the grantee as his own, till the existence of a certain event, or the performance of certain facts by the grantee. Thus a gratuitous writing, where it was found in the custody of one who was a stranger both to the granter and grantee, was presumed to have been deposited with him, under the tacit condition that it should have been returned to the granter, if he called for it during his life; but that if he did not, it should be delivered upon his death to the grantee, *Stair, Jan. 25. 1677, (Ker, DICT. p. 3249)*. But Lord Stair, without distinguishing between onerous and gratuitous deeds, affirms, *B. 4, T. 42, § 8*, that all deeds in the hand of a third person are presumed to have been delivered by the granter, absolutely for the grantee's behoof, and consequently become the grantee's unlimited property, unless it shall be proved by the writing or oath of the grantee, that they were deposited in that

⁹⁴ But where, in a foreign country, such execution has already passed as by the law of that country operates satisfaction of the debt, the creditor will not be entitled to avail himself here of the farther diligence, by which it might be competent to enforce payment of a similar debt in this country. Thus the judgment of an English Court, which has already received execution in England by imprisonment of the debtor on a writ of *scias ad satisfaciendum*, has been found to afford no ground for action or diligence in Scotland, "in respect of the opinions of English counsel, which bear, that the taking the body of the debtor in execution, is, between these parties, a satisfaction of the debt;" *Gordon, 12th Nov. 1818, Fac. Coll.*, overruling a previous decision to the contrary, *Lashley, 21st Dec. 1809, Ibid.* So also an English bankrupt cannot be examined at the instance of the assignees under the commission, before the Judge Ordinary in Scotland, as to matters on which, from having already obtained his certificate or otherwise, it would have been incompetent or illegal to examine him before the Commissioners in England; *Paton, &c. 15th Feb. 1816, Ibid.*

⁹⁵ As to the effect of a foreign commission of bankrupt, *vid. supr. not. 92*.

⁹⁶ A letter containing money, which had been wafered, addressed, and given, with a penny, to the writer's servant, for the purpose of being handed to a runner to put into the post-office, was held delivered, though the writer died suddenly, (but without recalling his instructions,) while the letter still remained in his house; and the party to whom it was addressed was found entitled to its contents; *Fac. Coll. Crawford's, 18th Nov. 1807, DICT. v. MOVEABLES, App. No. 2.*

that person's hand under certain limitations or conditions. Accordingly, a deed put by the granter into the possession of one who was doer both for the granter and grantee, was presumed to have been given to that person for the behoof of the grantee, 1735, *Mrs Seton*, (not reported)*. It cannot well be denied, however, but that in special cases the depositions of a deed with a third party may be proved, not only by the oath or writing of the grantee, but by the oaths of the writer and instrumentary witnesses; see *Stair, July 5. 1662, Drummond*, (DICT. p. 12309). Where the depositions of a writing is either acknowledged by the grantee, or otherwise sufficiently verified, the conditions of it may be proved by the oath of the depository, *Durie, March 5. 1624, Hay*, (DICT. p. 12378); *Edg. Jan. 29. 1724, Garden*, (DICT. p. 3519); unless where these conditions appear to have been reduced by the granter into writing, *Stair, Feb. 24. 1675, Cowan*, (DICT. p. 12379); in which case, the written articles afford a stronger and more unexceptionable evidence than the oath of the depository⁹⁷. After a deed appears in the custody of the grantee, the presumption of delivery to him is so strong, that it can in no case be elided but by his own oath or writing, *Mack. § 6. h. t.*; and if the delivery be confessed by the granter, or his representatives, the deed becomes the absolute right of the grantee, not to be defeated under the pretence of its having been granted in trust, unless the trust be proved, either by the signed declaration, or by the oath of the trustee. All deeds that appear in the hands of the grantee are presumed in law to have been delivered at their dates, especially where they are either onerous or rational, *Fac. Coll. ii. 63. § 3. (Gordon, 1st Dec. 1757, DICT. p. 11165)*.

44. The general rule, That deeds are not obligatory upon the granter before delivery, suffers several exceptions. *First*, Writings, if they contain a clause dispensing with the delivery, are good to the grantee, though they should be found in the granter's own custody at his death. These are of the nature of revocable deeds: For the granter, by continuing them in his own keeping, continues a power with himself to cancel them; but if he do not exercise that power, they become effectual upon his death. Death is, in such case, equivalent to delivery, because after it there can be no revocation. *2dly*, No deed of a testamentary kind requires delivery, because the effect of testamentary writings commences only at the period of the granter's death. *3dly*, Bonds, and other writings, in favour of children, need no delivery; because parents have, by a natural right, the custody of their children's writings. Nor is this exception, as some writers have imagined, confined to proper bonds of provision granted by fathers to lawful children. The same reason for which the law dispenses with the delivery of bonds of provision by fathers to their lawful issue, is equally applicable to other deeds that do not properly fall under that appellation: And in practice, bonds by a mother to her child, and by a father to a son who is forisfamiliar, and even to a natural child, have been adjudged effectual without delivery, *Durie, June 29. 1624, L. Silvertownhill*, (DICT. p. 4098); *Forbes, Dec. 16. 1712, Monro*, (DICT. p. 5052); *Stair, Feb. 25. 1663, Aitkenhead*, (DICT. p. 16994). On the same general ground, postnuptial settlements by the husband to the wife are obligatory without delivery; the husband himself being the legal keeper of his wife's writings, *Br. 78. (Lindores, Feb. 18. 1715, DICT. p. 6126)*⁹⁸. *4thly*, A deed in which the granter himself hath

What deeds require no delivery.

* See *Fac. Coll. May 31. 1796, Holwell*, DICT. p. 11583.

⁹⁷ See *Logan, &c. 27th February 1823, (S. & D.)*

⁹⁸ *Porterfeld, 15th May 1821, (S. & B.)*

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an interest, *ex. gr.* a reserved liferent, is good without delivery; for it is presumed, that the granter holds such deed in his own custody, not because his intention is not finished concerning it, but to secure that interest which he has reserved to himself, *Stair, June 19. 1668, Hadden*, (DICT. p. 16997). *5thly*, Deeds, which the granter lies under an antecedent obligation to execute, are valid without delivery; for he in whose favour such deed is conceived, as he had a right to demand the granting of it, is also entitled to compel the granter to exhibit it after it is signed: Thus an assignation by a principal debtor, of certain rights in his person to his cautioner, the better to enable him to recover payment or relief, is effectual without delivery, *Stair, Jan. 18. 1677, Dick*, (DICT. p. 6548). *6thly*, Mutual obligations or contracts, signed by two or more parties for their different interests, require no delivery, *Durie, June 29. 1625, Crawford*, (DICT. p. 12304); because every such deed, the moment it is executed, becomes a common right to all the contractors. The bare subscription of the several parties proves the delivery of the deed by the other subscribers to him in whose hands it appears; and if that party can use it as a deed effectual to himself, it must also be effectual to the rest. Hence a decree-arbitral was adjudged to have full force, in all questions with the submitters, from the time it was signed by the arbiter, even while it remained in the arbiter's own custody, or his clerk's; for the law considered them merely as the depositaries in keeping it for the common behoof of all the submitters; each of whom had a proper interest in it, the moment it was executed, *Home, 41. (Simpson, Dec. 10. 1736, DICT. p. 17007) **. *Lastly*, Where the granter of a deed inserts it in a public register, his publication of it to the whole people of the kingdom cannot be otherwise construed, than that he intends it should have full effect in favour of the grantee; and is therefore equivalent to delivery, *Dirl. 272. (Bruce, June 23. 1675, DICT. p. 11185)*.

The grantee is not bound by a deed till he accepts of it *cum omni onere*.

45. As the granter of a deed cannot be bound by it, till he deliver it, either to the grantee, or to a third party, neither can the grantee be bound, until he accept of it with all its limitations and burdens. The bare receiving it from the granter ought not, in reasonable construction, to infer acceptance; for where the granter of a deed gives it to the grantee, without expressly tying him to acceptance, the natural presumption is, that he leaves him at liberty to deliberate whether to accept or repudiate. Acceptance may be proved by the grantee's express declaration, either written or verbal; or by acts done by him, after receiving the deed, which import acceptance; such as, putting it into a public register, taking the benefit of certain clauses in it beneficial to himself, or otherwise using it as his own: All which acts may be proved, either by writing, or by the testimony of witnesses. A creditor present at a general meeting of creditors, where a trust-deed offered to them by the common debtor had been agreed to, was understood to have acquiesced in the resolution of the meeting; and therefore was tied down to acceptance of the deed, though he had given no opinion actually approving of it, since he did not expressly declare against it.

TIT.

* See a contrary decision, *Fac. Coll. June 20. 1789, Robertson*, DICT. p. 653. **

** These two decisions are, perhaps, not irreconcilable. In *Simpson*, (which is also reported by *Elchies, v. ARBITRATION, No. 2.*), the term of the submission had expired, and the arbiter's functions being thus, in every view, at an end, it was of course held, that he could not recall his decree, but that the same might be recovered by either of the parties in an exhibition. In *Robertson*, again, the term of the submission had not expired, and it was held, that, so long as the award remained with the clerk, neither delivered nor put on record, it was not yet out of the control of the arbiter, but might be recalled or altered by him, the clerk being considered as merely the arbiter's servant, and his possession, therefore, precisely equivalent to that of the arbiter.

TIT. III.

Of Obligations arising from Consent, and of accessory Obligations.

CONSENSUAL contracts are those, which, by the Roman law, might be perfected by consent alone, without the intervention either of things, or of writing. Of this sort were reckoned the contracts of sale, location, society, and mandate; to which our customs have added permutation or exchange. All these must, according to the law of Scotland, be limited to moveable subjects; for, as has been already observed, heritage can neither be sold, let, nor exchanged, without writing.

Consensual contracts.

2. In the first state of things, commerce was managed entirely by barter. One thing was given for another, and work was either paid in work or in commodities. After luxury, however, had multiplied the necessities of mankind, this became in a great measure impracticable. It seldom happened that one had just such a quantity of goods he had no occasion for, as might answer in value to those he wanted in exchange, or of such a kind as to be useful to the person with whom he wanted to make the exchange. Hence was introduced the use of coined money, which having a fixed value stamped on it by public authority, might be a common measure or standard for estimating every thing else. From this origin, sale, or, as it is called by the Romans, *emptio venditio*, had its rise, *L. 1. pr. De contr. empt.*; which may be defined, A contract, whereby one of the parties becomes bound to deliver a certain subject or commodity to another, with a view of transferring the property, in consideration of a determinate price in current money to be paid for it. Though this contract is perfected by consent alone, it does not strike against the rule of law, that the property of things cannot be transferred but by tradition; for though the contract is entered into and perfected with a view of transferring the property to the buyer, it is not actually transferred, but remains with the seller or vender till the delivery of the subject *⁹⁷.

Sale.

3.

* See *Fac. Coll. Nov. 20. 1798, Viscount of Arbuthnott*, Dict. p. 14220.

⁹⁷ Though not properly falling under the simple contract of sale, considered in the text, it may not be amiss to notice here one or two particulars touching the law of sales by auction.

The leading principles in regard to such sales are,—1st, On the part of the exposor, that the roop shall be conducted with the strictest *bona fides*, without any attempt to raise the price by undue means, and in such a manner as that the subject may ultimately fall to the highest *real* bidder:—And, 2d, On the part of the bidders, that no conspiracy or other unfair means shall be resorted to, to depress the price, or in any way to prevent the natural operation of a free competition. It has, accordingly, been found illegal for the exposor, either by himself or his agent,—or through the medium of the auctioneer, a *white bonnet*, or any other acting for his behoof,—to buy in the subject, or to raise its price by bidding, and so creating a fictitious and unreal competition; and sales effected under such circumstances have been set aside as fraudulent, the *bona fide* bidder,—where the subject has fallen to him, being entitled altogether to repudiate the transaction, on account of the improper increase of price,—and, on the contrary, where the subject has been bought in for the exposor, being entitled to insist on being preferred, as the last and highest real offerer, at the sum fairly bidden by him before the first illegal bidding by the exposor; *Gray, 7th August 1753*, Dict. p. 9560; *Elchies, v. SALE*, No. 10; *Kilk. Watson, 19th July 1743*, Dict. p. 4894; *Cree, 1st Dec. 1810, Fac. Coll.* So also, it has been found illegal, in the sale of a sequestrated estate, (even where the trustee was the exposor,) for the bankrupt, either in his own person, or by employing another, to bid for the subject; *Anderson, 16th Dec. 1814, Fac. Coll.* On the other hand, where the offerers at a public sale had combined to smother competition,

competition,

BOOK III.

What things
may be the sub-
ject of sale.

3. Whatever falls under commerce may be the subject of sale ; and even things not yet existing, but which are only in hope ; as the draught of a net, or the hope of a succession, *L. 8. § 1. De contr. empt.* Things, the importation or use of which is absolutely prohibited, cannot be the subject of commerce, nor consequently of sale, *L. 34. § 1. eod. tit.* But where the importation of particular goods is only burdened with a duty, a contract may be effectually entered into concerning them ; for though the law enacts penalties, if they should not be regularly entered, it allows the use of them to all the community, and so leaves them as a subject of commerce, *Kames, 40. (Commissioners of Customs, Nov. 27. 1723, Dict. p. 9533) * 98.* Yet even in the sale of run goods, no action for damages lies against the seller for not delivery, if the buyer knew that

* See Clerk *Home*, No. 155, *Wilkie*, Nov. 6. 1748, Dict. p. 9538.—Where a merchant settled abroad, sells goods which are afterwards smuggled into this country, without having any accession to the act of smuggling, he may maintain action for the price in our courts ; *Fac. Coll. ii. 16. Walker, Feb. 27. 1757, Dict. p. 9543 ; Ibid. iv. No. 15. p. 225, More and Irvine, Nov. 13. 1765, Dict. p. 9545.* But no action lies, if the seller has been concerned in the smuggling of the goods ; *Ibid. May 15. 1793, Attorney of Cullen and Company ; Dict. p. 9554, eod. die, Reid and Parkinson, Dict. p. 9555.* A distinction seems to have been formerly made between foreign merchants and British merchants settled abroad ; *Fac. Coll. Feb. 11. 1790, Attorney of Cantley, Dict. p. 9550 ; Ibid. July 7. 1790, Attorney of Young and Company, Dict. p. 9553.* But these cases were decided by narrow majorities ; and the distinction seems now to be departed from. See the above case of *Cullen* in 1793.

petition, and thus to enable one of their number to buy the subject at an undervalue, the proceeding was held to be fraudulent, and the sale not only voided, but the guilty party subjected in damages ; *Murray, 1st March 1783, Dict. p. 9567.* So also it was found “ unlawful for a person intending to bid at a roup, to give money to others that “ they might refrain from bidding ;” *Aitchison, 28th July 1783, Dict. Ibid.*

Articles of roup sometimes contain a stipulation that the highest offerer shall, within a given period, either pay, or give certain securities for the price ; failing which, he shall forfeit his right, and the immediate preceding offerer be preferred. Under such a clause, it has been decided, that, *rebus integris*, the next highest offerer is not entitled to insist on the forfeiture, the exposers being still willing to accept payment or security from the highest ; *Walker, 10th Feb. 1787, Dict. p. 14193.* But, on the other hand, where the exposers, on failure of the highest offerer, have made *intimation*, and formally called upon the next in order to implement his obligation, this gives to the latter “ a right to demand reciprocal performance, which no equitable considerations in favour of third parties can take away,” and entitles him to have the forfeiture strictly enforced against the highest offerer ; *Hannay, 15th July 1788, Dict. p. 14194.* See as to the further effects of such clauses, *Cred. of Currie, 13th Dec. 1791, Dict. p. 3162 ; Davidson, 19th Jan. 1815, Fac. Coll. ; Johnston's Trustees, 19th Jan. 1819, Ibid.*

Under another clause, not uncommon in articles of roup, especially in the sale of vessels or heritable property, it is provided that the subject shall be exposed “ during “ the running of a half hour sand-glass, and the highest offerer at the outrunning “ thereof preferred to the purchase.” This clause has become a mere formality ; for its legal construction is not that the glass shall be allowed to run out within the half hour ; on the contrary, it has been found “ competent for, and indeed the duty of “ the judge of the roup, by laying the sand-glass on its side, or making it run backwards, to prevent it from running out, so long as there appeared offerers bidding against each other ;” *Fac. Coll. Burns, 27th Nov. 1807, Dict. v. SALE, App. No. 4.* Nay, it would seem to be an irregularity sufficient to annul the sale, should the glass be allowed to run out, so as prematurely to stop the competition. Where “ the judge “ of the roup, for want of a sand-glass, made use of his watch,” and in the midst of the competition declared the sale at an end, and preferred, as the last bidder, the party who had made the last offer immediately before the expiration of the half hour, the Court held, that “ he ought to have managed the watch in some such way as the sand “ glass might have been ;” that is, he ought either to have stopped it, or set back the hands ; and, therefore, as the competition had been improperly stopped “ by the “ judge's misapprehension of what was his duty in such a case,” it was decided, “ that “ the proceedings at the roup were irregular, and cannot have effect ;” *Ibid.*

On the subject of sales by auction, see more at large, *Brown, p. 578, et seq.*

⁹⁸ The authority of this case, as well as that of *Wilkie, not. **, has been called in question, 1. *Bell Comm. 236 ; Brown, 143* : And the general proposition founded on it, is, at all events, extremely modified by the principles recognised in the subsequent decisions, as referred to both in the text and notes.

that the goods were run, Clerk *Home*, 34. (*Scougal*, Nov. 16. 1736, Dict. p. 9536.); see 11° *Geo. I. C.* 30 *⁹⁹. The subject to be sold ought, by the Roman law, to have been also certain; *i. e.* the individual itself ought to have been, by some obvious character, distinguished from all others of the same kind; insomuch, that even in a sale of fungibles *quæ recipiunt functionem*, such as sugar, oil, corns, &c. the sale was not perfected till the quantity to be sold was measured out or weighed, *L. 35. § 5. eod. tit.* But there is nothing more usual in our practice, than to sell wheat, barley, wine, &c. by samples, without setting apart any precise *corpus* for the buyer.

4. The price in a contract of sale must consist in current money, *i. e.* either in the known coin of the country, or in foreign coin, which hath a determinate value or currency set upon it by the tacit consent of the state, § 2. *Inst. De empt.* If the price should be payable in bullion, or in wrought plate, the Romans pronounced it to be, not a sale, but barter or exchange. But this distinction, though it might have been of use in the Roman law, which attributed different natures and properties to those two contracts, *infr.* § 13., can be of little use in ours, where the nature of both, and the obligations on the contractors, are in effect the same. *2dly*, The price must not be merely elusory; otherwise the contract will resolve into a donation, where the seller is only liable in that degree of warrandice which is implied in donations. The price ought also to be just, *i. e.* in the sense of the Roman law, in some degree proportioned to the value of the thing sold; and therefore, when a subject was sold for less than the half of its true value, the seller might have recovered it, on paying back the price to the buyer, *L. 2. C. De resc. vend.* But this doctrine being repugnant to the common nature of contracts, is rejected by our usage; for every price which the parties have agreed upon, is, in the judgment of the law of Scotland, just, if they have not been drawn into the contract by fraud or deceit, *Stair*, June 23. 1669, *Fairie*, (Dict. p. 14231). The price must be certain, as well as the subject sold. It is most commonly fixed by the parties themselves at striking the bargain; and sometimes by a third person, to whom the parties refer the determination of it: But if that third person either could not, or would not, determine the price, the bargain was void by the Roman law, *L. 15. C. De contr. empt.* †. The price could

The price.

not,

* *Kilk. No. 3. voce PACTUM ILLICITUM, Cockburn*, Nov. 11. 1741, Dict. p. 9539. See *Fac. Coll. Feb. 26. 1779, M'Lure and M'Cree*, Dict. p. 9546.

† *Fac. Coll. Jan. 11. 1778, Earl of Selkirk*, Dict. p. 627.

⁹⁹ So also, it would seem, that, even where the goods are delivered to the buyer, no action lies for the price at the instance of the *smuggler*; compare *Commis. of Customs, supr.* in text *Wilkie, not. * p. 640*, and *Cockburn, not. * h. p.*, with *Duncan, 8th Feb. 1776*, Dict. p. 9546, and *M'Lure and M'Cree, not. * h. p.*; and see 1. *Bell Comm. 236*, and *Brown, 137, et seq.* In *Macleane, 5th Dec. 1788*, Dict. p. 9549, a distinction was taken, under which the Court held, that where, after delivery by the *smuggler*, the goods passed from hand to hand, and were ultimately sold by a party, *not the smuggler*, action did lie to this party, notwithstanding the goods were afterwards seized for want of a permit. *Sed quære*, Whether, in the case of goods requiring *permit*, there be any solid ground for the above distinction;—the want of permit certiorating each successive holder of the contraband character of the goods; and his countenance to the traffic, under such circumstances, making him indirectly participant with the *smuggler*, in the infraction of the law, and so liable to the same exceptions? Such a party, in truth, seems to stand in somewhat a similar relation towards the *smuggler*, that the resetter does towards a thief.

not, by that law, be referred to the buyer, *L. 35. § 1. De contr. empt.*; but by our practice it may, *Durie, March 13. 1639, E. Montrose*, (Dict. p. 14155)*. Yet the buyer's determination upon such reference ought to be subject to the modification of the judge; for that cannot be called an obligation which depends entirely on the will of the person obliged, *L. 108. § 1. De verb. ob.*¹⁰⁰. Sometimes also the price in sales of grain is fixed by the sheriff-fiars. These are the rates settled by a sentence of the sheriff, proceeding on the report of a jury, on the different kinds of grain, of the growth of the county for the preceding crop; and serve as a rule for ascertaining the prices, not only in contracts where the parties themselves cannot fix them, but in all sales where it is agreed to accept of the rates settled by the fiars, *Fac. Coll. ii. 244. (Treasurer of Aberdeen against Gordon, Aug. 6. 1760, Dict. p. 4414.)* By act of sederunt, *Dec. 21. 1723*, the jury ought to be summoned before the 20th February, and the majority of them to consist of landed men; but this last injunction was never in universal observance; or, at least, is now in disuse in most counties †.

Earnest, its effect upon the contract of sale.

5. Though this contract is perfected by consent alone, yet earnest is frequently given by the buyer *in majorem evidentiam*, or as a corroborative symbol or mark that the bargain is perfected. Some civilians have affirmed, on the authority of *L. 17. C. De fid. instr. &c.*, and of *pr. inst. De empt. vend.*, that the giving of earnest, or *arrhæ*, in place of confirming or assuring the contract, weakens it; because a power is thereby granted to either party to resile, notwithstanding the earnest; to the buyer, upon forfeiting what he had given; and to the seller upon restoring what he had received, with as much more. But these texts are expressly confined to the special case where the parties have it in view to reduce the contract into writing, and where, consequently, the bargain is not complete till a written contract be signed; and the extending of that doctrine to all contracts of sale indiscriminately, appears contrary to the obvious intention of parties at giving earnest, to the known meaning of the word *arrhæ*, or *arrhæbo*, in all approved writers, and to the plain principles laid down in other texts of the Roman law, *L. 35. pr. De contr. empt.*; *L. 3. 6. 12. C. De resc. vend.*; *L. 5. C. De obl. et act.* If, therefore, he who hath given the earnest resiles, he not only forfeits it, but may be sued by the other party for performance; since what was intended for strengthening the contract cannot be wrested to the weakening of it. Since the question, In what cases earnest is to be imputed in part of the price? is never fixed by the parties at giving it, the solution seems to depend on the amount of the sum that is given *eo nomine*. Where it bears no proportion to the value of the subject sold, *ex. gr.* a shilling in the purchase of a ship, or of a box of diamonds, it is presumed to be given merely in evidence of the bargain, or, in the common way of speaking, dead earnest; but if the sum be more considerable, it is reckoned up in the price. Another symbol

Whether it imputes in part of the price.

* (So also, it may be referred to the seller). See *Fac. Coll. ii. 247. Steven, Nov. 18. 1760, Dict. p. 3158.*

† See above, *B. 1. Tit. 4. § 6.*

¹⁰⁰ "Goods commissioned at lowest price, are to be charged as at the date of receiving the order. This rule was reckoned most conducive to the interest of trade, as well as most agreeable to practice;" *Champion and Kirby, 14th Jan. 1811, Fac. Coll.; Brown, 160.*

bol was anciently used in proof that a sale was perfected, which continues till this day in bargains of lesser importance among the lower rank of people, the parties licking and joining of thumbs: And decrees are yet extant in our records, prior to the institution of the College of Justice, sustaining sales upon summonses of thumb-licking, upon this medium, That the parties had licked thumbs at finishing the bargain.

TITLE III.
Licking of thumbs.

6. What is said by Justinian, *pr. Inst. De empt.*, and copied by Mackenzie, § 1. *h. t.*, that how soon parties are agreed concerning the price, the contract is perfected, must be understood with caution, and not in the full extent of the words; for so long as the smallest difference remains between the parties, with regard to the term of payment of the price, the time or place of delivery, or any other article whatever, that may have been the subject of communing, the bargain remains unfinished, though the price should be agreed upon.

The agreement on the price does not perfect the contract.

7. Though the seller continues proprietor until delivery, yet if the subject perish before delivery, it perishes not to him, but to the purchaser; who may therefore be compelled to pay the price to the seller, notwithstanding the destruction of the subject, according to the rule, *Periculum rei venditæ, nondum traditæ, est emptoris, L. 8. pr. De per. et com. rei vend.**. This makes an exception from another known rule, That every thing must perish to the proprietor; and the reason of it is, that the property, which continues in the seller till after delivery, is but nominal; he is truly no better than the keeper of the subject for behoof of the purchaser, and so he is debtor for its delivery; and no debtor for the delivery of a special subject can in equity be answerable for the casual misfortunes to which it may be exposed. Stair is of opinion, *B. 1. T. 14. § 7.*, that by the usage of Scotland the seller hath no claim for the price where the thing sold perishes in his possession, even without his fault; but no judgment hath been given on this point, by which any such custom might have been established¹⁰¹. Admitting however his Lordship's doctrine to be well founded in the case of the entire extinction of the subject, it is agreed on by all, that the seller is entitled to the full price, though the subject should, by mere accident, have turned worse while in his hands; because, seeing the purchaser has the whole benefit arising from the improvement of it, he ought also to run the risk of its deterioration; *Cujus est commodum, ejus debet esse periculum*. It is also uncontested, on the other hand, that the subject perishes to the seller before delivery in the following cases. *First*, If it perishes through his fault¹⁰². The seller is accounted in fault, where he has, either

Periculum rei venditæ, nondum traditæ.

* See *Kilk. No. 5. voce PERICULUM, Melvil, Jan. 31. 1749, Dict. p. 10072.* (See *not. 103 infr.*)

¹⁰¹ On the contrary, judgment has repeatedly been given against Lord Stair's opinion; *Hutchieson, 3d January 1744, Elchies, v. SALE, No. 5; 1. Bell Comm. 354; Brown, 357.*

¹⁰² The seller is accounted in fault where, in the case of goods commissioned from a distance, he does not follow the buyer's instructions as to the mode of conveyance; *Harle, 24th January 1749, Dict. p. 10095*; or where, if left to himself, he does not take the usual and ordinary precautions, according to the custom of the place, for furnishing recourse against the carrier, wharfinger, &c. in case of loss; *1. Bell Comm. 364; Brown, 369.* Though the seller, however, be liable generally, for any neglect of duty in respect to the safe carriage, yet where he ships the goods on board of a trader in regular employment at the port, he is not responsible for loss occasioned by the unseaworthiness

either by some positive act, exposed the subject unnecessarily to danger; or hath not employed that middle degree of diligence which is required in the contract of sale, by the rule laid down in *L. 5. § 2. Comm.*; or where the subject has been lost through any latent insufficiency or distemper anterior to the contract, *arg. L. 6. C. De per. et comm. rei vend.*; or where the seller has been *in mora*, for not delivering it to the purchaser when he ought. But it is not accounted *mora*, if the not-delivery by the seller be owing to the purchaser's declining to pay the price; for the seller may lawfully retain the thing sold as a pledge, or in security of the price, *L. 13. § 8. De act. empt.* 2dly, If, by a special article in the contract, any part of the risk should be laid on the seller, the *lex contractus* must be the rule. Thus, where the seller becomes obliged to deliver the subject at a certain place, the *periculum* continues his, till it be so delivered, *Fount. Jan. 25. 1687, Spence, (Dict. p. 3153)*¹⁰³. 3dly, Where a commodity is sold as a fungible, not as a *corpus*, the hazard lies also upon the seller: A proprietor of lands, for instance, who sells a certain quantity of his farm-wheat of a particular crop to a merchant, without specifying any individual parcel, suffers the whole loss, if any part of that year's wheat should be destroyed by fire, shipwreck, or any other misfortune, before he had performed his part of the bargain; because the buyer did not purchase that precise part of the seller's farms which was lost, more than any other¹⁰⁴.

8. Delivery in a sale may be either real, by putting the *ipsum corpus* sold into the possession or under the power of the purchaser; or symbolical, if the thing sold does not admit of real delivery. By this delivery, the property is transferred to the buyer¹⁰⁵.

By

unseaworthiness of this vessel, "unless it can be proved that he was guilty of *culpa lata*;" *Sword, 17th Feb. 1813, Fac. Coll.*

Again, in the case of goods sent by sea, the seller is in fault, where he fails to give such due and timely notice of the shipment, as is required by mercantile usage, to enable the buyer to effect insurance, &c.; *Andrew, 6th Dec. 1810, Fac. Coll.*; *Arnot, 25th Nov. 1813*, affirmed on appeal, *17th March 1817*; *Ibid. Johnston and Sharp, 2d June 1815, Ibid.*, where the seller was subjected for his neglect;—compared with *Hoog, 24th July 1754, Dict. p. 10096*, and *Elchies, v. Factor, No. 11*; *Heseltines, 15th Jan. 1802, Dict. p. 10111*; *Elson, Hammond & Co. 13th Dec. 1808, Fac. Coll.*; where the seller was found to have sufficiently complied with the known custom of the trade. See, generally, on the subject of this note, 1. *Bell Comm. 354, et seq.*; *Brown, 367, et seq.*

¹⁰³ So found again, *Milne & Co. 1st Feb. 1809, Fac. Coll.* Mr *Brown* notices the case of *Melvil, not. * p. 643*, as an intermediate decision to the contrary. But in this he seems mistaken; for the point there decided was, not that the seller was freed from *periculum*, but, admitting the *periculum* still to be his, that, supposing the subject to have perished or been injured, *casu*, he was not further liable in *damages*, or for such profits as the buyer might have made of the subject if delivered safe. See the different reports of this case, *Kilk. supr.*; *Falc. Dict. p. 2289*; *Elchies, v. Sale, No. 8.*

¹⁰⁴ Generally, wherever something remains to be done by the seller in order to put the goods into a deliverable state, "as where the quantity has not been separated from a common mass; or where the price is referred to weight or measurement, and the quantity has not been ascertained; or where the bargain is in reference to some test or criterion not yet applied, the risk is with the seller; and if the goods have perished, he will have no claim for the price;" 1. *Bell Comm. 354*, and see also *Brown, 358, et seq.*

¹⁰⁵ Where the thing sold is not in the immediate possession of the seller, but in the hands of a third party, who is merely custodian for his behoof,—as, for example, a wharfinger, warehouse-keeper, &c.—notice to this custodian is sufficient, without any actual delivery or removal of the subject, to pass the property: the same sort and extent of possession which was formerly in the seller being thus given to the buyer, and the person, who originally held for the former, now holding, by a converted custody, solely for the latter; 1. *Bell Comm. 107*; *Brown, 525, et seq.* But without notice, the

By the Roman law, the property was not transferred till the price was also paid, or the seller satisfied with the security he had got for it. But whether this would be held for the law of Scotland remains a doubt¹⁰⁶. Though the seller, where the property is truly in

the property does not pass. Thus, in the sale of goods, lying in an artificer's hands for the purpose of being manufactured, notice to the artificer is necessary, in order to exclude the creditors of the seller; *Eadie*, 7th Feb. 1815, *Fac. Coll.* So also, in the sale of goods lying in a bonded warehouse, transfer of the property is incomplete, until notice to the keeper of the order of delivery; *Mathie's Trustee*, 23d Nov. 1804, *DICT. p. 14226*, as reversed on appeal, 16th March 1810, 1. *Bell Comm.* 112. *in not.*; *Tod and Co.* 1st Feb. 1809, *Fac. Coll.*; *Auld*, 12th June 1811, *Ibid.*

Under the bonding statutes, goods may sometimes happen, at the time of sale, to be deposited under the joint locks of the seller and of the revenue officers, in a warehouse belonging to, or in the occupation of the former. In such a case, it has been thought, that the seller, being himself keeper of the bonded warehouse, "required no notice, in the one character, of the act which he had performed in the other," and that, consequently, in so far as the Court, in *Auld*, *supr.*, held notice, under such circumstances, still to be essential, the judgment may be considered questionable; 1. *Bell Comm.* 116. But this situation of mercantile property has since been provided for by statutory enactment,—“That if any goods lodged in any warehouse, shall be the property of the occupier of such warehouse, and shall be *bona fide* sold by him, and upon such sale, there shall have been a written agreement, signed by the parties, or a written contract of sale, made, executed and delivered by a broker, or other person legally authorised for and on behalf of the parties respectively, and the amount of the price stipulated in the said agreement or contract shall have been actually paid, or secured to be paid by the purchaser, every such sale shall be valid, although such goods shall remain in such warehouse, provided that a transfer of such goods, according to such sale, shall have been entered in a book to be kept for that purpose by the officer of the customs having the charge of such warehouse, who is hereby required to keep such book, and to enter such transfers, with the dates thereof, upon application of the owners of the goods, and to produce such book upon demand made;” 6. *Geo. IV. c. 112. § 9.* This enactment comes in place of 4. *Geo. IV. c. 24. § 82.* repealed by 6. *Geo. IV. c. 105. § 366.*

Where, at the date of the contract, the thing sold is in the immediate possession of the seller, either by himself, or his servants, it may be doubted, notwithstanding a late decision to the contrary, whether any thing short of actual delivery, will be sufficient to pass the property. In the case referred to, it was held, that the property of grain, though allowed to remain in the seller's granary, and under the charge of one of his hired servants, was yet effectually transferred to the buyer, by merely intimating an order of delivery to the seller's servant; *Broughton*, 15th Nov. 1809, *Fac. Coll.* This decision, however, which was pronounced by the narrowest majority, has since been called in question; 1. *Bell Comm.* 103. and 228; *Brown*, 525; and see the previous case of *Salter*, 7th Feb. 1786, *DICT. p. 14202.*

¹⁰⁶ In the case of *actual* delivery, whereby the seller puts the buyer in immediate possession of the goods, there is no ground for the doubt here expressed. On the contrary, the doctrine of Lord Stair is quite recognised; “Sale being perfected, and the thing delivered, the property thereof becomes the buyer's, if it was the seller's; and there is no dependence of it, till the price be paid or secured, as was in the civil law, neither hypothecation of it for the price;” *Stair*, *B. 1. t. 14. § 2.*—And see *Kames' Elucidations*, *Art. 8*; 1. *Bell Comm.* 169; *Brown*, 393.

But in the case of *constructive* delivery,—that is, (taking the expression in the sense used by Mr Bell), where, instead of the possession of the buyer, “there is only that of a middle-man, employed in carrying the goods to their destination,” 1. *Comm.* 93,—the payment or non-payment of the price forms an important consideration. Where the price has been paid, this sort of delivery is equally effectual with the most direct actual delivery, to divest the seller of all right in the thing sold, and to pass the property to the buyer: But where the price has not been paid, and where, the goods being still in the course of *transport*, the buyer becomes insolvent, the seller's right so far remains, that he is entitled, in security of the price, to stop them *in transitu*. There is one exception, however: Where goods have been sent by sea, and a bill of lading transmitted, the right of stopping *in transitu* is barred by the transfer of the bill of lading to a *bona fide* onerous assignee; 1. *Bell Comm.* 120; *Brown*, 483. The *transitus*, where not thus barred, endures down to the moment when the goods reach their ultimate destination, and come into the possession or under the control of the buyer. Thus, goods delivered to a carrier are still *in transitu*, though they have reached the place to which they were directed, if they still remain in the carrier's warehouse; *Dunlop*, 22d February 1814, *Fac. Coll.* Even where part of a cargo has actually been delivered to the buyer, and the remainder unloaded and

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in another, cannot transfer that right to the buyer, which is not in himself; yet the purchaser, who bought under the belief that the seller was proprietor, is entitled to all the intermediate fruits of the subject, according to the rules of *bona fide* possession, set forth, *supr. B. 2. t. 1. § 25*. Delivery in a sale, *ubi dolus dedit causam contractui, ex. gr.* where the buyer knew himself insolvent¹⁰⁷, has not the effect to transfer the property to him; it remains with the seller, who was ensnared into the bargain; so that the contract becomes void; *Fac. Coll. i. 5. (Dunlop, Feb. 21. 1752, Dict. p. 741)**. And even though the goods so delivered should be afterwards disposed of to a *bona fide* purchaser, the former proprietor, as he would on that ground have been preferred to the right of the goods themselves, in competition with the arresting creditors of the bankrupt, had they been still *in medio*, is also preferable upon the price lying in the hands of the purchaser from him, as coming in place of the goods; *Fac. Coll. ii. 47. (Robertson's Creditors, July 27. 1757, Dict. p. 4941) †*.

Implied warrandice in case of eviction.

9. The seller is, by the nature of this contract, obliged not only to deliver to the buyer the thing sold, with all the fruits of it arising after the sale, to which he may be compelled by the *actio empti*, but to make that subject effectual to the buyer, though there should be no obligation of warrandice expressed; and consequently, if it should be evicted from the buyer, an action of recourse lies against the seller upon that implied warrandice, according to the rules that have been already explained, in the sale of heritage. On the other hand, the buyer may be compelled by the *actio venditi*, to make payment of the price, together with the profitable expense disbursed on the subject by the seller while it continued in his hands after the sale.

10.

* *Stair, Dec. 22. 1680, Prince, Dict. p. 4932*. Formerly it was held a rule that all purchases (upon credit) made within three days of the buyer's notorious bankruptcy and surrendering to his creditors, must be presumed fraudulent, *June 16. 1736, Inglis, Dict. p. 4936; Fac. Coll. Dec. 4. 1788, Allan, Stewart and Company, Dict. p. 4949*. But this last decision was reversed in the House of Lords.

† See *Fac. Coll. June 28. 1775, Shepherd, Dict. App. voce FRAUD, No. 3*.

laid upon the shore for the purpose of his taking it away, *transitus* is at an end only as to the part delivered, the remainder being still subject to be stopped by the seller; *Collins, 23d Nov. 1804, Dict. p. 14223*. Where goods imported had been lodged by the buyer in a bonded warehouse, in terms of the *stat. 43. Geo. III. c. 132*, (and the *ratio decidendi* equally applies to the more recent bonding acts,) it was held that the right of stoppage *in transitu* was at a close, and that complete and actual delivery had taken place; *Strachan, 21st Jan. 1817, Fac. Coll.*

Somewhat analogous to the above right of stoppage *in transitu* in the seller, is the power possessed by a buyer of rejecting *in transitu*, and refusing to take delivery of goods purchased on credit, when he finds himself insolvent; *Steins, 16th Nov. 1810, Fac. Coll.*; in which case a doubt was even intimated, "whether, if the bankrupt had taken the goods into his possession, with the deliberate intention of making them his own, and rendering them a part of the bankrupt estate, such a transaction might not have been reduced at common law, under the head of fraud;" *Ibid. per L. Pres. Blair*. See also, *1. Bell Comm. 158. 163. et seq.; Brown, 571. et seq.*; and authorities there referred to.

¹⁰⁷ Mere insolvency is not enough. So long as the buyer is honestly struggling to retrieve his affairs, and is not actually bankrupt, or, as Mr Bell expresses it, has not taken his "final resolution to abandon every thing, '*cedere foro*,'" there seems to be no fraud in his entering into contracts; *1. Bell Comm. 176. et seq.; Brown, 410. et seq.* Neither is it correct to say, that delivery in a sale, *ubi dolus dedit causam contractui*, "has not the effect to transfer the property;" *1. Bell. 229. in not.* This is indeed a mere inaccuracy of expression, as appears from what follows in the close of the section, as to the right acquired by "a *bona fide* purchaser" from the first buyer. As against the fraudulent party, however, and his creditors, the contract is reducible, and restitution of the property may be obtained.

10. It was reckoned one of the *naturalia* of this contract, by the Roman law, that if the goods bought had, at the time of the sale, a latent fault or insufficiency not easily discoverable by the buyer, and of that kind that he would not have purchased the goods at any rate had he known it, the buyer was entitled, at any time within six months after the delivery, to sue for the recovery of the price, by the *actio redhibitoria*, upon his returning the goods to the seller; *tit. ff. De ædil. edict.* This action is, by our usage, limited to the special case where the buyer, in a few days after the goods have been delivered to him, offers them back to the seller; for otherwise it is presumed, from the buyer's silence, either that he hath passed from all objections to the sale, or that the insufficiency has happened after the goods came to his possession; *Stair, Jan. 29. 1668, L. Ayton, (Dict. p. 14230); Fount. Feb. 16. 1681, Wellwood, (Dict. p. 14235);* stated in (folio) *Dict. ii. p. 357; Fount. Feb. 22. 1694, Mitchell, (Dict. p. 14236); Fac. Coll. iii. 38. (Ralston, June 16. 1761, Dict. p. 14238)*.* If the insufficiency was of a slighter kind, it was lawful for the buyer, by the *actio quanti minoris*, to have sued for the recovery of as much of the price as exceeded what he might reasonably have given for the subject had he known the defect. But as no action is, by our usage, competent for setting aside sales on account of the disproportion of the price to the value of the commodity, it may well be doubted, whether the buyer would, in consideration of its insufficiency, be entitled to the abatement of any part of the price †¹⁰⁷.

11. Among the conditions which are only accidental to a sale, and are not admitted except they be expressed, is the *pactum legis commissoriæ*, by which the sale becomes void, *res fit inempta*, if the price be not paid within a determinate day. This condition, where it is stipulated by an express clause, does not suspend the sale; the property is transferred to the buyer upon the delivery: But if he fail to pay the price within the time limited, the sale resolves, and the

TITLE III.
Actio redhibitoria, and Quanti minoris.

Pactum legis commissoriæ.

* See *Baird, Dec. 14. 1765, Dict. p. 14240, and Feb. 13. 1788, Baird, Dict. p. 14243.*

† See *Fac. Coll. Jan. 26. 1785, Hannay, Dict. p. 13334; Ibid. June 27. 1788, Inglis, &c. Dict. p. 13335.* The case is different where the buyer does not get the whole of the subject for which he contracted; *Fac. Coll. ii. 28, Maclean, June 23. 1757, Dict. p. 14164; Ibid. iii. 148, Wilson, Nov. 14. 1764, Dict. p. 13330.*

¹⁰⁷ The *actio quanti minoris* in its proper sense, and so far as it is founded on a mere disproportion of the price to the value of the subject, is rejected by our law; *Stair, B. 1. t. 9. § 10. and 11.; Ibid. B. 1. t. 10. § 14. and 15; Bankton, B. 1. t. 19. § 3.; Brown, 287, 328.* Accordingly, in the absence of fraud on the part of the seller, where lands are sold, and there is no dispute as to the buyer's having received the whole estate which he meant to purchase, he is not entitled to abatement from the price, on account of a mere error in setting forth the property, *descriptive*, as consisting of so many acres, or yielding such an amount of rental; *Hannay, supr. not. †. Inglis, &c. Ibid.; Gray, 23d Jan. 1801, Dict. v. SALE, App. No. 2.* But, on the other hand, where the buyer does not get the whole estate, *e. g.* if lands have been sold *cum decimis inclusis*, and it turns out that part of the teinds did not belong to the seller, *Wilson, supr. not. †,* or if it be expressly stipulated that the lands shall be entitled to a freehold qualification, and they turn out not so, *Maclean, Ibid.; Gordon, 15th June 1815, Fac. Coll., (reversed on a technical specialty, 1. Bligh, 287,)* he may either claim a deduction in respect of the part of the subject thus withheld wherever it is so distinct as that its value may be separated, or insist on the ground of error in *essentialibus* upon a *restitutio in integrum*. This latter remedy, indeed, is available in all cases where the contract can be shown to have proceeded in total misconception; and to the seller, of course, equally with the buyer; see *Hepburn, &c. 4th July 1781, Dict. p. 14168; Blair, 16th July 1790, as noticed 2. Bell Comm. 926; Brown, 318, et seq.*

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the property returns from him to the seller; *L. 1. De leg. Comm.*¹⁰⁸. But if a sale should be entered into, under condition that the price shall be paid on or before a day prefixed, such condition, before it be purified, is, as Stair justly observes, *B. 1. t. 14. § 4.* truly suspensive of the sale, which is not understood to be perfected till the condition exists; insomuch that though the subject should be delivered to the buyer, the property continues in the seller till the price be paid*.

Pactum de retrovendendo.

12. Among the *accidental*ia of this contract may be also reckoned the *pactum de retrovendendo*, or right of reversion in sales, by which the thing sold is stipulated to return to the seller, if he shall within a limited time repay the price to the purchaser. And this condition, when it is adjected to the contract, is most strictly observed; so that the seller, if he shall suffer that time to elapse without making payment, loses his right of reversion, from that moment, and cannot be restored by any subsequent offer of the price: For as in sales an adequate price is presumed to be paid to the seller, there is truly nothing penal in limiting the reversion, and therefore the buyer's absolute right of property ought not to be postponed or suspended beyond the agreement of the contractors. Though the right of reversion of lands is declared by special statute to affect singular successors; yet, in the sale of moveables, reversions retain their genuine nature of personal obligations, and consequently are effectual only against the buyer himself, but not against his assignee.

Permutation.

13. Permutation is a contract, by which one moveable subject is exchanged or bartered for another. It was deemed by the Romans an innominate contract, which therefore produced no action till one or other of the parties had actually performed his part of the contract by delivery; *supr. T. 1. § 35.* But it is, by our practice, fully perfected by consent alone, without any *interventus rei*. The Roman law seems to have held it for a rule, that where either of the things exchanged belonged to a third person, the property was not transferred on either side; and that therefore he from whom one of the subjects happened to be evicted, might recover from the other what he gave in exchange for it, as still continuing to be his property; *L. 1. § 3, 4. De rer. perm.* This doctrine may be equitable, if directed only against the party himself and his heir; but there could be little security in the commerce of moveables, if it were extended against a singular successor, who had *bona fide* bought the subject from the party after the exchange.

Duties incumbent on the lessor.

14. Location is that contract, in which a hire is agreed upon, for the

* The same effect is given to a clause stipulating as a condition, that caution shall be found for the price on or before a day specified; *Fac. Coll. July 15. 1788, Hannay, Dict. p. 14194.* See *Ibid. March 9. 1785, Young, Dict. p. 14191.*

¹⁰⁸ This must be understood only as in a question with the buyer himself; for, as against third parties, whether creditors using diligence, or voluntary acquirers from the buyer, a condition merely *resolutive* is of no avail. *Lord Stair's* doctrine is the correct one, that "if by the contract and clause, the buyer become once the proprietor, and the condition is adjected, that he shall cease to be proprietor in such a case, this is but personal; for property or dominion passes, not by conditions or provisions, but by tradition, and other ways prescribed in law;" *B. 1. t. 14. § 4. and 5.*; and to the same effect, see *Bankt. B. 1. t. 19. § 29. et seq.*; *1. Bell Comm. 170 et seq.*; *Brown, 33, and 427.*

It is different with the condition *suspensivè*. The property never having passed at all, can neither be attached by the buyer's creditors, nor be validly transferred to a voluntary purchaser; *Stair, ut supr.*; and see *Bell and Brown, ut supr.*

the use of any moveable subject, or for the work or service of persons. He who lets his work, or the use of his property, to hire, is called the *locator*, or *lessor*; and the other, the *conductor* or *lessee*. It is the less necessary to insist minutely on the nature of this contract, that it is governed nearly by the same rules which are observed in that of a sale, *pr. Inst. De loc. cond.*; of which, location may, without impropriety, be considered as a species; for the use of the thing or service of the person, in location, answers to the property which is acquired in a sale; and the rent or wages in location, which generally consists in money, and must always be certain, answers to the price. It is obvious, from the name and nature of location, that no property is transferred thereby to the lessee who is entitled to the bare use of the subject let, which subject is again to be restored to the owner at the time agreed on by the parties. If therefore the lessor, who remains proprietor, shall make over his property to a third person, the right of use in the lessee ceaseth, from whom the new proprietor may recover the possession of the subject, notwithstanding the prior location. This rule, which by its nature may be applied equally to all locations, *L. 9. C. De locat.* obtained with us, even in leases of heritable subjects, till it was altered by special statute.

15. As the contract of location is entered into for the benefit of both parties, they are liable in a middle kind of diligence; *præstant culpam levem*. The lessor is, by the nature of the contract, bound to procure and to continue the free use and enjoyment of the subject to the lessee, and he must deliver it in such condition that it may serve the purpose for which it was let¹⁰. If by some fatality, or *vis major*, which cannot be imputed to himself, it shall not be in his power to get the lessee into possession, he cannot be sued *ex locato* for damages, *L. 15. § 2. Loc.*: And, on the other hand, he has no claim for hire from the lessee, who was, without his own fault, debarred from the use of the subject, *L. 33. eod. tit. vers. Sine vero*. But if the lessee shall be kept or turned out of possession, by any act of the lessor which infers blame, *ex. gr.* by having, after the contract, sold the subject to another, without properly securing the lessee's interest, he not only loses his hire, but is bound, by an implied obligation of warrandice, to make up to him all the damage he shall sustain through the eviction of the subject, *L. 25. § 1.; d. L. 33. Loc.*

16. The lessee is, on the other part, obliged to use the subject well, to put it to no other use than that for which it was let, to preserve it in good condition during the lease, and to restore it to the lessor, and to pay to him the rent or hire agreed upon¹¹: And he is entitled to the necessary and profitable expense disbursed by him on the subject. If a mechanic, or workman, who lets his labour or service, shall, either from carelessness, neglect to perform the work he has undertaken, or, from want of skill, make it useless or insufficient, he is liable to his employer in damages, *L. 9. § 5.; L. 13. § 1, 2. Locat.*; for he ought not, as an artisan, to have undertaken

Obligations on the lessor.

Duties incumbent on the lessee.

¹⁰ See *Wilson*, 10th March 1810, *Fac. Coll.*

¹¹ A person hiring a serviceable horse, and returning him in a useless state, is liable for his value, unless he can "establish, that the injury sustained could not be prevented by due care and attention on his part, and was occasioned by that for which he was in no respect to blame;" *Marquis*, 11th June 1823, (*S. & D.*); *Robertson*, 28d June 1809, *Fac. Coll.*; *Binny*, 16th July 1679, *DICT.* p. 10070.

BOOK III:

Obligations between master and servant.

Freighting of a ship or charter-party.

dertaken a work to which he was not equal¹¹². But if it cannot be imputed to him that the work was not performed, he is entitled to the full wages agreed on, *L. 38. pr. eod. tit.* A workman or servant, who is hired to a precise day or term, is entitled to his full wages, though he should, by sickness or other accident, be disabled from his service for a part of that time¹¹³; but if he die before the term be elapsed, his wages are only due for the time he actually served¹¹⁴. If a master dies, or without good reason¹¹⁵ turns off a servant who was entitled to maintenance at bed and board in his family, before the term agreed on †, the servant has a right to his full wages, and also to his maintenance till that term¹¹⁷. And, on the other hand, a servant, who without a reasonable cause deserts his master's service before the term, forfeits his wages and maintenance, and is liable to his master in damages. For a like reason, if an apprentice either die, or desert his apprenticeship, before the term thereof be expired, the master is entitled to the whole apprentice-fee stipulated to him by the indentures, without any abatement, since he has done nothing to render the performance of the contract, for the remaining years of the apprenticeship, impracticable; *Fac. Coll. ii. 267. (Shepherd, Nov. 19. 1760, Dict. p. 589).*

17. The contract, by which the owner of a ship or vessel freights her to a merchant for the transportation of goods from one port to another, for a certain sum, to be paid either by the day or upon the whole voyage, is a species of location. But though that contract may be perfected by consent alone, it is usually reduced into writing, in the form of a mutual deed called a *charter-party*. Besides the freight specially covenanted to be paid to the master, he is also entitled to average; by which is understood, in the common acceptance of the word, that sum which is given to masters of ships, over and above the freight, upon account of the extraordinary charges they may be put to in the course of the voyage, by employing pilots to direct the navigation in rivers, or through banks or rocks near the shore, or of the damage they may sustain by the loss of masts, anchors, or other ship apparel in a storm, &c. No part of the freight is due to the master or owner of a ship, till the whole intended voyage be finished, by unlading the cargo, and discharging the ship at the last port mentioned in the charter-party;

* This was decided where the sickness of the servant had continued for eleven weeks in a year's service; *Fac. Coll. Nov. 29. 1794, White, Dict. p. 10147*¹¹⁵.

† Or if the master does not give notice to the servant a reasonable time before the term of removal; *Fac. Coll. July 14. 1779, Baird, Dict. p. 9182*¹¹⁶. As to the mode of estimating the servant's damage in such cases, *vide Kilk. No. 8. voce REPARATION, Rae, June 20. 1750, Dict. p. 13989*; also *Fac. Coll. Nov. 17. 1790, Puncheon, Dict. p. 13990*.

¹¹² *Vid. infr. h. t. § 37.*

¹¹³ *Maclean, 4th Feb. 1813, Fac. Coll.*

¹¹⁴ A servant cannot defeat his contract by enlisting as a soldier; his master being still entitled to insist on the full term of service; *Macdonell, 1st March 1805, Dict. v. MUTUAL CONTRACT, App. No. 3.*

¹¹⁵ See *Hamilton, 9th Dec. 1824, (S. & D.)*

¹¹⁶ *Morison, 27th June 1823, (S. & D.)*.—"When a servant is originally engaged for a year, tacit relocation takes place, unless an express warning of forty days be given;" *Dicente Lord Robertson, in Maclean, 4th Feb. 1813, Fac. Coll.*

¹¹⁷ A master cannot be compelled to retain the servant in his actual service, but "is entitled, without any paction, to dismiss him on paying wages and board wages;" *Cooper, 5th March 1825, (S. & D.)* Neither is a master bound by law, on expiration of the service, to give his servant a character; *Fell, 12th Dec. 1809, Fac. Coll.*

ty ; which obtains even in a trading voyage, where there are perhaps five or six different ports at which the master is bound to put in one after another *. In most charter-parties, the master is obliged to remain a certain number of days at every port, for unlading the old cargo and taking in the new ; in consideration of which, no allowance can be claimed by him over and above the stipulated freight ; and frequently a power is given to the freighter to whom the goods belong, in case of necessity, to keep the ship at demurrage, (from the French *demeurer*, to stay or continue,) in each port, a farther number of days, at the rate of a determinate sum to be paid to the owners or master of the ship, for each additional day that the ship shall be so detained in any of the ports aforesaid. —The owner of a ship, when he wants money to purchase provisions or other necessities for an intended voyage, frequently borrows money ; for which the lender's only security is upon the ship, without any personal obligation against the borrower. Debts of this kind are constituted by bond or bill of bottomry, signed by the borrower, acknowledging the receipt of the sum, and charging the ship with the payment thereof upon her safe return home, after finishing the voyage ; but declaring, that if she be lost during the course of the adventure, the obligation for the payment of that sum shall cease and determine, and that the whole loss shall, in that case, fall upon the lender. —Sometimes merchants who are unwilling to engage in an adventure upon their own risk, choose to give a certain sum as a premium to one or more, who, in consideration thereof, grant to the merchant an obligation in writing, styled a *policy of insurance* ; by which the insurers oblige themselves to undertake the whole risk of the ship or goods insured upon themselves, at a certain rate *per centum*, proportioned to their value, and to warrant them to the owner during the course of the adventure, against all dangers arising from the sea, enemies' ships, pirates, or other misfortunes whatsoever. Insurers are frequently called *underwriters*, from the style of most policies, which begin with the words, *We the underwritten*, &c. A merchant or owner, who insures ship or goods, knowing that they are already lost, has no claim against the insurers for any part of the sums insured : And if the master of a ship, after secretly unlading the cargo, shall fraudulently sink her, by boring a hole, in the hold, or other such device, with an intention to recover from the insurers the value at which the ship or goods insured are estimated, the insurers are discharged from their obligation, and the master is punishable criminally *ex dolo*. In case part only of the subjects insured be lost, each insurer or underwriter must pay at the rate of so much *per cent.* to the owner, in proportion to the sum for which he subscribed¹¹⁸.

(Obligations of insurance.

18. Society, or copartnery, another consensual contract, may be defined, that by which the several partners agree, concerning the communication of loss or gain arising from the subject of the contract.

Society or copartnery.

* See *Fac. Coll.* July 9. 1802, *Taylor & Company*, Dict. p. 10113 ; (1. *Bell Comm.* 482.)

¹¹⁸ It would be impossible to supply, in the compass of a note, all that is necessary to be known, of the important maritime contracts so shortly alluded to in the text. The reader is therefore at once referred to the treatises of *Marshall* and *Park on Insurance* ; *Abbot and Holt on the Laws of Shipping and Navigation* ; and to an excellent summary of all the leading points of doctrine, which *Mr Bell* has, with his usual talent, digested in his *Commentaries*, vol. 1. p. 404, *et seq.*

Equality is the characteristic of this contract.

tract *. Among the Romans, copartneries were sometimes entered into *omnium bonorum*, of the whole estate belonging to the partners or *socii*, *L. 1. 5. pr. Pro socio*. But by the present custom of nations, they are limited to a determinate sum of money, put by the partners into a common stock, to be employed in trade, agriculture, manufactures, or other lawful negotiation from which profit is expected †. It is not enough towards constituting this contract, that two or more persons have the same thing in common among them, as in the case of co-heirs, or of several legatees in the same subject; seeing such communion is not formed by the mutual choice of the proprietors, of each other for partners, *L. 31. Pro soc.* ¹¹⁹.

19. Equality among the partners is the great characteristic of this contract; and therefore, *first*, If the copartnery be entered into by writing, as it is most frequently in all trading countries, and if the contract express the several sums put in by each partner into the common stock, the proprietors are entitled to such a share of profit and loss as answers to the proportions of these several sums, unless it be otherwise covenanted. *2dly*, Where neither the quantity of stock put in by each partner, nor their shares of profit and loss are mentioned, their several stocks are presumed equal, till the contrary be proved; and of consequence, their shares of profit and loss will be also equal, *L. 29. pr. Pro soc.* ¹²⁰. But a copartnery may be so formed, without breaking in upon the equality essential to the contract, as to give one of the partners an equal share of profit with the others, though his stock should be less than theirs, or indeed though he should have no stock; because the skill or industry of one partner may be worth the stock of another. Nay, this consideration will justify a copartnery, by which one of the partners, either from his superior skill in the management, or his sole right of property in the subject, stipulates for a certain share of the profits to himself, without being subjected to any part of the loss, *L. 29. § 1. Pro soc.* ¹²¹. This is the case in leases of mines, granted

* This contract, though usually reduced to writing, may be effectually formed *rebus ipsis et factis*; *Fac. Coll. Jan. 17. 1775, Livingston, Dict. p. 14551*; (*2. Bell Comm. 625.*)

† But the obligations of the partners are not limited to the stock originally subscribed, as their share of the company's stock. See *Fac. Coll. July 24. 1778, Douglas, Heron and Company, Dict. p. 14605*. A contrary decision is reported by Lord Kames, *Sel. Decis. No. 135, Stevenson and Company, Dec. 14. 1757, Dict. p. 14667*; but it appears to have proceeded on a speciality. See *Fac. Coll. ii. 54. the same case, Dict. p. 14560.* (See *infr. not.* ¹²¹).

¹¹⁹ A victualling association, for the purpose of supplying its own members and the public with "articles of convenience and necessity," and which carries on its transactions on credit, as well as for ready money, is a proper copartnery; *Sawers, &c. 24th Feb. 1815, Fac. Coll.* (See *infr. not.* ¹²¹).

¹²⁰ *Macwhirter, 14th Feb. 1822, (S. & B.)*

¹²¹ "But such agreement, though effectual between the partners, will not free the partner with third parties;" *2. Bell Comm. 655*; and see *supr. not. †*. The responsibility of the partners to the company creditors is unlimited, notwithstanding the most express paction to the contrary among themselves. In the case of *Stevenson & Co.*, indeed, according to Lord Kames' report, *supr. not. †*, a contrary decision is said to have been pronounced, on the ground, that the partners having raised a joint stock by limited subscriptions, and placed the business under the management of certain directors, these directors had no power to bind the partners beyond their special shares; and that, consequently, what further debts they might contract, were good only against themselves, and the partners were not responsible. If such a decision was pronounced, it was, in a question with the company creditors, erroneous: the partners, on the ground stated, might be entitled to relief against their directors; but, in the first instance, and to the creditors, they were clearly liable. The Faculty report accordingly places the decision on a different basis: and in the later case of *Douglas, Heron & Co. supr. not. †*, it never was imagined that the partners were not responsible to the creditors to the last fraction of the debts. See also, *2. Bell Comm. 622. et. seq.*

ed by the proprietors of the ground, for a stated proportion of the ore brought up from the shaft; which proportion is not chargeable with any part, either of the loss, or even of the necessary expense attending the work; for such contracts, though made out in the form of leases, are as proper copartneries as those granted by a proprietor of land to the *coloni partiarum*, *L. 25. § 6. Locat.*¹²². But copartneries, by which one of the partners is subjected even to the smallest share of the loss or expense, without being entitled to any chance for some part of the profits, called by the Roman law *leoninae*, are justly reprobated; since it is quite irreconcilable to equity, that one should lose, or run a risk of losing, something, while, at the same time, he hath not the least chance of gaining any thing, *d. L. 29. § 2. Pro soc.*

29. Where a partner acquires a right in name of the company, the property, by the obvious nature of the acquisition, is vested directly in the company; and when he acquires in his own name with the company's money, he lies under an obligation to communicate the benefit of the purchase to them¹²³. Nay, it arises from the good faith implied in partnership, that a partner, when he purchases, even with his own money, or at his own expense, a right which is naturally connected with, or falls under the copartnership, is, like a tutor with respect to his pupil, presumed to purchase, not for himself, but for the company; *Durie, March 26. 1624, Inglis*, (Dict. p. 12562): But as the property still remains in the acquirer, those who purchase from him are secure against any challenge from the company; whose only remedy is an action of damages against the first purchaser for not having taken the right in their name or communicated it to them. It hath been much disputed, how far an obligation, signed by one of the partners, affects the company or copartnership by the Roman law; as to which a variety of distinctions hath been imagined by doctors to reconcile the different expressions of the Roman juriconsults. According to our present practice, the partners in private companies generally assume to themselves a firm or name proper to their own company, by which they may be distinguished in their transactions; and in all deeds subscribed by this name of distinction, every partner is, by the nature of copartnership, understood to be intrusted with a power from the company of binding them. Any one partner, therefore, who signs a bill, or other obligation, by the company's firm, obliges all the other partners*; but where he subscribes a deed by his own proper subscription, the creditor, who followed his faith alone in the transaction, hath no action against the company, unless he shall prove that the money lent or advanced by him was thrown into the common stock, *L. 82. Pro soc.* No partner, however, can, without a special warrant from the company, bind them by any deed of his, though signed by the social firm, in a matter which falls not under the

Obligations on the partners.

* *Fac. Coll. June 14. 1766, Dewar*, Dict. p. 14569; (*infr. not.*¹²⁴).

¹²² On the contrary, it would seem that these are not copartneries in any proper sense. The proprietor of the mine is nowise concerned with the operations or business of his tenant, farther than that there shall be set aside his stipulated proportion of the gross produce. The tenant may make large profits, or may be totally ruined by losses, but his landlord shares in neither. The lordship, to which he is in all events entitled, is nothing but a species of rent payable in kind.

¹²³ *Fac. Coll. Wallace, Hamilton & Co. 8th June 1821, (S. & B.)*; 2. *Bell Comm.* 614.

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Diligence incumbent on them.

Delectus personæ, not essential to all societies.

Expense incurred, or loss sustained, falls on the common stock. Limitation of this rule.

the ordinary course of administration¹²⁴. Hence a bond of arbitration, or reference of certain company-claims, made by a partner in name of himself and company, to arbiters, was adjudged ineffectual; *Nov. 1728, Lumsdaine*, (Dict. p. 14567), observed in (*Folio Dict.* ii. p. 376.

21. It also proceeds from the mutual confidence inherent in this contract, that the several partners are not always obliged to use that middle kind of diligence, which prudent persons employ in their own affairs; they are secure, if they manage the company's concerns as they would do their own. If, therefore, a partner should fall into an error in management, for want of a larger share of prudence or skill than he was truly master of, he is not answerable for the consequences: He did his best; and the other partners have themselves to blame that they did not make choice of a partner of greater abilities, § 9. *Inst. de soc.*

22. As partners are, from a *delectus personæ*, or the reciprocal choice they make of each other, united in a kind of brotherhood, no partner could by the Roman law transfer his interest or share in the society to a third person, without consent of the company, *L. 19. 59. pr. Pro soc.*; but copartneries, even private ones, may be now so constituted by a special article for that purpose, that the partners are left at liberty to transfer their shares to whom they please. If any of the partners shall assume a third person into partnership with him, such assumed person becomes partner, not to the company, but to the assumer, *L. 19. 20. eod. tit.* The company are not bound to regard the second contract formed by the assumption, which is limited to the share of the partner assuming: He still continues with respect to the company, the sole proprietor of that share, and must sustain all actions concerning it.

23. Every partner is obliged to advance the sums necessary for carrying on the company's business, in proportion to the original share he has in the copartnerly. If one of them has advanced any sum out of his proper money, upon the common account, or hath suffered any damage by robbery, shipwreck, or other misfortune, while he is managing the company's affairs, the expense so incurred, or the loss so sustained, must be made up to him out of the common stock, *L. 52. § 4. eod. tit.*; and, if that is not sufficient to repay it, all the partners must indemnify him out of their proper money, each in proportion to his share of profit and loss; and if any one of them shall have become bankrupt, that burden falls on those who remain solvent, with the deduction of the share falling on the partner himself who has expended the money or sustained the loss*. But if the loss be more remote or indirect, *ex. gr.* if one from malice against the company should have disinherited his

lawful

* *Fac. Coll. Nov. 18. 1785, Creditors of Macghie*, Dict. p. 14668; (*2. Bell Comm.* 625.)

¹²⁴ If, therefore, a partner grant an acceptance under the social firm, not for a company debt, but, without the knowledge and privity of the company, for a private debt of his own, the company are not liable to the creditor, improperly receiving such acceptance; *Blair Miller*, 22d Jan. 1811, *Fac. Coll.*; *Kennedy*, 22d Dec. 1814, *Ibid.*; *1. Bell Comm.* 312 and 314; *2. Ibid.* 616; and compare *Clark*, 30th Nov. 1821, and 28th Feb. 1823, (*S. & D.*) But "the company is liable even for the fraudulent acts of a partner acting in the line of the partnership;" *2. Bell Comm.* 618; and therefore where a partner obtains an advance, &c. as for the company's behoof, and grants a bill for the amount under the social firm, the company is liable, though the money, &c. shall afterwards be appropriated by this partner to his own private use; *Dewar*, *not.* * p. 653.

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3dly, By bankruptcy.

renouncer has a right to demand his just proportion of the common stock and profits. But if a partner shall renounce from unfair or interested views, *ex. gr.* to purchase on his own account what the company intended to have bought for themselves; or if he shall withdraw before the term fixed by the contract, or at an unseasonable conjuncture, which may bring damage to the company, he sets his partners free from all their engagements to him, while he continues liable to them for the unjust profits he may have made by quitting the society, and for the damage arising to the company from his renunciation, § 4. *Inst. De soc. L.* 65. § 6. *Pro soc.* In the case, either of death or of renunciation, the remaining partners may, if they shall judge proper, continue the copartnership¹²⁷, either expressly, by entering into a new contract, or tacitly, by going on in the management of their common affairs upon the former plan, *arg.* § 8. *Inst. De soc.* *. The Roman lawyers tell us, that society is al-

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* The dissolution must be notified to the public, *May 24. 1791, Dalglissh and Fleming, Dict. p. 14595, from Folio Dict. vol. iv. p. 288*¹²⁸.

¹²⁷ It is incorrect to say, that the remaining partners may "continue the copartnership." The natural effect of dissolution, where there is no arrangement to the contrary, is to terminate "the whole concern," and "to bring all to a sale," so far as an actual division of the common property may be inexpedient or impracticable; *Marshall, 23d Feb. 1816, Fac. Coll.; 2. Bell Comm. 641-2.*

¹²⁸ "There may be a complete dissolution as between the partners, and yet they may all continue responsible to the public" for future contractions under the social firm; *2. Bell Comm. 647.* It is with reference to this latter responsibility, that notice of the dissolution is requisite. As to what shall be considered sufficient notice, there is a distinction between those who have previously dealt with the company, and those who have had no such dealings; 1. To the former, nothing short of direct and special notice will do. Where a new partner is assumed, and there is a distinct change of firm, under which the new transactions take place, this is equivalent to actual notice; *Dunbar, 10th March 1810, Fac. Coll.* But advertisement in the Gazette, though accompanied by similar advertisements in other newspapers, unless brought home to the creditor's actual knowledge, will not avail; *2. Bell, 649; Douglas, Wilson, and MacAuley, 24th Dec. 1814; Sawers, 24th Feb. 1815, Fac. Coll.* 2. To strangers, who have not formerly dealt with the company, actual notice cannot be given, "and the law seems to be satisfied with a Gazette advertisement, accompanied by a notice in the newspaper of the place of the company's trade, or other fair means taken to publish, as widely as possible, the fact of dissolution;" *2. Bell, 651.* In the case of *Sawers, sup.* as reported in *Fac. Coll.*, the Court appears to have held advertisement in the provincial paper alone, sufficient notice to strangers. But Mr Bell, who was counsel in that case, and who refers to it in support of the passage just quoted, does not seem to hold it a safe authority to this extent; and the more prudent course, certainly, is that which he suggests.

It is said to have been held in England, that there is no necessity for advertising the dissolution of a secret partnership; 1. *Montagu, (on Partnership,) 106; Evans, 4. Esp. 89.* But in Scotland there does not seem to be any difference in this respect. "The general rule of law must be observed in all cases, whether the partners were active or sleeping, and whether their names appeared in the social firm, or whether the social firm consisted only of one name;" *Hay, &c. 27th Jan. 1809, Fac. Coll., overruling Armour, 29th Nov. 1774, Dict. p. 14575; 2. Bell, 652.*

As to the necessity of notice in the case of dissolution by death, there has yet been no express decision. *Lord Eldon*, in deciding an English question, seems to have leant towards the negative opinion: "I conceive," says he, "that the death of a partner of itself works a dissolution of the partnership; and I am not prepared to say, notwithstanding all I have read on the subject, that a deceased partner's estate becomes liable to the debts of the continuing partners, for want of notice of such a dissolution;" *3. Merivale, 614.* The same opinion is favoured by *Mr Bell, 2. Comm. 648.* The case of *Paterson, 5th July 1808, Dict. v. SOCIETY, App. No. 4.*, has been referred to as an adverse authority; *Stark, 305;* but it proceeded on a different principle, *1. Bell, 280-2;* as did also the later case of *Kemp, 17th June 1824, S. & D. Vid. infr. in notis.*

It must be observed in conclusion, that by no form of notice, and by no agreement, however express, with his copartners, can the retiring partner free himself from liability to third parties for the company debts and obligations, as existing at the date of dissolution; nor will these parties, by merely continuing to deal with the company, in the knowledge of the dissolution, be held to have discharged the retiring partner of such subsisting responsibilities; *Ramsay's Executors, 18th Jan. 1814; 2. Bell, 647.*

so dissolved *egestate*, or by a partner's bankruptcy¹²⁹: And without doubt, where all the partners, or rather when the company itself, becomes bankrupt, and hath no common stock left, *deest res*, there can be no society without a subject capable of yielding profit. But if the case be put, that after goods are purchased on the company's credit, for the price of which all the partners are bound, one of them shall become bankrupt, the insolvency of that partner confers no title upon the rest to pocket up the whole profits, to the exclusion of him who has failed, on pretence that the society is dissolved as to his share, and that therefore they are entitled to the whole profits, as they run the whole risk of the price; *July 12. 1749, Paterson*, (Dict. p. 14578)¹³⁰.

27. Upon the dissolution of the society, the company goods fall to be divided among the surviving partners, and the representatives of those that are deceased, according to the several proportions either expressed or implied in the contract¹³¹: And if the company-debts exceed the funds, the solvent partners must make payment to the creditors out of their proper estates. Where one of the partners is, by the conception of the contract, bound to contribute nothing more than skill and service, he is not subjected to any part of the loss; for such stipulation seems to exempt him from the payment of money¹³². As to the profits, he is, without doubt, entitled, upon the division of the society goods, to such a share of them as is allotted to him by the copartnership; but he has no claim to any part of the original stock, *arg. § 2. Inst. De soc. vers. Nam et ita*. His service is understood to be compensated with the use of that stock, not with the property of it; and as, upon the dissolution of the contract, he retains his skill and service to himself, it is equitable that the other partners should also retain what was contributed by them towards the common stock, and the hazard of which lay upon them alone. But from this rule, the case must be excepted, where the contrary is expressly covenanted, or at least implied from the special nature of the agreement; an instance of which last is stated by Puffendorf, *De jur. nat. Lib. 5. C. 8. N. 2*.

28. Public trading companies are now frequently constituted into corporate bodies, sometimes by statute, and sometimes by grant from the Crown, with rules very different from those which either obtained in the Roman Law, or to this day obtain with us in private partnerships. They are understood to be perpetual, if their duration is not limited by their charter or patent; and consequently a partner after his death transmits his share to his representative, who thereby becomes one of the partners. Any member of the company may also, during his life, by transferring the stock, substitute

Division of profit and loss upon the dissolution of the society.

Incorporated trading companies.

¹²⁹ Perhaps it would be more accurate to say, that a partner's bankruptcy (like his incapacity from disease, &c.) is a sufficient cause for the others renouncing the copartnership, or getting it judicially dissolved, than that such bankruptcy, of itself, and as it were *ipso facto*, operates a dissolution. See, however, 2. *Bell Comm.* 644; where it is laid down, that though the "insolvency of a partner does not alone dissolve a partnership," and though it may be doubted whether even "bankruptcy under the act 1696, c. 5," would have that effect, yet "bankruptcy by sequestration, which transfers to the creditors all the partner's rights, will unquestionably have this effect;" and so, it would appear, would a trust-deed for the benefit of creditors."

¹³⁰ In every case of dissolution, it is clear, that the representatives or creditors of the deceased or retiring partner must participate both in the subsequent profit and loss, wherever "these are the necessary results of what had already been done or commenced before the dissolution;—of which it may be said that the risk is already depending at the period of dissolution;" 2 *Bell Comm.* 656.

¹³¹ *Vid. supr. not.* ¹²⁸.

¹³² *Vid. supr. not.* ¹²¹.

Book III.

A joint trade differs from a society.

stitute another in his place, without consent of the company; but he cannot, in consequence of his renunciation, claim from the company his share of the common effects, as he might by the Roman law. By the charters or patents erecting these public companies, no obligation can be granted that shall be binding upon the company, nor can any subject be either sold or acquired for their behoof, but by the order of certain directors, who must be chosen according to the prescription of the grant. And a majority of proprietors at a general meeting have power, as a corporate body, to enact corporation-laws for the better managing and expediting their affairs¹³³.

29. There is a great difference, by the acknowledgment of all trading nations, between a proper copartnership and a joint trade¹³⁴. A copartnership is a collective and permanent society, in which all the *socii* are, in regard to strangers, considered as one person; and consequently are bound *singuli in solidum* for the company's debts. A joint trade, on the contrary, is only a momentary contract, where two or more persons agree to put a sum of money into a common stock, to be employed as an adventure in a particular course of trade, the produce of which, after the trading voyage is finished, is to be divided among them, according to their several shares

¹³³ Public companies, when not thus incorporated, are, in all essential respects, to be considered as private partnerships. By a recent statute, joint stock societies established "for the purposes of banking," have been so far privileged, that they may now, in all cases, "sue and be sued in the name of the manager, cashier, or other principal officer," provided they observe certain prescribed regulations; the most important of which is, that they shall make a yearly return to the Stamp-Office, setting forth the true name, title or firm of the society; the names and places of abode of all its partners; and of the officer in whose name judicial proceedings are to be conducted; the name of every town or place where any of the society's bills or notes shall be issued, &c. &c. 7. *Geo. IV. c. 67*. As to other public companies not incorporated, it has been said, that "in judicial proceedings, in raising actions for behoof of the company, or in prosecuting for debts due by the company, either the whole company must be named, and all interested called as parties, or the directors or other committee who are, by the constitution of the company, appointed to represent them;" 2. *Bell Comm.* 632. But this is intended only for the case, where the company, having no firm properly so called, distinguishes itself by a title merely designative of its trade, or other general object. Accordingly it has been held, that "there was a clear distinction between the case, where a mercantile company sued under its *proper firm*, by which it granted obligations, (as "*Douglas, Heron & Co.*," or the like,) and where it sued under a mere *descriptive* name or denomination," as "*The Culcreuch Cotton Company*," &c.; the Court being of opinion, that in the latter case, the title to pursue could not be sustained, but that in the former there would be no objection; *Culcreuch Cotton Company*, 27th Nov. 1822, (*S. & D.*) So also, "the Court were unanimously of opinion, that it was competent to charge the individual partners of a company upon letters of horning directed against the *firm*, and that it lay with the messenger to discover who the individuals composing the company were;" *Thomson*, 2d July 1812, *Fac. Coll.* There are, however, several important cases connected with this subject at present in dependence, until the decision of which, it might be unsafe to consider the law as settled. In particular, it is strongly liable to question, whether the directors, or other office-bearers, of an unincorporated society, have, in any case, *persona standi*, as representatives of the society.

¹³⁴ "A joint adventure is as proper a partnership as any other;" *dicente Lord Eldon*, in deciding on appeal *Davidson*, 4th July 1815, 3. *Dow*, 218. "The only intelligible or practical difference is, that the joint trade may be limited to one venture or course of trade; and that there is no firm;" 2. *Bell Comm.* 630. "It is only," Mr Bell adds, "by so considering it, that the errors can be avoided to which this passage in Erskine has sometimes led. The property of the joint trade is common, so as to confer a preference on the creditors of the concern: (so decided, *Crooks*, *not.* * p. 659.)—The partners are responsible *singuli in solidum*, each being bound as by mandate, express or presumed, for the engagements of the active partners:—The creditors, on occasion of bankruptcy, have claim on the estates of the partners only for the balance, after deducting what they get from the common stock;" 2. *Ibid.* & 635.

shares in the adventure. In this last kind of contract, no adventurer can be hurt by any deed not subscribed by himself; though it should be signed by a co-adventurer in his name; for where there is no proper copartnership, there is no subscription by a firm, the establishment of which, by an unanimous resolution of the company, is the only ground upon which the deed of one partner can induce an obligation upon the rest. If, for instance, that particular adventurer, who has been intrusted with the common stock for the purchasing of goods, shall be afterwards found to have given bills for them in place of money, the seller has no action for the price upon these bills against the co-adventurers; because he followed the faith of the buyer only, and not of the others, who were perhaps unknown to him; and therefore he can recover no more from these others but that part of the buyer's share which may happen to remain still in their hands. Yet, even in a joint trade, if one of the adventurers shall become insolvent, the others have a right to retain the whole stock, as long as it continues undivided, against the bankrupt's creditors, till they be relieved of all the engagements they may have entered into upon account of the adventure; for though the partners in a joint trade are not proper *socii*, they are proprietors of the stock or subject of the adventure *pro indiviso*; and consequently, while it exists, they are preferable to the creditors of any particular adventurer; *Jan. 11. 1740, Cred. of Macaul, (Dict. p. 14608) **.

30. Marriage is truly a society. The nature of the communion of goods between the *socii*, implied in marriage while it subsists, has been already spoke to. The legal effects of special settlements contained in marriage-contracts, in so far as they relate to the heirs or children of the marriage, are to be considered *infr. T. 8. § 38. et seqq.* It may suffice, in this place, to explain shortly the import of some doubtful expressions that have been used in marriage-contracts, in the case of conventional provisions granted to the surviving wife. A provision by a husband to the widow, of the liferent of all his goods and gear, moveable and immoveable, excludes the legal right which she would otherwise have had to the property of the third or half of his moveables; for it is presumed that the liferent of the whole was granted in full satisfaction of her *jus relictae*; and that the husband had no intention to give her both the property of that share to which she is entitled by law, and the liferent of the rest; *Stair, Dec. 20. 1664, Young, (Dict. p. 6447)*. A provision to the widow for her liferent use, of all the goods and gear that shall be acquired by the husband, is to be understood only of free gear, *deductis debitis*, and therefore cannot exclude the husband's creditors from attaching the subject of that provision; *Stair, Dec. 23. 1668, Smith, (Dict. p. 9858)*. Though the word *moveables*, when adjected to the word *furniture*, or *plenishing*, and limited to such moveables as are in the granter's possession, does not comprehend *nomina debitorum*, or moveable bonds, which cannot, like the *corpora* of moveables, be properly said to be possessed; *Falc. i. Feb. 19. 1745, Ker, (Dict. p. 2274)*; yet where the liferent

Marriage is truly a society.

* See *Fac. Coll. Jan. 29. 1779, Crooks, Dict. p. 14596, (see not. ¹³⁴)*; *Ibid, Jan. 16. 1784, Glass, Dict. p. 2587 ¹³⁵*.

¹³⁵ This was not a case of joint adventure, but a competition between one partner of a vessel and the creditors of another, in which the former was found entitled to a lien over the share of the latter for extra advances made by him on the ship. It has since been decided in the last resort, that there is no such lien; 2. *Bell Comm. 637. § 639*, and authorities there referred to.

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of lands, annualrents, goods, and gear, that shall be acquired by the husband during the marriage, is granted to the wife, without limitation, the provision extends to such moveable bonds as bear date while the marriage subsisted, but to none bearing date afterwards, if it do not appear that the sums contained in them were made up of the price of goods acquired during the marriage; *Stair, July 15 1673, Robson, (Dict. p. 3050)*¹³⁶. Though, in testamentary deeds, a provision to the wife, of the granter's moveables, is not understood to comprehend heirship moveables, which are reserved to the heir, *infr. T. 9. § 11.*; yet a provision to her, contained in a marriage-contract, or other deed *inter vivos*, of the moveables, or a certain part of them, which shall belong to the husband at his death, includes heirship moveables; *July 12. 1734, La. Kinfauns, (Dict. p. 11356); Home, 76. (Boswell, Novem. 18. 1737, Dict. p. 5916).*

Mandate.

31. Mandate was also ranked by the Romans among the consensual contracts, which might be perfected without either writing or the *interventus rei*. Absence, indisposition, and many other impediments, may disable one from looking after his own business; in which case, since he cannot act in person, it behoves him to employ one to act for him. Mandate is that contract by which one thus employs his friend to manage his affairs, or any branch of them. The person employed is generally called a *mandatary*, and sometimes an *attorney* or *factor*, according to the different nature of the mandate; and he who employs is called the *mandant*. As the bare granting of a power to act, can infer no obligation upon the person empowered, who is at liberty to refuse the office, this contract cannot be perfected till the mandatary has undertaken to execute the mandate; which he may do, either by word, by writing, or by any deed which sufficiently discovers his resolution. Mandate, therefore, where it signifies a mutual contract, includes not only the act of the mandant who employs, but the acceptance of the mandatary. Hence it arises, that mandates or orders for the sole behoof of the mandatary, cannot constitute this contract; for they are truly no other than advices, which the mandatary is at liberty to follow or not at pleasure. And even when mandates of this kind confer a positive right on the mandatary, *ex. gr.* procuratories of resignation or precepts of seisin, he lies under no obligation, even after acceptance, to execute them; for no man can come under an obligation to himself.

Whether it is a gratuitous contract.

32. The contract of mandate, when understood strictly, and in the sense of the Roman law, is grounded entirely on personal considerations of friendship; and was therefore always deemed a gratuitous contract. When he who was employed could claim a reward for his trouble, it resolved into a *locatio operarum, L. 1. § 4. Mandat.* But the honoraries of lawyers and physicians, though they may be sued for without a previous agreement, *L. 1. § 1. 10. 12. De extr. cogn.,* do not alter the nature of the contract from mandate

¹³⁶ There has either some clerical error crept in here, or the meaning of the authority referred to has been mistaken. It was decided that the provision did *not* extend to bonds bearing date "*while the marriage subsisted*;"—"unless the wife prove that they were granted for sums or moveables acquired during the marriage." This, indeed, rests on the same general principle which regulates the interpretation of all provisions of conquest, viz. that whatever real *addition* "has been made to the estate during the marriage, that, and that only, shall descend" as conquest; *Infr. t. 8. § 43.* It seems, however, to admit of reasonable doubt, how far the circumstance of the bonds bearing date during the marriage should not have been held to create a presumption in favour of the claim of conquest, and so have thrown the *onus probandi* differently.

date to location; because they are, as Stair expresses it, *B. 1. t. 12. § 5.* the reward of services which can receive no proper estimation; and therefore the action by which they are recovered is the *actio mandati*, not *locati*, *L. 6. pr. Mandat* *. By our usage, all commissions for the transacting of business, where no reward is promised, are presumed to be gratuitous, and consequently proper mandates; *Jan. 4. 1738, Trustees of Johnston*, (Dict. p. 13407), stated in (folio) *Dict. ii. p. 317*, unless a stronger contrary presumption for a reward arises from the special circumstances of the mandatary, or his way of life.

33. Mandate is either express, which is given in writing or in words, such as properly signify the mandant's desire; or tacit, which, without an express commission, is inferred or presumed from facts implying it. Thus a mandate is inferred from one's suffering another to act for him in his presence without contradiction, *L. 18, 53, Mandat.*; *Stair, Feb. 23. 1667, L. Renton*, (Dict. p. 9394); agreeably to the rule, *Qui tacet, consentire videtur*. A mandate to appear judicially, in name of a party to the suit, is presumed with respect to a procurator before an inferior court, from his being possessed of that party's writings¹³⁸, and as to an advocate¹³⁹, from his bare appearance in court for him †. Thus also, a servant's buying shop-goods in his master's name, and granting receipt for them, infers a mandate, which

It is either express or tacit.

* Physicians' fees are presumed to have been paid, except during the deathbed sickness; *Dalr. 171*; *Russel, Feb. 7. 1717*, Dict. p. 11419; *Fac. Coll. i. 134, Park, Feb. 7. 1755*, Dict. p. 11421; *Br. 29, & 32. Johnston, July 25. 1716*, Dict. p. 11418. See, however, *Fac. Coll. June 17. 1795, Flint*, Dict. p. 11422¹³⁷.

† But where the party is not resident in Scotland, a written mandate is necessary, *Bankt. B. iv. t. 3. § 25 & 26*; *Stair, Feb. 3. 1681, Stuart*, Dict. p. 353¹⁴⁰. Such authority has been found necessary to authorise a person residing abroad to be enrolled as a freeholder, either at a Michaelmas meeting, *Fac. Coll. July 20. 1780, Dundas*, Dict. p. 8837, or meeting for election, *Ibid. July 6. 1802, Davidson*, Dict. p. 8842.

¹³⁷ See also *Fac. Coll. Hamilton, 15th June 1781*, Dict. p. 11422; *infr. t. 7. § 17.*

¹³⁸ *King, 10th Jan. 1694*, Dict. p. 12247. So also mandate is presumed from the party's subscribing one of the pleadings; *Campbell, 29th May 1821, (S. & B.)*; from his knowledge that the proceedings are carried on in his name, and his taking no steps to disclaim them; *Wallace, 31st May 1821, (Ibid.)*; *Bryan, 13th Nov. 1824, (Ibid.)*; &c.—See also *Macdonald, 5th July 1821, (Ibid.)*.

¹³⁹ *Ballantyne, 7th Dec. 1676*, Dict. p. 348; *Grant, 11th Dec. 1678, 2. Stair, 656*; *2. Brown's Suppl., 236*; *Hamilton, &c. 25th Nov. 1813*. "An advocate appearing *bona fide* for a party, at the desire of a practising agent, is not responsible for the consequences of the agent's acting without authority;" *Wallace, 31st May 1821, (S. & B.)*.

¹⁴⁰ *Taaffe, 22d Feb. 1822, (S. & B.)*.—Where a pursuer is abroad at the commencement, or goes abroad during the progress, of the cause, some one resident in this country must be sisted in process as his judicial mandatary; and this mandatary will be liable along with his constituent, in any expenses awarded to the defender. This seems to have been first introduced with reference to foreigners pursuing in this country; but (with the exception, perhaps, of parties possessed of landed estates in Scotland, (*S. & D.*) *Ewing, 28. Nov. 1823*;) it has since been extended to the case of natives resident abroad; *Pyronon, 14. Feb. 1627*, Dict. p. 2069 & 16960; *Pringle, 16. June 1738, Ibid. p. 4643, Elchies, FACTOR, No. 5*; *Potter, 25th July 1739, Ibid. p. 4644, Elch. ut supr. No. 6*; *O'Haggen, 31. July 1761, Ibid.*; *Hope, 10. June 1797, Ibid. 4646*; *Neilson, 13. Feb. 1822, (S. & B.)*; *Hamilton, 18. May 1822, (Ibid.)*; *Gordon, 11. Dec. 1823, (Ibid.)*; *Scott, 29th Jan. 1823, (Ibid.)*. A judicial mandatary may at any time withdraw his appearance; but this can be done only by a formal entry on the record, *Neilson, supr.*; *Martin, 8. June 1827, (S. & D.)*; and such entry will not free from liability for expenses already incurred; *Gibson, 17. Dec. 1822, (S. & D.)*; *Gordon, supr.* If a new mandatary be sisted, he will not be allowed to qualify his liability, so as to restrict it to the future expenses merely; he must take upon him an universal responsibility; *Pease, &c. 4. June 1822, (S. & B.)*. Whether his doing so will liberate the original mandatary, has not been decided. As to mandataries in the case of a defender, resident abroad, see *McColl, 17. Jan. 1822, (S. & B.)*; *Kelting, 16. Jan. 1823, (Ibid.)*; *Ferguson, 22. Nov. 1825, (Ibid.)*; *Grant, 30. Nov. 1825, (Ibid.)*;—*Leigh, 19. Dec. 1792*, Dict. p. 4645; *Hamilton, supr.*; *Mackenzie, 5. March 1824, (S. & D.)*; *Mowbray, 14. Nov. 1823*, reported under date 8. Feb. 1825, (*Ibid.*); *Gray, 8. Feb. 1825, (Ibid.)*; *Lindsay, 8. Feb. 1827, (S. & D.)*;—*McInnes, 3. June 1813, Fac. Coll.*

Book III.

In what cases
he is answerable
for a *culpa levis*
or *levissima*.

Obligations on
the mandant.

ing which, they are liable in the several degrees of diligence which are suitable to the nature of their several contracts. Our judges have therefore governed themselves in this point by the equity of the Roman law, as it has been already explained; by which a mandatary in a proper mandate, where no benefit accrues to him, is liable only for actual intromissions, or for such diligence as he employs in his own affairs; *Stair, July 17. 1672, E. Wemyss, (Dict. p. 3515); Harc. 705, Sutherland against Ross, March 1683, (Dict. p. 3516); Fount. Feb. 8. 1701, Irvine, (Dict. p. 3517).*

37. But this rule must not be applied to the following cases, where the reason of it fails. *First*, A mandatary who plainly exceeds the limits of his mandate, is accountable for every accident, or *casus fortuitus*, that through occasion of such delinquency shall afterwards bring hurt to the management; *Dirl. 259, Hay against Gray, June 4. 1675, (Dict. p. 10083); Br. MS. June 28. 1716, Young, (Dict. p. 10088).* *2dly*, In improper mandates, where salaries are either expressly given or presumed from circumstances, the mandatary, conformably to the general rule of the Roman law, *præstat culpam levem*, is obliged to act with that diligence and discretion which a man of prudence uses in his affairs; *Stair, Jan. 7. 1680, Macbride, (Dict. p. 2561); Forbes, July 18. 1710, Gibson, (Dict. p. 3518);* and consequently, if through any neglect in the execution of his commission, a damage shall arise, he is liable to make it up to his employer, or other person who suffers by it; *Fac. Coll. ii. 2. (Goldie, Jan. 4. 1757, Dict. p. 3527)*¹⁴⁷.* This is the case of factors, whether granted by the Court of Session on sequestrated estates, or by private persons, with salaries annexed to them; or of merchants who are employed by others to purchase or sell goods, where a reward for pains is implied, though it should not be expressed. And this doctrine also obtains in factors who are appointed by the Court of Session *loco tutoris*, in consequence of an act of sederunt, *Feb. 13. 1730*, and who are bound by their office to take care that their pupil's money be lent out on proper security, and taken out of the hands of debtors so soon as they appear to be declining in their circumstances; *Fac. Coll. ii. 251, (Lizars, Nov. 27. 1758, Dict. p. 3532) †.*

38. The mandant is, by this contract, obliged to replace to the mandatary all the reasonable expenses disbursed *bona fide*, and the damage sustained by him in the execution of the mandate, even though the management should not have had the expected success; for *officium nemini debet esse damnosum, L. 56. § 4. Mandat. ; L. 4. C. eod. tit.* Where there are two or more mandants, each of them may be sued by the mandatary *in solidum, L. 59. § 3. eod. tit.* Thus, an agent who had managed a law-suit at the desire of several common

* See *Maccaul, Feb. 8. 1740, Dict. p. 3524; Feb. 4. 1787, Mason, Dict. p. 3535.*

† Strict diligence is required in the execution of a mandate to insure; *Garden, Jan. 7. 1752, Dict. p. 8488; Nicol, July 4. 1797, Dict. p. 7089¹⁴⁸.*

¹⁴⁷ As to the liability, 1. of law agents for damage occasioned by negligence, disobedience of orders, &c. in the discharge of their professional duty, see *Goldie, supr.* in text; *Mason, supr. not. **; *Lillie, 13. Dec. 1816, Fac. Coll.,* affirmed on appeal 1. *Bligh, 315; Dongan, 3. July 1817, Fac. Coll.; M^cMillan, 2. March 1820, Ibid.; Currie, 17. June 1823, (S. & D.); Fac. Coll. Struthers, 2. Feb. 1826, (Ibid.); Ibid. Mirrlees, 17. May 1826, (Ibid.); Ibid. Morrison, 2. June 1826, (Ibid.); compared with *Grant, 1. Jan. 1791, Bell's Cases; M^cLean, 15. Nov. 1805, Dict. v. REPARATION, App. No. 2; Wilson, 20. June 1826, (S. & D.) &c.*—2. of messengers, see *Aitkinson, 3. Dec. 1756, Dict. p. 13965; Chatto, 17. Jan. 1811, Fac. Coll.; Miller, 10. July 1810, Ibid.; Steel, 9. June 1814, Ibid.; Wilson & Co. 31. Jan. 1817, Ibid.; Hamilton, 14. Feb. 1817, Ibid.; Kennedy, 13. Dec. 1821, (S. & D.) &c.* The general rule, as to all professional persons, is, that *imperitia culpæ annumeratur*. But this contract falls more properly under *locatio operarum*. *Vid. supr. t. 1. § 14, not. ¹²; h. t. § 16; 1. Bell Comm. (5th edit.) 459.**

¹⁴⁸ *Gilbert, 12. June 1811, Fac. Coll.*

Book III.

ted part of his commission, and thereby becomes concerned that it should not be revoked; if, for instance, he should, on the faith thereof, have obliged himself to purchase goods from a third party; the mandant cannot effectually revoke his commission till he relieve the mandatary from such engagements; *L. 27, pr. De procur.*¹⁴¹. *2dly*, Mandates expire by the renunciation of the mandatary, even after he has accepted, and in part executed the commission; but if he does not notify his renunciation to the mandant immediately after giving up the management, he is liable for the damage occasioned by the delay, *L. 27. § 2. Mandat.* A mandatary who shall renounce *dolose*, at a critical time, which must be attended with loss to the mandant, is also liable in damages, *L. 22. § 11, eod. tit.* *3dly*, Mandates expire by the death of the mandant, both because it is presumed that the commission was accepted from a personal regard to him, and because the will of the mandant, which alone supports the commission, ceaseth necessarily upon his death¹⁴². *4thly*, They expire by the death of the mandatary; because the commission was given from the mandant's special confidence in him: And in the case of two or more mandataries, the mandate, where no quorum is named, expires by the death of any one of them; because in such case, they are all considered as joint mandataries, *supr.* § 34. The reason why this doctrine does not hold in tutors, has been explained, *B. 1. tit. 7. § 30.*

Where the mandatary continues to execute the commission after the death of the mandant.

41. If a mandatary, ignorant of the mandant's death, continue to execute the commission *bona fide*, what he doth under that *ignorantia facti* must be ratified by the mandant's heir; for till the mandatary knew of his employer's death, it was his duty to go on in the management, § 10. *Inst. De Mand.*¹⁴³. But if the mandatary, ignorant perhaps that mandates are vacated by the death of the mandant, shall, after his knowledge of it, proceed to execute a commission which he had accepted at the desire of the deceased, what he does cannot affect the mandant's heir; for ignorance of law can give no man a right to manage the affairs of another who had given him no commission. Yet this is to be understood *rebus integris*: For if part of the commission had been executed before the mandant's death, by which the management would suffer if the whole were not to be carried into immediate execution, the powers given by the mandate are not accounted to have expired; and the mandatary not only may, but ought to continue his management. In the same manner, if the mandatary should die, after having begun a course of management which required to be carried on without delay, his heir may execute what was left unfinished by his ancestor, *arg. L. 27. § 3. Mand. § 10. Inst. eod. tit.*

Procuratories of resignation, and precepts of seisin, are mandates.

42. Procuratories of resignation, and precepts of seisin, are mandates or orders by one who makes over a land estate, directed to the grantee, not for the behoof of the granter himself, but of the grantee, who has the sole interest in the execution of them. As these orders are not given on personal considerations of friendship, nor are revocable, no good reason can be given why they should fall by death; nevertheless, because they carried the form of mandates,

¹⁴¹ In like manner, where, (as in the case of mercantile consignments,) the mandatary has come under advance, the mandate is revocable, only upon relieving him of his advances; and where the mandant either refuses, or, from bankruptcy or otherwise, is unable to give such relief, the mandatary is entitled to sell for his own indemnification; *Broughton, 17th Dec. 1814, Fac. Coll.; 1. Bell Comm. 395.*

¹⁴² And likewise, (at least in all cases where "the principal may be bound, or his property altered,") by his bankruptcy; *1. Bell Comm. 395.* As to the effect of insanity, see *Pollock, &c. 10. Dec. 1811, Fac. Coll.; supr. B. 1. t. 7. § 51. in not.*

¹⁴³ *1. Bell Comm. 395.*

Book III.



der no necessity of performing the office of an overseer, by superintending the actual application of the money or materials for the use of the ship; and so is not bound to prove *in rem versum*, L. 1. § 9. *De exerc. act.* Yet equity demands, that he should inquire so far into the condition of the ship, as to know that it wanted repairs, or provisions to such an extent; otherwise every shilling that an exercitor could call his own must depend on the probity of the shipmaster. Where money is borrowed for refitting or victualling a ship, the bond must, for the exercitor's greater security, express the cause of borrowing; *arg. d.* § 9. Exercitors are not obliged by the shipmaster's contracts concerning things which have no relation to the subject of his trust, L. 1. § 12. *eod. tit.*; and therefore, as by the present custom of trading nations, masters are set over the ship, not over the cargo, exercitors, if they have not given the master a special commission, are not bound by any contract or obligation of his concerning the purchase of goods; *Forbes, Dec. 12. 1707, Coltran, (Dict. p. 3951).* The care of disposing of the exercitor's goods, and of purchasing others with the price, is now generally given to supercargoes, who therefore oblige their constituents for what sums they borrow in the course of the voyage, though no power of borrowing be expressed in their commission; *July 25. 1732, Rogers, (Dict. p. 5954).*

Whether a number of exercitors are liable for these *in solidum*, or *pro rata*.

45. Exercitors, whatever their number may be, are, by the Roman law, liable each for the whole, even he whose interest in the ship is the most inconsiderable; L. 1. § 25. L. 2. 3. *De exerc. act.*; for the contractor with the shipmaster might have had one particular exercitor in his eye, upon whose faith alone he was induced to make the bargain. By the customs of Holland, exercitors are liable only *pro rata*, lest they should be discouraged from employing their stock in commerce, from the danger attending such unlimited obligations; and in no case are they bound beyond the value of the ship and cargo; *Grot. De jur. bell. et pac. Lib. 2. c. 11. § 13.* No decisions of the Court of Session occur precisely applicable to this question; but it is certain that the British statute, 7. *Geo. II. c. 15*, which has, with a small variation, adopted the law of Holland, in so far as concerns the delinquencies of shipmasters, *ex. gr.* their embezzling any part of the cargo, without the privity of the exercitors, makes no alteration from the former law as to the obligations arising from their contracts *¹⁴⁵. Where the exercitors manage the ship by themselves, without appointing any of their number for master, each is accounted master for his own share, and consequently the contract of any one of them binds the contractor alone; and if they all become bound in one obligation, they are liable in proportion to their several interests or shares; L. 4. *pr. et § 1. De exerc. act.* ¹⁴⁶.

Similar obligations between prepositors and institors. In what respect the obligations differ.

46. The prætor in like manner introduced the *actio institoria*, whereby prepositors, or undertakers of any negotiation at land, from which profit may be expected, as of a farm, manufactory, shop, &c. may be sued upon the contracts of those whom they have set over it; who are called *institors*, from *instare*, to superintend; L. 3. *De inst. act.* †. Factors, to whom goods of the produce or manufacture of another country are consigned by merchants, are proper

* See *Dict. voce SOLIDUM ET PRO RATA*, Section XI.

† *Fac. Coll. Dec. 10. 1765, Bruce and Company, Dict. p. 4056.*

¹⁴⁵ "All the owners are in Scotland liable *singuli in solidum*;" 1. *Bell Comm.* 425 & 429.

¹⁴⁶ 1. *Bell Comm.* 42.

TITLE III.

In what cases
it is excluded.

renunciare potest. Where the act of homologation is itself invalid, the defects of the original deed cannot thereby be supplied¹⁴⁷. A woman, for instance, while she is clothed with a husband, is incapable of homologating an informal or defective deed which she had granted previously to her marriage, because the consent given by her in the act of homologation is as invalid and ineffectual as it was in the deed homologated.¹⁴⁸

48. Homologation cannot be inferred, *first*, From the act of one who was not in the knowledge of the original deed; for homologation imports an approbation of that deed; and he who is ignorant of a deed, cannot be said to approve of it. Hence the subscribing as witness to a deed, infers not the witness's homologation, because witnesses are called merely to attest the subscription of a deed, and are seldom told its contents. But in the case of witnessing the marriage-contract of a daughter or sister, by the bride's father or brother, a presumption arises from the attestor's near relation to the bride, that he both knew and approved the contents of the deed to which he was an instrumentary witness, *Forbes, MS. July 15. 1714, Davidson, (Dict. p. 5652); Feb. 1725, Johnston, (see Dict. p. 5657).* *2dly*, The approbatory acts must be so strong and express, that no reasonable construction can be put on them, other than that they were performed by the party from his approbation of the deed homologated; for no man is *in dubio* presumed to have an intention of obliging himself¹⁴⁹. Hence the attestation by an heir, of a deed of his ancestor *in lecto*, is presumed to have proceeded, not from his approbation of the contents, though he should be supposed to know them, but from the authority and influence the granter had over him, and his fear of offending; and therefore does not infer homologation, *Dalr. 46, 47. (Dallas, Jan. 13. 1704, Dict. p. 5677).* By the same rule, necessary deeds, as charters or precepts granted by a superior in obedience to a charge, infer no homologation of the right of him at whose suit the charge is given, *Stair, Dec. 20. 1662, Dunbar, (Dict. p. 6715).* But a marriage-contract, though defective in the legal solemnities, is held, from the favour of marriage, to be homologated by the subsequent marriage of the parties, *Mackenzie, B. 3. t. 2. § 5.* Thus a contract of marriage subscribed only by one notary, was found to be homologated by the marriage following upon it, *Durie, Dec. 10. 1630, Nisbet, (Dict. p. 5682); Stair, July 1. 1662, Brydie, (Dict. p. 5683)*.*

49.

* A marriage-contract, signed only by the bridegroom, and by the bride's father, a taking burden on him for his daughter, but not by the bride, though named as a party in the deed, was found obligatory, in respect of the subsequent marriage of the parties; *Fac. Coll. Nov. 16. 1760, Children of Wemyss, Dct. p. 9174*¹⁵⁰.

¹⁴⁷ Thus, there can be no homologation on the part of an idiot; *Morton, 11th Fe 1813, Fac. Coll.*

¹⁴⁸ A bond granted by a female minor, was held not to be homologated by a subsequent recognition, contained in an *antenuptial* contract of marriage, between her, w^l still in minority, and her intended husband; *1st*, Because the minor herself was incapable of homologating; and, *2dly*, Because, as to the husband, "at the time he entered into the contract of marriage, it might be doubted whether he had any title to charge the bond; and there is no evidence afforded of any homologation after the marriage;" *Rose, 20th Nov. 1821, (S. & B.)*

¹⁴⁹ *Munro, 19th Feb. 1810, Fac. Coll.; Cameron, &c. 18th Dec. 1810, Ibid.; Gordon, 16th Nov. 1821, (S. & B.); Clarks, 15th May 1823, (Ibid.)*

¹⁵⁰ "Proposals of marriage given to a woman's brother, but not proven to have been shewn to her nor her father, are not to be considered as a marriage contract though marriage follow; *Campbells, 5th June 1812, Fac. Coll.*

49. The proper effect of homologation is, to cut off the person homologating from all objections otherwise competent to him against the original deed; and, consequently, to give the right the same effect against him and his heirs, as if it had been valid from the beginning¹⁵¹. But in relation to third parties, who are not bound to acknowledge the deeds of him who homologates, homologation can have no effect; and the right in respect of these, must continue as liable to exception as before. Where a deed was conceived, partly in one's favour, and partly subjecting him to burdens, it was usual for the person concerned, if he was advised to do any approbatory act, before he had resolved to homologate it *in toto*, to protest that what he did might not be deemed an act of homologation. After such protestation, the act to which it is interposed, is not construed as a total approbation of the original deed, *Stair, July 12. 1671, Murray*, (Dict. p. 5689): And the Court of Session have, in several instances, sustained partial approbatory acts as acts of total homologation where this caution was omitted, *Stair, Feb. 19. 1663, Muir*, (Dict. p. 6107); *Ibid. June 28. 1671, Hume*, (Dict. p. 5688)¹⁵². It would seem, that one may avail himself of a deed in his own favour, and at the same time object against another tortious deed granted by the same party, which he had no power to grant, and which tends to cut the grantee of the first deed out of some just right. The grantee does not in such case approbate and reprobate the same deed: He homologates that of which he claims the benefit with all its qualities; and only objects against a separate deed, which it was not lawful to the grantor to execute, and which, were it sustained, would wrongfully deprive him of a legal right otherwise competent to him.

50. It is affirmed by Mackenzie, § 22. *h. t.*, that because homologation is an act of the mind, it cannot be proved by witnesses. But, by this rule, no contract ought to be proved by witnesses; since consent, which is essential to all contracts, is *actus animi*. It might have been more justly inferred, that because no act of the mind can be discovered but from exterior circumstances, every circumstance expressing consent or approbation ought to be sustained as homologation, whether it be by writing, or by facts which cannot in their nature be proved but by witnesses. Thus the debtor's paying interest for a sum due by him upon an informal or invalid bond, will be accounted an act of homologation, on the creditor's bringing a proof of that fact by the testimony of witnesses; because, even supposing the creditor had granted a written discharge of that interest, yet as it fell naturally to be in the debtor's keeping, he could not prove the payment by writing.

51. Obligations are formed, not only by proper contracts, but by *quasi* contracts. These are constituted, not by explicit consent, as proper contracts are, but *ex re*; that is, merely by one of the parties doing such deeds as in their nature infer an obligation upon him in favour of the other party, or upon that other party, though he be perhaps ignorant of it, in favour of the first. Thus *quasi* contracts are formed by the obligations arising from the office

TITLE III.
Effect of homologation.

Whether homologation is proveable by witnesses.

Quasi contracts.

¹⁵¹ *Kirkaldy, 16th June 1809, Fac. Coll.*

¹⁵² *Carmichael, 8th Feb. 1823, (S. & B.)*.—But where a deed confers no benefit, beyond what the party in his own right would, at any rate, be entitled to, the taking advantage of it, while it stands, infers no homologation; *Clarks, 15th May 1823, sess. pap., Malcolm, 19th June 1823, (S. & D.)*; Dict. v. HOMOLOGATION, Sect. VII.

Book III.

Negotiorum gestio.

What diligence is incumbent on the *negotiorum gestor*.

Indebiti solutio.

office of tutory, of which *supra*, B. 1. t. 7. § 24, *et seqq.*, and from services as heir, *infr.* T. 8. § 50. *et seqq.* And we may rank under the same class those arising from *negotiorum gestio*, *indebiti solutio*, communion of goods, and *jactus mercium navis levandæ causa*.

52. *Negotiorum gestio* produces those obligations which arise from the management of one's affairs in his absence, by another, without a mandate from the owner. The *negotiorum gestor* is accountable to the owner for all the sums of money and subjects belonging to him, with which he has intermeddled during his management, with all the fruits and profits of them, even for the interest of the money, L. 31. § 3. *De neg. gest.*, if the owner was a money-lender, L. 13. § 1. *De usur.* But this perhaps would not be received by the law of Scotland, unless where the *gestor* received a sum which carried interest formerly. He is, on the other hand, entitled to sue the owner for the recovery not only of all the disbursements he hath made upon his account in the course of the management, but of the interest, L. 19. § 4. *De neg. gest.*, for without the interest he would be a loser; and also for relief from all the engagements he has entered into in consequence of his *gestio*: And if these disbursements appear rational, it makes no difference, though the subject on which they have been made should by misfortune have afterwards perished, L. 10. § 1. *eod. tit.*; but he hath no title to any reward or recompence for his service. The text quoted by Stair, in support of the contrary opinion, L. 2. *eod. tit.*, restricts the *gestor's* claim to that which *ei abest*, or *abfuturum est*; an expression which never includes loss by pains or attendance.

53. By some texts of the Roman law, the *negotiorum gestor* ought to use the most exact diligence, L. 24. C. *De usur.*; § 1. *Inst. vers. Quo casu, De obl. quæ quas.* By others, he is liable only in the middle kind of diligence, L. 11. *De neg. gest.*; L. 20. C. *eod. tit.* But in truth the degree of diligence ever rises or falls according to the views of the *gestor* in undertaking the management, and the nature of the *gestio*. Where the *gestor*, from friendship, and the necessity of the case, takes upon him the direction of an affair which requires immediate execution, he is accountable only for gross omissions, L. 3. § 9. *eod. tit.* If, on the other hand, his motives appear selfish and interested, or if he act contrary to the express will of the owner, or if he has involved him in a new negotiation, in which he never dealt formerly, he is answerable even for casual misfortunes; and is not entitled to the recovery of any disbursements, except in so far as the owner has been a gainer by them, L. 6. § 3; L. 11. *vers. Veluti si novum, eod. tit.*; L. 40. *Mand.* The texts requiring a middle kind of diligence may be equitably applied to the cases where no special circumstances occur on either side: For though the *gestor's* office be gratuitous, he ought to be the more strictly accountable, that he assumed it to himself, without the owner's authority.

54. *Indebiti solutio*, or the payment to one of a debt not truly due to him, is in effect a *pro-mutuum*, or *quasi mutuum*, by which he who made the payment is entitled to an action against the receiver for repayment, called by the Romans *condictio indebiti* which arises, not from any explicit consent or agreement of parties but solely from equity. This action does not lie in the following cases. *First*, Though positive law could not have forced the payment of a sum due by an obligation merely natural, yet being one

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not have been saved to the owners but for the ejection of the other goods *. Neither the persons of those in the ship, nor the ship-provisions, suffer any estimation ; but wearing-apparel is estimated ; *L. 2. § 2. in fin. eod. tit.* ; which last is, by the present practice, restricted to what is put up in boxes or chests. In this estimation the goods ejected are valued at prime-cost ; and the goods saved, at the price they will give at the next port ; *L. 2. § 4. eod. tit.* †. A master who has cut his mast, or parted with his anchor, in a storm, to save the ship, is also entitled to this compensation : But if he should lose them by the storm, the loss falls only on the ship and freight, according to the known rules of location ; *L. 2. § 1. eod. tit.* By the later laws of Wisby, which have great authority with all states in matters of commerce and maritime questions, *art. 20*, goods may be warrantably ejected, if the master and a third part of the mariners shall judge that measure necessary, though the owner should oppose it ; and the goods ejected are by these laws to be valued at the same price that the goods of like sort which are saved shall be sold for. There can be no contribution without the ejection of some goods, and the saving of others : But it is not always necessary, in order to make room for it, that the ship should be saved ; for though she should be lost after the ejection, yet if any of the goods which perished with her shall be recovered by divers, the owners are obliged to contribute with those whose goods had been ejected, and who thereby lost the chance of recovering them by the same method of diving ; *L. 4. § 1. eod. tit.* This law obtains, not only in the ejection of goods, but when a merchant-ship taken by pirates, or by an enemy, is to be ransomed for a certain sum ; because by the payment of that sum the ship and cargo are saved to the owners ; *L. 2. § 3. eod. tit.* : And if any person belonging to the ship is detained as ransom till payment be made, he is for the same reason to be set free at the joint expense of the owners of the ship and cargo.

Right of dividing common property.

56. The communion of goods is also reckoned among the *quasi* contracts ; for where two or more persons become common proprietors of the same subject, by legacy, purchase or gift, without the view of any copartnership, an obligation is thereby created among the proprietors, without any covenant, by which they are mutually obliged to communicate the profit and loss arising from that subject while it remains common. Common subjects might, by the Roman law, have been divided at the suit of any of the proprietors, by the action *communi dividendo* ; and such division, when limited to moveable subjects, has been always competent by the law of Scotland. Because the part-owners of ships, though not properly copartners, suffer frequently by the contracts or delinquencies of shipmasters, perhaps not of their own choosing, for which they are answerable, not only to the extent of their own share, but to the value of the whole ship ; *Stair, Dec. 11. 1672, Carnegy*, (Dict. p. 9349) ; *Dec. 2. 1725, Macgivan*, (Dict. p. 14672), an action therefore has been indulged, without any statute, to the majority of the owners, for bringing the ship, not indeed to a division, for a ship is an indivisible subject, but to a public sale before the court of admiralty. Nay, any one owner may insist in an action before

* This doctrine is combated by Lord Kames. See *Principles of Equity*, p. 157¹⁵⁴.

† See *Fac. Coll.* iii. 123. *Landale, Nov. 30. 1763*, Dict. p. 13428.

¹⁵⁴ But, as Mr Bell observes, "with no great force of reason ;" 1. *Comm.* 501.

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prietors are the only parties, is fixed by the last clause of the act ¹⁵⁹, according to the valuations of the several lands and properties ¹⁶⁰; but where the question lies between the proprietors on the one part, and those who claim servitudes on the other, it is more equitable to observe the rule laid down in a preceding clause, according to the value of the interests of the several persons concerned*. The proprietors therefore were formerly entitled to a separate allowance, or a *præcipuum*, for their right of property, over and above the share due to them on account of their own or their tenant's possession by pasturage; *Kames*, 42, (*sup. cit.*). But as it may be extremely difficult to settle the proportion of this *præcipuum* with judgment, where there happens to be a valuable mine of gold, silver, or other metal, in the grounds, the method fixed by the above-quoted decision, *anno* 1748, appears the safest, by which the servitudes upon the surface are limited according to the rule above mentioned, leaving the extent of the claim arising from the right of property undetermined †.

59.

* *Fac. Coll.* Aug. 11. 1772, *Barclay-Maitland*, DICT. p. 2485 ¹⁶¹.

† See *Fac. Coll.* Feb. 21. 1782, *Henderson*, DICT. p. 2487 ¹⁶².

¹⁵⁹ It was, with reference to this clause, objected, that where, as in Shetland, there exists no valuation, in the strict sense, the lands being divided into *merks*, the statutory process of division was incompetent; but the court held that the act must be liberally interpreted, and repelled the objection; *Bruce*, 11th Dec. 1823, (S. & D.)

¹⁶⁰ And this, notwithstanding an immemorial contrary possession; *D. Douglas*, 2d Feb. 1740, DICT. p. 2474, *Elchies, v. COMMONTY*, No. 5; compared with *Tennant*, 17th Nov. 1738, DICT. p. 2466, *Elchies, sup.* No. 1.

An objection, that a mill and multures, which made part of the valuation, ought to have no share in the division, was repelled; *Small*, 10th Feb. 1804, DICT. App. v. COMMONTY, No. 3.

Where heritors have improved the border of a common lying next to their several properties, the Court have held it "reasonable that the parts so improved shall be allocated to the contiguous heritors who improved them; but found, that as, until a division takes place, these remain common property, the heritors who improved parts of the common property without any authority, and even in the face of protests taken against them, did so at their own risk, and must be held as being sufficiently reimbursed for their outlays, by the crops which they have reaped, or the rents which they have drawn; and therefore that the improved parts must be estimated at their real present value; unless it can be shewn, that they have been brought into their present state in consequence of money having been laid out in making expensive permanent improvements, such as inclosures or drains;" as to the effect of which nothing was decided; *Kinloch*, 14th Jan. 1814, *Fac. Coll.*

¹⁶¹ The rule of division was here fixed, "conform to the number of sheep and bestial in use to be pastured," except in cases where the parties were specially "limited by their rights to a lesser number." The extent of "immemorial possession" was again held the rule; *Hepburn*, 2d Feb. 1814, *Fac. Coll.*; *Graham*, 27th Feb. 1822, (S. & B.), [but compare *M'Kenzie*, 5th Dec. 1823, (*Ibid.*)]; and the same exception was enforced, that this possession could not be given effect to beyond the limits, within which, as by a bounding charter, it was confined by the express terms of the party's own titles; *Hepburn*, 25th Nov. 1823, (S. & D.). Where the commonity is more than sufficient to satisfy the servitudes, it would seem that the remainder ought to be divided among those claiming by virtue of rights of property, agreeably to the ordinary rule of their valuations; *Barclay-Maitland, not. sup.*; *Henderson, not. sup.* Where the proprietor of a barony, to which a commonity belongs, has feued out the whole barony in different parcels, giving to some of the feuars a right of common property in the commonity, to others only a right of servitude, and to some no right in the commonity at all, he is held to retain, under burden of the servitudes, a share of common property in the commonity effering to the valued rent of those portions "feued out with rights of servitude only;" *D. Buccleuch*, 16th June 1812, *Fac. Coll.*

See a special case as to the division of a moss; *Campbell*, 17th May 1804, DICT. v. COMMONTY, App. No. 4.

¹⁶² It was here found that a proprietor was not entitled "to any *præcipuum* in the division, but that he had thereby a right to coals, mines, minerals, and other fossils." See also *Johnston, &c.* 30th July 1768, DICT. p. 2481; more fully stated in note to *D. Buccleuch*, 16th June 1812, *Fac. Coll.*

TITLE III.

Division of run-
rig lands.

59. A separate act passed in the same session of parliament, 1695, c 23, for dividing lands belonging to different proprietors which lie runrig, with the exception of acres belonging to boroughs or incorporations. Lands are said to lie runrig, where the alternate ridges of a field belong to different proprietors. The execution of this last statute is committed to the judge-ordinary, or the justices of the peace; whereas the division of commonties is appropriated to the Court of Session; with power nevertheless to them to grant commission to sheriffs, &c. to perambulate the grounds, take the necessary proof, and report their opinion¹⁶³. The division competent to landholders by the last-quoted act 1695, is not in practice confined to runrig lands in a strict sense of the word, but is by liberal interpretation extended to cases, where the properties of the several heritors are broken off, not by single ridges, but perhaps by roods or acres; *Fac. Coll.* i. 213. (*Chalmers, July 29. 1756, Dict.* p. 10485)*; and without this extension, the statute would have contributed little, either to the beauty of the country, or to the improvement of agriculture, which nevertheless were the chief purposes of the statute¹⁶⁴.

60. There are certain obligations, called *accessory*, which cannot subsist by themselves, but are accessions to, or make part of, other obligations to which they are interposed. Of this kind are promissory-oaths, by which obligations may be corroborated; *2dly*, fidejussion, or cautionry; and, *3dly*, the obligation to pay interest. As to promissory-oaths¹⁶⁵, *first*, It is obvious, that when the subject of them is unlawful, that is, when it is repugnant to any divine or natural law, they can have no force whatever; and so cannot give strength to any prior engagement to which they were interposed. *2dly*, If a party should promise upon oath, not to impugn an obligation, which is declared defective in essentials, by the positive law of the state; the judge, as he could not sustain action upon such obligation, though the party did not compear, and object against it, neither ought he to sustain it, though the debtor should have interposed an oath to corroborate it; because no paction of a private party can constitute a rule of judgment by which a public law would be eluded¹⁶⁶. Thus, though one who makes over a right of annualrent to another should declare, and confirm it by oath, that the deed itself shall be a sufficient foundation for pointing the ground without infestment; yet if the debtor, contrary to his oath, shall afterwards object against such pointing, that it was used by a creditor not infest, it behoves the judge to declare such

Accessory obli-
gations.Promissory
oaths.

* The court extended the statute to an interjected parcel of six acres; *Fac. Coll.* i. 162. *Nov. 16. 1755, Heritors of Inveresk, Dict.* p. 14142; but in a later case it has been restricted to fields of four acres; *Ibid. Jan. 17. 1782, Lady Gray, Dict.* p. 14151. Small parcels of land, surrounded by a greater estate, and lying at a distance from one another, but each parcel lying contiguous, and not runridge, do not fall under the statute; *Falc. i. Dec. 7. 1744, Hall, Dict.* p. 14141; *Fac. Coll. July 14. 1780, Murison, Dict.* p. 14151.

¹⁶³ See *Davidson, 2d June 1748, Elchies, v. COMMONTY, No. 6, and RUNRIDGE, No. 1.*

¹⁶⁴ "Mansion-houses and policy" do not fall within the statutory power of division. This exception has been extended to farm-offices; *Gray, 14th Jan. 1777, Dict. v. RUNRIDGE, App. No. 1.*

¹⁶⁵ See on this subject, *Stair, B. 1. t. 7. § 14*; (*Elchies, Annotations on Stair, p. 96 et seq.*)

¹⁶⁶ See *Forrester, 27th June 1815, Fac. Coll.*, where a private paction between debtor and creditor, that no suspension should pass but on consignment, was, on a similar principle, held not to be obligatory.

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such diligence null, because the law hath said, that no pointing of the ground is valid without seisin, which enactment cannot be altered by any private compact, though of the most solemn kind. Upon the same footing, no action will be admitted for a debt contracted by a woman clothed with an husband, though she should have sworn never to object against it; *Stair, Feb. 18. 1663, Birsh, (Dict. p. 5961)*. 3dly, Where an oath is adjected to a deed which is not void *ipso jure*, but may be set aside by an action or exception, the swearer is by such oath barred from using the right of action, or pleading the exception otherwise competent to him; for as the right upon which the action is laid is not of itself void, it must be sustained by the judge; whose office does not authorise him to regard the plea of the granter, who has corroborated the right by his oath, unless it be judicially laid before and admitted by him; and this plea, whether it consists of a right of action or exception, may be effectually renounced by such oath, so that the judge, upon its being offered by the swearer in judgment, ought to declare it excluded by a personal exception against him. Thus a minor, who had granted bond for a debt contracted by his father, whom he did not represent, and had sworn never to impugn it, was found precluded by his oath from the right of action competent to minors to set aside deeds on the head of minority and lesion; *Stair, Feb. 10. 1672, Wauch, (Dict. p. 8922)*. But as a minor could be induced with equal ease to ratify his deed by oath, as to grant it, it is therefore ordained by 1681, c. 19., that no such oath of ratification shall be exacted from minors for the future, and that the deeds ratified shall be void; and as minors might be averse to plead against their own oaths, it is further declared competent to any person related to the minor, to obtain the deeds declared null. Bonds of corroboration signed by a debtor, ratifying and confirming his former debts, and perhaps accumulating the interest that has grown upon the bonds into a capital, though neither strengthened by any promissory-oath, nor by the intervention of a new obligee, are truly accessory obligations, since they always presuppose, and must necessarily refer to some antecedent debt. But though they be thus accessory in their first constitution, they may subsist of themselves after they have been formed, and are the proper foundations both of action and of diligence at the creditor's suit, though the original bonds should not be produced; because the debtor's corroboration of the debt referred to induces a proper obligation against him; *Gilm. 89. (Beg, July 1663, Dict. p. 16091); Dirl. 347, (Feb. 24. 1676, Johnston, Dict. p. 15798)*.

Cautionry.

61. Cautionry is that obligation by which one becomes engaged for a debtor, who hath bound himself to pay a sum, or perform a deed, that he shall truly fulfil it. As this obligation by the cautioner is barely adjected to the debtor's obligation without extinguishing it, cautioners were, by the Roman law, styled *adpromissors*. This obligation may be constituted indirectly, without any proper fidejussory clause; thus one, merely by giving a mandate to lend money to a third person, becomes cautioner for him¹⁶⁷. It may be also

¹⁶⁷ The cautionary obligation created by letters of credit is often of this indirect character; and so far has this been carried, that it sometimes is very difficult to distinguish what shall be held a proper letter of credit, and what a mere ordinary letter of introduction or recommendation. In forming an opinion on such cases, the following rules may be of use:

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Cautioner for
the performance
of a fact.

62. But a cautioner for another, that he shall perform a fact, is in no case liable, till the principal obligant be discussed. The reason of the difference is obvious. In money obligations, not only the principal debtor, but the cautioner, can by himself perform the obligation specifically; and therefore, where both are bound conjunctly and severally, either of them may be sued for payment: But where one is bound that another shall perform a fact, *ex. gr.* that an architect shall build a bridge sufficiently, that an apprentice shall perform his part of the indentures, or that a tutor shall faithfully discharge his office, the cautioners, though the architect or tutor should fail upon their parts, cannot perform for them; all that they can possibly be bound to is, that if the persons who are properly bound shall not perform, they the cautioners shall make up the loss, the *damnum et interesse*, to the parties suffering; see *Fac. Coll.* ii. 110. (June 21. 1758, *Sibbald*, Dict. p. 588). This sort of obligation, therefore, is barely subsidiary; so that the failure must be previously constituted against the proper debtors, before distressing the cautioner; *Harc.* 242, &c. (*Miln*, March 1684, Dict. p. 3588); *Fount.* Nov. 13. 1677, *Sandilands*, (Dict. p. 3580), quoted in (*Folio Dict.* i. p. 248 ¹⁷⁰).

Benefit of division among cautioners.

63. Cautioners were, by the Roman law, bound by pronouncing certain *verba solennia*; and where several cautioners were interposed to one obligation, each of them pronounced the words of style separately; and consequently every cautioner became, by the nature of his separate engagement, bound to the creditor *in solidum* for the whole sum or other subject contained in the principal obligation. This rigorous interpretation of cautionary engagements continued till the Emperor Adrian introduced, from equity, the *beneficium divisionis*, which authorised any one co-cautioner to insist, that the demand of the whole debt might not be made against him alone, but divided *pro rata* between him and the other solvent cautioners; § 4. *Inst. de fidej.* But as all the co-cautioners in an obligation are, by the forms of our law, taken bound in the same writing, there can be no room with us for the *beneficium divisionis*; since where several cautioners become bound conjunctly and severally with and for the principal debtor, that privilege is excluded by the explicit agreement of parties, against which no privilege can operate; and, on the other hand, where two or more become simply bound as cautioners for the proper debtor, each co-cautioner may, by the nature of such obligation, without any statutory privilege, insist for such a division as was competent to co-cautioners by the Roman law, if the matter of the obligation be divisible; and so is liable only for his own share, except in so far as, through the insolvency of the other obligants, the creditor cannot recover payment from them.

A cautioner cannot be bound for more than the principal, but may be more strictly bound.

64. A cautioner can in no case be bound in an higher sum to the creditor than the proper debtor is; for there cannot be more in an accessory obligation than in the principal; *L.* 8. § 7. *De fidej.* Yet he may be more strictly obliged than the proper debtor; as when the cautioner gives the creditor a pledge, or a real right on his lands; *L.* 59. *eod. tit.*; or where one is cautioner for a debtor, who is not himself civilly or fully obliged; for a cautionary obligation

¹⁷⁰ As to cautionary obligations for the faithful performance of an office, *e. g.* bank agent, notary, messenger, &c. see 1. *Bell Comm.* 276. *et seq.*

tion may be effectually interposed to an obligation merely natural, *L. 6. § 2. eod. tit.* Thus a cautioner in an obligation, where the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himself should get free, by pleading the statutory nullity, or his own legal incapacity; *Fount. Feb. 2. 1700, Hepburn, (Dict. p. 2076); Nov. 28. 1623, Shaw, (Dict. p. 2074); Feb. 11. 1748, Taylor, (Dict. p. 16813).* The reason of this is obvious; *sibi imputet* who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he the cautioner shall make good the debt. But since fidejussion is but an accessory obligation, it cannot subsist without some obligation to which it may accede; and therefore where the debtor has not subscribed his obligation, the cautioner, though he should have signed it, is not bound; *Had. Dec. 1612, contra Crichton, (Dict. p. 2074);* for in such case, not even a natural obligation is created against him for whom he became bound. All legal defences pleadable by the debtor against the creditor, are also pleadable by the cautioner; nay, a relevant defence, though it should be omitted by the debtor in an action for payment against him, continues competent to the cautioner; *July 9. 1623, Arnot, (Dict. p. 14051).*

65. As a cautioner binds himself at the desire of the principal debtor, he has an *actio mandati* against him, either upon his being distressed for the debt, or on his actual payment thereof to the creditor; concluding, in the first case, That the defender may relieve him from his distress, by procuring a discharge of the obligation; or, in the second, that he may repay to him the pursuer the principal sum, of which he has made payment to the creditor, with interest and damages. But under damage is not comprehended the loss sustained by the cautioner through his own fault, *ex. gr.* in suspending the debt upon frivolous grounds, or allowing diligence to proceed on it against his estate; for which *vid. infr. § 86.* A debtor is said to be distressed for a debt, where the creditor uses any legal step against him for obtaining payment. This *actio mandati*, or of relief, is competent against the debtor, before either payment or even distress against the cautioner, in the following cases. *First,* Where the debtor is taken expressly obliged to deliver to the cautioner his obligation cancelled, at the same term at which he hath bound himself to make payment to the creditor; for, upon that alternative, the cautioner may sue the debtor, if he fail to perform, as effectually as the creditor himself can do; *Gosf. July 7. 1668, Paton, (Dict. p. 2119).* *2dly,* If the debtor be *vergens ad inopiam*, the cautioner may, by proper diligence, secure his funds, towards his own relief before either payment or distress; *arg. L. 10. C. Mand.; Jan. 19. 1627, Thomson, (Dict. p. 2113)*¹⁷¹. *3dly,* The Roman law, most equitably, allowed action for relief to the cautioner against the debtor, where the debtor shifted the payment of his debt from day to day, for a considerable time together; especially if the cautioner's circumstances at the same time disabled him to make payment of the debt himself, by which he might be entitled to a proper relief; *L. 38. § 1. Mand.* Upon a similar ground of equity, the court

Cautioners have an *actio mandati* against the debtor.

¹⁷¹ *Kinloch, &c. 13th June 1822, (S. & D.)*

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The cautioner
is not bound
after his relief
is cut off.

court of session admits adjudication to pass at the suit of cautioners in conditional obligations, (because these may be long pendent), without any previous distress, under this quality, That no execution shall be used on the decree till distress; *Fount. Nov. 20. 1685, Burnett*, (DICT. p. 2121). This action of relief lies *de jure*, though the creditors should not have assigned the debt to the cautioner on payment; because the right of relief arises *ex natura rei*, from the mandate given by the debtor to the cautioner to bind for him; and it appears contrary to the nature of fidejussory obligation, that the cautioner should pay, without recourse against him at whose desire, and on whose account, he made the payment; *L. 10. § 11. Mand.*

66. In the general case, therefore, the cautioner is no longer obliged, after his relief is cut off. Thus, where the creditor suffers the obligation to prescribe, the plea of prescription saves the cautioner as well as the principal debtor; *Fount. Dec. 19. 1695, Doull*, (DICT. p. 2077); *July 12. 1735, Haliburtons*, (DICT. p. 2073)¹⁷². For the same reason, a debt cannot be fixed on a cautioner, though the creditor should offer to prove by his oath, that he heard the debtor acknowledge the debt; for as such oath cannot be received as evidence against the debtor, the cautioner, if he were made liable, would pay without relief; *Dalr. 17. (Herdman, Dec. 9. 1699, DICT. p. 2078)*. But the oath of the debtor himself, in points referred to him concerning the debt, affects the cautioner; because the accessory obligation must of necessity be subjected to the same mean of proof as the principal. Nay, the cautionary obligation ceaseth, if the creditor shall do any act which hath a tendency even to weaken the cautioner's right of relief¹⁷³; as, *first*, If he should release the debtor from prison, and so lose that chance of recovering payment which arises from the *squalor carceris*. But the cautioner continues bound, though the creditor should set the debtor at liberty, after he was apprehended by the messenger, but before his actual imprisonment; for as no creditor can be compelled by a cautioner to use diligence against the debtor, neither can he be compelled by him to consummate an incomplete diligence; *July 16. 1730, Grahams*, (DICT. p. 3390)¹⁷⁴. *2dly*, The obligation is also extinguished by the creditor's passing from any right in his person,
in

¹⁷² *Duff, 7th March 1771, DICT. p. 11059.*

¹⁷³ Much more, if he actually discharge the principal debtor; *Wallace, 13th Jan. 1825, (S. & D.)*. This seems to hold, even where the creditor, without consulting the cautioners, consents to the debtor's discharge in the course of sequestration; but under this qualification, "that where the creditor has made his demand on the cautioner, and where the cautioner either has refused, or is unable to pay the debt, and takes his own relief, the creditor may be at liberty to follow such prudent measures, as, in the circumstances of his debtor's affairs, may be advisable, without being held there by to discharge the cautioner;" 1. *Bell Comm. 275*, compared with *Whitelaw & Kirk, 20th May 1814, Fac. Coll.* Though the creditor, however, cannot with safety concur in the debtor's discharge, without carrying the cautioner along with him, he is not bound actively to interfere in preventing it. Thus, his neglecting to rank on the sequestrated estate of his debtor, even where, by so doing, his concurrence would have become indispensable towards the debtor's discharge, does not discharge the cautioner; *Anderson, &c. 25th May 1811, Fac. Coll.* Thus also, "to take a composition, without the creditor's concurrence, has, under the sequestration act, been voted confirmed, is not a discharge to the cautioner;" *Bell, ut supr.*

¹⁷⁴ *M'Millan, 21st Jan. 1729, DICT. p. 3390; 1. Bell Comm. 275.* So also a landlord does not lose his right of recourse against the cautioner for his tenant, by delay or neglecting to enforce his right of hypothec; *M'Queen, 11th June 1811, Fac. Coll.*

in farther security of the debt; *Dalr.* 167. (*Wallace*, Jan. 25. 1717, *DICT.* p. 3389); see *infr.* tit. 5. § 11 * ¹⁷⁶.

67. The cautioner however loses his relief against the debtor in the two following cases: *First*, Where his engagement is interposed to an obligation merely natural, he has not a total relief against the debtor: His relief is restricted to what he can prove is *in rem versum* of the debtor, or to the sums which have truly turned to the debtor's profit; for if the creditor hath no action against the debtor for payment, neither can the cautioner have an action against him for his relief. *2dly*, The cautioner who pays, without either a previous action in which the debtor is called, or a declaration by the debtor that the debt is still due, pays at his peril; and consequently, if the debtor had a sufficient defence against the debt, *ex gr.* of payment, or of compensation, the cautioner loses his relief; *Dec.* 19. 1632, *Maxwell*, (*DICT.* p. 2115).

68. As to the obligations among the co-cautioners, each co-cautioner was, by the Roman law, bound by a separate obligation; and consequently, a cautioner who paid the debt, though he had an *actio mandati* against the debtor, had none against his co-cautioners, whose obligations had no connection with his. The payment therefore was considered, in respect of these co-cautioners, as an entire extinction of the principal obligation; and, consequently, of all the accessory ones, *L.* 39. *De fidej.* To remedy this hardship, the cautioner, who was to make payment, might have demanded an assignation or cession from the creditor; and if he refused to assign, he might have been compelled to it by the *beneficium cedendarum actionum*, *L.* 11. *C. eod. tit.*; by which assignment, the right of action formerly competent to the creditor against the co-cautioner, was fully vested in the cautioner. But since, by our customs, the obligations of all the co-cautioners are contained in the same writing, and mutually connected with one another, a right of relief is competent *de jure* to the cautioner who pays the debt, against the other co-cautioners, without any assignment, or even without any clause of mutual relief in the obligation, unless where the cautioner appears to have renounced it. And it is because the cautioner's right of relief is good without a conveyance, that our law does not compel the creditor upon payment made by a cautioner, to assign, either against a co-cautioner, or against the principal debtor; *July* 10. 1666, *Hume*, (*DICT.* p. 2112); *Fount.* *Dec.* 31. 1697, *Panton*, (*DICT.* p. 3356); since the discharge

* See *Fac. Coll.* June 29. 1793, *Creditors of Weir*, *DICT.* p. 3403 ¹⁷⁵.

¹⁷⁵ It was here found, that a catholic creditor may, before the bankruptcy of his debtor, renounce his security over part of the estate, although such renunciation, by limiting his security to the remainder, might eventually prejudice a secondary creditor, whose security embraced only this latter part of the subject. But, as was observed on the bench, "There is no similarity between such a case, and that of a creditor who has the security of a cautioner."

¹⁷⁶ In the case of caution for the due performance of an office, such as that of a bank agent, the creditor's neglect to enforce the proper checks on the agent, and to call him to account in the ordinary regular course of business, may be sufficient to bar any claim against the cautioner; *Fac. Coll.* *Thomson, &c.* 29th January 1822, (*S. & B.*), as reversed on appeal, 9th June 1824; and see *l. Bell Comm.* 277; *Smith*, 9th June 1813; *l. Dow*, 296, per Lord Redesdale.

In the above, and other cautionary obligations of a continuing character,—the death of the cautioner does not discharge his bond; it still subsists against his representative; and this not merely for the debt as it stood at the cautioner's death, but until actual recall of the responsibility; *University of Glasgow*, 18th Nov. 1790, *DICT.* p. 2106; *Commercial Banking Co.*, 4th Feb. 1801, *cit. apud l. Bell*, 282; *Paterson*, 5th July 1808, *DICT. v. SOCIETY*, No. 4; see also *Kemp*, 17th June 1824, (*S. & D.*)

TITLE III.

In what cases the cautioner loses his relief.

Mutual relief among co-cautioners.

Book III.

Relief of a cautioner in a bond of corroboration against the cautioner in the principal bond.

discharge hath as strong effects as an assignment, except that of summary diligence; see *Fount. Dec.* 12. 1695, *Wood*, (DICT. p. 3355)*. But the creditor may be compelled to assign to the cautioner all separate securities obtained by him for the debt after its constitution; because the cautioner cannot plead upon these, without a formal conveyance; *Jan.* 10. 1665, *Lesly*, (DICT. p. 2111); *Feb.* 1735, *Garden*, (DICT. p. 3390)¹⁷⁸. From this relief competent to co-cautioners, it follows, that the creditor, if he have granted a discharge to one of several cautioners, of his part of the debt, cannot demand the whole debt from the others; because the relief competent to them for that share is cut off by the discharge, and cautioners cannot be compelled to pay, without relief against their co-cautioners.

69. Our decisions which relate to the extent of the relief competent to a cautioner in a bond of corroboration, against the cautioner in the bond corroborated, are far from being uniform. This appears to be uncontested, that where the cautioner in the first bond signs as a principal obligant in the bond of corroboration, and with him a new cautioner, the cautioner in the corroboration is understood to have bound himself at the desire of, and is consequently entitled to a total relief against, the first cautioner, who, being a principal obligant in the corroboration, must be considered as a principal debtor in respect of the last cautioner; *Falc.* i. *July* 10. 1745, *Mirrie*, (DICT. p. 2125)¹⁷⁹; see *Fac. Coll.* i. 168, (*Mackenzie*, *Nov.* 30. 1755, DICT. p. 14661)¹⁸⁰. And the law appears to be the same, where the principal debtor alone is party to the corroboration, or where the new cautioner grants a corroboration by himself, without either the principal debtor, or the cautioner in the first bond; for a corroborative security, in which the first cautioner hath no concern, ought not to make his condition better by throwing part of his cautionary engagement upon another; *Res inter alios acta, aliis nec nocet nec prodest*. The second cautioner's only view in obliging himself, is for the security of the creditor: But no intention can be presumed in him to loose any obligations lying on the first cautioner, and thereby to weaken and restrict the relief competent by the law to himself against all who were bound in the debt corroborated. This opinion is supported by two decisions observed by President Dalrymple, 38, 60, (*Clerkson*, *Dec.* 1. 1703, DICT. p. 14645; *Brock*, *Feb.* 14. 1705, DICT. p. 14648). See on the other side, *Harc.* 243, (*Ker*, *Feb.* 1685, DICT. p. 14641); *Kames*, 37, (*Murray*, *Dec.* 15. 1722, DICT. p. 14651) †¹⁸¹.

70.

* It has since been found, that the creditor is bound to grant such assignation to facilitate relief against the co-cautioner; *Fac. Coll.* *Jan.* 14. 1780, *Erskine*, DICT. p. 1386¹⁷⁷.

† *Fac. Coll.* *Nov.* 15. 1792, *Smiton*, DICT. p. 2138¹⁸¹.

¹⁷⁷ And so it was laid down as far back as the time of *Dallas*; *Styles*, vol. 1. p. 10.

¹⁷⁸ A cautioner for rent is entitled, on payment, to an assignation of the landlord's right of hypothec; *Stewart*, 31st *May* 1814, *Fac. Coll.*

¹⁷⁹ See *Kilk.*, reported DICT. *Ibid.*; also *Elchies*, v. CAUTIONER, No. 16.

¹⁸⁰ *Elchies*, v. CAUTIONER, No. 23.

¹⁸¹ The opinion delivered in the text, in opposition to these last cited authorities, has been overruled. The legal presumption now is, that the new cautioner interposed for the debtor alone, unless it can be made appear that he did so at the desire, or for the relief of the former cautioners; in which case alone, is he entitled to a total relief against them; *Murray*, *cit.* in text, affirmed on appeal, 21st *March* 1724, *Robertson's Cases*, 465; *Loch*, &c. 18th *Dec.* 1701, DICT. p. 14644; *Lockhart*, 19th *Dec.* 1738, *Elchies*, v. CAUTIONER, No. 9; *Kilkerran's Observations on Mirrie*, *supr. not.* ¹⁷⁹; *Smiton*, *not.* * *h. p.*; *Lennox*, &c. 18th *May* 1815, *Fac. Coll.*; 1. *Bell Comm.* 267, *et seq.*

Book III.

Relief of cautioners in a suspension.

Cautioners *judicio sisti, et judicatum solvi.*

tioner offered was responsible. As this was frequently the source of tedious proofs of the sufficiency of the cautioner at the time of the attestation, the attesters are, by said act of sederunt 1709, ordained to be taken bound, as cautioners for the cautioner in the suspension, and of course they are made liable *subsidiarie* for him; and the clerks of the bills, if they take an attester bound after the old form, are themselves declared to be liable as cautioners; see also act of sederunt, *Nov. 23. 1717* *.

72. A cautioner in a suspension is, for the reasons above assigned, entitled to a total relief against the cautioner in the bond suspended; *Harc. 247, (Broomhall, July 1687, Dict. p. 14643)*; and a cautioner in a second suspension, to a total relief against the cautioner in the first; *Fount. Feb. 27. 1685, Fleming, (Dict. p. 14642)*. By our constant practice, cautioners in a suspension, though they seem entitled, in the character of proper cautioners, to the benefit of discussion, may, after the process of suspension is closed in favour of the charger, be charged summarily on their bond of cautionry, without discussing the defender, who is the principal debtor; *Dabr. 105. (Strachan, June 17. 1714, Dict. p. 3583)* †¹⁸⁴.

73. In all maritime causes before the court of admiralty, where foreigners are frequently parties, the defender must give security *judicio sisti, et judicatum solvi*, to appear at all the diets of court, and pay the sums which he may be awarded to pay by the judge. A cautioner of this kind¹⁸⁵ does not get free from his engagement, though the defender die before sentence; *Kames, Rem. Dec. 47. (Dundas, Dec. 13. 1743, Dict. p. 2038)*; contrary to our former practice, *Stair, Jan. 20. 1680, Hodge, (Dict. p. 2034)*; and he continues bound, though the cause should be carried by suspension from the admiral-court to the session; *Durie, Nov. 16. 1636, Stewart, (Dict. p. 2033)*; see *Fac. Coll. iii. 87, (Robertsons, Coutts and Company, March 2. 1762, Dict. p. 2047)* ‡. Where the action pursued before the admiral is barely mercantile, which, from the reason of the thing, does not necessarily call for security *judicatum solvi*, the judge cannot demand it from the defender, and thereby make his condition worse than if the action had been brought before the judge-ordinary, but must rest contented with caution *judicio sisti*¹⁸⁶, unless there should be special circumstances, from which fraud

* By act of sederunt, *Feb. 18. 1686*, the clerk of the bills is made liable for the party's damage, as well when he refuses a cautioner who is sufficient, or holden and reputed to be sufficient, as when he receives an insufficient cautioner; but this having been found liable to misconstruction, and to lay the clerks of the bills under difficulties in the execution of their duty, it is repealed by a subsequent act of sederunt, *June 14. 1799*, which declares, "That, in time coming, the clerks of the bills shall be responsible for the due and faithful execution of their duty, whether in receiving or rejecting cautioners, according to the rules of common law and justice applicable to the circumstances of the cases that may hereafter occur."

Where a cautioner in a suspension becomes bankrupt during its discussion, the charger cannot demand new security; *Fac. Coll. Dec. 13. 1794, Govan, Dict. p. 15161*.

† Cautioners in the loosing of an arrestment are not entitled to the benefit of discussion; *Kames, Rem. Dec. 49, Dickie, Dec. 1743, Dict. p. 2110*.

‡ A later decision has been given to the same purpose, (where the process was carried to the Court of Session, in the shape of reduction); *Fac. Coll. Dec. 1. 1797, Myles, Dict. p. 2063, (1. Bell Comm. 296)*.

¹⁸⁴ Found, that the attester of the cautioner, in a process of advocacy, is not entitled to the benefit of discussion; *Henderson, 12th June 1824, (S. & D.)*

¹⁸⁵ It is otherwise with a cautioner merely *judicio sisti*; *1. Bell. Comm. 295*.

¹⁸⁶ In no other than the admiral-court, can caution even *judicio sisti* be exacted, in a civil action, unless the defender be *in meditatione fugæ*; *Smith, 12th. Feb. 1812, Fac. Coll. (No. 154.)*

Book III.

Obligations to
pay interest of
money.

Rate of interest.
Interest when
due.

junctly and severally; *Nov.* 13. 1746, *Elliot*, (not reported); *Fac. Coll.* iii. 7, (*Gordon*, *Jan.* 20. 1761, *DICT.* p. 14677)¹⁹⁰. One of several *correi debendi*, who hath paid the whole debt, is entitled, even without an assignation from the creditor, to a proportional relief against the rest; which proportion must in every case be so stated, that the loss shall fall equally on all the obligants who continue solvent; *Fount. Dec.* 22. 1710, *Craigie*, (*DICT.* p. 14649). But an obligant who upon payment gets a conveyance of the debt from the creditor, is thereby, in his right, entitled to sue any one of the co-obligants for the whole, leaving to that one his action of relief against the others; deducting nevertheless his own share, and those of the other co-obligants who are become notoriously insolvent; *Harc.* 241, (*Smeiton*, *March* 1684, *DICT.* p. 14641).

75. Obligations for sums of money are frequently accompanied with an obligation for the annual rent or interest thereof, which therefore may be accounted an accessory obligation. Interest is the recompence due by the debtor, of a sum of money to the creditor for the use of it. In the Roman law, it got the appellation of *usura*, because it was given for the use of money; but that only falls under the name of usury in our language, which is illegally taken from the debtor, in name of interest, over and above the rate allowed by law. The Jews were, by the law of Moses, forbidden to take interest from their brethren, but they might exact it from strangers; *Levit.* xxv. 36; *Deut.* xxiii. 19, 20. It was absolutely prohibited by the Canon law. There appears, however, nothing inconsistent either with law or equity, in taking a moderate profit for the use of money. On the contrary, it is become necessary, in countries so constituted as the nations of Europe are at this day. Accordingly, the stipulation for interest is authorised by the present practice of all civilized states, even of the Roman Catholic, in matters of commerce, at certain rates fixed by statute¹⁹¹.

76. Soon after the Reformation, when it became first lawful to bargain for interest in this kingdom, the legal interest was, by 1587, *c.* 52. fixed to the rate of 10 *per cent.* And it would seem, that, from the Reformation downwards to that enactment, interest was allowed to be taken without limitation as to the rate; for that statute saves the right of all prior contracts, in which an higher rate of interest was stipulated. Interest has been, since the aforesaid act, gradually reduced, till at last, by 12. *Ann. st.* 2, *c.* 16, it is brought down to the rate of 5 *per cent.*¹⁹² The obligation for interest is more restricted by our law than it was by the Roman. Interest by the Roman law was due upon all contracts *bonæ fidei ex mora debitoris*, *i. e.* from the time of the demand made on the debtor; *L.* 32. § 2. *De usur.*; and in all other cases, from *litiscontestation*; *L.* 35. *eod. tit.*: But, by the usage of Scotland, it is due only upon one of two grounds, *ex lege*, or *ex pacto*¹⁹³.

¹⁹⁰ *M^cKellar*, 7th June 1811, *Fac. Coll. supr. t.* 2. § 29, *in not.*

¹⁹¹ See 1. *Ross's Lectures*, 4. *et seq.* for an historical account of the practice of taking interest.

¹⁹² As to the effect given to foreign rates of interest in this country, *vid. supr. t.* 2, § 40, *not.*⁹⁰.

¹⁹³ The leaning of our law has daily been becoming more favourable to the allowing of interest. Mr Bell lays it down as settled, "that breach of contract, or *mora* in payment, raises this claim," *nomine damni*, 1. *Comm.* 558; and observes, "that were a rule now to be laid down, it would be more correct to reverse the proposition of the ancient law, and to say, that interest is due in all cases, where money is lent, or the use of it taken and retained; unless, from the circumstances of the case, there is ground in equity to hold, that interest was not to be demanded;" *Ibid.* 559; *infr.* § 80.—On the subject of interest, generally, see 1. *Bell Comm.* 557, *et seq.*

Book III.

3dly, Interest is due from the nature of the transaction.

capital sum, but as to the interest paid by them ; for these make truly a capital sum, in respect of the cautioner who pays them, without the repayment of which he is not fully indemnified. The registering of the bond is held to be sufficient distress for entitling the cautioner to this benefit, though no charge should have proceeded on it ; *Durie, Jan. 24. 1627, L. Waughton, (Dict. p. 519)*. Cautioners paying without distress are not entitled to the interest of the interest in the terms of the act ; but the court modifies largely of the penalty in name of damages, though seldom to the full extent of that interest ; *Gosf. July 18. 1668, Sir J. Stewart, (Dict. p. 525)*. And by our present practice, where a cautioner, paying even without distress, leads an adjudication against the debtor's estate, the interest of the interest paid by the cautioner is made part of the accumulate sum : Nor does it appear, that any decree of adjudication hath been objected to on that account. Factors named by the court of session on sequestered estates are also, in consequence of an act of sederunt, *July 31. 1690*, made liable in interest, for what rents they either have actually, or by proper diligence might have recovered, from a year after they fall due * 194.

79. Interest is also due *ex lege*, from the nature of the transaction. Thus, in a sale of lands, or of a liferent right, the purchaser is, by an act of the law itself, bound to pay interest for the price of the subject bought, from the term at which he enters into the possession, as long as he retains the price ; for the price becomes a *surrogatum*, or thing substituted in place of the subject sold ; and therefore the interest of the price must be given in consideration of the fruits of that subject. This obtains, though the price should be arrested in the purchaser's hands, after which he cannot pay safely ; *Durie, Feb. 17. 1624, L. Durie, (Dict. p. 542)* ; or though the delay of payment should be owing to the seller, who had not furnished the purchaser with a connected progress of title-deeds sufficient for his security ; *Stair, Jan. 28. 1663, L. Balnagowan, (Dict. p. 545)* ; *Fount. July 8. 1681, Gordon* 195 ; for, from whatever cause the non-payment may proceed, good conscience will not suffer the purchaser, at the same time that he enjoys the fruits of the lands, the property or liferent whereof he had bought, to enjoy also the profits or interest of the price ; *Forbes, July 23. 1707, Baillie, (Dict. p. 546)* †. But if the purchaser, unwilling to retain the price, shall, on the seller's refusal to accept of it, consign it in a proper and legal way, it stops the currency of interest, since the price is no longer in his hands. It arises from the same ground, that one who receives money belonging to another, which formerly carried interest, ought to restore not only the principal sum, but the interest ; for he must be accountable for the sum received *cum omni causa*, in as good condition as it stood in at the time of his intromission, and must therefore restore the whole intermediate interest, which, as an accessory, is to be held as part of the sum itself ; *Forbes, Dec. 22. 1710, Irving, (Dict. p. 553)* ; *Feb. 18. 1736, Erskine, (Dict. p. 554)*, stated in (folio) *Dict. i. p. 42* ; see *Fount. Jan. 25. 1699, Inglis, (Dict. p. 14115)*. This doctrine is also applicable to executors who have received sums belonging

* See *Fac. Coll. May 15. 1790, L. Elphinston, Dict. p. 4067* 194.

† *Fac. Coll. Feb. 2. 1773, Creditors of Scott, Dict. p. 14189 ; Ibid. Dec. 14. 1773, Creditors of Geils, Dict. p. 14190 ; (Infr. § 1. not. 206)*.

194 *Vid. supr. B. ii. t. 12. § 58. not. 389 ; Infr. § 81, not. 206*.

195 1. *Bell Comm. 561*.

p. 478)*; and where no term of payment is stipulated, *ex. gr.* in an open account, decree is generally awarded for the interest from the time at which the account ought to have been regularly paid, *viz.* after the elapsing of a year from the date of the last article; *Jan. 25. 1754, Grant against Lady Newmore*, (not reported)²⁰¹. *Lastly*, Where the claim of interest arises from the unjustifiable act or omission of either of the parties, which the other had it not in his power to guard against, equity will interpose for the reparation of the party hurt. From this source may be derived the obligation upon tutors to employ the *nummi pupillares* to advantage, and to account for interest to the pupil after certain periods; for the pupil's condition disables him from securing any benefit to himself by paction²⁰².

81. Interest also may be due by paction, either express or tacit. It is due by express paction, when money is, by an explicit clause in a bond or obligation, made to carry interest²⁰³. It is unlawful to accumulate interest by any previous conditional stipulation. Thus it is criminal to stipulate in a bond, that the interest, if not paid precisely as it falls due, shall be accumulated into a principal sum bearing interest; *Mack. Obs.* 364. Neither is it lawful, where the interest has run on unpaid for several years together, to state interest against the debtor upon that arrear of interest, from the day or term at which it fell due, except in the cases of a distressed cautioner, or of a denunciation²⁰⁴. On this ground, adjudications are sometimes set aside *in toto*, and sometimes restricted to a security, because the creditor had in his decree accumulated the interest, or made it to carry interest from a term prior to the date of the decree. Yet in the following cases, law supports the accumulation of interest. *First*, Where the interest has been for some time unpaid upon a bond, the creditor may take a bond for the past interest, by which it is made a principal sum carrying interest from the date of the accumulation²⁰⁵. And though this was not admitted by the Roman law, *L. 28. C. De usur.*, it contradicts no rule of law, more than a creditor does, who, after receiving the arrears of interest from his debtor, delivers them back to him upon a bond bearing interest. *2dly*, It is made lawful, by 1621, c. 28, to take bonds or other obligations, not only for the sum lent, but for the interest of it to the day of payment of the bond; by which means

* See (same case) *Kilk. voce BILL OF EXCHANGE, Moncrieff, Jan. 7. 1752, DICT. p. 481, (supr. § 77. not. †.)*

²⁰¹ Reported by *Elchies, v. ANNUALRENT, No. 14.* See to the same effect, *Henry, 15th Feb. 1801, DICT. v. ANNUALRENT, App. No. 1.*—The general rule seems well laid down by Mr Bell: “Where there is, by mercantile usage, a particular term of credit “fixed, as in the sale of commodities, interest is held to be due from the expiration “of the credit;” 1. *Comm.* 558. So found, accordingly, against underwriters, who had delayed beyond the usual period, (*viz.* four months,) to settle for a loss; *Crawford, &c. 15th May 1812, Fac. Coll.*

²⁰² Interest has sometimes, at pronouncing decree, been allowed on the expenses incurred in course of the process; but never unless under very special and peculiar circumstances. Compare *Fac. Coll. Groat, 15th May 1819, Ibid.; Warner, 29th May 1813, as explained by M'Dowall, 8th Dec. 1821, (S. & D.),—with Pearse, 2d March 1825, (S. & D.); Dunlop, 15th Nov. 1825, (Ibid.).*

²⁰³ *Moir, 17th May 1821, (S. & B.)*

²⁰⁴ 1. *Bell Comm.* 563. But see *Campbell, 3d March 1802, DICT. v. ANNUALRENT, App. No. 4.*

²⁰⁵ So found under a special compromise, even where the past interest had been accumulated on the principle of compound interest; *Hamilton, 15th Feb. 1826, (S. & D.).*

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means the whole sum contained in the obligation carries interest from the term of payment, not only the sum lent, but the intermediate interest from the date of the obligation to that term. This is daily practised by bankers, and dealers in exchange ²⁰⁶.

82. Interest may be also due from tacit or presumed paction ²⁰⁷. Thus a promise to pay the interest which is become already due, implies a general paction for interest while the debt remains unpaid; *Jan. 13. 1669, Hume*, (Dict. p. 486). Thus also, from the use of payment of interest, it is presumed that there was a paction for interest at constituting the debt; and when interest is stipulated for one term, it is presumed to be stipulated till payment; *Dirl. 408. (Carnegie, Dec. 20. 1676, Dict. p. 484)*. The obligation for interest, being merely accessory, cannot subsist without a principal debt to which the interest corresponds; and hence interest cannot in any case begin to run before the principal debt is created; *Jan. 2. 1739, Anderson*, (Dict. p. 4132), quoted in (Folio) *Dict. i. p. 293*.

83. After having described at some length the several contracts and obligations that are most known in our practice, with their distinguishing characters, it may be proper to explain some of the properties and effects that are common to all obligations.—The subject-matter of obligations consists either of things or of facts. Things exempted from commerce, either by nature, by the destination of the owner, or by statute, cannot be the subject of obligation; *vid. supr. B. 2. t. 1. § 5. et seq.* Under this class may be reckoned stolen goods, which acquire such a turpitude, or *vitium reale*, by the theft, that they fall no longer under commerce; § 2. *Inst. De usuc.* ²⁰⁸. On this ground, no contract of sale, or other obligation, entered into by a bankrupt, knowing himself to be such, can be a foundation for transferring property to the prejudice of his creditors; who therefore may recover the subject sold from the purchaser, though he should be put into the possession of it; the *dole* or fraud of the bankrupt being accounted theft; see *supr. § 8* ²⁰⁹.

84. As to facts, no person can lay himself under an obligation to perform what is naturally impossible; or to do any immoral or unlawful action, which is said to be legally impossible; because what is forbidden either by the rule of reason, or by positive institution, is, in the consideration of law, out of our power; *L. 15. De cond. inst. ** ²¹⁰. But though a *pactum super hæreditate viventis*, was by the

Interest due by tacit paction.

General properties of all obligations. Things which cannot be the subject of obligation.

Facts either naturally or legally impossible cannot be the subject of obligation.

* Action will not be sustained for payment of a wager; *Fac. Coll. Jan. 26. 1787, Bruce*; affirmed on appeal, Dict. p. 9523; *Ibid. May 15. 1799, Wordsworth*, Dict. p. 9524 ²¹⁰. By *stat. 1621, c. 14*, where any man shall win above 100 merks at cards or

²⁰⁶ As to the accumulation of interest,—in the case of a tutor and curator accounting for his intrusions, *vid. supr. B. i. t. 7. § 42, not. 220*; also *Ralston, 3d Feb. 1826, (S. & D.)*;—of a voluntary trustee, *Fac. Coll. Hall, 23d Nov. 1818*;—of an agent, mandatary, or factor, *Ibid.*; factor, *D. Queensberry's Executors, 23d May 1822, (S. & B.)*; *Ibid. La. Montgomery, 4th June 1822*; and see previous branch of the case, *4. Dow, 109; Graham, 14th Jan. 1824, (S. & D.)*; *Shirra, 25th June 1824, (Ibid.)*. The Court, in other cases, where there were very strong equitable considerations, have likewise ordered periodical accumulations; see *McNeil, 26th May 1826, Ibid.*; *Scott's & Geil's Creditors, supr. § 79. not. † &c.*

²⁰⁷ *Cunninghame, 13th Dec. 1821, (S. & B.)*

²⁰⁸ *Vid. supr. t. 1. § 10. in not. * & 2.*

²⁰⁹ As explained and modified in § 8. *not. 107.*

²¹⁰ *Vid. supr. t. 1. § 10. ad fin. et in nott.*

Book III.

Conditions ad-
jected to obli-
gations.
Impossible ones,
unfavourable
ones, and
potestative ones.

the Romans accounted *contra bonos mores*, L. 61. *De verb. obl.*; yet the usage of Scotland permits an heir to sell or make over his hope of succession during the life of his ancestor; *Durie*, July 6. 1630, *Aikenhead*, (Dict. p. 9491); *Fount.* July 29. 1708, *Rag*, (Dict. p. 9492)*. And on this footing mutual tailzies, though they are in truth a mutual purchase of one another's succession, are effectual. One who obliges himself to what is not the proper subject of obligation, is not truly bound; and consequently cannot be subjected to a penalty in default of performance; for a penalty implies a delinquency in him who incurs it. But all facts in themselves possible are the subject of obligation, though they should be beyond the power of the party bound, who ought not to have undertaken what he knew or might suspect could not be performed by him.

85. Conditions are frequently adjected to obligations. As an obligation to perform impossible facts is null, so are those granted under an impossible condition; for the adjection of a condition which cannot exist, is an evidence that the parties did not seriously intend a bargain. But deeds are construed to be granted absolutely, and the condition is held *pro non scripta*, not only in testaments and legacies, but even in grants *inter vivos*, where the granter of the obligation lies under a natural tie to execute them. Thus bonds of provision granted by a father to a child, under condition that the grantee shall travel over Britain in a day, or shall commit murder, are held to be granted *purè*, or without any condition. This last rule obtained formerly, not only in unlawful, but in unfavourable conditions; a condition, for instance, that the grantee should not marry without the consent of certain friends named in the grant; because that condition restrained the natural liberty of marriage; see *Gilm.* 60. *Gordon*, Jan. 8. 1663, (Dict. p. 2965). And even by our later practice, conditions of this sort, though they are not utterly ineffectual, have no greater force allowed them than to the judge shall appear proper; for if the friends stand off without sufficient grounds, the child is entitled to the subject provided, though she should have counteracted the condition; *Fount.* July 6. 1688, *Dalzell*, (Dict. p. 2971); *Fount.* July 20. 1688, *Pringle*, (Dict. p. 2972). Where the granter lay under no natural obligation to provide the grantee, such conditions were, by our old customs, strictly adhered to; *Stair*, Jan. 17. 1673, *Rae*, (Dict. p. 2966). But the irritancy has been since that time so softened, that if the consent be refused unreasonably, the grantee may marry without consent, and be nevertheless entitled to the provision; *March* 1682, *Ford*, (Dict. p. 2970), quoted in (*Folio*) *Dict.* i. p. 190 †²¹¹. Yet it

or dice, or by wagers upon horse-races, within the space of twenty-four hours, the surplus shall, in twenty-four hours thereafter, be consigned with the kirk-treasurer if in Edinburgh, or with the collector for the poor if in the country; "to be employed upon the poor of the parish where such winning shall happen to fall out." This statute was found to be in force; *Fac. Coll.* July 14. 1774, *Maxwell*, Dict. p. 9522; and the forfeiture belongs to the poor of the parish where the wager is laid; *Ibid.* June 15. 1776, *Kirk-Session of Dumfries*, Dict. p. 10580.

* See *Wright*, &c. against *Murray*, July 9. 1746, Dict. p. 4952.

† See *Fac. Coll.* Feb. 9. 1774, *Grahame*, Dict. p. 2979.—Where a father had granted a provision unconditionally to a daughter, and had declared in a subsequent deed that it should be forfeited by her marrying a person named; the provision was sustained

²¹¹ A condition, that the grantee should not reside with his mother, contained in a settlement by the grantee's uncle, was given effect to; *Reid*, 5th March 1813, *Fac. Coll.*

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seemed to be designed chiefly to remove the inconvenience arising in most cases from the uncertainty of the creditor's damage, by substituting a precise penal sum, which was understood to come in place of it; § 7. *Inst. De verb. obl.* By our customs also, such penalties are not unfrequent: But they have no tendency to weaken the obligation itself, being adjected purely for quickening the performance of the debtor; who therefore cannot get free by offering payment of the penalty, though the words of style, *by and attour performance*, should be omitted; *Fount. Dec. 27. 1695, Beatie*, (DICT. p. 10039); *Fac. Coll. 1. 89. (Broomfield, August 11. 1753, DICT. p. 9446)*; *St. B. 1. t. 17. § 20*²¹⁴. It must, however, be admitted on all hands, that a debtor who is bound for a fact to be performed by another, cannot, in the nature of things, be bound to precise performance; and so is liable no farther than for the conventional penalty; *Forbes, July 27. 1706, Bairdner*, (DICT. p. 10043)*. No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other, if he himself either cannot or will not perform the counter-part; for the mutual obligations are considered as conditional. Thus, in a marriage-contract, if the husband shall, before receiving the tocher, become insolvent, and thereby incapable of securing his wife in the stipulated jointure; neither he, nor even his creditors, though singular successors, can demand it, till the wife's jointure, and the other rights provided to her and her children by the marriage-articles, be secured to them; *Home, 93. (Watson, June 9. 1738, DICT. p. 9196)*; see *Fac. Coll. iii. 2. (Jan. 12. 1761, Monro, DICT. p. 9200)* †. But after the death of the wife, and of the issue, if any ever existed, the husband can effectually sue the person liable for the tocher. Nor can the defender save himself from payment, by pleading the husband's inability to perform his part: For as the obligations he lay under were entered into

* In obligations *ad factum præstandum*, where a sum is stipulated to be paid in case of non-implementation, that sum is considered as the estimated amount of the damage sustained, and is not subject to modification. Thus, where a tenant had become bound to pay a year's rent in case of his not entering at the term, the full rent, on his failure, was decreed; *Durie, July 15. 1637, Skeen*, DICT. p. 8401. The same rule has guided the judgment of the court, in cases where a tenant had agreed to pay double rent for every year he should retain possession after the expiry of his lease; *Fac. Coll. Feb. 1. 1798, Macintosh*, DICT. *voce* TACK, No 5., or had stipulated an *extra* rent for over-ploughing, &c. *July 24. 1777, Pollock, Ibid. No. 4; Fac. Coll. Feb. 24. 1802, Henderson*, DICT. p. 10054²¹⁵. See to the same purpose, judgment of the House of Lords, *Feb. 18. 1772*, in a case from Chancery, *Rolfe versus Petersons*. See also *Principles of Equity*, b. iii. c. 2.

† This has since been solemnly decided; *Fac. Coll. Jan. 29. 1781, Woollen Manufactory of Haddington*, DICT. p. 9144. See *Ibid. March 6. 1787, Buchanan, &c. DICT. p. 9201*. But if there have been no marriage-contract, the tocher cannot be retained in security of the wife's legal claims; *Dec. 1. 1795, Lee*, DICT. p. 5889²¹⁶. See also *Fac. Coll. March 8. 1794, Rob*, DICT. p. 5900.

²¹⁴ *Supr. B. ii. t. 6. § 39. not. 121*; *B. ii. t. 1. § 14*. In *Johnstone's Trustees, 19th Jan. 1819, Fac. Coll.* it was found, that the damages for non-implementation of an offer, on which the party had been preferred as purchaser at a public sale, could "in no event exceed the penalty" in the articles of roup; but by these articles, the seller had reserved a special "option to compel the purchaser to implement his bargain," which he might have enforced, and which as he did not enforce, the penalty, besides being the stipulated, became the natural, measure of the only other alternative.

²¹⁵ Where the stipulation in such cases is not an additional rent, but a proper penalty, it is, in conformity with the general rule, liable to be modified to the actual damage; *supr. B. ii. t. 6. § 39. not. 121*; see also *Fac. Coll. M'Gregor, 9th Feb. 1826, (S. & D.)*; and 1. *Bell Comm. 566*.

²¹⁶ There is an erratum in the marginal title of this decision, as given in DICT. *apud loc. cit.*, which is again copied into the Synopsis. For "the relations are entitled," read "the relations are *not* entitled," to retain.

into solely in favour of the wife and children, no other has a right to offer that defence; and after their death, his obligation is totally extinguished; *Fac. Coll.* ii. 132. (*Angus, Aug. 3. 1758, Dict. p. 4882*). The equality essential to mutual contracts requires that the mutual contractors be bound effectually to one another. If either of the parties can, by any defect in the contract, shake himself loose of the obligation, equity will not suffer the other party to be fettered; *Tinw. June 30. 1756, Hays contra D. Roxburgh.*

87. Doubtful clauses in obligations are to be interpreted against the granter: for *sibi imputet* that he did not express his mind more clearly when it was in his power; *L. 99. pr. De verb. obl.* Where the granter ranks among the lower orders of the people, and is unassisted by men of skill in drawing the obligation, the words ought to be understood in the vulgar sense; *St. B. 4. t. 42. § 21.* In a mutual contract, in which each contractor has the framing of the contract equally in his power, it would seem that dubious clauses ought to be explained, not in favour of the creditor, as some have affirmed, but of the debtor, agreeably to the rule, That obligations are not to be presumed. Where a clause in a contract obliges one of the parties to a fact which appears impossible, and where the alteration of a single word or two will bring it to a meaning which was obviously the intention of the contractors, our supreme court have presumed, that the mistake proceeded from the inaccuracy of the writer, and have therefore exercised their pretorian power of correcting the clause accordingly; *Fac. Coll.* ii. 81. *Couts and Company, (Jan. 9. 1758, Dict. p. 11549)*²¹⁷. In obligations to extend more solemn deeds, in which some clauses may possibly have been overlooked or neglected, the writer, instrumentary witnesses, or others present at the communing, are sometimes, though seldom, examined for the discovery of the truth; but in formal or solemn deeds, this is hardly to be admitted; *Stair, Jan. 5. 1667, Cheap, (Dict. p. 12312)*; except for the proof of fraud, violence, or some such unjustifiable act. Most of the rules for interpreting laws, drawn from the intention of the lawgiver, or from the preamble, or from the subject-matter of the statute, may be fitly applied to the interpretation of contracts and obligations.

88. Most of what hath been hitherto said of obligations and contracts, is applicable only to such as are onerous, where mutual engagements are entered into *hinc inde* by the several contracting parties: We may therefore, in this place, shortly explain the doctrine of gratuitous obligations, otherwise called *donations*, in so far as their nature, properties, and effects, differ from the other.—**Donation** is that obligation which arises from the mere liberality of the giver. It is sometimes constituted by writing²¹⁸; but a verbal obligation to gift moveable subjects, which is usually called a *promise*, is equally effectual with a written obligation, and may be proved against the promiser by his oath, provided the promise be made in words proper to express a present act of the will, such as, *I promise, or, I oblige myself to give, or make over in a present.*
Lord

Doubtful clauses, how to be interpreted.

Donations. Whether a promise to gift requires acceptance.

²¹⁷ When a word of a flexible meaning is used in a doubtful sense in one part of a deed, but has occurred in an antecedent part where the meaning is clear, it will be interpreted as having the same clear meaning in both places; *Dick, 14th Jan. 1812, Fac. Coll.*

²¹⁸ See an instance, *M^cQueen, 3d March 1812, Fac. Coll.*

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Lord Stair is of opinion, *B. l. t.* 10. § 4, that promises are effectual, without being accepted by the donee; because a right may be acquired by those who are absent, or ignorant that it is conferred upon them; as to which, see *Fac Coll.* ii. 156, (*Warnock, Jan. 8. 1759, Dict.* p. 7730). Grotius on the contrary, *De jur. bell. et pac. Lib. 2. c. 11. § 14*; and Puffendorf, *De jur. nat. et gent. Lib. 3. c. 6. § 15*, affirm that the most absolute promises require acceptance, because no obligation can be formed without the joint consent or concurrence of both parties. But acceptance, admitting that it is necessary towards constituting an obligation, may be reasonably presumed, without any formal act, in pure and simple donations, which imply no burden upon the donee; and Stair's opinion is agreeable to our practice. His Lordship distinguishes between promises and offers, *Ibid.* § 3; which last do not, in his opinion, infer an obligation upon the offerer till acceptance. And it must be acknowledged, *first*, That an offer, where it implies something to be done by the other party, is not binding on the offerer, till it be accepted with its limitations by him to whom the offer is made²¹⁹; and, *2dly*, That the offer, even of a pure donation, if it be made under the express condition of acceptance, requires a formal act of acceptance, in order to purify the condition: But in the general case, though a donation should be made in the form of an offer, yet if the offerer do not insist on acceptance from the other party, it can hardly be distinguished from an absolute promise, where acceptance is presumed.

The *beneficium competentiae* allowed in gratuitous obligations.

89. The Roman law indulged to every one who laid himself under a gratuitous obligation the *beneficium competentiae*, by which he might have retained as much to himself as was necessary for his subsistence, if, before fulfilling the obligation, he happened to be reduced to indigence; § 38. *Inst. De act.* Our present practice allows this privilege to fathers and grandfathers, against their children and grandchildren; *Falc. i. Feb. 21. 1745, Bontin, (Dict. p. 2895)*²²⁰; but rejects it in the case of collateral relations, even of a brother against his sister: And indeed the admitting it in favour of a parent against his child is a natural consequence of the doctrine formerly explained, *B. l. t.* 6. § 57, that children are bound to maintain their indigent parents.

Pactum donationis gives only a *jus ad rem*.

90. Though the *pactum donationis* confers on the donee a *jus ad rem*, a right of suing for performance, it gives him no right in the thing itself; the donor continues proprietor till delivery; and therefore, if, after having become bound to give it to one, he should actually deliver it to another, upon the title of a gratuitous obligation posterior to the first, the second donee, whose right was perfected by tradition, becomes proprietor. Where the donor is not himself the proprietor, all the right which the donee acquires, even after delivery, is a power or faculty of making the subject his own by prescription, if the true owner shall neglect to claim it for forty years. Nor is there an action of recourse competent to the donee against the donor, though the subject should be evicted from him by the right owner, because it is a rule founded in the nature of donation, That the donor is only liable to warrant the gift against his own future deeds. Donations, though perfected by delivery, were revocable by

Donations *a non domino*.

If donations are revocable on account of ingratitude.

²¹⁹ See *Cooper, 26th May 1825, (S. & D.)*

²²⁰ *Hardie, 1st July 1813, Fac. Coll.*—But see *Kilk. & Falc. Hogg, 30th Nov. 1749, Dict. p. 1390.*

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In what cases
alimont is pre-
sumed a dona-
tion.

tion; for no person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss.²² Yet the maintaining at bed and board of one who is come of full age is in law accounted a donation, because it is presumed that he who affords the alimony, if he does not stipulate for himself, that he shall have an allowance in name of board, makes him whom he maintains welcome to his house, either for the sake of his company, or in consideration of the service he expects from him. But if he earns his bread by the entertainment of strangers, this stronger presumption entitles him to board, even without a previous paction. *Dair.* 147. (June 23. 1715, *Forrest*, DICT. p. 11098); *Br.* 106. (*san case*, *Forrest*, DICT. p. 9713). If one affords alimony to a minor the question, Whether he be entitled to board? falls to be decided differently, according to the different conditions of him who entertains, and of the minor who is entertained. If the minor's father be alive, he who entertains the minor is presumed to do it *animo donandi*; for if he had intended to exact board, he ought to have made previous bargain with the father; but if the father be in another kingdom, or so situated that no bargain can be made with him, he who maintains the son has a just claim for board against the father. *Forbes*, Nov. 18. 1707, *Chisholm*, (DICT. p. 11428). Upon the same ground, alimont which is given to a minor who has tutors or curators, is presumed to be given *animo donandi*, if no paction hath been entered into with the guardians; *Stair*, July 21. 1665, *L. Lucquhairn*, (DICT. p. 11425); *Ibid.* June 11. 1680, *Gordon contra Leslie*, (DICT. p. 11426); but if the minor has no tutors or curators, and is possessed of a fund capable of maintaining himself, the giver of the alimony is entitled to an allowance for board; unless it be the mother or grandmother, whose natural affection for her issue may create a presumption, that she has no intention of rearing up a claim against him; especially if the minor's stock can do no more than maintain him; *Stair*, Feb. 2. 1672, *Guthrie*, (DICT. p. 10137); or if her own estate can spare the expense of the alimony without pinching her. Where a minor enjoys an estate independent of the father, law presumes not, even against the father himself, that he means to maintain his child, without an allowance for board; and by stronger reason, if such minor shall, on the father's death, be left without tutors, any person, whether kinsman or stranger, who takes him into his family, is in the general case entitled to board. Nay though a child without tutors shall be at first maintained by his mother *ex pietate*, yet if he shall afterwards, while he yet continues in his mother's house, succeed to funds sufficient for his alimony, an action lies at the mother's instance against him for board from the time that the succession opened to him; *Dirl.* 165. (*Lugton*, June 13. 1672, DICT. p. 11435); *Fount.* Nov. 17. 1697, *Gourla*, (DICT. p. 11438); but he is subject to no demand for prior alimony afforded to him while he had no fund of subsistence; *Fac. Coll.* 43. (July 12. 1757, *Home*, DICT. p. 412). One who is entitled to an allowance for the maintenance of a minor, and shall continue to maintain him in his house after he is come of age, has a claim against him for board, even without any covenant, as long as he shall remain in his family; *Stair*, Feb. 16. 1681, *Spence*, (DICT. p. 11437). An eldest son who stands indebted to his brothers or sisters for their

²² See the earlier judgments in *Garthland's Trustees*, reported 26th May 1820 *Fac. Coll.*; *Guthrie*, 7th June 1821, (S. & B.); *Mollison*, 22d Feb. 1822, (S. & D.)

their provisions, and who has maintained them in his family, is entitled to a reasonable consideration for board, which he may retain to himself out of the interest of their provisions, even though they were of perfect age when they came first to live in their brother's family; *Fac. Coll.* ii. 63. § 5. (*Gordon, Dec.* 1. 1757, *DICT.* p. 11161) ²²⁴.

93. As a necessary consequence of the presumption against donation, there arises yet a stronger, *Debitor non præsumitur donare*; for where a debtor gives money or goods, or grants bond to his creditor, the natural presumption is, that he means to get free from his obligation, and not to make a present, unless donation be expressed. Hence, though assignations of a debt, without mentioning any cause of granting, may, in the general case, as some writers affirm, be accounted donations; yet when they are thus granted by a debtor, they are presumed to be intended, either in security, or in satisfaction of the debt due by the granter; *Forbes, July* 4. 1712, *Hamilton*, (*DICT.* p. 11468); *St. B.* 1. t. 8. § 2. *. But an obligation which expresses a special cause of granting, *ex. gr.* a bond of borrowed money, which bears no relation to a former debt due by the borrower, is not presumed to be granted towards the payment of that debt, but constitutes a new and separate obligation against him, agreeably to the rule to be explained next title, *Novatio non præsumitur*. The rule *Debitor non præsumitur donare*, being only a presumption, must yield to contrary presumptions, where they are more forcible ²²⁵. Hence bonds of provision by a father to a child, especially one who is not forisfamiliated, are, from the presumption of paternal affection, understood to be granted, not in satisfaction of former bonds, but as an addition to the child's patrimony, *St. ibid* ²²⁶. But even this presumption may be overruled by circumstances, which point out an intention in the father to include the first bond in the last † ²²⁷. Thus a settlement to a daughter in a marriage-contract is presumed to be granted in satisfaction or *solutum* of all former provisions, though it should not bear the words *in satisfaction*; because provisions granted by fathers in marriage-contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife, or her father, in name of tocher; *Stair, June* 29. 1680, *Young*, (*DICT.* p. 11476); *Harc.* 221. (*Yester, Feb.* 2. 1688, *DICT.* p. 11479); *Pr. Falc.* 107. (*Robertson, Nov.* 27. 1685, *DICT.* p. 9619).

*Debitor non
præsumitur do-
nare.*



TIT.

* *Fac. Coll. Feb.* 19. 1768, *Greig*, *DICT.* p. 11454.

† *Vide Fount. Feb.* 19. 1709, *Burnet*.

²²⁴ A parish supporting a pauper is entitled to relief from every party liable to aliment him; and the most correct mode of procedure, in such cases, is, for the heritors and kirk-session to refuse the application for maintenance, either altogether or in part, according to circumstances, so as to oblige the pauper to have recourse against those relations who are able to support him; *Heritors, &c. of Ettrick*, 14th Feb. 1824.

²²⁵ *Spadin*, 14th Jan. 1819, *Fac. Coll.*; *Hardie*, 17th Jan. 1821, *Ibid.*; *Cruikshank*, 16th June 1665, *DICT.* p. 11489; *Winram*, 15th Dec. 1668, *Ibid.* p. 11493.

²²⁶ *Clark*, 16th May 1823, (*S. & D.*)

²²⁷ *Greig, supr. not. **; *E. Wemyss*, 23d Nov. 1810.

TIT. IV.

Of the Dissolution of Obligations.

Obligations dissolved, 1st, By performance.

AFTER having explained how obligations may be constituted, it falls to be considered how they may be extinguished.— They may be extinguished, *first*, by specific performance on the part of the debtor; *2dly*, by the bare consent of the creditor; *3dly*, by compensation; *4thly*, by novation; and, *lastly*, by confusion.— *First*, by specific performance. Thus an obligation for a sum of money is dissolved or extinguished by payment²²⁸. A creditor can demand full payment of his debt at once, and is not compellable to receive it by such parts as the debtor is pleased to offer; *L. 41. § 1. De usur.* But where a sum is, by the obligation itself, payable in parts, the creditor must accept of payment by the several divisions contained in the obligation; for in such case, there are truly as many different obligations as terms of payment. By the same rule, a creditor in two or more separate debts cannot refuse to accept the payment of any one of them, though the debtor should not offer to clear off the others, or even the interest due upon them; for every one who is laid under an obligation is entitled to a discharge or acquittance upon performance, in the precise terms of it.

Indefinite payment, how to be applied.

2. By the Roman law, where a debtor who owed several debts to the same creditor, made a payment, without declaring, at the time, to which of the debts he ascribed it, it behoved the creditor to apply such indefinite payment as it was to be presumed the debtor would have done, who had it in his power to make the application, if he had declared his intention when the payment was made; *L. 1. De solut.*; and consequently indefinite payments were, by that law, applied *in duriorem sortem*, or, as it is sometimes expressed, *in graviolem causam*, to that debt which bound the debtor fastest, or to which a penalty was adjoined; *L. 3. 4. 5. eod. tit.* But the usage of Scotland has, in this point, shewed a greater regard than the Roman to the interest of the creditor. Where indeed one of the debts carries a high penal certification against the debtor; where, for instance, adjudication is led upon it which may carry off the debtor's whole estate upon failure of payment within the legal; the payment is applied towards the extinction of that debt, to save the debtor from so rigorous a forfeiture: But the application, where it hath no such penal consequence, is made in favour of the creditor²²⁹. Thus, where one debt is secured by inhibition, the other not, the payment is applied to the debt not secured, though such application may hurt the other creditors of the common debtor; *Jan. 1744, Paterson*, (not reported), see *Home, 133. (Forbes, Nov. 9. 1739, Dict. p. 6813)*. Thus also the creditor

²²⁸ Payment of money, without proof of a previous obligation, will be presumed to have been made as a loan, and not in extinction of debt; *Ross, 24th Nov. 1809, Fac. Coll.*

²²⁹ *Macleod, 26th Jan. 1821, (S. & B.)*; *Cochrane and Co., 22d June 1821, Ibid.*; *Houston's Executors, 25th June 1824, (S. & D.)*; *Bannatyne's Representatives, 26th Feb. 1825, (Ibid.)*.

Book III.

Payments between landlords and tenants, or superiors and vassals.

Presumed payment.

Payment by a third person is presumed to be made with the debtor's money.

guish the obligation ; for he ought to have consigned the debt in the hands of some public officer, as a magistrate, or the keeper of the prison, if they were solvent. The same is the case with payments made to messengers executing poindings ; for though a messenger is considered as a judge in the execution of poindings, it is not thence presumed, that a mandate had been given him by the user of the diligence to receive payment.

4. To prevent collusion between landlords and tenants to the prejudice of third parties, payment of rent made by a tenant to his landlord before the term of payment, is deemed collusive in a question with the landlord's creditor, or his singular successor, and so excludes *bona fides*; *Durie*, June 12. 1629, *Gray*, (Dict. p. 10023); *Stair*, Feb. 5. 1667, *La. Traquair*, (Dict. p. 10024); *Home*, 16. (*York-buildings Co. Feb. 17. 1736*, Dict. p. 1784). Nor will such payment avail the tenant in whose hands the landlord's creditor had arrested the current rents before the term, even though the arrestment was used after he had made the payment. The same doctrine holds in payments made by a vassal to his superior before the term ; but in common debts, where the creditor and debtor are not connected, the debtor may safely pay, even before the term of payment.

5. Obligations may be dissolved, not only by actual, but by presumed payment²³². Payment is presumed, if the written voucher which constitutes the obligation be found, either in the hands of the proper debtor, or even of the cautioner ; *Fount. Feb. 5. 1703*, *Gordon*, (Dict. p. 11408), according to the rule, *Chirographum apud debitorem repertum præsumitur solutum*. This presumption holds, not only where the ground of debt is personal, *ex. gr.* a bill, or a moveable bond ; but in heritable bonds even when they are perfected by seisin, *Dalr. 92.* (*Rollo against Simpson, Jan. 26. 1710*, Dict. p. 11411). But it may be elided by positive evidence, that the ground of debt came into the hands of the debtor otherwise than by the creditor's consent. Consignation of a debt by the debtor, where the creditor refuses without just ground to receive payment, if used in the hands even of a private person who is solvent, not only stops the currency of interest which was running against the debtor ; *Feb. 1. 1738, Robertson*, (Dict. p. 3077), observed in (*Folio Dict. i. p. 199* ; but is, in the judgment of law, equivalent to payment ; *vid. supr. B. 2. t. 8. § 19 ; B. 3. t. 1. § 31.*

6. Payment by a third person is, *in dubio*, presumed to be made with the debtor's money. Thus, if a discharge or receipt bear payment by one person in the name of another, it is presumed that the sum was paid by him in whose name payment was made, and that the maker of the payment was no more than an interposed person ; *Stair, Jan. 20. 1672, Trotter*, (Dict. p. 11526) ; *Fount. June 12. 1711, Donaldson*, (Dict. p. 11511)²³³. Though the acquittance expressly recite, that payment was made by one of several obligants ; yet if the payer afterwards cancel the bond, he is presumed either to have

²³² The presumptive evidence, in order to be conclusive, must be "utterly irreconcilable with the idea that the debt is still due." On this principle, the presumption was repelled in *Graham, &c. 18th Dec. 1823, (S. & D.)*

²³³ Where a bill or promissory-note is marked in general terms as paid, without specifying by whom, the payment is presumed to have been made with the funds of the proper debtor, though the document may be in other hands ; *Fac. Coll. Webster, 15th Jan. 1819 ; Ibid. Williamson, 9th Dec. 1825, (S. & D.)*

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extent, whether conveyances, discharges, bonds of arbitration, &c. the general clause is not to be extended to subjects or claims of a different kind, or of a greater importance, than any of the particulars mentioned in the special²³⁵; for if the granter had not intended to confine himself to subjects of the same species, or of as small importance as those which appear from the deed to have been under his view, it is presumed he would have expressed his whole intention as clearly as he has done that special part of it; *St. B. 1. t. 18. § 2 **. Thus, though a general clause subjoined to the discharge of a special debt, may, without a stretch, be extended to debts for greater sums than those that are mentioned, provided they be of the same kind; if, for instance, they be both personal debts for sums of money; *Forbes, June 29. 1705, Chapel*, (Dict. p. 5027); yet it will not comprehend an heritable bond bearing a clause of infestment²³⁶. A discharge, or other deed, where it is entirely general, without mentioning any special debt or claim, though it receives a more liberal interpretation than the first kind²³⁷, and is consequently more effectual to the grantee, is not to be extended to debts of an uncommon nature, which are not presumed to have fallen under the grantee's²³⁸ notice; *ex. gr.* to obligations of relief from cautionary engagements not yet paid to the creditor; *Stair, Jan. 23. 1678, Campbell*, (Dict. p. 5035); nor to obligations of warrandice not yet incurred, nor to those for performing special facts. Hence a general discharge of all debts and claims does not include an obligation to purchase an apprising; *Stair, Nov. 19. 1680, Dalgarno*, (Dict. p. 5030). Nor does it comprehend such debts due by the grantee as the granter had assigned to another previously to the discharge; which obtains, though the assignment had not been completed by intimation; for no intention can be presumed in the granter to discharge a debt which he had no longer any title to demand, or make over to another; *Stair, Feb. 3. 1671, Blair*, (Dict. p. 940); *Feb. 14. 1736, Lady Logan*, (Dict. p. 5041), cited in (Folio) *Dict. i. p. 343*.

Three consecutive discharges of termly duties.

10. In all yearly or termly payments, as of rent, feu-duties, interest of money, salaries, pensions, &c. from three consecutive discharges granted by the creditor, of the yearly or termly duties, it is presumed that all preceding duties had been paid. In the rent or feu-duty of lands, part of which is payable in grain, this presumption hath no place, if the discharges be not granted for full years, because the victual-rent is deliverable only once in the year; but where the whole is silver-rent, and paid at two terms, or by two moieties, the presumption is inferred from three successive discharges for three termly duties. In like manner, where a salary or the interest of money is payable at two terms in the year, three discharges for three consecutive half-years, infer the payment of all precedings. This presumption arises from reiterating the discharges thrice successively; and so does not hold in the case of two discharges, though they should contain the duties of three or more years or terms. Mackenzie, § 4. *h. t.*, considers the creditor's

* *Fac. Coll. Dec. 13. 1797, Logan*, Dict. p. 11379.

²³⁵ See *Ewen, 15th Jan. 1824, (S. & D.)*

²³⁶ See to same effect, with reference to a general clause of conveyance in a deed of settlement, *Brown, 3d Dec. 1805, Dict.*; and compare *Glover, 7th Dec. 1810, Fac. Coll.*

²³⁷ *Harris, 2d March 1822, (S. & B.)*

²³⁸ So, in all the former editions;—should be “granter's.”

tor's heir in this question as the same person with his ancestor ; but a later judgment, *Dalr.* 21. (*Gray against Reid*, Dec. 8. 1699, *DICT.* p. 11399), appears better founded, that the presumption is not inferred from two discharges by the father, and the third by his eldest son, unless where it appears that the son knew of the two discharges that had been granted by his father. Three consecutive discharges by the creditor's administrator, *ex. gr.* a tutor or steward, do not infer the payment of all preceding rents indiscriminately, but only of such as were incurred during the granter's administration ; *Feb.* 1682, *E. Marishal*, (*DICT.* p. 11399), cited in (*Folio*) *Dict.* ii. p. 137. The arrears of rent, or of interest, constituted by a bond granted by the debtor, are deemed to be still subsisting, though the creditor should afterwards grant three consecutive discharges for three posterior terms or years ; because these discharges cannot, by any just interpretation, include such arrears as the debtor had formerly acknowledged to be due by a proper written voucher. And, on this ground, a decree recovered against the debtor for the interest of certain past years, is sufficient to support a demand for that interest, though the debtor should produce consecutive discharges, to any number, for the interest of posterior years ; because such arrears of interest, rent, feu-duty, &c. after being constituted by bond or decree, from that period ceased to be resting as annual prestations, but are to be considered as a common debt. But the defence founded upon three consecutive discharges, may, under special circumstances, be sustained, to the effect of cutting off the pursuer's claim for past arrears, even where the debtor has acknowledged them to be due by separate written vouchers ; *Fac. Coll.* ii. 11. (*Grant*, *Feb.* 11. 1757, *DICT.* p. 11402). This method of extinction, being founded entirely on presumption, may be elided by the debtor's oath ; *Stair*, *Feb.* 18. 1669, *Cockburn*, (*DICT.* p. 11398).

11. Compensation, which is defined the contribution of debit and credit among themselves, hath been introduced where the same persons were both debtor and creditor to one another, to avoid the unnecessary circuit of two mutual payments. It has the effect to extinguish both obligations, if the sums due *hinc inde* be equal ; and if they are not equal, still both obligations are extinguished, in so far as there is a concurrence of debit and credit, or, in other words, in so far as the two parties were mutually debtor and creditor to each other ; so that he who owed the greater sum is afterwards debtor in no more than the balance or difference between the two debts.

12. Compensation, because its doctrine arises from the nature of the thing, had, by the Roman law, its effect *ipso jure* ; *L. ult. C. pr. De compens.* ; and consequently, so soon as sufficient evidence of the concurrence was laid before the judge, it had its full operation backwards to the period of concurrence, even though he who pleaded it had been willing to pass from some of its legal effects ; for whatever operates *ipso jure* has effect by the necessity of the law, without regard to the intendment of parties : Yet even by the Roman law, it behoved the party entitled to it to plead it ; and the judges, after hearing both sides, to pronounce sentence, sustaining the ground of compensation, before any of its effects could appear. By the ancient law of Scotland, which rejected compensation, no debtor who was sued upon a debt could have defended himself on a debt due by the pursuer to him to the same extent, had it been ever so liquid, but it behoved him to insist in a separate action for recovering

Extinction,
sdly, By com-
pensation.

Whether it operates
ipso jure.

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recovering it, *Balf. p. 349. c. 32*, till it was enacted by 15 c. 141, that compensation *de liquido in liquidum*, should be received by way of exception as well as of action. Lord Stair's doctrine, *B. l. t. 18. § 6*, that compensation operates with us since that statute, as it did by the Roman law, *ipso jure*, is not to be understood in its full extent: For several effects which are by customs given to it, begin only from its being pleaded in judgment without having any retrospect to the date of the concurrence; so that it is considered, in regard to these particulars, as the operation of the judge rather than of the law. Thus compensation is not admitted on a debt extinguished by prescription at the time of pleading it, though it was not prescribed at the period of concurrence. *Kames, 17. (Carmichael, against Carmichael, July 1719, Dict. p. 2677) **; even where the debt pleaded as compensation was set off, not by the long prescription, but by one of the shorter; *T. Aug. 1. 1753, Baillie †*; whereas if compensation had operated backwards to that period, the mutual grounds of credit must have been extinguished the mutual obligations. Thus also, one who has several debts in his person on which compensation may be pleaded may plead it upon such of the debts as he judges most for his interest, viz. on those which are the least secured, even though the first concurrence was made by the others; *Nov. 15. 1738, Sir Maxwell, (Dict. p. 2550)*. In like manner, the party who pleads compensation in a suit, may pass from it at any time before sentence; *Stair, July 14. 1664, L. Balmerino, (Dict. p. 2681)*; see *Fac. Coll. i. 85. (Haldane, July 13. 1753, Dict. p. 2690)*. It is nevertheless true, that compensation, when admitted by our judges, extinguisheth the mutual obligations from the time of concurrence downwards; and, consequently, stops the currency of interest on both sides from that period, in as far as there is a concurrence; an extinguished obligation can carry no interest. This last effect of compensation is founded on the highest equity, which will not suffer a debtor who hath paid to his creditor a sum equivalent to the debt, to continue still liable for the interest of it, merely because he hath taken an obligation for the sum paid, without a claim of interest, in place of a bond, or discharge of his debt.

It is requisite in compensation, that each of the parties be debtor and creditor in his own right;

13. In order to found compensation, it is necessary, *first*, That each of the two parties be both debtor and creditor in his own right ²³⁹: Where, therefore, a tutor owes a sum *proprio nomine*

* See *Fac. Coll. Aug. 6. 1773, Clark, Dict. p. 2664*; *Ibid. June 12. 1799, Gray, Dict. p. 11122, (2. Bell Comm. 134.)*

† Reported also by *Lord Kames, Dict. p. 2680*.

²³⁹ *2. Bell Comm. 136*; *Pearson, 10th March 1814, Fac. Coll.*; *Campbell, 13th Dec. 1823, (S. & D.)*; *M'Leay, 9th July 1825, (Ibid.)*; *Hay, 22d Dec. 1825, Fac. C.*

Upon this principle is founded the general rule, that compensation has no place between proper company debts, and the private debts of the partners. But, 1. It is inconsistent with such a rule, (all parties being solvent, and the rights of third parties not interfering, *vid. infr. § 18.*) that the company,—when sued at the instance of a company creditor,—should, under an arrangement with its partner, be entitled to plead compensation, on a private debt due to the latter by the company creditor; for as every partner is entitled to pay the company debts, it is only one mode of doing so, when he discharges, or enables his company to discharge, his own debt against the company creditor; and, besides, the partner being entitled to assign his private debt, the arrangement between him and his company, as implying such an assignation, has the same effect in bearing out the plea of set-off. 2. Neither is it inconsistent with the general rule, (all parties being still supposed solvent, and the rights of third parties not interfering,) that where the partner of a company is sued in his own person, as liable for a company debt, he should be entitled to plead compensation, on a private debt

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 And at the same
 time.

The mutual
 debts must be
 of the same
 quality.

14. *2dly*, Each of the two parties in compensation must be both debtor and creditor to one another at the same time ²⁴¹. Hence, if *Seius* were debtor to *Titius* in a sum which he assigned to another, and if, after the conveyance was intimated, *Seius* should become creditor to the same *Titius*, *Seius* cannot plead compensation against the assignee upon the debt due by *Titius* the cedent to him; because there was never a concurrence of debit and credit between the same persons; for before *Seius* became creditor to *Titius*, he had ceased to be his debtor, by the conveyance of the debt to a third person; *Dirl.* 3. (*Ferguson*, Dec. 12. 1665, Dict. p. 1652). But if the debt due by *Titius* to *Seius* had been truly contracted before intimating the conveyance of the debt due by *Seius* to him, though perhaps not constituted by decree till afterwards, compensation would be competent to *Seius* against the assignee, though he were an onerous one; *Durie*, Jan. 11. 1627, *Paton*, (Dict. p. 2601) ²⁴².

15. Compensation takes no place in debts which are not of the same species and quality; for if they be not commensurable of their own nature, the one cannot be precisely balanced by the other ²⁴³. Generally compensation is understood of one sum of money with another; and though it may be also receivable in quantities of corns, or other fungibles, provided the fungibles be of the same good quality, *ex. gr.* two quantities of wheat, both of equally good growths; yet a sum of money cannot be compensated with a quantity of corns, or any other thing of a different kind or species from itself; because till the precise prices are fixed, at which the grain is to be converted into money, the two debts are incommensurable. But in this case some short time would probably be indulged to him who pleads the compensation, for ascertaining the conversions or liquidations, in order to make his debt a proper subject of compensation. On the same ground, compensation could not be admitted between moveable sums and those secured by wadset, or by a right of annualrent after the old form, bearing a clause of requisition; for a sum, which by the conception of the right securing it, cannot be exacted without a previous notorial requisition, is not truly due till it be so required, since, till then, the estate burdened is debtor more properly than the owner of it; *Stair* Nov. 12. 1675, *Home*, (Dict. p. 2633); but after requisition, the granter becomes debtor in a sum of money; by which both debts become money-debts, and so capable of compensating one another. An heritable bond after the new form, containing an obligation on the granter to pay without requisition, may doubtless compensate a moveable bond; for though the one sum be heritably secured, the other not, yet both parties are both debtor and creditor to each other in a sum of money; and no difference in the security of the two creditors makes any in the species or quality of the debts; *Stair*, June 18. 1675, *L. Leyes*, (Dict. p. 286). If compe-
 sati

²⁴¹ "But this is a rule which holds strictly, only while the parties are solvent. If one of them become bankrupt, the other may defend himself against a present demand, by setting off a debt due after the bankruptcy;" 2. *Bell Comm.* 133.

²⁴² See *Wallace*, 18th May 1821, (S. & B.).

²⁴³ "But when one of the parties is bankrupt, and the maxim applies, "*in locum facti impræstabilis subest damnum et interesse*," it would seem that compensation would be pleadable by the debtor to a bankrupt estate, on the claim for a pecuniary indemnification on account of failure to deliver goods;" 2. *Bell Comm.* 133.

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implied in deposite, that compensation cannot be received against the depositor; *supr. t. 1. § 27**. Neither could it be pleaded in the case of blank bonds, in which the debtor, by granting the bond blank in the creditor's name, virtually renounced the benefit of compensation against him from whom he received the money, at least where the compensation was founded on debts which had been contracted before the date of the bond; *Harc. 265. (Grant, Jan. 1681, Dict. p. 1653)*. Neither can it be pleaded against the possessor of a note payable to the bearer by the debtor, upon a debt due to him by any of the former possessors of it. This doctrine is, for the encouragement of commerce, extended by all trading nations to indorsed bills, which the debtors cannot compensate with any debt due to them by the indorsers; see *Fac. Coll. iii. 79. (Feb. 24. 1762, Scougal against Ker, Dict. p. 1641)*. Neither, lastly, can small blanch duties due by a vassal be compensated with a money-debt due to him by the superior; because these duties are payable barely as an acknowledgment of homage, without any consideration had of their value. But it is thought this would not hold, notwithstanding the decision, *Stair, July 26. 1678, L. Powry, (Dict. p. 2685)*, in the case of feu-holdings; for feu-charters are granted with a special view to bring an annual profit to the granter by the yearly feu-duty, which, in more ancient times, was frequently equal in value to the full rent of the lands; and it would be the height of iniquity and oppression, to forfeit the vassal upon an irritancy incurred through the fault or fraud of the superior, who, by detaining from the vassal his just debt, disabled him from performing his part of the feudal contract, and so made that forfeiture necessary.

Where debts are acquired from a bad intention, or the compensation would void the diligence of third parties.

18. Where the concurrence is made by the debtor's acquiring a debt due to his creditor, compensation is rejected, either where a bad intention is presumed against the acquirer, or where the compensation, if admitted, would evacuate the legal diligence of third parties²⁴⁵. Thus a factor who is sued by his constituent for intrusions, cannot offer compensation upon a debt due by that constituent, and acquired by the factor after receiving the rents sued for; *Stair, Nov. 9. 1672, Pearson, (Dict. p. 2625)*; nor is it pleadable by the debtor to a person deceased, who hath, after his creditor's death, acquired the right of a debt due by him, in a question with the other creditors of the deceased; *Stair, Feb. 8. 1662, Crawford, (Dict. p. 2613)*²⁴⁶.

It is only pleadable before sentence. Re-compensation.

19. By the foresaid act 1592, c. 141, compensation is only pleadable by way of exception before sentence; so that a debtor who might have defended himself by a ground of compensation, but neglected to plead it pending the suit, cannot plead it afterwards by way of suspension or reduction of the creditor's decree; *Fount. Dec. 5. 1710, Naesmith, (Dict. p. 2645)*; *Home, 216. (Paterson, Dec. 9. 1742, Dict. p. 2646)*. But if it has been pleaded by the debtor in the course of the process, and repelled by the judge, it may be received, either by suspension or by reduction. Even decrees in absence are by our practice considered as decrees in the sense of this statute; and consequently have the effect to cut off the

* *Fac. Coll. Dec. 11. 1781, Campbell, Dict. p. 2665.*

²⁴⁵ *Vid. supr. § 13. not. 237.*

²⁴⁶ A debt existing prior to the debtor's bankruptcy cannot be pleaded in compensation against a claim by the bankrupt debtor's trustee, arising subsequently to the bankruptcy; *Mill, &c. 22d Nov. 1825, (S. & D.)*.

stowed either their money or their labour upon the subject sought to be retained; and it commonly arises in that case, from the mutual obligations which naturally lie upon the contractor. Thus, a writer or agent is entitled to the retention of the writings in his custody belonging to his client, till his bill of accounts be paid ²⁵⁰; a tradesman may retain the piece of work which he was employed to make till payment of the expense he has disbursed on it, or of the price of the workmanship ^{*}; a factor or steward of a land estate ²⁵² may retain the balance of his intromissions ²⁵³, till he recover the reasonable disbursements which he has laid out on the subject of his factory †. Nay, this kind of retention is sometimes extended to debts due to him who claims it, which do not flow from the nature of the obligation by which he is debtor. Thus, a factor may, in the case last stated, retain his balance, not only till he recover payment of his expenses, (for in so far the right arises from the nature of the factory), but also till he be relieved of the separate engagements he hath entered into on his constituent's account; which retention

^{*} But in such cases retention cannot be pleaded in security of any extraneous claim; *Fac. Coll. Jan. 27. 1791, Cred. of Harper, Dict. p. 2666* ²⁵¹.

† See *July 5. 1749, Cred. of Lidderdale*, reported by *Kilk. and Falc. Dict. p. 6248*. See *Clerk Home, 82. Sutherland, Jan. 31. 1738, Dict. p. 6247*, and *Kilk. p. 273, Feb. 1744, A. against B. Dict. p. 6228*; also *Kilk. No. 2. v. Hypothec, Stewart, Jan. 29. 1742, Dict. p. 6248*. The clerks of session have right to retain the papers of a process till satisfied of their fees, *Reg. 1696, § 5* ²⁵⁴. See also as to the clerk of the bills, *Act of Sed. July 30. 1663*.

²⁵⁰ 2. *Bell Comm. 117. et seq.* The agent is entitled to refuse even exhibition of the writings, *ad modum probationis*, when demanded under a diligence at his client's instance; *Finlay, 23d Jan. 1773, Dict. p. 6250*; but not when they are called for by a third party, not for the client's benefit; *E. Sutherland, not. † h. p.*;—neither, where the client has become bankrupt, can the agent withhold delivery from the trustee on his sequestrated estate, the latter being “vested with a right to the possession of all the property and papers belonging to the estate;” and the agent being entitled only to a reservation of his right of preference against the estate; *Johnstone, 23d Jan. 1823, (S. & D.)*; *Paul, 2d Feb. 1826, (Ibid.)*. This lien subsists, notwithstanding the agent holds a bill or bond for the amount of his account; *Fac. Coll. Linning, 27th June 1821, (S. & B.)*; *Ibid. Skinner, 31st May 1823, (S. & D.)*. Where it affects title-deeds, it is preferable to an heritable debt, completed by infestment before the agent's account was incurred; *Fac. Coll. Campbell, 1st Feb. 1817*; *Ibid. Campbell & Clason, 15th Nov. 1822, (S. & D.)*; *Cameron, 25th June 1824, (Ibid.)*. But it does not cover cash advances for the client's behoof, beyond that ordinary professional expenditure which strictly falls within the province of an agent; *Skinner, supr. ; Creditors of Lidderdale, and Stewart, not. † h. p.*; *Grant, 28th Feb. 1801, Dict. v. Hypothec, App. No. 1*; *Moncreiff, 1st Dec. 1799, cit. apud 2. Bell Comm. 117*. Neither does it extend to professional business done for behoof of a company, of which the client was a partner, although the company was dissolved, and the client had undertaken its obligations; *Skinner, supr.*

²⁵¹ On this principle, a banker, to whom bills are indorsed, for the special purpose of negotiation, cannot retain them in security of his general balance; *Matheson, 12th June 1822, (S. & B.)*; *Haig, 20th June 1823, (S. & D.)*; and see 2. *Bell Comm. 123, et seq.*; *Ibid. 208*. The rule, indeed, applies to all parties holding their debtor's property by a temporary or limited title of possession, and under a strictly specific appropriation; *M'Kenzie, 2d July 1824, (S. & D.)*; and while it is thus the basis of our law, as to all special and particular liens, (*c. g.* the lien for the expense of carriage of goods, *(S. & D.)*, *Stevensons, 18th Nov. 1824*;) it keeps those general liens, which the law has come to recognise, within their own peculiar and appropriate limits. On the subjects—of lien, or the right of retention in general, see 2. *Bell Comm. 97. et seq.*;—of special liens, *Ibid. 103. et seq.*;—of general liens, *Ibid. 110. et seq.*

²⁵² The rule extends to factors generally; see 2. *Bell Comm. 119. et seq.*

²⁵³ And generally the goods and other property belonging to his constituent, not placed with him under a specific appropriation; 2. *Bell Comm. 120*; *York-buildings Co., 6th July 1805, Dict. v. Hypothec, App. No. 2*.

²⁵⁴ The clerk of the commissioner, to whom it had been remitted to take the pursuer's oath in a *cessio*, has no such right; *Macdonald, 27th Feb. 1813, Fac. Coll.*

tion will be effectual against all diligences that may be used by the constituent's creditors to attach the balance due by the factor to the common debtor; *Nov. 1729, Stark*, (not reported)*.

22. Obligations are also dissolved by novation or innovation, which, in the strict acceptation of the word, denotes the change of one obligation to another, in such manner that both the debtor and creditor continue the same. The first obligation being thus extinguished by novation, the cautioners in it must necessarily get free; and all the penalties or damage arising from it are understood to be purged or rather discharged; so that the debtor remains bound only by the new obligation. Delegation, which may be accounted a species of novation, is the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged; *ex. gr.* if the debtor in a bond should substitute a third person, who becomes obliged in his place to the creditor, and who is called in the Roman law *expromissor*, this requires not only the consent of the expromissor, who is to undertake the debt, but of the creditor: For no debtor can get quit of his obligation without the creditor's consent, except by actual performance; and no creditor can be compelled to accept of one debtor for another against his will. Neither novation nor delegation is to be presumed: For a creditor who has once acquired a right, ought not to lose it by implication; and consequently the new obligation is, *in dubio*, to be accounted merely corroborative of the old; § 3. *Inst. Quib. mod. tol. obl.*; *L. 8. C. De novat.* †²⁵⁵. Hence, though the debtor in a special sum contained in a bond should assign to his creditor a bond granted to him by a third party for the like sum, the first debtor's obligation is not extinguished by the assignment, unless the creditor has clearly discovered his intention to set him free. But where a second obligation expressly bears to be granted in satisfaction of the first, these words must necessarily be explained into novation, or a discharge of that first; *Durie, Dec. 6. 1632, Chisholm*, (Dict. p. 16472). Yet put the case, that lands are sold by a conveyance, purporting that satisfaction, or even payment of the price, is made by the purchaser, and that a bond is nevertheless granted by him to the seller, of even date with the deed of conveyance, for a determinate sum as the price of these lands, the conveyance and bond are accounted part of one and the same transaction, notwithstanding the discharge of the price; more weight being laid, under these circumstances, on what was *actum et tractatum* between the parties, than on the *forma verborum* made use of in the conveyance; see *Durie, Nov. 14. 1628, Cumin*, (Dict. p. 9147).

23. Lastly, Obligations are dissolved *confusione*, where the same person becomes both debtor and creditor in them, and so is not only vested *activè* with the right of the debt, but *passivè* subjected to the payment of it; *L. 21. § 1. De liber. leg.*; for no person can be creditor or debtor to himself. This manner of extinction by the

succession

* See *Kames, Rem. Decis. No. 54. Murray, June 19. 1744*, Dict. p. 2626; *Fac. Coll. Nov. 26. 1793, Cred. of Brough*, Dict. p. 2585, (*supr. not.* ²⁴⁹.)

† *Fac. Coll. Feb. 25. 1785, Rutherford*, Dict. p. 7069; *Ibid. July 24. 1785, Douglas, Heron and Company*, Dict. p. 7070.

²⁵⁵ *McPhail, 13th June 1821, (S. & B.)*; *Linning, Skinner, supr. not.* ²⁵⁰; *Mowbray, 17th June 1824, (S. & D.)*; *Edgar, &c. 8th Feb. 1825, (Ibid.)*.

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Novation or innovation, and delegation.

Confusion.

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In extinction by confusion, we must distinguish between principal and accessory obligations.

In this point the Roman law differs from ours.

succession of the creditor to the debtor, or of the debtor to the creditor, or of a stranger to both, is to be so understood as to comprehend, not only universal succession, or proper representation, but succession by singular title; *ex. gr.* the succession of the debtor to the creditor by an assignation *inter vivos*. Extinction by *confusio* is total, where the successor is sole heir and executor of the deceased; but where the succession is divided among several co-heiresses, not any one of them can be said to represent the deceased fully; and consequently, if one of the co-heiresses were either debtor or creditor to the deceased, the obligation is extinguished no farther than her representation goes: If she is, for example, one of three co-heiresses, the obligation is dissolved *confusione* as to a third; and it subsists *quoad reliquum*, and will accordingly afford action either to or against the other two co-heiresses.

24. In this point we must distinguish between principal and accessory obligations. If the principal debtor, who is entitled to no relief from the other obligants, comes in the right of the creditor, the principal obligation must be extinguished, because one cannot lie under an obligation to himself; and consequently the accessory obligation must also be dissolved, which cannot be figured to exist without a principal. But if he on whom the right of credit devolves, whether by succession to the deceased creditor, or by an assignation *inter vivos*, be only liable as cautioner, the accessory obligation is indeed extinguished, because the debtor in that obligation becomes also creditor in it; but the principal obligation is not extinguished, because in that the debtor and the creditor continue to be different persons; and therefore the principal debtor is liable to the cautioner, who succeeds in the right of the original creditor as fully as he was before to the original creditor himself. On the same ground, though it be true that an heir is liable *in suo ordine* for his ancestor's moveable debts, he is only liable *subsidiarie*, in case the moveable estate shall fall short of paying them off; and therefore, if a creditor in a moveable debt shall succeed as heir to the debtor, or shall make it over to the debtor's heir upon a singular title, the debt is not extinguished *confusione*, but still subsists in favour of the heir against the executor, who is properly and primarily liable in that sort of debts; *Had. July 20. 1610, Johnston* (Dict. p. 3035). This doctrine, and the reason of it, may be applied *vice versa* to an executor acquiring right to an heritable debt.

25. When the principal debtor succeeded as heir to the cautioner or the cautioner to him, the accessory obligation was quite extinguished by the Roman law; because it was deemed incongruous that a debtor should be bound by two separate obligations for the same debt; *L. 21. § 2. De fidej. ; L. 95. § 3. De solut.* Which doctrine, by a mere subtilty of law, but contrary to reason and equity, deprived the creditor of the fidejussory security which he had stipulated for himself, without any fact of his own; for the property of the cautioner, whose obligation was, according to that rule, extinguished by his death, could be no longer affected at the suit of the creditor by any diligence used against his heir. But by the usage of Scotland, both the principal obligation and the accessory subsist in the case above stated; so that the creditor may use diligence against the estate of the deceased cautioner, who is still accounted the proper debtor in regard of the creditor, upon which diligence he will be preferred before the creditors of the heir, according to the rules to be afterwards explained, *t. 8. § 101.*

TIT. V.

Of Assignations.

AFTER having considered how obligations are constituted, and how they are dissolved, the natural order leads to explain how they may be transmitted from one to another *inter vivos*, without extinction. It has been explained, under *B. 2. tit. 7.* that heritable rights when they are made properly feudal by infeftment, are transmitted by a deed of conveyance containing procuratory of resignation and precept of seisin, in the form sometimes of a charter, and sometimes of a disposition : But heritable rights, before they become feudal by seisin, cannot, strictly speaking, be transferred by a deed of that sort ; because the granter, who is vested with a right barely personal, is not himself proprietor in the true legal sense, and so cannot effectually grant either procuratory for resigning the lands, or warrant for taking seisin upon them ; see *supr. B. 2. t. 7. § 2. & 26.*—

Conveyances of personal rights are either, 1st, Presumed ; 2dly, Legal ; and, 3dly, Voluntary.

Conveyances of rights, when opposed to proper dispositions, are either, *first*, presumed ; 2dly, legal ; or, 3dly, voluntary.—From the possession of the *ipsa corpora* of moveables, a conveyance by the former proprietor is presumed without either written deed, or the testimony of witnesses.—Conveyances or assignations are said to be legal, when they are made, either, *first*, by an act of the law ; thus, marriage is a legal assignation of the wife's moveable estate in favour of the husband. Or, 2dly, by a judicial sentence ; *ex. gr.* where the judge, by a decree of forthcoming, declares goods arrested to belong to the creditor-arrester, or where one is confirmed executor in special subjects by the commissary, which is accounted in law an assignation, in certain respects, to the subjects confirmed.—But by assignation in proper speech is understood, a written deed of conveyance, by the proprietor, to another, of any subject not properly feudal ; so that even heritable rights, when they are either not perfected by seisin, or when they require no seisin, as servitudes, reversions, patronages, &c. are proper subjects of assignation. Assignations are, either of debts, as bonds ; and these are completed by intimation ; or of moveable goods, which sometimes, though improperly, get the name of *dispositions*, and are completed by an instrument of possession. The granter of the assignation is called *the cedent*, because it is he who cedes or parts with his right in favour of the assignee. The receiver or assignee is sometimes called in our law-style, as he was also by the Roman, *cessionary*, because the right is ceded in his favour. If the assignee makes over his right to a third person, the deed is called *a translation* ; and if that third person conveys it back to the cedent, it is called *a retrocession*.

Assignations.

All rights may be assigned, unless where the nature of the subject opposes it, or immemorial custom.

2. It would seem, that by our ancient law all obligations were intransmissible, from a notion that no creditor could compel his debtor, contrary to the precise terms of his obligation, to become debtor to another, where the obligation did not expressly bear to assignees. And it was perhaps upon this ground, that by the old style of assignations, which is sometimes continued to this day, the assignee was made mandatary and procurator *in rem suam* ; which

mandate

mandate empowered him to sue for, recover, and discharge the obligation, as the creditor himself could have done; but our later customs have considered assignations, not barely as mandates, but as conveyances, by which the property of the subject assigned is, without any such clause, fully vested in the assignee; and the general rule is, that whoever is in the right of any subject, though it should not bear *to assignees*, may at pleasure convey it to another, except where he is barred, either by the nature of the subject or by immemorial custom.—The chief of those exceptions may be shortly mentioned. *First*, Some rights, not only natural, as conjugal, or parental, but conventional, are so constituted as to be incapable of proper transmission: *ex. gr.* rights of liferent; for of these nothing can be assigned but the profits during the life of the granter; *supr. B. 2. t. 9. § 41.* *2dly*, Certain rights are, in respect to the uses for which they are granted, incapable of transmission; as alimentary rights, which are given for the personal subsistence or alimony of the grantee*. *3dly*, Other rights are so personal to the creditor, from the *delectus personæ*, or choice made of him by the granter, that they cannot be transferred by him to another, without special powers given for that purpose by him from whom he himself derives right; as the right of an office, of a lease²⁵⁶, &c. *Lastly*, There is a special kind of rights which, though the proprietor hath full power over them, are not presumed to be conveyed, unless they be particularly specified in the assignation; as paraphernal goods, which are so peculiarly the wife's property, that a general assignation by her to her husband, of all the moveable estate which did then or should afterwards belong to her, was adjudged not to include the paraphernalia; *Dec. 1733, Paton*, (not reported).

3. Though no heritable right is perfected by the delivery of the charter or disposition conveying it, till it be followed by seisin; yet in personal rights the doctrine of the Roman law obtains with us, that property is fully transferred by the will of the proprietor, joined with the delivery of the right assigned. But because a deed of conveyance, while it continues under the power of the granter, may be cancelled at his pleasure, therefore no conveyance can be effectual to the grantee, unless the deed conveying be delivered to him, as well as the right conveyed; *Harc. 113. (Hisleside, Jan. 1685, Dict. p. 11496)*. And, as a consequence of this, one who had sold a subject, but retained in his own hands the conveyance granted by himself, in security of the price, was preferred to the creditors of the buyer, upon the subject sold; *Fac. Coll. ii. 133. (Baird, Aug. 1758, Dict. p. 14156)*.—As debtors, who are not presumed to know that their debt has been made over to a third party, cannot, by the conveyance, be put *in mala fide* to pay to the original creditor, it was thought necessary that the assignation should be intimated or notified to the debtor, to let him know that he must make payment, not to the first creditor, but to his assignee. But though this seems to have given the first rise to intimations, it is certain, that by inveterate custom, intimation made under form of instrument by the assignee or his procurator to the debtor, or at least some notification which the law accounts equivalent to it, is an essential requisite, not only for interpellating the debtor from making payment to his first creditor, but for completing the conveyance; *Stair, Jan. 22. 1663,*

Delivery of the right assigned completes the transference.

Intimation of assignations.

* See *Fac. Coll. May 19. 1791, Mackenzie, Dict. p. 10413* ²⁵⁵.

²⁵⁵ *McDonell, 25th Nov. 1819, Fac. Coll.; and see infr. t. 6. § 7.*

²⁵⁶ *Supr. B. ii. t. 6. § 31.*

BOOK III.

1663, *Wallace*, (DICT. p. 837); *Dirl.* 3. (*Ferguson*, Dec. 12. 1665, DICT. p. 2652)²⁵⁷. Hence, though an assignation not intimated be valid against the granter, who cannot question his own deed; yet if, before intimation of a first assignment, the cedent shall grant a second to a different assignee, the second, if it be intimated before the first, will be preferred to the first*. On this ground also, an assignee cannot plead compensation upon the debt assigned, if the concurrence ceased before the assignment was completed by intimation; *Nov.* 1733, *Barham*²⁶⁰. And, in like manner, if an assignation be not intimated by the assignee during the life of the cedent, any creditor of the cedent, who, upon his death, shall confirm the debt assigned before the assignment be intimated, shall be preferred to such assignee; *Kames*, 87. (*Sinclair*, July 5. 1726, DICT. p. 2793). Nor is any alteration made in this point by 1690, c. 26. declaring special assignations, though not intimated during the granter's life, to be valid titles, on which the assignee may sue or defend, without the necessity of confirmation; for that statute reserves entire the rules of preference formerly established in competitions among the creditors of the deceased.

A formal intimation is not always required, but may be supplied by equipollents.

4. Though intimation by the assignee to the debtor be necessary towards the completing of assignations, a formal intimation attested by a notary is not always precisely required. It is true, that where any proper solemnity is established for perfecting a right, equipollents are not to be admitted; *supr.* B. 1. t. 1. § 54; as in the case of feudal rights, in which no equivalent can supply the want of a seisin. Intimation therefore of a conveyance by a notarial instrument is not a solemnity in this acceptation of the term. All that the law requires is, either the intervention of some public officer, as a notary, to intimate the assignation to the debtor, or some other notice, which implies intimation as strongly as a notarial instrument. Thus, *first*, An action brought by the assignee, or a charge on letters of horning, or a citation upon any diligence used by him against the debtor, has been uniformly sustained to supply the place of intimation; because in any of these instances the publication of the conveyance is still more solemn than in the case of a notarial instrument; for they are judicial acts, exposing the conveyance of the right in favour of the pursuer to the eye of the judge as well of the debtor²⁶¹. Thus, also, *2dly*, The debtor's promise of pay-

* See *Fac. Coll.* v. iii. 117, *Till*, &c. July 27. 1763, DICT. p. 2858²⁵⁸; *Ibid.* May 1797, *Cred. of Gordon*, DICT. p. 2905²⁵⁹.

²⁵⁷ In the sale or transfer of goods, lying in the hands of an artificer, for the purpose of undergoing a manufacturing operation, intimation to the artificer is necessary in order to exclude the diligence of the seller's creditors; *Eadie*, 7th Feb. 1815, *Fac. Coll.*

²⁵⁸ For the import of this case, *vid. infr.* § 7. *ad fin.*

²⁵⁹ An assignation, not intimated till after the cedent's sequestration, but prior to the vesting of the bankrupt estate in the trustee, was in this case preferred to the right of the latter. But every question of this kind under the bankrupt statutes is now regulated by the following enactment, "That all dispositions, assignations, and venditions, which do not require seisin, but to which intimation or delivery are requisite in order to render them complete as transferences or as securities, shall be reckoned to be of the date of the intimation, delivery, or other act requisite for completing the same, without prejudice to their validity in other respects;" 54. *Geo. III. c. 13* § 13.—See some farther remarks on the above case, 2. *Bell Comm.* 366. *et seq.*

²⁶⁰ Reported by *Elchies*, No. 2. v. COMPENSATION.

²⁶¹ A draft upon one's debtor, protested by the payee, or indorsee, for non-acceptance, is a sufficient assignation of the debt, and so preferable to a posterior arrestment; *Fac. Coll. Campbell, Thomson, & Co.*, 28th May 1803, DICT. v. IMPLIED ASSIGNATION, App. No. 2; *supr.* t. 2. § 29.

Of Assignations.

TITL

ment to the assignee upon the assignee's shewing him the conveyance, whether the promise be made by a missive, or other proper writing, supplies the want of a formal instrument; *Durie, Jan. 22. 1630, Macgill, (Dict. p. 860) **; because it is in effect a corroboration by the debtor of the original debt in favour of the assignee, to which the cedent's consent is held as interposed by his having made a conveyance thereof to him. And as a debtor might safely make payment to the assignee, when he demands it with the assignation in his hands; so he may ratify the debt by a deed corroborating the first obligation in the assignee's favour; see *Kames, Rem. Dec. 124. (Turnbull, June 12. 1751, Dict. p. 868) †*. Nay, a verbal promise of payment by the debtor to the assignee, upon a communing, serves for an intimation²⁶³; but no verbal promise is accounted equivalent to an intimation, unless it has proceeded on a communing; *Dalr. 179. (Faculty of Advocates against Dickson, July 25. 1718, Dict. p. 866)*.

5. Payment of interest made by the debtor to the assignee is equivalent to intimation; for the assignee, by his receiving interest, is truly in the actual possession of the debt, in virtue of his conveyance; and all rights not feudal may be completed by the acquirer's entering into the natural possession. But the debtor's private knowledge of the assignation is not sustained as intimation; since that imports neither publication nor possession on the part of the assignee. This doctrine is however confined to the case where there is a competition of creditors; for where there is no creditor in the field, and the sole question is between the assignee and the debtor, the debtor's private knowledge of the conveyance is a sufficient interpellation to him, and puts him *in mala fide* to make payment to the cedent; *Fount. Feb. 16. 1703, Leith, (Dict. p. 865) ‡*. If possession by an assignee completes his right, it follows, that the assignation of a lease, or of the rents of an estate, is perfected without the necessity of intimation, as soon as possession is attained by the assignee²⁶⁵; and, on the other hand, an assignation of rents, or, as it is commonly called, *mails and duties*, though it should be intimated to the tenant, is not valid in a competition with creditors,

What is held equivalent to intimation.

* See *Fount. July 22. 1708, E. of Selkirk, Dict. p. 4453*²⁶².

† A holograph acknowledgment by the debtor, that the assignation has been intimated to him, has been in like manner sustained; *Fac. Coll. Nov. 23. 1785, Newton and Company, Dict. p. 850*.

‡ See *Fac. Coll. Jan. 18. 1776, Dicksons, Dict. p. 873*; and *Durie, March 14. 1626, Westeraw, Dict. p. 859*²⁶⁴.

²⁶² As reversed in House of Lords; *Robertson's Cases*, p. 1; see also 2. *Bell Comm. 23*.

²⁶³ Mr Bell thinks that this doctrine may be questioned; 2. *Comm. 23*; and see *Sphinston, 11th Dec. 1674, Dict. p. 12462*.

²⁶⁴ This last case is adverse to the doctrine in the text, and seems to be recognised by Erakine as not unsound; *supr. B. ii. t. 1. § 28*. The other case of *Dickson*, so far its very brief report can be relied on, is equally adverse; and to the same effect is *Fac. of Advocates*, cited in the text, *supr. § 4. ad fin.* Indeed, in the only case on which the doctrine is rested, there appears to have been more than a simple private knowledge: the assignee had not only shewn the debtor his assignation, but had previously shewn him a letter signifying his right, and there was besides an averment of actual usion against the debtor, who had paid only "on getting an ease." See *Stair, i. t. 1. § 24; Bankt. B. iii. t. 1. § 12; 2. Bell Comm. 23*.

²⁶⁵ *Fac. Coll. Sime's Trustees, 23d May 1806, Dict. v. TACK, App. No. 13; vid. B. ii. t. 6. § 25. not.*¹⁰² The case of *Brock*, there cited, has since been adhered to. *Fac. Coll. 29. Nov. 1822, (S. & D.)*. It is now before the House of Lords on appeal. See also *Russel, 3. Dec. 1822, (S. & D.)*; *Miller, 31. May 1825, (Ibid.)*.

tors²⁶⁶, if the assignee hath suffered the grantor to continue in possession; for all rights of moveable subjects that are granted *retenta possessione*, where the grantor continues to hold the possession, are presumed to be collusive for the grantor's own behoof, and only intended as a cover against just creditors. It may be here observed, that an assignation of the rents creates merely a personal right to the assignee against the possessor, or against personal creditors, but confers no real right in the lands; *Durie, Dec. 13. 1628, Huntly, (Dict. p. 2764)*; for the cedent continues proprietor of the lands, notwithstanding the assignation granted by him of the rents; and as he transfers his property to a purchaser by a sale of the lands, the purchaser from him must, in the character of proprietor, be preferable²⁶⁷ in a competition with assignations of rent, or other personal rights of that sort, which fall upon the cedent's being divested of the property²⁶⁸. Where there are many obligants, whether joint debtors, or principals and cautioners, intimation made to any one is sufficient for completing the conveyance; but such intimation is not effectual for interpellating those to whom no intimation was made from making payment to the cedent; and therefore assignees ought in prudence to make intimation to all of them; *St. B. 3: t. 1. § 10*. In debts due by a corporation, or a trading company, it would be often extremely difficult, if not impracticable, to discover all its members, and the places of their residence; so that if there was a necessity to intimate to all of them, there could be no security in the purchasing of shares in any joint stock: Wherefore in practice the intimation of an assignation of a debt due by an hospital, made to no other but the treasurer, was admitted as a proper intimation; *Jan. 1739, Cred. of Lethem, (Dict. p. 738)*; and an intimation to two clerks, who were also the managers of a trading company, a minute of which was regularly entered into their books, was adjudged to have the effect of fully divesting the cedent; *Tinw. Nov. 19. 1755, Watson of Muirhouse contra Murdoch, &c. (Dict. p. 850)*.

Several assignations require no intimation.

6. There are sundry kinds of assignations which need not be intimated: *First*, Transmissions or indorsations of bills of exchange; because as the different parties to commercial transactions reside in different countries, their conveyances must not be fettered with forms introduced by the laws of particular states, but ought to be governed by the *jus gentium*, and the custom of trading nations. Inland bills, though the parties to these are not foreigners, have by custom all the privileges of bills of exchange, and consequently require no intimation to complete their transmission²⁶⁹. *2dly*, Bank-notes, or bank-bills, which the law considers as cash or ready money, are fully transferred to the possessor by the bare delivery of them; for being payable to the bearer, their property must pass with

* See this rule applied to a competition between a creditor by disposition in security followed by seisin, and an arrester; *Kames, Rem. Decis. No. 94. Kelhead, Nov. 2. 1748, Dict. p. 2785; Fac. Coll. July 15. 1780, Webster, Dict. p. 2902*. It has even been found to support such an heritable creditor, in competition with a poinder of growing corns upon a personal obligation; *Fac. Coll. Feb. 5. 1785, Parkers, Dict. p. 286*.

²⁶⁶ Who have completed a real right in the lands; see *2. Bell Comm. 11-13; Ho. &c. 12th June 1816, Fac. Coll.; Hardie, Douglas, &c., 6th June 1794, Dict. p. 28*.

²⁶⁷ After he has completed his real right to the lands.

²⁶⁸ *2. Bell Comm. 13.*

²⁶⁹ *Vid. supr. t. 2. § 31.*

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How far an assignee is secure, *si dolus dederit causam contractui.*

against the cedent; *Stair, June 20. 1673, Somervel*, (Dict. p. 8325). But the subject is not rendered litigious, barely by a citation given by the debtor to the cedent, which hath not been brought the length of an action; *Forbes, Jan. 21. 1707, Houston*, (Dict. p. 8329). 2dly, As the assignee is after intimation truly creditor, the debtor may refer to his oath, whether the assignation was gratuitous or in trust for the cedent; *Stair, June 16. 1665, Wright*, (Dict. p. 12455); and if he acknowledge either of the two, the cedent's oath will prove against him, as if there had been no assignation; because no creditor can, by a deed granted without a valuable consideration, put his debtor in a worse case than he was before, so as to deprive him of any method of proof formerly competent to him. If the assignation be in part onerous, and in part gratuitous, the oath of the cedent will be received against the assignee in so far as it is gratuitous; *Stair, Feb. 25. 1679, Steel*, (Dict. p. 8467); *Harc. 258, (Fotheringhame, Jan. 1684, Dict. p. 12460)*²⁷⁷. All defences competent to a debtor in a moveable debt against the original creditor, which he can prove otherwise than by his oath, continue relevant against even an onerous assignee, whether those defences arise from a separate back-bond granted by the creditor at constituting the debt, or from other grounds; *Stair, Jan. 14. 1663, Scot*, (Dict. p. 10187); because no assignee can be in a better condition than his cedent; *utitur jure auctoris*; for the assignment gives him the right merely as it stood in the cedent or original creditor. And this doctrine extends also to mutual contracts, in which the assignees are subjected to all the burdens which affected the right while it was vested in the cedent, not only where the mutual obligations are inserted in the contract itself, (for these the assignee cannot be ignorant of), but even where they are partly formed by a separate back-bond, if it shall appear by witnesses that the contract and back-bond have a relation to and are mutual causes of one another; *St. B. 1. t. 10. § 16*²⁷⁸. It is otherwise in the transmission of feudal rights; for there the disponent rests upon the faith of the records; and so may disregard all rights granted by his author, upon which infestment has not been taken before that which hath proceeded on his own disposition. The question, How far, in contracts whereof the foundation is laid in fraud, a purchaser *bona fide* will be secure? may be solved by a similar reasoning. Purchasers of real rights rely on the faith of the records, and the subject of their purchase is the most valuable of all those which fall under the consideration of law; for which reason the Legislature hath, for their security, enacted by special statute, 1621, c. 18, that

²⁷⁷ " Though a cedent's oath is competent against a gratuitous assignee, yet the Lords thought it not competent against an onerous purchaser from that assignee; *Aitchison's Assignees, 15th July 1737, Elchies, v. ASSIGNATION, No. 3, and (Notes, v. ADJUDICATION, No. 10.*

²⁷⁸ This doctrine. " in so far as it has been considered as applicable to any other exceptions than those competent to the debtor in defence against the claim," would not now receive effect; 1. *Bell Comm. 222*. " It may now be held as settled law, that *jura incorporalia*, though liable, even in the hands of a purchaser, to those exceptions, which the debtor may have to state against the claim, are not qualified by any collateral obligation or latent trust;" *Ibid. 223*. See this distinction well supported in *Macdonells, infr. not. **, where, however, effect was refused to it; and more especially in *Redfearn*, as reversed on appeal, 1st June 1813, 1. *Dow, 50*, where it was carried into full operation. See also *supr. t. 1. § 32. not. 27*.

that they shall not be affected by the fraud of their authors, if they themselves have not been *participes fraudis*. There was also a necessity for extending the same doctrine to purchasers of moveable subjects, and to onerous indorsees in bills, to give a free course to commerce; but in bonds, or other personal obligations or contracts, the assignee is neither secure by statute, nor by the necessity of the case; and therefore he falls under the general rule, *Assignatus utitur jure auctoris*; he is no more than procurator in *rem suam*, and therefore must be in the same case with the cedent; so that all exceptions founded upon any declaration or deed of the cedent, whether arising from his obligation or delict, are good against the assignee; *St. B. 4. t. 40. § 21*; *Fac. Coll. i. 152. (March 6. 1755, Irvine, Dict. p. 1715)**.

II. This title may be concluded with observing, that conveyances, not only of rights of land, but of personal obligations, may be necessary on the part of the creditor; for wherever a creditor receives payment from one who is not the proper debtor, but who has right of relief competent to him against the debtor, he who pays is from equity entitled to demand an assignation from the creditor of every separate security which he hath in his person for the debt, that he may thereby work his relief the more effectually against the principal debtor; see *Feb. 1735, Garden, (Dict. p. 3390)*; observed (*Folio Dict. i. 227*); and *Fount. Feb. 10. 1708, Fergusson*, inasmuch that if the conveyance be rendered impracticable by the fault of the creditor, who has perhaps through negligence lost the grounds of debt, he alone must suffer the consequences, and not the cautioner, whose condition ought not to be rendered worse through the omission of another²⁷⁹. But if such assignation tends to hurt the granter, equity interposes on the other part with this rule, That no creditor can be compelled to assign a right to his own prejudice. Hence, though a creditor who has got a pledge from his debtor in security of his debt may be forced to transmit his right of pledge to the cautioner, upon payment made by him of the debt; yet if the creditor hath the same individual subject impignored to him in security also of another debt, in which the cautioner is not bound, equity will not compel him to transfer it, and thereby run the hazard of losing the other debt, unless the cautioner shall likewise pay off that debt for which he did not interpose his credit. The doctrine of necessary assignations, in the case of rights of land, hath been explained, *supr. B. 2. t. 12. § 66*.

TITLE V.

Creditors receiving payment must assign all the securities to the person who pays, unless the assignation be to the assigner's hurt.

TIT. VI.

Of Arrestments and Poindings.

PERSONAL obligations, though constituted according to the forms of law, may be rendered ineffectual to the creditor, either in whole or in part, by the debtor's inability to pay or perform,

All personal obligations on which no diligence has followed, come in *pari passu*.

* *Fac. Coll. Nov. 10. 1772, Macdonells, Dict. p. 4974*. See, however, *Ibid. Nov. 15. 1791, York-buildings Company, Dict. p. 10466*.

²⁷⁹ *Vid. supr. t. 3. § 68*.

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form, and by the preference of other creditors upon the debtor's funds. In the competition of personal creditors, where no diligence has been used by any of them, they are all preferred *pari passu*, without regard to the dates of their obligations or grounds of debt. And though the court of session did, by the more ancient practice, prefer widows for the sums of money or moveables settled on them by their marriage-contracts, before other personal creditors, from favour and compassion; *Stair, Feb. 8. 1662, Craufurd*, (Dict. p. 2613); yet by a solemn decision, *Fount. Feb. 17. 1688, Keith*, (Dict. p. 11833), the preference of personal creditors, even where widows were competing, was settled according to the common rules of law, without privilege. The practice since has been conformable to that decision; *Datr. 100. 110. (Allan, Feb. 19. 1713, Dict. p. 11835; Lindsay, June 24. 1714, Dict. p. 3204)*. It is therefore the priority of the diligence used upon the debt, and not of the debt itself, which alone entitles the creditor to a preference before others who have not used so timely diligence. The diligence competent to creditors against their debtor's heritable estate has been explained, *supr. B. 2. t. 11. § 12*. Where his estate is moveable, the creditor may either arrest or poind.

Arrestment.

2. The term *arrestment* denotes sometimes the securing of a criminal's person, till he undergo a trial, or give bail, 1487, c. 99. At other times it is used to express the order of a judge, enjoining two or more competing parties not to intermeddle with the subject in dispute till the event of a process. But when it is considered as a diligence competent to a creditor, it may be defined, The command of a judge, by which he who is debtor in a moveable obligation to the arrester's debtor, is prohibited to make payment of his debt, or perform his obligation, till the debt due to the arrester who uses the diligence be paid or secured. The arrester's debtor is usually called *the common debtor*, because where there is a number of competing creditors, he is debtor to all of them. He in whose hands the diligence is used is styled *the arrestee*.

Arrestment may proceed either by the authority of the court of session or on the precept of an inferior judge.

3. Arrestment may be used by the authority, either of the court of session, or of an inferior judge. Where it is laid on by the authority of the session, it proceeds, either, *first*, on a warrant contained in letters of horning; for all hornings, whether grounded on registered obligations, or on more formal decrees, contain an order to the messenger to arrest all the debtor's moveable goods in default of payment within the time limited in the letters²⁸⁰; or, *2dly*, Arrestment proceeds upon special letters²⁸¹; which the creditor, if his ground of debt be liquid, may obtain upon exhibiting it to the court, though not registered; or, if the debt due to him be not yet constituted or ascertained by any sentence, he may raise a summons against his debtor for payment; which summons, after it is executed against the debtor*, is considered as a begun action, and consequently

* By *Stat. 33. Geo. III. c. 74. § 3, (54. Geo. III. c. 137. § 2.)* it is enacted, "That in time coming, letters or precepts of arrestment bearing to be upon a depending action may be granted summarily, upon production of the libelled summons, and that it shall be no objection to the *pari passu* preference hereby established, that the summons upon which any arrestment proceeds was not executed, or that the debt upon which

²⁸⁰ It is not necessary that a charge be given on the letters of horning, to render arrestment competent; *Weir, 2d Feb. 1814, Fac. Coll.*

²⁸¹ When at the instance of a foreigner, these letters, to be competent, must bear the concurrence of a mandatary; *Johnston, 23d Jan. 1813, Fac. Coll. p. 110.*

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III.

tor, or steward, or trustee, whose powers are limited to the receiving and disposing of the rents of a particular land-estate, such arrestment hath been adjudged improper; because though the arrestee may be debtor to his constituent or trustee, he is not debtor to the common debtor; *Fac. Coll.* i. 44. (*Dec.* 12. 1752, *Campbell*, *DICT.* p. 742). Such arrestment, however, seems as proper as that used against commissioners, subject to the following restrictions²⁸⁶. *First*, The constituent himself cannot be affected by the prohibition contained in the arrestment, because it was neither directed to him nor to his general administrator. *2dly*, Such arrestment cannot hinder the factor from clearing accounts with his constituent, and paying him the whole balances: It imports barely an injunction to him as factor, not to make payment to the arrester's debtor. *3dly*, The constituent must be made a party to the action of forthcoming, *infr.* § 16; otherwise his whole rents may, without his knowledge, be recovered from his factor, for debts which are perhaps not justly due; *Forbes*, *Jan.* 18. 1709, *Donaldson*, (*DICT.* p. 735). Arrestment may be used in the hands of the purchaser of an estate upon which the common debtor is a creditor, because the purchaser is truly debtor by his purchase to the creditors: And indeed if the estate be sold at the suit of an apparent heir, the purchaser is the only proper arrestee; for the apparent heir, who is supposed not to have subjected himself to his ancestor's debt, is in no sense debtor to the common debtor; *Tinw.* *Nov.* 27. 1753, *Cred. of Bonjedburgh*²⁸⁷.

Effect of arrestment in the hands of the arrester's debtor.

5. Arrestment used by a creditor in the hands of his own debtor, did, by our former decisions, subject those who had *bona fide* purchased the goods arrested from the arrestee, to restore them to the arrester. *Stair*, though he censures those judgments, incline to think, *B. 3. t. 1.* § 25, that arrestment used in the debtor's hands ought to have the effect of subjecting the debtor, who should afterwards dispose of the goods arrested, to the pains of breach of arrestment: But *Steuart's* opinion, *Ans. voce ARRESTMENT*, seems better founded, that as that diligence is intended merely for a restraint on third parties who are debtors to the arrester's debtor, the only legal method of affecting moveable goods in the debtor's own possession is by poinding; and that consequently arrestment in the debtor's own hands is an inhabile and improper diligence. Arrestment may be used in the hands, not only of private persons but of corporations: But as corporations have no natural person of their own to represent the whole body-corporate, the directors have an implied power, though there should be no special provision in the grant for that purpose, to appoint an officer, in whose name the corporation may sue or be sued; and arrestment in the hands, either of that officer, or of the directors themselves is effectual; *Jan.* 10. 1739, *Creditors of Menzies*, (*DICT.* p. 738)

Arrestment in a corporation's hands, or depositary's.

Arrest

* See *Kames, Sel. Decis.* No. 198, *Dalrymple*, *June* 23. 1762, *DICT.* p. 75; an arrestment used in the hands of the British Linen Company.

²⁸⁶ Mr Bell observes, that this qualification of the general rule has "not been tenanted by any decision;" *2. Comm.* 79.

²⁸⁷ Reported by *Kames*. See *DICT.* p. 743, and 10178; *Elchies, v. COMPTON* No. 14; and *Fac. Coll. DICT.* p. 724.

²⁸⁸ As to arrestment in the hands of joint stock societies, instituted "for the purposes of banking," *vid.* 7. *Geo. IV. c.* 67;—*supr.* t. 3. § 28. *not.* 133.

BOOK III.

Bills are not arrestable, nor sums destined for a special purpose, as alimentary debts.

22. 1666, *Lockhart*, (DICT. p. 701)*. Whether a wadset sum consigned upon an order of redemption be arrestable by a creditor of the wadsetter, see above, *B. 2. t. 8. § 23* †.

7. There are some subjects, which, though they be moveable, cannot be arrested: *First*, Bills; for these being considered as bags of money, which pass from hand to hand, cannot be affected with any burden in the person of the possessor²⁹² ‡. *2dly*, Sums destined by the granter for a special purpose, cannot, by arrestment, or any other diligence, be inverted contrary to the granter's intention, to any other use; *Stair, Jan. 15. 1674, Baillie*, (DICT. p. 703). Upon this ground alimentary rights, granted for the personal subsistence of the grantee, are not arrestable; Clerk *Home*, 109. (*Urquhart, Dec. 19. 1738, DICT. p. 10403*) §, but the past interest due upon an alimentary debt may be arrested by him at whose expense the alimony was supplied. No person can reserve any part of his effects to himself for his alimony, so as to withdraw it from the diligence of his creditors; but a debtor may lawfully exchange one alimentary subject belonging to himself, for another of equal value, so as that subject which is surrogated in the place of the first shall not be arrestable more than the first; for the creditors are not thereby put in a worse condition than before. Servants' fees are of an alimentary nature, being given that they may maintain themselves in a condition suitable to their service; and so cannot be arrested, except as to the surplus fee, over and above what is necessary for their personal use; *Stair, July 9. 1668, Boog*, (DICT. p. 10388). The King's pensions are not arrestable, because they are alimentary; *St. B. 2. t. 5. § 18; B. 3. t. 1. § 37* ||. These are either annexed to offices; in which case the grantee is considered as the King's servant employed in a particular station, (and on this foundation, the court of session have, by several acts of sederunt, *June 11. 1613*, preserved in *Spottisw. Pract. p. 228. and Feb. 27. 1662*, [Acts of sederunt, *Edit. 1790, p. 87.*], declared their own salaries not arrestable ¶); or if the pension

* A debt secured by an assignation to a lease of an heritable subject, followed by possession, cannot be carried by arrestment; *Fac. Coll. Dec. 5. 1794, Watson*, DICT. p. 731²⁹². It is competent to arrest the price of heritable subjects vested in trustees, whether for behoof of creditors, *Fac. Coll. Feb. 25. 1780, Grierson*, DICT. p. 759²⁹³; or of legatees, *Ibid. June 29. 1796, Douglas*, DICT. p. 16213.

† Money consigned for the redemption of a wadset cannot be arrested; Clerk *Home*, 122. *Mackenzie, June 22. 1739*, DICT. p. 713²⁹⁴.

‡ See *Fac. Coll. Dec. 9. 1766, More*, DICT. p. 12259²⁹⁶.

§ Annuities granted to the widows, and sums provided to the children, of ministers, &c. by *Stat. 19. Geo. III. c. 20.* are by § 78. declared not arrestable²⁹⁷.

|| See *Dick, Dec. 22. 1676*, DICT. p. 10387.

¶ The fees of commissioners to the Scottish Parliament, though not mentioned in these acts of sederunt, were found not arrestable; *Forbes, March 18. 1707, Molison*, DICT. p. 10398.

²⁹² *Supr. B. ii. t. 2. § 12. not. †.*

²⁹³ *Vid. supr. B. ii. t. 2. § 15. in nott.; Wilson, ibi cit.; Gordon's Trustees, 4th Dec. 1821, (S. & B.); M'Dowall, 6th Feb. 1824, (S. & D.); Pindar, 27th May 1824, (Ibid.).*

²⁹⁴ But this does not hold after the wadset has been declared dissolved; *Stormonth, 24th May 1814, Fac. Coll.; supr. B. ii. t. 8. § 23; Ib. t. 11. § 12. not.*³³⁴

²⁹⁵ *Dick, 1st June 1815, Fac. Coll.; Haddow, 7th Dec. 1796, DICT. p. 763; Thorold, &c. 5th March 1767, DICT. p. 757, in not.; 2. Bell Comm. 76; Thomson, 318 et seq.*

²⁹⁶ As observed on, *2. Bell Comm. 76; Thomson, 322.*

²⁹⁷ *Supr. t. 5. § 3. not. *; B. ii. t. 10. § 68. in nott.*

pension be merely gratuitous, it is presumed to have been granted by the Sovereign, from a personal regard to, and for the maintenance of the grantee. And indeed all salaries annexed to offices, in so far as they amount to no more than a reasonable allowance for the decent support of those who are named to them, though they be granted, not by the King, but by subjects, whether communities or private donors, ought on the same ground to be accounted alimentary*.

8. Neither are future debts affected by arrestment; that is, debts not due by the arrestee till after the time of serving him with the diligence †²⁹⁹. It is true, that inhibition, which is a diligence against heritage corresponding with the arrestment of moveables, affects the estate afterwards acquired by the person inhibited, as well as that which belonged to him at publishing the inhibition. But this arises from the different styles of the two diligences. Letters of inhibition carry a tract of future time, and so include both *adquisita* and *adquirenda*; whereas the warrant to arrest is confined precisely to such debts as shall be due at the time of using the diligence. This distinction hath been probably established to preserve the free course of trade in moveables, which would be greatly embarrassed if debts not yet existing might be attached by the diligence of creditors. The only method therefore of affecting debts due after arrestment, is by laying on a new arrestment, which may be done on the first warrant. Claims depending on the event of a suit are not, in the judgment of law, future debts; for the sentence of the judge admitting the claim, when it is pronounced, draws back to the period at which the debt became first due; see *Falc. i. Dec. 19. 1744, Wardrop*, (Dict. p. 4860). The same doctrine holds in conditional debts, in which the condition, after it exists, hath a retrospect to the date of the ground of debt.

Nor future debts. What are understood to be such.

9. In the arrestment of debts which carry a yearly profit to the creditor, it is the past and current rents, or interest only, which can be affected by that diligence; all that falls due afterwards is accounted future debt. By current rent is understood that debt which has begun to run from the term preceding the arrestment, but which cannot be demanded from the debtor till next term, *ubi dies cessit, licet nondum venerit*. An arrestment, for instance, used before the term of Whitsunday in the hands of a tenant, not only affects the past rent due to the landlord, but that which does not become payable till the Whitsunday next ensuing the arrestment; for though that rent cannot be exacted till Whitsunday, its term is current, as the lawyers express it, because it has begun to run from the

It is only the interest that can be arrested of debts carrying a yearly profit.

* Lord Fountainhall, v. 1. p. 46. mentions that it was doubted whether ministers' stipends were arrestable. It has since been decided in the affirmative; Clerk *Homo*, 12. *Hale*, Feb. 12. 1736, Dict. p. 711²⁹⁸. This diligence has also been found competent to attach macers' fees; *Fount. (and Stair,)* Jan. 14. and Feb. 9. 1681, *Cunningham*; the dues payable to the principal keepers of the Parliament House; *Fac. Coll. Feb. 23. 1773, Holiday*, Dict. p. 729; and arrears due to officers in the army; *Jan. 26. 1715, Brodie*, Dict. p. 709; but not half pay. See (*Folio Dict.* vol. iv. p. 76 & 138.

† See Dirleton's Doubts, p. 7. (v. ARRESTMENT).

²⁹⁸ And again, *Smith*, 13th Dec. 1815, *Fac. Coll.*; see also *Hogg*, 15th Feb. 1743, *Elchies*, v. STIPEND, No. 5.

²⁹⁹ This, however, does not include debts, the obligation for which is already incurred, but the term of payment only not arrived.

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the preceding term, and therefore is accounted a present debt * 300. But though the diligence of arrestment be valid with regard to the current rents, yet the full execution of it must be suspended; so that no forthcoming can be pursued upon it, till the debt become actually demandable. Though in annuities due to widows, there is truly no current term, *dies nec cedit nec venit* till the next term; because the question, whether any annuity shall fall due to her after the last term? depends on her surviving the next, *B. 2. t. 9. § 64*; yet arrestment before the term, used by a widow's creditor, was, from the favour indulged to the creditors of liferenters, sustained to carry the annuity that became due and payable at the term next after the arrestment, where the widow actually survived that term; *Fount. Jan. 31. 1705, Corse, (Dict. p. 767) †*. In obligations of this sort, the effects of the arrestment are more or less limited, according to the different nature of the obligation. If the obligation itself which constitutes the debt be arrestable, *ex. gr.* a bond of borrowed money, or even an heritable bond not perfected by seisin, the whole of it is carried by the arrestment; because in that case the full *jus debiti* is affected, not only the past interest due on the bond, but the principal sum, and the whole interest that may afterwards fall due till payment, as an accessory of the bond itself. But where the obligation which creates the debt is not arrestable, *ex. gr.* a disposition of lands or an heritable bond completed by seisin, it is only the interest on the bond or disposition, that had either fallen due, or was current, at the time of the arrestment, that can be affected with the diligence; for the future interests are accounted a debt not yet existing, and so cannot be carried by it. This doctrine holds also in the arrestment of rights not falling under the *jus mariti*, though they should be moveable in the article of succession. Thus the arrestment of a moveable bond due to a wife, laid on for a debt due by the husband, carries only the past and current interest, because no more falls under the *jus mariti*; for the bond itself belongs to the wife, whose property cannot be carried off by the creditors of the husband; *Jan. 19. 1739, Cred. of Clunes, (Dict. p. 713)*, observed in (*Folio Dict. i. p. 55*).

All debts in which the debtor is personally bound are arrestable.

10. All debts in which a debtor is personally bound, are grounds upon which the creditor may arrest his moveable estate. Stair indeed affirms, that no creditor in a debt properly heritable can use arrestment against his debtor; *B. 3. t. 1. § 27*; because there ought to be an analogy between the nature of debts arrestable, and of those on which arrestment may proceed. But, by the same reasoning, inhibition, because it strikes only against heritable subjects, ought not to be used but by creditors in heritable debts; whereas it is a rule grounded not only on law, but on the highest equity, that a creditor, whatever may be the nature of the debt due to him, ought to have access to secure it, by affecting every right belonging to his

* *Fac. Coll. March 10. 1795, Livingston, &c. Dict. p. 769*. Arrestment on the *term-day* will not affect the half-year's rent then ensuing, that day being considered as the last day of the preceding term; *Fac. Coll. June 23. 1802, Wright, Dict. p. 15919*; (*2. Bell Comm. 80*) 300.

† The same judgment has been given where the fund arrested was an aliment awarded to the wife by decree of separation; *Fac. Coll. June 16. 1761, Creditors of La. Coithness, Dict. p. 772*.

300 See *Pindar, 27th May 1824, (S. & D.)*. Where the *conventional* term of payment is postponed beyond the *legal* term, the arrestment of rents is regulated by the latter; *Handyside, 15th Jan. 1813, Fac. Coll. ; 2. Bell Comm. 80*.

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by Stair himself, *B. 3. t. 1. § 36. 42*, to lay a *nexus* upon that subject, which entitles the arrester to a subsequent action, by which he may appropriate it to himself. Arrestment, therefore, by our present practice, continues to affect the subject after the death of the arrestee, so as to be the ground of an action of forthcoming against his heir, while it remains *in medio*; and hence, such arrestment, being prior in date, is preferable to one used after the arrestee's death in the hands of his heir; Clerk *Home*, 110. (*Aberdeen Dec. 22. 1738*, Dict. p. 775). On a like principle, the diligence of arrestment subsists after the death of the common debtor, in the same manner that the diligence of poinding the ground does; and consequently, an arrester before the debtor's death is preferable to one who, after his death, hath confirmed the debt arrested, as executor-creditor to the deceased; *Stair, Jan. 20. 1681, Riddel* (Dict. p. 783); *Harc. 94, 95. (Hume, Feb. 1688, Dict. p. 2790; Russel, June 29. 1688, Dict. p. 2791)*³⁰². Far less is arrestment lost by the death of the creditor-arrester; for where one uses diligence, he does it not only for himself, but for those who are to succeed in the right of the debt; and as the right of a debt goes to successors, though they be not expressed, the right to a diligence for securing that debt must, as an accessory, go also to successors.

Loosing of arrestment.

12. Arrestment may be loosed³⁰³, and of course the prohibitor upon the arrestee taken off, on the common debtor's giving security³⁰⁴ for the payment to the arrester of the sums arrested, if they shall be adjudged to belong to him*. This loosing upon security may be demanded, in every case where the arrestment does not proceed, either on a formal or on a judicial decree, declaring a debt to be due by the common debtor to the arrester; *Gosf. Dec. 19. 1673, Holme*, (Dict. p. 792); or at least upon the registration of the arrester's ground of debt, which the law as to the article of diligence holds for a decree; see *Stair, Feb. 7. 1665, Graham*, (Dict. p. 792); for till decree it cannot be known with certainty

* This is the utmost extent of the obligation undertaken by a cautioner in loosing arrestment, and it may be ascertained by the writing or oath of the arrestee; *Stair, B. i. tit. 17. § 8; Bankt. B. iii. t. 1. § 37*³⁰⁵.

³⁰² See also to this effect, *Bankton, B. iii. t. 1. § 49; Crawford, 20th July 1732*; Dict. p. 2791. The contrary has, however, been since decided,—on the principle, that confirmation as executor-creditor being the more perfect diligence, must, like a poinding, exclude the arrestment, until completed by decree of forthcoming; *Fleming, 26th June 1823, Fac. Coll.*; *Carmichael, 22d June 1742, Dict. p. 2791*; *2. Bell Comm. 7*. But this doctrine seems to leave some strange inconsistencies in the law; for an arrestment before the debtor's death is preferable to a second arrestment also before the debtor's death, though this last be followed by the first decree of forthcoming, *ibid.* § 18; and likewise to an assignation intimated in the debtor's life, *2. Bell Comm. 7*; yet, while either of these is sufficient to exclude the preference of the executor-creditor, the executor-creditor is preferred in the face of a diligence, stronger than both. What would be the decision, were there three competitors,—an executor-creditor, an assignee with a title sufficient to exclude that executor, and an arrester before the debtor's death, preferable to the assignee?

³⁰³ An arrestment may be recalled by a letter under the hand of the arresting creditor, and cannot afterwards be revived, so as to compete with a second arrestment; *Erving, May & Co. 9th Dec. 1813, Fac. Coll.*

³⁰⁴ It was lately found, but under very special circumstances, "that the arrestment complained of ought to be loosed *without caution*, unless the respondent (arrester) shall find caution on her part, to answer for the damage resulting from keeping up the said arrestments;" *Hamilton, 4th March 1823*.

³⁰⁵ See a special case, *Fac. Coll. ii. 239, Macarthur, July 22. 1760, Dict. p. 303*—(vid. *infr.* § 14. not. *)

ty whether any debt be due to the arrester by him whom he sues as the common debtor; and therefore no encumbrance ought to lie upon his effects, if he give security to make them forthcoming to the arrester in case a debt shall appear to be due to him. But arrestments, if they be grounded, either upon formal decrees, or on registered obligations, cannot be loosed on caution; because, where a creditor's ground of debt is constituted by the sentence of a judge, the debtor can have no pretence to demand a loosing, since he ought to make payment, which will effectually discharge the arrestment.—Sundry arrestments, even upon decree, may be loosed upon caution. *First*, Those where the term of payment of the debt due to the arrester is not yet come, or where the condition of the debt has not yet existed; for a debtor ought to have full power over his effects till he be brought under a present obligation to pay. *2dly*, An arrestment, when it is founded on a mutual contract, though registered, may be loosed upon security; because debts due by contract are generally illiquid, depending on articles to be fulfilled *hinc inde*, the performance of which cannot appear by the contract itself; *Harc. 88. (Forbes, Feb. 1685, Dict. p. 797); Forbes, July 31. 1705, Macfarlane, (Dict. p. 798).* *3dly*, Arrestment used by a creditor whose decree is either suspended, or turned into a libel, may be loosed upon caution; for till the suspension be discussed, or the action concluded, it remains doubtful whether the sum be due; *Stair, June 30. 1675, Murray, (Dict. p. 794); ibid. Nov. 20. 1675, Warden, (Dict. p. 796).* But arrestment used before suspension of the decree cannot be loosed upon security; *July 7. 1733, Martin**. Arrestment cannot be loosed, except upon consignation, where the only ground of suspension is double distress, unless it be accompanied with an action of multiplepoinding, that both the creditor and arrester may be called; *Act sed. Feb. 1. 1677.*

13. Anciently letters of loosing arrestment contained a warrant to the messenger, to receive the security that should be offered by the common debtor; and on the messenger's reporting, that sufficient security was given, the arrestment was loosed, which he was directed to intimate immediately to the creditor: But as the judging of the sufficiency of the security was thought too great a trust to be reposed in messengers, all bonds of caution in the loosing of arrestments are now received by the clerk of the bills, and recorded in the books of session, 1617, c. 17³⁰⁶. And since the date of this act, the form of intimating the loosing to the arrester is gone gradually

Bonds of caution in loosings are received by the clerk of the bills.

* Not reported.—In a case where suspension of a decree-arbitral had been obtained, after arrestments used thereon, it was held, that wherever a decree is suspended, arrestments on it are loosable, though laid on before the suspension; and therefore the Court granted warrant for letters of loosing, but upon new caution; *Kirk. No. 9. voce ARRESTMENT, White, July 22. 1741, Dict. p. 802; (Elchies, v. ARRESTMENT, No. 17).*

³⁰⁶ Subsequent to this statute, letters of loosing continued erroneously to be framed in the old style, authorising not merely the loosing of the arrestment mentioned in the application, but farther, that "how oft any such arrestment shall be used" at the instance of the creditor, the messenger should "as oft loose and take off the same." Upon a charge of loosing given on this warrant, the Court held that the arrestee in a subsequent arrestment was *in bona fide* to pay; observing, however, that "it was intolerable that this practice should continue," and that "it would be necessary to correct it by act of sederunt;" *Fac. Coll. Paterson, 16th Feb. 1826, (S. & D.).* See accordingly, *A. S. 11. July 1826*, which distinguishes the procedure, as to loosing arrestments, into applications for "Special loosing," and applications for "General loosing," as the case may require. (*Appendix, infr.*)

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Effect of loos-
ing.

gradually into disuse; *Dalr.* 84. (*Crichton*, 1707, *DICT.* p. 798); *Fac. Coll.* i. 83. (*Bannerman*, *June* 16. 1753, *DICT.* p. 802). The loosing of an arrestment has this effect, that the arrestee may safely pay the debt due by him to the common debtor who hath loosed the arrestment; *Durie*, *June* 21. 1626, *Lord Balmerino*, (*DICT.* p. 788): For the loosing, as its name imports, takes off that tie or *nexus* which was laid on the subject arrested; and the cautioner is substituted in place of the arrestment for the arrester's security. Yet the arrester may, while the subject continues in the arrestee's hands, sue him to make it forthcoming, notwithstanding the loosing; *Stair*, *Feb.* 7. 1665, *Graham*, (*DICT.* p. 792).

Effect of breach
of arrestment.

14. If the arrestee shall, in contempt of the diligence, pay or deliver the sum or subject arrested to the common debtor, he may not only be subjected to penalties upon a criminal trial, of which afterwards; but he may, upon a civil action, be condemned to pay the whole debt a second time to the arrester³⁰⁷, together with his full expenses, and a sum to be modified by the judge in name of damage, 1581, c. 118*. This doctrine holds also in the case of arrestments served against the arrestee, only at his dwelling-house, though in fact the execution should not have been notified to him; for the admitting pretences of ignorance might evacuate the lawful diligence of creditors. Nay an officer of the army, in whose hands, while he was abroad in the King's service, an edictal arrestment was used at the market-cross of Edinburgh, and pier and shore of Leith, having made payment to his creditor after the date of the arrestment, was found liable in second payment to the arrester, upon this medium, That the arrester had done all in his power to notify his diligence; *Fount.* *July* 22. 1701, and *Dec.* 16. 1703, *Blackwood*, (*DICT.* p. 1793) †³¹¹.

15.

* Lord Stair, referring to the statute, says, B. i. tit. 9. § 29, that "breakers of arrestment shall escheat their whole moveables, and the party injured shall be first paid off his debt and damages." Mr Erskine, in the above passage, seems rather to mean, that it is not the debt upon which the diligence was used, but the debt paid in contempt of the diligence, that is to be paid a second time in the civil action. Perhaps there may be a distinction between the criminal suit, which is now seldom used, and the civil action. In a late case, *Feb.* 27. 1792, *Grant*, *DICT.* p. 786, the Court was in general of opinion, that where the value of the subject arrested could be ascertained, the contravener should be liable no farther than *in valorem*³⁰⁸; but it is believed the decision is not correctly reported, as the judgment went upon a different ground, viz. an objection made to the validity of the arrestment. In the case of *Macarthur*, *Fac. Coll.* *July* 22. 1760, (*DICT.* p. 803), an arrestment of goods contained in lockfast trunks and packages, being loosed upon caution, and the goods afterwards given up by the arrestee to the common debtor, without any inventory or appretiation, the cautioner in the loosing was found liable to the arrester to the extent of the debt upon which the arrestment was used; *DICT.* p. 803.

† It is enacted by *stat.* 33. *Geo.* III. c. 74. § 4. (after 23. *Geo.* III. c. 18. § 3) "That an arrestment executed at the market-cross of Edinburgh, and pier and shore of Leith, to attach the effects of the debtor, as in the hands of a person out of Scotland, shall not be held to have interpellated such person from paying to the original creditor, unless proof be made that he or those having authority to act for him

³⁰⁷ Where the arrestee has, in contempt of a first arrestment, made payment to the common debtor, the illegality of this proceeding will not avail the crown laying on a second arrestment after payment was made, even though this last diligence might have been preferable to the other, had the fund remained *in medio*; *Campbell*, 25th *Nov.* 1823, (*S. & D.*).

³⁰⁸ This was held the measure of the cautioner's liability in a loosing of arrestment; *Anderson, Child & Co.* 4th *Feb.* 1825; and see *supr.* § 12. *not.* * p. 736. The value of the subject is to be taken as at the date of the loosing; and though the subject thereafter perish, even accidentally, the cautioner is not free; *Ibid.* See *A. S.* 11. *July* 1823, *infr.* in *Appendix.*

³¹¹ Compare § 3. *supr.* *ad fin.*

TITLE VI.

Forthcoming on
arrestment.

15. As an arrestment is only an inchoated or begun diligence, which of itself gives no preference, an action must, in order to perfect it, be brought by the arrester against the arrestee, to make the sums or other subjects arrested forthcoming, concluding that the arrestee may be decreed to pay to the pursuer the debt, or deliver him the goods belonging to the common debtor, which he stood possessed of at the time of the arrestment. This action was, by our older practice, competent only to the court of session, or to that inferior judge by whose warrant the arrestment was laid on; because it was thought, that inferior courts, whose jurisdiction was confined within their own territory, could not pronounce sentence on the warrant of any other judge: But Stair justly observes, *B. 3. t. 1. § 24*, that a warrant to arrest, if granted by a competent judge, must be accounted to flow from the sovereign, from whom all our judges derive their authority, by the same reason, that a decree given forth by one inferior judge is a ground of action against a defender condemned in payment before any other competent court, in whose territory he shall afterwards take up his residence; and our practice has favoured this opinion; *Forbes, June 23. 1710, Dalrymple, (Dict. p. 7662)*.

16. In this action of forthcoming, the pursuer must make it appear, *first*, That a debt is truly due by the defender, the arrestee, to the common debtor; for if none be due, there is no subject to be made forthcoming to the arrester³¹². If the debt arrested has been constituted by writing, the pursuer may, by an incident diligence, recover the ground of it from the common debtor, or other possessor; and if he cannot prove the debt by writing, he must refer it to the oath of the arrestee³¹³; but though that oath be negative, that he owes nothing to the common debtor, it cannot hurt the common debtor in any action he may afterwards bring for payment, since the oath was not given on his reference. As the arrester affects by his diligence the subject arrested, *tantum et tale* as it stood in his debtor, with all its burdens, therefore if the arrestee, whose condition ought not to be made worse by the diligence of creditors, has any just defence against the debt, whether of payment, compensation,

Requisites in
the action of
forthcoming.

“ were previously in the knowledge of such arrestment having been so used³⁰⁹.”
The practice is for the messenger to execute the arrestment edictally against the principal arrestee as forth of Scotland, and to give specific intimation to his known agent in this country³¹⁰.

³⁰⁹ This enactment is repeated, *54. Geo. III. c. 137. § 3*. As to edictal service, &c. *vid. infr. B. 4. t. 1. § 8*.

³¹⁰ Such intimation to the arrestee's known agent gives no additional privilege to the arrestment in competition with a prior one not so intimated. The Court held, “ that the intention of the statute was merely to protect a debtor residing abroad, who had *bona fide* previously paid,” and not “ to alter the law as to preferences,” where the fund was yet *in medio*; *Syme, &c. 7th Dec. 1824, (S. & D.)*; *infr. § 18*.

³¹² In a late case, attended with rather suspicious circumstances, the Court seem to have decerned in a forthcoming, on *prima facie* evidence only of the existence of a debt. But while they refused to sist process, till the issue of a multiplepoinding in which this question was stirred, they ordained the arrester to find caution to repeat, in case it should eventually turn out that there was no debt; *Smith, 14th May 1823, (S. & D.)*.

³¹³ On this passage, Mr Bell observes,—“ I see no reason why the arrester should be deprived of that evidence which would be open to the common debtor himself; and I find no authority but that of Mr Erskine for limiting the proof at the instance of the arrester, to a reference to the arrestee's oath. If the arrester can in no other way succeed, he may make a reference to the oath of the arrestee;” *2. Comm. 72*.
“ The arrester ought to be considered as having, by his diligence, acquired every right which is in the original creditor, and every remedy for enforcing payment, as well as establishing the debt, which was in him;” *Ibid. in not.*

pensation, &c. which would be relevant against the common debtor, the same defence ought to stand good against the arrester, who has no claim but in the common debtor's right; insomuch that though the debt should be constituted by writing, the arrestee may refer his defence to the common debtor's oath, which will be effectual against the arrester, unless the common debtor has been bankrupt when he made oath; *Forbes, Feb. 20. 1711, Horn, (Dict. p. 12464); Kames, 62. (Nairn, 1725, Dict. p. 12468)*. It is otherwise in intimated assignations, where the oath of the cedent does not hurt the onerous assignee. The reasons of the difference may be, *first*, That arrestment does not divest the common debtor of the property of the subject arrested, as an intimated assignation divests the cedent; but merely lays an embargo upon it. *2dly*, An assignee purchases the debt, not singly on the faith of the cedent, but he relies also on the written grounds of debt conveyed and delivered to him; whereas an arrester uses his diligence at a venture upon all debts which he has any ground to think are due to his debtor, and therefore the oath of the common debtor ought to be as effectual to the arrestee in a question with the arrester, as it would be in a question with the common debtor himself. *3dly*, The pursuer of the forthcoming must establish and constitute the debt due to himself by the common debtor, and ascertain its precise extent; for the pursuer can be no farther entitled to the subject arrested, than to the amount of the debt due to him by the common debtor³¹⁴. Upon this account the common debtor must be made a party to the action, that he may have an opportunity of offering defences against the debt alleged due by himself, which must, if relevant, and proved, prevent sentence in the forthcoming. The arrestee may in this action object, that the arrestment, on which the forthcoming is grounded, is null; for a nullity in the diligence must also invalidate any action which proceeds on it. But he cannot plead, that the debt due by his creditor, the common debtor, to the arrester, is paid; seeing he has no interest in making that plea: The common debtor is the sole person that can have benefit by it, and therefore it is competent to him alone to plead it; *Durie, Dec. 21. 1621, Hamilton, (Dict. p. 7799)*.

Decree of forthcoming.

17. Where the subject arrested is a sum of money, that sum is by the decree of forthcoming directed to be paid to the pursuer towards satisfying his debt; but where it is a certain *corpus*, or consists in goods, the judge, in place of decreeing the arrestee to deliver the goods themselves to the pursuer, pronounces sentence, ordaining them to be put up to a public sale, and the price to be delivered to him; *Stair, Nov. 12. 1680, Stevensons, (Dict. p. 5405)*. This sentence does of itself establish in the pursuer a right to the subject arrested, and excludes all co-creditors from poinding it afterwards; *Feb. 17. 1735, Muirhead, (Dict. p. 687)*³¹⁵. The decree of forthcoming, therefore, whatever the nature of the subject arrested may be,

³¹⁴ It was formerly held, "that an arrestment upon a dependence did not entitle the arrester to a forthcoming, for the expenses laid out in that depending process after the arrestment, but only for the sum due by the common debtor at the date of the arrestment;" *Kilk. Dickie, 15th Feb. 1744, Dict. p. 772; 2. Bell Comm. 81*. But as to expenses, it is now "a settled point, that those of the depending action (but not those of the forthcoming,) are covered by the arrestment," that arrestment having been so laid as to meet the conclusion for expenses; *May, 7th June 1825, (S. & D.); M'Donald, &c. 2d Feb. 1825, (Ibid.); Wight, 23d May 1822, Fac. Coll.*

³¹⁵ *Vid. infr. § 21. not. *. p. 745.*

Book III.

Warrant of
poin ding.

A previous charge must be given to pay or perform, unless in poidings for feu-duties.

compulsion, which were writs issuing from the Chancery, directed to the sheriff, or other judge-ordinary, to judge in the debt recited in the brief; and the decree pronounced in consequence of the brief was the warrant of poiding; *Hist. Law-tracts, App. No. 6* though Stair, *B. 3. t. 2. § 13*, seems to understand, by the brief of distress, not the writ which founded the action, but the decree proceeding upon the writ. Personal poiding may proceed, either by letters issuing from the signet of the session; and indeed, letters of horning for payment of debt have usually contained a warrant for poiding since 1661, c. 29; or on the decrees of inferior judges, the extracts of which, a precept of poiding is always subjoined³²³. In the last case, the diligence can have no effect beyond the territory of the judge who pronounces sentence, and is commonly executed by the proper officers of the inferior court. But when poiding proceeds on letters from the signet, it may be used, not only in execution of the decrees of the supreme court, from whence the letters issue, but of those of inferior courts. It reaches to the debtor's goods³²⁴ in whatever part of the kingdom they may lie³²⁵; and can be executed by messengers only.

21. No personal poiding can be carried into execution till the debtor be first charged to pay or perform, and the days of the charge be expired, under the pain of spuilzie, by 1669, c. 4. This statute was enacted to put a stop to a former rigorous practice, of poiding the goods of debtors, without giving them the least notice that the bond, or other ground of debt, was registered, by which persons of entire credit were frequently affronted. Poidings against vassals for the arrears of feu-duty are expressly excepted from the act. But the exception is improper; for the act itself is confined to personal poiding; and therefore no poiding of the ground fell under it though there had been no exception. As all creditors had, before this act, a right, by the common law, to poid without any previous charge, that right could not but be competent to landlords who, it appears by 1469, c. 35, might have poided their tenants for the payment of their rent immediately after it fell due, except where the terms of payment were the feasts of Whitsunday or Martinmas. And, agreeably to this custom, several decisions are quoted by *Balf. p. 398, c. 9**, 10, sustaining poidings against tenants, where the arrears were liquidated by the sentence of the baron-bailie, without the least mention of the necessity of a previous charge. This ancient right is still reserved entire to the landlord by the aforesaid act 1669, c. 4, from the presumption, that a landlord will not, without the most urgent necessity, break his tenant's credit, and lay his own grounds waste. And, in consequence of this reservation, barons may, by the present law, poid their tenants for the arrears of rent fixed by decree, not only without an antecedent charge, but even *instanter* after pronouncing the decree without

* See *Crichton, Feb. 12. 1560, Dict. p. 10505.*

³²³ Justices of Peace acting under the authority of statutes, which direct recovery by distress, cannot issue a warrant for poiding; *Lo. Advocate, 20. Feb. 1817. Fac. Coll. ; (Justiciary, App. 1810-1812.)*

³²⁴ A question was raised, but not decided, as to the competency of poiding *Baird's notes ; Alexander, 10. Feb. 1826, (S. & D.)*

³²⁵ It is illegal to execute a poiding within the Palace of Holyroodhouse, in consequence of its privilege as a royal residence; *Fac. Coll. Laing, 18. Feb. 1823, (S. & D.)* as reversed on appeal; *1. W. & S. 1.*

without waiting the expiration of the days, which are ordinarily indulged to debtors when a charge is given them upon a edcree; *Clerk Home*, 5. (*Edinburgh*, 1736, *Dict.* p. 9400). A debtor's goods may be poinded by one creditor, though they have been arrested before by another; for arrestment being but an imperfect diligence, leaves the right of the subject still in the debtor, and so cannot hinder a creditor from using a more perfect kind of diligence, which may have the effect of carrying the property of the goods directly to himself * 327.

22. Growing corns may be poinded; for they are truly moveable: and their prices and quantities are as capable of being fixed before their separation from the ground as after it; *Fount. June* 15. 1709, *Ballantyne*, (*Dict.* p. 10526). And as they may be attached by diligence, it was found, that a sale of them fairly made by a person insolvent to certain creditors who were ready to poind, transferred the property, exclusive of other creditors who had neglected to use the proper diligence *debito tempore*; *Fac. Coll.* ii. 154. (*Grant*, 1758, *Dict.* p. 9561)³²⁸. It is an obvious principle of equity, that no creditor has a right to poind any goods but those which belong to his debtor. Our ancient usage, which, contrary to this rule, authorised the poinding of the goods of tenants for the debts due by their landlord, was in part corrected by 1469, c. 37, which confined such poindings to the amount of the rent due by the tenant to the landlord, *supr. B. 2. tit. 8. § 33*; and now of a long time no poinding has been used against a tenant, even to the least extent, for a personal debt due by his landlord. The only method competent to a landlord's creditor for affecting the rent due by his debtor's tenant, is by arrestment in common form. By the Roman law, *L. 7. 8. C. Quæ res pign. obl.*, no plough-slaves, plough-oxen, or instruments of tillage, could be subjected to any right by which creditors might carry them off, lest the culture of lands should suffer. This law is, with some restrictions, made ours by 1503, c. 98, which prohibits all officers of the law to poind horses, oxen, and other goods pertaining to the plough, at the time of labouring the ground, either where the debtor hath other moveables that may be poinded, or where he has lands that may be appraised. But the last part of this act relating to the appraising of lands, has been long in disuse; and now plough-goods may be poinded where the debtor hath no moveables, though he have lands; *Fount. Dec.* 7. 1692, *Turner*, (*Dict.* p. 10523). By the time of labouring mentioned in this act is understood, that time in which the tenant whose goods are to be poinded is tilling the ground: For the law was enacted, that tenants, by being stripped of the instruments of tillage, might not be brought under the necessity of letting their farms lie waste; which reason ceaseth, as to the tenant whose tillage is finished, though his season of ploughing may have been earlier than that of his neighbours; *Durie, Nov.* 22. 1628, *Watson*, (*Dict.* p. 10510). For the

Growing corns may be poinded.

No poinding can proceed against a tenant for a debt due by his landlord.

* But where poinding was executed, after another creditor had not only arrested the goods, but obtained a warrant to sell them, the arrester was preferred; *Fac. Coll. June* 27. 1767, *Stevenson*³²⁶, (*not in Dict.*)

³²⁶ There is another report of this case by *Kames, Sel. Dec.* 257, *Dict.* p. 2762. See to the same effect, *supr.* § 17.

³²⁷ 2. *Bell-Comm.* 70, *vid. supr.* § 11. *not.*³⁰².

³²⁸ Symbolical delivery was here held effectual to exclude creditors; 1. *Bell Comm.* 100. See also *supr. t. 5. § 5. not. **, and *infr.* § 25.

Book III.

the same reason a debtor's plough-goods cannot be poinded, if his own ploughing be not over, though that of the neighbouring tenants be finished. But this exemption does not reach to the case where the tillage for immediate sowing is finished, though the tenant should be continuing to plow for summer fallow; *Forbes, June 20 1712, Arnot*, (DICT. p. 10527). The poinding of plough-goods in contravention of this act, if as many of the other goods of the debtor as are sufficient for the debt be exposed to the messenger's view infers a spuilzie: But if the messenger has been to blame only in not making a thorough search for moveables, the debtor is entitled to restitution only; *Fount. July 20. 1703, Lawson*, (DICT. p. 10524)³²⁹. If a messenger in his search find some moveables, but not enough for clearing off the debt, he may lawfully proceed in the execution of the poinding; *March 1684, Goodsire*, (DICT. p. 10520) cited in (Folio) *Dict. ii. p. 94.*—This exemption from poinding was by an old decision, *Balf. p. 400. c. 20, (Sibbald, 1555, DICT. p. 10504)*, extended by analogy to the bucket and wand of a salt pan, which can at no time be poinded if the debtor has sufficient of other poindable goods*.

Form of poinding. Goods must be twice appraised.

23. In the execution of poinding, the debtor's goods must be twice valued or appraised; first on the ground of the lands where they were first laid hold on, either by the stated appretiators or birleymen of those lands, if the debtor shall demand it; or otherwise, by appretiators named for that purpose, and sworn by the messenger or other officer who executes the poinding³³⁰. After this it behoved the messenger, by our former practice, to carry the goods to the market-cross of the county-town, or other separate jurisdiction; and if they could not conveniently be driven or removed, samples or parcels of them must have been carried thither and there valued a second time by the stated appretiators of that jurisdiction; and in default of them, by persons named and sworn by the messengers. But now, by the late jurisdiction-act, 20. *Geo. II* they may be carried to the market-cross of that royal borough, or borough of barony, or even of that borough of regality, though the jurisdiction be now abolished, that lies next to the place where the poinding was begun. This is declared to be as sufficient as if the goods had been carried to the market-cross of the county-town. This double apprisement was introduced, that if the goods should happen to be estimated too low by the first appretiation, the debtor might have a chance of getting the mistake rectified by a second valuation; for which reason, the birleymen in the two valuations must be different persons, and the poinding must proceed against the debtor according to the second apprisement; *Falc. ii. 244 (Geddes, Dec. 6. 1751, DICT. p. 10535).*—In the following cases however, poinding requires only a single apprisement. *First, The* which is used by ministers for recovering their stipend is declared valid, if the goods be appraised on the ground of the lands where the

Exceptions to this rule.

* See *Mack. Obs. 123.*

† So the Court found, *Fac. Coll. Aug. 2. 1787, Hotchkis*, DICT. p. 10542. (*Viz. infr. § 24. not. 331.*)

³²⁹ Resisting the officer in an attempt to poind plough-goods, without previous search for other moveables, is not relevant to infer deforcement; *Lo. Advocate, 25 Feb. 1811, Fac. Coll. (Justiciary, App. 1810-12.); 1. Hume, 586.*

³³⁰ See the modern practice explained, *infr. § 24. not. 331.*

Of Arrestments and Poindings.

they were seized by the messenger, 1663, c. 21. This privilege is, in the opinion of some writers, extended in favour of universities, schools, and hospitals, by 1696, c. 14, contrary to the words of the statute, which restrict the extension to the particulars there expressly mentioned. *2dly*, It appears to have been an ancient custom, that poinding by a baron for his rent might proceed upon one appraisement, either on the lands where the goods were first apprehended, or upon any other accustomed place of poinding within the barony; *Balf. p. 40, c. 10*. This privilege has been, by our later decisions, adjudged to belong still to barons, in poinding for arrears of rent, as far down as *Dec. 1735, Macqueen*, (Dict. p. 6862); and is justly extended by *Stair, B. 4. tit. 47. § 30*, to all poindings proceeding on baron-decrees, whatever the ground of debt may be; since no baron can give his officer a power of carrying a debtor's goods through the territory of another judge to the next county-town.

24. After the messenger hath made public intimation of the appraised value of the goods by three Oyesses, he must require the debtor to make payment of his debt, including the interest and expenses. If the debtor shall offer payment to the creditor, or, in his absence, to his lawful attorney; or if, upon their refusing to accept of payment, he shall consign the debt in the hands of the judge-ordinary, or his clerk; the goods must be left with the debtor, and the messenger must make mention of this consignment in the execution of poinding. If no offer be made of payment or consignment, the messenger ought to adjudge the goods to the creditor at the appraised values, and deliver them over to him; which adjudication and delivery vests the creditor with the full right of them, and completes the diligence. The messenger ought also to deliver to the debtor, after the poinding is completed, a copy of the warrant and its executions, containing a full note of the appraised values, as a voucher to the debtor, that his debt is satisfied, in whole or in part, by the goods poinded*.

TITLE V

Messenger's
procedure
the poinding

25.

* The form of executing this diligence is altered, in many important particulars, by *Stat. 33. Geo. III. c. 74. § 5, &c.* ³³¹.

³³¹ Still farther changes have been made by *54. Geo. III. c. 137. § 4*. The rule now is, "That in future the messenger or other officer employed in executing a poinding for debt, shall leave the poinded goods in the hands of the debtor, with a schedule of the poinded goods, and note of the appraised values, (one appraisement being in every case sufficient,) and shall forthwith report his execution of poinding to the sheriff, or other judge-ordinary, who shall give direction for keeping the goods poinded in safe custody, and selling them by public roup, after such publication, not shorter than 8 free days, nor longer than 20, from and after the day when the order was given, and at such time and place as circumstances may require, and who shall give all necessary orders for intermediate security; any person who intromits with or carries off the goods in the mean time, in order to disappoint the poinding, being liable in double the appraised value thereof; and a note or minute of the sale, and of the sum arising from it, shall be, within 8 days of the sale, lodged with the clerk to the said sheriff or judge-ordinary, and forthwith marked by him as so lodged within 8 days after such sale, to be made patent to all concerned, for a fee of one shilling; and the net sum arising from such sale, after deduction of all charges, or the goods, in case no offerers appear, shall be delivered over to the poinding creditor."

With reference to this form of proceeding, it has been decided,—1. That the first-mentioned period, "not shorter than 8 free days, nor longer than 20," "applied to the publication, and not to the sale;" *Carmichael, 10. Feb. 1821, Fac. Coll.*—2. That any undue delay in reporting the execution of the poinding to the sheriff, *Samson,*

Book III.
 Symbolical
 poidings of
 corns.

Letters of open
 doors.

Time of poid-
 ing.

25. Corn is sometimes poided symbolically³³², by rips, or parcels, which are drawn from the stacks; and this sort of poiding is effectual to creditors, when proceeded in regularly, so that the user of it is preferable to another creditor who shall consummate a poiding before him, by getting the grain legally appraised, and its quantity ascertained; *Fount. Dec. 22. 1698, Cathcart*, (DICT. p. 10524); *June 1727, Macwhirter*, (not reported); because it is the sentence of the messenger, adjudging the subject poided to the creditor, which transfers the property*. But if a creditor poiding in this way, by rips, take possession of the corns before their price be legally fixed by a sworn appriser, and the quantities settled, either by sworn threshers, casters, and measurers, or at least by the tenants from whom the creditors received them; *Forbes, March 11. 1707, Erskine*, (DICT. p. 10525); he will be liable in a spuilzie. If the debtor's goods be within lockfast doors, to which the messenger employed in executing the diligence cannot get easy access, he ought to return an execution, setting forth that fact; on which a new precept will be directed of course for making open doors: But if the messenger shall, before obtaining this second precept, attempt to break up any lockfast place, he may be lawfully resisted †. If the messenger be possessed of letters of caption directed against the debtor, he may lawfully force open lockfast places; because letters of caption by their usual style contain a warrant to make open doors, in case access shall be refused. Poiding, though it be sometimes accounted the sentence of a messenger, is truly the execution of that decree on which the diligence proceeds. Though letters of caption, which is a diligence merely personal, may be executed at any time of the day or night; yet where the execution

* See *Fac. Coll. June 20. 1765, E. of Morton*, DICT. p. 6197, where it was found that the poiding, though duly inchoated, could not be completed after the death of the common debtor.

† See *Fac. Coll. Nov. 19. 1770, Sinclair*, DICT. p. 13966.

son, 15. *May 1822, (S. & B.)*, or in lodging the minute of the sale with the clerk, *McGhie*, 1. *Dec. 1824, (S. & D.)*, renders the poiding inept; though this consequence will be avoided where the delay arises from causes beyond the control of the poiding creditor; *Scoullar*, 27. *May 1824, (Ibid.)*; or is otherwise accounted for in a manner satisfactory to the Court; *Carmichael, supr.*—3. That, although the powers conferred on the sheriff are more extended than those formerly competent to the messenger, yet his duty "is still merely ministerial, and only entitles him to take cognisance of objections arising as to the *ex facie* regularity of the diligence, the liability of particular articles to be poided, or the like,—but not to decide any objections as to the justness of the debt, or the title of the party to have obtained the diligence;" *Clark*, 15. *June 1824, (Ibid.)*, compared with *Mitchell*, 14. *June 1822, (S. & B.)*.—And, 4. That the poiding is not completed, nor the property of the poided goods transferred, till after lodging the minute of sale with the clerk; *Tullis*, 18. *June 1817, Fac. Coll.*: the doubts expressed by Mr Bell, 2. *Comm.* 69, as to the soundness of this construction of the statute, having since been disregarded by the Court; *Samson, supr.*

It has also been decided, that the apprisement reported in an execution of poiding, requires neither the subscription of the apprisers, nor a stamp; the Lord President, however, observing, "that perhaps if the messenger were to employ regular sworn apprisers, and get a written apprisement, a stamp might be necessary;" *Drummond*, 25. *Nov. 1824, (S. & D.)*, overruling a contrary decision, *McPherson*, 14. *May 1819, ibi cit.* See also *Rhind*, 16. *May 1821, (S. & B.)*.

With reference to the case, which may happen, of the debtor's taking the goods at the appraised value, Mr Bell notices, "that Bankton is of opinion, that if the debtor were to buy them, they might be re-poided by the same creditor; *Bankt. B. iii. t. 13. § 13.* But this is not law, and so the Court held in the case of *Feddes against Fyfe*, "in 1792, *Bell's Cases*; 355;" 2. *Comm.* 67. *in not.*

As to the *pari passu* preference of poidings, *vid. infr.* § 27. *not.* *

³³² *Vid. supr.* § 22. *not.* ³²⁸; § 24. *not.* ³³¹.

execution imports the transference either of property or of possession, it must be gone about between sun and sun; *Fount. Nov. 10. 1703, Gordon* *. This rigour, however, is somewhat abated in poiding, which, if begun before sunset, is sustained, provided it be finished before the going off of day-light; *Stair, Feb. 11. 1675, Douglas, (Dict. p. 3739)*. The messenger employed in the poiding, who is entitled to the sheriff-fee for executing his office, *supr. B. 1. t. 4. § 38*, may, without decree, reserve it to himself out of the value of the goods poided; and this ought to be expressed in his execution.

26. As the property of moveables is presumed from the possession of them, a creditor may poid all the moveables in his debtor's possession: Nor will the debtor's allegation, even upon oath, that the goods to be poided belonged to another, stay the diligence. If a third party shall, before the poiding be completed, offer to make oath that the goods are his; the messenger, who is vested with a judicative authority in this matter, is authorised to take his oath, and put special interrogatories to him, in order to discover in whom the property is truly vested; and if, by the claimant's answers, it shall appear to him that the claim is patched up and collusive, he may proceed in the poiding; *St. B. 4. t. 30. § 6; B. 4. t. 47. § 26*. It might be naturally concluded, that since the messenger has legal authority to judge whether a claimant's oath proves his collusion with the debtor, he ought to be vested with the same full authority in an article of no higher disquisition, viz. Whether a written conveyance of the goods to be poided, granted by the debtor to a third party *retenta possessione*, be collusive? By the general opinion of our writers, however, supported by several decisions, the messenger, where a claimant appears, supported by the title of a written conveyance, hath no cognisance of the validity of that claim, if the claimant shall make oath on the verity of it, but must leave the poiding unfinished; *Fount. July 22. 1687, E. Breadalbane, (Dict. p. 10522)*. He ought, however, in that case, to express in his execution the reasons that prevailed with him to stop short in the diligence³³³.

27. Where a messenger is obstructed in the execution of a poiding by a claim, let it be ever so groundless or lame, or is deforced by violence from completing it, the property of the goods is not transferred to the user of the diligence: For sundry solemnities are by law accounted necessary and essential in poidings, in order to transfer the property; and consequently such imperfect poidings cannot bar any co-creditor, upon whom the violence which occasioned the interruption was not chargeable, from using that diligence. But if the deforcement is imputable to the creditor, he will be cast in the competition *personali objectione*. Hence, where a poiding was forcibly stopped by the possessor of the goods, under pretence that they had been before arrested in his hands by another, the poiding was held for completed in a question with the prior arrester; Clerk *Home, 14. (Corrie, Feb. 13. 1736, Dict. p. 2760)*, from a presumption, that the arrester, whose diligence was used as a handle for stopping the poiding, had been privy

Powers of the messenger in poidings.

Deforcement of messengers.

* See this case reported by President *Dalrymple, Dict. p. 3739*.

³³³ 2. *Bell Comm. 68*.

Book III.

Pointing of
stray cattle.

privity to the deforcement. All who stop a pointing, whether by violence, or by a claim under a collusive title, are liable not only criminally in the pains of deforcement, *infr. B. 4. t. 4. § 32. 33*, but civilly in the value of the goods which might have been pointed by the creditor; *Dalb. 112. (Carse, July 15. 1714, Dict. p. 13970); July 6. 1727, Niven, (Dict. p. 13973)*, observed in (Folio) *Dict. ii. p. 342*; see *Edg. June 10. § 23. 1724, Gordon, (Dict. p. 10529)**.

28. This title may be concluded with a short account of a species of pointing much differing from common pointings, viz. the pointing of horses, cows, or sheep, found in fields of corn or grass, plantations, or other inclosures, by the proprietor or possessor. This pointing does not transfer property, and was intended merely as a spur to tenants to keep a watchful eye over their cattle, and as a compensation to him whose corns, grass or plantations, have suffered by the trespass. The possessor of the grounds on which the cattle were seized might, by our most ancient custom, carry them off *brevi manu*, without a sentence, to any house or field belonging to himself, and detain them there for twenty-four hours. If the owner of the cattle did not, within that time, appear and make his claim, the possessor might insist to have a value fixed by the stated appraisers of the barony, of the damage he had suffered, comprehending the maintenance of the cattle from the time they were seized; and might retain one or more of them for himself, in proportion to the apprisement, restoring the rest to the owner. This right was confirmed by 1686, c. 11, appointing winter herding; by which the owner of the cattle is subjected in payment to the party suffering, of half a merk *toties quoties* for each cow, horse, or sheep, besides the damage done to the corn †, grass, or plantation; and it is declared lawful to the possessor of the ground to detain the whole, till he be paid off the said half-merk for each, and the expense

* By *Stat. 33. Geo. III. c. 74. § 6, (54. Geo. III. c. 137. § 5)*, it is enacted, that when a person has been rendered notour bankrupt, in terms of the act 1696, c. 5, as extended by the British statute, (for which *vide infra, B. iv. t. 1. § 41*), no pointing of the moveables belonging to such bankrupt, used within sixty days before the bankruptcy, or within four kalendar months thereafter, shall give a preference to such pointer; but that every other creditor of the bankrupt having liquidated grounds of debt, or decrees for payment, and summoning such pointer, (*Jan. 16. 1788, Finlay, Dict. p. 1250*), ["or judicially producing the same, in any process or competition relative to the goods or price thereof," *54. Geo. III. c. 137. § 5*], before the said four months are elapsed, shall be entitled to a proportional share of the price of the goods so pointed effecting to his debt, deducting always the expense of such pointing, which the pointer shall retain, in preference to the other creditors, the said debt being thereby so far diminished in the competition with them; and providing also, that all pointings after the four months shall have such preference as they were entitled to by former law and practice³³⁴, saving always the landlord's right of hypothec for rents, or any other hypothec known in law, which shall be nowise hurt or impaired by any thing contained in this act. There is a separate regulation, (*§ 31. 54. Geo. III. c. 137. § 40*), established for the *pari passu* preference of arrestments and pointings, ("with-
in 60 days before the date of the first deliverance,") in case of sequestration. (See also *2. Bell Comm. 81. et seq. supr. § 18*).

† The word "corn" does not occur in the statute; but it has been found to comprehend corn as well as grass and planting; *Fac. Coll. Feb. 18. 1794, Govan, Dict. cr. p. 10499*. It also applies to the case of trespasses committed over a march-fence; *Ibid. July 3. 1799, Loch, Dict. p. 10501, (vid. infr. not. 335)*.

³³⁴ This preference cannot be defeated by any attempt to create a second bankruptcy; no second bankruptcy, to the effect of creating a *pari passu* preference, being possible, "without intervening solvency;" *Fac. Coll. Strang, 12. May 1821, (S. & B -)*.

expense of their maintenance³³⁵. Though the act does not give expressly a right of detention for the damage, yet as that right was competent to the possessor by our usage prior to the act, it may be safely concluded, that that right continues in the possessor; as the plain intention of the law was, not to weaken, but on the contrary to strengthen the possessor's rights. If he who poinds in this way do not put the cattle into a poind-fold, or other place where they may have fodder and water, he is liable in a spuilzie; *Gosf. Feb. 13. 1676, Kid, (Dict. p. 10514).*

TITLE VI.

TIT. VII.

Of Prescription.

IN treating of the several ways of acquiring rights, we delayed explaining the doctrine of prescription, because it is also a way of losing rights or obligations. Prescription must therefore be considered in this title, under a double view, not only as a method of extinguishing property, but of establishing it. Both kinds have their effect by the course of time; but the one by which property is secured to us is called the *positive prescription*; the other, *the negative*. The law of prescription hath been by many writers censured, as hardly agreeable to the law of nature; and Stair seems to favour this opinion, when he says, *B. 2. t. 12. § 9*, that it is of positive institution, and founded on utility rather than on equity. Thus far must be admitted, that it is not deducible directly from natural law, and that it hath received all its forms from statute: But it is also certain, that the nature and ends of society have made prescription necessary; and that it has been introduced, after the example of the Romans, into most nations of Europe, though under different limitations, as best suited the genius and constitution of the several states. The great reasons for the law of prescription are the two following: *First*, For fixing and ascertaining property, *L. 1. De usuc.*, the improvement of which must have been greatly neglected, and the minds of possessors laid under continual fear and anxiety, if they had been for ever exposed to the effect of obsolete claims, which perhaps had not been heard of for a century of years backwards. *2dly*, For preventing forgeries, 1617, c. 12, which must have been exceeding frequent, if deeds of the most ancient dates, though they had never been used, should have any legal effect given to them, as the difficulty of discovering the falsehood at a great distance of time, and consequently the hopes of impunity, would afford strong temptations to the commission of that crime. This policy is not only profitable

Prescription, its foundation.

³³⁵ The mere keeping of a herd does not relieve the owner of the cattle from the penalties of the statute. The statutory enactment can "only be obeyed and satisfied by such herding as secures and prevents the sheep from trespassing;" *Turnbull, 23. Feb. 1809, Fac. Coll.; Shaw, &c. 2. March 1809, Ibid.* Nor is it necessary to poind and detain the animals, to entitle to the penalties. "It is only necessary to have such evidence as the nature of cases of this sort admits of, *i. e.* parole evidence, shewing the number of animals, and of trespasses;" *Shaw, &c. supr.*

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ble to society, but most consistent with the essential rules of government: for the supreme magistrate of every state hath an inherent power to limit the natural rights of his subjects by proper restraints, and to punish, by forfeiture itself, the negligence of proprietors, when the great purposes of government demand it. Prescription is therefore grounded on the proprietor's relinquishing or abandoning his right; which the law takes for granted, or presumes, from his forbearing to exercise it for the whole term of prescription.

Positive prescription,

2. Positive prescription is generally defined by our lawyers, as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer, for such a time as is described by the law to be sufficient for that purpose: But it ought rather to have been defined, the establishing or securing to the possessor his right against all future challenge; for both the Roman law and ours require an antecedent title in the possessor, capable of transferring property; and therefore it may be observed, that our statute establishing the positive prescription, 1617, c. 12, does not once mention the acquisition of property; but supposes the person, whose right is secured by that prescription, to have been formerly the proprietor.

introduced by act 1617, to secure heritage possessed 40 years in virtue of infeftments.

3. The positive prescription was first introduced into the law of Scotland by 1617, c. 12, which enacts, that whoever shall have possessed his lands, annualrents, or other heritages, by himself or others, in virtue of infeftments, for the space of forty years continually and together, subsequent to the dates of the said infeftments, peaceably and without lawful interruption, shall not be troubled or disquieted therein by his Majesty*, or any other pretending right to the same. Though the act requires forty years' possession ensuing the dates of the infeftments, yet if a precise proof of such possession were required universally, no prescription could be received upon rights of so old dates as to exceed the memory of man: If therefore continued possession shall be proved as far back as memory can reach, that possession is by the presumption of law carried backwards from thence to the date of the right. Under the word *heritages* are included, wadsets, fishings, and all other subjects or rights that can be called heritable; and all privileges annexed to heritable subjects, *fundo annexa*, as patronages †, fairs or markets, &c.; and all servitudes or other real burdens affecting lands belonging to our neighbours; *Stair, Feb. 10. 1666, Minist. of N. Leith*, (DICT. p. 10890) ‡. Though the statute mentions in general terms seisin, as necessary to prescription; yet rights admitting no seisin, or which may be perfected without it, if they be heritable, as tacks³³⁷, servitudes, &c. have been by repeated decisions adjudged to fall under the statute, as subjects capable of prescription: For actual seisin cannot with propriety be required as a title of prescription, in rights which either do not admit seisin, or are complete without

* *Mack. Obs. p. 312. 348.*

† This doctrine was confirmed in a question relative to a right of patronage, by judgment of House of Lords, *March 7. 1759*, on the case *Fac. Coll. July 28. 1758, Earl of Home*, DICT. p. 10777.

‡ See *Forbes, June 5. 1713, Duke of Roxburgh*, DICT. p. 10883³³⁶.

³³⁶ See also *Magistrates of Lauder, 15. Nov. 1754*, DICT. p. 1987.

³³⁷ See *Maule, 2. Dec. 1817, Fac. Coll.*

without it *. Upon this ground, a decree of adjudication, even without seisin, has been sustained as a good title to acquire a right of tithes by prescription; *Fac. Coll.* ii. 120. (*Gordon, July 1758, Dict. p. 10825*): For though tithes may be, and frequently are, transmitted by seisin; yet they admit of being completely carried by a personal right, *ex. gr.* when they have never been established in the proper feudal manner by seisin: And consequently a bare adjudication, with possession upon it for forty years, will give to the adjudger a full right to the tithes ³³⁸, though the decree should have been led against one who had not the least shadow of right to them †. Though it would be hard to affirm, that subjects incapable of continual possession are also incapable of prescription; yet as the act requires the possession to be continual, it may reasonably be doubted, whether a person, even supposing him standing infest for forty years in a right of patronage, without challenge from any other during that whole period, can, in a competition with one claiming under a preferable title after the forty years, plead the positive prescription, though he should have exercised his right by once presenting an incumbent upon the only vacancy which happened during the course of the prescription. A single act of possession cannot with any propriety be called continual possession; and the law of prescription might on good grounds be taxed with iniquity if a single instance of negligence in the patron should infer the forfeiture of his property, and transfer it to him who hath without a title presented an incumbent to the benefice, though the effect of that presentation should last for a whole course of prescription; if, for instance, the presentee should continue incumbent in the church for full forty years ‡. What number of acts of possession may be requisite to establish such prescription, is an arbitrary question: But this can hardly admit a doubt, that in a right of patronage constituted without seisin, as is sometimes the case, the grantee's exercise of the right for such a time, and by such a number of acts, as ought by the intendment of the statute to be deemed continued possession, will secure his right against all future challenge, even without seisin; *St. B. 2. t. 12. § 23*. The possession must by the said act be held for the forty years, without any lawful interruption; *i. e.* he who is to establish his right by prescription, must not only continue to possess during that whole period, but he must not be disturbed in his possession by any act of interruption, made either by a notorial instrument or *via facti*.

4. The statute requires, that the possessor shall produce, as his title of prescription, a charter of the lands, under which is included every deed of alienation, whether by disposition, or even by a bare procuratory of resignation, with the seisin proceeding on it, and dated previously to the forty years' possession; and where there is no charter or disposition extant, seisins, one or more, standing together for forty years, and proceeding on retours or precepts of
Clare

Title of this prescription.

* This was decided as to a tack of teinds; *Kames, Rem. Decis. No. 76, Muir, July 2. 1746, Dict. p. 10820*.

† The same judgment was given, *Fac. Coll. November 1764, Irvine, Dict. p. 10830*. See, however, *Falc. v. i. Kilkerran, voce TEINDS, June 25. 1745, Chatto, Dict. p. 15657; (Elchies, v. TEINDS, No. 23.)*.

‡ See *Mack. Obs. p. 175* ³³⁹.

³³⁸ Where they have not previously been established in a feudal manner, by seisin; *Gordon, supr.; Irvine, not. † h. p.*

³³⁹ See also *Bankt. B. ii. t. 8. § 91-97; Connell, (Parishes,) 480. et seq.*

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Clare constat. This hath given rise to a reasonable distinction, observed in practice between the prescription of a singular successor and that of an heir. Singular successors must produce for their title, not only a seisin, but a charter or disposition, either in their own person, or in that of their author: But more favour is shown unto heirs, who possess *titulo universali*, and who therefore need only produce seisins, one or more, connected together for forty years without producing the relative charter³⁴⁰. If the seisins themselves labour under no nullity, and are grounded either on retours or on precepts of *Clare constat*, the prescription obtains in favour of the heir, though he should not produce these retours or precepts nay, though they should appear to be informal or defective; *Stair* Feb. 15. 1671, *E. Argyle*, (Dict. p. 10791); *Feb. 9. 1739, Purdie* (Dict. p. 10796), observed in (Folio) *Dict. ii. p. 103*. And in the same manner, after prescription is run in favour of a singular successor, the charter and seisin, if they be formal deeds, will of themselves support the prescription, without the necessity of producing the grounds of the charter; or even though, if extant, they were reducible upon nullities*. And as prescription cuts off all ground of preference, which, if insisted in before the expiration of the forty years, would have excluded the prescriber; a charter, though granted *a non domino*, by one who himself had no right, is a good title of prescription: So that, if the title be a fair genuine writing, and proper for the transmission of property, the possessor is, after the years of prescription, secure by the statute; which admits no ground of challenge except falsehood, the length of time standing in the place of all other requisites; 1740, *Ged*, (Dict. p. 10789). From this rule another may be deduced as a corollary, That a possessor after he has acquired a subject by the positive prescription, cannot be affected by the alleged preference of any title in his competitor antecedent to the commencement of the prescription, more than he can be by the legal defects of that charter, or other title on which his own right of prescription was grounded. If he and his author have had such possession as the statute requires during the whole course of forty years, he is fully secured against all disturbances upon pretence of antecedent titles, though they should be unquestionably preferable to his own. A right or subject may be carried by prescription, though it be not expressed in the prescriber's charter if he shall have possessed it for forty years as part and pertinent another subject specially mentioned in it. This obtains though the competitor should have been specially infeft in the subject in dispute, unless he has also taken care to preserve his right, either by acts of possession, or of interruption, within the years of prescription; *Stair*, Nov. 27. 1677, *Grant*, (Dict. p. 10876); *Forbes*, Feb. 2. 1711, *E. Leven*, (Dict. p. 10816). But if the subject cannot by its nature

* Even where there is an objection to the formality of the investiture, unless that can be proved by the charter or seisin itself, it may be removed by prescription. Thus where a seisin was objected to, as having been taken, not upon the ground of the land but at a different place, in consequence of a dispensation in the immediate warrant, viz. a disposition from a subject, the Lords sustained the defence of prescription, previous titles might have contained a regular dispensation, and such dispensation though a subject superior could not originally grant, yet being once competently conferred, he could convey it; *Fac. Coll. July 1. 1779, Scott*, Dict. p. 13519.

³⁴⁰ A singular successor may, of course, defend himself in right of his author, on the same title which would have been available to the latter in the character of heir. In all cases, the party pleading prescription must connect himself with a seisin; *Crawford* 20. Dec. 1822, *Fac. Coll.*, and 2. June 1826, (S. & D.); *Neilson*, 26. Feb. 1823, (S. & D.)

nature be accounted a pertinent of the lands in which he who claims the prescription is infert, prescription cannot be admitted; an instance of which has been already given in the case of a bounding charter, *supr. B. 2. t. 6. § 3.*

5. Possession must, by the said statute, be continued through the whole course of prescription, upon the title of seisins. No part therefore of the possession of a singular successor, upon a bare personal right, as a charter or disposition, can be computed to make up the years of prescription. And this is also the case of an heir's possession before he hath completed his titles by seisin; because such possession by the heir is grounded barely on the right of appearance, and not upon seisins; *St. B. 2. t. 12. § 15; Stair, Feb. 15. 1671, E. Argyle, (Dict. p. 10791)*.* The possession of tenants, adjudgers, wadsetters, liferenters³⁴², and others who have temporary rights on the subject derived from him who claims the prescription, is, both by the nature of possession, *supr. B. 2. t. 1. § 22,* and by the words of the act, accounted the possession of the prescriber; and so must be computed in order to complete the course of prescription, in a question with third parties; *Forbes, June 19. 1713, Murray, (Dict. p. 10934); Edg. July 28. 1724, E. Marchmont, (Dict. p. 10797).* Though the statute requires, in the case of an heir, seisins founded either on retours or on precepts of *Clare constat*, yet a seisin by hasp and staple in burgage tenements is deemed equivalent to one proceeding on a precept of *Clare constat*; because the bailie, by the constant usage of boroughs, receives heirs upon a summary cognition of their propinquity; and if this manner of entry were not accounted sufficient for prescription, the act 1617 could be of little use in burgage tenements; *Dalr. 65. (Ker, Nov. 1705, Dict. p. 10813).* On the same ground, a seisin of burgage tenements bearing resignation to have been made in the hands of a bailie, is a good title of prescription; because, by the borough forms, the resignation and seisin are contained in one instrument, without either charter of resignation or precept of seisin; *Dalr. 68. (Ker, Dec. 1705, Dict. p. 10813).*

6. An account hath been given of the titles required in the prescription of salmon-fishing, *supr. B. 2. t. 6. § 15;* and in that of servitudes, *B. 2. t. 9. § 3. 4. & 29.* In all prescriptions of the regalia, a charter even from a subject is deemed a sufficient title; because possession for the forty years, upon the title of such charter, creates a *præsumptio juris et de jure*, that the right of that subject was originally granted by the King; *Stair, Dec. 2. 1679, Farquharson, (Dict. p. 10879); Ibid. Jan. 13. 1680, Brown, (Dict. p. 10844); Dec. 22. 1731, Tarbat, (Dict. p. 10879).* Forty years' possession, without any title in writing, is sufficient to establish a right to a private road through the grounds of a neighbouring proprietor; *Fount. July 17. 1700, L. Bennoch, (Dict. p. 10881).* Real rights of annual prestations, as tilling the ground, leading manure, &c. and the casualties and perquisites of sheriffs, and other such public officers of the law, may be also constituted by a possession of forty years, without

The whole possession must be held in virtue of seisins.

Prescription of servitudes, regalia, &c.

* The contrary was found, *Fac. Coll. Jan. 22. 1791, Caitcheon, Dict. p. 10810,* where the argument on the part of the defender refutes, most satisfactorily, the doctrine contained in the text. There are two older decisions to the same purpose, *Edgar, July 28. 1724, E. Marchmont, Dict. p. 10797; Fac. Coll. Dec. 22. 1774, Middleton, Dict. p. 10944*³⁴¹.

³⁴¹ See *Crawford, and Neilson, supr. not.* ³⁴⁰

³⁴² *Neilson, 26. Feb. 1823, (S. & D.).*

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Where possession may be supported on two different titles, one limited, and the other free.

without any special clause in the charter or grant; *Durie, March 11. 1634, Sher. of Galloway*, (DICT. p. 10888); *Stair, July 11. 1672, E. Callender*, (DICT. p. 10892); *Forbes, Dec. 27. 1709, Cunningham*, (DICT. p. 10906)³⁴³. Where one's possession of heritage may be supported on two different grounds or titles, the most ancient of which contains limitations on the possessor or his heirs, which the latter is free from, it is lawful for the possessor to establish his right upon the unlimited title, and ascribe his possession thereto; which possession, if it is uninterrupted for forty years together, will entitle him to the benefit of the positive prescription, and secure him and his successors against any attack from all such deserted infeftments or claims fettering his right, upon which no legal step had been taken during that period. By this rule, an estate which has been possessed for a whole course of prescription, under titles descendible to heirs of line, becomes an unlimited fee in the possessor, disburdened of every limitation formerly conceived in favour of heirs-male, even though all the heirs who enjoy the estate during that period were the heirs-male as well as heirs of line; Clerk *Home*, 126. (and *Kilk. Macdougall, July 1739*, DICT. p. 10947); *Fac. Coll. i. 59. (Douglas, &c. against Douglas, Feb. 3. 1753*, DICT. p. 4350); for the possessor is, in the precise terms of the statute 1617, secured from the effect of all prior infeftments *³⁴⁶. And if the law stood otherwise, that statute of prescription could afford little security to purchasers: For though the proprietor had possessed upon unexceptionable titles for a double course of prescription, still if any burdens or limitations should appear in any charter, dated perhaps some centuries ago, these burdens would, by that doctrine, continue effectual to perpetuity, not only against the heirs, but the singular successors of that proprietor.

7. There

* It has even been found, that where the title in fee-simple is merely of the superiority possession for forty years of the property, though upon apparency, is sufficient to work off any limitations in the previous titles of the property, and to establish a fee-simple in toto, by the positive prescription; *Fac. Coll. Dec. 6. 1770, Bruce*, DICT. p. 10805; *Ibid. Dec. 22. 1774, Middleton, &c.* DICT. p. 10944³⁴⁴. But if, by both rights, the possessor is unlimited fiar, prescription cannot run by possession upon the one title against the other; *Kilk. No. 20. voce PRESCRIPTION, Smith, &c. June 1752*, DICT. p. 10803; *Fac. Coll. Nov. 24. 1802, Durham*, DICT. p. 11220, (affirmed on appeal, 5. *Mar. 1811.*)³⁴⁵.

³⁴³ As to the right of the keeper of a royal park to work minerals within the bounds, and to dispose thereof for his private behoof, he having no feudal right in the lands, see *E. Haddinton*, 24. *June 1823*, and 11. *July 1826*, (S. & D.).

³⁴⁴ See also *Harvie*, 29. *Jan. 1822, Fac. Coll.*

³⁴⁵ This is founded on the rule, that no person can prescribe against himself. A similar judgment was again pronounced, *Zuille*, 4. *March 1813, Fac. Coll.* When one of the titles is a strict entail, so long as both rights remain in the same person, the making up of a title under the entail will not exclude from afterwards going back on the unlimited investiture; *Fac. Coll. L. Reay*, 25. *Nov. 1823*, (S. & D.).

³⁴⁶ In all cases, in order to cut down the limited title, the unlimited title under which possession is held must not connect therewith, but must be conflicting and independent.

Thus, even where an entail remains personal, if the entailer's heir of line, without a radical renewal of the investiture, possess on apparency, or connect himself, through the person of the entailer, with the previous unlimited title, by service, or precept of *clare constat*, (neither of which is a habile mode of altering the settlements of an estate,) this will not be sufficient to exclude the entail; *Zuille, supr. not.*³⁴⁵; *Fac. Coll. Maxwell*, 21. *June 1808*, DICT. v. *Prescription, App. No. 8*; *Lumsdaine*, 13. *June 1811, Fac. Coll.*, both affirmed on appeal. It is otherwise, where there has been a radical creation of a new investiture by resignation and charter, or by some other form of title in fee-simple, not connecting with the entailer, but incompatible with, and in contravention of, the entail, and whereon the positive prescription has run, as an entirely independent title; *Fac. Coll. Routledge*, 19. *May 1812*, and 16. *Dec. 1819*; 2. *Bligh*, 692; *Buchanan*, 121; *Zuille, supr.*; *D. Hamilton's Trustees*, 18. *May 1824*, (S. & D.).

So also, where *in græmio* of the title possessed on, there is an express saving of the limited title, or where the former is burdened with an obligation to make up a limited title, there is no room for the plea of prescription; *Dalziel*, 17. *Jan. 1810, Fac. Coll.*; *Murray*, 17. *Jan. 1811, Ibid.*

7. There is no statute establishing a positive prescription in moveable rights or subjects; nor indeed was one necessary; for since the property of moveables is presumed from possession alone, without any title in writing, the proprietor's neglecting for forty years together to claim them, by which he is cut off from all right of action for recovering their property, effectually secures the possessor.

8. The negative prescription may be defined, the loss or forfeiture of a right, by the proprietor's neglecting to exercise or prosecute it during that whole period which the law hath declared to infer the loss of it. This kind of prescription, by the running of forty years, had been made part of our law long before the positive, by two statutes, 1469, c. 29; 1474, c. 55; which enact, that all creditors by obligation shall follow forth their right, and take document upon it within forty years; otherwise that the right shall prescribe. These acts were at first strictly interpreted, and confined to simple obligations; *Durie*, Feb. 26. 1622, *Hamilton*, (Dict. p. 10717); but they were soon extended to mutual contracts; *ibid.* Nov. 27. 1630, *L. Lauder*, (Dict. p. 10655); to marriage-contracts, even where they were supported by subsequent marriage; *ibid.* Dec. 23. 1630, *Ogilvie*, (Dict. p. 6541); and to actions concerning moveables, though they were grounded on rights of property; *ibid.* Dec. 7. 1633, *Min. of Abersharder*, (Dict. p. 10927)³⁴⁷. The act 1617, by which the positive prescription is established, hath also amplified the negative, which was understood formerly to be limited to moveable rights, and hath extended it, so as to strike against all actions competent on heritable bonds, reversions, contracts, and others not sued upon within forty years after their date. It was, on this clause of the statute, adjudged, that actions founded on rights of property of land, cannot be lost by the negative prescription, unless they be excluded by a positive right in him who objects it; *Dec.* 24. 1728, *Presb. of Perth*, (Dict. p. 10723), observed in (Folio) *Dict.* ii. p. 98; and there had been a decision nearly similar some years before; *Edgar*, July 20. 1725, *Paton*, (Dict. p. 10709). Both judgments proceeded on the same medium, That the negative prescription of heritable rights of property cannot be pleaded, even by one who hath a title in himself proper to be the foundation of a positive prescription, if it be not actually established in him by that prescription; because the negative prescription confers no right on him who pleads it, but barely extinguishes that which is in the adversary; and consequently, that none but he who hath in himself a full right of property in the lands, can have any interest to plead against his party, that he has lost his by the negative prescription, since, by that plea, his adversary's right cannot be transferred to himself.

9. The right of setting aside any deed upon extrinsic objections, which do not appear *ex facie* of the writing, but require a separate evidence, *ex. gr.* the right of reduction *ex capite lecti*³⁴⁸, is lost if not exercised within forty years³⁴⁹. But objections arising from intrinsic nullities

TITLE VII.
Positive prescription of moveables.

Negative prescription.

Right of setting aside deeds upon extrinsic objections, falls under the negative prescription.

³⁴⁷ A right to levy customs prescribes by disuse "for forty years and upwards;" *Mag. of Linlithgow*, 21. June 1822, (S. & B).

³⁴⁸ A very interesting question is at present, (Feb. 1827,) depending in Court: Whether the right of reduction *ex capite lecti* prescribes, where the heir has himself been in possession under a different title, against which, though no challenge was brought during the years of prescription, yet the right of challenge had been preserved, in consequence of interruption by minorities; *Mackinlay v. Eund.* The printed papers contain an elaborate inquiry into the accuracy and authority of a previous case, *Lady Inveraw*, 21. Jan. 1747, as reported, 1. *Falc.* p. 167, (Dict. p. 6554.) and more especially as abridged, 4. *Fol. Dict.* p. 91;—and an additional report from the MS. of Lord Elchies is appended. See also *Seton*, 14. Feb. 1736, *Elch. h. t.* No. 9.

³⁴⁹ *Paul*, 8. Feb. 1814, *Fac. Coll.*

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What rights
do not fall un-
der the negative
prescription.
*Res meræ facul-
tatis.*

nullities fall not under the negative prescription. Thus a bond, or instrument of seisin, without subscribing witnesses, cannot become valid by any lapse of time. This doctrine holds also in diligence used against heritable subjects, as adjudications, which, if intrinsically null, may be set aside, even after the years of prescription. *July 25. 1738, Ainslie, (Dict. p. 10736), cited in (Folio) Dict. ii p. 99.* But where the adjudger hath established a right to the land adjudged by the positive prescription, he is secure against all such challenge³⁵⁰.

10. Certain rights are *ex sua natura* incapable of the negative prescription; at least where statute does not interpose. *First, Res meræ facultatis*; powers which one may exercise or not at his pleasure; *ex gr.* a power or faculty to burden lands with a certain sum, or to revoke a right granted, &c.; for it is the nature of these to lie over so that they may be exercised *quandocunque*, at any time. Hence where one subjected to thirlage had got a power from the proprietor of the dominant tenement to build a mill on his own property that power was adjudged not to be lost, though neither he nor his ancestors had used it for an hundred years together; *Forbes, March 14. 1707, L. Bimmerside, (Dict. p. 10726).* Hence also the right inherent in every proprietor, of building, or using any other act of property on his grounds, cannot prescribe by any length of time though a neighbouring landholder should suffer ever so much by the exercise of it³⁵¹. A right of reversion, when not limited in point of time, is justly ranked in this class of things; for it is a faculty reserved to the reverser to redeem his lands at any time that he shall think convenient, at whatever distance of time that may happen to be from the constitution of the right. From hence it follows, that reversions would not have fallen by the negative prescription, if the act 1617 had not expressly declared, that that prescription should strike against all actions competent upon reversions. This enactment was necessary for the security of purchasers and creditors who could not possibly be secured if such reversions as were latent or could not be known to singular successors, had continued effectual without being limited by some period of time. From the general enactment in the statute extending the negative prescription against reversions, are excepted all such reversions as are either incorporated³⁵² in the body of the infeftment which is used by the possessor for his title, or registered in the books of the clerk-register; not merely because all suspicion of falsehood ceaseth as to these which is the reason assigned in the act; but also because reversions which are either registered in a public record, or expressed in the body of the purchaser's right, are easily discoverable by him. Such reversions are not only secured by this act to the reverser against the negative prescription, but they are an effectual bar against any person

³⁵⁰ On the same principle of intrinsic nullity,—it has been held, “that the vassal's right to object against a multiplication of superiors, could not be extinguished by the negative prescription;” *Fac. Coll. Stewart, 14. May 1823, (S. & D.)* Nor will a division of the superiority in *lifereit* merely, though continuing unchallenged for forty years, bar the challenge of a subsequent division in *fee*; *Ibid.*

³⁵¹ So, where a party's titles contain a right to coals, or a grant of fishing, the actual exercise of this right is *res meræ facultatis*, and the right cannot be lost *non usudo*, except in so far as others have, upon a proper title, established a preferable right; *Crawford, 10. July 1821, (S. & D.); Agnew, 27. Nov. 1822, (S. & D.)*

³⁵² “It is not necessary that the right of reversion be *verbatim* inserted. It is enough that there be such a clear and explicit expression of the nature of the right, as is capable of putting people on their guard;” *Per Curiam, in Geddes, 28. May 1814 Fac. Coll.* But a mere general reference will not do; *Ibid. Munro, 19. May 1814 Fac. Coll.* See also *Chambers, 6. June 1823, (S. & D.)*

person from pleading the positive; *Kames*, 92. (*Elliot*, Jan. 1727, Dict. p. 10977).

11. As to the question, Whether exceptions or defences competent to a defender for eliding any action, can be lost by the negative prescription? the following distinction may be made. Where the exception establishes no right in the excipient, but tends merely to exempt him from a demand that may be made on him by another, it cannot be lost *non utendo*, but must operate as long as it is possible for the other party to prosecute his right; because the negative prescription supposes some right or claim in a person, which is understood to be abandoned or deserted, by not insisting upon it within the time limited: And besides, exceptions which relate, not to the constitution, but to the extinction of a claim, not being intended to have any farther operation, are seldom productive of an action, and so cannot be founded on till the persons having right to them be sued upon the claim. An exception therefore arising from the discharge or acquittance of a debt, or from receipts of money restricting the debt to a fixed sum, must be perpetual. Nay, if the debtor should, for his farther security, bring an action after the years of prescription for declaring the debt to be paid off or restricted by these vouchers, it cannot be objected to him, that his right of action is prescribed; since the intention of it is not to rear up any demand or claim against the defender, but barely to extinguish an obligation which was once due by himself. Hence also a decree of valuation, or of sale of tithes, cannot be lost *non utendo*; because such decree establishes no right or claim of tithes in the obtainer of it against another, and can be used by him no otherwise than as a defence against the claim of the titular; *Forbes*, June 7. 1710, *La. Cardross*, (Dict. p. 10657)*. Upon this ground a decree, by which any final adjustment of differences is made between the parties, *ex. gr.* a judgment settling the boundaries between two conterminous landholders, must, notwithstanding the longest silence of either party, remain as a perpetual settlement of their several rights. But where the exception is founded upon some claim of the defender against another, which is of its own nature productive of an action, *ex. gr.* compensation, it may be lost by prescription; because such right ought to have been insisted in within the years of prescription; *Kames*, 17. (*Carmichael*, July 1719, Dict. p. 2677.)³⁵³.

12. The right of bringing an action of improbation on the head of falsehood or forgery, is not lost by the negative prescription. This proceeds both from the rule, *Nunquam præscribitur in falso*, and from the express words of the act 1617. No right can be lost *non utendo*, or by disuse, unless the loss of it to him who neglects to exercise it shall establish some positive right in another. From this principle the rule arises, *Juri sanguinis nunquam præscribitur*: For though the right of blood should be lost to one, no other can take it up. A person may therefore, at the greatest distance of

TITLE VII.

Whether defences for eliding an action can be lost by the negative prescription.

Nunquam præscribitur in falso.

No right can be lost unless the loss establishes a positive right in another.

* See (*contra*) *Fac. Coll. Aug. 4. 1773, Somerville*, Dict. p. 15764.

³⁵³ Where the entry of singular successors is taxed in the original investiture, the benefit of this taxation will not be lost by the negative prescription, on renewals of that investiture by precepts of *clare constat* wherein it is omitted to repeat the taxing clause; it being held, that such a mode of renewal "can only be regarded as an acknowledgment of the grantee, as heir of his predecessor, under the conditions and obligations contained in the original investitures, and that any alteration thereon can only be made by express agreement between the parties;" *Stewart*, 3. Jan. 1813, *Fac. Coll.*

When a proprietor sells part of his lands, his right to be relieved from a proportional part of the public burdens cannot be lost by the negative prescription; *Mill*, 7. Feb. 1794, Dict. p. 10715.

Book III.

A vassal cannot prescribe an immunity from feu-duties.

Whether tithes can be lost by the negative prescription.

Bonds of pension.

of time from the death of his ancestor, serve heir to him, if no other has been served during that period; for as that right is proper to him who is vested with the character of heir, no interest can be established in any other to found an opposition. A vassal cannot prescribe an immunity from the feu-duties, services, and casualties of superiority, due to his overlord, though he should not have made payment of them for forty years; and consequently the superior's right to these cannot be lost by his silence, or neglecting to exact them; for the right of feu-duties, and of feudal casualties, being inherent in, and essential to, the superiority itself, or *dominium directum*, is accounted a right of lands, which does not suffer the negative prescription, except in favour of one who can plead the positive; *supr.* § 8. This the vassal cannot do, who has no title of prescription in him, his only title being a charter from the superior, which, in place of being a ground of the positive prescription, directly excludes it. This doctrine is not applicable to a right of servitude, which is in no sense a right of lands, or a necessary concomitant of property, but is extinguishable; and therefore he who is subjected to that right may plead an immunity from it, by the non-usage of him who is entitled to it, though he himself should have no positive title of prescription in him, or even though the servitude should be expressed in that very charter by which he holds the servient tenement; *Feb. 7. 1735, Graham*, (Dict. p. 10745), cited in (Folio) *Dict. ii. p. 100*; for *bona fides* is not necessary to the long negative prescription; *infra*, § 15.

13. The above-mentioned rule concerning feu-duties holds also in tithes, the right of which cannot be lost by the negative prescription*. But here we must distinguish between parsonage and vicarage tithes. The last are not due universally out of all lands; they are only payable, at least the lesser vicarage tithes of herbs and roots, where the right hath been established by usage. That right therefore may be extinguished totally by contrary non-usage, or more properly by a disuse of payment; agreeably to the rule, *Nihil tam naturale est, quam unumquodque eodem modo dissolvi quo colligatur*, *St. Nov. 24. 1665, Bish. of the Isles*, (Dict. p. 10758).³⁵⁴ But the obligation to pay parsonage-tithes is founded on the public law, which hath imposed this burden upon all lands that are not specially exempted; for the tithes of all lands were appropriated originally to the church. And even since the Reformation, that burden is still continued in favour either of the church or of a laic titular; so that every proprietor of a land-estate must know that his lands are subjected by the law to the payment of parsonage-tithes; and consequently no course of time can sopite or extinguish the obligation to pay them †. But though neither the superior's radical right to the feu-duties, nor that of the titular to the tithes, can be lost by the negative prescription; yet such of the feu-duties or tithes as have been due for upwards of forty years, without any demand made by the superior or titular for all that time, fall under prescription; *Durie, Dec. 15. 1638, L. Grandtully*, (Dict. p. 10750); for the claim of these hath no such necessary connection with the radical right of the superior or titular, but that the last may subsist without the first; and every year's obligation for the feu-duty, or for the tithe, is considered as a several or distinct right, which must therefore run a separate course of prescription. Much like to feu-duties and parsonage-tithes are bonds of pension, or other obligations of

* *Nov. 3. 1749, D. of Rosburgh*; reported by *Kames, Rem. Dec. No. 112*, and by *Falc. ii. 108, Dict. No. 64, voce PRESCRIPTION*, p. 10764.

† See *Fac. Coll. Feb. 7. 1794, Mill*, Dict. p. 10715, (*supr. not.* 353.).

³⁵⁴ *Lyon, 12. Jan. 1757, Elch. v. TRINDS, No. 4.*; 2. *Connell, (Tithes,) 484.*

of an annual prestation, which subsist by themselves without any relation to a capital sum or stock ; for these admit not of a total prescription, though no diligence should be used on them for forty years together, seeing such obligations cannot be paid at once, but year after year ; and prescription cannot commence against a debt till it be payable. Put the case, of a bond of pension to an advocate, on which no diligence has been used for upwards of forty years ; doubtless the arrears incurred before the forty years, which were never demanded, suffer prescription ; but the bond itself still subsists during the grantee's life, not only as to all future pensions, but as to those which fell due within the years of prescription ; *L. 7. § 6. C. De præscr. 30 vel 40 ann. ; July 1730, Lockhart, (Dict. p. 10736)**. But in a bond which carries a yearly interest, of which no demand is made by the creditor for the years of prescription, not only the interest which had become due before the forty years suffers prescription, but the bond itself and all its consequences ; for there the obligation is but one, and can be performed at once, and the interest growing upon it is an accessory to, or quality of that one obligation †.

14. Sundry rights are incapable of the positive prescription. Thus things sacred or public could not by the Roman law be acquired by usucapion, because they were exempted from commerce : And this reason, being founded in nature, must extend to all countries ; for whatever is incapable of becoming one's property is also incapable of being acquired by the positive prescription, since prescription is one way of establishing property. Tithes fell under this class of things before the Reformation ; for till then they were appropriated to the service of God : But now they are *privati juris*, except in so far as they are destined for the support of the clergy ; and accordingly they have been granted by the crown to lay titulars, and may be bought and sold as any other subject of commerce. A proprietor of land, therefore, if he has an habile title of property ³⁵² to his tithes derived from the laic titular, and under that title shall have possessed them for forty years by charter and seisin, establishes an irrefragable right to them by the positive prescription, though he cannot lose that right by the negative. Things stolen, or possessed by violence, were in the Roman law understood to have received such a *vitium*, or noxious quality, by the theft or robbery, that they could not be acquired by usucapion, even in the person of a *bona fide* possessor, § 2. *Inst. De. usuc.* † ; but this, and all other grounds of challenge, seems to have been cut off by the *præscriptio longissimi temporis* ; *L. 3. 4. C. De præscr. 30 vel 40 ann.* Neither is there any thing in our statute 1617, that makes them incapable either of the positive or negative prescription ; for it makes no exception of actions for the restitution of goods stolen or carried off from the owner by violence ³⁵³.

15. Mackenzie, § 5. *h. t.* affirms, that *bona fides* is not requisite either in the positive or negative prescription of forty years. And it is certain, that as to the positive, the statute 1617 takes *bona fides* for

What rights are incapable of the positive prescription.

Bona fides is presumed in the positive prescription, and is not requisite in the negative.

* See *Forbes, July 6. 1711, Stewart, Dict. p. 10722.*

† See *Fac. Coll. Dec. 9. 1779, Anstruthers, Dict. p. 10719*, as to the claims of relief by a cautioner, which being kept alive *quoad* the principal debt, were found to be equally so for recovery of interests paid by him beyond forty years.

‡ See *Bankt. B. 2. t. 12. § 19.*

³⁵² *Vid. supr. h. t. § 9.*

³⁵³ A corporation may be constituted by prescription ; *Vid. supr. B. 1. t. 7. § 62. See also Fac. Coll. Gray, 16. Jan. 1823, (S. & D.)*

Book III.

for granted, rather than requires it: For continued possession for forty years, proceeding upon an habile title of property, not chargeable with falsehood, secures the possessor against all other grounds of challenge, *sup.* § 4; and so infers *bona fides præsumptione juris et de jure*; *Stair, Nov. 27. 1677, Grant, (Dict. p. 10876)*. All our lawyers are agreed, that in the long negative prescription, the creditor, barely by his silence for the whole course of prescription, is understood to have abandoned his claim, and so loseth his right of action, without the necessity of *bona fides* in the debtor. Hence if a creditor who has made no demand within the years of prescription, should afterwards offer to prove, by the debtor's own oath, that the debt still subsisted, even that offer would not save the debt from being extinguished by the elapsing of the forty years; though it is obvious, that the debtor's consciousness of the subsistence of the debt excludes *bona fides*; *Fount. Dec. 7. 1703, Napier, (Dict. p. 10656)*. Though in the general case rights are not lost by the negative prescription in less than forty years, it has been thought reasonable to establish by special statutes a shorter prescription in sundry debts and rights, in some of which *bona fides* is required on the part of the debtor.—These shorter prescriptions fall next to be explained.

Shorter negative prescriptions.

Triennial prescription of actions of spuilzie and ejection.

16. Actions of spuilzie suffer a triennial prescription. Spuilzie is the taking away or intermeddling with moveable goods in the possession of another, without either the consent of that other, or the order of law. When a spuilzie is committed, action lies against the delinquent, not only for restoring to the former possessor the goods or their value, but for all the profits he might have made of these goods, had it not been for the spuilzie. These profits are estimated by the pursuer's own oath, and get the name of *violent*, because they are due in no other case than of violence or wrong. The words of the statute 1579, c. 81, limiting the duration of actions of spuilzie to three years after the commission of the fact on which the action is grounded, would, if understood in its full extent, cut off all right of action competent to the person despoiled against the delinquent after that period. But by these words is only meant the action of spuilzie, as it includes the privileges of the violent profits, and of proving the extent of the pursuer's damage by his own oath; a species of evidence rejected by the common rules of law. Action for simple restitution of the goods, and ordinary damages, therefore, is competent against the despoiler at any time within forty years; *Durie, March 16. 1627, Hay, (Dict. p. 12131)*. This statute also limits actions of ejection, and others of that sort, to a triennial prescription. An action of ejection is competent to a tenant, or other lawful possessor of an heritable subject, who is violently turned out of possession, against him who hath ejected him. By the general words, *and others of that sort*, may be understood, all suits grounded upon acts of violence or wrong committed by the defender, where the pursuer is entitled to a proof of damages by his own oath *in litem*; *ex. gr.* an action of intrusion, which is competent to a tenant or others having interest, against those who have intruded into the void possession of any heritable subject which the pursuer was possessing *animo, i. e.* which he had been possessed of some short time before, and had left with a presumed intention of returning to it. This act contains a reservation or exception in favour of minors who shall pursue within three years after their majority. The same exception is expressed in some other statutes establishing

tablishing the short prescriptions, 1669, c. 9, &c. *, but left out in most ; which intimates, not obscurely, that the short prescriptions run against minors in the general case, according to the rule, *Exceptio firmat regulam in non exceptis*. And though it has been judged reasonable to indulge minors with privileges in particular cases, because their interests may be neglected by their tutors or curators ; yet where statute does not take them out of the common case, they must be subjected to the common rules ; *Forbes, Jan. 26. 1709, Brown*, (DICT. p. 11150) ; *Ibid. Dec. 10. 1712, Stewart*, (DICT. p. 11151).

17. A triennial prescription is also established in actions for servants' fees, house-rents, and merchants' accounts, by 1579, c. 83. This triennial prescription is received, whether the merchant furnishes the goods directly for the use of a private family, or sells them to another merchant who is again to retail them ; *Durie, Feb. 15. 1630, Ord*, (DICT. p. 11083). Mention is likewise made in the act of men's ordinaries ; by which is meant debts due for the entertainment of persons at board : and then a general clause is subjoined of *such like debts*, in virtue of which alimentary debts are subjected to a triennial prescription ; *Br. MS. July 25. 1716, Hamilton*, (DICT. p. 11100) †. The act is, by practice, extended also to debts due to artificers or tradesmen, for their work or wages ; *Fount. Dec. 21. 1692, Bayne*, (DICT. p. 11092) ; and to accounts of writers, agents, procurators, &c. *Stair, Dec. 16. 1675, Somervell*, (DICT. p. 11087), because of their near resemblance to merchants' accounts³⁵⁷. Nay, a particular piece of work performed by an accountant in settling accounts between two persons, by neither of whom he was employed in any other business, was found to be a debt that was comprehended under that general clause, though it did not appear to be the subject of a proper account ; *Tinw. July 22. 1755, Farquharson* ‡. Accounts also which are due to surgeon-apothecaries or druggists fall under the act. But a physician, who is presumed either to have received his honorary from time to time as he attended, or to have served

TITLE VII.

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Triennial pre-
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vants' wages,
house-rents, and
merchants' ac-
counts.
Honoraries.

gratis,

* Particularly in *stat. 12. Geo. III. cap. 72*, establishing the sexennial prescription of bills and promissory-notes. See note *infra*, § 29.

† The same was found, (in the case of a claim for aliment furnished to a minor without paction,) *Nov. 16. 1739, Davidson*, reported by Clerk *Home*, No. 135, and by *Kilk. No. 3. v. PRESCRIPTION*, DICT. p. 11077. But this last judgment was reversed upon appeal. The aliment of a bastard child falls under this prescription ; *Fac. Coll. Feb. 15. 1791, Forsyth*, DICT. p. 11081³⁵⁴.

The statute has been repeatedly found not applicable to claims of reimbursement by a *negotiorum gestor* ; *Feb. 19. 1740, Drummond*, Clerk *Home*, No. 147, DICT. p. 5858, and *Kilk. No. 7. voce PRESCRIPTION*, DICT. p. 11103 ; *Fac. Coll. June 13. 1781, Butchard*, &c. DICT. p. 11113 ; *Ibid. Nov. 18. 1794, Saddler*, DICT. p. 11119³⁵⁵. See *Fac. Coll. Jan. 24. 1795, Hamilton and Company*, DICT. p. 11120 ; *Ibid. Feb. 20. 1799, La. Christian Graham*, DICT. p. 11063³⁵⁶.

‡ Reported, of the same date, in *Fac. Coll. i. No. 159*, DICT. p. 11108³⁵⁸.

³⁵⁴ But see *contra*, *Fac. Coll. Macdowall*, 19. Feb. 1807, DICT. v. PRESCRIPTION, *App. No. 6*, where the father had gone abroad immediately after the birth of the child : and compare also, *Paterson*, 14. Feb. 1758, DICT. p. 11080, and *Finlayson*, 7. July 1809, *Fac. Coll.*

³⁵⁵ *Fac. Coll. Freer*, 27. Jan. 1826, (S. & D.)

³⁵⁶ This last was a case of quinquennial prescription.

³⁵⁷ So also, to the account of an English solicitor for business done in England for a domiciled Scotsman ; *Campbell*, 23. Nov. 1813, *Fac. Coll.* ; affirmed on appeal, 6. *Dow*, 116. *Vid. infr.* § 48.

³⁵⁸ From this report, it appears, that the debt found to be prescribed was a claim for trouble as clerk to a submission.

gratis, has no claim against the representative of his patient, even within the three years, unless he can either plead a promise, *Br. MS. July 25. & 31. 1716, Johnston*, (DICT. p. 11418), or shall restrict his claim to his advice or attendance on the patient on death-bed, that is, for sixty days immediately preceding his death; *Dabr. 171, (Russel, Feb. 7. 1717, DICT. p. 11419)*; see *Fac. Coll. i. 134. (Park, Feb. 7. 1755, (DICT. p. 11421) * 359*. In explaining this statute, practice has distinguished between accounts, and the other particulars mentioned in it; a distinction which is founded in the act itself. In house-rents, servants' fees, and alimony, every year's rent, or fee, or pension, runs a separate course of prescription; so that in an action for the payment of these, the claim is restricted to the arrears incurred within the three years immediately preceding the citation, upon a presumption that all former arrears have been cleared; *Stair, Feb. 12. 1680, Ross*, (DICT. p. 11089); *Br. 106, (Forrest, June 23. 1715, DICT. p. 9713)*; *Jan. 14. 1747, Fergusson*, (DICT. p. 11103); *Clerk Home, No. 32, (Douglas, July 22. 1736, DICT. p. 11102)*; whereas in accounts each article hath not a separate prescription; for a single article cannot be said to make an account: In these, therefore, prescription does not begin to run till the last article; *Stair, Dec. 16. 1675, Somervel, (sup. cit.)*, and the furnishing of any one new article within the three years interrupts the prescription, and preserves the currency of the account; *Forbes, Nov. 25. 1709, Mason, prope fin.* (DICT. p. 11094) †. An account is deemed to be current, though part of it was furnished to the deceased, and the remainder to his heir, when the question is with that heir; because the heir is *eadem persona cum defuncto*, *Stair, Feb. 26. 1670, Graham*, (DICT. p. 12491); and the same doctrine may perhaps hold in executors³⁶⁰. But the currency of an account between a merchant and a person deceased, is not preserved by furnishings made by the same merchant after the debtor's death for his funerals, if these furnishings are made, not to the executor himself, but to a *negotiorum gestor*; *Forbes, Nov. 11. 1709, Lo. Justice-Clerk, (Ormiston, DICT. p. 4981) 361*.

18. The debts mentioned in this statute may, even after the three years,

* The presumption here alluded to, that physicians' fees are instantly paid, will yield to circumstances of an opposite tendency; *Fac. Coll. June 15. 1781, Hamilton*, DICT. p. 11422. In particular, this presumption was found not to hold where it was not the practice of the place to pay the fees immediately, and where the physician had supplied the patient with medicines, an account for which was due at his death; *Ibid. June 17. 1795, Flint*, DICT. p. 11422³⁵⁹.

† But prescription is not obviated by counter-furnishings within the three years; *Fac. Coll. July 19. 1782, Ramage*, DICT. p. 11118.

³⁵⁹ *Vid. supr. t. 3. § 32. in not.* The law, as generally laid down in the text, was again given effect to in *Sanders, 19. Feb. 1822, Fac. Coll.*

³⁶⁰ Mr Bell observes, that "this is not held to be law, the account of the heir being regarded as entirely a new account;" 1. *Comm. 251*; and he cites *Kennedy, 23. June 1741, DICT. p. 11104*. See also *Wilson, 7. Feb. 1826, (S. & D.)*

Where the account comes down to the date of the debtor's death, so that the whole term of prescription runs during the heir's time, the oath of the heir negative of payment, will establish resting owing; 1. *Bell Comm. 253*; *Fac. Coll. Leslie, 15. Nov. 1808*; *Ibid. Broughton, 24. Feb. 1826, (S. & D.)* But where part of the period of prescription runs in the debtor's life, the oath of the heir, that he never heard of the debt, and does not know whether it was paid or not, will not bar prescription; *Stirling, 11. March 1817, Fac. Coll.* This decision had reference to the case of a bill; but the principle seems to be general. See also *Wilson, supr.*; *Fac. Coll. Andersons, &c. 4. Feb. 1826, (S. & D.)*

³⁶¹ Affirmed on appeal, *Robertson's App. Cases, p. 92*; and see sequel of the same case, *Forbes, 23. July 1712, (omitted in DICT.)*; affirmed on appeal, *Robertson, p. 61*.

Book III.

Prescription of
retours and pro-
cesses of error.

statute secures both purchasers and magistrates against any action at the suit of the said proprietors.

19. Where one was retoured heir erroneously to an ancestor deceased, as not being next in blood to him, all right of action competent to the true heir, prescribed, or was lost to him, by our ancient law, 1494, c. 57. in three years; not only as to the inquest, who were, after the running of that short prescription, secured against the penalty of returning a false verdict, but as to the person served, whose retour could not be afterwards set aside upon the head of error. As this was judged too short a prescription in a matter of such importance, it is made lawful to the righteous heir or next of kin, by 1617, c. 13, to bring his process of reduction of the erroneous retour, notwithstanding the first statute, at any time within twenty years from the date of it. This last act assumes the appearance of a declaratory law, and explains the former act 1494, as if it had only meant to save the inquest from an assize of error after the three years, without meaning to cut off the heir's right of setting aside the erroneous retour. But, by the express words of the first act, the privilege of reducing the retour is declared to be lost after the course of that short period; and for that reason, the last act 1617 contains a salvo or exception, in favour of those who had before the date of it acquired a right to lands *bona fide* from persons retoured thereto, that they shall enjoy their rights according to the former law. Mackenzie, *Observ. on said act 1617*, gives his opinion, that the prescription of twenty years obtains only in the case of a competition between the different kinds of heirs among themselves, as between the heir of line and the heir of tailzie, without excluding the clear interest of blood, where, for instance, a younger son is retoured to the prejudice of an elder. But this opinion has no support from the act, which enacts in general, that all erroneous retours whatever shall be free from challenge after elapsing of twenty years; and therefore he has ingenuously retracted his first opinion in a supplemental note subjoined to that treatise. It is however certain, that the prescription, as stated in both acts, is to be limited to retours in favour of one who is not the righteous heir, to the prejudice of the true heir or next of kin: For it appears by the whole strain of them, that they are levelled merely against erroneous retours, which may lay the foundation of an assize of error against the inquest, for serving one heir who had no just title to that character. This prescription therefore hath no operation against the person himself who is retoured, if he shall, after the twenty years, bring an action for setting aside his own service, not on the head of error, but on that of minority and lesion; *Fount. July 11. 1701, Lady Edinglassy*, (Dict. p. 10987) *.

Quinquennial
prescription of
mails and duties,
multures, minis-
ters' stipends,
bargains of
moveables, sale,
locations and ar-
restments.

20. Sundry debts and diligences fall under a quinquennial prescription. The arrears of rent, or, in our law-style, of mails and duties, prescribe, if they be not pursued for within five years after the tenant's removing from the lands out of which the arrears are due, by 1669, c. 9 †³⁶⁴. This prescription was introduced solely in

* See *Fac. Coll. May 17. 1793, Drummond*, Dict. p. 6936. It has been found in several cases that the warrants of decrees need not be produced after twenty years. See, in particular, *Fac. Coll. Jan. 17. 1782, Lane, &c.* Dict. p. 5179.

† This plea is competent to a cautioner of the tenant as well as to the tenant himself; *Fac. Coll. March 7. 1771, Duff*, Dict. p. 11059, (*Vid. supr. t. 3. § 66.*)

³⁶⁴ This prescription applies, "whether the tenant has possessed by written or verbal tack;" *Nisbet, 10. July 1729, Dict. p. 11059.*

in favour of tenants, natural possessors of the land, who, from their rusticity or ignorance in business, ought not to be overtaken, though they should not be exact in preserving their receipts or acquittances for any considerable time after they are granted; and so is not to be extended to such tenants as cannot justly plead the same ignorance or rusticity. On this ground, action was sustained for the arrears of rent backwards for forty years, at the suit of a liferentrix against a fiar, to whom she had granted a lease of all her liferent-lands, and who was not, like a common tenant, admitted to plead the quinquennial prescription; *Dec. 9. 1709, Murray*, (Dict. p. 11054). Hence also a tack of a gentleman's whole estate, containing a power of removing tenants, is not deemed a tack of such a nature as was intended to fall under the statute; *July 20. 1733, L. Carfin*, (not reported) * ³⁶⁵. By the same act, multures, or debts due for the manufacturing of corns, and ministers' stipends, prescribe in five years after they become due. By ministers' stipends one might be apt to understand such stipends only as are due to ministers; which would exclude those that fall due during a vacancy, because such belong to no minister: But it has been adjudged, that even vacant stipends fall under the spirit of the law, because all our short prescriptions have been established in favour of the debtors, and because the favour of the persons liable in payment of the stipend is as strong for the prescription during a vacancy, as when there is an incumbent; *Fac. Coll. i. 77. (Gloag, July 3. 1753, Dict. p. 11063)* † ³⁶⁶. The stipend or revenue of bishops, or other dignified clergymen, did not fall under this prescription; because the appellation of *ministers* is, in common use, restricted to the inferior or parochial clergy; *Pr. Falc. 62. (Hamilton, Mar. 1683, Dict. p. 11061)*. All bargains concerning moveables, or sums of money, which the law allows to be proved by witnesses, prescribe by the same act in five years after making the bargain. Under this description are included sales, locations, and other consensual contracts, to the constitution of which, writing is not necessary; for these are proveable by witnesses ³⁶⁷. But it must be observed, that all the above-mentioned prescriptions, introduced by the act 1669, relate barely to the manner of proof; for the debts themselves, expressed in them, may, after the five years, be proved by the oath or writing of the debtor; as to which, *vid. supr. § 18*. By the same statute, 1669, c. 9. a quinquennial prescription is established in arrestments, whether proceeding on decrees, registered obligations, or depending actions. Where the arrestment is used on a decree, or a registered bond or contract, the five years are to be computed from

* Neither does the statute apply against an heritor who has sold his lands, though the purchaser have been five years in possession, the tenant still remaining on the ground; *Kilk. No. 2, voce PRESCRIPTION, Strahorn, June 19. 1739, Dict. p. 11059.*

† See *Fac. Coll. Feb. 20. 1799, La. Christian Graham, Dict. p. 11063.*

³⁶⁵ This case is reported under the name of *Nisbet, 2. Fol. Dict. p. 117*, and under date, 10. July 1729, Dict. p. 11059. The tack there referred to was a tack of the "mails and duties" of the estate, not of the estate itself, and as such was held not to fall under the act, "which regards only tenants, who are in the natural possession by labouring the ground." See also *Bankt. B. ii. t. 12. § 5*. The statute was accordingly found to apply to a proper tack of the estate; *Edg. Fairholm, 3. Feb. 1725, Dict. p. 11058, and Fol. Dict. Supplement, p. 129.*

³⁶⁶ Reported also by *Elchies, v. STIPEND, No. 8.*

³⁶⁷ A claim for the price of sheep falls under the quinquennial and not the triennial prescription; *Emart, June 1730, Dict. p. 11067.* The same as to the price of a cow; *Nobles, 11. June 1813, Fac. Coll.*

BOOK III.

Quinquennial
prescription of
appeals to the
House of Lords.

Limitation or
septennial pre-
scription of cau-
tionary engage-
ments.

from the date of the arrestment ; for as the debt due to the arrester is in that case constituted previously to the diligence, he has access, the moment after using it, to bring his action of forthcoming to make it effectual. Where the arrestment is grounded on a depending action, the prescription does not begin to run till the date of the decree by which the depending debt is constituted ; because, till then, the arrester can have no title to insist in a forthcoming * ³⁶⁸.

21. A quinquennial prescription of the right of appealing from the supreme courts of Scotland to the House of Lords of Great Britain, is established by an order of that House, *March 24. 1725* ; by which, no petition of appeal from any decree or sentence of any court of Scotland, to be afterwards signed and enrolled, or extracted, is to be received after five years from the signing, enrolling, or extracting of it, and the end of fourteen days, to be computed from the first day of the meeting of parliament next ensuing the said five years, unless the person entitled to such appeal be within the age of twenty-one years, or covered with a husband *non compos mentis*, imprisoned, or out of Great Britain or Ireland ³⁶⁹. A quinquennial prescription is also introduced in the case of high treason, by a most anxious statute, *Aug. 1584, c. 2.* which falls to be considered, *infr. B. 4. t. 4.*

22. A limitation of cautionary engagements is introduced by *1695, c. 5,* which enacts, that no person binding conjunctly and severally with or for another, in any bond or contract for a sum of money, shall be bound for longer than seven years after the date of the obligation ; and that whosoever is bound for another, either as express cautioner, or as co-principal, shall have the benefit of the act, provided he has either a clause of relief in the bond itself, or a separate bond of relief intimated to the creditor at his receiving the bond †. This limitation having been established by a public law, to prevent the fatal consequences of rash fidejussory engagements, which had proved the undoing of many families, the benefit of it cannot, before elapsing of the seven years, be renounced by the party entitled to it ; *Edg. Feb. 19. 1724, Norie,* (Dict. p. 11013). But this act has fallen short of the purposes for which

* This species of prescription has been found to be interrupted by an action of multiplepoinding raised by the arrestee against the arrester, and scen and returned by the counsel for the latter ; *July 20. 1732, Crawford,* Dict. p. 11049 ; *Fac. Coll. July 28. 1774, Thomson,* Dict. p. 11049, &c. ; *Ibid. July 9. 1802, Macmath,* Dict. p. 11051.

† The clause or bond of relief here mentioned, is provided merely for the information of the creditor as to the real situation of the cautioner. Therefore, where the cautioner is bound, expressly in that character, there is no occasion either for a clause of relief in the bond, or for an intimated bond of relief ; *Dec. 11. 1729, Ross,* Dict. p. 11014 ; *Fac. Coll. Nov. 20. 1792, Douglas, Heron and Company,* Dict. p. 11032.

³⁶⁸ *Paterson, 16. Feb. 1826, Fac. Coll. ;* and the prescription is not interrupted by the bringing of a process of suspension against the decree ; *Ibid.*

³⁶⁹ Various alterations have been introduced by *6. Geo. IV. c. 120. § 25.* The petition of appeal must now be lodged within two years from the day of signing the last interlocutor appealed from, or before the end of fourteen days, to be accounted from the first day of the session of Parliament next ensuing ; except, 1. That in the case of persons out of the kingdom, it shall be competent to enter an appeal within five years from the date of the last interlocutor, if they remain abroad so long, or within two years from the time of their return, if there be so much of the said space of five years then to run as it being declared that the whole time allowed shall in no case exceed the said space of five years : And, 2. That where the party is under twenty-one years of age, or *non compos mentis*, appeal may be entered at any time within two years after full age or coming of sound mind, or after the death of the party so disqualified, and the opening of the succession to his heirs :—the additional period of fourteen days, from the first day of the session of Parliament next ensuing the expiration of the said terms of years, respectively, being likewise allowed in each of these cases. *Vid. infr. B. iv. t. 3. § 2.*

which it was intended; for money-lenders, that they may elude its effects, take all the obligants bound as co-principals, without any clause of relief in the bond; the relief from the proper debtor to the other obligants being granted in a paper apart. The creditor's private knowledge that there was a bond of relief granted by one of the obligants to another, is not sufficient to bring the case within the statute, *Feb. 14. 1727, Bell*, (DICT. p. 11039); for it requires expressly, that the separate bond be intimated to the creditor at his receiving the principal obligation. Yet the creditor himself being the writer of the bond of relief to the co-obligant, joined with his subscribing as witness to it, is justly deemed equivalent to a personal intimation; *Dalr. 108. (Macranken, Feb. 14. 1714, DICT. p. 11034)*.

23. This act, being correctory of our former law, hath received a most limited interpretation. Hence a bond granted by several persons, conjunctly and severally, though it contained a clause of mutual relief, was adjudged not to fall within the statute; because the act was to be understood of those bonds only in which one or more of the co-principals became bound to relieve all the other obligants, *Jan. 21. 1708, Ballantyne*, (DICT. p. 11010)*: nor bonds of corroboration; because in these the granter is neither bound as cautioner, nor has a clause of relief in his favour, he being entitled to relief only *ex lege*; *Br. 61. (Scot, Feb. 9. 1715, DICT. p. 11012)*; *Dec. 15. 1747, Lady H. Gordon* †. In the same manner, one who had by a missive letter promised to pay a debt due by another, was not found entitled to the benefit of the act; because the missive was in effect an obligation corroborating the debt; *Feb. 16. 1710, More*, (DICT. p. 11011) ‡. Neither do obligations fall under this act where the condition is not purified, nor the term of payment come within the seven years after the date of the obligation, because no diligence can be used upon these; *Br. 54. (Borthwick, Feb. 4. 1715, DICT. p. 11008) § 370*. The act itself seems to exclude all judicial cautioners, as in suspensions, *Dalr. 135. (Hope, Feb. 4. 1715, DICT. p. 11009) || 371*; cautioners for the faithful discharge of an office, *Fount. Jan. 5. 1709, Fleet*, (DICT. No. 205. p. 11005); and cautioners *ad factum præstandum*, *July 1726, Stewart*, (DICT. p. 11010); because the act is confined to persons engaged for others in bonds or contracts for sums of money. Neither does it extend to the relief competent to co-cautioners against one another, which, like other rights not limited, subsists for forty years; *Feb. 1726, Forbes*, (DICT. p. 11014) 372.

In what cases this limitation does not take place.

It does not apply to judicial cautioners, nor to the relief between co-cautioners.

24. Though

* This was expressly found, *Fac. Coll. Feb. 16. 1785, Park's Creditors*, DICT. p. 11051.
 † *Kilkerran's* report of this case is dated *Nov. 16. 1748*, DICT. p. 11025, (1. *Bell Com. m. 273.*). The cautioner in a bond of relief cannot plead the statute, *Fac. Coll. June 26. 1793, Bruce*, DICT. p. 11033.

‡ *Fac. Coll. July 9. 1765, Hogg and Company*, DICT. p. 11029. In reporting a similar case, *Dec. 3. 1742, Caves, Lord Kames*, (*Rem. Decis. No. 35.*) has given an able analysis of the statute, DICT. p. 11020.

§ The same judgment was given in a later case, *Kames, Sel. Decis. No. 189, Millers*, *Feb. 19. 1762*, DICT. p. 11027.

|| *Fac. Coll. Feb. 14. 1781, Mackinlay*, DICT. p. 2154.

370 *Fac. Coll. Anderson, &c. 25. May 1821, (S. & B.)*. Compare this passage with the close of § 24. *infr.*

371 So also, in regard to cautioners, for payment of a composition under the bankrupt statute; *Cuthbertson, 23. May 1823, Fac. Coll.*; and see *Anderson, supr. not 370*. So also, in regard to cautioners in a process of sequestration for rents; *Hogg, 13. June 1828, (S. & D.)*

372 Acceptance of a bill of exchange, "as security jointly and severally," does not fall under the act; *Fac. Coll. Sharp, 24. June 1808, DICT. v. BILL OF EXCHANGE, App. No. 22. Vid. supr. t. 2. § 29. not 71*. See also *Macneil, &c. 21. Jan. 1825, (S. & D.)*; *Macindoe, 18. Nov. 1824, (Ibid.)*

Book III.

In what respect this limitation of cautionary engagements differs from prescription.

24. Though in compliance with the common way of speaking, this statute is classed here among those which establish the short prescriptions, it would seem that the limitation of cautionary engagements is somewhat stronger than prescription, notwithstanding the decisions observed to the contrary; (Folio) *Dict.* ii. p. 117. (*Dict. voce* PRESCRIPTION, Division VII. Section IV). The act 1695 provides, not that cautionary engagements shall prescribe in seven years, for prescription is not once mentioned in the statute; but that no cautioner shall continue bound for a longer term than seven years, and that after that period he shall be *eo ipso* free. This emphatical expression seems to be made use of on set purpose to distinguish the limitation from prescription, and to make the elapsing of the seven years a virtual avoiding or discharge of the obligation; with this only reservation, that the special diligence used against the cautioner before the running out of that term, by horning, arrestment, inhibition, and adjudication for the sums then fallen due, shall have its course after that period. The general rules, therefore, laid down in the matter of prescriptions, are not truly applicable to this case: Particularly, no interruption used within the time limited, except that alone which is made by diligence, ought to preserve the obligation from being extinguished at the expiration of the seven years; so that though the cautioner should have granted a declaration, that he stands bound for the debt ³⁷³, or though the creditor should have brought an action for payment against him within the seven years, and even obtained decree, still the obligation is discharged *ipso jure* by the elapsing of that term*. Nay, diligence used within that period has no effect in favour of the creditor, but to secure the special subjects affected by the diligence †. If these observations be just, the seven years ought to be computed from the date of the cautionary obligation, according to the letter of the statute without regard to the term at which the debt is made payable which last term, (that of payment,) the law can have no respect to but upon the supposition that the limitation expressed in the statute

* This act provides, "That what legal diligence, by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the seven years, by creditors against their cautioners, for what fell due in that time, shall stand good and have course and effect after the expiring of the seven years, as if this act had not been made." A decree in absence has been held to be legal diligence under this clause *Fac. Coll. March 1. 1793, Douglas, Heron and Company, Dict. p. 11045, (affirmed on appeal, 2. April 1800; vid. 1. Bell Comm. 274.)*

† There does not appear sufficient authority for the doctrine here laid down by the author. The effect of doing diligence within the seven years seems to be that of interrupting the prescription, and of saving to the creditor the bond as to the principal sum and such annualrents as fell due within that period; *Clerk Home, 94. Rowand, Jun. 13. 1738, Dict. p. 11041; Kilk. No. 19. v. PRESCRIPTION, Irvine, Jan. 7. 1752, Dict. p. 11043.* But no annualrent subsequently falling due is affected by the diligence; *Fac. Coll. Feb. 17. 1780, Reid. &c. Dict. p. 11043* ³⁷⁴.

³⁷³ But see *contra*, as to the effect of such a declaration, 1. *Bell Comm. 274.* See also *Douglas, Heron and Co. not. *, h. p.* where a cautioner, in consequence of delay occasioned by his own negotiations with the creditor, was found barred *personali exceptione* from pleading the statute.

³⁷⁴ The practical result of the decisions, as set forth in this note, and as extending the operation of the diligence beyond the special subjects affected, is correct; but the principle is inaccurately described, if it be meant to represent it, as the same with that which regulates the case of a proper interruption to the course of prescription. The distinction on this head taken in the text is sound: and whatever diligence is used, still the effect of statutory "limitation is perfect in stopping responsibility on the part of the cautioner, except for what becomes due before the expiration of the seven years;" 1. *Bell Comm. 274,* and compare *Ibid. notes 2. and 5.*

Book III.
Obligations for
sums under
L.100 Scots.

In the prescription introduced by act 1669, there is a distinction between the claims of debts and the actions proceeding on them.

Inexplicable clause in this act.

Extinction of obligations by taciturnity without prescription.

yers have, from analogy, extended this prescription of holograph writings, to obligations without witnesses, granted for sums below L.100 Scots; because, though such obligations have been in practice held for valid, notwithstanding the act 1540, c. 117, yet they ought not to have the same duration as obligations attested by witnesses.

27. In the above-cited act 1669, a distinction is made between the claims or debts which are there declared to prescribe, and the actions proceeding upon those debts. Though in the short prescriptions, the right or ground of action is lost for ever, if not exercised within the time limited by statute; yet when action was brought upon any of the debts before the prescription was run, it subsisted, like any other right, for forty years. As this defeated, in a great measure, the intention of the laws establishing the short prescriptions, it was enacted by the said statute, that all actions which should be pursued on the several kinds of debt mentioned in it, should prescribe in ten years, if they were not wakened every five years. A depending action, in which no new step has been taken for a year together, is said to sleep, and cannot be farther insisted in till it be wakened by a summons within the forty years, raised by the pursuer, in the manner to be explained, *B. 4. t. 1. § 62*. The words of the statute, that these actions shall prescribe in ten years, if not wakened every five years, were so explained by the practice immediately subsequent to the statute, that the action was adjudged to subsist for ten years without a wakening: so that it was deemed a sufficient interruption, if the first wakening was within ten years, and the wakening renewed every five years after; *Pr. Falc. 95, (C. of Wemyss, Dec. 16. 1684, Dict. p. 11321)*. But by a posterior act, 1685, c. 14, all such actions are declared to prescribe, if the first wakening be not raised within five years after the action which was to be used as an interruption, first began to sleep³⁷⁷.

28. It is hard to comprehend the meaning of that clause in the statute, that it shall be without prejudice of any actions that are by former statutes declared to prescribe in a shorter time. There is no former statute limiting the duration of any of these actions to a shorter period; for in all the acts establishing the shorter prescriptions, it is only the right to bring the action that is declared to prescribe, and not the action itself when it is once commenced.

29. Sundry obligations are lost by the running out of a shorter period than forty years, without the aid of any statute, where the nature of the obligation, or the circumstances of parties, justify it. Thus, though there is no act limiting the duration of bills, whether foreign or inland, to a short prescription, even where they are not protested and registered according to the directions of the act 1681; yet as they are not intended for lasting securities, action was refused on a bill after a silence of thirty years, unless it should be proved by the defender's oath, that he had subscribed it, and that the sum contained in it was still due; *Fac. Coll. ii. 158. (Wallace, Jan. 9. 1759, Dict. p. 1637); Falc. ii. 48. (Wallace, Jan. 31. 1749, Dict. p. 1631)*; which was soon after extended by *Falc. ii. 248 (Moncrief, Dec. 13. 1751, Dict. p. 478)*, to the case of a bill, where the acceptor was dead, and which had lain over without diligence used upon it for twenty-three years. Thus also it was adjudged

³⁷⁷ An action of reduction, founded on a holograph missive, does not fall under this prescription; *Stein, &c. 18. June 1825, (S. & D.) Vid. infr. § 43.*

BOOK III.

ing obligations is said to be by taciturnity; and arises from a presumption, that the creditor would not in his own particular situation, and that of his party, have been so long silent, if the debt had not been paid or the obligation fulfilled: So that no general rule can be laid down, at what precise time action may be lost by taciturnity.—Several rights and privileges fall under a short prescription, which either have been, or are yet to be explained in their proper places; as the right of restitution competent to minors, *B. 1. tit. 7. § 35*; that of redeeming appraisings, *B. 2. tit. 12. § 3. 34*; and adjudications, *B. 2. tit. 12. § 39. 40*; the benefit of inventory, *B.*

It is no where specified what kind of writ, on the part of the debtor, will be sufficient proof of such debts under the clause of the statute. It has been found, that any writing (e. g. the marking of a partial payment, payment of interest, &c.) which clearly imports an acknowledgment of the debt, if granted after the six years, or even a short time before the expiry of that term ³⁸⁰, will be sufficient; *Fac. Coll. Feb. 3. 1784, Scott, Dict. p. 11126*; *Ibid. May 23. 1792, Russel, Dict. p. 11130*; *Ibid. May 19. 1797, Lindsays, Dict. p. 11137* ³⁸⁰. See also *Ibid. March 3. 1798, Viscount Arbuthnot, Dict. p. 11133*.

It was found, *Fac. Coll. Jan. 31. 1787, Buchan, Dict. p. 11128*, that the sexennial prescription was not obliterated by a relative writing, of equal date with the bill itself. The case, *May 19. 1797, Campbell*, was differently decided, *Dict. p. 1648* ³⁸¹.

The *stat.* further enacts, § 40, That the years of the minority of the creditors, in such notes or bills, shall not be computed in the said six years ³⁸².

standing the surviving partner, against whom action is brought, qualifies the admission by adding that he does not know whether the debt was paid by any of his copartners; *Fac. Coll. Stewart, 5. Dec. 1823, (S. & D.)*; *Thomson, 705*.

But where the debtor in the bill is dead, and action is brought against his representative, prescription is not barred, by an oath, that the latter never heard of the bill, and does not know whether it was paid or not; *Stirling, &c. 11. March 1817, Fac. Coll., Houston, 19. May 1825, (S. & D.)*

Where a bill was granted for a previous debt, due under a clause of warrandice in a conveyance of lands, the Court held that there was no *novatio*, that the original obligation still subsisted, and that there was no presumption, from the lapse of the sexennial prescription, and the consequent extinction of the bill, that the previous debt had been paid; *Sinclair, 19. Dec. 1823, (S. & D.)*

³⁸⁰ It is now quite established as the general rule, that no acknowledgment, before expiry of the six years, will avail; *Horsburgh, 18. Feb. 1811, Fac. Coll.*; *Ferguson, 7. March 1811, Ibid.*; *Black, 16. Jan. 1823, (S. & D.)*; *Mactavish, 25. Jan. 1825, Ibid.* The case of *Lindsays*, where the Court sustained an acknowledgment granted on the very last day of the six years, was a very special and extreme case: See *1. Bell Comm. (5. edit.) 395*; *Thomson, 683-8. et seq.*

“It is quite inaccurate to say, that the prescription is interrupted by a marking of payment of interest after six years; for this is merely the writ of the party establishing the debt. It has been thought by some, that the writ or oath of the debtor rears up the bill for a second course of six years; but this is quite incorrect. It is the debt only which is raised up, and it is then subject to the ordinary prescription;” *Per L. Pitmilly, (the Court concurring.) in M'Indoe, 18. Nov. 1824, (S. & D.)*. From this doctrine, flow two important practical consequences, in the case of joint acceptors: 1. Wherever the bill is kept alive, by action commenced, or diligence raised and executed, against any one of the acceptors, within the statutory period, this “interrupts the prescription as to all of them;” and, the whole force of the bill remaining unimpaired, the joint liability under it also continues, and action or diligence may be followed out, any time within forty years; *Fac. Coll. Gordon, 23. June 1784, Dict. p. 7532*; *Infra, § 46, apud fin.*; *Bell, ubi supra*; *Thomson, 676*: 2. But where prescription is once allowed to take effect, and the bill to expire, so that it is the debt, and not the bill, which thereafter comes to be the ground of liability, the writ, or oath, of each of the several co-obligants, as tending to a new, distinct, and independent constitution of the debt, will affect himself only; *Fac. Coll. Houston, 31. May 1822, (S. & D.)*; *Fac. Coll. Hannay's Trustees, 31. Jan. 1823, (Ibid.)*; *M'Indoe, 18. Nov. 1824, (Ibid.)* There is a third consequence, which applies in the case of all bills whatever, viz. That where the bill is prescribed, there can be no summary execution, even against a party admitting the debt; that being a statutory privilege attached to the bill, and of course expiring with the bill itself; *Fac. Coll. Armstrong, 16. May 1804, Dict. p. 11140*.

³⁸¹ Compare *Sinclair, supr. not.* ³⁷⁹.

³⁸² Where a bill is drawn by the minor's trustee, this exception does not apply, and prescription runs as in the case of the drawer's own proper bill; *Hannay's Trustees, supr. not.* ³⁸⁶. See *infra. § 45. and not. 4. ibid.*

Book III.

Both positive and negative run against the church and hospitals.

Thirteen years' possession supports a churchman's right to a benefice, though he produce no title in writing.

management of processes, by omitting the proper pleas or defences which were competent to the Sovereign*.

32. One might naturally conclude, that neither the positive nor negative prescription runs against the church, or against hospitals; because neither churchmen, nor overseers of hospitals, are proprietors of the church-benefices possessed, or of the donations to the poor managed by them: For the overseers of the poor are barely administrators, and churchmen have no more than a temporary interest in their stipends or benefices; who therefore ought in no respect to hurt their successors by their misconduct or negligence: Yet both the positive and negative prescriptions run against these successors, because it was necessary that property should not be kept for ever fluctuating, and the act 1617 makes no exception in their favour. Hence, the right of an old glebe of an united parish was found to be established in the proprietor of the adjacent lands, as part and pertinent of them, by a forty years' continued possession; *Edg. June 10. 1724, Crawford*, (DICT. p. 10819); see *Stair, June 30. 1671, Beidmen of Magd. Chapel*, (DICT. p. 11148). This doctrine is also applicable to corporate bodies, as universities, &c.; *Gosf. July 14. 1675, College of Aberdeen*, (DICT. p. 7230).

33. Our law has however so far favoured churchmen, because their rights are more exposed to accidents than those of other men, through the frequent change of incumbents, that thirteen years' possession is accounted sufficient to support a churchman's right to any subject as part of his benefice, though he should produce no title in writing to it. But this is not properly prescription: For prescription establishes a firm right in the possessor, which stands good against all grounds of challenge; whereas the *decennalis et triennalis possessio* confers on the churchman no more than a presumptive title; his possession is presumed to be well founded, till the contrary appear; and hence the rule is thus expressed by the canonists, *Decennalis et triennalis possessor non tenetur docere de titulo*; his title is presumed from his possession; but as it is barely a presumption, it may be elided by a contrary proof. If therefore the churchman's title be recovered, either out of his own hands or from others, and it thence appear that he has possessed to a greater extent than his title warranted him, his possession will be restricted within the bounds of the title thus recovered; *Stair, July 11. 1676, Bishop of Dumblain*, (DICT. p. 7950); *Forbes, July 23. 1708, Representatives of Rule*, (DICT. p. 11002)³⁸². This presumption, relative to a churchman's thirteen years' possession, bears but little resemblance to the rule of the Roman chancery, *Triennalis possessor beneficii est inde securus*, That the possession of a benefice for three years, under a probable or specious title, secures the possessor; or to that other rule assumed by canonists, That ten years' possession of a benefice creates a presumptive title to it; see *P. Gregor. Nov. Inst. t. 40. § 19*: For these last-mentioned rules concern the right to the benefice itself; whereas the presumption first stated, takes the incumbent's right to the benefice for granted, and serves only to ascertain what subjects are to be regarded as part of the benefice.

* See *Stair, Feb. 1. 1671, Ferguson*, DICT. p. 10775; *Fac. Coll. Dec. 1773, Com. Annexed Estates*, DICT. p. 7860. See also the case of *Gillies against Graham*, in which the court, *Feb. 1804*, ordered memorials upon the general question, Whether the negative prescription runs against the King³⁸².

³⁸² This case of *Gillies v. Graham*, does not seem to have entered the books. See also *Dirl. and Stew. v. Prescription against the King*.

³⁸³ *Greig, 21. Nov. 1809, Fac. Coll.* See on the subject of this, and the following section, *Connell, (Parishes) 439, et seq.*

34. As this thirteen years' possession has been introduced to supply the want of titles in writing, it would probably not be adjudged to extend to the right of vicarage-tithes; seeing these are not constituted by writing, as the other stipend is, but regulated by custom; so that as to them the reason of the privilege ceaseth. Neither does it obtain in subjects which the law hath added to benefices, without making them properly part of the stipend³⁸⁴, *ex. gr.* in the extent of the minister's grass; *Nov. 12. 1737, Min. of Dunipace*, (DICT. p. 11004). This sort of possession constitutes a presumptive title, not only to the present incumbent, but to all successors, who are entitled to plead upon the possession of their predecessors in office. Stair seems to be of opinion, *B. 2. t. 8. § 29*, that the three years' possession of a churchman contained in the above-mentioned rule, *Triennalis possessor, &c.* though it does not avail the churchman's successor, yet secures the incumbent who has possessed for that time in the subject so possessed during his life as part of the benefice. And though he observes that the decisions upon this precise point are not clear, yet he cites one observed by himself, *Stair, Nov. 25. 1665, Peter*, (DICT. p. 10640), to prove, that by the usage of Scotland, *seven years' possession* by a churchman, of tithes, or of any other subject, as part of his stipend, entitles the possessor to the benefit of a possessory judgment, in virtue of which he may continue his possession, though a preferable right should be produced, till his own be formally set aside. The rights of churchmen having been exposed to many accidents at the Reformation, the court of session, for some time subsequent to that period, when no title-deeds appeared, decided questions regarding church-lands, according to the possession at the time of the Reformation, and for ten years preceding it, and allowed a proof of the possession by witnesses. A proof of this kind, however, having in course of time become impracticable, an act of sederunt was made, *Dec. 16. 1612*, whereby the Lords declared, that in time to come they would decide all questions with regard to church-lands, and livings pertaining to churchmen, by their possession for thirty years immediately preceding the suit concerning them; *Spottisw. Pr. p. 190*³⁸⁵.

35. Whether the positive prescription of forty years runs against minors has been doubted. The statute 1617, on the interpretation of which this question depends, establishes first the positive prescription, and afterwards the negative, by two distinct clauses, without deducting in either of the two the years of minority. Then follows a third clause in the following words: *And sicklike it is declared, That in the course of the said forty years' prescription, the years of minority shall not be accounted.* As neither of the two first clauses enact any thing concerning minors, and as the reason appears stronger for saving the heritage of minors from the effect of the positive prescription, than for protecting their claims of debt against the negative, it was adjudged, *Fac. Coll. i. 118. (Blair against Shedden, Dec. 6. 1754, DICT. p. 11156)**, that the enactment in favour of

TITLE VII.

To what subjects this prescription does not extend.

Act of Sederunt, relative to the possession of church-lands.

Minors saved from the effect, both of the positive and negative prescription; but not hospitals for minors.

* This decision has been considered as finally settling the point; *Fac. Coll. Nov. 23. 1798, Fullarton*, (in note to p. 219.) DICT. p. 11175. See also *Kilk. No. 6. voce PRESCRIPTION, Ged, Dec. 5. 1740, DICT. p. 10789*³⁸⁶.

³⁸⁴ Compare, *Connell (Parishes)*, 448.

³⁸⁵ The first edition contains the following additional sentence: "This right being expressly limited to church lands, is quite different from the thirteen years' possession, which is sufficient to establish the right of an incumbent, to other subjects, as part of his benefice."

³⁸⁶ Reported also by *Elchies, h. t. No. 22. and v. Adjudication, No. 28.*

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of minors in the third clause, should not be restricted to the case of the negative prescription, though that was established by the clause immediately preceding, but ought to be extended also to the positive. This interpretation seems agreeable to the opinion of former writers, *St. B. 2. t. 12. § 18.* and *Mack. § 15. h. t.*, who do not distinguish in this question between the positive and the negative prescription*. The exception of minority, however, does not extend to such hospitals for children as have a continual succession of minors, one after another, where the children are always discharged from the hospital before majority; for that is a *casus insolitus*, which is presumed not to have fallen under the eye of the legislature; and the admitting of such extension must have rendered all dealings with orphan-hospitals most insecure; *Fount. Dec. 17. 1695, Heriot's Hospital*, (Dict. p. 10786). It has been already said, that the short prescriptions run against minors, where minors are not expressly excepted in the statutes establishing them; *vid. supr. § 16*³⁸⁷.

Prescription runs only from the time that the debtor's right can be demanded in judgment.

36. The negative prescription begins to run only from the time that the debt or right can be demanded in judgment, or sued upon; because, till then, negligence cannot be imputed to the creditor, and prescription is the penalty of negligence. The act 1617 does indeed precisely fix the date of the obligation to be the period from which that prescription begins its course; and in the same manner, the act 1579, c. 82. declares, that actions of removing against tenants shall prescribe in three years after the warning given to the tenant: But the words of these and other such statutes are in practice equitably explained, or rather corrected, into an agreeableness with this rule, that the course of prescription cannot by its nature commence against an obligation, till that obligation be productive of an action. Hence prescription runs against a bond, not from its date, according to the words of the act 1617, but from the term of payment; because, till then, the creditor can make no demand; *Stair, Feb. 17. 1665, Butter*, (Dict. p. 11183) †. On the same ground, where a bond is payable to a husband and wife, and the longest liver, prescription does not begin to run against the wife's interest in it, till after the husband's decease; because, while he is alive, the wife cannot sue upon it; *Stair, June 22. 1675, Gaw*, (Dict. p. 11183); see also *Ibid. June 23. 1675, Bruce*, (Dict. p. 11185)³⁸⁸. Hence also, in removings, the course of prescription commences only from the term at which the tenant is warned to remove; though the words of the act 1579, c. 82. expressly warrant the commencement of it from the date of the warning; because the landholder cannot, till the term of removing be passed, insist in the action of removing *cum effectu*; *vid. supr. § 18. in fin.* In like manner

* It has been found, that in the case of an entail, the only minority for which the law makes deduction, is that of the heir to whom the succession has opened, not of any expectant heir; *July 12. 1739, Macdougall*, reported by *Kilk. No. 5. voce PRESCRIPTION*, and by Clerk *Home*, No. 126. Dict. p. 10947; *Fac. Coll. Dec. 21. 1785, Gordon*, Dict. p. 10968; *Ibid. Jan. 31. 1792, Cred. of Auchindachy*, Dict. p. 10971³⁸⁶. See as to the application of this rule, *Fullarton, 23. Nov. 1798*, Dict. p. 11171.

† See this accounted for, *Kames, Elucid. Art. 33, p. 245.*

³⁸⁶ This last case was affirmed on appeal, See also *D. Buccleuch, 30. Nov. 1826* (S. & D.); *infr. § 37. in fin. Sandford, 150. et seq.*

³⁸⁷ *Vid. supr. § 29. not.*³⁸².

³⁸⁸ Where a bond is assigned in trust, prescription against the party having the beneficial interest, does not run from the date of the assignment, but from the time of the trustee's receiving the money; *Gregory, 24. May 1716, in Dom. Proc.*, affirming judgment of the Court of Session, *Robertson's Cases, 178.*

the years are computed, in the prescription of an inhibition, not from its own date, nor even from the date of the bond or right granted to the inhibitor's prejudice, but only from the time that such right is made public to the inhibitor, by seisin, or real diligence used on it; *Pr. Falc.* 32; (*Moutry, Nov. 22. 1682, Dict.* p. 11187.) We may therefore conclude, that though the act 1617 statutes, that the prescription of actions of warrandice shall run, not from the date of obligation to warrant, but from the actual eviction, because, before the subject is evicted, there can be no room to sue upon the obligation; yet this is not to be understood as the only exception from the rule of the act, That the prescription of obligations runs from their dates, but rather as an example by which to determine all other cases of the same kind.

37. It is a rule grounded on the same principle, That *contra non valentem agere non currit præscriptio*; prescription cannot operate against one who is under any legal incapacity to sue; for no man can be called negligent for omitting what is not in his power. When therefore one is barred from prosecuting his right by a forfeiture, against which he is afterwards restored *ex justitia*, the years of his incapacity must be deducted from the prescription; *Stair, Jan. 25. 1678, D. Lauderdale, (Dict.* p. 11193)³⁸⁹. Nay, in some cases, prescription does not run against a person, though the impediment which bars him from acting should not amount to an absolute disability. Thus, though a wife may, upon application to the court of session, be authorised to sue her husband for performing his part of the marriage-articles; yet if she forbear to insist, *ex reverentia maritali*, from the duty which she apprehends she owes to her husband, prescription hath no operation against her while she is *vestita viro*; *Stair, July 5. 1665, Mackie, (Dict.* p. 11204). But in all actions competent to the wife against third parties, upon bonds or other obligations, prescription runs against her, even during the marriage; since the *reverentia maritalis* is no bar to the suit; and if the husband will not concur, the wife may be authorised by the session; see *Dirl. 297, (Taylor, &c. Nov. 16. 1675, Dict.* p. 6055). On a similar ground, prescription has no course against one for not bringing an action upon his right, if he can assign any just cause of forbearance³⁹⁰; *ex. gr.* if he can have no benefit by the suit; for in that case his forbearance cannot be imputed to negligence, but to this, that the action would be fruitless. For this reason, where a creditor who is in the right of two separate adjudications against the same estate, has possessed for some time upon one of them, which is afterwards declared a redeemable right, such possession preserves the other adjudication from prescribing, without any positive step taken by the adjudger for that purpose; for it would serve no purpose for him who already holds a total possession of the subject upon one title, to bring an action upon any other, since the only view of bringing a suit is to obtain possession; see *Nov. 26. 1728, Fraser, (Dict.* p. 10661), observed in (*Folio Dict.* ii. p. 97. Hence also a husband who has acquired a right affecting his wife's estate is under no necessity during her life to use diligence

Contra non valentem agere non currit præscriptio.

³⁸⁹ But see *O'Neal, 23. Nov. 1803, Dict.* p. 11201. The prescription of bills is not stopped by sentence of outlawry against the debtor; *Brodie, 20. Feb. 1821, Fac. Coll.* As outlawry, indeed, affects the rights only of the person outlawed, it is at all times competent to take decree against him, though his right of defence is cut off; *supra, B. 2. t. 5. § 60; Fac. Coll. Macombie, 3. Jan. 1750, Dict.* p. 4775.

³⁹⁰ See, as to the practical extent of this principle, *Fac. Coll. Macghie, 17. Dec. 1776, Dict.* p. 11112, and *v. PRESCRIPTION, App. No. 3.*

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diligence for preserving the right from prescription; for while she lives, he is possessed of all the rents of her estate *jure mariti*, and so can profit nothing by his diligence; *Fac. Coll.* ii. 63. § 1. (*Gordon, Dec.* 1. 1757, *DICT.* p. 11161)*.—There is a case which at first appears an exception to this rule, but indeed is not. If an entailed estate has been possessed by the immediate heirs, upon unlimited titles, beyond the years of prescription, a remoter heir cannot urge the plea of *non valens agere*, though the right of the immediate heirs was preferable to his³⁹¹. The reason is, that every action founded upon the entail, was competent to the remoter heir against those in possession. He might have brought an action, concluding, That the deed of entail might be exhibited in court, and recorded; that the heir should be ordained to make up titles, as directed by the entail; or even that the contravention might be declared, and the estate evicted to himself †.

Interruption of prescription.

What cannot interrupt prescription.

38. This title may be concluded with a short account of interruptions, which are, steps taken by the owner of a right or debt against the possessor or debtor, for preserving it from prescription.—In handling this doctrine, it may be explained, *first*, negatively, what cannot be deemed interruption; *next*, positively, by what acts or deeds, whether written or verbal, prescription may be interrupted; and, *lastly*, the effects of interruption, and the statutory requisites to sundry kinds of it.—By the expression in the two statutes 1469 and 1474, relative to the prescription of obligations, that they shall prescribe in forty years, if document be not taken on them within that time, nothing can be understood, but that they are lost, if some act be not done or used by the creditor before the elapsing of that period, by which the debtor may know that he is following forth his right. It must appear therefore from the obvious notion of interruption, that the bare registration of a writing cannot interrupt or break the course of prescription, either positive or negative; *Stair, Jan.* 12 1672, *Johnston*, (*DICT.* p. 11237); for though the proprietor or creditor, when he registers his ground of right or obligation, does a deed by which he owns his right; and though registration be in several respects accounted a decree, which is the strongest of all interruptions yet no notification is truly given to the possessor or debtor by registration; and there can be no interruption, without certifying the possessor of the subject, or debtor, that the proprietor or creditor is following forth or prosecuting his right ‡. For this reason, no conveyance

* See *Kilk. No.* 20. *h. t. Smith, &c.* June 30. 1752, *DICT.* p. 10803, (*supr.* § 6. *not.* *).

† See *Fac. Coll. March* 1. 1782, *E. of Dalhousie contra Maule*, *DICT.* p. 10963 where a latent entail was found to be cut off by prescription, both positive and negative except in the case of a lease, as to which the defence of *non valentia agere cum effect* was sustained³⁹².

‡ The doctrine here maintained, that a decree of registration does not interrupt prescription, has been confirmed by many decisions; *Nov.* 27. 1630, *Lauder*, reported by *Spottiswood*, p. 237, and by *Durie*, *DICT.* p. 10655; *Fac. Coll. Nov.* 26. 176 *Douglas, Heron & Company*, *DICT.* p. 11127.

Even though letters of horning have been raised on the decree of registration, (as a suspension presented by the debtor, *infr.* § 39,) this will not be sufficient, unless the horning has been followed by a charge; *Dalr. No.* 177, *Wright, Dec.* 11. 1717, *DICT.* p. 11268³⁹³.

³⁹¹ *Vid. supr.* § 35. *not.* *, p. 778.

³⁹² Afterwards, and on the same principle, prescription was found to reach the case of the lease also; *Maule, 2. Dec.* 1817, *Fac. Coll.*

³⁹³ Nor letters of pointing, unless followed by execution; *M^cNicol, 29. Nov.* 1822 (*S. & D.*)

veyance or transmission of a debt can be considered as an interruption of the negative prescription, not even where it is intimated to the debtor: For though the intimation apprises the debtor of the debt and conveyance, that is barely a form necessary for perfecting the assignee's title to the debt; but no notice is thereby given to the debtor, that the assignee intends to prosecute it, or to demand payment from him. Upon a similar ground, citation against the debtor, when it proceeded on a blank summons, *i. e.* a summons not libelled, *B. 4. tit. 1. § 5*, could not be looked upon as a certifying of the debtor, nor consequently as an interruption of the prescription of any particular debt; see *Stair, July 14. 1669, E. Marischal*, (DICT. p. 10323); because the defender could not, in such case, know the special ground on which the pursuer was to insist*. Hence also no citation upon a summons, though libelled, can interrupt prescription as to grounds which are not specially libelled upon; *Fount. Feb. 16. 1699, Menzies*, (DICT. p. 11258). And an action upon a debt secured by inhibition, though it preserves the debt itself from prescribing, does not stop prescription of the inhibition used upon it, which can only be done by a reduction *ex capite inhibitionis*; *June 22. 1681, Kennoway*, (DICT. p. 5170).

39. The course of the positive prescription may be interrupted by any act by which a proprietor of either an heritable or moveable subject uses or asserts his right against the possessor; and the course of the negative, by acts by which a creditor prosecutes his ground of debt, or uses diligence upon it against the debtor. And it frequently happens, that the same act of interruption may preserve from the negative prescription the right of him who interrupts, and break the course of the positive, which is running in favour of his adversary. More particularly the course of the negative prescription is effectually broken; *first*, By any declaration signed by the debtor acknowledging the debt, or by a missive promising payment; for though these are not the deeds of the creditor, they are in effect corroborations of the debt by the debtor; which

By what circumstances the positive and negative prescriptions are effectually interrupted.

must

Lord Kilkerran expresses doubt, whether prescription is effectually interrupted by a submission relative to the claim; *Kilk. No. 11. voce PRESCRIPTION, Garden, Nov. 26. 1743*, DICT. p. 11274³⁹⁴. See *Fac. Coll. June 19. 1765, Buchanan*, DICT. p. 11676. As to the effect of an obligation to submit, see *Fac. Coll. July 27. 1757, Hay*, DICT. p. 11276³⁹⁵.

* This has been repeatedly found; *Kilk. No. 4. voce PRESCRIPTION, Macdougall, Nov. 30. 1739*, DICT. p. 11273; *Fac. Coll. June 23. 1784, Gordon*, DICT. p. 7532.

³⁹⁴ This is not an accurate statement of the doubt entertained by Lord Kilkerran. His Lordship says, "A general submission is no interruption of the prescription of any claim; and it was even doubted, if a special submission, now cancelled, would be an interruption." To the same effect is *Lord Elchies' report*, No. 25. *h. t.* Accordingly, in a more recent case, where the decisions both in *Garden* and *Hay* were commented on, the Court held, that, though a general submission of all clags, claims, &c., without evidence that a particular debt had been included under its operation, would not interrupt prescription as to that particular debt, yet, "where a submission refers to the very matter in question, especially where proceedings have been held under it, it does interrupt prescription;" *Vans, 14. June 1816, Fac. Coll.* The principle is here much the same, as in the case immediately afterwards noticed in the text, of citation on a blank summons, or on a summons where the grounds of the particular debt are not specially libelled.

³⁹⁵ In this case, such an obligation, added to other circumstances, was found an effectual interruption. But the judgment was reversed on appeal, *24. April 1758*, DICT. p. 11279; and in the case of *Vans, supr. not.*³⁹⁴, the Bench seem to have admitted that it was "properly reversed."

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must preserve the right against any prescription that may be running in his favour. A new course of prescription must run from the date of the acknowledgment. *2dly*, By citation or action at the suit of the creditor against the debtor; or by any judicial demand of the debt made by the creditor; *ex. gr.* a requisition used upon an infestment of annualrent: But no extrajudicial demand of the debt is accounted an interruption, if it be not accompanied with some acknowledgment of the debt by the debtor; *Fount. July 4. 1705, Lo. Pitmedden*, (Dict. p. 11261 *.) *3dly*, By a charge given by the creditor to the debtor on letters of horning; and, in general, by every diligence used on the debt, as inhibition, arrestment, poiding³⁹⁸, and adjudication. The simple raising and signeting, either of a summons, or of letters of diligence, makes no interruption; because if the debtor be not either cited or charged thereupon, it is no notification to him; and this holds, though the debtor should offer a suspension of the diligence, which is frequently done before a charge be given, *Dalr. 177. (Wright, Dec. 11. 1717, Dict. p. 11268)*; for suspension is a deed, not of the creditor, but of the debtor, which does not import an acknowledgment of the debt. *4thly*, Partial payments made by the debtor interrupt the long negative prescription; because that long prescription is grounded on a presumption, that a creditor has relinquished his claim, which is plainly elided by his receiving the partial payment. But none of the short prescriptions of debt are interrupted, but on the contrary receive additional strength by partial payments; because the short prescriptions are grounded on a presumption, that the whole debt was paid within the years of prescription; and that presumption can never be taken off or weakened by a proof that part of the debt

* It is enacted by *Stat. 33. Geo. III. c. 74, § 41. (54. Geo. III. c. 137. § 52.)* relative to the sequestration of the estates of persons engaged in trade, "That the making of production of the ground of debt, or certified account, with the oath of verity thereon, in the hands of the interim factor, sheriff-clerk, or trustee, or in the court of session, shall have the same effect as to interrupting prescription of every kind, from the period of such production, as if a proper action had been raised on the said grounds of debt against the bankrupt, and against the trustee." A provision nearly similar had been made by a prior bankrupt statute, *23. Geo. III. c. 18. § 36.* It seems also to be understood, that prescription may be interrupted by producing the document of debt in any action relative to it, provided the proper debtor be made a party to such action³⁹⁶; *March 9. 1756, and July 27. 1757, Hay against King's Advocate, Dict. p. 11276*³⁹⁷; *Fac. Coll. Nov. 26. 1784, Douglas, Heron and Company, Dict. p. 11127.*

³⁹⁶ This seems to be stated too broadly. To give production of the document the effect stated, it seems necessary that the action should be such, that the claim could be discussed, and decree competently obtained therein, by the creditor, *e. g.* a ranking and sale, as in *Douglas, Heron and Company, supra, not.*; a multiplepoiding, *Macmath, 9. July 1802, Dict. p. 11051*; *Graham, 30. May 1811, Fac. Coll.*; or "any other process of competition;" *infra, § 41*; *1. Bell Comm. (5th edit.) 393*; *Thomson, 67*. The production of a claim, though accompanied by an oath of verity, in a process of cognition and sale, brought at the instance of tutors, for authority to sell the pupul debtor's estate, was held not to interrupt prescription; *Ferrier, 9. July 1811, Fac. Coll.* See also *M'Nicol, 29. Nov. 1821, (S. & B.)*.

The quinquennial prescription of arrestments is interrupted by a multiplepoiding to which the arrester is a party; *supr. § 20. not *. p. 768*; *infr. § 41. in fn.* This holds, though production of the arrestment and grounds of debt is not made in the action, within the five years; *Macmath, and Graham, supr.*

³⁹⁷ The production founded on in this case was not sustained; and judgment to that effect was affirmed on appeal.

³⁹⁸ *Vid. supr. § 38. not. 393.*

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Where possession is abandoned or taken away, the prescription is interrupted.

All citations to interrupt prescription, must be renewed every seven years: But interruptions by diligence subsist for forty years.

whomsoever it has been used, may be pleaded by any creditor, where the bringing of such suit has been intended by law to promote the common interest of all the creditors. Thus the quinquennial prescription of an arrestment may be interrupted, by an action of multiplepounding, insisted in, not by the creditor-arrester, but by the arrestee against the arrester; for as all the co-arresters have a common right to appear in that action for their several interests, and obtain decree thereupon according to their legal preferences, it must have the same effect as if it had been brought at the suit of the arrester himself; *July 20. 1732, Crawford, (Dict. p. 11049)*, observed in (*Folio Dict. ii. p. 117* ⁴⁰¹).

42. Where the possession of a subject is either voluntarily abandoned by the possessor, without any intention of resuming it, or is actually taken from him within the forty years, the course of the positive prescription is broken with regard to him who has thus abandoned the possession, or been turned out of it; because the law hath said, That in order to establish a right by prescription, the possession must be constant and uninterrupted through that whole period. Though therefore the former possessor should recover the possession, he must enter upon a new course of prescription, to be computed from the time of that recovery, *L. 5. De usurp.* Interruptions used by protestation, or even *via juris*, by process not followed forth to a sentence, where the possession is not inverted, but the possessor continues to possess, either by himself, or by another in his name, though they are indeed profitable to him who uses them, have no effect against the possessor in favour of third parties, agreeably to the rule, *Res inter alios acta, aliis neque nocet neque prodest.*

43. Interruption of prescription may be either of real rights, or of personal debts, as sums of money. Some particular forms are common to both kinds; and in others, the two differ. By our more ancient law, all citations to interrupt prescription, proceeding on libelled summonses, though nothing had followed on them, were effectual to break the course of prescription, because they were vouchers used by the proprietor or creditor upon the right or debt within the forty years: But by 1669, c. 10, all citations which shall be used from thenceforth, for interrupting the prescription, either of real or of personal rights, must be renewed every seven years otherwise they are declared to prescribe. Minority is excepted from this act, and consequently citations used by minors need not be so renewed. This statute relates to all prescriptions, whether long or short; *Dalr. 15, (E. of Forfar, July 21. 1699, Dict. p. 11324)* *. From the limitation of this act to citations, it may be observed, *first*, That if, upon the citation, there shall follow the appearance of parties, or any judicial act, it is no longer accounted a bare citation, but an action, which subsists, though not renewed, for forty years; *Dec. 1731, Creditors of Libberton, (Dict. page 11321)*; unless it be an action whose duration is confined by statute to a shorter period, as in the case of actions on arrestment, which, by 1685, c. 14, are declared to prescribe if they are not wakened

* See *Fac. Coll. vol. iii. No. 55. Camerons, July 30. 1761, Dict. p. 11331*, and *No. 154, Macpherson, Feb. 15. 1764, Dict. p. 2605.*

⁴⁰¹ *Vid. supr. § 20, not. *; § 39, not 396.*

wakened every five years ; *Jan. 14. 1726, Gray*, (DICT. p. 11331), cited in (Folio) *Dict. ii. p. 131* ⁴⁰². *2dly*, That interruptions by diligence fall not under the act 1669, but subsist for the whole course of prescription, without the necessity of being renewed ; *Fount. Feb. 15. 1704, Johnston*, (DICT. p. 11259). The difference between interruptions by citation and by diligence, lies in this, that where a creditor falls from his citation, without carrying it the length of an action, it looks like a passing from it ; and therefore the same force ought not to be given to that slender degree of notification, as to interruptions by diligence, which leave behind them strong effects against the debtor's person and estate.

44. It was also common, by our former practice, to all kinds of interruption, that the citations for interrupting might be given, not only by messengers, but by the officers of inferior courts, who were generally amongst the lowest class of subjects, and might be more easily corrupted by bribes or promises, to antedate their executions. As the reposing such a trust in these officers tended to render the rights of land estates precarious, all interruptions of real rights by citation are, by another clause of the said act 1669, ordained to be executed by messengers, who give security at their admission for the faithful discharge of their office. That singular successors in heritage may be certified by the public records, what acts of interruption have been used against the subject of their purchase, it is provided by 1696, c. 19, that all summonses used for interrupting the prescription of real rights, shall pass on a bill under the signet, and specify all the grounds on which they proceed, and be registered, with their executions, within sixty days, in a particular register to be kept at Edinburgh, otherwise that they shall be ineffectual against singular successors : And that no interruption of real rights, made *via facti*, shall be of force against them, if an instrument be not taken on it, and registered within the same time, and in the same record, as is required in the case of interruptions by summons.

45. Interruption has the effect to cut off the course of prescription ; so that the person prescribing cannot avail himself of any part of the former time, but must begin a new course, commencing from the date of the interruption in the negative prescription, and from that of the recovery of possession in the positive *. Minority, therefore, is truly no interruption, though it gets that name in vulgar speech ; for it is no document or evidence taken by the minor on his right, which is the description given of interruption in the acts 1469, c. 29, and 1474, c. 55. It is no more than a personal privilege competent to the minor, that he shall not suffer by the elapsing of time, while he continues minor. Neither does it, like a proper act of interruption, break the course of prescription ;

Requisites of interruption in the prescription of real rights.

Effect of interruption.

Minority is no interruption, but only a suspension of prescription.

* So the Court have found as to the septennial prescription of cautionary engagements ; *Pres. Dalr. and Bruce, Gordon, Jan. 19. 1715, DICT. p. 11037* ⁴⁰³. The question, How far the same rule applies to the other short prescriptions ? appears to have been repeatedly under the consideration of the Court. See *Fac. Coll. May 23. 1792, Russel, DICT. p. 11130 ; Ibid. March 3. 1795, V. Arbuthnott, DICT. p. 11133* ⁴⁰⁴.

⁴⁰² Prescription, in the case of actions on arrestment, runs from the date of the last step of procedure, and not from the falling asleep of the process ; *Graham, May 30. 1811, Fac. Coll.*

⁴⁰³ See this case commented on, *Thomson, 698.*

⁴⁰⁴ *Vid. supr. § 29, not. 380, and case of M^rIndoc, ibi cit.*

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scription; the years of minority are only discounted from it: So that its operation is indeed suspended during the minor's non-age; but how soon he becomes major, the prescription, which had commenced before the minority, continues to run, and the years before the majority are conjoined with those after it, in order to complete the term of prescription. This doctrine is applicable also to the privilege arising from one's legal incapacity to act. The minor is entitled to this privilege of suspending the course of prescription, not only when the right against which it is running is vested directly in himself, but when it stands in the person of a trustee for his behoof; *Fac. Coll.* ii. 63. § 1, (*Gordon, Dec. 1. 1757, Dict. p. 11161*)*. By the said statute 1617, no minority is to be discounted from prescription, but that of him against whom the prescription is used and objected. The act expressly says, that the years during which the parties against whom prescription is objected are majors, shall be counted; there is no insinuation, that they may avail themselves of the minority of third parties, from whom they derive no right: And if this privilege of minority may not be used without authority from the minor, still less can it be made to operate against his interest, or what may be presumed to have been his desire. For instance, one cannot, with a view to elide the effect of prescription run against his title, plead another's minority, in order to defeat the minor's own title, or subject him to limitations and fetters which it was evidently his intention to get free from. A decision, however, is observed in 1756, *Fac. Coll.* i. 214, (*Ayton against Monypenny, Dict. p. 10956*), where the court sustained the plea of minority under these circumstances; but that judgment was upon appeal, reversed by the House of Lords.

In what cases interruptions against one person or subject secures the whole right from prescription.

46. In an obligation, where the right of the creditor is unlimited extending equally against all the obligants and subjects which it affects, if the right itself be safe from prescription, the whole of it is preserved; since, as the right continues *unum quid*, one part of it cannot be separated from the other. On this ground, diligence used by an annualrenter, whose right is constituted on two separate tenements, against any one of them, even after the right of the two has gone to different persons, or payment of annualrent made by the proprietor of one of the tenements, preserves from the negative prescription, the whole right of the annualrenter, which cannot be weakened by the proprietor's making over one of the two in favour of another; *Stair, June 22. 1671, L. Balmerino, (Dict. p. 3350)*. But whether such diligence can also hinder the possessor of the other tenement under a singular title, from the benefit of the positive prescription, may be doubted: For no interruption can be said to be made by the diligence, which we have supposed to affect only one of the tenements, against the possessor of the other; and if he continues to possess without interruption for the forty years, he seems to be precisely in the case of the act 1617; unless the two tenements should be parcels of the same barony; in which case there is no doubt that the interruption would be effectual as to the whole. *Baronia* being *nomen universitatis*, it is quite established, that interruption against the possessor of a barony, by arresting or levying the rents of any part or tenement, covers the whole from prescription;

* See a contrary decision, *Fac. Coll.* i. No. 207, *June 24. 1756, Macdellan's Children, Dict. p. 11160* 405.

405 And another, *Hannay's Trustees, supr. § 29. not. 382*.

prescription; *vid. supr. B. 2. l. 6. § 18**. In the same manner, diligence used upon a debt against any one of two or more co-principals, preserves the debt itself, and so interrupts prescription against all of them⁴⁰⁶; and diligence used against a cautioner, interrupts prescription as to the principal obligants. Thus also, by our former law, a partial payment made by the principal debtor, interrupted prescription from running in favour of the cautioner; *Dec. 18. 1667, Nicholson, (Dict. p. 11233)*. But since the statutory limitation of cautionary obligations by 1695, c. 5, the cautioner is free, barely by the elapsing of seven years, notwithstanding any diligence used against, or even partial payments made by the principal debtor, within the seven years.

47. In obligations where the right of the creditor is divided into distinct parts, either originally, or by voluntary conveyance from the first creditor, it may well happen, that part of the right may be preserved from prescription, while another part falls under it. Thus, where a creditor in a bond assigns part of it to another, he divides the right between himself and the assignee; and therefore interruption made by the assignee, though it preserves the part assigned, cannot avail the cedent, as to the part which he retained to himself; nor, *e contra*, will interruption used by the cedent preserve the assignee's part. Thus also in the case of a bond of provision, by which two or more children are provided, each in a separate sum, interruption used by one of the children is not available to the rest, for preserving to them their respective sums which they had neglected to demand during the currency of the prescription †.

48. Questions are frequently moved concerning the prescription of debts due to foreigners, and demanded in this country, whether the decision ought to be governed by the law of Scotland, where the judicial demand of the debt is made by the creditor, or by the *lex loci contractus*, or by what other rule of law or equity. Civilians differ upon this point. Some hold, that the law of the country where the ground of debt, and of the action competent upon it, had its rise, that is, the *lex loci contractus*, ought to be regarded: But others maintain, with greater probability, that the question is to be regulated by the law of the place where the action itself is instituted against the debtor, or, in other words, by the law of the defender's present domicil; because debtors can be sued before those courts only to whose jurisdiction they are subjected, and all courts must judge by their own municipal laws. Hence an Englishman who has furnished goods in England to a Scotsman, need not disquiet himself about the laws of our prescription, so long as his debtor continues to reside where he contracted the debt: And indeed, though the debtor shall return to Scotland after the expiration of three years, but before the English limitation of six years has taken place, the creditor ought not to be cut off from his claim upon our triennial prescription, unless he shall have delayed to commence a suit for three years after the debtor's return home; *first*, because

In what cases one part of a right may be prescribed while the rest is safe.

By what law is the prescription of debts due to foreigners determined.

* *Fac. Coll. Dec. 9. 1785, Cheap, &c. Dict. p. 14520.*

† See in confirmation of this doctrine, *Kilk. No. 12, v. PRESCRIPTION, Lady Immer-rett, Jan. 20. 1747, Dict. p. 6560 and 11156; Fac. Coll. Dec. 8. 1790, Cuming, Dict. p. 11170*⁴⁰⁷.

⁴⁰⁶ *Vid. Gordon, &c. cited supr. § 29. not.*³⁸⁰.

⁴⁰⁷ It was found in these cases, that the minority of one of several nearest in kin saved from prescription only the minor's own proper share of a moveable debt which formed part of the executry.

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because our statute establishing that prescription, though expressed in general terms, cannot by a just interpretation be extended to foreign contracts, (for England is in this question a foreign country to us,) unless the debtor has afterwards resided in Scotland for that whole term of three years; *2dly*, because it is inconsistent with equity, that a debtor's fraudulent device to disappoint his creditor by changing domicils, should have the same effect as a discharge of his obligation, without any negligence that can reasonably be imputed to the creditor. If in the case of an English debt, which is in their law limited to a short prescription, but not in ours, an action shall be brought in Scotland by the creditor for payment, after the years of the English limitation shall have elapsed, the English statute, which is of no proper authority in the courts of Scotland, cannot be regarded as an extinction of the claim: Nevertheless, it ought in equity to be received as a presumption that the debt is paid, if the creditor shall not elide it, either by direct evidence, or by stronger contrary presumptions. It is hard to quote any decisions of our supreme court, in support of what has been observed on this head, to which contrary decisions may not be opposed: But these and other rules relating to it are laid down with great precision, and the contrary judgments censured by the author of Principles of Equity, *B. 3. c. 8. § 6.* By the latest decision on this point, *Fac. Coll. i. 156, (Renton's Trustees, July 7. 1755, Dict. p. 4516, & 11124)*, the court of session have made the law of Scotland the rule of their judgment*.

Prescription of foreign heritage.

49. Questions concerning the prescription of heritage must be governed by the law of the place where the heritage lies, and from which it cannot be removed.

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* The same has since been repeatedly found, *Fac. Coll. March 2. 1761, M'Neil, Dict. p. 4516; Ibid. July 13. 1768, Randale, Dict. p. 4520, (Hailes, 225); Ibid. Feb. 20. 1771, Kerr, Dict. p. 4522, (Hailes, 408); Ibid. Feb. 4. 1772, Barret, Dict. p. 4524.* It is to be observed, however, that in all of these cases the debtor had left England within the period of the statutory limitation there; so that the court had no other rule than that of the Scots prescription to go by. In the cases of *Delvalle against York-Buildings Company, (30. July 1783, Hailes, 926.) March 9. 1786, Dict. p. 4525, (as reversed on appeal, 12. March 1788,)* and *York-Buildings Company against Cheswell, Feb. 14. 1792, Dict. p. 4528,* the Scots prescription was finally overruled⁴⁰⁸.

⁴⁰⁸ It seems to have been overruled in these cases, because the debtors were "in all respects an English Company, domiciled in England, and by their charter of erection fixed down to a residence there." Accordingly, it was observed, that "if, instead of being thus permanent in England, they had changed their place of residence to Scotland, and continued here during the forty years, it might have been competent to them to plead our prescription, notwithstanding that England was the *locus contractus*. For it is the *lex domicilii debitoris*, which in this matter is the governing rule." "In all cases in which the court has sustained our prescriptions against English debts, the debtors were considered as having acquired a residence in this country." *Per curiam, in York-Buildings Company against Cheswell, supr. not.*.* In conformity with this principle, and with the authorities cited in the first part of *not.**, the Scots prescription was again sustained, and the judgment affirmed in the last resort; *Fac. Coll. Campbell, 23. Nov. 1813, 6. Dow, 116; and see to the same effect, Fac. Coll. Broughton, 24. Feb. 1826, (S. & D.)*

The foreign prescription, however, as observed in the text, is the rule in all cases where the debtor has remained long enough domiciled in the foreign country, to bring it into operation: For the debt being once extinguished abroad, cannot be revived merely by the debtor's passing into this country. This was assumed in all the authorities above referred to: and a strong illustration of it, in reference to the Russian decennial prescription, is to be found in *C. Hadinton, 6. March 1821, Fac. Coll.*

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propinquity explained, *B. 1. t. 6. § 8.* The preference given to the line of descendents in the article of legal succession, is established by nature itself, and confirmed by the universal consent of nations, as well as by the authority of the sacred text, which makes the right of succession to be consequent upon the relation of a child, *Rom. viii. 17.* It is not so clear, whether, in a competition among descendents themselves, sons ought, by the natural rule of preference, to have a larger share than daughters, or whether the eldest son should be regarded above the rest. By the Roman law, the succession of the father's whole estate was divided equally among all the immediate descendents of the deceased, whether sons or daughters: But it may be safely affirmed, that the preference of the sons before daughters, in heritage, is, at least, not adversary to the law of nature, since the judgment given by God himself, in the case of the daughters of Zelophehad, *Num. xxvii. 6, 7, 8,* is grounded on the supposition, that daughters have no claim to the inheritance of the father while sons exist. By the law of Scotland also, sons are preferred to daughters in the succession of heritage; one reason of which may be deduced from the first feudal maxims, which subjected all proprietors of land to military service. This rule had at first the effect of excluding females, in every case where there was no special destination in their favour, *Lib. 1. Feud. t. 8. § 1. vers. Filia*; and though daughters succeed by our later customs in feudal rights, where there are no sons, yet the original rule continues to have this effect, that where sons exist they are preferred before daughters. In the case of daughters only, they succeed equally, and are called *heirs-portioners*.

Right of primogeniture of great force in Scotland.

6. Though by the law of Moses, the eldest son's right of primogeniture over the rest was but partial, extending only to a double portion, *Deut. xxi. 17,* it has been from our most early times considered as total by the usage of Scotland, so as to exclude the younger sons from the least share of the heritable succession. This was originally made part of the feudal plan, out of favour to superiors, that they might not be in danger of losing their vassal's services by the fees being divided into small parcels; and was soon after adopted into our law, with universal approbation, as the most effectual expedient for perpetuating the dignity and influence of great families, and for the security and defence of our country in the times of public trouble. All heirs *ab intestato* succeed according to the proximity of their several degrees, under the exceptions to be hereafter mentioned; so that a grandson cannot succeed to a grandfather while his immediate father is alive. In default of immediate descendents, grandchildren succeed, and upon their failure great-grandchildren, and so *in infinitum*; still preferring males before females, and the eldest male before the younger.

Succession of ascendents.

7. If the law of nature be considered abstractly, ascendants ought to have the next place in the legal succession after descendents; for though it is not conformable to the order of nature that parents should outlive their children, yet when that case happens, they ought not to be deprived of the sorrowful comfort, as it is expressed in the Roman law, of succeeding to their own issue, *L. ult. C. Comm. de succ.*, nor to suffer at the same time the loss both of their children's person and of their goods, *L. 15. pr. De inoff. test.* The first Feudal law did however in no case admit ascendents to the succession, *Lib. 2. Feud. t. 50,* and *Lib. 4. t. 84.* For which Cujacius, *ad Lib. 1. Feud. t. 1,* assigns this reason, That feus were originally

originally granted only *posteris*, to descendents; and therefore, in their default, returned to the granter. This was also agreeable to the ancient usage of Scotland, *Reg. Maj. L. 2. c. 34, § 1—5*. And Craig assures us, *Lib. 2. Dieg. 13. § 47*, that the first instance in which a service was attempted by a father as heir to his son, was towards the middle of the 16th century, in the case of the Earl of Angus, who had put his son in the fee of his estate, and after his son's death wanted that it should return to himself. Yet this is certain, that by our later customs, which seem more agreeable to the natural law, fathers are every day served heirs to their children without opposition, *St. B. 3. t. 4. § 35*. Ascendents, though they be capable of succeeding by our present practice, yet come not in immediately after descendents; for in default of children of the deceased, his brothers and sisters are preferred to the father: For which Stair gives this reason, *ibid.*, That as such fees proceed for the most part from the father, and as these brothers and sisters are the father's own issue equally with the deceased himself, the paternal affection is presumed to operate as strongly for them as for the deceased.

8. These brothers and sisters succeed in the following order. Brothers-german have the first place; that is, brothers both by the father and mother. But as, by the law of Scotland, the legal succession of heritage is not divided, except in the special cases to be soon explained, the brother-german next youngest to the deceased succeeds to him as heir-at-law, according to the natural rule, *Heritage descends*. Where the deceased is himself the youngest brother of three or more, the succession goes to the immediate elder brother, and not to the eldest of all; because where there is no room for heritage to descend, which is its natural course, it is the least deviation from the rule, that it ascend, not *per saltum*, but by the slowest degrees; *Fac. Coll. ii. 137, (Grant, Nov. 29. 1758, Dict. p. 14874)*. If there are no brothers-german, the sisters-german succeed equally as heirs-portioners, though there should be brothers-consanguinean, *i. e.* by the father only; for even a sister by the full blood excludes a brother by the half blood*. In default of sisters-german, brothers-consanguinean succeed, one after another, in the same order as brothers-german; and in default of these also, the sisters-consanguinean take the succession equally as heirs-portioners. Brothers or sisters of the deceased by the mother only, who are called *uterine*, are by the law of Scotland incapable of succession, either in heritage or in moveables; which is indeed the case of all cognates, *i. e.* relations of the deceased by the mother; *Fount. Feb. 20. 1696, Alexander, (Dict. p. 14873)*. This doctrine, at least as to succession in heritage, may be deduced from the choice or *delectus* of a special family made by the superior in his feudal grant, which would be elided if the fee were descendible to the kinsmen of the mother, whom the law considers as of a different family from the vassal.

9. If the deceased leave neither child, brother, nor sister, the succession mounts upwards to the father, as the only ascendent in the first degree capable to succeed; for the mother, though an ascendent in the same degree, is as incapable of succeeding to her child as any of the child's relations by the mother are. If the father be already dead, the succession goes to the father's brothers; and

Succession of collateral brothers and sisters-german. Uterine succeed not by the law of Scotland.

Order of succession of ascendents.

The mother cannot succeed to her child.

* See *Fount. Jan. 17. 11688, Collison, Dict. p. 14872*.

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Consequences
from the rules
of succession,
above laid
down.

and in default of them, to his sisters, in the same order in which it would have gone to the brothers and sisters of the deceased, if he had had any. On the failure of these, it ascends to the father's father, and if he be not alive, to his brothers and sisters; and so upwards, the brothers and sisters of the nearest ascendent still excluding the more remote, and his collaterals. Where there is no agnate or kinsman to the deceased by the father, the King succeeds as *ultimus hæret*; *vid. infr. tit. 10.*

10. Upon the rules above set forth, it may be observed, *first*, That though a mother cannot succeed to her child, yet a child is as truly heir to the mother as to the father. *2dly*, The rule, That the full blood excludes the half blood, holds only in the same line of succession. Thus, though a brother-german excludes a brother-consanguinean, because both are in the collateral line; yet a brother-consanguinean is preferred to the father's full brother, because these two are in different lines. *3dly*, No regard is had to the question, From what quarter the estate of the deceased has come? If the right appears to be once vested in the deceased, the only remaining question is, Who is his heir-at-law? without considering, whether such heir stands related to him from whom the estate descended to the deceased. The contrary rule, *Paterna paternis et materna maternis*, obtains in England; and, in the opinion of Craig, *Lib. 2. Dieg. 17. § 9*, ought also to obtain universally, on account of its equity, where the estate proceeds from an heiress: Yet he admits, that our supreme court rejected it, in the case of one Gilbert; and a similar decision has been pronounced since Craig's death, by which a father was preferred to the succession of his son, in lands in which the son was infest as heir to his mother, to the exclusion of the brother-uterine of the deceased from that very estate which belonged to his own mother.—Before going farther, we may mention, as an universal rule in every country, That the succession to land-estates, and all heritable subjects, must be governed by the law of the kingdom or state where they are situated, and not according to the *lex domicilii* of the proprietor, though he should happen to die abroad, and have his settled residence there at his death.

Right of representation in heritage.

11. There is a right of representation peculiar to heritage, by which one succeeds in heritable subjects, not from any title in his own person, but in the place of, and as representing some of his deceased ascendants. Thus, where one dies, leaving a younger son, and a grandchild, whether male or female, by an elder son predeceased, the grandchild, though farther removed in degree from the deceased than his uncle, excludes him from the legal succession; because he succeeds, not in his own right, but in that of his father, who was the eldest son of the deceased, and as such would have excluded the younger son, had he been alive when the succession opened to him upon his father's death. The word *representation*, when applied to this right, must not be understood in that sense in which it is commonly taken by lawyers, as if the grandchild, in the case now stated, were liable for the debts of his immediate father whom he represents; he represents him barely in his propinquity, and not in his debts. This right obtains in the succession of collaterals, as well as in that of descendents: And therefore, where it is said that brothers succeed next after descendents, then sisters, &c. not only the persons themselves are meant—but all their descendents *jure representationis*. Thus, if one die

election of what she judges best, then the second, and so in their order, till all the superiorities be exhausted. Craig is of opinion, *Ibid.* that in the superiority of lands holden feu, the feu-duties, being a constant yearly rent, ought to be deemed part of the property, rather than of the superiority; and consequently to be divided among the heirs-portioners, even in the case of a single superiority: But, in truth, feu-duties are proper parts of the superiority, and the only title for pointing the ground for the arrears is the right of superiority; so that if the yearly feu-duty were divided among the sisters, as Craig would have it, it is only that part of it which remains with the eldest that would be *debitum fundi*, since she only, as superior, could point the ground for its payment; *St. B. 3. tit. 5. § 11.* But though feu-duties cannot for this reason suffer a separation from the right of superiority; yet because they are a fixed yearly rent, and so of a different nature from the casualties of superiority, which depend upon accidents, the younger sisters have compensation for their shares of them out of the other estate of the deceased, in so far as the division of the several superiorities hath been unequal; *St. Ibid. Kames, Rem. Dec. 57. (Houston, Nov. 3. 1744, Dict. p. 5369).* The principal mansion-house of the lands is accounted an indivisible right; but because that subject admitted of valuation, our old law directed, that the younger sisters should be recompensed out of the deceased's other estate to the amount of its value; *Reg. Maj. L. 2. c. 27. § 4. et c. 28.* But by our later customs, the eldest is entitled to it, even without recompence to the other sisters, *Forbes, March 5. 1707, Cowie, (Dict. p. 5362); Clerk Home, 226. (Peadie, Feb. 2. 1743, Dict. p. 5367)**; as she is also to the garden and orchard belonging to it, since the one ought not to be separated from the other; *Forbes, June 24. 1708, Cowie, (Dict. p. 5364) †.* Upon this ground, the heirship-moveables fall also to the eldest alone; for the right of these ought to accompany that of the mansion-house; *Jan. 16. 1725, Executors of Lady Garnkirk* ⁴¹⁰. Houses within borough, especially if they lie discontinuous from the other estate of the deceased, and all country houses, except the principal mansion-house, are accounted common pertinents of the ground on which they stand, and are therefore equally capable of division with the lands themselves; *Fac. Coll.*

* The same judgment has since been given; *Fac. Coll. Nov. 14. 1765, Ireland, Dict. p. 5373.*

† This last proposition is supported by the above decision from Clerk Home, No. 226. It is also confirmed by *Fac. Coll. June 24. 1774, Forbes, Dict. p. 5368.* In a later case the *præcipuum* has been extended to the mansion-house, offices, bar-yard, and garden; *Fac. Coll. Dec. 12. 1798, Wight, Dict. App. voce HEIR-PORTIONER, No. 1* ⁴⁰⁹. The estate being divided into equal portions, under the authority of the Sheriff, the eldest heir-portioner is entitled to that portion in which the house and its pertinents are situated; and the other heirs-portioners, if there are more than one, cast lots for their choice of the remaining portions, *Dec. 16. 1742, Lady Houston, Dict. p. 5366*; which decision has been followed in later instances, particularly in the case of *Inglis against Inglis*, concerning the division of the estate of Auchindinn, in November 1781, and seems now to be the established practice.

⁴⁰⁹ And again, *Ibid. No. 3. Maclauchlan, 27. May 1807.* See also *Ibid. No. Cruickshanks, 27. May 1801.*

⁴¹⁰ In a late case, "the Lords, with one dissenting voice, found, that the moveables in this case divide equally among the heirs-portioners, without any *præcipuum* to the eldest;" *Cruickshank, 27. May 1801, Dict. v. Heir-Portioner, App. No. 2.* It was also stated in the pleadings, that "the ultimate decision in the case of *Garnkirk* was against the exclusive right of the oldest." And such, accordingly, is the tenor of the only report of the case of *Garnkirk* to be found in the books; *1. Fol. Dict. 365, Dict. p. 5366.*

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ascends: But the succession of conquest, *i. e.* of such heritable rights as had been acquired by the deceased himself, ascends to the immediate elder brother or uncle, who is therefore called *the heir of conquest*, because his right of succession is confined to the subjects which the ancestor himself had thus acquired, or, as we long expressed it, *conquished*, by some singular title. This doctrine has been probably introduced with a view of enriching elder brothers, who have been always more favoured by our law than the younger. Where the deceased is the youngest brother, and leaves two elder, whether they be procreated of the same or of a former marriage, the youngest of the surviving brothers is not only heir of line to the deceased, *vid. supr.* § 8, but his heir of conquest, because he is his immediate elder brother; *Stair, July 20. 1664, La. Clerkington, (Dict. p. 14867); Mack. § 11, h. t.*; contrary to the opinion of Craig, *Lib. 2. Dieg. 15. § 19*, who affirms, that if the surviving brothers are only consanguinean, procreated of a former marriage, the eldest of them is heir of conquest to the deceased. — Without all doubt, where the deceased leaves but one brother, whether elder or younger than himself, he is heir both of line and of conquest*.

Succession to conquest among females.

What accounted conquest.

15. There is no place for this distinction between heritage and conquest, where the succession divides among sisters; for seeing sisters do not succeed in heritage, as brothers, one after another, but as heirs-portioners, conquest goes in the same way, without any preference in favour of the immediate elder sister; *Kames, 3, (Carse, Feb. 5. 1717, Dict. p. 14873.)* Conquest can ascend but once; or, in other words, where one who has himself acquired an estate, dies, such estate, though it must go to the immediate elder brother, as heir of conquest, does not continue conquest in the person of that brother; because it was no acquisition of his; he succeeded to it as heir: And therefore it is upon his death, he should leave an elder and a younger brother, the estate does not, as conquest, ascend to the elder, but must descend to the younger as heir of line. An heritable subject made over by a father to his eldest son, who is at the date of the right *alioqui successurus*, is not conquest in the person of the son, because he would have succeeded to it as heir, though there had been no disposition; and consequently, if the son die after his father, leaving two uncles, one elder than the father, and the other younger, the subject will descend to the younger as heir of line. But an heritable grant by one who has no lawful issue, in favour of a brother, ought to be accounted conquest in the grantee, unless the grant has been expressly made over to him as the granter's successor, *Cr. Lib. 2. Dieg. 15. § 17*: For though the disponent was at the date of the right the disponent's presumptive heir, the disponent might afterwards had issue of his own body, who would have been nearer in blood to him than the disponent.

All rights requiring seisin are accounted conquest.

16. Not only lands and other heritable rights on which seisin has been actually taken, but those also to which seisin is required as a solemnity, even heritable bonds, though these are not in strict speech rights of property, fall under conquest. This doctrine appears not quite conformable to our ancient law of *Q. Attach. c. 8* which mentions lands as the proper subject of conquest; nor

* In conquest, as in heritage, the whole blood excludes the half blood; *Fount. i. — (S. Brown's Supplement, 241).*

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be confirmed by an executor-nominate; for it is absurd to affirm, that any subject which excludes executors indefinitely without exception, may be carried by the confirmation of executors of any kind. The same doctrine is applicable to bonds granted under substitution; for these also import a virtual exclusion of executors, and therefore cannot be bequeathed by the creditor to the prejudice of the substitute. The reasons assigned by our writers, why heritable subjects cannot be devised by testament, are, *first*, That by the genuine feudal rules, the investiture of lands ought not to be altered without the superior's consent; which consent of the superior the law has not required as essential to a vassal's testament; *Cr. Lib. 2. Dieg. 1. § 25.* *2dly*, That heritable rights require seisin to perfect them; and testaments do not admit of seisin. But these reasons do not strike against moveable subjects which pass by service; and therefore cannot be the grounds upon which our law declares them not to be testible; besides that they are equally applicable to all countries that have adopted the feudal plan. Notwithstanding which, lands in fee-simple may, by the law of England, be devised by last-will, *32. Hen. VIII. c. 1; 34. § 35. Hen. VIII. c. 5;* and by the customs of Normandy, *art. 422*, one may, under special limitations, dispose by testament of a certain part of his conquest, or *feuda nova*. A *third* reason is also assigned by our writers, why heritage cannot be disposed of by testament, namely, that it is dangerous to intrust persons under bodily sickness or distress with the power of alienating their heritage to the prejudice of the heirs at law, *Cr. Lib. 2. Dieg. 1. § 28; St. B. 3. t. 8. § 29;* and indeed this restraint seems to have been originally imposed for securing heirs at law from being hurt by deathbed deeds granted by their ancestors; but it is by our practice extended, beyond this original reason of it, to all testaments, even those executed by the testator in a state of perfect health, *St. B. 3. t. § 31.* This rule of our law was never considered as a bar against settling heritage by a writing, though it should have contained nomination of executors, if that part of it which conveyed the heritage was made out in the form of a disposition, or deed *inter vivos*. *July 11. 1733, Douglas, (Dict. p. 15940),* observed in (Folio) *Dict. ii. p. 459.* If, on the contrary, the writing appeared by its strain to be of a testamentary nature, the clause settling the heritage was disregarded as inept or improper; *Dec. 4. 1735, Brand, (Dict. p. 15941),* cited *ibid.* But indeed it appears to be conformable to the present practice, that a man may effectually settle his heritage in a testamentary deed, reserving to himself the liferent, and a power of revocation, provided he makes use, in the conveying clause, of the words, *give, grant, or dispone*, in place of *legate or bequeath*: see *Fac. Coll. ii. 200, (Mitchell, Nov. 21. 1759, Dict. p. 8082)*.* And it is usual enough not only to make a settlement

* This appears now to be settled by a very uniform series of decisions. See *Fac. Coll. June 17. 1785, Robertson, Dict. p. 15947; Ibid. Dec. 4. 1789, Lamont, Dict. p. 5494; May 21. 1790, Trotter, (not reported) 419.* See also, on this point, *Fac. Coll. June 6. 1798, Fleming, Dict. p. 8111; Ibid. Jan. 12. 1802, Galloway, Dict. p. 15959.*

⁴¹⁹ It may be well to compare these decisions, with those in the close of the note, and with those also in note ⁴¹⁸,—as illustrative of the extreme nicety of construction that sometimes occurs in questions arising out of general clauses of conveyance. The principle of decision is well laid down, in the case of *Robertson*. “Heritable effects, as a debt secured by adjudication, will not be carried by a deed conceived in a testamentary form. Where, however, proper dispositive words have been used, the question is concerning the *intention* of the deceased.”

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come to succeed, that they shall not alter the course of succession settled by the maker. They have therefore this only legal effect, that the order of succession contained in the entail is to be observed, so long as no alteration is made by any of the heirs succeeding to the lands. But as those heirs are laid under no restraint in the exercise of their property, they are unlimited fiars; and consequently may either bring back the succession to the heirs-at-law, or carry it to any other order of heirs, at pleasure, in the same manner that the maker himself could have done. And this rule, That a bare substitution does not disable any of the heirs from altering the order of succession gratuitously, holds, though the maker should reserve a power to himself to alter, without conferring a like power upon the heirs succeeding him; *Fount. Jan. 25. 1705, Dalgarno, (Dict. p. 4319)*. From this it is consequent, that the next substitutes have truly no more than the hope of succession, entirely pendent on the will of the heirs first succeeding; and that, of course, they cannot, by inhibition, encroach upon or weaken the right in those heirs, or disable them from altering. Inhibition supposes an antecedent obligation upon the debtor, which is intended to be secured by that diligence; and as no obligation is, by a simple destination, laid upon the heirs of entail, there can be no ground for an inhibition against them at the suit of the next substitute.

2d, Entails with prohibitory clauses.

23. Entails containing prohibitory clauses have a stronger force than simple destinations. These prohibitions are all calculated for preserving the succession to that order of heirs which was devised by the maker. Sometimes the clause is expressed in general terms, that the heirs of entail succeeding to the lands shall do no deed by which that course of succession may be innovated; and sometimes it is more particular, that it shall not be lawful to any of those heirs to contract debt, or alienate the lands. By entails of this kind, the heirs succeeding are effectually barred from granting gratuitous deeds to the prejudice of the substitutes who are to succeed after them; for a proper right of credit is by those prohibitions created to the substitutes; who consequently may, in the character of creditors, set aside such gratuitous deeds on the statute 1621, to be hereafter explained; *Fount. Jan. 27. & 28. 1687, Callender, (Dict. p. 15476)*. But as the proper fee of the estate continues, notwithstanding those restraints, in the several members of entail as they succeed, they may, as fiars, burden the lands with debt, or alien them for onerous causes; by which they may be evicted from themselves and all the posterior substitutes; *Forbes Dec. 7. 1705, Young, (Dict. p. 15482)*; for the obligation upon them not to alien, or to contract debt, when it is not strengthened by irritant and resolute clauses, is only personal against them and their heirs, but does not affect creditors or purchasers. *Hope Min. Pr. § 364. 365, and Mackenzie, § 16. h. t.*, affirm, that the next substitute in this kind of entails may, on the prohibitory clause use inhibition against the present heir, which will be effectual even against onerous debts contracted after inhibition⁴²⁰. Supposing this doctrine to be well founded, where the prohibition lays a special restraint on the heirs not to contract debt; yet where the clause goes no farther than to prohibit the fiar to alienate, or to do any deed

⁴²⁰ It is now decided, that inhibition has no such effect; *Bryson, and Ankeroil &c. not. **, *infr*: the former of which cases is also reported by *Monboddo, 5. Brown's Susp. 879. and 940*, and the latter by *Hailes, p. 1030*. See also *Sandford, 57. et seq. and infr. § 29. ad fin.*

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3d, Entails with irritant and resolute clauses.

Forms and solemnities requisite to these entails.

directed the prohibitions not only against the subsequent heirs, but himself, he is as effectually restrained as they, even though he should have got no valuable consideration for fettering himself; because it is implied in the nature of property, that the proprietor can dispose of it at pleasure: And if he can gift it absolutely to another, he may *a fortiori* restrict himself in the manner of using it*. It is upon this principle, that all donations by a proprietor are effectual, which, though they be at first voluntary, may be so constituted by the donor as not to be subject to revocation; *Br.* 119, (*Shaw*, July 15. 1715, *Dict.* p. 15572).

25. Entails which have irritant and resolute clauses annexed to the prohibitory, bind the heirs succeeding to the lands still more strongly than either of the other two. As to which it may be premised, that though such entails appear to have been first brought into use as far back as Hope's time, *Min. Pr.* § 367, yet they were generally accounted not only contrary to good conscience, as they cut off the right of the lineal heir, (which is a character applied even to simple destinations where the legal succession is not observed, see 1493, c. 50), but inconsistent with the genius of our law, as they sunk the property of land estates, and created a perpetuity of liferents. It was therefore made a question, whether such entails were effectual, even where the superior had consented to them: And though they were by a single decision sustained even against onerous creditors, *Stair*, Feb. 26. 1662, *V. Stormont*, (*Dict.* p. 13994), yet to remove the doubts which still remained as to their validity and legal effects, it was by 1685, c. 22, declared lawful to his Majesty's subjects to settle their estates † by entail, under such conditions and provisions as they should think proper ‡, and to affect these entails with resolute and irritant clauses, which might put it out of the power of the heirs succeeding to contract debt, or do any deed by which the lands could be evicted from the substitutes who were to come after them: And that if any heir should contravene, that is, counteract the provisions or injunctions of the entail, the next substitute might bring a declarator of irritancy against the contravenor. If a distinction is to be made between irritant and resolute clauses in entails, it seems to be this, that an irritant clause is that which irritates or avoids the right granted in contravention of the entail; and a resolute, that by which the right of the heir contravening is declared to resolve; so that the one respects the right itself, and the other the granter of it; but both terms are used by writers promiscuously⁴²². With regard to entails authorised by the foresaid act 1685, it may be considered, *first*, What is necessary to constitute them, or make them effectual; *2dly*, What is by the law deemed a contravention.

26. As to the forms and solemnities essential to those entails the statute requires, *first*, That the entail be produced before the court

* This debated, but not decided, *Fac. Coll.* iii. 101, *Hamilton*, Dec. 9. 1762, *Dict.* p. 4358.

† It has been argued more than once, that by *estates*, in the sense of this statute must be meant considerable properties in land, to the exclusion of burgage tenements; but the distinction has been disregarded, *Fac. Coll.* Jan. 27. 1768, *Maclauchlan*, *Dict.* p. 15421; *Ibid.* Jan. 14. 1780, *Dillon*, *Dict.* p. 15432.

‡ As to obligations to bear certain arms, see *Mackenzie's Works*, vol. ii. p. 616.

⁴²² On this passage, the first edition contains the following note:—"The distinction was established by *New Coll.* ii. 94. (*Hepburn*, 8. Feb. 1758, *Dict.* p. 15507,) which it was found, that an entail containing prohibitory and irritant clauses against contracting debt, but no resolute clause, *i. e.* no clause voiding the right of the contravening heir,—was not effectual against the onerous deeds and debts of the heir in possession: And the judgment was affirmed on appeal." The distinction is expressly recognised by the statute 1685 itself. See also *infra*. § 29.

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Neglect of statutory requisites renders the entail ineffectual against singular successors, but it continues to bind the heirs of the granter.

27. A distinction must be made in this question between the heir of entail and his creditors; for entails may be in many cases effectual against the heir of the granter, or against the institute who accepts of it, which cannot operate against singular successors. Thus, when the act declares, that no unregistered entail shall be good, the meaning is not, that they shall be ineffectual against the institute, or other heirs of entail who have accepted of it with all its qualities, but that they shall have no force against singular successors, for whose special security the registration of entails was directed. For as the act was made to authorise entails, no general expression in it ought to be so explained as to destroy the effect of such entails as by the common rules of law were effectual antecedently to the enactment. On this ground, the contracting of debt by an heir of entail contrary to the condition of the right accepted of by himself, makes way for the next substitute, though the entail should not be registered; *Kames*, 47, (*Willison*, Feb. 26. 1724, Dict. p. 15369). And in like manner, the omission by the heir to repeat the irritant clauses in his retour and seisin renders the entail of no force against singular successors; see Clerk *Home*, 269, (*Murray*, July 5. 1744, Dict. p. 15601); notwithstanding which, the act declares, that such omission shall import a contravention against the heir. See other instances of this kind, *Gosf.* July 26. 1677, (*Stevenson*, Dict. p. 15475); *Forbes*, Feb. 5. 1713, *Sir Al. Don*, (Dict. p. 15591).

Whether it is necessary to record entails made prior to act 1685.

28. It has been doubted, whether the clause in the aforesaid act requiring the registration of entails, has a retrospective quality, so as to include such as had been made before the act. It is obvious, that the rule, That laws, because they cannot regulate our past conduct, ought to have no retrospect, is not applicable to this case; for nothing hinders an entail, though it should bear a date prior to the act, from being registered after it, as well as an entail of a date posterior to it. The security of creditors calls equally for both and a posterior statute, 1690, c. 33, which enacts without distinction, That no heir of entail shall be hurt by his ancestor's forfeiture provided the entail has been recorded in the terms of the act 1685, implies strongly, that no entail is to be deemed effectual against creditors, whatever its date may be, unless the regulation in that act be complied with. It was nevertheless decided, *Kames*, 809, (*Cant*, Dec. 27. 1726, Dict. p. 15554), that entails dated before the act needed not be recorded, in respect of the expressions in it, that it shall be lawful to make deeds of entail, and that such only shall be allowed, *i. e.* such as should be made afterwards. By a later decision, it was found, that entails completed by seisin before the statute 1685, needed not be recorded; *Fac. Coll.* ii. 94, (*Hepburn's Creditors*, Feb. 8. 1758, Dict. p. 15507); and by the latest that has been pronounced upon this point, entails, though dated previously to the statute, if they have not been confirmed by seisin till after it, must be recorded; *Fac. Coll.* ii. 145, (*Philip*, Dec. 14. 1758, Dict.

was granted by the heir prior to recording the entail, but the money not actually advanced, nor (what might have been equivalent) any obligatory contract come under in behalf of the heir, *e. g.* to pay his debts to third parties, &c.,—until after the entail was recorded, the court held that the estate was not attachable for the debt; *Ferris*, 10. Dec. 1813, *Fac. Coll.* This is a question, however, which could scarcely now occur, if the inference deduced above from the case of *Agnew*, be well founded.

See farther on the subject of this note, 1. *Bell Comm.* (5th edit.) 48. et seq.; *Sandford*, 74. et seq.; *Ibid.* 84. et seq.

DICT. p. 15609); because such entails were not entails, but barely incomplete deeds before the passing of that act, and therefore to be considered as entails made posterior to it, which it is agreed by all require registration. Against this last decision, an appeal having been brought, the interlocutor of the session was affirmed on 16th January 1761; but it may be observed, that in the judgment of the House of Lords affirming it, it is declared in general, that all entails created of lands in Scotland before making the act 1685, ought to be recorded in the register of tailzies*. This is uncontroverted, that even in deeds of tailzie dated before the act, it behoves the heir to repeat the irritant clauses in all the conveyances made after it; for admitting that such entails required no registration, yet when they come now to be transmitted from one heir to another, the act ought to regulate their transmission as well as the transmission of those that were of a date posterior to it; *Kames*, 60, (*Viscount Garnock*, July 28. 1725, DICT. p. 15596).

29. Entails of this rigorous kind, as they impose an unfavourable restraint upon property, and become frequently a snare to trading people, are *strictissimi juris*. An heir of entail has therefore full power as fiar over the entailed lands to which he succeeds, in every particular where he is not fettered: He may *ex. gr.* cut down the whole growing timber on the estate; *Fac. Coll.* ii. 13, (*Hamilton*, Feb. 16. 1757, DICT. p. 15408)⁴²⁵, or he may grant leases of the lands, not only for nineteen years, but for the life of the tacksman, if there be no clause limiting him †⁴²⁶. Upon this principle, no restraint,

Entails are
strictissimi juris.

* In the case, *Fac. Coll.* June 22. 1765, *E. Rosbery*, DICT. p. 15616, it was found, that an entail, though completed by infestment before 1685, was ineffectual, because not recorded; and the judgment was affirmed on appeal, April 3. 1767: And in the case, *Kinnaird*, Nov. 26. 1761, DICT. p. 15611, it was found, that an entail, though completed by infestment before 1685, and though the charter proceeding upon the entail was registered in the register of tailzies, was not effectual against singular successors, because the entail itself was not recorded in terms of the act⁴²⁴.

† See *Fac. Coll.* March 2. 1779, *Leslie*, DICT. p. 15530.

⁴²⁴ See also *Irvine*, 26. June 1776, DICT. p. 15617, and *App. v. TAILZIE*, No. 1; *Borthwick*, in *Dom. Proc.* 19. March 1731, i. *Cr. & St.* 53.

⁴²⁵ See also 1. *Bell Comm.* (5th edit.) 52; *Sandford*, 162; and cases there referred to.

In a late case, it is said, that "the Court were satisfied, that an heir of entail is not entitled to cut young and unripe wood, though planted by himself;" and "that, in a strong case of injury, likely to be done to the comfort of the mansion-house, the Court would interfere; but that it requires an extreme case to warrant the interference of the Court." The matter was in consequence arranged by a concerted minute, in which the heir agreed, "that no wood shall be cut down, which is not ripe and fit for sale, and that the ornamental timber necessary for the amenity of the mansion-house shall be allowed to stand;" *Mackenzie*, 6. March 1824, (*S. & D.*): See as to the powers of ordinary liferenters, *supr.* B. 2. t. 9. § 57 and 58; also *Dickson*, 24. Jan. 1823, (*S. & D.*); and compare *Tait*, 2. Dec. 1825, *Ibid.*

In the absence of prohibition, the heir of entail may work mines, quarries, &c.; and in so far as these have been opened, his creditors will be entitled to the benefit. "But it does not appear to have been decided, whether the creditors of an heir of entail can explore the lands, and open such mines or quarries;" *Bell*, *ubi supr.*

Neither the heir, nor his creditors, are entitled to pull down the mansion-house for the purpose of selling the materials; *Gordon*, &c. 24. Jan. 1811, *Fac. Coll.*

⁴²⁶ Though there be no restraint as to the granting of leases, it is now settled law, that where there is a prohibition to "*alienate*," (and in this respect the word "*dispone*" has been construed as equivalent,) the heir cannot, without an express permissive clause, grant any lease of longer duration, or otherwise of a more unfavourable character for his successor, than would naturally fall within the exercise of a fair and ordinary administration. On this principle, a lease "for the life of the tacksman" would seem to be excluded, as being one of extraordinary endurance. The court have set aside a lease for thirty-one years; *Stirling*, 20. Feb. 1821, *Fac. Coll.* The longest that has been sustained is for twenty-one years; *Fac. Coll.* *E. Wemyss*, 12. June 1822, (*S. & D.*); and

straint, though evidently intended by the maker, nor any prohibition or irritancy, is to be raised against an heir of entail from implication or inference ⁴²⁷; so that if any clause should be omitted, perhaps *per incuriam*, which by the established form is made use of in creating a limitation, the court does not interpose, for supplying the defect. Thus, where all alienations to be made by the heir, or debts to be contracted by him, are by the maker of the entail declared null, which one might conclude is in the precise terms of the act 1685; yet if he have not also adjoined a clause, resolving the right of the contravener, such heir may, as far, contract debts to which the entailed estate shall be subjected; *Dalr.* 77, (*Lady Reidheugh*, March 11. 1707, *Dict.* p. 15489); *Forbes*, July 22. 1712, *Cred. of Riccartoun*, (*Dict.* p. 15494)*. This clause resolving the contravener's right, though it is not required by the statute ⁴²⁹, has been

* This last decision is likewise reported by *Fount.* under date June 13. 1712, (*Dict. ibidem*). It has been discovered that it was reversed on appeal; *Robertson's Cases of Appeal*, p. 110; but the doctrine laid down by the author was confirmed by a later judgment, also referred to in the text; *Fac. Coll.* ii. 94, *Hepburn's Creditors*, Feb. 8. 1758, *Dict.* p. 15507 ⁴²⁸.

and see *Do.* 11. *Dec.* 1821, (*S. & B.*) "Perhaps, according to the principle finally assumed, a lease of nineteen years is alone to be relied on, under a general clause prohibiting alienation;" 1. *Bell Comm.* (5th edit.) 70. Leases, where the rent is reduced below the just value, whether in consideration of grassums paid to the heir in possession, or from favour to, and as a provision for the tenant, or from an opposite feeling towards the next substitute, &c. all equally fall within the principle. In support of the above, see *Dict. v. TAILZIE*, *App.* No. 15; the numerous questions arising out of the Queensberry leases, as decided in the Court of Session, *Fac. Coll.* 17. *Nov.* 1807, 25. *May* 1813, 17. *Nov.* 1815, 2. *Feb.* & 11. *Dec.* 1821, 7. *March* 1816, 5. *Feb.* 1818, 6. *July* 1820, 12. *June* 1822;—in the House of Lords, 10. *Dec.* 1813, 2. *Dow*, 90; 10. *July* 1817, 5. *Ibid.* 293; 12. *July* 1819, 1. *Bligh*, 389; 2. *July* 1821, 1. *S. Ap. Ca.* 59. & 64;—also *Turner*, 17. *Nov.* 1807, *Dict. v. TAILZIE*, No. 16., affirmed on appeal, 1. *Dow*, 423; *Malcolm*, 17. *Nov.* 1807, *Ibid.* No. 17, affirmed, 2. *Dow*, 285; *Fac. Coll.* *Turner*, 6. *Dec.* 1811; *D. Hamilton*, as reversed on appeal, 2. *Bligh*, 196; *Fac. Coll.* *Elliot*, 10. *March* 1814, reversed, 1. *S. Ap. Ca.* 16. & 89; *Ibid.* *Hamilton*, 3. *March* 1815, said to have been reversed, *Sandford*, 179, but at any rate controlled by the reversal in *Elliot*, and by the subsequent cases; *Ibid.*—*B. Mordaunt*, 9. *March* 1819, affirmed 1. *S. Ap. Ca.* 169; *Stirling*, 20. *Feb.* 1821; *Malcolm*, 19. *June* 1823, (*S. & D.*). With which compare *Wellwood*, 11. *March* 1810, affirmed 1. *S. Ap. Ca.* 44, and *Fac. Coll.* 12. *Nov.* 1823; *Fac. Coll.* (p. 400.) *Agnew*, 23. *June* 1813; *Ibid.* *M. Queensberry*, 15. *Nov.* 1815; and see 1. *Bell Comm.* (5th edit.) 46. 68, et seq.; *Sandford*, 174, et seq.

Whether a lease granted for a term beyond what is permitted in the entail, must be reduced *in toto*, or only in so far as the heir has exceeded his powers, is perhaps, as in a pure case, scarcely yet a settled question. See *Queensberry case*, *supr.* 17. *Nov.* 1816, *B. Mordaunt*, *supr.* and *D. Gordon*, 22. *Nov.* 1822, (*S. & D.*); *Malcolm*, 19. *June* 1823, *Ibid.*; *Agnew*, *supr.*; *Sandford*, 184; 1. *Bell Comm.* 70.

As to purgation of the irritancy incurred by taking grassums, see *Queensberry case*, *supr.* 6. *July* 1820, and 2. *Feb.* 1821; *Sandford*, 300.

⁴²⁷ It is enough, however, that the act prohibited be specified, in such intelligible words, as to bring it substantively within the fair and obvious construction of the clause: there is no technical language, or set form of words, in which the clause must necessarily be expressed, in order to be effectual.

For the construction of clauses in entails, as effectual, or ineffectual,—

1. To prevent a sale of the lands, see *Elliot*, 19. *May* 1803, *Dict.* p. 15542; *infra* not. †, and ⁴³⁰, &c. &c.

2. To prevent an alteration of the succession, see *Innes and Ker competing*, 23. *June* 1807, *Dict. v. TAILZIE*, *App.* No. 13; *M'Laine*, 23. *June* 1807, *Ibid.* No. 14; *D. Roxburghe*, 12. *Jan.* 1808, *Ibid.* No. 18, and 17. *June* 1813, *Fac. Coll.*, affirmed on appeal, 2. *Dow*, 149; *Brown*, 25. *May* 1808, *Dict. v. TAILZIE*, *App.* No. 19; *Henderson*, 21. *Nov.* 1815, *Fac. Coll.*; *Oliphant*, 7. *June* 1816, *Ibid.*; *Tytler*, 9. *Mar.* 1826, *Ibid.* (*S. & D.*)

3. To prevent the contraction of debt, see *Haggart, &c.* 19. *Dec.* 1820, *Fac. Coll.*; *Mackenzie*, 23. *May* 1823, *Fac. Coll.* (*S. & D.*); *Nisbet*, 10. *June* 1823, *Ibid.* (*ib.*); *Monro*, 15. *Feb.* 1826, *Ibid.* (*ib.*).

⁴²⁸ This judgment was affirmed on appeal. *Vid. supr.* § 25. not. ⁴²², and *infra* not. †, and ⁴³⁰.

⁴²⁹ This is a mistake. A resolute clause is expressly required by the statute.

been thought necessary in the constitution of strict entails, from the general rules of our law, by which every landholder, while he continues proprietor, may affect or burden his own property: Unless therefore he be divested of his right by a resolute clause, depriving him of the power of alienation, his debts and deeds must stand good against the estate, notwithstanding the strongest prohibitory clauses; *Fac. Coll.* ii. 94, (*Hepburn's Creditors*, Feb. 8. 1758, *DICT.* p. 15507): and though inhibition be used upon an entail executed under the strictest irritant clauses; yet if there be none resolving the contravener's right, the entail is ineffectual against singular successors, and purchasers are secure in buying the entailed subject; because inhibitions cannot supply the defects in a right, but serve merely to secure it such as it stood formerly; *Fac. Coll.* ii. 211, (*Bryson*, Jan. 22. 1760, *DICT.* p. 15511)*. On the other hand, where there is a clause irritating the right of the contravener, but none declaring the debts to be contracted null, the limitation is not to be extended to such nullity, notwithstanding the presumed intention of the entailer; *July* 11. 1734, *Baillie*, (*DICT.* p. 15500) †. Hence also, a prohibition to innovate or alter the succession, with an irritancy adjoined to it, restrains the heir only from granting gratuitous deeds in prejudice of the succession, but not from contracting onerous debts; *Falc.* i. 116, (*Campbell*, June 1746, *DICT.* p. 15505). And though the entail should prohibit the heirs to contract debt under an irritancy, the heir has power to sell, if there be not also an irritant clause *de non alienando*, 1732, *E. Hopetoun* against *Hepburn*, (not reported), which judgment was affirmed by the House of Lords; *Falc.* ii. 92, (*Sinclair*, Nov. 8. 1749, *DICT.* p. 15882) ‡.

30. As to the *second* head, What is deemed an act of contravention against the heir, (by which is understood any step taken by him, counteracting the directions of the entail, whereby he falls from his right,) the act is express, That if he do not repeat the irritant clauses in the conveyances under which he enjoys the estate, he forfeits his right, which accrues to the next substitute. This enactment appears to relate only to retours on special services. For a general service is not properly the conveyance of an estate; it carries to the heir only unexecuted procuratories of resignation or precepts of seisin, which are rights merely personal, in order that charters and seisins, which are the only proper conveyances, may proceed thereupon; and for this reason, the irritant clauses were seldom or never repeated in retours upon general services. It was however, adjudged, *Kames*, 79, (*Stewart*, Feb. 1. 1726, *DICT.* p. 7275), that the omitting of the irritant clauses in a retour even on a general service, imported a contravention against the heir: But this was reversed upon appeal, and will not probably be hereafter

What deeds of the heir infer contravention.

* *Fac. Coll.* August 8. 1787, *L. Ankerville, &c.* *DICT.* p. 7010, (*supr.* § 23.)

† The same was found, *Clerk Home*; *Kilk.* No. 4. *voce* TAILZIE, *Gairdner*, Jan. 27. 1744, *DICT.* p. 15501; *Fac. Coll.* Jan. 28. 1779, *Kempt*, *DICT.* p. 15528.

‡ Where an entail contained prohibitory and irritant clauses against selling, but no resolute clause applicable to that particular, it was found, *quoad hoc*, to be ineffectual against an onerous purchaser; *Fac. Coll.* Jan. 15. 1799, *Bruce*; affirmed on appeal, *DICT.* p. 15539⁴³⁰; March 8. 1804, *Scott Moncrief* against *Cunningham*, (not reported).

⁴³⁰ And again with reference to the same entail; *Clarke*, 23. May 1806, *DICT.* p. 16643. See to the same effect, *Lockhart*, 11. June 1811, *Fac. Coll.*; *Henderson*, 21. Nov. 1815, *Ibid.*; *Barclay*, 8. Feb. 1821, affirmed on appeal, 18. May 1821, (*Shaw's Appeal Cases*): — And again, as to a prohibition against leases, *Dick*, 14. Jan. 1812, *Ibid.*

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after drawn into a precedent. A general reference made by the heir in his conveyance to the irritant clauses of the entail, as it is equivalent to an entire neglect of the injunctions of the act, must of course be deemed a contravention against the heir; *Kames*, 60, (*Viscount Garnock*, July 28. 1725, Dict. p. 15596). The act also declares, that the contracting of debt, or the doing of any deed by which creditors may adjudge or evict the lands entailed, shall irritate the right of the heir: Yet it is not the bare contraction which makes the irritancy, but the allowing the debt contracted to affect the property; for the words, “whereby the same *may* be adjudged,” are favourably explained to mean, “whereby they shall be adjudged⁴³⁰.” The sense is supported, not only from the unfavourableness of entails, but from the reason of the thing; for if the simple contraction were to infer contravention, the heir durst enter into no bargain, even for the necessaries of life, without being brought under an irritancy; *Kames*, 34, (*Scot*, July 1722, Dict. p. 3673); 1738, *Stewart* against *Denholm*, (Dict. p. 15500). An heir of entail, though he should be restrained under the strictest irritancy from the contracting of debt, may nevertheless settle a jointure on his widow, not exceeding the legal terce, if he be not specially limited in his powers of providing for her; because the provisions of law are not understood to be excluded in entails; *Kames*, 90, (*Cant*, Dec. 27. 1726, Dict. p. 15554.)⁴³¹ But the granting of provisions to younger children, even moderate ones suitable to the condition of the granter, has been adjudged a contravention; *Feb*. 1730, *Borthwick*, (Dict. p. 15556), upon this medium, That the providing of these is to be accounted the voluntary deed of the granter, seeing younger children are not secured in any legal provision out of the father’s estate, as widows are out of that of the husband⁴³². Yet it ought to be observed, that this last judgment was reversed upon appeal.

31.

⁴³⁰ See *Nairne*, 15. Feb. 1810, *Fac. Coll.*

⁴³¹ The terce may be excluded by a clause to that effect; *Gibson*, 24. Nov. 1795, Dict. p. 15869, and 1. March 1796, *Ibid.* p. 5891; *McGill*, 13. June 1798, *Ibid.* p. 15451. See also *Cunninghame Fairlie*, 15. June 1819, *Fac. Coll.*; *supr.* B. 2. t. 9. § 46.

⁴³² Where the entail regulates the extent of provisions, whether to the widow or children, the heir may, of course, grant any thing within the limits pointed out; and if he go beyond, the provision will not be null, but merely restrictable to the prescribed amount. As to the construction and operation of such clauses,—in the case of provision for the widow, see *Agnew*, 12. Dec. 1810, in note to *Gordon*, 24. Jan. 1811, *Fac. Coll.* *Malcolm*, 21. Nov. 1823, *Fac. Coll.* (S. & D.); *D. Roxburghe’s Trustees*, 9. June 1824, *Ibid.* (ib.); *E. Kintore*, 13. May 1814, *Ibid.*; *D. Roxburghe*, 25. June 1818, *Ibid.* *Halket Craigie*, 4. Dec. 1817, *Ibid.*; *D. Roxburghe*, 11. Jan. 1820, *Ibid.*; *Douglas*, & *15. May 1822, Ibid.* (S. & D.); *E. Rothes*, 21. Jan. 1823, (S. & D.); *Campbell*, 1. Dec. 1818, *Fac. Coll.* :—And in the case of provisions for the children, see *Crawford*, 1. March 1809, *Fac. Coll.*; *E. Wemyss*, 23. Nov. 1810, *Ibid.*; *Halket Craigie*, *supr.*; *Campbells*, 6. Feb. 1821, *Fac. Coll.*; *Douglas*, &c. *supr.* *Oswald*; 20. Dec. 1821, (S. & D.); *E. Rothes*, *supr.*

In cases where such provisions are altogether excluded by the entail, or are too much restricted in their amount, a remedy is provided, by *Stat. 5. Geo. IV. c. 87*, as follows :

1. With regard to the widow.

The heir in possession may provide his wife, by way of annuity, to the extent of one-third of the free rental, after deducting public burdens, liferent provisions, interest of debts and provisions, and the yearly amount of all other burdens of what nature soever affecting the lands, or diminishing its clear yearly rent or value, at the time of his death *Ibid.* § 1.

If the heir in possession be a female, she may in like manner provide her husband to the extent of one-half of the free yearly rental. This is restricted to a third, in case the estate be already burdened with a prior existing annuity, whether to a wife or husband.

Book III.

A declarator of irritancy, necessary before a substitute can dispossess the contravener.

(Feb. 14. 1758, *Erskines*, reported in) *Fac. Coll.* ii. 100, (DICT. p. 4406)*.

32. No substitute in an entail can enter into the possession of the entailed estate, upon the contravention of the former heir, without first declaring the irritancy against him⁴³⁴. After which he might, before the act 1685, have served himself heir, either to him who had contravened, or to the maker of the entail; (*Mack.* § 17. *h. t.*, edition 1684, which has been continued by mistake in the later editions). But the special method prescribed to the substitute, in that case, by the act 1685, is, that after having obtained declarator of irritancy against the contravener, he pass him by, though he had been last seised in the fee, and serve heir to the person who died last seised, and did not contravene. This is doubtless a deviation from the rule, That one ought to serve to the ancestor last infeft, who is in this case the contravener; but the law considers the contravener, after the irritancy is declared against him, as having never had a right, and consequently as having never been infeft. And the plain reason why this anomalous method of service is prescribed, is, that if some expedient had not been fallen upon, for the next heir to enter without being made liable for the debts of the person last infeft, he could have reaped no benefit from the resolute and irritant clauses conceived in his favour. As all the heirs of entail have an interest to preserve the settlement which is made in their favour, it is competent to a remoter substitute to bring a declarator of irritancy against the heir contravening, if the more immediate substitute shall decline it; *Fount.* Jan. 6. 1697, *Simpson*, (DICT. p. 15353); *Jan.* 1723, *Irvine*, (DICT. p. 15369)†. The contractions of debt by which an irritancy is begun, and the diligences which are directed thereupon against the entailed estate, are not simply null, though the next heir may get a nullity declared by a proper action; for irritant clauses, being intended merely in behalf of the next heir, can have no operation but in his favour; and if that person who alone has an interest to

take

* A previous decision, to the same purpose, had been pronounced on July 24. 1752, in the case of *Leslie of Findrassie*; and the point has since been considered as put to rest, by a decision of the House of Lords, in the case of *Edmonstone of Duntreath*, Nov. 24. 1769, DICT. p. 4409, which has been uniformly followed as a precedent, and in which the case of *Leslie of Findrassie*, (not reported,) is referred to. See also *Fac. Coll.* June 25. 1785, *Menzies*, DICT. p. 15436. On appeal, this case was, upon June 30. 1801, remitted by the House of Lords to the Court of Session, to review their interlocutor; and the court adhered, Jan. 18. 1803; *Ibid.* May 22. 1798, *Marchioness of Titchfield*, DICT. p. 15467, (affirmed on appeal, June 20. 1800); *Ibid.* Feb. 12. 1799, *Miller*, DICT. p. 15471. It is often a matter of difficulty to determine whether the substitute is meant to be comprehended or not. See March 3. 1762, *Livingston against L. Napier*, DICT. p. 15418; *Fac. Coll.* Feb. 23. 1791, *Gordon*, DICT. p. 15465; *Ibid.* eodem die, *Wellwood*, DICT. p. 15463; *Ibid.* Feb. 27. 1799, *Syme*, April 26. 1802, DICT. p. 15473, affirmed on appeal, App. voce TAILZIE, No. 5.⁴³³

† See this found, in a case where the pursuer of the declarator was the twenty-fifth substitute; *Fac. Coll.* Nov. 29. 1774, *Dundas*, DICT. p. 15430.

⁴³³ See also *Steele*, 12. May 1824, *Fac. Coll.*, affirmed on appeal, 5. Dow, 72; *Macenzie*, 24. Nov. 1818, *Fac. Coll.*, and 13. May 1822, 1. S. Ap. Ca. 150; *Douglas*, 14. Nov. 1823, *Fac. Coll.* (S. & D.), affirmed on appeal.

⁴³⁴ Nor can he, in respect of the act of contravention, insist in a reduction of the contravener's title, without first declaring the irritancy; *Fac. Coll.* *Bontine*, 15. Jan. 1800, (S. & D.).

It is competent for a succeeding heir of entail to pursue reduction of a lease, or other deed, executed by his predecessor in contravention of the entail, although the irritancy incurred through that contravention was not declared in the lifetime of the contravener, and though the successor's own title was made up by service as heir of entail to the contravener; *B. Mordaunt*, 9. March 1819, *Fac. Coll.* affirmed on appeal, 1. S. App. Ca. 169.

take the benefit of such irritancy, shall neglect to use his right, the irritancy is ineffectual⁴³⁵. If therefore the next heir should not, within the years of prescription, bring his challenge against the contravener's right, the diligences led against the estate would carry it off, and put an end to the entail. As the irritancies in an entail are imposed solely for the benefit of the more remote substitutes, the last substitute called by the entail, on whose failure the estate is to descend to *heirs whatsoever*, or to *heirs and assignees*, lies under none of the limitations that fettered the former heirs, but is at liberty, as absolute and unlimited fiar, to carry on the representation of the family by a new entail; for entails being *stricti juris*, admit of no limitation by inference upon any of the heirs, though truly intended by the maker. Now those who succeed by the last termination of *heirs whatsoever*, or of *heirs and assignees*, fall not under the description of *heirs of entail*, that expression being merely of style, originally calculated to exclude the fisk; and the laying restraints on the proper substitutes in favour of the *heirs whatsoever*, is evidently contrary to the intention of the entailer, whose chief view in making the entail is presumed to be, the continuing the representation of his family in one person; which is in itself impossible, if the heirs whatsoever, who succeed after all the substitutions are exhausted, should happen to be heirs-portioners; *Fac. Coll.* ii. 217, (*E. of March, Feb. 27. 1760, Dict.* p. 15412).

33. By the late act for abolishing ward-holdings, 20. *Geo. II. c. 50*, it is declared lawful for the King to purchase any lands in Scotland, for erecting buildings or making settlements, notwithstanding the strictest entail: And by the act immediately following, *c. 51*, of the same year, where the lands to be purchased belong to minors or fatuous persons, who cannot covenant for themselves, his Majesty may purchase them from the tutors, curators, or guardians of the proprietor. These acts appear, by the preamble to both of them, to be limited to lands lying in the Highlands of Scotland; but the enacting words of both, comprehend all lands in Scotland without exception. By the first of the above-cited statutes, every heir of entail may sell to his vassals the superiorities belonging to the entailed estate; but where either lands or superiorities are thus sold, the purchase-money is to be settled on the same series of heirs, and under the same limitations and irritancies, that the lands or superiorities sold were settled on before the sale*.

TITLE VIII.

The last substitutes are unlimited fiars.

The King may purchase lands however strictly entailed.

Heirs of entail may sell their superiorities to their vassals.

34.

* See *Stat. 10. Geo. III, c. 51*, "for the improvement of lands in Scotland held under settlements of strict entail," abridged in Appendix, No. 7. See also a decision, as to the import of this statute, in *Fac. Coll. Jan. 22. 1793, Elliot, Dict.* p. 15622⁴³⁶.

⁴³⁵ A lease granted in contravention of the entail, was on this principle found to require reduction, and not to be *ipso jure* null; *Agnew, 29. June 1813, Fac. Coll.* (p. 402.)

⁴³⁶ Unless strict obedience be paid to the various statutory provisions in regard to notices, &c. the benefit of the statute will be lost; *Elliot, supr.*; *Torrance, 1. Dec. 1820, Fac. Coll.* as reversed on appeal, *1. W. & S. Ap. Ca. 429*; *Finlayson, 12. Dec. 1821, Fac. Coll. (S. & D.)*; *Campbell, 15. May 1822, Ib. (ib.)*; *Thomson, 11. Dec. 1824, (S. & D.)*. For other questions connected with this statute, see *Fletcher, 4. July 1826, (Ib.)*; *Frazer, 7. June 1825, (Ib.)*; *Todd, 14. Jan. 1823, (Ib.)*; *L. Elibank, 11. July 1821, (Ib.)*; *M'Kechnie, 11. July 1821, (Ib.)*; *Stirling, 14. Dec. 1814, Fac. Coll.*

The powers given by this statute, and by the more recent one, *5. Geo. IV. c. 87, (supr. not.)* cannot competently be exercised to such an extent as on the whole to deprive the heir in possession of more than two-thirds of the free yearly rental; *5. Geo. IV. c. 87. § 13.*

As to the heir of entail's power of sale for the redemption of land-tax, see *42. Geo. III. c. 116*; *Fac. Coll. Colquhoun, 7. July 1803, Dict.* p. 15089; *Ibid. Anderson,*

BOOK III.
Rights taken in
conjunct fee.

34. Rights are frequently granted to, or settled upon, two or more persons jointly, who, as conjunct fiars, enjoy the subject during their joint lives *pro indiviso*. The rules which govern the succession of such rights, fall properly to be explained here.—It may be premised, that not feudal subjects only, but bonds, may be granted in conjunct fee. For though there is no proper *feudum* of money or of bonds, yet as a yearly profit arises from money as well as land, lawyers have admitted a *quasi feudum* in bonds, which gets the name of *feudum nominis*; a term borrowed from the Romans, who gave the appellation of *nomina* to all money-debts bearing interest; *L. 11. C. de pact. conv.* The same general rules are common to both, and they all arise from the will of the granter, either express or presumed.

Conjunct fees
granted to
strangers.

35. Conjunct rights are granted, either to strangers, to father and son, or to husband and wife. Where an entail is made, or any right conceived, in favour of two strangers, in conjunct fee and liferent, and their heirs, the two are equal fiars during their joint lives, as if they had contributed equally to the purchase: But after the death of the first, the survivor has the liferent of the whole; and after the survivor's death, the fee divides equally between the heirs of both. If the right be taken to two jointly, and their heirs, without any mention of liferent, the conjunct fiars enjoy the subject equally while both are alive, as in the former case: But on the death of the first, neither the fee, nor even the liferent of his half, accrues to the survivor, but descends to his own heir. In a right taken to two jointly, and the longest liver, and their heirs, the words *their heirs* are understood to denote the heirs of the longest liver; and consequently, though the several shares belonging to the conjunct fiars are affectable by their several creditors while both are alive, yet upon the death of any one of them, the survivor has the fee of the whole, exclusive of the heirs of the predeceased; not only the fee of his own original share, but that of the share belonging to the predeceased, in so far as it is not exhausted by his debts, *Falc. i. 206, (Riddels, Nov. 6. 1747, Dict. p. 14878) **. If the right be taken to two strangers, and to the heirs of one of them, he to whose heirs the fee is taken is the only fiar; the right of the other resolves into a naked liferent. All these rules arise naturally from the import of the several expressions. But notwithstanding the last-mentioned rule, a father who takes a right to himself, and his son *nominatim*, and to his son's heirs, continues the only fiar and the son is barely an heir substitute to him, though he should be infeft by his father on the right; for rights from fathers to children being gratuitous, and granted merely in consequence of the natural obligation annexed to the relation of a parent, are interpreted favourably for the granter, so as not to deprive him of the fee during his own life, unless it appear from the tenor of the grant, that

* Also reported by *Kilk. No. 3, voce FIAR, Dict. p. 4203.*

18. Nov. 1814; *Lawrie's Trustees, 1. June 1805, (S. & D.); Fac. Coll. Elliot, 9. Feb. 1826, (Ibid.); Sandford, 226. et seq.*

As to his powers of burdening the estate, for money laid out in the construction of turnpike roads and bridges, see 4. *Geo. IV. c. 49.*

Private statutes are sometimes obtained under special circumstances, for the sale or excambion, partial or total, of entailed estates.

In such cases, the strictest attention must be paid to the statutory formalities, or the transactions gone into will be void; *Agnew, 2. June 1818, as reversed on appeal, 1. S. C. 223; and see M'Culloch, 17. May 1826, (S. & D.).*

that his intention was to state it in the son; *Stair, July 23. 1675, L. Lamington, (Dict. p. 4252)**.

36. Where a right is taken to a husband and wife in conjunct fee and liferent, and the heirs of their body, or their heirs indefinitely, the general rule is, that the husband is, from the prerogative of his sex, the sole fiar, as the *persona dignior*; and the right of the wife resolves into a liferent; for which reason, the words *their heirs* are interpreted to be the heirs of the husband; *Dirl. 85, (Johnston, June 19. 1667, Dict. p. 4199)*. But this rule suffers several limitations, all founded on the intention of the parties, presumed from the different circumstances of cases. *First*, The person from whom the subject originally flowed is accounted fiar; *Hope, Maj. Pr. Liferent, Kincaid*, unless where it appears from the strain and contexture of the conjunct right, that the fee was intended to be given to the other; *Forbes, Nov. 21. 1705, Cred. of Paterson, (Dict. p. 4223) †⁴⁴¹*. But though the right have flowed from the wife, yet if it was given her in name of tocher, the fee is in the husband; since

TITLE VIII.

Rights taken to husband and wife in conjunct fee and liferent.

* Few questions in law have been more frequently agitated than those which regard the right of fee, in settlements in favour of parents and children. The only general rule of construction that can be gathered from the numerous decisions upon this point, seems to be that which is laid down in the text. Thus, a disposition granted to a person in liferent, and to the heirs of his body *nascituri* in fee, vests the fee in the father; *Clerk Home, No. 1. Frog, Nov. 25. 1735, Dict. p. 4262; Kilk. No. 2. (& Elch. No. 7.) v. FIAR, Lillie, Feb. 24. 1741, Dict. p. 4267; Fac. Coll. July 7. 1761, Douglas, Dict. p. 4269⁴³⁷*. This rule of construction, though frequently founded on the maxim, "that a fee cannot be *in pendent*," (as to which *vide supra*, B. ii. tit. 1. § 4, *in fine*), seems to have been adopted rather from the presumed will of the granter, to which the court always gives effect where it is possible. If such is the rule where the father is restricted simply to a liferent, there is still more reason for preferring him to the fee, where he expressly retains the power of disposing of the property, or of burdening it with debts; *Feb. 10. 1756, Cumming, Dict. p. 4268 and 15854; Fac. Coll. June 23. 1779, Porterfield, Dict. p. 4277; Ibid. Dec. 7. 1780, Dickson, Dict. p. 4269; March 1. 1781, Cuthbertson, Dict. p. 4279⁴³⁸*. On the other hand, where it appears to have been clearly intended to restrict the father to a liferent, the court will give effect to the expressions, and hold the fee to be vested in trust for the children⁴³⁹. Thus, where the subject is conveyed for the parent's "liferent use *allearly*," this mode of expression seems uniformly to have had the effect of restricting his right to a mere fiduciary fee. This is plainly taken for granted in a case reported by *Stair, Feb. 4. 1691, Thomsons, Dict. p. 4258*; and the court gave judgment to that effect, *March 8. 1791, Ross, mentioned in Fac. Coll. July 9. 1794, Newlands, affirmed on appeal, April 26. 1798, Dict. p. 4289; Ibid. Nov. 25. 1801, Watherstone, Dict. p. 4297⁴⁴⁰*. In the same way the court have construed a conveyance to a parent "in liferent alimentary;" *Ibid. June 14. 1781, Gerran, Dict. p. 4402*. It seems also a settled rule, that where the investiture is made to trustees for behoof of the father in liferent, and his children *nascituri* in fee, the import of the several expressions shall be more strictly attended to, and the father's interest reduced to a liferent without any additional circumstance; *Fac. Coll. March 6. 1793, Seton, Dict. p. 4219. Vide supra, B. ii. tit. 1. § 4.*

† See *Fac. Coll. Dec. 6. 1780, Paterson, Dict. p. 4212.*

⁴³⁷ See to the same effect, *Thomson, affirmed on appeal, l. Dow, 417; Robertson, 20. Nov. 1806, Dict. v. FIAR ABSOLUTE, LIMITED, App. No. 2; Pollock, 4. July 1806, Ib. v. PROVISION TO HEIRS, &c. App. No. 6; Lindsays, 9. Dec. 1807, Ib. v. FIAR, App. No. 1; Maxwell, 7. June 1822, (S. & B.); Turnbull, 12. Nov. 1822, (S. & D.); Kennedy, 19. Feb. 1825, (Ib.)*

The reverse is the rule where the disposition is taken to the father in liferent, and his child or children *nominatim* in fee; *Macintosh, 28. Jan. 1812, Fac. Coll.; Dykes, &c. 2. June 1813, Ibid.; Steele, 28. Jan. 1823, Ibid. (S. & D.); Spence, 17. Nov. 1826, (Ib.)*

⁴³⁸ See also *Wilson, 14. Dec. 1819, Fac. Coll.*

⁴³⁹ See *Scott, &c. 14. Feb. 1826, (S. & D.)*

⁴⁴⁰ And again, in *Harvey, 26. May 1815, Fac. Coll.; Falconer, 20. Jan. 1825, (Ib.) See Dundas, 23. Jan. 1823, (Ib.); Falconer, 22. Jan. 1824, (Ib.)*

⁴⁴¹ See *Muirhead, 16. Jan. 1824, (S. & D.)*

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since whatever is given in tocher is the property of the husband *.

2dly, Where the right is taken to the wife's assignees, the law considers her as fiar; for it is of the essence of a fee to dispose of the subject at pleasure; *Forbes, Feb. 4. 1709, Fead, (Dict. p. 4240) †.*

3dly, The wife is fiar where her heirs are more favoured in the substitution than those of the husband, according to the maxim, That he is fiar, *cujus hæredibus maxime prospicitur.* This character is,—by Craig, *Lib. 2. Dieg. 22. § 6*, and Stair, *B. 3. tit. 5. § 51, vers.* *The next difficulty is*,—applied to that spouse on whose heirs the last termination falls; and no doubt the spouse on whose heirs the succession is settled in the last place, must be fiar, in consequence of this rule, where there are no intermediate substitutions between the heirs of the marriage and them. Thus a sum of money assigned by the wife in tocher, to her husband in conjunct fee and life-rent, and the bairns of the marriage, whom failing, to the wife's heirs, was adjudged to belong to the wife; *June 1733, Angus, (Dict. p. 4244) †.* But where there are intermediate substitutions, that spouse is deemed fiar whose heirs are first called after the heirs of the marriage, though the succession should be settled ultimately upon the heirs of the other; because the heirs first called are undoubtedly favoured above those who are only substituted in default of the first; *Stair, Feb. 20. 1667, Cranston, (Dict. p. 4227); July 1720, Cred. of Elliot, (Dict. p. 4244).* Where the right is taken to the husband and wife, and to the longest liver and their heirs, the fee is, in the event of the wife's survivorship, adjudged by our later decisions to belong solely to the wife, to the entire exclusion of the husband's heirs, as if the right had been granted in the same terms to two strangers; *June 22. 1739, Ferguson, (Dict. p. 4202) § 443*; contrary to the older practice; *Stair, Jan. 23. 1668, Justice, (Dict. p. 4228).* Though the husband is thus preferred to the fee in feudal rights, and in the *quasi feuda* of bonds taken jointly to him and his wife; yet in the rights of moveable goods, the words of style are more strictly observed, so as the heirs of the husband and wife succeed equally, in regard that moveables suffer a division more easily than heritage; *Durie, Feb. 2. 1632, Bartholomew, (Dict. 4222).* For the origin of conjunct rights between husband and wife, see *Cr. Lib. 2. Dieg. 22. § 8.*

rights to corporate bodies not conjunct

37. Rights to corporate bodies are not conjunct fees: For the several members of the corporation are not conjunct fiars; and the corporate body itself has no right to the fee, but to the fruits only.

* *Stair, July 12. 1671, Gairns, Dict. p. 4230; Harc. No. 348, Ramsay, Dec. 20. 1682, Dict. p. 4234; (see *infr. not. †*, and 442.)*

† The same construction is put upon the destination, where the subject is placed at the wife's disposal; *Stair, June 27. 1676, E. Dunfermline, Dict. p. 2941, 4078, 4244, &c.*

‡ The contrary appears to have been found, *Fac. Coll. Jan. 20. 1790, Bruce-Henderson, affirmed on appeal, May 11. 1791, Dict. p. 4215 442.*

§ See *Falc. ii. No. 150, Wordie, July 18. 1750, Dict. p. 4207.*

⁴⁴² The cases of *Gairns* and *Ramsay, supr. not. **, seem equally adverse. See also *Watson, 18. July 1766, Dict. p. 4288, Hailes, 82*, where it was held settled law, that, under the destination of a subject belonging to the wife, to the spouses in conjunct fee and life-rent, and the heirs of the marriage in fee, the fee is in the husband. Such being the law, it might now perhaps be held in a case like that of *Angus*, as was done in the case of *Ramsay*, viz. "that, there being no restriction as to the husband, he was fiar, and that the heirs of the marriage, and the wife's heirs, were but heirs-substitute to the husband; and the wife never having been institute in the conjunct-fee, the termination (on her heirs) could not give a fee, which clears only which of more persons institute is the fiar." But it may be well to compare the different authorities.—See also, on this subject, 1. *Bell Comm. (5th edition,) 56.*

⁴⁴³ See *Fac. Coll. Murray, 19. May 1826, (S. & D.).*

only, according to the limitations of the grant or patent ⁴⁴⁴. Neither are such rights conceived to heirs, as conjunct infeftments are.

38. Though all who succeed in a certain subject by the destination or appointment of the proprietor, without impropriety may be, and sometimes are, called *heirs of provision*; in which sense, those who succeed to an entailed estate are styled *heirs of tailzie and provision*; yet that appellation is most commonly given to those who succeed by a provision in a marriage-contract, or in a bond, or other right containing a clause of substitution. By the ordinary style of provisions in a marriage-contract, the father settles the lands or other subjects expressed in it, upon himself and his wife in conjunct fee and liferent, and on the heirs of the marriage in fee. If there are sons of the marriage, the eldest is the sole heir of provision, or of the marriage, where the subject provided is heritage. In the case of daughters only, all of them are heirs-portioners of provision. If in a marriage-contract, providing an heritable subject to the heirs-male of the marriage, a special provision is granted to a daughter, in default of, or failing such heirs-male, the daughter is entitled to it, though a son should exist of the marriage, unless he shall also survive the father; for one cannot with any propriety be called heir while the ancestor to whom he ought to be heir is alive*: And the plain intention of parties by such a stipulation is, that the daughter shall have the right, unless the succession of the subject provided shall actually devolve upon the son as heir-male, on his father's predecease. Heirs of a marriage are more favourably regarded than heirs substituted in a simple destination; which last, being gratuitous, gives only the hope of succession, and may be altered by the maker, or any of the members who succeed before the substitute; whereas marriage-contracts are onerous deeds, by which the bride and her friends stipulate, that special provisions therein mentioned shall be made good by the father to the heir or other issue of the marriage, in consideration of the tocher or fortune brought with her. The heir of a marriage has therefore a mixture of two distinct characters in him: He is not only heir, but *quodammodo* creditor to his father: For by the marriage articles, the father is laid under an implied obligation not to defeat those provisions by any gratuitous deed †, consequently the heirs in whose favour the obligation is granted, have an action competent to them; or they may use diligence against the father ⁴⁴⁵,—if the subject provided has been carried off by onerous creditors, or if he hath done any deed to the prejudice of his obligation,—to purge encumbrances, or to make their provisions effectual in the event of his death; *Stair, Feb. 13. 1677, Fraser, (DICT. p. 12859, and 12944);*

Dec.

* See *Fac. Coll. Jan. 12. 1780, Maconochie, DICT. p. 13040.*

† See *June 9. 1743, Graham against Coltrain, DICT. p. 13010. (Infr. § 39. not. 454.)*

⁴⁴⁴ This seems inaccurate. A corporate body,—unless where the grant in its favour expressly provides the contrary,—or where the subject is destined to some public use, from which, it is a necessarily implied condition of the grant, that it shall not, by sale or otherwise, be diverted, (as in the case of the jail, town-house, &c. of a royal burgh, (*S. & D.*), *Magistrates of Auchtermuchty, 22. May 1827.*)—has the same absolute right to the fee, and the same unlimited powers of disposal over it, with any private individual *fiar*.

⁴⁴⁵ It is thought that no diligence can be used against the father. He is *fiar* while he lives, and has the largest powers of administration. The right of the heir, under a marriage settlement conceived in the ordinary style assumed in this section of the text, does not open as a proper *jus crediti*, until the father's death. See *Cunningham, and E. Wemuss. infr. not. 450.*

TITLE VIII.

Heirs of provision and heirs of a marriage cannot have their right defeated by gratuitous deeds.

Book III.

How this right is limited. The father may do all onerous deeds, and lies under no restraint in favour of the substitutes of the heir of provision.

Dec. 5. 1734, *Fotheringham*, (DICT. p. 12929)*; or they may set aside gratuitous deeds signed by him to their prejudice, upon the statute 1621, to be hereafter explained, even though they should be granted in favour of the heir's own mother; *Stair*, July 10. 1677, *Carnegie*, (DICT. p. 12840); or of a second son of the same marriage; *Feb.* 1718, *Fea*, (DICT. p. 12926)⁴⁴⁶. And this the heir of a marriage hath a right to do, without serving heir to his father, the granter of the deeds under challenge; for he is truly creditor to his father; and it is not only unnecessary, but improper, for a creditor to serve heir to his debtor, in order to make his payment effectual; *Dict.* ii. p. 279. 280, (DICT. *voce* PROVISION TO HEIRS AND CHILDREN, Sect. 6.); *Fac. Coll.* ii. 202, (*Moncrieff*, Dec. 8. 1759, DICT. p. 12871), and *arg.* 255, (*Porterfield*, Dec. 9. 1760, DICT. p. 12874)⁴⁴⁷.

39. Though settlements in marriage-contracts conceived in the general terms above expressed, restrain the father from gratuitous deeds to the prejudice of the heir of the marriage; yet the heir's right is not a right of proper credit, but of succession: And the case is the same in provisions of money as of land⁴⁴⁸. If therefore a father should become bound to pay a particular sum to the children of the marriage at the first term after the decease of him and his wife, the children have barely a right of succession. The term of payment is in that case a plain indication, that the children had no proper right of credit against the father during his life; *Fac. Coll.* i. 109, (*Strachan*, July 1. 1754, DICT. p. 996)⁴⁴⁹. And since they are only heirs of provision, it follows, that they cannot come in competition with their father's onerous creditors, though he had been incontestably solvent at the time of signing the contract, or granting the provision; *Fount.* July 24. 1696, and *June* 17. 1697, *Napier*, (DICT. p. 12898). Nor does it import, in that case, whether the sum be or be not actually lent according to the father's obligation of provision; *Stair*, Jan. 24. 1677, *Graham*, (DICT. p. 12887); *Fac. Coll.* i. 109, (*sup. cit.*). Hence the father is understood to reserve to himself the fee, notwithstanding such provisions, and, of course, continues to have a power of charging the subject with just debts, and even to alienate it for onerous causes⁴⁵⁰. And from this he cannot be debarred by inhibition; for, as has been already observed, diligences are barely fences to secure obligations to the creditor, such as they are, but cannot make the

* See *Bruce*, No. 44. and No. 49, *Mackintosh*, 1716 and 1717, DICT. p. 12881.

⁴⁴⁶ *Dykes*, 9. Feb. 1811, *Fac. Coll.* (*vid. infr. not.* ⁴⁵²), and reported in a note in that case, *Hyslop*, 1. June 1804. See also *Fac. Coll. Hyslop*, 15. Nov. 1821, (*S. & D. Ewen*, 15. Jan. 1824, (*Ibid.*); *Wood*, 3. Dec. 1823, (*Ibid.*).

⁴⁴⁷ See *infr.* § 73; *Ogilvy*, 16. Dec. 1817, *Fac. Coll.*

⁴⁴⁸ On the subject of marriage-contracts conceived in the ordinary form alluded to in this and the preceding section, see 1. *Bell Comm.* (5th ed.) 639: And on the subject of those others, where a proper right of credit is conferred, as noticed *infr.* § 40, see *Ibid.* 640.

⁴⁴⁹ Reported also, *Kilk.*, 5. *Brown*, *Supp.* 274.; and *Elch. v. ADJUDICATION*, No. 41. (*Vid. infr. not.* ⁴⁵⁸.)

⁴⁵⁰ *Cunynghame*, 17. Jan. 1804, DICT. p. 13029. Where the father sells the estate settled by his contract of marriage, and with the price purchases other lands, the heir is not entitled to these lands as a *surrogatum*; neither can he insist, as a creditor of his father, for the value of the estate sold, as at the latter's death: his claim lies only to the price which his father actually obtained; *Cuningham*, 20. Dec. 1810, *Fac. Coll. Wemyss*, 28. Feb. 1815, *Ibid.* affirmed on appeal, 20. May 1818; *Fac. Coll. Hyslop*, 15. Nov. 1821, (*S. & D.*)

broader than they were originally*. Hence also the father, notwithstanding his settlements upon the heir of the marriage, continues to have a power of administration, so as to lay him under reasonable restrictions for the preservation of the family; *Dec. 7. 1728, Craik*, (DICT. p. 12984); *Jan. 7. 1737, Trail*, (DICT. p. 12985)⁴⁵². And though the decision, *Kames*, 50, (*Douglas*, July 10. 1724, DICT. p. 13002), which entirely excluded the heir of a marriage from the estate provided to him, in respect of his weakness and extravagance, is not perhaps to be made a precedent; yet it might seem to encroach too much upon the right inherent in fathers, if they had it not in their power to save their family from destruction, by limiting in the use of his property an heir who had plainly discovered a riotous and dissipating temper, with irritant and resolute clauses, provided these clauses were pointed against him alone, and that the order of succession settled on the other heirs of the marriage was not altered or innovated in that new deed †. The father lies under no degree of restraint in favour of the substitutes who are called by the marriage-contract after the issue of the marriage, and who acquire no right by such substitution, *St. Ans. p. 145*: For no contract can have effect beyond the interest of the parties contracting; and the wife and her relations, who are the only contractors with the husband, are not interested in the succession, except in so far as it is provided to the wife's issue. As to the remoter substitutes, if the husband contracted, it was with himself alone; and therefore the substitution must be accounted a simple

* This found, *June 9. 1748, Gordon*, reported by *Kames, Rem. Decis. No. 91.* and by *Kilkerran*, No. 6. *voce FIAR ABSOLUTE AND LIMITED*, DICT. p. 12915 and p. 4998; (affirmed on appeal, 7. *March 1751.*) See (to the same effect,) *Dirl. and Stair, Grahame*, Nov. 24. 1677, DICT. p. 12887⁴⁵¹.

† One bound by his contract of marriage to dispoise certain lands, and what other lands should be acquired during the marriage, to the heirs of the marriage; the son being prodigal and bankrupt, he conveyed the lands to the son's children, burdened only with a liferent to him. In a reduction at the instance of the son's creditors, the Lords sustained the deed and assailed; *Kames, Sel. Decis. No. 187. Thomson*, Feb. 11. 1762, DICT. p. 13018⁴⁵³. See *Fac. Coll. Dec. 8. 1790, Farquhar Gordon*, DICT. p. 13028; *Ibid. Feb. 26. 1799, Ewing*, DICT. p. 12997; and *July 28. 1778, Spiers*, DICT. p. 13026. It has often been made a question, Whether a father, who has come under an obligation in his marriage-contract, to settle an estate upon the heir of the marriage, does sufficiently implement that obligation by making the settlement in the form of a tailzie, containing prohibitory, irritant, and resolute clauses? The court have hitherto waved determining the general point, but have decided according to the rationality of the deed under challenge⁴⁵⁴. In the following cases, the deed executed in contravention of the marriage-contract was set aside; *Dec. 11. 1731, Gordon*, DICT. p. 12984; *Kilk. No. 7. voce PROVISION TO HEIRS AND CHILDREN, Ker*, Jan. 23. 1747, DICT. p. 12987; *Fac. Coll. July 28. 1778, Spiers, &c.* DICT. p. 13026; *Jan. 28. 1801, Watson against Pyott*, DICT. App. *voce PROVISION TO HEIRS AND CHILDREN*, No. 4.

⁴⁵¹ See also *Cunningham and E. Wemyss, supr. not.* ⁴⁵⁰: But inhibition is available where the marriage settlement is conceived in such terms as to confer a proper right of credit. *Vid. infr. § 40*, and case of *Douglas*, 22. *July 1724, ibi cit.*

⁴⁵² He has also power, if possessed of no other fund out of which to provide them, to burden the estate settled on the heir with reasonable provisions to the younger children; *Ewing, not. †, h. p.*; but he cannot convey any part of the estate itself; *Dykes*, 9. *Feb. 1811, Fac. Coll.*

⁴⁵³ On this decision, Lord Hailes, in delivering his opinion in the subsequent case of *Spiers*, observes, "As to the case of *Cummerhead*, as commonly related, I shall only say, that I do not admire the judgment;" and an express decision to the contrary was accordingly pronounced, *Spiers, supr., Hailes*, 806.

⁴⁵⁴ As to a father's powers thus to impose restrictions upon his heirs, not contained in the previous contract of marriage, the court delivered "an unanimous opinion, that it was now settled law that it was incompetent to do so;" *Munro*, 13. *Feb. 1810, Fac. Coll.*; and see to the same effect, *Douglas*, 5. *Dec. 1804*, DICT. v. *FIAR ABS. AND LIM. App. No. 1.*; *Fac. Coll. Macneill*, 27. *Jan. 1826, (S. & D.)*; *Graham, supr. § 38. not. †*, with which compare *Stewart*, 2. *March 1815, Fac. Coll.*

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simple destination as to them, which may be altered by him at his pleasure; see *Jan. 29. 1735, Craik*, (DICT. p. 4313).

40. Though such marriage-settlements, when executed in the ordinary form, are postponed to every onerous debt of the granter, even those contracted after, and so cannot come in competition with his extraneous creditors; they are nevertheless effectual against a cautioner who has engaged himself in the marriage-contract for the father's performance of his obligation: For the plain language of that engagement is, that he shall make the provision effectual to the heir, in case the father himself shall fail; so that the claim competent to the heir of the marriage in such case, is not as heir to his father, but as creditor to the cautioner; *Fount. Dec. 19. 1707, Dickson*, (DICT. p. 12938); *Dec. 5. 1734, Fotheringham*, (DICT. p. 12941)*. It may also be observed, that marriage-settlements may be so drawn as to give to the heir a proper right of fee in the land-estate, or a proper right of credit in the special sum provided to him. When this is the intention of parties, it is commonly executed by the father's obligation in the marriage-articles, not to contract debt; or to infest the heir in the lands against a determinate day, or when he shall have attained a determinate age; or by a clause restricting his own right to a liferent: And such obligations, though granted *liberis nascituris*, if secured by proper diligence⁴⁵⁶, or perfected by seisin, found a preference to the heir against all the posterior deeds of the father, even onerous, *Kames 51. (Douglas, July 22. 1724, DICT. p. 12910)*; see the *ratio decidendi* in a decision, *Pr. Falc. 30. (Creditors of Marjoribanks, Feb. 1682, DICT. p. 12891)*⁴⁵⁷. Thus also in a money-provision, where the father is bound not barely to provide the heir or children of the marriage in a sum, but to make payment of it⁴⁵⁸ to them at a term which may happen to exist before the father's death, a proper *jus crediti* is constituted to them, in virtue of which they are entitled to come in competition with the father's onerous creditors; and the preference will be determined according to the nature of their rights, and the priority of the diligences used upon them; *Edg. Jan. 24. 1724, Cred. of Easter Ogle*, (DICT. p. 8150); *Kames, 45, (same case, ibidem)*; *Fac. Coll. ii. 160, (Henderson, Jan. 1759, DICT. p. 12919)* †. From these observations it follows, that though the rights which thus create a proper credit to be granted to the heir of the marriage, that appellation is to be understood only *designative*, for marking out that the person to whom the right is granted stands in such a relation to the deceased as gives him a right to serve to him if he should think fit; but there is no necessity that he be *hæres actu* to his father; for he is his proper creditor; *Fac. Coll. i. 177, (Kinminity's Creditors, Jan. 20. 1756,*

* See *Stair, Nov. 23. 1677, Crawford*, DICT. p. 12934⁴⁵⁵.

† See *Fac. Coll. Nov. 15. 1787, Mactavish*, DICT. p. 12922; *Ibid. Feb. 2. 1792, Mackenzie*, DICT. p. 12924.

⁴⁵⁵ Which compare with *Dickson*, cited in the text, a later decision under the same contract.

⁴⁵⁶ See and compare *supr. § 39, not.*⁴⁵¹.

his right has not been perfected, the personal right of fee, though preference, entitles him to be ranked *pari passu* with the

1756, Dict. p. 6127). Yet, as it is not to be presumed that a father intends to divest himself of the fee during his life, the expressions must be very explicit to take his obligation of provision to the heir out of the common case ⁴⁵⁸.

41. Though a father cannot gratuitously disappoint any of his wife's issue, whether they be called by the marriage-contract as institutes or as substitutes; yet the heir, when he comes to succeed, lies under no such restraint; for so soon as the heir first called is, upon the father's decease, served heir of the marriage, the provision in the contract is fulfilled; and therefore if he be not limited in his right of fee by the marriage-articles, he may, as absolute fiar, alter the order of succession at pleasure. If, for example, lands be devised by the father in fee-simple to the heir-male of the marriage, whom failing, to his eldest daughter; the heir-male may, after completing his titles to that estate as heir of provision, make a new gratuitous settlement of it upon his own heir-female, to the exclusion of the next substitute in the marriage-contract, though a daughter of the same marriage with himself*.

42. A father may, notwithstanding a first marriage-contract ⁴⁵⁹, settle, by a second, a jointure upon the second wife, or provisions on the issue of the second marriage; which will be effectual against the heir of the first, though such settlements or provisions should encroach on the subject provided to him by his mother's prior contract, if the father had no other fund out of which he could provide the said wife and children. This arises from the favour of marriage, and because such settlements are rational, and in truth onerous deeds, which the father cannot be barred from executing by any prior contract ⁴⁵⁹. Yet he cannot, without control, make such exorbitant settlements upon a second marriage, as would too much encroach upon the prior *jus crediti* acquired by the children of the first; he can only provide them suitably to his circumstances †. If a provision be not exorbitant, the heirs of the first marriage are liable, as heirs, to fulfil that rational settlement made by the father upon the wife and issue of the second marriage: But if it exceed the just measure of his circumstances, they are, *qua* creditors to their father, entitled to challenge it, as a fraudulent or gratuitous deed ⁴⁶⁰. The quantum of such provision is therefore entirely arbitrary, and must be judged of by the extent of the father's free estate. It is not only the heir of the first marriage who can bring a reduction of a settlement in favour of a second marriage *quoad excessum*; the action is also competent to the heirs of the wife of the first marriage, in case any sum or subject should be left to them by a substitution in the first marriage-contract; *Fount. Jan. 19. 1697, Laws*, (Dict. p. 12899). Where onerous or rational deeds are thus granted by a father, by which the provisions to the heir of a marriage are diminished, an action of recourse lies at the heir's instance against the father; in case he shall afterwards acquire a separate fund

TITLE VIII.

The heir in a marriage-contract, to whom others are substituted, is notwithstanding unlimited fiar.

The father's powers of making provisions by a second marriage-contract.

* See *Kilk. No. 1, voce FIAR ABSOLUTE AND LIMITED, Edgar, July 6. 1736, Dict. p. 4325.*

† See *Fac. Coll. and Kames, Feb. 7. 1761, Bruce, Dict. p. 13096.*

⁴⁵⁸ See *Wilson, 13. Jan. 1825, (S. & D.)*

⁴⁵⁹ *Sed quære*, in the case of a contract, where a proper right of fee is conferred on the heir, and that right has been so perfected by diligence, or seisin, as (§ 40. *supr.*) "found a preference to the heir against all the posterior deeds of the father, even onerous?"

⁴⁶⁰ *Fac. Coll. Wood, 3. Dec. 1823, (S. & D.)*

Book III.

Provisions of conquest in a marriage-contract.

fund which may enable him to fulfil both obligations; *Jan. 27. 1730, Henderson, (Dict. p. 12928)* ⁴⁶¹.

43. In provisions by marriage-contract, the conquest during the marriage, or a certain proportion of it, is frequently settled, either on the heir, or on the issue of the marriage. By conquest is understood the estate which the father shall acquire during the marriage; concerning which the following general rules are observed in practice. *First*, What the father succeeds to, as heir to an ancestor, or as executor to a person deceased, is not conquest ⁴⁶²: Nothing is comprehended under that term, but what is acquired by the father's own industry, or by singular titles; *Stair, B. 3. tit. 5. § 52* ⁴⁶³. *2dly*, All conquest must be free, after the deduction of debts; and therefore, if the father shall have sold one estate, and with the price purchased another, the price of the estate sold must be discounted from the purchase; for the plain meaning of a clause of conquest is, that whatever real addition has been made to the estate during the marriage, that, and that only, shall descend to the heir or issue of the marriage; *June 27. 1676, E. Dunfermline, (Dict. p. 2941)* ⁴⁶⁴. *3dly*, An obligation of conquest does not bind the father so strongly as a special provision: For both our judges and lawyers have looked upon it as little better than a simple destination; so that the subject may be affected, not only by the father's onerous or rational deeds, but even gratuitous, provided they be granted for small sums, perhaps to a child of another marriage; *Feb. 9. 1669, Cowan, (Dict. p. 12942)*; *June 19. 1677, Murray, (Dict. p. 12944)*; *Dalr. 10. (Jan. 20. 1699, Cumming, Dict. p. 6443)*. But any deed merely gratuitous, alienating the whole, or a considerable part of the conquest to the prejudice of the heir to whom it was provided, which has no rational consideration to support it, is to be regarded as granted in *fraudem* of the provision of the contract, and is therefore subject to reduction. This ample right of fee as to the conquest, remains with the father in full force, notwithstanding the dissolution of the marriage to the issue of which the conquest was provided ⁴⁶⁵: No action therefore lies at the suit of the child entitled to the conquest against the father himself, to obtain a liquidation thereof; and consequently the conquest is computed *quoad* the father, as at the time, not of the dissolution of that marriage, but of the father's death; *Fount. Nov. 27. 1684, Anderson, (Dict. p. 12960)*; *Fount. Feb. 24. 1685, Cruickshanks, (Dict. p. 12964)*.

Substitution. It was differently understood by the Roman law, and by ours. Prohibitory clause annexed to substitutions.

44. Those who succeed in virtue of clauses of substitution, are all heirs of provision in a proper sense. A clause of substitution is that by which the succession of any subject is declared by the granter to devolve on the substitute, in default of the institute; and such clauses are frequent, not only in entails and marriage-contracts but in bonds of provision to children, bonds of borrowed money, testaments, &c. The Romans had the name of *substitution*, without the thing. By their law, no man could name an heir or a substitute to the person who was to succeed to himself, unless that person w

⁴⁶¹ *Vid. Cunningham, &c. supr. not. 445 and 450.*

⁴⁶² Nor what he succeeds to, by way of legacy; *Mercer, July 1730, Dict. p. 3054*; —nor what his wife succeeds to, and he, in consequence, acquires *jure mariti*; *Rae, 29. Jan. 1810, Fac. Coll.*

⁴⁶³ Leases taken by the father fall under a provision of conquest, where the term of entry had arrived during the marriage, but not otherwise; *Duncan, 15. Feb. 1810, Fac. Coll.*

⁴⁶⁴ *Vid. supr. t. 3. § 30, and ib. not. 136.*

⁴⁶⁵ *Maconochie, 12. Jan. 1780, Dict. p. 13040.*

Book III.

least onerous causes; *Stair*, July 8. 1673, *Graham*, (Dict. p. 4100). A prohibition is implied in a bond of provision by a father, substituting his children mutually to one another, by which the share of the child deceasing is appointed to go to the survivors; *Forbes*, Dec. 14. 1710, *Smith*, (Dict. p. 4332); see also *Fac. Coll.* i. 34, (*Macreedy*, Nov. 15. 1752, Dict. p. 4402); and *Edg. Feb.* 6. 1724, *Moffats*, (Dict. p. 4321). The seclusion of assignees in a bond, granted to two sisters, must bar any of the sisters from assigning her part to a stranger, to the prejudice of the other sister, as effectually as a mutual substitution of children to one another; for the prohibition to assign, is only implied in the last case, whereas, in the first, it is express; *Fac. Coll.* ii. 162, (*Boswell*, Feb. 7. 1759, Dict. p. 12578). But where the deed vesting the subject in the sisters, instead of secluding assignees, barely prohibits any of them to alter the succession, an assignation by one sister to her husband, though in a postnuptial contract, is sufficient to carry the right to him; for the restraint in such case does not extend against alienations *inter vivos*; *Fac. Coll.* i. 37, (*Weir*, Nov. 28. 1752, Dict. p. 4314).

Provision by a clause of return.

45. A clause of return, is that by which a sum in a bond or other right, or any part of it, is provided in a particular event to return to the granter and his heirs: It is therefore truly a species of substitution, by which the granter provides, that the right shall, in default of the grantee, go, not to a third person, as in a common substitution, but to himself. And the known rule of simple substitutions, That the institute can defeat the substitution, even by a gratuitous deed, hath been applied to clauses of return. Hence a legatee, whose legacy contained a provision of return to the granter's own executor, has been found to have the same power of assigning it gratuitously, as if the substitution had been in favour of a stranger; *Home*, 13. (*Lewis* against *Lawrie*, February 13. 1736)⁴⁶⁷. But a distinction has been lately attempted to be made between the two. It has been said, that where there is a proper clause of substitution, the fee of the subject is fully vested in the donee; which implies a power of disposing of it; whereas as a clause of return makes a conditional right, by which it is to return in a certain event to the granter himself, and so disables the donee from disappointing the provision, at least gratuitously; but this point has not yet received a decision*. Where the right bears a clause, not of return to the granter himself, but barely of substitution in favour of his heir, it seems to be agreed, that there is no prohibition to alter; *Fac. Coll.* i. 51, (*Wauchope*, Dec. 22. 1752, Dict. p. 4404)⁴⁶⁸. Where a bond is granted for an onerous cause, though it should contain a provision of return, the creditor is not barred from altering the destination, even gratuitously; because such clause is considered as proceeding from the will of the creditor alone, and so is of the nature of a simple destination. Thus a creditor,

* It was found, That a clause of return might be defeated by a gratuitous deed, in the same way as a simple substitution; *Fac. Coll.* iii. 101. § 1, *Hamilton*, Dec. 9. 1762, Dict. p. 4358⁴⁶⁷.

⁴⁶⁷ 5. *Brown's Supp.* 161.

⁴⁶⁸ See *Duff*, 27. *June* 1807, Dict. v. MEMB. OF PARLIAMENT, App. No. 13, where a distinction was taken between the case of a stranger donee and that of "a son and heir." In the former, it was held, that the clause of return could not be gratuitously defeated: in the latter, as had been decided, *M. Clydesdale*, 26. *Jan.* 1726, Dict. p. 1261, and 4343, affirmed on appeal, *Robertson*, 564, that it was "merely a simple destination, which might be altered at pleasure." A younger son has in this respect been treated as a stranger donee; *D. Douglas*, 18. *Feb.* 1717, Dict. 4343. This last case, in so far as it is an example of a return, not taken expressly to the granter himself, may be compared with *Wauchope*, 22. *Dec.* 1752, cit. in text. See *Johnstone*, 30. *May* 1804, Dict. p. 15112.

tor, who in a bond adjects a clause of return, failing heirs of own body, to the debtor himself, may evacuate the return at his own pleasure; *Stair, Nov. 18. 1680, Murray*, (DICT. p. 4339); *Clerk v. Robertson, Jan. 28. 1737*, DICT. p. 9441). But where the return is contained in the obligation flows from the granter, as in the case of provision, donations, &c. or where there is any other good reason for the provision of return in his favour, the creditor's right is limited, so that he cannot frustrate the return gratuitously, *Jan. 31. 1679, Drummond*, (DICT. p. 4338); *Pr. Falc. 97. 1737, Fac. Coll. of Edinburgh, Feb. 11. 1685*, DICT. p. 4342⁴⁶⁸; yet he cannot, on the character of fiar, assign the sum for an onerous cause, or it may be affected for his debt; and he may even demand the completion of the bond, without giving security that the return shall be paid, because his credit was trusted to at granting the right; if he be *vergens ad inopiam*, he must give security before payment be made to him; *June 30. 1747, Beatson*, (DICT. p. 4345).

It would appear, that by the Roman law, *L. 102. De cond. instr.*; *L. 6. C. De inst. et subst.*; *L. 30. C. De fideic.* (though these texts are by some applied to special cases,) this condition, *Si liberis decesserit*, was implied in all settlements by testament, made by one who had at the time no lawful issue; so that if the testator came afterwards to have descendants of his own body, the condition is lost its force. This rule arises from a presumption founded on the nature itself, that the granter would have preferred his own issue if he had had their existence in view; and it seems to be applied in our practice; *Clerk Home, 104. No. 1. (Magistrates of Glasgow, Nov. 21. 1738, DICT. p. 6398)*⁴⁶⁹. But if the testator had issue, or wards children, and, notwithstanding their existence for some competent time before his death, made no alteration of the settlement in their favour, it is presumed that he neglected them from carelessness, especially if the settlement was not of the whole or the greatest part of his estate; *Fac. Coll. ii, 150, (Yule, Dec. 20. 1758, p. 6400)**.—The import of other conditions adjected to settlements will be considered under the next title.

Doubts frequently arise, who the heir is that is truly intended by the maker of a settlement or entail. Upon this head, it may be observed, that though by the word *heir* in the most proper signification, the heir at law is understood, it is certain that that term has not always one fixed signification, but varies according to the nature of the subject⁴⁷⁰, or of the security, or other circumstances; signifying sometimes heir at law, sometimes heir of conquest,

Fac. Coll. June 26. 1789, Wood, DICT. p. 13043; *Ibid. Feb. 14. 1794, Rough-DICT. p. 6403.*

Fac. Coll. Johnstone, 22. June 1824, (S. & D.); *vid. supr. h. s. not.*⁴⁶⁷.

The rule is not confined to the case of immediate children of the testator; but is applied in other cases of provision to near relatives, and even where the provision was only collateral. Thus, by the judgment in *Montrose, cit. in text*, and reported *Kilk. v. PROV. TO HEIRS, &c. No. 3, and Elch. v. WARRANDICE, No. 3*, it was found in favour of grandchildren, that, in a provision to children, with a declaration that in the event of the death or presumed will of the father, that the substitution to the survivors should place only *si instituti sine liberis decesserint*; *Kilk. p. 455*;—and the same was decided, *Binning, 21. Jan. 1767, DICT. p. 13047*; *Wood, and Roughheads, not. **, *Fac. Coll. Baillies, 4. June 1822, (S. & D.)* So also where the provision was in favour of the nephew, judgment was pronounced in favour of the nephew's descendants; *Walker, Jan. 1807, DICT. v. CLAUSE, App. No. 6.*; *Thomson, &c. 16. Nov. 1814, Fac. Coll. v. WILKIE, No. 5.*; *Mackenzie, 2. Feb. 1781, DICT. p. 6602*; *Fac. Coll. Christie, v. WILKIE, 1822, (S. & D.)*; *Wilson, 13. Jan. 1825, (Ibid.)*

Lowie, &c. 23. Feb. 1809, Fac. Coll.

TITLE VIII.

Condition, *si sine liberis decesserit.*

Meaning of the word *heir*. Rules for ascertaining, *in dubio*, who is meant by it.

Book III.

quest, sometimes heir *in mobilibus*, or executors. Thus, in personal bonds, or other moveable rights, it signifies executors ⁴⁷⁰. In heritable bond, with a clause of infestment, that general term carries the subject to the heir at law; but if the creditor charges debtor to pay, that very term in the same bond is afterwards plained to signify executors ⁴⁷¹. In bonds of corroboration, where principal sums secured by heritable bonds are accumulated with interests, the term receives two different meanings, according to two subjects contained in the bond: The principal sum descends in the same manner as if there had been no accumulation, and interest arising therefrom goes to executors. In a *feudum novum* or heritable right acquired by a person himself, it is made use to denote the heir of conquest*. Thus also, in every case where there has been an antecedent destination of a subject, limiting succession to a particular order of heirs, the general word *heir*, *heir whatsoever*, in all posterior settlements of that subject, must be understood, not of the heir at law, but of the heir of the former investiture; *Dalr.* 4. (*Hay*, Nov. 16. 1698, *DICT.* p. 14899; *Jan.* 17 *M. Clydesdale*, (*DICT.* p. 1275); unless it shall appear from prominent circumstances that that term was intended to be used in proper sense; which arises from this rule, That a destination or made, is not easily presumed to be altered or innovated †. In like manner, if one who has taken the right of lands to himself and to heirs of a certain character, shall afterwards acquire adjudications, reversions, tacks or any other collateral security affecting those lands, taking the conveyance to himself and his heirs indefinitely, the general expression of *heirs* in the last deed does not point out the heirs at law, but those to whom the lands themselves were before provided; for the deceased, when he acquired a right affecting those very lands which he had before settled on a special order of heirs, could not mean to set his heirs at law against them by the ears to dispute on their several interests in the subject. *St. B.* 3. t. 5. § 12. On a similar ground, if one vested with an heritable subject, descendible to his heirs at law, shall acquire right in another subject intimately connected with the former ⁴⁷³; if, for instance, a superior of lands shall afterwards acquire their property such posterior acquisition does not ascend to his heir of conquest though it was truly purchased by himself upon a singular title, but descends to the heir to whom the first right was provided ‡; *Jan.* 17.

* See *Fac. Coll.* case of *Duke of Hamilton*, Dec. 9. 1762, Point 5. *DICT.* p. 43; *Ibid.* June 28. 1765, *Burnet*, *DICT.* p. 14939; *Ibid.* March 10. 1784, *Rose*, *DICT.* p. 14955; *Ibid.* June 17. 1789, *Fairservice*, *DICT.* p. 2317; *Ibid.* Dec. 4. 1792, *Doll*, *DICT.* p. 13008; *Ibid.* Feb. 14. 1794, *Robson*, *DICT.* p. 14958 ⁴⁷².

† It was found, that by heirs whatsoever in a total settlement, were to be understood the heirs at law, or heirs-general, not the heirs of the former investiture; case of *Duke of Hamilton*, *sup. cit.*

‡ The same found as to teinds; Dec. 16. 1736, *Greenock*, reported by Clerk *Ho* No. 44, *DICT.* p. 5612; (*Elch. v. HERITAGE AND CONQUEST*, No. 1.) ⁴⁷⁴.

⁴⁷⁰ *Pearson*, &c. 28. June 1825, (*S. & D.*) And the same meaning is attached to term, "personal representatives;" *Stewart*, 21. May 1802, *DICT. v. CLAUSE*, *App. No.*

⁴⁷¹ But compare *B.* 2. t. 2. § 16. *supr.*

⁴⁷² See also *Sutties*, 19. Jan. 1809, *Fac. Coll.*

⁴⁷³ The same was found, even where the subjects were unconnected, apparently from a presumption, founded on the trifling nature of the new acquisition, that there could have been no view to an alteration of the prior destination of the party's general succession; *Robson*, *supr. not.* *

⁴⁷⁴ Where one had entailed his lands, and afterwards purchased the teinds, taking the disposition "to him and his successors in the lands," the court unanimously held, that this was not sufficient to bring the teinds under the entail; *Spalding*, 20. Feb. 1771 *DICT.* p. 14461.

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ther, before which period the right does not become special to every one of them : For the right is given *familia*, to the whole issue taken together ; and therefore, though the father is, by his obligation, restrained from executing gratuitous deeds in favour of strangers, *extra familiam*, he has a power inherent in fatherhood of distributing the subject provided among his own issue in such proportions as he shall judge proper ; *July 19. 1706, Edmonstone*, (Dict. p. 3219), and from motives known only to himself, and which it may be improper to expose to public view ; or he may convert the subject, if it be moveable, into a land estate, descendible to the eldest son alone, provided he burden it with provisions to the other children ; *Dec. 16. 1738, Campbell*, (Dict. p. 13004), observed in (Folio) *Dict. ii. p. 289**. Yet the father cannot exercise this power to the entire exclusion of any one child ; *ibid.* Our supreme court did indeed sustain a settlement by a father upon a younger son of the marriage, to the utter exclusion of the eldest, to whom the succession was provided by the father's marriage-contract, in respect of his weakness and extravagance, *Kames, 50, (Douglas, July 10. 1724, Dict. p. 13002)* : But this judgment has been generally censured, as proceeding upon principles adversary to those that are received in our law ; see *supr. § 39⁴⁷⁹*. A disposition by a father after marriage, to which he was not bound by the marriage-articles, if it be granted to children yet unborn, is no better than a simple destination ; which therefore can neither oblige the father himself, nor stand good in a competition with creditors ; for such disposition is not only gratuitous, not being grounded on a marriage-contract, but is given without any special regard to the disponees, who were at the date of the right so many *nonentia*.—The import of a provision by a father to children already existing, shall be considered *infr. B. 4. tit. 1.*

All heirs represent the defunct universally.

50. An heir is, in the judgment of law, *eadem persona cum defuncto* ; and therefore, after he has acknowledged the succession by service, he represents the deceased, not only in his rights, but in his debts and burdens, agreeably to the rule, *Cujus est commodum, ejus debet esse incommodum*. In the first view, he is said to be heir *activè*, or to have an active title ; because he is entitled to enjoy all heritable rights belonging to the ancestor, and to prosecute all actions for making them effectual. In the last view, he is said to be heir *passivè*, or to incur a passive title ; because, by representing the deceased, he is subjected to all his debts and deeds, and must suffer or sustain actions brought against him for paying or performing them. But as this passive title to pay the ancestor's debts is not equally strong and extensive against all kinds of heirs, it cannot be improper to explain, at some length, the different degrees of obligation by which the different kinds of heirs become liable for the debts or deeds of their ancestors.—Those who enter heirs *titulo universalis*, not to any special subject, but to an inheritance considered as an *universitas*, as, heirs of line or of conquest, represent the ancestor universally, both *activè* and *passivè*. As their right is universal, so is their burden. This is also the case of those who are served general heirs-male, without relation to any special subject ; for that manner of service carries to the heir every right in the ancestor,

* And in *Kilk. No. 4. voce PROVISIONS TO HEIRS AND CHILDREN*, Dict. p. 6849 ; *Elch. v. MUTUAL CONTRACT*, No. 14.

⁴⁷⁹ As to the construction of clauses vesting a power of distribution in trustees, or other parties named in a deed, setting apart a general fund for provisions, see *Facc. Coll. Sivwright, Jan. 27. 1824, (S. & D.) ; Stein, Dec. 8. 1825, (Ibid.)* 2

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ceeds on two grounds: *first*, Such a one is under no necessity to serve heir in order to take the bond, but is considered merely as a conditional institute in the event of the creditor's death; and, *2dly*, The same plea of equity which was misapplied in the case of heirs of entail, may be properly used in such substitutions, That they can carry no right to the substitute beyond the subjects contained in the bond. Heirs therefore substituted in a bond, whether moveable, *Stair, July 3. 1666, Fleming, (Dict. p. 13999)*, or even heritable, *Tinw. June 5. 1745, Mercer **, ought not to be subjected to an universal passive representation, being on the matter singular successors. As their whole right is limited to the sum contained in the bond, they are liable for the debts of the deceased simply *in valorem* of that sum; *Harc. 189, (Stark, Nov. 1683, Dict. p. 14004)*. And this doctrine extends to grantees in a disposition *omnium bonorum*, to take effect at the death of the granter, though such disposition be burdened with his debts; for it is considered as an universal legacy, which does not subject the legatee, even after acceptance, *ultra valorem*; and indeed it differs from a legacy but in the name, said *June 5. 1745; Jan. 1731, Purdie, (not reported)*. To what has been said upon the representation of heirs, and in what case it suffers limitations, it may be added, that an heir of entail, though the deed should contain a prohibitory clause against the contracting of debt, is liable in payment of all the onerous debts contracted by the former heir, unless he has used inhibition against him upon that clause, which will secure him against such of those debts as have been contracted posterior to the diligence; *supr. § 23*. Heirs ⁴⁸¹ by an entail, fenced with irritant and resolute clauses, are liable for no debt contracted by the former heir, contrary to the directions of the entail, § 25; and heirs of a marriage are subjected to the payment only of the onerous, but not of the gratuitous debts contracted by the father, § 38. Heirs ⁴⁸² must fulfil all the deeds of their ancestors, under whatever title they may take the estate. Thus, by the Roman law, an heir who, by the testator's will, was burdened with certain legacies, could not get free from them, by repudiating the will, and entering heir *ab intestato*, *L. 1, pr. Si quis om. caus. test.*; and thus also, by our law, if one should, in an universal settlement of his estate to his heir at law, burden him with provisions to his young children, or with certain legacies payable to strangers, the heir, though he should serve himself heir of line, neglecting the designation, will be liable for those special provisions.

52. Though proper heirs are all at last liable universally for the debts of their ancestor, yet they must be sued in a certain order. Some heirs are liable in the first place, and others not till those who are primarily liable have been discussed. Thus, in the case of obligations relative to a particular subject, the heir who succeeds in that subject may be sued without discussing any other heir; for whoever succeeds in a right, must be the proper debtor in any burden chargeable on that right; *St. B. 3. t. 5. § 17* ⁴⁸³. Thus also, in debts which the debtor's heir-male, or any special heir is burdened with, the creditor may sue such heir, without taking notice of the heir

The order in which heirs are liable for the debts of their predecessor.

* Reported by *Falc.* and by *Kilk.* No. 6, *voce* PASSIVE TITLE, *Dict.* p. 9786; (*Elk. v. IMPLIED WILL*, No. 4, and *v. PROVISION TO HEIRS, &c.* No. 8.)

⁴⁸¹ Inhibition in such a case is totally ineffectual; *supr. § 23, not. 420*.

⁴⁸² *i. c.* "Proper heirs;" *infr. § 52, in princip.*

⁴⁸³ *Robertson's Creditors*, 13. *Dec. 1803, Dict. v. COMPETITION, App. No. 3.*

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Apparent heirs,
their privileges.*Jus deliberandi.*Effects of this
privilege, and
who may plead
it.

which must in that case be adjudged in payment of the debt, *Fount. Jan. 11. 1698, Colquhoun*, (DICT. p. 3572); *Br. 40, (Allan, Jan. 15. 1715, DICT. p. 3566)*; see *Forbes, July 23. 1708, Straiton*, (DICT. p. 3579); after which the creditor may sue the other heirs in their proper order*. But he must assign all the diligences and decrees in his person affecting the subjects belonging to his debtor in favour of the subsidiary heir, before he be entitled to a decree against him; *Stair, June 22. 1678, Crawford*, (DICT. p. 3578). The subsidiary heir continues entitled to the benefit of discussion, though he should incur the passive title of behaviour; because that passive title cannot be farther extended against an heir than his actual service; which yet is no bar to the benefit of discussion; *Dair. 145, (Wightman, June 16. 1715, DICT. p. 3573)*.

54. Before an heir can have an active title to his ancestor's rights, he must be entered by service and retour. He who is entitled to enter heir to a deceased ancestor, is, before his actual entry, styled, both in our statutes and by writers, *apparent heir*, though that appellation is used sometimes in vulgar speech to denote an eldest son, even before the father's decease. The bare right of apparenacy carries certain privileges with it. One of the most considerable, *viz.* the benefit of deliberating, we have borrowed from the Roman law, *Tit. C. De jure delib.*; which thought it reasonable, that as the heir, by his entry, subjects himself universally to his ancestor's debts, he ought to be allowed a competent time to deliberate, whether the succession to which he has a right to enter, be profitable or not. Apparent heirs have, by our law, a year and day indulged to them for that purpose; which is computed in the common case, from the death of the ancestor; and where it is pleaded by a posthumous heir, from the birth of that heir; *Spottis. p. 137, Feb. 28. 1627, Livingston*, (DICT. p. 6870). During that period, apparent heirs could neither be sued in any action, nor, by the strict letter of the law, be even charged to enter: And when, after the expiration of the year, the creditor had charged an apparent heir to enter, he was allowed forty days longer from the date of the charge to consider with himself, whether he should enter or not; *1540, c. 106; 1621, c. 27*. But, as those statutes have been explained by practice, heirs may be charged by creditors to enter within the year, though the law protects them from any suit founded on such charge, till the year be elapsed. Action is, however, sustained against the heir, though the summons be executed within the year of deliberating, if the day of compearance shall fall without it; *Fount. Dec. 15. 1709, Lockhart*, (DICT. p. 6878).

55. It was long a common opinion, that though an apparent heir might have defended himself⁴⁸⁵, while the *annus deliberandi* was current, against suits where he must be charged to enter, and consequently must either enter or renounce; yet he could not against declaratory or real actions, which may proceed without a previous charge: But now it is an agreed point, that an apparent heir can be sued in no action relating to the estate of his ancestor, within the year, though it should not by its nature require a previous charge to him to enter, or though it should contain no personal conclusion against him, if at the same time he cannot plead the proper defences, without founding on his ancestor's right, and so in-

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* See *Fac. Coll. Jan. 13. 1773, Innes*, DICT. p. 3567.⁴⁸⁵ *i. e.* upon this privilege.

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but exhibition of writings in favour of strangers, was by several older decisions refused to the heir on account of the danger of exposing the title-deeds and writings of singular successors to the inspection of apparent heirs, and perhaps because it was thought the heir had no interest in the inspection of writings that had been granted by the ancestor to strangers, unless they had been in the ancestor's custody cancelled at the time of his death; *Stair, Dec. 6. 1661, Tailfer, (Dict. p. 4006); Ibid. Dec. 22. 1675, Maxwell, (Dict. p. 4009); Forbes, Jan. 16. 1706, Buchanan, (Dict. p. 4010)*. But as an heir cannot resolve with judgment, whether to accept of or abandon the succession, till he be apprised of every obligation granted by the deceased; and as the objections against exhibiting the ancestor's obligations appear equally strong, whether they be granted to those *intra* or *extru familiam*, our later practice has extended this privilege, so as to include deeds granted to strangers; *Br. 112, (Spark, June 30. 1715, Dict. p. 3988)*. *Stair* affirms, *B. 3. t. 5. § 1*, that the heir cannot, in this action, call for rights affecting the ancestor's estate which have been perfected by seisin, because these may be known by the records, without the necessity of an exhibition: But the contrary was decided, *Br. 112, (sup. cit.)*. And in the case of seisins not registered, which are without doubt effectual against the granter's heirs, the apparent heir entitled to sue for an exhibition, who cannot discover the existence of such seisins by any record, has no other method of coming at the knowledge of them, but by an action of exhibition. See more on this head, *B. 4. t. 1. § 51, prope fin*⁴⁸⁶. Where the ancestor is divested of any special estate or subject by an entail or irredeemable disposition, the disposition, though no seisin should have proceeded on it, plainly exclude the heir's title of action as to that subject; and so is a good defence to the disponee, against exhibiting to him the writings relative to it; *Harc. 482, (Yester, March 1683, Dict. p. 3999)* *.

To whom this right of pursuing an exhibition is competent, and to what end.

57. This right of insisting in an action for exhibiting *ad deliberandum*, is competent, not only to the heir of line, but in general to every heir who may be charged to enter, *Harc. 490, (Callender, March 1686, Dict. p. 3985)*⁴⁸⁸; even to him who has behaved as heir, *St. B. 4. t. 33. § 5. Br. 112, (Spark, June 30. 1715, Dict. p. 3988)*: For though an heir loses by the passive title of behaviour his right of deliberating, in a question with creditors who have pursued on their grounds of debt, *supr. § 55*; yet as behaviour cannot be objected against an heir but by a creditor, a stranger, if he be pursued by an heir in an exhibition, cannot defend himself by the plea, that the pursuer has behaved himself as heir; because not being himself a creditor, he has no interest to object that passive title against him. An apparent heir who has renounced the succession, cannot sue for exhibition against the special creditor at whose suit he was charged to enter, because his renunciation upon the charge give him by that creditor, imports an approbation of his right; *Jan. 172 Richard*

* This is a settled point. Case of *Hamilton of Dalziel* against *Miss Hamilton Rosehall*, in 1756, (not reported), mentioned in *Fac. Coll. Nov. 28. 1761, Du Hamilton, &c. Dict. p. 3966*; and *Feb. 4. 1795, Cathcart, Dict. p. 3993*. See *Coll. Jan. 12. 1779, Macfarlane, Dict. p. 3991*⁴⁸⁷.

⁴⁸⁶ Also *Ibid. § 52*.

⁴⁸⁷ Reported also, *Hailes, 815*. In this case it was found, that a charter of dedication and infestment, in favour of the party in possession, was not sufficient to conclude the heir's title of action; the right not having been rendered absolute by the expiry of the legal.

⁴⁸⁸ *Ibid. supr. not.*⁴⁸⁵.

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his life, and to which he had made up no active title, were *ex necessitate juris* considered, after his death, not as his property, so as to be confirmed by his executors, or affected by the diligence of creditors, but as *in hæreditate jacente* of the person last infeft in the lands, whose heir therefore might carry them upon making up his titles by service and retour; *Harc.* 44. 71, (*Macbrair*, July 7. 1681, *Dict.* p. 5245, and *Balgony*, Feb. 1688, *Dict.* p. 5247.) But this doctrine has been of late disputed by writers, who affirm, that the rents and interest unuplifted by the apparent heir himself belong to his executors, upon this principle, That the heir's right to them was not, as had been formerly imagined, founded on his actual possession, but in consequence of his title to possess, which arose to him *ipso jure*, without the necessity of any act upon his part; and that as the apparent heir himself was entitled to them, that right, like all other moveable rights, passed upon his death to his executors. The later decisions upon this head run directly cross to one another. The question in the case of *Nicolson of Carnock*, *Fac. Coll.* i. 181, (June 27. 1755, *Dict.* p. 5249,) was given for the apparent heir's executor. By a later decision, *Fac. Coll.* ii. 254, in the case of *Hamilton of Dalziel*, the heir of the ancestor last infeft was preferred; (*Dict.* p. 5253)⁴⁸⁷. And by the latest, July 24. 1765, *Lo. Banff* against *Joass*, (not reported,) the court preferred the executor*. This right of possession continues with the apparent heir, though the ancestor should have made over the lands to a third party; because that grant, if it be not completed by seisin, imports only a personal obligation on the heir to divest himself; which is quite consistent with his possessing the subject, till he be compelled to make up his titles, and convey to the disponee; *Fount.* June 24. 1698, *Home*, (*Dict.* p. 5235); July 18. 1727, *Ogilvie*, (*Dict.* p. 5242) †. The privilege competent to apparent heirs, of bringing their ancestor's estates to a sale, has been already considered, *B. 2. tit. 12. § 61*; and their right to sue liferenters for arrears of alimony; *B. 2. tit. 9. § 62*. Their right to leases, and other such subjects as require no service which vests in them by possession alone, is to be explained, *infr.* § 77, and their right to reduce death-bed-deeds, § 100. The exercise of such of those privileges as cannot be used without immixing with part of the ancestor's estate, which is attended with some pecuniary advantage, infers the passive title of behaviour against the heir; *infr.* § 84. 86, &c.

Judicial service
of heirs. Brief
of inquest.

59. As different competitors frequently claim to be heirs to the deceased, it ought to be proved judicially, who has the best right to that character: And therefore, he who is truly heir, before he can have an active title to the estate which was in his ancestor, must be served and retoured heir by an inquest. Though all our briefs are executed by the intervention of juries or inquests, yet the brief for serving heirs has got the special name of the *brief of inquest*, as far back as the reign of *Rob. III. c. 1*. This brief proceeded either from the King's Chancery, or from a jurisdiction having a right of Chancery, *ex. gr.* a regality, while that jurisdiction subsisted. It contains a command to the judge to whom it is directed, to try the validity of the claimant's title by an inquest; and

* In consequence of this decision, the case of *Hamilton of Dalziel* was appealed, and the judgment was reversed, April 8. 1767; so that the point seems now to be established in favour of the executor of the apparent heir. See *Dict.* p. 5257, (1. *Bell. Com.* (5th edit.) 99.)

† *Fac. Coll.* Nov. 28. 1761, *Duke of Hamilton*, *Dict.* p. 3966; *Ibid.* March 9. 1766, *Mackay and Fullarton*, *Dict.* p. 5239.

⁴⁸⁷ Reversed on appeal, *not. *. h. p.*

TITLE VIII.

inquest cannot proceed on the trial, till fifteen days after the service is proclaimed in the manner described below, § 64; see 1503,

The inquest was also to be summoned fifteen days before service, by *Stat. Rob. III. c. 1. § 2*: But by the aforesaid act they may now be called on the shortest warning; nay, they may be present in the court-house, be compelled, without any summons, to pass upon the inquest, if no disqualification be objected to.

The inquest hath always consisted of an odd number, that the equality of voices might not make the verdict doubtful, sometimes seventeen, sometimes thirteen; but it appears, that, by the practice, the number has been fixed to fifteen, as far back as the time; *Lib. 2. Diog. 17. § 27**. At first, it behoved all of them to be co-vassals of the same rank as the claimant, as every one was entitled to the judgment of his peers or equals; but in the course of time, every one possessed of L.40 Scots yearly rent was admitted; and even that is not now accounted a necessary qualification.

No defender need be cited as a party to the service of an heir, but the publication of the brief supersedes the necessity of per citation; yet if one having interest shall apply to the Court of Session, praying that no brief may issue without calling him as party, warrant will be directed accordingly to the director of the inquest; *Fount. Nov. 10. 1696, Meldrum*⁴⁸⁸. And even after issue of the brief, advocacy of it will be granted on any probable ground that the competitor may plead, by the Court of Session; after discussing the sufficiency of the reason of advocacy, the brief, either to the judge advocated from, or to delegated generally to their own macers, and appoint one or two of their number to sit with them as assessors⁴⁸⁹. But no objection offered to the inquest which is not instantly verified, can bar the service⁴⁹⁰, for the brief of inquest is not a pleadable brief, but a brief of plea, 1503, c. 94, and so cannot admit of terms to be pleaded, or exceptions †. The inquest being set, the apparent heir comes to them his claim as heir, together with the brief published by him, and the executions of it; and in judging of the merits of the brief, the inquest may proceed, not only on the evidence offered by the claimant, but on the proper knowledge of the facts of themselves; for they are considered both as judges and assessors. If it appear to the inquest, that the claim is proved or denied, they serve the claimant, *i. e.* they declare him heir to the estate by a sentence or service, which must be attested by the

Effect of publication of the brief. No objection can bar the service unless instantly verified.

Procedure before the inquest.

The brief of inquest has been from the beginning a retour-brief; that is, it behoved the judge to return it, with the service of the inquest, to the Chancery; for which reason, the service, if it was thus returned and recorded in the Chancery-books, got the name of a retour; *St. Rob. III. c. 1. § 3*. But it would appear from the general practice from the time of Robert III. to the year 1680, that the obtainer or purchaser of the brief got the principal service

The brief must be retoured, otherwise the service is incomplete.

^e *Wight on Parliament*, (edit. 1784), p. 173.

^e *Hist. Law-Tracts*, vol. i. p. 342; and *Mack. Obs.* p. 114.

^f *Brown's Supp.* 327. See also 3. *Ibid.* 376, *Thomson*, 4. *Feb.* 1680, *Fount.* and 256, for *Stair's* report of the same case, under title *Napiers*, 6. *Feb.* 1680.

^g *Infr.* § 64. *not.* 495.

See *infr.* § 62. *not.* 492.

BOOK III.

Brief of mort-
ancestry.Service of heirs,
general and spe-
cial.

service delivered to him, either by the judge or the Chancery; for many of our oldest families have at this day in their keeping the authentic services of their ancestors, with the seals of the inquest appended to them; and hence a principal or original service, of a date prior to 1550, was sustained, though there had been no evidence of any retour proceeding upon it to the Chancery; *Durie, Feb. 17. 1624, Lo. Elphinston*, (DICT. p. 2218). But from that time no service has been reckoned complete, so as to confer an active title, till it be retoured, *Fount. Feb. 2. 1698, Macintosh*, (DICT. p. 14431); after which, the heir served may, upon application to the Chancery, get an extract of it, or a *vera copia*, as a voucher of his service: But such extract is not essential to the completing of it; *Jan. 1738, Buchan*, (not reported)⁴⁹¹. Where a service proceeded on a brief issuing from a regality jurisdiction, it was returned, not to the King's Chancery, because the brief came not from thence, but to the regality Chancery from whence the brieve issued; *Durie, Dec. 8. 1631, L. Cleish*, (DICT. p. 13459).

62. Though the brief of inquest sometimes gets the name of the brief of *mortancestry*, *De morte antecessoris*, *Cr. Lib. 2. Dieg. 17. § 25*, these two were originally distinct. By the brief of inquest, one is served or declared heir to his ancestor; and though it may meet with opposition, where there are different competitors for the succession, it generally passes of course, and always without the citation of any special defender⁴⁹². But a brief of mortancestry was purchased by the undoubted heir, even though he had been already served, against the superior of the lands, or against others who had been seised in them upon a title preferable to that of the heir. This last was therefore the ground of a proper action, in which behoved the heir to cite the person who withheld the possession from him, as a party to the suit, *Reg. Maj. Lib. 3. c. 28. et seq. Q. Att. c. 52*. See, on this head, the act 1429, c. 127, as it is explained by *Craig, Lib. 2. Dieg. 7. § 24*.

63. The service of heirs, whether of heirs *ab intestato*, or those of provision, is usually divided into general and special. A general service, in its most proper signification, is competent only to the heir at law, and has no relation to any special subject; for it is not intended to carry any proper feudal right of lands, but merely to

⁴⁹¹ "The clerk to every service whatsoever of a retourable brieve, shall, along with the verdict, deliver, or cause to be delivered, into Chancery, to be preserved, subject to the orders of the Lord Clerk-Register, the original claim of service, minute of the proceedings, and depositions of the witnesses; and no retour of any service shall be issued without such previous delivery;" 1. and 2. *Geo. IV. c. 38. § 12*.

⁴⁹² In a general service, the legal effect and immediate object of the proceeding being merely to vest in the claimant the abstract character of heir to the deceased, and not to carry any proper feudal right of lands, (*infra. § 63.*), no party is entitled to appear and oppose, unless as a competitor for the same character of heir, and on production of a competing brief. Although, therefore, the ultimate purpose of such service may be to enable the heir to challenge the title of a third party infest in lands that had belonged to the deceased, the latter has no legal title to interfere; *Lo. Forbes, 3. July 1810, Fac. Coll.; Cochrane, 28. June 1821, Ibid. (S. & D.); Robson, 22. Jan. 1799, DICT. p. 16139*. It is otherwise in the case of a special service; for there the proceeding being calculated for perfecting the heir's title to a certain subject, (*infra. § 63.*) any party having, or laying claim to a feudal right in that subject, is entitled to appear for his interest; *Ibid., Fac. Coll. Innes, 29. June 1807, DICT. v. TAILIE, App. No. 13*. See also *Suttie, 20. July 1793, DICT. p. 14457; Douglas, 25. Nov. 1761, DICT. Ibid.*

How far a party who wrongfully opposes and prevents a service is liable in damages, see *Somerville, 19. May 1815; reversed on appeal, 8. June 1818*.

Book III.

that jurisdiction where the heir is to be served: But brieves, in order to serve to a special subject, must be directed, either to the sheriff of the county where the subject lies, with the exception of the stewartry of Kirkcudbright, which is set forth in 1587, c. 60; or to the bailies of the borough, if it be a burgage-tenement; or to the macers of the Court of Session⁴⁹⁵, as sheriffs in that part, by the special warrant of that court, which is granted of course upon the application of the heir. And this last course is generally pursued, either where the lands lie in different counties, or where the heir to be served represents a considerable family. The proclamation of this brief must, in all cases, be made at the head borough of the jurisdiction where the lands lie.

Formerly brieves were necessary only in special services, now in both.

65. So long as the feudal investiture was comprehended in one writing, there could not possibly be an imperfect personal right of lands, because the proper feudal right was completed at once by a single act, *B. 2. t. 3. § 17*, and consequently the points or heads of the brief into which it was the inquest's business to inquire, were entirely adapted to a special servicé. And even long after seisins were in use to be granted in writings distinct from the charters or dispositions, and of dates perhaps long posterior to them, it would appear that no brieves of inquest passed, unless where the deceased died seised in heritable subjects. There is still extant, in the charter-chest of the family of Stirling of Keir, a decree of the sheriff of Dumbarton, dated November 29. 1532, whereby the sheriff cognosces a person to be next heir of the deceased, without an inquest, in pursuance of the King's letter directed to him, proceeding on the heir's complaint that he could not purchase a brief, in regard his ancestor had alienated all his heritage, and so was disseised when he died. Soon after this, brieves were allowed in order to general services; but, in place of settling a new form of brief, that might be adapted to that kind of service, the old form or style continued without alteration, even where a general service was intended; so that it is the nature of the claim offered by the heir to the inquest in consequence of the brief, which alone makes the difference between the two services. If the heir claim to be served in special to certain subjects in which his ancestor died seised, the inquest must answer the whole heads of the brief; but if he want a general service, their inquiry is confined to the heads proper to that kind of service, without regard to the condition of any particular lands, because a general service conveys no proper right to lands.

66.

⁴⁹⁵ By *Stat. 1. and 2. Geo. IV. c. 38. § 11*, the direction of brieves to the macers, either in the first instance, or by advocation, is prohibited; and it is enacted, that in all cases in which it was formerly lawful to grant commission to the macers by authority of the Court of Session, and in which the brief issued from Chancery was thereupon directed to the macers, "such commission shall, from and after the 20. June 1821, be granted, and such brief issued, according to similar forms, to the sheriff-depute of Edinburgh, or his substitute, as sheriff in that part specially constituted, whether such service may relate to lands and heritages situated in or beyond the sheriffdom of Edinburgh, or in several sheriffdoms; and in all cases of competition of brieves as well as where a party claiming right to appear and oppose a service shall make such appearance, either party may apply for, and obtain advocation of the brieve to the Court of Session, not only from any inferior judge, but also from the sheriff of Edinburgh, acting under special commission."

"It shall not be lawful to any person to be clerk to any such service before the Lord Ordinary on advocation, or before the sheriff of Edinburgh on commission, unless he be a writer to the signet;" *Ibid. § 12*.

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Creditors need not rest on an estimation of the inventory by witnesses.

The heir is trustee for the creditors.

Entry upon precept of *clare constat*.

p. 5336). A decree, however, obtained by one creditor in general terms, sustaining his claim, and finding the heir liable to the extent of the inventory, without condemning him in payment of the particular sum acclaimed, gives to such creditor no preference over the others, while the subject continues *in medio*; Clerk *Home*, 104. No. 2, (*Lawson*, Nov. 28. 1738, Dict. p. 5348)*.

70. By the first principles of equity, heirs are entitled to no part of their ancestor's estate till full satisfaction be made to all the creditors, who have a natural right to make the most of their debtor's estate towards their own payment; and it is obvious, both from the rubric and the tenor of the aforesaid act 1695, that that statute, which was calculated for obviating the frauds of apparent heirs, cannot be so interpreted as to overthrow this rule of equity; and that the special clause, introducing the privilege of inventory, was designed merely to save the heir from an universal representation. No creditor, therefore, whose right is perfected by seisin, or made real on the ancestor's estate by adjudication, if he be not satisfied with the value of the inventory as estimated by witnesses, is bound to acquiesce in it, since no more than the presumed value can arise from that manner of estimation; but he may, by analogy with 1681, c. 17, while the estate is yet unsold, insist that it may be put up to public sale, which is the only way of discovering its true value; *July 12. 1738, Heirs of (Strachan) L. Glenkindy*, (Dict. p. 5348). Hence it appears, that an heir who enters by inventory is indeed trustee for the creditors. Upon this ground, if he enter into the possession of his ancestor's estate, without having first got a judicial value put on it, he is liable for the value, not barely as it stood at the time that the lands were given up in the inventory, but as it has been since raised by their improvement; *July 6. 1727, Aikenhead*, (Dict. p. 5344); and in like manner, an heir *cum beneficio* was decreed to communicate to all the other creditors the ease which he had got in transacting any debt due by the deceased with one particular creditor; *Kames*, 65, (*Aikenhead*, Dec. 1725, Dict. p. 5342).

71. One may enter heir to heritable subjects in which the ancestor died seised, not only by the legal method of special service, but also by private consent; for it happens frequently in lands holden of a subject superior, that upon the vassal's death, his heir, in place of being served by an inquest, obtains a precept of seisin from the superior, called of *Clare constat*, from the first words of its narrative, in which the superior acknowledges, that the obtainer of the precept is next lawful heir to him who died last vest and seised in the particular lands therein specified, holden of himself the grantor, and therefore commands his bailie to infest him in them. The heir, by taking seisin on this precept becomes *passive* liable to all the debts of his ancestor⁵⁰¹; and, on the other hand, acquires an active title.

* See the proper style of a decree against an heir entered *cum beneficio inventarii*; *Gordon*, July 22. 1741, Dict. p. 5352.

† An heir entered *cum beneficio inventarii*, may bring his ancestor's estate to judicial sale under the statute 1695, c. 24, referred to *supra*, B. 2. t. 12. § 61. See *Kilgobbin* No. 5 and 7, voce HEIR CUM BENEFICIO; *Rutherford*, July 30. 1748, Dict. p. 5353, and *Blair*, Feb. 27. 1751, Dict. p. 5353.

⁵⁰¹ But see *contra*, *Farmer*, March 1683: and Lord Monboddo adds the following N. B. to his report of *Baird*, *supr.* § 51. not. 480. "It appears to me that this decision must go the length of relieving a man from a universal passive title, who infests himself upon a precept of *clare constat*;" 5. *Brown's Supp.* 927. See *infr.* § 72. not. 504.

Book III.

A service to one who at his death was not in the full right of the subject is ineffectual.

The *jus crediti* of heirs of provision is vested without service.

ed ⁵⁰⁶ *. How far it subjects him to a passive title will soon appear. — It has been explained, *supr.* B. 2. tit. 12. § 12, *et seqq.*, in what cases charges given by creditors to apparent heirs to enter, stand in the place of an actual entry, so as to support the creditor's diligence.

73. A service as heir to one who was not at his death in the right of the subject intended to be carried, is improper and ineffectual ⁵⁰⁸: A settlement, therefore, or disposition, in which the grantor does not first institute himself, but makes over the subject from himself to his son, whom failing to a stranger, can be no foundation for a service by the substitute as heir of provision to the grantor: For though the feudal right, or the fee of the estate, remained with the grantor, notwithstanding the disposition; yet the personal right of the subject, which is the only thing conveyed by the disposition, did not continue in the grantor, and so cannot be carried by a service as heir to him, *arg. Falc.* i. June 5. 1745, *Mercer*, (DICT. p. 9786) †; the substitute must make up titles to such a right by a service as heir of provision, not to the grantor, but to the first institute, who stood in the personal right of the subject ⁵¹⁰. Where a father is bound by a marriage-contract to provide a sum to the heir of the marriage, the heir may, in the character of creditor, without the necessity of a service, sue the father for securing it to him in the terms of his obligation, *Stair*, Feb. 13. 1677, *Fraser*, (DICT. p. 12859); and if the father has granted any deeds inconsistent with, or contrary to the stipulations in the marriage-contract, the heir may bring those deeds under challenge, in an action either against him ⁵¹¹ or his representatives, *Fac. Coll.* ii. 202, (*Moncrief* Dec. 8. 1759, DICT. p. 12871); and he may sue them for payment, in

* See as to this method of making up titles, and the effect of it, *Fac. Coll.* iii. 22, *Gordon*, Feb. 17. 1761, DICT. p. 14070; *Ibid.* July 25. 1781, *Hepburn*, DICT. p. 14487 ⁵⁰⁷.

† See *Kilk.* No. 7. *voce* SERVICE AND CONFIRMATION, and *Falc.* i. 242, *Creditors of Carleton*, Feb. 8. 1748, DICT. p. 14366 ⁵⁰⁹.

⁵⁰⁶ A party, claiming the character of heir, may make up his title in this way: 1. Though he has already attempted to serve, and been prevented from carrying through his service by the effect of an appeal to the House of Lords; 2. Though his right to the estate be disputed *in toto*, and be *sub judice* in the House of Lords; 3. Though he be heir of a strict entail; *Craigie*, &c. 19. Jan. 1808, DICT. v. ADJUDICATION, App. No. 16.

An attempt by the claimant of an estate, (another party being already in possession,) to create a tentative title, not by a trust-bond, but by trust-disposition of the property and adjudication in implement, was defeated; and a practice of completing titles in this way being alleged, the court expressed an opinion, "that if it existed it was improper, "and the sooner it was checked the better;" *Dunlop*, 4. July 1820, *Fac. Coll.* See *Murray*, 17. Jan. 1811, *Fac. Coll.*

⁵⁰⁷ See also *Geddes*, *supr.* § 66. *not.* *; *Bellenden*, 6. June 1823, (S. & D.); *Cunninghams*, *infr.* *not.* ⁵⁰⁸.

⁵⁰⁸ A special service is also ineffectual, wherever the fee is full at the time. Accordingly such a service was found an incompetent mode of making up a title, with a view to challenge the infestment of a party in possession; *Cunninghams*, 27. Feb. 1812, *Fac. Coll.* The proper mode is by general service or adjudication on a trust-bond, *Ibid.*; *Carmichael*, 15. Nov. 1810, *Fac. Coll.*; *Horns*, 6. Nov. 1746, DICT. p. 16117; *Gordon*, *supr.* *not.* *.

⁵⁰⁹ In this case, the disposition being conceived to heirs-male of the grantor's body whom failing, to a series of substitutes, the right, upon failure of the heirs-male and of the first *nominatim* substitute, who had predeceased the grantor, (*Falconer's* report, as to this particular, being inaccurate) was found to be properly carried by service to the grantor. See to the same effect, *Fac. Coll.* *Peacock*, 22. June 1826, (S. & D.)

⁵¹⁰ *Dennistoun*, 5. Feb. 1824, (S. & D.)

⁵¹¹ *Vid. supr.* § 38. *not.* 445.

the father has not, in terms of his obligation, secured the sum specified in the contract to him. But it is unnecessary, and indeed would be incongruous, for him to serve to the father as heir of provision in order to carry the father's obligation; for he is creditor, not heir, in that obligation⁵¹²; and if this *jus crediti* is vested in the heir of the marriage without service, he must, in like manner, transmit it to his heirs or singular successors, though they should not be served, *Feb. 3. 1732, Campbell*, (DICT. p. 12885), observed in (Folio) *Dict. ii. p. 279; Fac. Coll. ii. 255, (Finlayson, or Porterfield, Dec. 9. 1760, DICT. p. 12874)**. But if the father has actually fulfilled his obligation, by lending out the sum, and securing it in the terms of the contract, the right of credit that was in the heir of the marriage is converted into a specific provision actually secured to him, to which he may succeed, and which therefore cannot be taken up without a service. A substitute who is named in a bond immediately after the creditor, has full right to sue for payment, without the necessity of a service for proving the creditor's death, *Stair, Feb. 4. 1680, Robertson*, (DICT. p. 14357)⁵¹³; and this holds even in an heritable bond, provided it has not been perfected by seisin: But if the *nominatim* substitute be only called in the second place, a service is necessary, for proving that all the heirs called before him have failed; *St. B. 3. tit. 5. § 6*. As bonds taken to the creditor and his heirs indefinitely, descend to executors, the title to them must be made up, upon the death of the creditor, not by service, but confirmation, which is the form of conveyance proper to executry; but if a bond be taken, either to heirs secluding executors, or to a special order of heirs, *ex. gr.* to heirs-male, which implies an exclusion of executors, it cannot be carried but by service. No right clothed with infestment can, in any case, be transmitted to substitutes without a service.

74. A service which has proceeded upon a claim as next and lawful heir to the deceased, carries all the subjects descendible to the heir of line which have not been limited by any entail. But this rule fails in subjects not left by the deceased to the disposition of law, but devised by him to a certain order of heirs, even though the claimant should, by the failure of the prior members of entail, happen to be also heir of provision at the time of the service. Put the case, that an estate was entailed by the deceased to A; whom failing, to B; whom failing, to the heirs of line; a service by the heir of line simply *qua* such, can carry no right to the estate which was first provided to A and B, though, by their failure, the succession has devolved on him before the service. The reason is, he is not entitled to the subject as heir of line, but as substitute in a provision to special heirs: He ought therefore to have claimed as heir of provision. The service, being a sentence, ought to be restricted to the claim offered to the inquest, and the evidence brought by the heir in support of it. But a proof that the claimant is truly the heir of line is no evidence that the prior substitutes have failed, which however is essentially necessary in a service by an heir substitute,

The service must describe the special character of the heir who claims.

* *Fac. Coll. Nov. 18. 1784, Cameron, &c. DICT. p. 12879; (Hailes, 959.)*

⁵¹² *Vid. supr. § 38. ad fin. Ogilvy, 16. Dec. 1817, Fac. Coll.* Service is equally unnecessary to transmit a *jus crediti* under a trust-deed; *Fac. Coll. Gordon's Trustees, 4. Dec. 1821, (S. & D.)*; and see *Ibid. Russel, 6. Feb. 1824, (Ib.)*

⁵¹³ See also *Wilson, 6. July 1757, DICT. p. 5186, and 14968.*

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substitute; *July 21. 1738, Edgar*, (Dict. p. 14015 and 14436)⁵¹⁴ *. It seems to be a consequence of this doctrine, that in all services as heir of tailzie or provision, the claim and retour ought not only to describe the claimant barely by the character of heir of tailzie and provision, but to express the special deed under which he claims, and the special lands to the succession of which he is entitled by that deed, and that all the heirs called before him are extinct. Yet this is not precisely necessary for supporting those services. Though a retour be considered as a decree proceeding on the verdict of an inquest, there is no necessity that every decree should express the evidence on which it is founded: It is enough if it be laid before the judge before he passes sentence. This the law presumes to be done in services, and in fact is never omitted; which has probably been the reason of the almost constant practice observed till the beginning of this century, as appears from a search into the Chancery-records, that all services as heirs of provision passed in general terms, without any such reference in the retour; all which have nevertheless been uniformly sustained; *Fac. Coll. i. 90*; (*Forbes, Aug. 12. 1753, Dict. p. 14431*); *Fac. Coll. ii. 114*, (*Hay, June 30. 1758, Dict. p. 14369*) †.

A special service includes a general one of the same kind.

75. A general service cannot include under it a special; because it has no relation to any special subject, unless where an heir of provision is served in general; and even then it carries only that class of rights upon which seisin has not proceeded. But a special service necessarily implies in it a general one of the same kind and character. Thus a service as heir of line in special to a particular estate, includes a general service as heir of line to the same ancestor; and, of consequence, carries all personal rights descendible to the heirs of line; and *vice versa*, subjects the heir to all the burdens to which he would have been liable, had he been served heir-general of line; *Dirl. 323, (Ricarton-Drummond, Feb. 1676, Dict. p. 14457)*. Thus also a service as heir-male in special, carries all the ancestor's personal rights provided to the heir-male; for if the inquest's returning an answer *affirmative* to the two first heads of the brief by themselves, vests all those personal rights in

* See *Fac. Coll. March 10. 1784, Rose, Dict. p. 14955*; *Ibid. Feb. 21. 1793, McCullum, Dict. p. 16135*. But the service will be good, if it appear, from what is set forth, that either by his state of relationship to the deceased, or by the description given of the special subject to which he is served, the claimant must be vested with both characters; *Kilkerran, Kames, D. Falconer, June 21. 1749, Bell against Carruthers, Dict. p. 14016*; *Fac. Coll. Nov. 27. 1766, Haldane, Dict. p. 14443*⁵¹⁵.

† It seems not to be considered so necessary in a precept of *clare constat* as in a service, to set forth the special character in which the heir takes up the succession. An objection to a precept of *clare*, founded upon an inaccuracy in this particular, has been more than once overruled; *Fac. Coll. Jan. 16. 1798, Creditors of Crichton, Dict. p. 15115*⁵¹⁶; *Ibid. Jan. 31. 1798, Trustees of Durham, Dict. p. 15118*; contrary to prior decisions, *Ibid. Nov. 18. 1788, Reid, Dict. p. 14483*; *Ibid. June 17. 1789, Feair-service, Dict. p. 14486*.

⁵¹⁴ *Woodmass, 28. Jan. 1825, (S. & D.)*; *Cairns, 12. Nov. 1742, Dict. p. 14438*.

⁵¹⁵ See, to the same effect, *Cathcart's Trustee, 16. Nov. 1802, and 24. Nov. 1807, Fac. Coll.*, as modified by the judgments of the House of Lords on appeal; *24. May 1805, and 9. May 1810, Dict. p. 14447, and v. SERV. OF HEIRS, App. No. 2*.

⁵¹⁶ In this case, the principle of distinction was thus laid down;—That a service "being an *actus legitimus* must be accurate in every particular, whereas it is sufficient that a precept of *clare constat* be substantially right." In the case of *Durham's Trustees*, it was held sufficient that the precept, when taken "with the deeds to which it referred, and which must be considered as part of it, contained every specification necessary."

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session is a complete title without service ; but if the heir die without attaining possession, these moveables do not descend to that heir's executor, but pass to the heir of the first deceased ³¹⁹. *3dly*, An heir is, by his right of apparen- cy, entitled, after his ancestor's death, to tacks, pensions, and such other heritable subjects which had belonged to him, as have a tract of future time, not only to the effect of recovering or continuing his ancestor's possession, but also with respect to the right to the tack itself, which the law deems to be in the heir, without the necessity of a service, *Stair, June 17. 1671, Boyd*, (DICT. p. 14375) ; for in all cases where the right of the deceased was temporary, running out by a certain course of time, that course is not stopped, though the heir should not be entered heir to the deceased ; *St. B. 3. t. 5. § 6*. And this holds, in so much that a creditor adjudging the right to a tack that belonged to his debtor, from the debtor's heir, needed not charge the heir to enter in special ; *Durie, June 19. 1635, Rule*, (DICT. p. 14374). It obtained indeed by the more ancient practice, that though the apparent heir could enjoy the tack, he could not assign it ; because a tack is an heritable subject, which remains *in hæreditate jacente*, as much as a land-estate, till the entry of an heir ; *Ibid. Feb. 14. 1623, Rattray*, (DICT. p. 10366) : but by the latest decisions, the apparent heir is, in the judgment of law, full proprietor of his ancestor's tacks, in which character he may, by voluntary assignation, make them over to another ; *Feb. 16. 1739, Campbell*, (DICT. p. 14375), cited in (Folio) *Dict. ii. p. 366*. An apparent heir of a tacksman, even where the ancestor was not at his death in the possession, may insist in an action of removing against such tenants of the lands contained in the tack, as derive no right from that ancestor ; and any tenant shall found his possession upon an assignation from him, if the heir has a good title to set aside such assignation upon any legal ground, without the necessity of a service ; *Tinw. June 28. 1754, Scot **. *4thly*, A right of reversion is said by *Stair* to require no service, *B. 3. t. 5. § 6*. But it has been already remarked, *B. 2. t. § 21*, that the apparent heir of a reverser cannot take so much as the first step that is necessary for making good his reversion, viz. his using an order of redemption, till he be entered. *Lastly*, The fee of a land-estate cannot be established without a service, even in one who is *nominatim* substituted in an entail ; for though, in bonds, a person named immediately after the creditor, is not under a necessity to confirm, *supr. § 73*, yet in land-rights such *nominatim* substitute cannot be vested in the fee *ipso jure*, but must first be served ; because property of lands once vested cannot be transmitted but by writing ; the rule which obtains in some other countries, *Mortuus sasis vivum*, being quite repugnant to the genius of our law. And this holds in the substitution, not only of proper feudal rights completed by seisin, but of personal rights of land for a general service is as necessary to establish a title to the last as a special service to the first ; *Fac. Coll. ii. 23. & 114, (Livingstone March 9. 1757, DICT. p. 15409 ;—Hay, June 30. 1758, DICT. p. 14369)*.

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* Reported by *Kames, Sel. Decis. No. 63, DICT. p. 14376*, (and by *Monboddo 5. Brown, Suppl. 814.*)

³¹⁹ Where books, furniture, &c. have been destined to pass along with an entailed estate, the successive substitutes may make up a title by service, though possession also a complete title to such articles without service ; *Veitch, 25. May 1808, Fac. Coi*

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that the heir must at the same time offer to the superior the casualties due to him by law, *i. e.* the non-entry-duties and relief; which indeed arises from the nature of the right; for all such precepts, whether directed to the immediate or mediate superior, are conditional, *vassallo faciendo superiori quod de jure facere oportet*; *Hop. Min. Pr. Ibid.*; *Durie, July 29. 1624, L. Caprington, (Dict. p. 6897)*. The superior may also decline giving obedience to the charge, till the ancient title-deeds of the estate be shewed to him, that he may make out the precept for infeftment in the precise terms of the provisions and limitations therein contained; for since the vassal lies under an obligation to exhibit to the superior the ancient writings of the lands when demanded, no time can be more proper for it than when the vassal enters to these lands.

re the su-
r himself
not made
his titles.

80. Where the superior himself has no more than a personal right to the superiority, and consequently cannot give a valid and effectual seisin to another, a charge against him to infeft the heir would be fruitless: The heir therefore in such case must charge the superior, agreeably to the directions of 1474, *c. 58*, to obtain himself infeft in the superiority, within forty days, that he may be in a capacity to enter the heir, under certification, that if he fail, he shall, as the act expresses it, lose the tenant for his lifetime, *i. e.* lose the casualties that may fall to him through the act or delinquency of his vassal, beside making up the damage that may be sustained by him through that failure. But the superior forfeits none of the fixed yearly duties payable by the vassal, as part of the penalty; these not being properly casualties. Mackenzie in *Obs. on said act 1474*, (p. 79), mentions an act of sederunt *anno 1634*, which declares the meaning of the statute to be, that the superior shall forfeit for his own life, and not for his vassal's only: But that act of sederunt is neither to be found in the collection lately published, nor in the books of sederunt⁵²². Where the immediate superior neglects to complete his titles, notwithstanding the charge against him, the heir may, as in the former case, proceed against all the intermediate superiors between him and the Sovereign⁵²³: But the mediate superior, who upon a charge given him enters the heir of his subvassal, loses none of the casualties falling by his immediate vassal; because what he does is barely an act of obedience.

The two rights
of superiority
and property
meeting, are en-
joyed under dif-
ferent titles, and
descend to dif-
ferent heirs, till
consolidated.

81. When a vassal who succeeds as heir to the superior, has, according to the rules explained in this title, completed his right to the superiority, or a superior to the property of the lands vested in the ancestor, the two rights, though they both meet in the heir, are indeed two distinct estates, and must continue to be enjoyed under different titles, and to descend to the different heirs to whom they were originally provided, till the property be consolidated with the superiority; which is effected by the heir's granting procuratory of resignation for surrendering the lands to himself, in the manner described, *B. 2. t. 7. § 19*. But though this be the proper feudal method, it is the general opinion of lawyers and conveyancers, that where a superior succeeds to the vassal, a precept of *clare constat* granted

⁵²² It was assumed, that the forfeiture was for the vassal's life; *Dickson, 1. July 180*, *Dict. p. 15024*.

⁵²³ Before obtaining a charter *supplendo vices*, it would seem necessary to obtain decree of declarator of tinsel of superiority, against the superior passed by. At least this was required by the Crown, *Dickson, supr. not.* ⁵²².

may be elided by the defence, That the deceased was neither baron, nor burghess, and consequently could have no heirship. It is inferred by the heir's intermeddling with the writings or title-deeds of his ancestor's estate: And the extending it in his case was necessary, that apparent heirs might not have it in their power to cut off lawful creditors from their payment, by repairing up debts against them, the discharges or acquittances of which in the ancestor's charter-chest. It may perhaps be hard to reconcile the different decisions on this point; but in all of them great weight seems to be laid on the good or bad intention of the heir; and, in general, it may be observed, that passive titles are not now so strictly attended to as they were formerly*. Where the heir possessed himself of the charter-chest, which is *nomen universitatis*, his *animus gerendi* was presumed, and therefore he was subjected to the passive title, *Gosf. June 28. 1670, Eleis*, (Dict. p. 9668); *Fount. Feb. 26. 1698, Murray*, (Dict. p. 9675); but if he carried off from the deceased's repositories only particular deeds granted in his own favour, or where, from his making no use of the writings, or from other favourable circumstances, there appeared no intention of behaving, he was absolved; *Durie, July 8. 1628, Dunbar*, (Dict. p. 5392); *Fount. Jan. 28. 1698, E. Airly*, (Dict. p. 9676)⁵²⁷.

in-out on.

84. Behaviour is inferred, even without intromission, barely by the heir's making over to a third party, any subject belonging to his ancestor, to which he himself might have succeeded as heir, or by his consenting to the conveyance thereof made by another; or such deeds have a direct tendency to carry off from creditors part of their payment; *Durie, Feb. 10. 1642, Johnston*, (Dict. p. 9692); *Stair, July 30. 1672, Foulis*, (Dict. p. 9711). Granting discharges of rents, or of debts due to the ancestor, has the same effect; for the extinction of such debts in favour of the debtor, is as hurtful to the creditors of the ancestor, as the assigning them over to others: But the simple renunciation by the heir, of all claim to the succession, in favour of the heir-male, or of provision, infers no passive title, though he should have got a valuable consideration for granting it; because no right which might have been otherwise competent to creditors, is either transmitted or extinguished by such renunciation; and the creditors of the deceased are in no worse condition than before; *Stair, July 5. 1666, Scott*, (Dict. p. 9693); *Ibid. July 19. 1676, Nevay*, (Dict. p. 9694) †.

In what cases this title is excluded: Where the subject was truly no part of the estate, or the heir had a separate title to it.

85. The passive title of behaviour or *gestio* is excluded, if the subject intermeddled with was truly no part of the estate left by the ancestor, who died at the horn, after his single escheat was gifted, and the gift declared, infers no passive title; because these moveables

* See, in confirmation of this general remark, *Fac. Coll. Jan. 27. 1789, Gordon* &c. Dict. p. 9840⁵²⁵. See also two cases in which this passive title was not inferred even from the heir's actual entry, *Fac. Coll. ii. No. 69. § 4, Gordon, Dec. 1. 1757* Dict. p. 11161; *Ibid. July 7. 1784, Creditors of Ayton*, Dict. p. 9732⁵²⁶.
 † See *Fac. Coll. Feb. 26. 1783, Blount*, Dict. p. 9731.

⁵²⁵ See also opinion of the Lord President, in *Bruce*, 13. Dec. 1826, (S. & D.).
⁵²⁶ In *Gordon's* case, the service was as heir of tailzie, so that on a principle of law totally distinct, the universal passive title was excluded; *supr. § 51, not. 480*. In *Ayton* a passive title would have been held incurred, but that "there was sufficient ground to relieve the defender, by setting aside the service altogether."
⁵²⁷ See *Scott*, 25. May 1821, (S. & D.); *Fac. Coll. Fischer*, 24. May 1822, (Ib.).

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Of Succession in Heritable Rights.

ables belonged, after declarator, not to the deceased, but to the donatary, to whom alone the heir was accountable, and not to the creditors; *Stair, Dec. 22. 1674, Seton, (Dict. p. 5397)*. By stronger reason it must be excluded, if the possession by the heir can be ascribed to a disposition, gift, or other singular title in himself, *ex. gr.* if he has immixed with the ancestor's heirship-moveables, as donatary to his escheat; *Ibid. Feb. 10. 1676, Grant, (Dict. p. 9763)*. Under the colour of this rule, it became a common practice for apparent heirs to grant simulate bonds to trustees, that adjudications might be deduced upon them against the ancestor's estate; after which they got the adjudication made over to themselves, and possessed the lands under that singular title, without representing the deceased. Against such fraudulent practices, first, the court of session interposed, by act of sederunt, *Feb. 28. 1662*, subjecting the heirs who should possess upon adjudications that had been led on their own bond, to a passive title; and afterwards the legislature, by *1695, c. 24*⁵²⁸. By this statute it is enacted, that if an heir, without being served, shall possess any part of his ancestor's estate, or purchase any right affecting it, otherwise than as highest offerer at a judicial sale, such possession or purchase shall be deemed behaviour as heir. This enactment was extended by former decisions to the case of a purchase made by the heir in the ancestor's lifetime, provided he possessed under that title after the ancestor's death; *Fount. June 7. 1710, Watson, (Dict. p. 9743)*; *Dalr. 117, (Mercer, Nov. 24. 1714, Dict. p. 9747)*. But by a later decision, *Fac. Coll. ii. 192, (Macneill, July 29. 1759, Dict. p. 9752)*, it was found, that a purchase made by an apparent heir while the ancestor lived, and possession assumed thereupon before his death, excluded all ground of challenge upon this statute, though the purchaser continued in the possession after his death: *First*, Because sundry expressions are used in that clause which discover the legislature's intention to confine the enactment to proper apparent heirs, whose ancestors are dead; and, *2dly*, Because a variety of hardships, contrary to the received rules of law, must follow upon a contrary interpretation: One strong instance of which occurs in the case of a son who is creditor to his father, and enters into the possession of his lands upon proper diligence, and who, if the clause reached to purchasers while the ancestor was yet alive, would be subjected to an universal passive title, merely for using the legal diligence competent to all creditors. This is undeniable, that if the ancestor was dead before the heir made the purchase, the purchasing alone, without the least possession following upon it, subjects him *passivè*, both by the words and the intendment of the statute*. If the heir shall, before the ancestor's death, acquire a right to the property of his estate from himself, there can be no room for the passive title of *gestio*, (though perhaps there may for that of *præceptio hæreditatis*, soon to be explained); for after the ancestor is divested, the estate is no longer his, but the purchaser's; and the passive title of behaviour is limited to such heritable subjects as belonged to the ancestor at the time of his death.

86. Behaviour is also excluded, where the subject intermeddled with by the heir is inconsiderable, if there be no circumstances from which his intention or *animus* can be presumed to defraud the creditors

But see *Fac. Coll. June 10. 1796, Calland, Dict. p. 9759.*

⁵²⁸ *Vid. infr. § 94.*

Where the subject is inconsiderable, and no circumstances presume an intention of defrauding creditors.

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itors of the deceased, *Durie*, Nov. 6. 1622, *L. Dundas*, (Dict. p. 9658)*; for behaviour as heir is not *tam facti quam animi*, L. 20. pr. *De adq. vel amit. hæ.*; and therefore, upon the other hand, intromissions, however small, subject the heir *passivè*, where an *animus* of immixing appears; *Hadd. March* 8. 1610, *Baillie*, (Dict. p. 9658). The heir's voluntary payment of his ancestor's debt is not to be construed against him into behaviour; for a stranger, as well as an heir, may lawfully pay what is due by another; and such payment, in place of being hurtful to creditors, is profitable to them, as it disburdens, and so enlarges the fund of their payment; *Durie*, Jan. 26. 1628, *Comm. of Dunkeld*, (Dict. p. 3502). Nor does the purchasing of brieves by the heir to enter, infer behaviour, though it signifies a present purpose or intention to serve heir, because any man may alter his resolution before it be put in execution, *Stair*, June 28. 1670, *Eleis*, (Dict. p. 9668); nor an apparent heir's assuming his ancestor's titles of honour, nor the exercising any office of high dignity hereditary to the family, which carries by the crown to the blood of the grantee, from a *delectus familiae*, are *extra commercium*, and so may be enjoyed by the heir without representation; *Harc.* 31, (*Bower* against *E. Marshall*, Feb. 2. 1682)⁵²⁹. Yet the exercising any hereditary office of profit, which may be bought and sold, and is consequently adjudgeable, may be justly deemed to infer this passive title. Lastly, As passive titles have been received into our law, merely for the security of creditors; therefore, where questions arise concerning behaviour, among the different orders of heirs, in which creditors have no concern, the heirs are not liable to one another *in solidum*, but are only accountable *in valorem* of their several intromissions; *Durie*, Nov. 20. 1630, *Pride*, (Dict. p. 9861)⁵³⁰.

87. That apparent heirs might not, upon gratuitous dispositions from their ancestors, enjoy their estates without being liable for their debts, the passive title of *præceptio* was introduced, by which an heir, if he accepts of a grant from his ancestor, of any part, however small, of that estate to which he would have succeeded as heir, is subjected to the payment of all such debts due by the ancestor, as were contracted previously to the grant. It is called *præceptio hæreditatis*, because the heir, by such acceptance, takes the succession before it opens to him by the death of the ancestor; so that this passive title, as well as *gestio pro hærede*, is founded on the heir's immixing with the ancestor's heritage. But the two differ somewhat in point of time. In behaviour, the whole immixtion is after the ancestor's death; but in *præceptio*, the whole immixtion is after the heir's acceptance of the right in the ancestor's lifetime, and is only continued after his death. This passive title has been sustained against the heir, by his acceptance of the gratuitous right from the ancestor, and possessing upon it in his lifetime, without the least act of possession subsequent to his death, *Durie*, July 8. 1625 *Gray*⁵³¹; and even by the heir's bare acceptance, though he had made no use of the right at any period of time; *Dirl.* 377, (*Joh* 171 1072

The passive title of *præceptio hæreditatis*.

* Reported also by *Spottiswood*, p. 87, Dict. p. 9658.

⁵²⁹ 2. *Brown*, Supp. 18; reported also by *Fount.* 3. *ibid.* 420. See also to same effect, 1. *Fount.* 94, 1. *Edinburgh*, Feb. 1680, 3. *Brown* Supp. 348.

⁵³⁰ See *Bruce*, 13. Dec. 1826, (S. & D.)

⁵³¹ 1. *Brown*, Supp. 25.

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stone against Rome, July 8. 1696, Dict. p. 9780). But these judgments appear contrary to the common notions of a passive title, which is a legal penalty inflicted on the heir for some irregular act done by him after the death of the ancestor. Though therefore the heir should have possessed upon the right while the ancestor was alive; yet if he repudiate it immediately after his death, or abandon the subject to the creditors of the deceased, he ought to be secure against the passive title: But he is doubtless liable in that case to account to those creditors for all the profits of that right which he had received during the life of his ancestor.

88. The ground of this passive title is, that the heir, by taking a gratuitous right to subjects in which he is to succeed to the granter, is considered as acknowledging himself his heir, and so is liable in payment of all the debts contracted by the granter before his own acceptance of such right; and he is, on that account, called *successor titulo lucrativo post contractum debitum*: But he lies under no obligation to pay such debts as the granter may contract afterwards, not even those that may have been contracted in the intermediate time between the heir's acceptance of the right, and the perfecting of it by seisin, Feb. 1721, L. Aldie, (not reported); for, as Stair observes, B. 3. t. 7. § 6, the passive title is directed against successors, *titulo lucrativo, qui titulus est post contractum debitum*; and therefore has no place as to debts contracted after the right or title is accepted of by the heir. And though, by this doctrine, creditors may be deceived, who have no means of knowing but by the records, whether he, whose credit they are to trust, has granted any right of his estate to his apparent heir; the granting rights to strangers is liable to the same inconveniency; and if it shall appear that such rights are kept latent, without seisin, on purpose to defraud creditors, they may be set aside *ex capite fraudis*; St. *ibid.* Where the original ground of the obligation against the ancestor is prior in date to the right granted to the heir, the heir is liable in payment of the debt, though its constitution by bond or decree should be posterior to it; Spottis. p. 315, Jan. 14. 1634, Ogilvie, (Dict. p. 9799); Forbes, MS. July 22. 1714, Douglas, (Dict. p. 9804). According to this view of preception, it may, without impropriety, be accounted a limited species of behaviour as heir. The heir, where his possession or im-mixtion is not founded on any right granted to him by his ancestor, is subjected universally by the passive title of proper behaviour; but where he possesses under a grant from his ancestor, the effect of the passive title becomes restricted, as if the ancestor had died immediately after executing the right, and so extends to no debts contracted by him afterwards.

89. The heir who incurs this passive title must be successor *titulo lucrativo*; and, of course, is not liable, if the right has been granted to him for an onerous cause. But it is not enough that the recital expresses an onerous cause; for, in rights granted *inter conjunctas personas*, creditors cannot be hurt by the bare assertion of the granter in the recital, which may have been inserted with a particular view to defend the grantee against the passive title; Stair, Feb. 15. 1676, Hadden, (Dict. p. 9794); *Ibid.* Nov. 29. 1678, Higgins, (Dict. p. 9795). If the heir shall prove *aliunde*, that he has paid money for the right, it must be considered, whether the sum paid bears any proportion in value to the subject disposed. If it do not, the heir is presumed to have paid that trifle *dicis causa*, on purpose to get quit of a passive title. If the sum comes near the

TITLE VIII.

The ratio or ground of this title.

The heir incurring this passive title, must be successor *titulo lucrativo*.

Book III.

Who are reckoned to succeed *titulo lucrativo*.

value, though it should not be fully adequate to it, he is secure from the penal consequences of preception: But the anterior creditors may set aside the right, in so far as it appears to be gratuitous, upon the statute 1621, so that the heir shall be liable only *in quantum lucratus est*, said Nov. 29. 1678, (Dict. p. 9795).

90. The passive title of *præceptio* is inferred against an heir, though the right accepted of by him should have been granted for the fulfilling of a marriage-contract: because settlements, or obligations to settle in a marriage-contract, in favour of the heir of the marriage, are barely rights of succession, taking place only after the father's death, and granted with the implied burden of his debts; and therefore the heir's acceptance of a present right to the subject provided during the life of the father, makes him be considered as successor *titulo lucrativo*; *Stair, Feb. 22. 1681, More*, (Dict. p. 9781). But if, by any clause in the contract, a proper right of credit be given to the heir, *ex. gr.* if the father binds himself to infest him against a day specified; the heir, who thereby becomes the father's creditor in the strictest sense, incurs no passive title by accepting of a right from him to the subject provided, more than he would do by taking seisin on the obligation; *Ibid. Nov. 29. 1678, Higgins*, (Dict. p. 9795). This passive title is extended to the case of rights granted to the mediate apparent heir. A right, for instance, granted by one to the eldest son of his eldest son makes his grandchild who accepts of it liable *præceptione*, *Durie, Jan. 29. 1639, La. Smeton*, (Dict. p. 9774); because, though he be not himself the granter's immediate apparent heir while his father is alive, yet he is, by the necessary course of law, *alioqui successurus* to the granter. But if one who has no issue shall grant a right of lands to his only brother, the brother, though he be at the date of the right next in succession to the granter, is not liable *præceptione*, though the succession should actually open at last to him; because the granter might have afterwards had heirs of his body, who would have succeeded preferably to the grantee; *Stair, Dec. 22. 1674, Seton*, (Dict. p. 5397). According to this rule, a right accepted by a daughter ought not to subject her *passivè*, because the granter might have afterwards had male-issue: Yet a daughter who had thus accepted of a right from her father was made liable *præceptione*, *Durie, Feb. 15. 1634, Orr*, (Dict. p. 9767); because perhaps a fraudulent intention is more easily presumed in favour of one's own issue, than in favour of collaterals. A disposition in favour of a stranger, which the grantee, by a personal obligation, declared to have been granted for the behoof of the granter's apparent heir, has been adjudged not to infer preception; *Stair, Jan. 14. 1662, Harper*, (Dict. p. 9774): But this judgment appears inconsistent with the rule, *Plus valet quod agitur quam quod simulate concipitur*, since the interposition of a third party is in such case merely nominal. Preception may take place in all heritage, even in heritable bonds, though these are not properly *feuda*, *Stair, Dec. 2. 1665, Edgar*, (Dict. p. 9777); *Ibid. Feb. 7. 1679, Hamilton*, (Dict. p. 9780): and on the same ground it ought to be inferred, from the heir's accepting a right of lease from his ancestor: But it is not inferred, by his accepting a right to moveables, because the heir is not *alioqui successurus* in moveables, said *Feb. 7. 1679. Mackenzie, § 38. h. t.* puts the case of a right granted by the ancestor of heirship moveables, which, he says, does not subject the heir *passivè*: But such case can hardly be figured; for no right infers preception, which does not afford to the heir a present

Book III.

Passive titles of
proponing de-
fences against
the predeces-
sor's debt, and
not renouncing
upon a charge
to enter.

Two statutory
passive titles.

1. Possessing
under a title vest-
ed in a relation
to whom the
possessor may
succeed as heir ;

being merely an exception pleadable against a pursuer who has not first discussed the heirs more directly liable, requires no active title : And even as to the right of relief, it is admitted, *loc. cit.*, that the creditor who has received payment from such heir, may be compelled by the judge to assign over the debt in his favour, by which he may obtain that relief indirectly, by suing the executors in the name of the cedent, which the law denies to him directly, unless it be presumed from circumstances, that the heir's *gestio* was attended with fraud, or in other respects unfavourable. It has been observed, *supr.* § 87, that behaviour and preception agree also in this, that in both, some intromission or immixtion must appear after the death of the ancestor.

93. There are yet two or three other passive titles in heritage which deserve some notice. First, Where an heir is cited in an action for payment, as representing his ancestor, he incurs a passive title, if he shall offer any peremptory defence against the debt : *ex. gr.* of payment or prescription : For he has no interest to object against the validity or subsistence of the debt, unless he be liable in payment of it as heir ; and therefore the bare pleading of such defence, is an acknowledgment that he represents the deceased ; *Dalb.* 98. 147, (*Lundie, Feb. 11. 1713, Dict. p. 12064* *Forrest, June 23. 1715, Dict. p. 11098*)⁵³¹. But a defence which is offered merely to exclude the pursuer's title, or to prove an allegation, without founding on any right that was in the ancestor, infers no passive title ; *Kames, 7, (Wilson, July 1717, Dic p. 9715)*. In like manner, an heir who is charged by his ancestor creditor to enter, if he neither enter, nor renounce the succession, is liable in a passive title, and may be sued personally for the debt. But neither of these passive titles reaches farther than to the special debt upon which the action or charge is founded ; for the deed from which the representation is inferred is private, and done in consequence of a process or step of diligence at the suit of a particular creditor ; *Dirl. 223, (Carfrae, Jan. 20. 1675, Dic p. 9711)*. The passive title which is incurred by the heir's neglecting to renounce, does not operate till decree pass against him ; and a renunciation offered even after decree, if the decree be in absence, entitles the heir to a suspension of all diligence, either against his person or his proper estate, that may proceed on these debts due by his ancestor : But the heir's renunciation will not be received, if he have already behaved as heir, or have, by incurring any other passive title, done something inconsistent with renunciation, or if the ancestor's estate is adjudged for the heir's proper debt ; in which last case, the heir must clear off that debt before his renunciation be admitted ; for his allowing adjudication to be led on his own debt, against his ancestor's estate, is justly deemed immixtion, as it diminishes the creditor's fund of payment, by applying part of it to extinguish an obligation properly due by himself⁵³².

94. Two passive titles in heritage have been introduced by special statute, 1695, c. 24 : The one, universal, against apparent heirs who shall possess any part of the ancestor's estate, under a title vested in the person of any such near relation as these apparent heirs may also succeed to as heirs ; and this sort requires no illustration :

⁵³¹ *Gilmour, 14. Dec. 1821 (S. & B.)*

⁵³² 1. *Bell Comm. (5th edit.) 712.*

Book III.

of a singular title derived from a third person, and preferable to, and exclusive of, the right of apparency, and has at the same time openly ascribed his possession to that singular title, the heir next succeeding falls not within the statute: But if the creditors are kept from the knowledge of such title, or if the title be of a private nature, and latent, the onerous debts of the interjected person are effectual against the succeeding heir passing by; *Fac. Coll.* ii. 224, (*Irvine, June 27. 1760, Dict.* p. 5276). The heir who, by thus passing by, is subjected to a passive title, has the benefit of discussion; so that the creditors of the interjected person must discuss all the debtor's representatives, before the heir can be condemned; *Forbes, Nov. 13. 1712, Vint.* (*Dict.* p. 3562); and if the heir shall have made payment, without pleading that exception, action of relief is competent to him against these representatives; *Kames, 75, (Marquis of Clydesdale, sup. cit. Branch 6.)*⁵³⁶.

Reduction *ex capite lecti.*

95. Our most ancient law, from a jealousy of the weakness of mankind while under sickness, and of the importunity of friends in that conjuncture, has declared, that all deeds affecting heritage, if they be granted to the prejudice of the heir by a person upon deathbed, *i. e.* after contracting that sickness which ends in death, are ineffectual, *Reg. Maj. Lib. 2. c. 18. § 7, et seqq.*, unless where the debts due by the granter have laid him under a necessity to alienate his lands; *St. Gul. c. 13. § 2.* The term properly opposed to deathbed is *liege poustie*, by which is understood a state of health; and it gets that name, because persons in health have the *legitima potestas*, or lawful power of disposing of their property at pleasure.—In handling this subject, it shall be *first* explained, what constitutes a deathbed-deed; *2dly*, what deeds are struck at or affected by the law of deathbed; and, *3dly*, to whom the reduction of deathbed-deeds is competent.

What constitutes a deathbed-deed.

96. As to the *first*, It is sufficient to constitute a deathbed-deed, that the granter laboured under the distemper of which he afterwards died, immediately before signing it; for if the two extremes be proved, of sickness going before, and of death following, the rest is inferred, by what lawyers commonly call a *præsumptio juris*, which may doubtless be elided by a positive proof to the contrary: But if positive evidence brought, that the granter was not confined to his bed at the time of signing the deed, does not elide it, nor exclude reduction *ex capite lecti*, *St. B. 3. t. 4. § 28, vers. To come thereon*; and, *As to the third* *; nor is it sufficient, on the other hand, to constitute a deathbed-deed, that the granter died in a few days after signing it, unless the pursuer bring proof that he was on his deathbed at that precise time, or at least immediately before, *Nov. 12 1751,*

for it is very possible that he might have been in *liege poustie* when he granted the bond, and the moment after seized with an illness, which cut him off suddenly. Any disease which may bring death after it, though it should not be a *morbus soniticus*, which affects the judgment or the whole body, falls under the law of deathbed; *Durie, Jan. 7. 1624, Shaw, (Dict. p. 320 8)*

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necessary that the granter be confined even to his house:

Book III.

Fount. Nov. 25. 1687, *Keiry*, (DICT. p. 3321); *Harc.* 648, (*Daughters of Mountainhall*, Feb. 1683, DICT. p. 3322). The granter's going either to kirk or market, is a good defence against reduction, *Stair*, June 28. 1671, *Cred. of Balmerino*, (DICT. p. 3292)⁵³⁹; even though he should go on horseback; but if he go on foot, he must not be supported, or lean on any person by the way, unless he has been accustomed, when in health, to make use of such assistance: And if his going thither appear to be done with a special view to give validity to the deed, a more slender proof of supportation will be received as evidence of it; for which reason Lord Stair, *Ibid.*, advises those ladies who are to go to church, with a view of securing a deed from challenge *ex capite lecti*, to lay aside such prerogatives of quality as may afford any presumption of bodily weakness. The going to kirk or market must be performed at the stated days and hours appointed for divine service, or for public market, that so the granter may be exposed to the view of a sufficient number of unbiassed witnesses; *Act of Sederunt*, Feb. 29. 1692. This legal presumption of convalescence is so strong, as not to be defeated but by a pregnant proof that the granter was labouring under the weight of his distemper when he went thither; *Stair*, Feb. 26. 1669, *Pargillies*, (DICT. p. 3304); *Fount.* Dec. 5. 1711, *Crawford*, (DICT. p. 3312)⁵⁴⁰; Feb. 1692, *Graham*, cited by Stair, *B. 3. t. 4. § 28, vers. As to the sixth* *. By our former practice, the deed was esteemed to be granted *in lecto*, if the granter was sick at signing it, though he had survived that sickness ever so long, if he had not afterwards gone to kirk or market. This confined the proof of convalescence within too narrow bounds: It is therefore declared, by 1696, c. 4. that the granter's living sixty days after the date of the deed, shall be sufficient to exclude the exception of deathbed, though, during all that time, he shall not have gone either to kirk or market †. Deeds done to the heir's prejudice, by one under sentence of death, are equally subject to reduction, as if the granter had been on deathbed; and as holograph deeds, not attested by witnesses, bills of exchange excepted, prove not their own dates in a question with the heir, *supr. t. 2. § 22*, they are consequently presumed to have been granted *in lecto*⁵⁴¹.

or by living 60 days.

* See *Harc. March* 1686, *Cunningham* against *Hay*, DICT. p. 3311, (and 1. *Fount.* 356. and 409, 9. *Br. Sup.* 590.); Clerk *Home*, No. 35, *Roseberry*, Nov. 24. 1736, DICT. p. 3322, (*Elch. v. DEATHBED*, No. 8.); *Kames*, *Sel. Decis.* No. 208, *Laird*, July 1763, DICT. p. 3315; *Fac. Coll. Dec.* 11. 1787, *Tailzeour*, DICT. p. 3317.

† A deed was reduced, where the granter had survived its execution fifty-nine days and three hours; *Fac. Coll. Dec.* 10. 1793, *Sir John Ogilvie, &c.* affirmed on appeal March 1. 1796, DICT. p. 3336⁵⁴¹. See the case of *Mitchell*, 3. Feb. 1801, DICT. App. voce DEATHBED, No. 4.

⁵³⁹ *Ragg*, 28. Jan. 1725, DICT. p. 3314; 1. *Bell Comm.* (5th ed.) 88.

⁵⁴⁰ With which compare *Faichney*, 9. July 1776, DICT. p. 3316; *Ibid. App.* DEATHBED, No. 1; 5. *Brown's Sup.* 422.—See 1. *Bell Comm.* (5th edit.) 89, and 91; *supr. not.* ⁵³⁸, *ap. fin.*

⁵⁴¹ The ground of decision in the House of Lords is important, as fixing the rule of computation, "That the *terminus a quo*, mentioned in the act, is descriptive of a period of time, viz. the date or day of the death, which is indivisible: and *sixty days after* is descriptive of another and subsequent period, which begins when the first period is completed. The day of making the deed must therefore be excluded; so the maker lived only fifty-nine days of the period required. Had he seen the morning of the subsequent day, the rule of law would have applied, *dies inceptus pro completo habetur*, which makes it unnecessary to reckon hours." Accordingly, in the other case of *Mitchell*, *supr. not.* †, where the maker of the deed survived till one o'clock afternoon of the sixtieth day, the period was held complete, and the deed sustained.

⁵⁴² *Maitland*, 16. May 1815, *Fac. Coll.*

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III.

the ancestor to grant it, yet that obligation, if it be merely natural, and so not productive of an action, is considered as gratuitous, and consequently the posterior deed lies open to reduction. Thus a father cannot *in lecto* provide his younger children in reasonable portions, because that is a debt, which, however equitable, he could not have been forced to acquit himself of, by any action at law; (*Kames*, 27, (*Forbes*, July 1721, Dict. p. 3223); *Fac. Coll.* ii. 55, (*Campbell*, Nov. 15. 1757, Dict. p. 3232)*: But he can effectually settle a sum for their alimony during their minority, even on deathbed; because a father's obligation to maintain his minor children is not merely equitable, but may be likewise the foundation of an action. Hence also a husband may *in lecto* settle a jointure on his wife, if it do not exceed the legal terce, because such provision is considered as the deed of the law; *Stair*, Jan. 21. 1668, *Shaw*, (Dict. p. 3196); see *Clerk Home*, 30, No. 2, (*Strachan*, July 14. 1736, Dict. p. 3227): *Fac. Coll.* ii. 147, (*Logan*, Dec. 18. 1758, Dict. p. 428).

what cases
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98. Though the law of deathbed does not strike in the general case against the alienation of moveables, that rule suffers several exceptions. *First*, A disposition of moveables in which heirship is included, is subject to reduction as hurtful to the heir; for heirship-moveables descend to the heir. *2dly*, A moveable bond including executors cannot be assigned upon deathbed, because such bonds also descend to the heir. *3dly*, The alienation *in lecto* of any part of the conquest during the marriage, which is provided to the heir, though the subject of it should be a moveable, may be set aside by the heir, who would have succeeded to it had there been no alienation; *Kames*, 32, (*Maxwell*, Feb. 1722, Dict. p. 3194). *4thly*, Since moveable debts may be the foundation of legal diligence, by which the heritage may be affected; therefore a moveable bond, or an assignation to a moveable debt granted *in lecto*, where the heritage may be reduced by the heir, that so the moveable debts may be enlarged, and the heritage protected against the diligence of personal creditors; *Forbes*, July 22. 1707, *Cowie*, (Dict. p. 3220) †. As an ancestor can neither alienate, nor assign *in lecto* to the heir's prejudice; neither can he, by a deed merely voluntary, alter the nature of any subject deathbed to the prejudice of the heir, so as from heritable to make it moveable. But if the heir shall be excluded from the succession by an irrevocable deed in *liege poustie*, he cannot be heard to complain against any subsequent deed that may be granted on deathbed, in the exercise of special powers reserved by the granter in the first deed; for by the irrevocable deed in *liege poustie* in favour of a stranger, the heir of the granter loses the character of heir, and so has no interest to set aside any posterior deed. But the disposition of an estate, though granted in *liege poustie*, if it be revocable, neither conveys any right to the grantee, nor divests the granter's heir of the character of heir: Its effect is suspended till the

* The like was found, *Kilk.* No. 6. voce DEATHBED, *Leslie*, Dec. 17. 1747, Dict. p. 3229.

† *Kames*, 53, *Mackay*, Jan. 12. 1725, Dict. p. 3224.

‡ See July 19. 1745, *Paterson*, reported by *Kames*, by *Kilkerran*, and by *Falconer*, Dict. p. 3333 545.

545 This was a case of approbate and reprobate; *vid. supr.* § 97. not. 543.

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heir, as soon as the immediate heir dies, if, in a deathbed settlement, he should be excluded from the succession, by the substitution of a stranger next after the immediate heir: For as sick persons may be more easily prevailed upon to disappoint a remoter heir than the immediate, the sanction of the law ought also to guard against that mischief which is likeliest to take effect; *Kames*, 33, § *ult.* (*Kennedy*, July 13. 1722, *Dict.* p. 1681) *. But where the immediate heir consents to, or ratifies the deed †, it not only excludes the consenter himself from bringing it under challenge ‡, but every remoter heir, *Reg. Maj. Lib. 2. c. 18. § 10* ⁵⁵⁰; either because the concurrence of the immediate heir removes all suspicion of the deed having been extorted by importunity ⁵⁵¹; or because the same effect is given *fictione juris* to his consent or ratification, as if the dying person had made over the subject absolutely to the immediate heir, and he, after the ancestor's death, had conveyed it to the stranger who was substituted in the deathbed-settlement ⁵⁵². But the heir's signing witness to the granter's subscription of a deed *in lecto*, does not imply his consent: For though, in the general case, the attestation of a subscription by a near relation of the granter, is regarded as presumptive proof of the attester's knowledge of the contents of the deed, and therefore infers his approbation, *tit. 3. § 48*; yet the granter's authority over the heir, and the heir's dependence on him, create a presumption that the heir attested the deed *in lecto*, even admitting that he knew the contents, from the fear of incurring the ancestor's displeasure; *Dabr. 47.* (*Dallas*, Jan. 1704, *Dict.* p. 5677). The heir can, by no antecedent general writing, renounce his right of reduction, and thereby give validity to all dispositions that may be afterwards granted *in lecto* to his hurt, *Dec. 4. 1733, Inglis*, (*Dict.* p. 3327) §; for few heirs, for fear of being disinherited, would dare refuse to sign such renunciations; so that the sustaining them would utterly defeat the law of deathbed, and no private renunciation or consent can authorise persons to act against a public law.

Only to those *alioqui successuri*, and to their creditors.

100. The right of reduction *ex capite lecti* is introduced in favour of that heir who was *alioqui successurus* in the subject alienated by the deathbed-deed. As therefore the heir of line succeeds where no destination excludes him, the right is in such case competent to him alone. By the same principle, if the deed should relate to lands that had been formerly settled on heirs of entail, or of a marriage, reduction is competent, not to the heir of line, but to the heir of entail or provision ⁵⁵³: And such deed is subject to reduction, though the succession had been formerly settled in a way that was truly hurtful

* *Stair*, Gosford, July 16. 1672, *Gray*, *Dict.* p. 3196; *Kilk. No. 2, voce DEATHBED*, *Craigs*, Feb. 1739, *Dict.* p. 3199.

† See *Clerk Home*, No. 158, *Hedderwick*, Nov. 18. 1740, *Dict.* p. 3180, and *Kilk. No. 1. voce DEATHBED*, *Irving*, Nov. 1738, *Dict.* p. 3180.

‡ *Fac. Coll. ii. 233; Anderson*, July 15. 1760, *Dict.* p. 5701.

§ See *Kilk. No. 4. voce DEATHBED*, *Irving*, Nov. 4. 1744, *Dict.* p. 3332.

⁵⁵⁰ Where the immediate heir is, from minority, or otherwise, incapable of homage, and in this condition dies, after having taken possession under the deathbed-deed, such possession will not exclude a challenge by the next heir; *Irving*, 3. *June* 1808, *Dict. v. DEATHBED*, No. 6.

⁵⁵¹ See *Fac. Coll. Murray*, 21. Jan. 1826, (*S. & D.*)

⁵⁵² See 1. *Bell Comm.* (5th edit.) 98.

⁵⁵³ See *M'Indoe*, 7. Dec. 1826, (*S. & D.*)

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with a preference to the creditors of the deceased as to his proper estate, provided they demanded such separation within five years from his death, *L. 1. § 1. De separat.* After their example, our legislature, by 1661, c. 24, preferred the creditors of the deceased before those of the heir, on their debtor's estate, if they used diligence against it within three years after his death⁵⁵⁸. This diligence must be not only begun, but perfected within the three years; *Harc. 773, (Ballenden, March 1685, Dict. p. 3127)*, otherwise the creditors of the heir might be for ever excluded from their right of attaching that estate, by the imperfect diligence of the creditors of the deceased, *St. B. 2. t. 12. § 29*; and therefore the heir's creditors may, after that period, attach their deceased debtor's estate for their own payment. This limitation of three years is not a proper prescription, by which the right of action, that would of its own nature have been competent for a longer course of years, is confined to a shorter period. It is a statutory privilege conferred on the creditors of a person deceased, who had no such privilege before, under condition that they shall use due diligence within the time expressed in the act. The three years therefore are not to be computed according to the rule of prescription, *Contra non valentem agere non currit præscriptio*, but they must, in every case, be reckoned down from the death of the ancestor, in the precise terms of the statute; *Stair, Dec. 19. 1678, Paterson, (Dict. p. 3126)*.

No disposition by the heir, of any part of the defunct's estate, within a year of the ancestor's death, can be hurtful to his creditors.

102. By a posterior clause of the same act, no disposition of any part of the ancestor's estate, granted by the heir⁵⁵⁹ within a year after the ancestor's death, is valid, in so far as it may be hurtful to the creditors of the ancestor. This is declared, in general terms, without distinguishing whether the ancestor's creditors have or have not used diligence within the three years, and seems to have been inserted in the last clause of the act, purposely to save it from falling under the triennial limitation established by the first part of it; *Falc. i. 219, (Taylor, Nov. 26. 1747, Dict. p. 3128)**. Such dispositions,

* See farther, as to this point, *Fac. Coll. Feb. 25. 1773, Creditors of Morton, Dict. p. 3134; Ibid. June 14. 1780, Magistrates of Ayr, Dict. p. 3135.*

⁵⁵⁸ Where the heir has, within the three years, been sequestrated under the bankrupt statute, an important question arises,—Whether the ancestor's creditors, in order to secure their preference, must still, at their own instance, complete diligence against the ancestor's estate, as an estate essentially separated from that of the heir?—Or, Whether, without any act of theirs, their preference be not secured by force of the trustee's adjudication under the sequestration, the ancestor's estate being here regarded not as a separate estate, but as a constituent part of the heir's estate, subject to certain preferences on the part of the ancestor's creditors, and the ancestor's creditors being consequently dealt with, just as if they were preferable creditors of the heir. On this question, the First Division of the Court have, in course of the same sequestration, pronounced opposite judgments. In the first instance, where the trustee claimed the estate by virtue of his adjudication, and maintained his right to administer and distribute it, (having regard to all preferable claims,) under the sequestration, the ancestor's creditors, on the other hand, putting in an exclusive claim as having completed separate diligence,—the Court unanimously repelled the claim of the trustee, and preferred the ancestor's creditors; *M'Lachlan, and Bennet, competing, 25. May 1820, Sess. pap. pen. me.* But more recently, a majority of the court held, that the estate was carried by the general adjudication of the trustee; that by force of that adjudication, and without any separate diligence on the part of the ancestor's creditors, the preference conferred on the latter by the act 1661 was fixed; and their Lordships seemed even to think, that, subsequent to the first deliverance in the sequestration, all separate measures by the ancestor's creditors were incompetent; *same parties, 15. June 1826, Sess. pap. Fac. Coll. (S. & D.)* See 1. *Bell Comm. (5th edit.) 733.* It is evidently impossible to reconcile these decisions. The case is now under appeal; and the question will be set at rest by the judgment of the House of Lords.

⁵⁵⁹ This clause of the act is not confined to rights granted by heirs in a state of apparenay; *Mag. of Ayr, not. *, h. p.*

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next in degree of blood to the deceased, or the next of kin, succeeds to the whole; and if there be two or more equally near, all of them succeed by equal parts, without the prerogative which males enjoy above females in the succession of heritage, or any right of primogeniture in the eldest male above the younger. *2dly*, The right of representation in heritage, by which remoter heirs represent their ascendants, explained *supr.* T. 8. § 11, has no place in the succession of moveables. Thus, where one dies without issue, leaving two sisters, and a nephew or niece by a third sister deceased, the two surviving sisters succeed to the whole moveable estate, excluding the child of the sister predeceased: and in the same manner, immediate children surviving, exclude the grandchildren, by a child predeceased. Yet in questions between the full and the half-blood, representation is admitted, even in moveables. Thus, where one deceased leaves a sister consanguinean, or by the father only, and a nephew by a sister-german, or full sister predeceased, the nephew, though more removed by one degree from his uncle than the sister by the half-blood, shall take the whole moveable succession, as representing his mother, who was sister to the deceased by the full-blood; *July 4. 1729, Gemmil, (Dict. p. 14877), observed in (Folio) Dict. ii. p. 398* ⁵⁶¹.

The heir who succeeds to the heritage, has no share in the moveables.

Collation by the heir.

3. Where the estate of the deceased consists partly in heritage, and partly in moveables, the proper heir in heritage has no share of the moveable estate, if there be others as near in degree to the deceased as himself. Thus, in the line of descendants, the eldest son gets the whole heritage; and all the other children, whether sons or daughters, divide the moveable estate among them *in capita*. Thus also, in the collateral line, that brother, who, as heir-at-law, is entitled to the whole heritage, is excluded by his other brothers and sisters from any share of the moveable succession. But where the heritable estate of the deceased is so inconsiderable in proportion to the moveable, that the heir finds it his interest to renounce his exclusive claim to the heritage, and betake himself to his right as one of the next of kin, the law allows him to collate or communicate the heritage with the other next of kin, who in their turn must collate the executry with him; so that the whole estate belonging to the deceased is thrown into one mass, and distributed by equal parts among all of them ⁵⁶². And even though the heir be not one of the next of kin, *ex. gr.* if he be a grandson by the eldest son of the deceased, he seems entitled to the privilege of collating with the deceased's immediate children; for since he succeeds to the heritage, as representing his father, who was one of the next of kin to the deceased, he ought to enjoy all the privileges which would have been competent to his father as heir, had he survived the grandfather*. Where the deceased leaves only one child, he

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* The contrary was found, in such a case, *Fac. Coll. Nov. 28. 1787, M'Carw, Dict. p. 2383; (1. Bell Comm. (5th edit.) 10.)*

⁵⁶¹ This holds, as is expressly stated in the authority referred to, "not by right of representation, which takes no place in moveables," but because the full blood excludes the half blood.

⁵⁶² Even in the case of foreign heritage, the heir must collate, if he claim his share of the Scots executry; *Robertson, 18. Feb. 1817, Fac. Coll.* Where he succeeds to heritage in Scotland, and the moveable succession falls to be regulated by a foreign law, the Scots law of collation has no place; and it will depend on the rules of the foreign law, whether he may not both keep the heritage, and claim an interest in the moveable estate; *Robertson, 10. Feb. 1816, Fac. Coll.; Trotter, 5. Dec. 1826, (S. & D.); 1. Bell Comm. (5th edit.) 103.*

is both heir and executor without collation ; for where the right of the whole estate, heritable and moveable, descends to the same person, there is no room for collating the one with the other. This kind of collation is admitted, not only in the succession of descendants, but of collaterals ; so that a brother who succeeds as heir to the deceased, if he judges the moveable succession the most profitable of the two, may collate with his younger brothers and his sisters, and so come in as equal sharer with them to the whole succession, 1742, *Chancellor*, (DICT. p. 2379)⁵⁶³; for as collation was admitted into our law, that the heir might, in no event, be in a worse condition than the other next of kin, that reason has equal force in the succession of collaterals, and of descendents. It is only the legal heir, or the heir *ab intestato*, who is thus obliged to collate the heritage with the other next of kin, in order to have the benefit of the moveable succession⁵⁶⁴. Where, therefore, in the case of daughters only, the heritable estate is settled on the eldest by an entail or destination, she is entitled upon her father's death to her just share of the moveables with the other daughters, without collating that estate, *Kames*, 20, (*Riccart*, Nov. 19. 1720, DICT. p. 2378) ; for she succeeds to the heritage by the provision of the father, who had full power over it ; and that provision can in no degree affect the moveable estate, which by the legal succession descends equally to her and her younger sisters*.

4. Where a Scotsman dies abroad *sine animo remanendi*, the legal succession of his moveable estate in Scotland must descend to his next of kin, according to the law of Scotland ; and where a foreigner dies in this country *sine animo remanendi*, the moveables which he brought with him hither ought to be regulated, not by the law of the territory in which they locally were, but by that of the proprietor's *patria* or domicil whence he came, and whither he intends again to return. This rule is founded in the law of nations † ; and the reason of it is the same in both cases, That since all succession *ab intestato* is grounded on the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession, as the person whom it presumes to be most favoured by the deceased ; see *Princ. of Equity*, p. 279 ‡, and the decision there quoted, *Falc. i. Nov. 28. 1744, Brown*, (DICT. p. 4604) ¶ ; which however is contrary to some former decisions, though

Succession of a Scotsman dying abroad, or of a foreigner dying in this country.

* See *Fac. Coll. Nov. 15. 1787, Hay-Balfour, &c.* DICT. p. 2379 ; *Ibid. Dec. 3. 1794, Rae-Crawford*, DICT. p. 2384⁵⁶⁵.

† It is founded likewise on the statute-law ; see 1426, c. 88.

‡ In 8vo edition 1778, the decision here mentioned is quoted, vol. ii. p. 346.

¶ Subsequent to the case of *Brown*, referred to in the text, there are several decisions of the court in favour of the *lex rei sitæ* ; *Fac. Coll. Jan. 13. 1778, Davidson*, DICT. p. 4613 ; *Ibid. eodem die, Henderson*, DICT. p. 4615 ; *Ibid. Jan. 19. 1785, Morris*, DICT. p. 4616 ; *Ibid. Nov. 15. 1787, Hay-Balfour, &c.* DICT. p. 2379, (and 4617 ; also *Hailes*, 1048 ; reversed, however, on appeal, 11. *March 1793.*) But after the most

⁵⁶³ Reported also, *Elchies, v. Succession*, No. 8.

⁵⁶⁴ The legal heir, even where he does not succeed *ab intestato*, must collate every subject wherein he is *alioqui successurus*, whether he take it *præceptione hæreditatis*, by particular destination of his immediate ancestor, or by strict entail of some other ancestor more remote ; *Murray*, 23. *Feb. 1678*, DICT. p. 2374 ; *Baillie*, 23. *Feb. 1809, Fac. Coll. ; Stewart*, 2. *Dec. 1824, (S. & D.) ; Little Gilmour*, 13. *Dec. 1809, Fac. Coll. ; I. Bell Comm. (5th edit.) 102.* The ground of distinction between these cases, and that noticed *infr. in text*,—of a single heir-portioner taking the whole estate *provisione hominis*,—is discussed by Lord Meadowbank in the case of *Little Gilmour*.

⁵⁶⁵ The second of these cases confirms the text, and overrules the first, (reported also, *Hailes*, 1032), which was adverse. The doctrine of the text was again recognised in *Little Gilmour, supr. not. 564.*

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though conformable to the opinion of the most celebrated civilians. As *nomina debitorum*, or personal debts, are moveable in the strictest sense, their succession is therefore descendible according to the *lex patriæ* or *domicilii*, wherever they may be locally situated, or be due. Yet we must except from this general rule, as civilians have done, certain moveables, which, by the destination of the deceased, are considered as immoveable. Among these may be reckoned the shares of the trading companies, or of the public stocks of any country, *ex. gr.* the banks of Scotland⁵⁶⁷, England, Holland, South Sea Company, &c. which are, without doubt, descendible according to the law of the state where such stocks are fixed*. But the bonds or notes of such companies make no exception from the general rule. These are accounted part of the moveable estate of the deceased, in the same manner as if the obligation were due by a single person. A question having been moved, Whether debentures granted for money lent to the public in Ireland, and secured to the creditors by an act of the Irish parliament, were to be held *loco rerum immobilium*? it was adjudged that they were not, but that they descended as proper moveables *secundum legem domicilii*, said Nov. 28. 1744, *Brown*, (*supr. cit.*)

Testament, its nature. The executor is a *hæres fiduciarius*. Nuncupative testaments.

5. A testament is, in the Roman law, defined, A declaration of what a person wills to be done with his estate after his death. By that law, which acknowledged no difference between heritable and moveable succession as to the power of testing, a testament included the whole estate which belonged to the deceased; but by the law of Scotland, nothing can be devised by testament but what is moveable; and even subjects that are *sua natura* moveable, if they require a service to carry them to the representatives of the deceased, cannot be tested upon, *t. 8. § 20*. A testament may be made in the last moments of life, and under the heaviest sickness or bodily distress, provided the maker be *sanæ mentis*, of sound judgment⁵⁶⁸, when he signs it. It is ineffectual till the death of the testator; and consequently he retains a power of revoking it at pleasure, and substituting another in its place, by which the first

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solemn and deliberate discussion, the court have settled the point in favour of the *domicilii*; *Fac. Coll.* (No. 185), June 7. 1791, *Hog*, Dict. p. 4619, affirmed on appeal May 7. 1792; *Ibid.* Nov. 27. 1794, *Macdonald*, Dict. p. 4627⁵⁶⁶. The decision of the House of Lords, April 15. 1790, on the case, *Fac. Coll.* June 25. 1788, *Bruce*, Dict. p. 4617, went on the same ground. See also *Ibid.* June 16. 1802, *Wightman*, Dict. p. 4479.

* In the case, *Fac. Coll. Dec. 23. 1791*, *Hog*, Dict. p. 5479, investments in government funds were found to be moveable; (affirmed on appeal, 7. May 1792.)

⁵⁶⁶ *Durie*, 30. Nov. 1791, Dict. p. 4624; *Robertson*, *supr.* § 3, *not.*⁵⁶²; *Trotter*, *Ibid.*

⁵⁶⁷ The stock of these banks is moveable; 2. *Bell Comm.* (4th edit.) 4, 5; 1. *Ibid.* (5th edit.) 106. Indeed, as our author himself observes, *supr.* B. 2. t. 2. § 8, "the shares of proprietors in any public company or corporation," (*i. e.* in Scotland,) "constituted either by statute or patent, and the shares of partners in a private society, are precisely of the same nature as to this question, and therefore ought to be governed by the same rule." There is nothing peculiar in such stock that should alter its condition from moveable to heritable, "unless by the statute or charter of erection such alteration is made;" 2. *Bell Comm.* *ubi supr.*

⁵⁶⁸ What in this respect constitutes a sound disposing mind, whether considered apart from, or combined with circumstances of undue influence, or fraud and circumvention, may be gathered from *Towart*, 16. May 1817, 5. *Dow*, 231; *White*, 17. June 1817, and again, 20. June 1823, 1. *Shaw's Ap. Ca.* 472; *Gillespie*, 11. Feb. 1817, *Fac. Coll.* 18. Nov. 1825, (*S. & D.*) See also *M'Diarmid*, 17. May 1826, (*Ibid.*)

supr. *infr.* B. 4. t. 1. § 27.

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its proper appellation is a codicil⁵⁷². Legacies have no necessary dependence on testaments; and therefore are effectual, though the granter has not previously named an executor, or made any general settlement of his moveable estate, or though the executor named by the deceased should have died before him⁵⁷³. Legacies are, like testaments, ambulatory, and may be revoked by the testator, even in his last moments, either expressly, or by posterior derogatory deeds⁵⁷⁴. But if one becomes bound by an irrevocable deed *inter vivos*, to grant a legacy, or not to alter one formerly bequeathed, the grant changes its nature to a proper obligation, and becomes as effectual as a deed of gift delivered *in liege poustie*, *St. B. 3. t. 8. § 28*⁵⁷⁵. In an universal or residuary legacy, bequeathed by one to his nearest relations, or nearest in blood, in which certain effects belonging to the testator in a foreign country are included, the description in the testament, which points out the legatee, is to be understood according to the meaning that the words bear in the testator's own country, so as to carry even the effects situated in a state where that expression would be explained in a different sense. Thus the testator's brothers and sisters, and other next of kin, having been named as residuary legatees by a Scotsman's testament executed in Scotland, the words *next of kin* were found not to include the testator's nephews and nieces, as long as he had brothers or sisters alive, even as to certain Antigua effects contained in the testament, though, by the laws of that island, the right of representation obtains in the succession of moveables; *Fac. Coll. ii. 238, (Machargs, July 22. 1760, Dict. p. 4611)*.

Nuncupative legacy.

7. Though nuncupative testaments are not effectual by the law of Scotland to support the nomination of executors, yet nuncupative or verbal legacies are valid to the extent of L.100 Scots; and the reason why they are not sustained for greater sums, may be drawn from the rule of our law, That no obligation for a sum exceeding L.100 is proveable by witnesses. Where the verbal legacy granted for more, the legatee is entitled to the L.100, if he be willing to restrict his claim to that sum, and the legacy is ineffectual as to the remainder; *Durie, July 7. 1629, Wallace, (Dict. p. 1350)*. This doctrine, authorising verbal legacies to a determinate extent, may reasonably comprehend universal legacies of one's whole moveable estate when constituted verbally: For though no such settlement can have the effect of conferring on the grantee the office of bequest

⁵⁷² *Vid. Panton, 23. Jan. 1824, (S. & D.); Melvin, 20. May 1824, (Ibid.)*

⁵⁷³ A legacy was also found effectual, notwithstanding the testament was vitiated to the nomination of executor; *Kemps, 2. March 1802, Dict. p. 16949.*

⁵⁷⁴ *Vid. infr. § 10. ap. fn. and § 11.*

⁵⁷⁵ It is rather thought, that an obligation to grant, or not to alter a legacy, may be equally revocable with a legacy itself, and that it is truly a contradiction in terms to denominate such an obligation a deed *inter vivos*. The passage cited from *Stair*, and another to the same effect, § 33, are rested on the authority of *Houston, 13. Jan. 1631*; but the judgment, as reported under that date, by *Durie, Dict. p. 8049*, does not support the doctrine; and from a later judgment in the same case, the view of the court seems to have been, not that the obligation was irrevocable, but merely that "being extant in writ, it was not to be taken away by a posterior nuncupative testament, in which the granter had revoked all preceding legacies. The ultimate finding of the court, as given by *Durie*, was, "that this bond in writ was not revocable by any such posterior deed, to be proven only by witnesses, there being no writ to verify the same;" *Houston, 18. Feb. 1631, Dict. p. 12307*; noticed also, *Stair, B. 3. t. 8. § 34*. The general doctrine as to a testator's power of revocation is more correctly stated, *supr. § 5, and ibi not.*⁵⁶⁹.

because they do not become due, *dies non cedit*, till the death of the testator⁵⁷⁹; and nothing can pass from one to his heir or executor till it be due to himself; *L. 5. § 1, Quand. dies leg. **⁵⁸⁰. On this ground, a conditional legacy falls, if the legatee die before the condition be fulfilled, *L. 25, pr. eod. tit.*⁵⁸¹ †. It is otherwise in conditional obligations, in which the creditor, though he should die before the existence of the condition, transmits the *spes obligationis* to the heir, § 4, *Inst. de verb. obl.*; because in obligations the creditor stipulates not only for himself, but for his heirs, *L. 9, De prob.*; whereas in legacies the person of the legatee is alone regarded, and not his heir: But in legacies where the legatee is hindered from fulfilling the condition by the executor himself, the legacy is transmitted after the legatee's death to his own executors, because the law suffers no man to avail himself of his own fraud; *L. 161, De reg. jur.* A legacy, where it is devised to a legatee and his executors, is not evacuated by the predecease of the legatee, but passes, after the testator's decease, to the legatee's executors, not by any right which these executors derive from the legatee, to whom that legacy never belonged, he having died before it could have effect by the testator's death, but in their own right, as conditional institutes in the legacy. As a consequence of its being due to the legatee's executor, it must pass upon his death, though he should die without making up a title to it, to his own executor, excluding those who may have confirmed themselves improperly to the first legatee; *Fac. Coll. ii. 234, (Inglis, July 16. 1760, Dict. p. 8084) ‡*. Bonds of

* See Clerk *Home*, No. 166, *Paterson*, June 4. 1741, *Dict. p. 8070*; and *Fac. Coll. June 6. 1798, Fleming*, *Dict. p. 8111*.

† See case of *Sempill*, Nov. 15. 1792, *Dict. p. 8108*, where a legacy being payable at a certain age was found lapsed, the legatee not having attained to that age⁵⁸².

‡ See also *Fac. Coll. July 28. 1778, Turnbull*, *Dict. p. 4248 (and 8099)*; *Ibid. Feb. 13. 1781, Boston*, *Dict. p. 8099*; *Ibid. Dec. 15. 1782, Earl of Moray*, *Dict. p. 8103*. But the decisions on this point have not been uniform; for, in other cases, it has been found, that although *heirs, executors, or assignees*, are mentioned in the deed of legacy, the legacy nevertheless lapses by the predecease of the legatee; see Clerk *Home*, No. 166, *Paterson*, *Dict. p. 8070*; *Fac. Coll. March 10. 1769, Russel*, *Dict. p. 6372, (Hailes, 288)*; *Dec. 13. 1769, Scott*, *Dict. p. 8090, (Hailes, 324)*⁵⁸³. See also *Fac. Coll. June 2. 1792, Brown*, *Dict. p. 14863*⁵⁸⁴.

⁵⁷⁹ *Rutherford*, 30. May 1821, (*S. & B.*)

⁵⁸⁰ Neither can the legatee convey away his right to the legacy before it has vested in himself. Accordingly, an arrestment of a legacy used in the executor's hands after the testator's death, was preferred to an assignation of the same legacy executed and intimated in the testator's lifetime; *Bedwells, &c. 2. Dec. 1819*. See also, *Graham, infr. not.*⁵⁸³, *Henry, &c. Ibid.*

Where a legacy is left by two persons in a joint settlement, payable with interest from the death of the longest liver, it does not, (unless the intention to that effect be clearly brought out,) lapse by the legatee's predecease of the last survivor; *Nicolson*, 16. Dec. 1806, *Dict. v. LEGACY, App. No. 2*; compared with *Lawson*, 24. Jan. 1826, (*S. & D.*); *Wallace*, 28. Jan. 1807, *Dict. v. CLAUSE, App. No. 6*. In a provision to children of two marriages generally, "the survivance of issue of one, prevents it from lapsing"; *Per L. Glenlee, in Wilson*, 13. Jan. 1825, (*S. & D.*)

⁵⁸¹ *Stevenson*, 30. June 1826, (*S. & D.*); *Pearson*, 28. June 1825, *Ibid.*; *Fac. Coll. Glendinning*, 30. Nov. 1825, (*Ibid.*) Or if the legatee decline to fulfil the condition; *Henderson, supr. not.*⁵⁷⁸.

⁵⁸² *Vid. supr. t. 1. § 6. not. **; *Nisbet*, 27. June 1809, *Fac. Coll.*

⁵⁸³ The cases here alluded to turned on specialties. The general doctrine, as laid down in the text, is undoubted; *Graham*, 17. Feb. 1807, *Dict. v. LEGACY, App. No. 3*; *Fac. Coll. Henry, &c. 19. Feb. 1824, (S. & D.)*; *Ibid. Glendinning*, 30. Nov. 1825, (*S. & D.*). See also *supr. t. 8. § 44.* with the notes. Those cases in which the condition, *si sine liberis*, comes to operate, are examples to the same effect; *vid. supr. t. 8. § 46. not.*⁴⁶⁹.

⁵⁸⁴ *Vid. supr. t. 8. § 44. not.*⁴⁶⁵.

of provision, like legacies, are personal to the child to whom they are granted, and consequently fall if he die before the granter; for as the provision never belonged to the grantee, in whom it was not vested, it cannot be transmitted upon his death to his executors; *Fac. Coll.* ii. 60, (*Gordon, Nov. 17. 1757, Dict.* p. 6343). Upon this ground, in the case of an additional provision settled upon a daughter, in default of heirs-male of the granter; as the failure of heirs-male is the condition of the provision, there can be no obligation till that condition exist, *t. 1. § 7*; and consequently, if she die before heirs-male fail, the provision cannot pass from her to her executor; *Fac. Coll.* ii. 263, (*Macculloch, Dec. 18. 1760, Dict.* p. 6349)⁵⁸⁵.

10. By the Roman law, if one bequeathed a subject which he knew did not belong to himself, the legacy had this effect, that the heir must have either purchased it for the legatee, or paid its value to him if it could not be purchased, § 4. *Inst. De legat.*: For all testamentary deeds ought to be so explained *ut sortiantur effectum*; and unless the legacy had been interpreted in this manner, it could have had no effect. Where the testator *rei alienæ* believed the subject to be his own, which, *in dubio*, is to be inferred from his act of bequeathing, neither the thing itself, nor its value, could have been claimed from the heir; because it was not to be presumed he would have burdened the heir, if he had known that the subject bequeathed was the property of another, *ibid.* These rules relating to *legata rei alienæ* hold also by the usage of Scotland; *Stair, June 16. 1664, Murray, (Dict.* p. 13300); *Ibid. June 24. 1664, Falconer, (Dict.* p. 13301); and they are justly extended to legacies, even of subjects which truly belonged to the deceased, but are not transmissible by testament. Thus the legacy of an heritable bond due to the testator himself, which he could not but know was heritable, and consequently not devisable by testament, falls by our practice under the rule of a legacy, *rei alienæ scienter legata*, and so may be demanded, either itself or its value, by the legatee, though the subject of the legacy was *res sua*, *Stair, Dec. 2. 1674, Cranstoun, (Dict.* p. 8058); *Falc. i. July 19. 1745, Paterson, (Dict.* p. 3333); for the reason of the rule is equally applicable to both. There is this separate ground why the legacy of an heritable bond devised in a testament, in which the testator's heir is appointed executor and universal legatary, cannot be questioned by the executor, namely, because he must not be suffered to approbate and reprobate the same deed; he must not, in the character of heir, decline payment of the legacy with which the testament is charged, and at the same time take the benefit of the testament as executor; see *Fac. Coll.* ii. 88, (*Cunningham, Jan. 17. 1758, Dict.* p. 617)⁵⁸⁶.

Where

TITLE IX.

Bonds of provision also personal to the grantee.

Legatum rei alienæ.

⁵⁸⁵ *Stevenson, Glendinning, supr. not.* 581.

⁵⁸⁶ It is rather thought, that this principle of approbate and reprobate affords the only ground, on which a legacy of heritage can be made effectual. In all cases of this class, there are two essential requisites: 1. There must be clear evidence that the testator, though he used an inhabile mode, really meant to convey the heritage: and, 2. The party against whom the legacy is sought to be made effectual must have so connected himself with the deed devising the legacy, *c. g.* by making up his title, or otherwise taking benefit under it,—that by his own act, he is bound to give effect to its whole scope and intention. A legacy of heritage is not good against the heir at law, if he repudiate *in toto* the settlement in which it is contained, and confine himself to his strict legal right. But it is good against any party who has no title but the settlement, or who has chosen to accept of that title; because the intention of the testator being thus the basis of his

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OR III.

Where the testator appears from the circumstances of the case to have been in a mistake, and to have apprehended the subject bequeathed to be moveable, when it was in truth heritable, he is presumed to bequeath it *tantum et tale* as it stands, without warrandice against the executor, who therefore lies under no obligation to make good the legacy; *Stair, Feb. 21. 1663, Wardlaw, (Dict. p. 5703)*. Where one, after having bequeathed a moveable bond, has taken an heritable security for the sum, neither the bond nor its value is due to the legatee; for the alteration of the nature of the debt from moveable to heritable, is considered as a tacit revocation of the legacy; *Ibid. July 8. 1673, Edmonston, (Dict. p. 13304)*⁵⁹⁷.

Universal, general, and special legacies.

11. Legacies, when they are universal, *vide supra*, § 6, include cash lying in the deceased's repositories, moveable bonds, and all other moveable subjects whatever, excepting only heirship-moveables, which in testamentary deeds are reserved to the heir; see *Fount. November 12. 1680, Stevenson, (Dict. p. 11348)*, compared with *July 12. 1734, La. Kinfauns, (Dict. p. 11356)*, both observed in (Folio) *Dict. ii. p. 133, 134*; and Clerk *Home, 76*; (*Boswell, Novem. 18. 1737, Dict. p. 5916*). But where the subject of the legacy is specially limited in the testament to the whole furniture and moveables contained in the house of the deceased, there is no *universitas* of moveables bequeathed: that term is understood to be merely exegetical of the term *furniture*; and consequently comprehends neither moveable bonds, which are *jura incorporalia*, having no proper situation, nor even cash in the repositories of the deceased, which cannot fall under the appellation of *furniture*, Clerk *Home, 53, (Cunningham, Feb. 18. 1737, Dict. p. 11660)*; neither does a legacy of the testator's whole moveable goods and gear, of whatever species they may be, comprehend cash in the testator's custody when he died; *Fac. Coll. ii. 135, (Johnston, Nov. 17. 1758, Dict. p. 11364)**. Particular legacies may be divided into indeterminate, which are by our writers frequently styled *general*, and determinate or special. A general legacy, called the Romans *legatum quantitatis*, is where a certain sum of money bequeathed, without mentioning any special debt due to the testator, or any particular fund out of which the legacy is to be paid. This kind gives to the legatee no *jus in re*, no real right in any special debt or subject for making the legacy effectual; for that is vested in the executor, and the legatee can only insist for payment by a personal action against the executor, who is liable for the sum, if he has a sufficient fund of free executry in his hands for satisfying it. A special legacy, on the other part, where a determinate subject which belonged to the deceased, or a particular debt due to him is devised, is of the nature of a conveyance, by which the property of that subject, or the right of that debt, is vested, on the death of the testator, directly in the legatee, to whom therefore an action is competent, for the recovery of it, against the possessor of the subject or the debtor in the bond⁵⁹⁸. Yet a special legatee cannot sue the

* The doctrine here laid down is confirmed by *Fac. Coll. May 14. 1795, Earl of Fife, Dict. p. 2325*; *Ibid. May 30. 1797, Macnab, &c. Dict. p. 2303*⁵⁹⁸.

his own right, he cannot avail himself of that intention partially, but must allow it operate as a whole. See the cases cited in the text; also *Gibson, 20. June 1786, Dict. p. 620*; *Robertson, 16. Feb. 1816, Fac. Coll.*; *Trotter, 5. Dec. 1826, Ibid. (S. & D. Henderson, 18. Jan. 1803, Dict. p. 15953*.

⁵⁹⁷ See an analogous case, *Paul, 5. July 1821, (S. & B.)*; see also *Wyllie, 12. N^o*

Book III.

Deeds of a testamentary nature receive a more liberal interpretation than deeds *inter vivos*.

Who can make a testament.

no *jus in re*; for there is no special thing bequeathed which admits of being the subject of a real right, and his title is no stronger to any one individual thing, than to every individual of the same kind which belonged to the deceased. In this kind of legacy, the Roman law appears to have given the election, sometimes to the heir and sometimes to the legatee, according to the nature of the thing bequeathed, § 22, *Inst. De legat.*; L. 71, *pr. De legat.* 1; L. 4, *De trit. vin.*; but the general rule laid down in L. 37, *pr. De legat.* 1, is equitable, That the heir shall not be compelled to give the best, nor the legatee to accept of the worst.

14. Deeds of a testamentary nature are more favoured, and therefore receive a more liberal interpretation, than obligations *inter vivos*; L. 12, *De reg. jur.* Hence a testament to which an impossible condition is adjected, is as effectual as a pure testament, the law considering the condition as not adjected; L. 3. *De cond. et dem.* Hence also unintelligible expressions in a testament or legacy are held *pro non scriptis*, and what remains plain has full effect; L. 2. *De his quæ pro non.* And, in general, though the words should be ambiguous, or even improper, they ought to be interpreted according to the presumed will of the testator, if by any construction they can be brought to it; L. 24, *De reb. dub.*; L. 69. § 1, *De legat.* 3⁵⁹⁰. From this rule it also follows, that in any donation by the testator of a sum left to the management of trustees, to be applied to special uses, the settlement does not lose its force, though the trustees should either by death or renunciation be reduced to less than a quorum⁵⁹¹; in which case the survivor who accepts may by himself execute the trust; and even though all of them should die or renounce, the court of session may substitute one in their place, with powers to carry the will of the deceased into execution; *ut voluntas testatoris sortiatur effectum*; *Fac. Coll.* i. 32, (*Campbell, July 26. 1752, Dict.* p. 7440). In questions arising upon legacies between the executor and the legatee, the executor, as the debtor, is more favoured than the legatee who is the creditor; L. 47. *De legat.* 2*.

15. All who are capable of consent, may make a testament, grant legacies, if they are not disabled by special statute or custom⁵⁹²; even minors, without the consent of their curators; *wit*

* The Statute 39. and 40. Geo. III. c. 98, (passed July 28. 1800), "to restrain trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited," appears, from § 3, to extend to Scotland so far as regards moveable property, and is, therefore, abridged in the Appendix, No. 10.

⁵⁹⁰ See *Stewart, 26. Nov. 1813, Fac. Coll.*; *M'Lehose, 28. Feb. 1815, Ibid.* Where different deeds or codicils, executed by the testator, contain legacies in favour of the same individual, the posterior legacy, whether it be of the same or greater amount, does not, *in dubio*, supersede or derogate from the prior, but both are due; *M'Intyre, 1. March 1821, Fac. Coll.*; *Elliot, 27. Feb. 1823, Ibid. (S. & D.)*; *Sutherland, 22. Nov. 1825, (S. & D.)*. See also *Fac. Coll. Hay, &c. 16. May 1823, (S. & D.)* How far payments, &c., to a legatee in the testator's lifetime, are to be held as made in anticipation of the legacy, see *Molleson, 22. Feb. 1822, (S. & D.)*; *Stirling, 20. June 1704, Dict.* p. 11442.

⁵⁹¹ See *Forbes, 2. Feb. 1808, Dict. v. SOLID. ET PRO RATA, App. No. 3, affirmed 31. May 1808*; *Towart, &c. 14. May 1823, (S. & D.)*; *supr. B. 2. t. 12. § 58.* See also 2. *Bell Comm.* 585.

⁵⁹² "By the Roman law, legacies left *alieno arbitrio*, were sustained; and the same is the rule of our own law;" *Per Lord President, in Hill, &c. infr.*; 1. *W. & S.* 82. This holds true, not as to legacies merely, but generally as to the party's whole succession, whether moveable or heritable, assuming, that in the latter case the proper dispositive words for the transmission of heritage are employed in favour of the party who is to make the distribution. See *Brown, 3. Aug. 1762, Dict. p. 2318*; *Snodgrass, 16. Dec. 1806, Ibid. v. SERVICE, App. No. 1*; and other cases referred to in *Hill and Crichton, infr.* Accordingly, a general bequest of residue to trustees, with no other

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unlimited right in the husband ceaseth before his actual death. So soon as he begins to die, as Dirleton expresseth it, *voce LEGITIMA LIBERORUM, i. e.* from the moment that he is first seized with that disease which ends in death, he is in the judgment of law already dead, and loses the *legitima potestas* of disposing of the society-goods, or, as the words are commonly translated by our lawyers, his *liege poustie*. All gratuitous deeds, therefore, executed by him after that period, tending to diminish the right of the widow or children, are void, though they should not be fraudulent: Nay the husband, though he should be in *liege poustie*, cannot dispose of his moveables to the prejudice of the *jus relictæ*, or right of legitim, by way of testament, or indeed by any revocable deed; for revocable grants create no debt till the death of the granter, and at that period the right of the society-goods is fully vested in the widow and children; *Kames, 107, (Henderson, Feb. 1728, Dict. p. 8199)*. Nevertheless rational deeds granted by the father in relation to his moveable estate, if they be executed in the form of a disposition *inter vivos*, are sustained, though their effect should be suspended till his death; *Fount. Jan. 12. 1697, Johnston, (Dict. p. 8198)*; *Jan. 18. 1721, La. Balmain, (Dict. p. 8199)**⁵⁹³. A wife who has accepted of a conventional provision from her husband, is not understood by that acceptance to have renounced her *jus relictæ*, or her legal interest in the moveables under communion: She is indeed in such case excluded from her terce by special statute, unless it be expressly stipulated in the deed of provision, that she shall have right to both, 1681, c. 10; but as that act mentions nothing of the *jus relictæ*, when there was the fairest opportunity, if the legislature had truly such intention to exclude it, a presumption arises, that it was omitted purposely, and that consequently the widow is entitled, both to the special provision, and to the

* The bankruptcy of a son has been found not sufficient to authorise his father to make a settlement depriving him of his legitim; *June 17. 1762, Allan, Fac. Coll. iii. 91, Kames, Sel. Decis. No. 197, Dict. p. 8208*⁵⁹⁴.

in truth, seems to be the result arrived at in the text, when taken, not in separate passages, but altogether; *Vid. infr. § 21. &c.* It is supported by both of the cases referred to in *not. **, p. 883; in *Montgomery-Agnew*, a conveyance having been sustained though in prejudice of the legitim, because granted *inter vivos*, completed by delivery, in every way absolute and irrevocable; while in *Millie*, (affirmed on appeal,) though different judgment was pronounced as to the particular deed, in consequence of its no delivery, and other specialties showing that it had never been effectually placed beyond the father's power of recall, it was substantially found, that the children's claim might be defeated, "by a *bona fide* alienation and transfer of property during the parent's life or time." See to the same effect, *Hogg, 14. May 1800, Dict. v. LEGITIM, App. No. 2*, as decided on appeal, 16. July 1804.

There seems to be an inclination in late decisions to hold a conveyance in prejudice of the legitim, if absolute in itself, and completed by delivery, so as thoroughly to divest the parent of all future control over it, as perhaps more secure to the grantee, than a conveyance in prejudice of the *jus relictæ*; inasmuch as the parent's right in the property resting on a broader basis than that of the husband, the Court hold it less relevant to inquire into his motives. With regard to the *jus relictæ*, it has been decided, that a husband's power over the goods in communion does not authorise him to execute a deed, with the evident design of disappointing the relict's claims; *Sorlies, 5. Dec. 1771, Dict. p. 5947, Hailes, 459*. But compare this with *Agnew* and *Hogg, supr. as applicable to the case of legitim*.

⁵⁹⁴ Neither can a father substitute to his child in the legitim, so as to regulate the child's succession in case of his death, while incapable of making a will. The right, once vested in the child, necessarily transmits to his next of kin; *Morton, 11. Feb. 1813, Fac. Coll.; Robertson, 2. June 1742, Dict. p. 8202, Elch. v. LEGITIM, No. 6*.

⁵⁹⁵ *Vid. Montgomery-Agnew, Hogg, &c. supr. not.*⁵⁹³.

the *jus relictæ* ⁵⁹⁶, unless she has accepted that provision in full, not of her terce only, but of all her other legal rights*.

17. No legitim can be claimed by children, but out of the moveable estate belonging to their father at the time of his death; so that there is no room for it, upon a mother's death, though she should survive her husband; not even out of that part of the goods in communion, which she had received *jure relictæ* upon her husband's death; for her share of these became, upon the division, her own absolute property. *2dly*, Children who are forisfamiliaried, (a term explained *infr.* § 23), are not entitled to a legitim. *3dly*, It is due to immediate children only, and not to grandchildren or remoter descendents; either because the law considers the legitim as a right so personal to the child himself, that unless he claim it during his lifetime, it falls by his death; or because a *præsumptio juris et de jure* arises from the immediate father not claiming it, that he had renounced it before his death, upon receiving his just share of the effects of his father ⁵⁹⁸. All the husband's children, of whatever marriage they may have been procreated, are equally entitled to a legitim on their father's death; for as children have no such claim on the death of their mother, the children of former marriages would be entirely cut off, if they were not entitled to a legitim equally with the children of that marriage which was dissolved by the father's death.

18. What remains over the *jus relictæ*, and the children's legitim, is the absolute property of the deceased, of which he has the free disposal, even to a stranger, not only in *liege poustie*, but by testament *etiam in articulo mortis*; and it is called the *dead's part*, because the deceased had full power over it. Where a person has neither wife nor child, all his moveable estate is dead's part, and consequently may be devised by testament. This dead's part, if it was not disposed of by will, was, by our ancient law, *St. Gul. c. 22*, committed to the care of the bishop of the diocese, or ordinary, who began about that time to be looked upon as the legal trustee of the moveables of deceased persons. The bishop, in the exercise of that trust, sometimes applied them to pious uses, and sometimes retained them to himself, to the exclusion of the next of kin, even when

TITLE IX.

Legitim is due only out of the estate belonging to the father at his death.

To whom is it due.

Dead's part.

* Or unless where it is presumable, from other circumstances, that her claim to the *jus relictæ* was meant to be barred. See *Fac. Coll. Nov. 28. 1781, Riddel, Dict. p. 6457; Ibid. Feb. 24. 1763, Mackinnon, Dict. p. 2278 (and 6451) 597.*

⁵⁹⁶ *Howden, 18. May 1821, (S. & D.)*. It is the same in regard to the legitim. A legacy left to a child, if not expressly declared to be in lieu of the legitim, does not exclude it, but the child is entitled to both; *Ibid.*

⁵⁹⁷ With which compare, *Tod, 12. Dec. 1770, Dict. p. 6451, Hailes, 385*. Where the widow had, down to the period of her death, (being twelve years after that of her husband,) taken payment of an annuity settled upon her by her husband, without making any claim for her *jus relictæ*, her executor was held barred from setting up such claim; *Milne, 5. Dec. 1822, (S. & D.)*. The same rule must of course hold in regard to the legitim; see *Carmichael, 8. Feb. 1823, Ibid.* The contrary is said to have been found in one case, "in respect the party was all the time entirely ignorant of the amount of her claim of legitim;" *Johnstone, 29. Nov. 1825, (S. & D.)*; *sed quære* as to the soundness of this ratio. In *Dickson, 1. Feb. 1827, Ibid.*, which also turned so far on the widow's ignorance of the value of her interest, the chief ground of decision was, that her renunciation of her legal right was revocable, as *donatio inter virum et uxorem*.

⁵⁹⁸ This reasoning is unsound; for if the child survive his father, the legitim vests in him without confirmation, *infr.* § 30, and transmits to his next of kin; *Jervoy, 7. Jan. 1762, Dict. p. 8170*. It is only in case of the child's *predecease*, that the rule of the text applies. As to presumed renunciation, whether of this claim, or the *jus relictæ*, *vid. supr. not. 597.*

pose, she is entitled both to her special provision, and her *jus relictae*, if she has not accepted the first in full satisfaction of the last, conformably to the rule laid down *supr.* § 16. Donations to the wife, and obligations of provision to children, delivered to them by the granter in *liege poustie*, whether by marriage-contract or in separate bonds, must, like other debts due by the deceased, come off the whole head of the executry; *Stair, June 19. 1678, Dickson, (Dict. p. 3944); Ibid. July 16. 1678, Murray, (Dict. p. 2372).* The funeral charges of the deceased, the widow's mournings, and the alimony due to her from the day of her husband's death, till the first moiety of her jointure be payable, affect also the whole executry; for though those debts are never contracted till after his death, yet because, by the necessity of nature, that expense must be incurred by all men, it is therefore, in the judgment of law, the husband's proper debt; *Forbes, June 20. 1713, Moncrieffe, (Dict. p. 3945)*⁶⁰¹; but legacies, or gratuitous obligations, granted by him on deathbed, because they cannot hurt the legitim or *jus relictae*, affect only his dead's part. The share of the goods in communion, which on the wife's predecease falls to her next of kin, cannot be affected by any debt contracted by the husband after her death because the right of that share accrues *ipso jure* to the wife's executors, by the division consequent upon her death, after which the husband hath no power over it. But the wife's funeral charges are considered as her own proper debt, and so fall wholly on her executors, or next of kin, who are entitled to her share; and they will affect her *paraphernalia* as well as other executry. Personal bonds due to the husband, because they are, by 1661, c. 32, moveable in respect of succession, and heritable as to the widow, must therefore increase the legitim, and dead's part, but not the *jus relictae*.⁶⁰² And as she has no benefit from such bonds when due to the husband, neither can her share decrease by any personal bonds due by him, the burden of which falls altogether upon his children or next of kin. These observations concerning the legitim and *jus relictae*, in questions with the widow, children and next of kin, are not applicable to the case of a competition with the creditors of the deceased. Let the estate falling under communion be ever so large, if there be heritable debts due by the deceased more than will exhaust it, the creditors in these can affect the whole executry for their payment.

legitim is not to children for being forfami- liated. It is not of a child's renoun- cing the legitim.

23. By a child forfami- liated is to be understood one who, being having already received from his father his share of the legitim, and discharged it, or by his renouncing it even without real satisfaction, is no longer accounted a child in the family, and is therefore excluded from any farther share of it. As this right of legitim is strongly founded in nature, the renunciation of it is not to be inferred by implication. It is not presumed, either from the child's marriage, or his carrying on a trade by himself, or even his acceptance of a special provision from the father at his marriage; *Harc. 475, (Russell, Dec. 8. 1687, Dict. p. 8177)*, if he have not expressly accepted

⁶⁰¹ On the ground of their being thus proper debts of the husband, and so not falling under the denomination of provisions, the widow's claims for mournings and alimony are not excluded by her general acceptance of a voluntary provision, in full of all she could ask or claim through her husband's decease in any manner of way; *Rennie, &c. 16. May 1800, Dict. v. PRESUMPTION, App. No. 4.*

⁶⁰² *Stair, B. 3. t. 4. § 24, vers. "In the succession," &c.*

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Collation among
the younger
children.

In what cases it
is excluded.

in blood to the deceased than they; Clerk *Home*, 101, (*sup. cit.*) In like manner such renunciation excludes, not only the renouncer himself, but his descendents, in competition with the descendents of the children who had not renounced; for they cannot, in their father's right, lay claim to any subject to which the father has expressly given up his claim; but the renouncer's children are not excluded in a question with collaterals, after all the other descendents of the deceased have failed; for where the father procures a renunciation of the legitim or executry from any child, his purpose is barely, that his other children may have the benefit of it, without the least intention that any of his own descendents, even the children of the renouncer himself, should be thereby excluded from their natural right, in competition with a collateral kinsman; *Feb. 2. 1731, Campbell*, (DICT. p. 9263), observed in (Folio) *Dict. ii. p. 4 **.

24. For preserving an equality in the distribution of the legitim among the younger sons entitled to it, who have an equal interest in the father's moveable estate, we have adopted the doctrine of the Roman law, *Tit. De collatione bonorum, & De dot. collat.*, which introduced a *collatio*, by which the child, who had already got a provision from the father, was obliged to collate it with the other children, and impute it in his part of the legitim. Every provision given by the father to the child falls under collation, *L. 29, c. De inoff. test.*; not only the tocher, or other provisions, granted in his or her marriage-contract, or in separate bonds, *St. B. 3. t. 8, § 45*; Clerk *Home*, 18, (*Ranken, Feb. 17. 1736, DICT. p. 14931*); but all sums actually advanced by the father to the child, or for his behoof, though without any writing signed by the receiver obliging himself to account; which sums may be proved by his oath †. But neither the expense of such education as is suitable to the child's quality or fortune, nor inconsiderable presents made to him by the father, suffer collation.

25. Collation is excluded, where it appears evidently to have been the granter's intention, that the child should have the provision as a *præcipuum*, over and above his share of the legitim. Thus, *first*, A clause in a bond of provision by a father, that the child should, notwithstanding that provision, have at his death an equal share of his goods with his other children, is the clearest indication of his will, that the provision should not be collated; *Durie, Feb. § 19, 1631, Corson*, (DICT. p. 12849, & p. 2367). *Stair affirm B. 3. tit. 8. § 45. 46*, that a clause declaring that the child shall continue a bairn in the house, implies also a prohibition to collate, and it was so adjudged, *Nov. 18. 1737, Beg*, (DICT. p. 2379), observed in (Folio) *Dict. i. p. 149*. But a father's declaration in the bond of provision, that the child is to continue in his family, and consequently to be entitled to a share of the legitim, seems to be but a slight evidence of his purpose, that the child is not to collate, for collation is admitted only among those who are entitled to a legitim ‡. *2dly*, A child cannot be compelled to collate a bond of provision granted to him by his father on deathbed, contrary to the doctrine maintained by some writers, *Mack. § 11. h. t.*; for if he were, the provision would be altogether frustraneous, since the child could not receive the least degree of benefit by it, though it be obvious, that the father meant it as a gratification to him. It is true, that

* See *Kilk. No. 2, voce LEGITIM, Campbell, July 2. 1738, DICT. p. 8167.*

† *Fac. Coll. Dec. 20. 1775, Skinner, DICT. p. 8172.*

‡ See *Fac. Coll. July 19. 1766, Spence, DICT. p. 8178.*

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tain as much of the dead's part as, when added to his legal share, makes up a third. The act makes no provision for executors, who, without any nomination by the deceased, are appointed by the judge, and who therefore are excluded from all share in the testament, as they were before the enactment. Where the stranger is named, not only executor, but universal legatee, there is no room for presuming a trust lodged in him for the behoof of the next of kin.

Confirmation of executors.

27. As an heir in heritage must complete his titles by entry, so an executor is not vested with the right of the moveable estate belonging to the deceased, without confirmation; which is therefore styled by some lawyers, though improperly, *aditio hereditatis in mobilibus*. Confirmation may be defined, A sentence of the judge competent, authorising an executor, one or more, upon making inventory of the moveable estate, and debts due to the deceased, to sue for, recover, possess and administer the whole, either for the behoof of themselves or of others interested therein. Where an executor named by the deceased is authorised by the judge, it is called the *confirmation of a testament-testamentary*; and when the judge confers the office of executor upon a person of his own nomination, it is styled the *confirmation of a testament-dative*.

Origin of confirmation.

28. Confirmation must be carried on before the bishop's court commissary. This right the bishops assumed gradually to themselves from very small beginnings. The general opinion of their integrity in the first ages of Christianity, not only led dying persons to commit to their care their orphan children, but also induced the civil power to intrust the bishop of the diocese with the execution of legacies granted for pious uses, where the deceased himself had named no executor; *L. 28. § 1. 2. c. De episc. et cler.* And their claim appeared to have been stretched no farther for many centuries after, either by the Canon law, *Decretal. L. 3. t. 26. c. 17. 19*, or by our most ancient customs, which left to the sheriff or judge-ordinary the execution of testaments, *Reg. Maj. Lib. 2. c. 98. § 4*; unless where the party who was brought before the sheriff objected a nullity against the testament, or denied that the subject in question was bequeathed; in which cases the bishop had the sole cognisance, *ibid. § 5. 6.* But soon after the reign of David I, a right was acknowledged in bishops, not only of disposing of the goods of all who died without a will, *St. Gul. c. 22**, but of confirming the testaments of all Scotsmen who died in foreign parts, *1426, c. 89*. By this branch of jurisdiction, a great addition was made to Episcopal revenues, even after churchmen had been deprived of the right of the dead's part, by 1540, *c. 120*; for in every confirmation of a testament, besides the other fees of court, the twentieth part of the moveables fell to the bishop of the diocese, which was called the *quot* of the testament, because it was the proportion or quota to which the bishop was entitled at confirming. At first the debts due by the deceased were not deducted from his effects, in the computation of the quot; so that, even where the moveable estate was not sufficient for satisfying the debts, the bishop was secure of his quot, to the great prejudice, not only of the deceased's next of kin, but of his creditors, and in direct contradiction to the above-cited statute of K. William, *c. 22. § 2. 3*, by which the bishop was made answerable for the debts due by the deceased, to the full extent of his funds, in the same manner as executors named by testament.

Quot of testaments.

* See this statute explained, *Hailes's Annals of Scotland*, (4to edit. Edin. 1776, vol. i. p. 330; 8vo edit. Edin. 1797, vol. iii. p. 22).

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executor without confirmation, a decree-dative can have no such effect; which, without vesting any right, barely declares, that the obtainer of the decree has a title to be confirmed, if he chooses to apply for it⁶⁰⁹.—There are several subjects which require no confirmation. *First*, By 1690, c. 26, special assignations granted by the deceased, though neither intimated nor made public in his life, are declared sufficient to carry to the assignee the full right of the subjects assigned, without confirmation⁶¹⁰; and special legacies being truly assignations, have been adjudged to fall under this statute; *Jan.* 1729, *Gordon*, (Dict. p. 14384)*. Formerly the law stood otherwise: Special legacies being incapable of intimation, were, like unintimated assignations, regarded as imperfect conveyances; and therefore the subject of the legacy remained a part of the executry of the deceased, till confirmation by the legatee. *2dly*, Confirmation is not necessary by the widow and children, to vest in them, or transmit to their next of kin, that share of the moveables falling under the legitim and *jus relictæ*. That does not fall to them by succession. It belongs to them in their proper right, in consequence of the communion of goods induced by marriage, and the natural obligation on fathers to provide for their issue. The case is different with regard to the dead's part. It falls to the next of kin in the way of succession. Confirmation is therefore necessary to vest it in him, and to transmit it from him to his own next of kin. If the next of kin should die before confirmation, it remains *in bonis* of the first deceased, and can be confirmed by that person only who becomes his next of kin on failure of the other, since there is no right of representation in the succession of moveables. Thus, where one of two younger children dies without confirming the father's testament, the share of the father's dead's part, which belonged to the child deceased, is not transmitted to his children who are next of kin to himself, but may be carried after his death by his surviving brother, confirming it as next of kin to the father, to the exclusion of his nephews, who are by one degree removed farther from their grandfather than their uncle⁶¹¹: But the child pre-

* General assignations or dispositions, on the other hand, require confirmation to render them effectual, in the same way as decrees-dative; *Fac. Coll. Nov.* 26. 1788, *Lenox, &c.* Dict. p. 14381; *Ibid.* June 28. 1785, *Creditors of Park*, Dict. p. 14382.

⁶⁰⁹ *Vid. not. infr.* ⁶¹¹.

⁶¹⁰ *Lyell*, 11. *March* 1823, (S. & D.) This effect of special assignations is reserved entire, 4. *Geo. IV.* c. 98. § 3.

⁶¹¹ This no longer holds. By *Stat. 4. Geo. IV.* c. 98. § 1, it is enacted, that "whoever any person or persons, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin, immediately upon the death of such intestate."

It has been thought, that, by force of this enactment, "the succession is made to vest *ipso jure* without confirmation;" 1. *Bell Comm.* (5th ed.) 142; though Mr Bell adds, "the language of the statute is not, perhaps, very happily conceived for bringing out the principle which it was intended to sanction."

If this opinion be well founded, our law would be, in a great measure, assimilated to that of England, where neither the taking out administration, nor actual possession of the estate, is necessary, to vest the right of the next of kin:—(See opinions of *English Counsel*, cit. in *Egerton, &c. infr.*—And there could now be no room for the question, so much agitated before the statute, viz. Whether, from the peculiar operation of the English rule, moveable property belonging to a Scots defunct, but situate in England, vested *ipso jure* in the Scots next of kin, or required confirmation:—Neither could there be any longer a difference of opinion as to the soundness of the judgment, pronounced in *Egerton*, 27. *Nov.* 1812, *Fac. Coll.*; *Craigie*, 12. *June* 1817, *Ibid.*; *Milligan*, 9. *Feb.* 1826, *Ibid.* (S. & D.),—that the property did vest *ipso jure*:—For such, on the above view of the statute, would be the result under either law.

Perhaps, however, it may be doubted, whether the statute makes any alteration, as to the vesting of the executry. On the contrary, as its words rather point at the repre-

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Form of confirmation.

Confirmation of a testament where executors are named, and a testament-dative.

Confirmation must be upon inventory.

31. The form of proceeding in the confirmation of testaments, is this: The commissary, at the suit of any person having interest in the executry, issues an edict, which serves as an intimation to all concerned, that they may appear in court on a particular day specified in the edict, nine days at least from the publication of it, to see the testament of the deceased confirmed. This edict, as is the case of all edictal citations, need not be served against any one personally, but is affixed on the church-door of the parish where the deceased resided; and if he died in a foreign country, *animo remanendi*, citation must be used upon it at the market-cross of Edinburgh, and pier and shore of Leith⁶¹⁶, against all that may have any interest or claim in the executry.

32. In a competition for the office of executor, the commissary gives the first place to the person named to it by the deceased himself, whose will ought to be first regarded in the management and disposal of his estate after his death⁶¹⁷. By the former practice, great attention was given to the distinction already stated between the office of executor, and the right of succession, that an universal legatee, if he was not also appointed executor by the deceased, was not admitted into the office, if either next of kin, widow, creditor, appeared to oppose him; but now he is preferred to the next of kin, or any person whomsoever not named by the deceased; *Fac. Coll.* i. 125, (*Crawford, Jan. 19. 1755, Dict.* p. 3818); because those to whom the deceased has given the most substantial interest in his succession, ought also to have the right of administering it, if he has not expressly excluded them*. After them the next of kin is preferred to the office; if they fail to appear, the widow, then creditors, and last of all special legatees; see *Inst. to Commissaries*, 1666. Executors not named by the deceased, are called *dative*, because they are given by the judge, and derive their authority solely from him. It is true that an executor, even when he is named by testament, must be confirmed or ratified by the commissary; but that confirmation requires no previous sentence decerning him executor; for it is the nomination of the deceased, and not any sentence of the judge, that makes him executor: Whereas in the case of one applying for the office, who was not named by the deceased, the commissary pronounces, previously to the confirmation, a sentence decerning him executor, which gets the name of a *decree-dative*; and if the person so decerned incline afterwards to confirm, the commissary authorises him, by a second sentence, which is properly the confirmation, vesting the subject of the testament in him, and confirming him in the office; *vid. supr.* § 27.

33. Where the testament of the deceased is confirmed, either by an executor of his own nomination, or by his widow, or universal legatee, or next of kin⁶¹⁸, the person confirming truly undertakes a trust

* See *Kilk.* No. 1, *voce* EXECUTOR, *Kinninmond, July 27. 1737, Dict.* p. 3816.

⁶¹⁶ *Mr Bell* says, "at the market-cross of Edinburgh, and the parish-church door of *St Giles*," 2. *Comm.* 87. And this is believed to be consistent with practice.

⁶¹⁷ See *Grahame*, 28. *Feb.* 1822, (*S. & D.*).

⁶¹⁸ In this case there was such an excluding clause as the text alludes to, and effect was given to it.

⁶¹⁹ Where there are two or more executors *qua* nearest in kin, and one only expects a confirmation of the whole executry, "the unconfirmed executor may either pursue a reduction"

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ditors.

gate. As this was calculated purely for the bishop's benefit, who could have no right to any quot unless the testament was confirmed, and as it occasioned great loss and expense to the subjects, all actions or charges against any person to confirm a testament are now prohibited by 1690, c. 26, except at the suit of the widow, children, next of kin, or creditors of the deceased*. Since the passing of this statute, no commissary has an interest to except to, or oppose a confirmation which a creditor or next of kin is carrying on before another commissary, on the pretence of the incompetency of that other, more than he has to compel the creditor to confirm before himself; Clerk *Home*, 63, (*Tran's Cred. June 29. 1737*, Dict. p. 7550).

34. Before proceeding farther in explaining the rights competent to proper executors, and the obligations under which their office lays them, some observations may be made upon the confirmation of a particular kind of executors who act merely for their own behoof, *viz.* executors-creditors. Where a creditor hath before his debtor's death begun legal diligence against him, he may perfect it after his death, according to the legal forms; *ex. gr.* he may, upon his debtor's death, obtain forthcoming upon an arrestment that had been used, when he was yet alive; *Harc.* 95, (*Russel, June 29. 1688*, Dict. p. 2791). But such creditors of the deceased as have used no diligence against their debtor himself, must, on his death, sue the executor already confirmed, who is the legal trustee for the creditors, to make payment of his debt; or if there be yet no confirmation, they themselves may apply for the office as executors-creditors, and confirm the testament, which will entitle them to sue for and recover the subject confirmed for their own payment⁶²². Where one thus applies to be confirmed executor-creditor to the deceased, every co-creditor may apply to be conjoined with him in the office. As an executor-creditor confirms only for the payment of his own debt, he is exempted from the necessity of confirming more than is sufficient to satisfy himself; *Act of Sederunt, Nov. 1. 1679*⁶²³. This kind of executor is therefore neither trustee for others who are interested in the executry, nor has he any right in the moveable succession of the deceased, except in so far as he may affect it to recover what is due to himself; his confirmation is no more than a form of diligence established by law, by which he, as creditor, may be enabled to recover payment out of the executry-effects⁶²⁴. In case he confirmed more than the amount of his debt, our older decisions were not uniform, whether he was liable in diligence for the whole of what he had confirmed. It was adjudged,
Gosf.

* See *Kames, Essays on British Antiquities*, p. 191.

⁶²² By *Stat. 4. Geo. IV. c. 98. § 4*, it is enacted, "that notice of every application for confirmation by any executor-creditor shall be inserted in the Edinburgh Gazette, at least *once* immediately after such application shall be made; in evidence whereof, a copy of the Gazette in which such notice shall have been inserted shall be produced in court before any such confirmation shall be further proceeded in."

⁶²³ "In the case of confirmation by executors-creditors, such confirmation may be limited to the amount of the debt and sum confirmed, to which such creditor shall make oath;" *4. Geo. IV. c. 98. § 4*.

A partial confirmation by an executor-creditor does not carry more than the sum actually confirmed; *Lee, 17. May 1816, Fac. Coll.*

⁶²⁴ As to the right of an executor-creditor, in competition with a creditor of the deceased who had used arrestment in the lifetime of his debtor, *vid. sup. t. 6. § 11. not.*³⁰².

Gosf. July 18. 1671, Harlaw, (Dict. p. 3495), that he was obliged no farther than to assign the surplus, after retaining what satisfied his own debt, in favour of any other having interest⁶²⁵; but afterwards he was declared liable in diligence for the whole; *Fount. Feb. 7. 1679, Pearson, (Dict. p. 3497)*. This last judgment was strengthened by said act of sederunt, which expressly subjects executors-creditors to the same degree of diligence with other executors.

35. A creditor who had not constituted his debt, or had not brought his claim to an issue by decree during the life of the debtor, has no title to demand directly the office of executor *qua* creditor to the deceased, because he was never properly creditor to him. In such case, the creditor may constitute his debt in an action against the executor, where one is already confirmed⁶²⁶. But where there is no confirmation, the following method is prescribed by 1695, c. 41. He may charge the next of kin who stands off, to confirm within twenty days after the charge, or otherwise to be liable for the debt. If the next of kin neither renounce the succession, nor confirm within the days of the charge, he will incur a passive title, in the same manner that one does in heritage, who is charged to enter heir, and fails to renounce: If the next of kin renounce, the creditor may constitute his debt, and obtain a decree *cognitionis causa* against the *hæreditas jacens* of the moveables, declaring them liable for payment of the debt; upon which he may get himself decerned executor-creditor, and afterwards confirm in common form: But the directions of this part of the statute are not in universal observance. Though creditors to a person deceased might, by the expedients authorised either by statute or custom, attach the moveables that pertained to their deceased debtor, in order to recover payment of their debts; yet where one was creditor, not to the deceased, but to his next of kin, till the forecited act, 1695, there was no method laid down in our law, by which he could affect the moveable estate of the deceased, in case his next of kin should stand off from confirming. By a separate clause of that act, the creditor may either require the procurator-fiscal to confirm, and afterwards to assign to him; or he may obtain himself decerned executor to the deceased, as if he were creditor to him, and not to his next of kin.

36. Though the words of the act of sederunt, *Nov. 14. 1679*, above quoted, seem to import, that proper executors, who hold the office for all interested in the moveable succession, are obliged by law to make their inventories full, it is certain that, let the inventory be ever so defective, the executor is liable in no penalty for that omission, at the suit of creditors or others who are entitled to any part of the executry; *Durie, June 18. 1629, Peebles, (Dict. p.*

How a creditor ought to proceed, who has not constituted his debt during the debtor's life.

Confirmation of executor *ad omnia vel male apprehiata*.

⁶²⁵ So also it had been found, *Craig, June 1666, Dict. p. 3494*.

⁶²⁶ It was objected, that, on the dependance of such an action, arrestment of debts due to the executry is incompetent, because "creditors can arrest only the debts or effects which belong to their debtor; but the executor, in whom the funds are vested, is so far from being a debtor to the creditors of the deceased, that he is a trustee for them;" but the court paid no attention to this reasoning, and sustained the arrestment; *Fac. Coll. Swayne, 8. June 1822, (S. & D.)*. In an analogous case, "the court unanimously held, that the mode of proceeding against the funds of a deceased debtor, whose executors are foreigners, is to arrest *jurisdictionis fundandæ causæ*, and then to raise an action concluding for decree *cognitionis causa* merely;" *Houston, 3. Feb. 1824, (Ibid.)*.

p. 3494)⁶²⁷. Where therefore the executor confirmed has either omitted out of the inventory any effects belonging to the deceased, or has estimated them below their just values, the only remedy left to any person interested, is to apply to the commissary, that he himself may be confirmed executor to the deceased *ad omnia vel male appretiatata*. Where one applies for a confirmation *ad male appretiatata*, it is competent to him to prove by witnesses, that the goods confirmed in the principal testament are undervalued. This holds though the first executor should have sworn to the values put up on them; both because such oath is to be looked upon merely as oath of credulity, *Harc. 451*, (*Histleside, March 1683, Dict. p. 3876*.) and because the executor, being truly a party, ought to have it in his power to fix the values of those goods for which himself is to be accountable. But if the goods have been appraised under the authority of the commissary, whose office it is to name fit persons for that purpose, there is no room for a second appraisement; nor can the commissary in such case interpose, by directing the goods to be put up to a public sale, though the creditors of the deceased should apply for it, unless fraud or collusion appear in the appraisers. If the deceased himself has fixed the values, the valuation ought to stand good as to the dead's part, because every man is the best judge of the value of his own property; and though he should have plainly underrated them, it is presumed, that it was his intention to make a present to the executor of the difference: Nay, though the executry-effects should not be sufficient to satisfy the debts, the valuation should be sustained, unless the prejudice arising from thence to the creditors be enormous; *Stair, Feb. 1. 1662, Belsches, (Dict. p. 3873)*⁶²⁸. Where an executor had intermeddled with any subject not contained in his confirmation, it seems to have been doubted, whether, by our more ancient practice, the creditors of the deceased had any other relief competent to them, than to confirm these subjects *ad omnia*⁶²⁹; but it has been since adjudged, that they might, without such confirmation, pursue the executor directly for their value; *Durie, Jan. 24. 1639, Inglis, (Dict. p. 2737)*.

37. He who applies to be executor *ad omnia vel male appretiatata* must call the principal executor as a party; for the executor in the principal testament is by his office entitled to the administration of the whole moveable estate, and so has an obvious interest to oppose the nomination of another executor who is to deprive him of part of that administration. If therefore it should appear that the first executor has neither left out of the testament, nor underrated, any subject contained in it, *dolose*, the commissary will, in place of naming a second executor, ordain the subjects omitted, or the difference between the estimations in the principal testament, and the true values, to be added to the testament; *Durie, March 12. 1631, Duff, (Dict. p. 2188)*. If there be ground to presume fraud, a testament *ad omnia vel male appretiatata*, is not like a principal testament divided into legitim, relict's part, &c. but carries the whole subjects contained in it to him who is thus decerned executor, in

In this confirmation, the principal executor must be made a party.

⁶²⁷ *Vid. supr. not.* ⁶²⁰.

⁶²⁸ *Sed quare.*

⁶²⁹ See *Lee, infr. not.* ⁶³⁰.

so far as his interest in the executry extends, to the utter exclusion of the executor in the principal testament; *Fount. Feb. 16. 1703, Robertsons*, (DICT. p. 3498). Executors, to prevent any creditor of the deceased from confirming *ad omissa*, and thereby carrying off from them the subjects not formerly confirmed by themselves, protest sometimes at their confirmation, for liberty to add or eik to the inventory all subjects belonging to the deceased that afterwards may come to their knowledge⁶³⁰. These additions the commissary admits of course, without any new confirmation.

38. It is the office of an executor to carry the testament into execution, in order to distribute the executry-effects amongst all having interest in them⁶³¹. A testament is said to be executed in the proper and legal sense, when the executor has obtained possession of the moveables belonging to the deceased, or received payment of the debts due to him, or at least established a right to them in himself, by decree or corroborative securities. But the office of executor is, like other trusts, personal, and consequently not descendible to heirs. Hence, when there are two or more in the office, it accrues upon the death of any one of them to the survivors, and it falls entirely on the death of the last; and therefore the commissary, in all cases where the office happened to fall before the testament was fully executed, was in use to appoint an executor-dative *quoad non executata*, as if there had been no former confirmation, for executing that part of the testament which had not received execution during the life of the first executor. This executor-dative was accountable to the next of kin, not of the first executor, because no right was vested in him as to that part, it continuing *in bonis defuncti* till execution, but of the deceased, whose testament that executor had confirmed; see *Durie, Jan. 31. 1633, Wilson*, (DICT. p. 9249). As to the part which was executed, it was transmitted from him who was the executor, to his executors in the common course of succession. There was at no period of time any place by our law for a confirmation *quoad non executata*, where an executor-creditor, whose confirmation is always for his own behoof, died before executing the testament; because the subjects which are confirmed by an executor of that kind are by the confirmation carried out of the executry to himself alone as his own property, which therefore he may dispose of to others without limitation. But by the older practice, the confirmation of executor *qua* nearest of kin, though he confirmed chiefly for his own behoof, did not so establish in himself the right of the subjects confirmed, as to enable him to convey them to others, even to the creditors of the deceased, before the testament was executed as to those subjects in the manner above explained; till then the assignation of them by the executor had the bare effect of a procuratory, which ceased by the granter's death, *St. B. 3. t. 8. § 60*. But by the later usage it has obtained, that in every case where a testament is confirmed, chiefly, though not solely, for the executor's own behoof,

ex.

⁶³⁰ A creditor partially confirmed is not entitled to eik to his confirmation after another creditor has applied for confirmation *ad omissa*; but he is entitled to be conjoined with him, if he apply before the confirmation *ad omissa* is carried through; *Lee, 17. May 1816, Fac. Coll.*

A creditor confirming *ad omissa* may call a creditor partially confirmed to account for what he has drawn beyond the sum confirmed; *Ibid.*

⁶³¹ *Vid. Spalding, supr. not. 619.*

TITLE IX.

Nature of the office of executor. It is not descendible to heirs.



Executors *ad non executata*.

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ex. gr. by the next of kin, such confirmation is adjudged to have the effect of an assignation or procuratory *in rem suam*, by which the full right of the subjects confirmed, and consequently the right of execution, is transmitted to the representatives of the person confirming⁶³³; *Stair, Feb. 12. 1662, Bell; Clerk Home, 60, (Dict. p. 9250)*, so that for upwards of a century there have been few or no confirmations *ad non executi*.

to pur-
before con-
ation.

39. Though an executor cannot, in the general case, sue the debtors of the deceased till he be confirmed, because it is the confirmation which gives him the *jus exigendi*; yet executors who are unwilling to be at the charge of confirming doubtful debts, may even, before confirmation, sue for payment, if they obtain a licence from the commissary for that purpose. These licences are never granted, till he who applies for them has obtained a decree decerning himself executor. They are intended merely to save expense, where there is danger of getting nothing by the confirmation; and for that reason they do not include a power to the pursuer to insist for a decree against the debtor; they are only granted *usque ad sententiam*. If therefore the executor shall, before confirmation, take decree for the debt⁶³³, it cannot avail him, seeing the licence which is the executor's only warrant for pursuing, excludes decree. A licence may be granted, not only to the executor in a principal testament, but to an executor surrogate, *ex. gr.* to an executor-creditor *ad omissa*, there being the same or stronger reason to indulge the last than the first; *Stair, Feb. 21. 1668, Scot, (Dict. p. 16093)*. Where an executor hath already confirmed sundry debts due to the deceased⁶³⁴, he may, without a licence, sue for other debts not contained in the confirmation, before that commissary who grants the confirmation; *Forbes, Jan. 10. 1710, Bothwell, (Dict. p. 16103)*. A disposition *omnium bonorum* is also sustained as equivalent to licence; *Stair, June 25. 1663, Haliburton, (Dict. p. 16090)*. English letters of administration, issuing from the proper court, are adjudged to be also equivalent to our licences, and consequently to be a sufficient title to sue in any of our courts, for recovery of the debts due to the deceased, which were contracted and payable in England, the creditor confirming before extract; because whatever title is sufficient in England, to found an action such debts, ought likewise to be found sufficient here; *Fac ii. 203, (Clerk, Dec. 20. 1759, Dict. p. 4471)*⁶³⁵. All diligence used by an executor upon a licence, must fall if he should fore confirmation; for, seeing the licence, on which the action is founded, is a bare personal permission, which the person licensed, the diligence used by him cannot be supported by any confirmation of his next of kin; *Forbes, June Jackson, (Dict. p. 3890)*. Such diligence, however, may

⁶³³ *Vid. suppr. § 30. ap. fin.*

⁶³⁵ It is enough if the executor confirm before extract, *infr. h. s., i effect of English letters of administration; Stewart, infr. not. 636, 26. May 1802, Dict. p. 3922; Black, &c. 16. Jan. 1823, (S. & J court are said even to have sustained an adjudication notwithstanding not taken place until after extract. But it is thought that there is the report.*

⁶³⁴ *Vid. suppr. § 30. ap. fin.*

21. Nov. 1826, (S. & D.); Wardlaw, 21. June not. 611.

have the effect to interrupt prescription against the debt; for it bears the essential characters of interruption; it both shews the creditor's intention to prosecute his claim, and it is an intimation or notification to the debtor.

40. Where two or more are conjoined in the office of executor, all of them are understood to hold the office *pro indiviso*⁶³⁶. They have but one office, and represent the deceased as one person; and therefore all of them must concur in suing the debtors of the deceased; *Durie, March 8. 1634, contra L. Lag, (Dict. p. 14689)*; and if any one of them shall refuse to concur, he may be excluded from the office at the suit of the co-executors. The concurrence, however, of all the executors, is only necessary, in so far as the testament is not executed; for after a debt is established in their person by decree, or after the debtors have given new securities for their debts to the executors, every executor may, by himself, sue for his particular share of such debt, and the debtor may safely make payment to him of that share; *Durie, March 17. 1630, Sempill, (Dict. p. 2739)*. But since all the executors have an equal share in the debts due to the deceased, no executor can grant an acquittance farther than his own share amounts to, unless where one executor has already got payment from the debtors of as much as extends to his whole share of the executry; for then the co-executor may, by himself, receive payment of and discharge the debts that continue unpaid; *Durie, March 24. 1630, Sempill, (Dict. p. 14688)*. A debtor, however, ought in prudence to decline paying his full debt to any one executor, till all the other executors be made parties, that it may be known whether these others have already drawn their just share of the whole executry-effects out of separate funds. In the particular case, where the persons conjoined in the office are executors-creditors, every debtor of the deceased who makes the smallest payment to any one executor, without the concurrence of the co-executors, does it at his peril; because the question, Whether the executor-creditor, who received the payment, was truly entitled to any part of it? depends entirely on the validity of the debt due to him by the deceased, which the co-executors have an obvious title to inquire into before payment; and if the debt be liable to legal exceptions, the debtor must pay what he owed to the deceased, a second time, to the other executors. As all the co-executors have an equal right to the debts due to the deceased, they are only liable *pro rata* in the debts due by him. The burden of those debts must fall equally upon all the executors, unless it shall appear that he who is sued has by himself intermeddled with as much of the executry-effects, as extends to the debts sued for. In that case, the defendant is subjected to the full amount of his intromissions, without considering what his proportion of the burden amounts to when justly divided between him and the other executors; *Durie, July 22. 1630, Salmon, (Dict. p. 14688)*.

41. The confirmation of an executor, though it sometimes gets the name of *aditio hereditatis in mobilibus*, does not, like the entry of an heir in heritage, infer any proper representation of the deceased: For executry is truly an office: The executor is, in the judgment of law, a trustee, appointed either by the deceased or by the

Executors hold the office *pro indiviso*. They have equal right in debts due to the defunct, and are liable *pro rata* in debts due by him.

Executors are not liable *ultra vires inventarii*.

⁶³⁶ Where expenses were necessarily incurred by one of several co-executors, in discharge of the common duty, and to relieve himself of responsibility attaching to the office, all are liable; *Stewart, 20. May 1823, (S. & D.)*.

BOOK III.

What diligence
required of
them, and how
they are lia-
ble for interest.

the judge, for executing the testament, and therefore is not subjected to the debts due by the deceased, *ultra vires inventarii*, beyond the value of the inventory. Hence it follows, that he cannot be sued personally for the payment of any debt due by the deceased, till decree be awarded against him as a proper debtor, upon one or other of the two following grounds: *First*, That he has actually intermeddled with the executry-effects; or, *2dly*, That he ought to have received them; for his office of trust imports an obligation to diligence, for reducing to money the subjects confirmed and recovering, for the benefit of all concerned, the debts due to the executry, at least such of them as may be in danger of being lost by delaying to sue the debtors. A year after confirmation is usually indulged to executors for this purpose, which may perhaps be founded on 1503, c. 76, where it is taken for granted, that executors are obliged to make up their accounts within a year. A registered horning is in practice accounted sufficient diligence, without proceeding the length of a caption. As it is not always in an executor's power, even after diligence, to make the debts due to the executry effectual, he ought to preserve such vouchers as may prove that he had not neglected to use diligence *debito tempore*. The obtaining a decree against the debtor will of itself save the executor, though he use no diligence upon it, if he can prove the debtor was insolvent when the decree was pronounced, since the expense of diligence must, upon that supposition, have been laid out unprofitably. The executor, where no benefit can accrue to himself by the office, is not bound to any diligence, if he execute the testament *quamprimum*, and immediately after assign the decrees, registered hornings, and other securities in his person, to the creditors of the deceased, according to their several preferences, that they may sue for payment in their own names. It is the duty of an executor, after he has converted the moveable effects into cash, in order to a distribution thereof among the parties having interest, to hold the money in his hands, that he may have it in readiness when that distribution is to be made. If, therefore, in place of retaining the money, to which his office obliges him, he should lend it out upon bond bearing interest, he lends on his own risk, though the debtor's credit should have been ever so unexceptionable at the date of the bond⁶³⁷: And seeing he runs the hazard of the debtor's solvency, he ought, on the other part, to be entitled to all the profits arising from the loan, and consequently is not accountable to the creditors upon the executry, for the interest of the sum so lent; *July 1730, Cred. of Thomson*, (Dict. p. 534), observed in (*Folio*) *Dict. i. p. 41*. Upon the same principle, an executor who has recovered payment, even of bonds which carried interest to the deceased, is not liable for the interest of the sums contained in those bonds from the time that he received payment of them; *Falc. i. 177*, (*Countess of Caithness, June 3. 1747*, Dict. p. 534), unless in special circumstances, which take the executor out of the common case, *ibid.* * 638.

42.

* An executor was found liable for interest on such sums only as bore interest at the defunct's death, *Fac. Coll. June 16. 1763, Ferguson*, Dict. p. 541; *Ibid. Dec. 12. 1765, Watsons*, Dict. p. 541. See on this subject, *Ibid. Jan. 4. 1758, Arbuthnot, &c.* Dict. p. 539.

⁶³⁷ It is otherwise where the executor, in good faith, and without any view to his own profit, allows money to remain at interest, where it had been placed by the testator, *Carson, 19. Nov. 1825, (S. & D.)*, and see the cases noticed, *infra, not. **, h. p.

⁶³⁸ *Vid. supr. t. 1. § 31. not. 26.*

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they are not only onerous, but strongly founded in humanity, are preferred before all others, and get the name of *privileged*. These the executor may pay without decree. Of this sort are reckoned medicines furnished to the deceased on deathbed *, physicians' fees incurred during that period †, funeral charges ‡, a year's rent of the house where the deceased died ||, and his servants' wages, either for a full year, or half a year, according to the time for which they were hired; see *Stair, Nov. 25. 1680, Crawford, (Dict. p. 11832) §*. Under funeral charges are included all expense necessary for the decent performance of the funeral, *sine quibus funus honeste duci non potest* ⁶⁴⁴, *ex. gr.* hanging the chamber where the dead body is laid with black, if the rank or fortune of the deceased require it in point of decency, mournings for the widow, and such of the deceased's children as are to assist at the funeral; but no claim for mournings can be made by the children who were not present at it; see *Fac. Coll. i. 57, (Hall, Jan. 19. 1753, Dict. p. 4855) ¶*. *2dly, No executor*

* See *Fount. Feb. 19. 1697, Auchinleck, Dict. p. 11834.*

† As to the duration of this period of deathbed, see *Dalb. No. 171, Russel, Feb. 7. 1717, Dict. p. 11419; Fac. Coll. i. 134, Park, Feb. 7. 1755, Dict. p. 11421; Ibid. Feb. 12. 1784, Lawson, &c. Dict. p. 4473, (and p. 11854.) Vid. supr. (B. 3. t. 3. § 32.) B. 3. tit. 7. § 17* ⁶⁴⁰.

‡ *Falc. ii. No. 145, Lady Dunnipace, July 6. 1750, Dict. p. 11452.* Funeral charges have been found preferable even to the current house-rent, *Kilk. No. 4, voce COMPETITION, Rowan, June 1742, Dict. p. 11852*; though not to a claim for medicines furnished to the deceased on deathbed, *Kilk. No. 1, voce FUNERARY EXPENCE, Peter, &c. July 6. 1749, Dict. p. 11852.*

|| This was found in the case of *Lady Dunnipace, 5. July 1750, Dict. p. 11852.*

§ The court, after a careful inquiry into the practice of the sheriffs in the different counties of Scotland, and on reports from thirteen of the principal counties, found, that the wages due to the servants of a bankrupt tenant, that is, to the servants kept for the purposes of the farm ⁶⁴¹, are privileged debts upon the price of the bankrupt's effects, and are preferable to arresters, *Fac. Coll. Jan. 23. 1779, Melvil, Dict. p. 11853*; and an entry of the judgment was made, of the same date, in the books of sederunt; see *edit. 1790, p. 595* ⁶⁴². This preference appears, from the preamble of the act of sederunt, to extend no further than to the term current at the period of bankruptcy, and it is strictly confined to farm-servants. Thus, in a case where the bankrupt tenant had exercised also the trade of a wright, and employed servants in both capacities, the court, while they gave the labouring farm-servants a preference to the extent of half a year's wages, found that the servants, the artisans, were not entitled to a similar preference on the materials of their handicraft, and only to be ranked as common creditors; *Fac. Coll. Jan. 31. 1781, White, &c. Dict. p. 11853.* The preference has also been denied to the overseer of an extensive distillery, in a case where a salary of L. 500 per annum was allowed; *Ibid. Feb. 3. 1789, Ridley, Dict. p. 11854* ⁶⁴³.

¶ There is another report of this case, *Kames. Sel. Dec. No. 15. (Dict. p. 485 - 4.)* and see also *Dict. p. 11852.* Neither of these reports seems to warrant the general doctrine

“ decrees of constitution, in order to show who was *primus veniens*; but that there is no absolute necessity for that, as the executor pays *suo periculo*;—but the preference is not, that there should be funds to pay the creditors, but that they are true debts which he pays: And, in dispensing with decrees, the executor saves an expense to the estate, which is *utiliter gestum* ;” *Gardner, 28. Nov. 1810, Fac. Coll.*

Where an executor has made payment of a debt due by the defunct, the creditor is not bound to repeat on a shortcoming of the funds; *Cathcart, 17. Feb. 1804, Dict. v. HEIR & EXEC. App. No. 2. Vid. infr. § 46, et ibi not.* ⁶⁴⁰

⁶⁴⁰ *Sanders, 19. Feb. 1822, Fac. Coll. (S. & D.)*

⁶⁴¹ This was held to include “ farm-servants hired by the day to perform harvest work, as well as those hired for a term ;” *Lockhart, 14. Nov. 1804, Dict. v. PRIVILEGED DEBTS, App. No. 2.*

⁶⁴² The claim of a farm-servant for his current wages, is also preferable to the landlord's hypothec; *M'Glashan, 29. June 1819, Fac. Coll.*

⁶⁴³ See on the subject of this note, 2. *Bell Comm. 164.*

⁶⁴⁴ See *Glass, 23. Nov. 1821, (S. & D.)*

Book III.
 Regulations by
 act of sederunt
 altering this
 practice.

Citation of the
 executor with-
 in six months
 gives a *pari pas-
 su* preference.

Executor's con-
 duct after ex-
 piry of the six
 months.

45. A considerable alteration has been made upon this head of our law by act of sederunt, *Feb. 28. 1662.* This act recites the prejudice sustained by the creditors of deceased persons who live at a distance, or are otherwise late in coming to the knowledge of their debtor's decease, through the earlier diligence of other creditors, by which they were postponed, and perhaps totally excluded from their payment. For preserving an equality, therefore, among all the creditors, a rule of preference is established, whereby every creditor, using diligence within half a year after the debtor's death, either by obtaining himself decerned executor-creditor, or by citing one of the executors confirmed, is entitled to a *pari passu* preference with those who had used more timely diligence. Since this act of sederunt, an executor cannot avail himself of his right of retention, so as to exclude any creditor who shall have cited him within the six months, and thereby shall have acquired a *pari passu* preference with him in virtue of the said act. Neither can he now make payment even upon decree, to any creditor, except a privileged one, though he should not be interpellated by any other; because till the running out of the six months, it cannot be known how many creditors may be entitled to a dividend out of the executry-funds, by having used diligence within that time. The chief purpose of citing the executor within the six months, is to give him a notification of the debt upon which the citation proceeds. And therefore, *first*, A testamentary-creditor, even without citation, stands on an equal footing with those who have cited the executor; because his debt is sufficiently made known to the executor by the testament. *2dly*, A bare citation within the six months by one creditor, does not found him in a preference to those who shall cite the executor after that term, while the executry-funds are still *in medio*; *July 1742, Cred. of Johnston*, (not reported)⁶⁴⁶; for the act of sederunt was intended simply to discourage too hasty diligence, by bringing in all the creditors *pari passu*, who should use any step of diligence within the half-year, but by no means to give a bare citation as strong effect as a decree, or to exclude those creditors who shall after that time have first completed their diligence. But a decree within the six months will exclude all creditors using diligence afterwards, because a decree is a legal ground of preference⁶⁴⁷.

46. After the six months are expired, it is the executor's duty to bring into the field all the creditors who have used that diligence which is prescribed by the aforesaid act of sederunt, that the whole executry-fund may be divided among them, according to their several degrees of preference. As that act relates to such creditors alone who have used diligence within that period, questions of competition among those who have used no diligence till afterwards, must be determined by the legal rules of preference, as if the act of sederunt had never been made. In a competition between two
 creditors

⁶⁴⁶ Reported by *Elch. v. EXECUTOR*, No. 10. See also *M'Douall*, 19. *Feb. 1742, Ib.* No. 9; reported by *Kames*, *DICT.* p. 3141, and by *Kilk. DICT.* p. 3936, in which last report the case of *Johnston* is noticed.

⁶⁴⁷ "It is now settled, that while the fund continues undistributed in the hands of the executor, a decree in favour of one creditor gives no preference over others, provided they have interpellated the executor from payment by a summons;" 2. *Bell Comm.* 90. and 94, citing *Russell v. Symes*, 1791; *Bell's Cases*, 217; see also *Dunlop*, 29. *Jan. 1824*, (S. & D.).

creditors of this kind, the preference was governed formerly by the priority of the citations; *July 1723, Sir J. Gray*, (DICT. p. 3140)⁶⁴⁸. But by the later practice, which appears more agreeable to law, the first citation gives no preference by itself; *Feb. 15. 1738, Graham*, (DICT. p. 3141)⁶⁴⁸. The executor may, after elapsing of the six months, use the right of retention which was competent to him by the former practice, as to all debts due by the deceased to himself, which will be equally available to him, as if he had obtained decree, and consequently will found him in a preference before all creditors who have used no diligence within that period, though they should immediately after sue for their debts; *Falc. i. Dec. 22. 1744, Cred. of Crichen*, (DICT. p. 10007). Legatees, being gratuitous creditors, are postponed to the onerous creditors of the deceased; but a legatee who has actually received payment, is not bound to restore to the creditors of the deceased the sum bequeathed, if it shall appear that there was originally a sufficient fund in the executor's hand for satisfying both creditors and legatees, though he should afterwards have become bankrupt⁶⁴⁹; for legatees cannot by any action compel an executor to clear off the executry-debts; the creditors themselves are alone to blame for having neglected to sue him while he continued solvent; and therefore ought to be the only sufferers, and not the legatee, who received *optima fide* what had been bequeathed to him by the proprietor as his own; *Fac. Coll. ii. 241, (Robertson, July 29. 1760, DICT. p. 8087)*. The expense of confirmation, and the other charges necessary for the common management, come off the whole head of the executry-funds, and are therefore, like the debts properly called *privileged*, preferable to every other creditor. All the creditors of the deceased who shall use diligence against the moveable estate of their debtor within a year from his death, are preferable to the creditors of his next of kin; but after that period, the creditors of the next of kin have access to attach what remains not affected by the proper creditors of the deceased, according to the form prescribed by 1695, c. 41⁶⁵⁰.

47. By our old custom it behoved executors who wanted to be discharged of their trust, and have their accounts settled, to apply for formal decrees of exoneration, upon actions to be pursued by them before the commissaries against all interested in the executry; which decrees must have contained a particular inventory both of the funds and debts of the deceased, and an account how every part of the executry-funds was applied; for general decrees of exoneration

Exoneration of executors now disused.

⁶⁴⁸ Reversed on appeal, *Robertson's Ap. Ca. 483*.

⁶⁴⁹ This doctrine received the sanction of the court in *Wallace, 16. May 1821, Fac. Coll. (S. & B.)*; where it was also found, that in case the legatees have not actually received payment, they will still be postponed to creditors, notwithstanding the testator left funds originally sufficient to satisfy both debts and legacies; *Ibid. Vid. supra, § 43, et ibi not.*⁶³⁹, *ap. fin.*

⁶⁵⁰ "The statute applies only to the case where the executor is not confirmed and the creditor is found (*forced?*) to take indirect means of getting at the executry; and therefore, if the preference (of the ancestor's creditors) depended on the statute alone, it might perhaps be denied where the executor has confirmed. But as it is a preference at common law, grounded on the fide-commissary nature of the executor's office, it follows, 1. That even where the executor is confirmed, the creditors of the deceased have preference over those funds of the deceased which can be distinguished and identified: and 2. That this will subsist *even after expiration of the year*, in whatever way the executry has been taken up, provided the fund can be clearly identified;" 2. *Bell Comm. 96*, citing *Dirl. Exer. 91. and 92*; and *Tait, 12. Feb. 1779, DICT. p. 3142; supr. § 42.*

Book III.

Exception of
exhausted.

operation were accounted as covers to fraud, and concealments, and therefore did not avail the executor, *St. B. 3. t. 8. § 75; Durie, March 10. 1632, L. Ludquhairn*, (DICT. p. 3872). But now of a long time this action has been disused; and executors, when they are sued by creditors, are admitted to plead, by way of exception, that the inventory is exhausted by lawful articles of discharge. What articles are sufficient for that purpose, may be gathered from the four preceding paragraphs. It may only be farther observed, that it is no good defence for the executor, that the testament is exhausted by lawful sentences recovered by the other creditors against him, unless he can also plead, that payment has been made by him in consequence of those sentences; for every creditor, after he has interpellated the executor by process, has a right to dispute his preference against all the other creditors, even those who have obtained decrees upon their debts, if, when the action is brought by them against the executor, payment has not been made of the sums contained in these decrees; *Durie, July 8. 1634, (Preston, DICT. p. 3881)*. The exception of *exhausted*, which is pleadable by executors, may be elided by the creditor's reply of superintromissions, *i. e.* that the executor has intermeddled with more of the effects of the deceased than were contained in the inventory. As for the debts due to the deceased, which continue unpaid notwithstanding proper diligence used against the debtors, the executors may be released of those, by producing to the court decrees and registered hornings, and assigning them to the creditors, together with the grounds of debt in the manner explained, *supr* § 41.

Debts according
to their nature
are burdens on
the heir or executor

48. The law itself has divided succession into two branches, the heritable and the moveable; and as each of these ought to bear the burdens which naturally attend it, the heir is the proper debtor in heritable debts, because he succeeds to all the subjects upon which those debts are secured; and the executor is primarily liable in the moveable debts, because he is considered as heir in the moveable estate. Though, therefore, not only heirs but executors represent the deceased to the extent of the inventory; and consequently both one and the other are directly liable to the creditors of the deceased, who have, by the style of their bonds, not only the deceased himself, but his successors or representatives, bound in payment; yet by our ancient law, 1503, c. 76, the heir was protected against all actions on moveable debts for a year after his ancestor's death, because he was not the proper debtor. A year was indulged to the heir, because that space of time appears, by the said statute, to have been allowed, by our former practice, to executors to make up a state of the executry; after which the heir was entitled to call for that account, and to take security of them to relieve him of the moveable debts, to the extent of the free moveable estate; and it was thought unreasonable to subject the heir to the payment of moveable debts, till he had it in his power to call the executors to account. By our present usage, however, in contradiction to this statute, the heir may be sued for moveable debts immediately after the ancestor's death, if by his actual entry he has lost the benefit of the *annus deliberandi*; and thus, though he be only a subsidiary debtor, he is less favoured than the executor himself, who cannot, since the before-cited act of sederunt 1662, be obliged to pay any of the executry-debts sooner than six months after the debtor's death. From this doctrine, that the burden of the

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subject with which he intermeddled was not the property of the deceased, if, for instance, he had purchased it *bona fide* in the way of trade, he is not to be accounted a vitious intromitter, though that subject should be afterwards proved to have been the property of the deceased at the time of his death: But as the property of it could not in such case be transferred to the intromitter by the seller, who was not himself the owner, he may be compelled to restore it to any creditor who may afterwards confirm it. Neither is this passive title incurred where the intromission is necessary, that is, where it is barely *custodiæ causa*, or for preservation; as where the widow or next of kin does no more than continue the possession had by the deceased, for the behoof of all interested in the executry, that the goods may be saved from perishing. But the necessity of the intromitter, that is, his destitute condition, is no good defence against the passive title; so that if he dispose of any part of the deceased's goods, or their price, for his own behoof, he is liable *passivè*. This is carried so far in our practice, that a widow was found liable as vitious intromitter, though she had intermeddled with no more than was applied to the sustenance of her and her children, who had no other fund to keep them from starving; *Durie, March 20. 1624, Cochran, (Dict. p. 9825).*

This passive title cannot be sued upon by legatees, nor is it pleadable against the heir of the intromitter.

54. This passive title is introduced merely in favour of creditors whose debts are constituted by an obligation *inter vivos*; and therefore such as have only a right by legacy, or by a *donatio mortis causa*, cannot sue upon it; yet a bond of alimony by a father to his unprovided daughter, though it should be so conceived as not to take effect till after his death, is justly considered as a debt by obligation, rather than as a *donatio mortis causa*, because fathers lie under a proper obligation to maintain their children till they can do for themselves; *Dec. 5. 1729, Loch, (Dict. p. 9864)*, observed in *(Folio) Dict. ii. p. 43, 44.* Upon this ground also, vitious intromission is not pleadable against an intromitter, by a widow, for the share falling to her *jure relictæ*, or by the children for their legitim: For though both of these have a claim to certain proportions of the moveable estate of the deceased, they are not creditors. And even creditors themselves, where their debts are heritably secured, cannot insist against vitious intromitters, till the heir, who is the primary debtor in that sort of debts, be first discussed. No creditor of the deceased can sue the intromitter's heir on this passive title; for vitious intromission is a delict; and delicts, being personal, can affect no other than the intromitter himself, who is the delinquent. But an action, when restricted to simple restitution, is competent to a creditor against the heir of the intromitter; for though an heir does not represent his ancestor in penalties, yet he does in civil obligations; and the ancestor's intromission induces an obligation, not only against himself, but against his heir, for restoring the subject intermeddled with, or its value⁶⁵³.

Where there are several vitious intromitters, they are liable *in solidum*, but with relief.

55. If vitious intromission be a delict, it follows, that where there are several vitious intromitters, any one of them may be sued by a creditor of the deceased *in solidum* for the whole of the debt due to him, without the necessity of making the others parties to his suit; for in delicts every one of the offenders must be accountable for all the consequences of the wrong, as fully as if he had had no accessories:

⁶⁵⁶ *Penman, 15. Dec. 1775, Dict. p. 9836.*

TIT. X.

Of Last Heirs and Bastards.

Feus formerly reached no farther than to the heirs contained in the grant; but now they go to heirs whatsoever.

FEUDAL rights were at first granted by superiors, only during pleasure, or for the vassal's lifetime, upon whose death the lands returned to the superior who granted the right; *B. 2. t. 3. § 4.* Even after feus became hereditary, they were deemed so far *stricti juris*, that for some time they reached no farther than to the special heirs contained in the grant, in default of whom the superior resumed his right, *Lib. 1. Feud. t. 20, & Lib. 2. t. 11,* to the exclusion of the heirs of line. This continued to be the law of Scotland, not only in the opinion of Craig, *Lib. 2. Dieg. 17. § 11,* but in that of Dirleton and Stewart, *voce LIMITATION,* and of Mackenzie, § 1, *h. t.:* For which reason the vassal who was to get the right, that he might prevent the exclusion of his heirs whatsoever from the succession, took care that, after calling all the special substitutes, a clause should be inserted in the charter in the following words, or words of the like import. (*whom failing, to his heirs whatsoever.*) But Stair, and all our later lawyers, have maintained, agreeably to our present practice, that since the nature of feus has been so much altered from gratuitous to patrimonial rights, the superior ought to be held, by granting a charter, even when it is limited to a special order of heirs, to be fully divested of the property, without any right of reversion to himself upon failure of the special heirs, unless he has expressly reserved such right in the grant, and allowed the vassal a valuable consideration for it; *Fac. Coll. ii. 194 (Johnston, July 31. 1759, Dict. p. 4356).* It may therefore be concluded, that where there is no such reservation, the succession will by our present law, devolve upon the vassal's heir of line, and not on his superior.

In default of heirs whatsoever, the King succeeds as *ultimus hæres.*

2. In the same manner, when a grant was made to a vassal and his heirs indefinitely, without any limitation, some feudists have maintained on the authority of *Lib. 1. Feud. tit. 1. § 4,* that if the vassal had no heir within the seventh degree, the superior, whether the King or a subject, did by the first feudal rules return to the right of his own lands. Others affirm, that the superior's right was excluded, if any one claimed the succession, who could prove propinquity to the vassal, let the degree of blood be ever so remote; *Lib. 2. Feud. t. 58.* This last opinion seems to have been agreeable to our first feudal usages, *Reg. Maj. L. 2. c. 55. § 2;* where the overlord's right of return is said to take place, only upon the failure of an heir, without any distinction of degrees; and to the practice in Craig's time, who cites two decisions in the case of persons being served heirs to their ancestors, though the one was beyond the tenth degree of propinquity, the other beyond the seventh, to the exclusion of the right of the superior, *Lib. 2. Dieg. 17. § 11.* But in this all were agreed, that if the vassal had no heirs at all, then the feu returned to the superior. By our later customs, however, this right is cut off from the superior, and transferred to the sovereign, who by his prerogative-royal excludes all other superiors. By the law at present, then, in default of heirs
1
whatsoever,

Book III.

of it is an *universitas*, which in other cases is called an *hæreditas*; comprehending the whole estate of the deceased; and it passes, as succession does, from the dead to the living. And the plain reason why the King's donatary is not liable beyond the extent of the inventory, and consequently not subjected personally, except in so far as he has intermeddled, is, that this special right of succession in the sovereign arises from the law itself, without any act of his, which can be justly interpreted to extend the obligation farther against him. Neither is this peculiarity inconsistent with representation; for, not to mention executors who are *quodammodo* heirs, a method has been established in our law, by which those who enter *cum beneficio inventarii*, represent their ancestors in the most proper sense, and nevertheless are not liable *ultra vires inventarii*. It has therefore been adjudged, that if one who has no heir to succeed to him, shall grant a deed on deathbed, alienating his heritage in favour of a third party, the King is entitled to set it aside as granted to his prejudice, by an action of reduction *ex capite lecti*, as if he were the proper heir; *Fac. Coll.* i. 86, (*Goldie, July 31. 1753, Dict.* p. 3183)⁶⁵⁴ *. But this doctrine is farther confirmed and amplified below, § 5. The creditors of the deceased to whom the King succeeds, may carry on all legal diligence against their deceased debtor's estate,—whether heritable, by adjudication,—or moveable, by confirmation, in order to make their payment effectual; *Cr. Lib. 2. Dieg.* 17. § 12. 15; see *St. B. 3. t. 3. § 47*. But in the deducing of such diligence, the officers of state must be called as parties; because the subject which the creditors are insisting to affect, is the sovereign's property, who therefore has an interest to except to the grounds of debt upon which the diligence is to proceed.

The King succeeds as *ultimus hæres* to bastards.

5. This is the proper place for treating of the crown's right arising from the death of a bastard. It has been explained who they are whom the law accounts bastards, *supr. B. 1. t. 6. § 49, 50*; the effects of bastardy may be now considered. It is a settled rule in the law of Scotland, That there is no succession by the mother, *t. 8. § 8*; and that all estates, whether heritable or moveable, can, after the death of the owner, descend only to such as are related to him by the father. A bastard, his father being uncertain, can have no relations by the father, and, of course, no collateral heirs upon his death. If he die without lawful issue, therefore, the King takes up his succession by the necessity of law, in the character of *last* heir. Hence it appears that bastardy is a proper species of *ultimus hæres*, the crown succeeding, because the bastard has no agnates to claim his succession. The crown's right too is precisely the same in bastardy as in the other. It comprehends the *universitas bonorum* of the deceased. It cannot be hurt by a deed on deathbed, *Skene, voce BASTARDUS; Cr. Lib. 2. Dieg.* 18. § 14; *St. B. 4. t. 12. § 7*. The same methods must be pursued by the King to make good his interest in the succession. On the other hand, the estate which accrues to the crown, is in both cases subjected to the same diligence of creditors, and to the same burdens; the widow, *ex. gr.* is entitled to her legal provisions of terce, and *jus relictæ*, in both; for the donatary's right is no better than a right of succession, since he is assignee by the King, whom the law looks upon as successor; and the legal provisions of widows cannot be hurt by any right of succession, whether legal or testamentary; *Durie, July 7. 1629, Wallace,*

* See *Kames, Rem. Decis.* vol. ii. No. 18, *Beg, Feb. 1741, Dict.* p. 3182.

⁶⁵⁴ *Vid. supr. t. 8. § 100, not. †, and 557.*

Book III.

Legitimation
of bastards.

former marriage by divorce, are not, in the opinion of Stair, bastards, notwithstanding the act 1600, c. 20. If this opinion be well founded, the crown's right here explained cannot take place to their prejudice; for as they are not bastards, they have the power of testing; and upon their death, their legal heirs, though not of their own body, will take the succession.

7. Bastards are sometimes legitimated by the Sovereign. Legitimation, in the proper sense of the word, and in that of the Roman law, entitled the person legitimated to all the rights of lawfully begotten children; for which reason the Romans did not admit of legitimation *per rescriptum principis*, where the bastard's father had at the time lawful issue, that so their right of succession might not be divided with the bastard; *Nov. 89, c. 9*. Letters of legitimation with us, though they contain high-sounding clauses, have no tendency to hurt the right of third parties; they enable the bastard to dispose of his moveable estate by testament, *Stair, June 18. 1678, Commiss. of Berwickshire*, (*DICT. p. 1351*); but they encroach not in any degree upon the rights, either of the lawful children already procreated by the bastard's father, or of those he may afterwards beget in lawful marriage, or of any of their posterity; for the sovereign cannot, nor is presumed to intend the cutting off the right of third parties. The bastard is not therefore entitled, in consequence of this sort of legitimation, to a bairn's part of gear, nor to any share of the father's succession. Yet where the right of third parties is not affected, the King may effectually renounce any right competent to himself in favour of the bastard or any other, since he himself is the only sufferer by such renunciation. Though therefore he is by law entitled to the bastard's succession, he may by letters of legitimation, enable that person to succeed *ab intestato* to the bastard, who would have been his heir, had the bastard been procreated in lawful marriage. This prerogative was exercised in letters of legitimation, granted by K. James III, *anno 1479*, in favour of Andrew Lord Evandale, and Arthur and Walter Stewart, all natural sons of Sir James Stewart, son of Murdoch Duke of Albany; in virtue of which, Alexander, the son of Walter, succeeded to his uncle Andrew in the estate of Evandale*: And though it has been lately drawn into question, on pretence that the sovereign cannot grant away future casualties in prejudice of his successors, that effect of legitimation has been sustained; *Fac. Coll. ii. 79, (Ramsay, Jan. 4. 1758, DICT. p. 1359) †*.

Obstructions
to succession
by the law of
Scotland.Bastards in-
capable of le-
gal succession,
but not of suc-
cession by
destination.

8. This title may be concluded with mentioning some of the chief bars or obstructions to succession by the law or usage of Scotland. As the legal rights of succession are, in this and all other civilized countries, grounded on marriage, they can be claimed by those alone who are procreated in lawful marriage; and consequently, the issue of such marriages as the law has reprobated are incapable of succession. It is upon this ground that bastards, because they are procreated of an unlawful conjunction, are disabled from taking by succession *ab intestato*. *Stair, B. 4. t. 12. § 1*, and *Bankton, B. 1. t. 2. § 4*, are of opinion that this position ought to be limited. They admit, that bastards cannot succeed to their father, because

* See the letters of legitimation in *Crawford's Lives of the Officers of State*, p. 435.

† It has since been found, that letters of legitimation do not entitle agnates to succeed to a bastard, without a special provision in their favour; *Fac. Coll. Feb. 10. 1784, Hunter, DICT. p. 1362*.

Book III.

Aliens cannot
succeed in feudal
rights.

ness the Popish religion are not only disqualified from purchasing feudal rights by voluntary disposition, *supr.* B. 2. t. 3. § 16, but declared incapable, by 1700, c. 3, of succeeding in heritage, if they shall refuse to sign the formula prescribed by that act, containing a renunciation of Popery; and the succession is, upon such refusal, declared to belong to the next Protestant heir who would succeed, if they and all the intervening Popish heirs were naturally dead. The Popish heir may, within ten years after incurring the irritancy, be restored to the succession, if he purge himself of Popery, by signing the formula; in which case, the Protestant heir who for a time excluded the Popish, makes all the intermediate rents his own, after paying the current interest of the debts affecting the estate, and its other yearly burdens. If the Popish heir neglect to purge himself within the ten years, he forfeits his right for ever*.

10. Aliens, by which are understood those who are born out of the kingdom, and are subject to the dominion of a foreign prince †, can neither enjoy nor succeed to a feudal subject in a country to whose sovereign they bear no allegiance. The reasons of this may be collected from the nature of feudal homage and fidelity; for if an alien should be allowed to enjoy a feu under a prince to whom he owed no obedience, the jurisdiction and power which the liege lord has naturally over the person, as well as the estate, of his vassal, would be rendered elusory, by the vassal continuing to reside in his native country under the liegeance of another prince: Neither can one who is a vassal to two different sovereigns, in case

* See *Statute* 33. Geo. III. c. 44, referred to in a note subjoined to B. ii. tit. 3. § See also *Fac. Coll.* Feb. 17. 1803, *Ferguson*, Dict. p. 8733.

† It is enacted by 7. Anne, c. 5, ("for naturalizing foreign protestants.") § 3, That the children of all natural-born subjects, born out of the liegeance of her Majesty, her heirs and successors, shall be deemed to be natural-born subjects of this kingdom. In explanation of this statute, it is enacted, by 4. Geo. II. c. 21. § 1, That all children born out of the liegeance of the crown of England, or of Great Britain, whose fathers are natural-born subjects of the crown of England, or of Great Britain, at the time of the birth of such children respectively, shall, by virtue of the above clause in the 7th of Queen Anne, and of this act, be held to be natural-born subjects of the crown of Great Britain. But by § 2, this provision is not to extend to children, whose fathers, at the time of the birth of such children respectively, may be attainted of high treason, either in this kingdom or in Ireland, or liable to the penalties of high treason or felony in case of their returning to this kingdom or into Ireland, without the king's licence, or in the actual service of any foreign prince or state at the time in enmity with the crown of England or of Great Britain. These privileges are, under the like exceptions, communicated to grandchildren, by 13. Geo. III. c. 21. § 1, which enacts, That all persons born out of the liegeance of the crown, whose fathers are, in virtue of these two acts, natural-born subjects, shall, in like manner, be considered to be natural-born subjects.

Under these statutes, which extend equally to all parts of the united kingdom of Great Britain, it has been found in the English courts, That the son of an alien father and English mother, born out of the king's allegiance, cannot inherit to his mother in this country, *Doe versus Jones*, (4. T. R. p. 100). There appear in the books no decisions of the Scottish courts upon the import of these statutes. See *Fac. Coll.* May 18. 1792, *Stewart*, Dict. p. 4649.

At a period when there was an unusually great resort of foreigners to Great Britain, the legislature, in order to prevent any danger to the public tranquillity from that circumstance, imposed, by a temporary statute, 33. Geo. III. c. 4, various restraints upon aliens of every description. This act, after having been continued by subsequent acts, and amended 38. Geo. III. c. 50 and 77, was repealed after the conclusion of peace with the French Republic, by 42. Geo. III. c. 92, which, however, substituted other provisions in lieu of the former. This act, on the renewal of hostilities, was repealed by 43. Geo. III. c. 155, (passed August 12. 1803), "for establishing, until three months after the ratification of a definitive treaty of peace, regulations respecting aliens arriving in this kingdom, or residing therein, in certain cases"⁶⁰.

⁶⁰ Various other statutes, directed towards the same object, have since been passed. The existing statute is 7. Geo. IV. c. 54.

BOOK III.

66, and 1669, c. 7, carry a strong supposition that aliens cannot succeed, or be succeeded to, even in moveables *. And it obtains at this day in France, that on the death of any foreigner who had taken up his fixed residence there, the King succeeds by the *Droit d'aubeine, alibi nati* †, to the moveable estate of the deceased; but where a foreigner goes to that kingdom as a traveller, a merchant, or a public minister, without an intention of fixing his domicile there, the *Droit d'aubeine* is excluded. It may well be doubted whether this right was ever claimed by our sovereigns, notwithstanding those statutes which take it for granted.

Disability from
forfeiture.

11. The disability to succeed, arising from a forfeiture in consequence of high treason, or from being convicted of the crime of murdering a parent, will be treated of under *tit. Crimes*.

* See 1661, c. 39, and 40; 1681, c. 12.

† See this term explained, *Spelm. Gloss.* p. 24.

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BOOK IV.

TIT. I.

Of Actions.

IT would import us little, that rights belonged to us, or that persons stood obliged to us, if there were no method by which we might make those rights effectual, and attain the enjoyment of our property, or compel those who stand bound to us to perform their obligations. If we were left at liberty to do ourselves justice by our own authority, on occasion of every difference with our neighbour, there would soon be an end of government. The judge or magistrate therefore must be applied to, by a proper action. As the special purposes and properties of most of the actions now in use with us, have been already considered at some length in the course of this treatise, we shall content ourselves with explaining, in this place, the general nature of actions, and the most material divisions of them received in our law, excepting a few, which, because they have not been handled before, deserve a fuller consideration.

2. The Romans defined an action to be, A right of prosecuting in judgment what is due to us : But that term, in its more common acceptation, is understood of the actual exercise of the right ; and in this sense, it may be defined, A demand regularly made and insisted upon, before the proper judge, for the attaining or recovering of a right. He who makes the demand is called the *pursuer*, and he who is subject to it, against whom the action is brought, the *defender*.

3. By our ancient law, the greatest part of actions proceeded on *briefes* issuing from the Chancery, which were directed either to the justiciar of Scotland, or judge ordinary, who tried the matter by an *inquest* or jury ; and upon their verdict, *veredictum*, judgment was pronounced. *Briefes* were either *retourable* or not *retourable*. *Retourable* *briefes* were not executed against any special defender, but barely published at the market-cross of the county town ; because the parties who applied for them wanted no more, than to declare a right belonging to themselves, without any conclusion in the *libel* against others. Such were the *briefes* of

TITLE I.
Actions.

Their definition.

Pursuer and defender.

Formerly most actions proceeded on *briefes*.

Book IV.

inquest, or service of heirs, of tutory, idiocy, &c. ; and they were styled *retourable*, because the verdict of the jury was returned to the Chancery by the judge to whom the brief was directed. Brieves not retourable were the ground of proper actions, to be insisted on before the judge competent ; on which account they got also the name of *pleadable*, as the brief of right, of mortancestry, of terce, of division of lands, &c. *. This sort of brieves must have been served against special defenders ; but the judge, after pronouncing sentence according to the verdict of the jury, made no return either of the brief itself, or of the verdict to the Chancery. Lord Stair conjectures, *B. 4. t. 1. § 2*, that James I. of Scotland, who had been long bred in England, where brieves are to this day the foundation of all actions pursued in the court of Common Pleas, did, on his return from thence, erect in this kingdom a Chancery, and establish the use of brieves after the example of the English ; but mention is made of brieves, not only in numberless passages of the books of the Majesty, which are by some excepted to, as of suspected authority, but in the undoubtedly genuine statutes of William, c. 39 who reigned upwards of two centuries before the return of James I. and in the first statutes of Robert I. c. 19, from whom James was descended in the fourth degree. We have to this day retained the use of sundry brieves which have been already explained ; but upon the institution of the college of justice, summonses were introduced into our law in the place of brieves, as the foundation most of our ordinary actions ; and the clerks of the signet are entrusted with the forms both of them and of diligences : See 15 c. 59, 60, 61, &c.

Summonses.

4. A summons is a writ which goes forth under the authority or direction of the judge before whom the action is to be brought, reciting in the libel or declaration the pursuer's title, with the ground and extent of his right or demand, and concluding with a warrant to the proper officer of court for citing the defender to appear. When it is applied to actions brought before the court of session, it issues from the King's signet of the session, and the warrant for citation is directed to messengers. It ought to be observed, that where mention is made of the word *summons* or *summonition*, in the old books of our law, or in our statutes prior to the institution of the college of justice, as in 1429, c. 113, that term is to be understood, not of the warrant of citation, but of the citation given upon the warrant.

Must be fully libelled and signed by a clerk to the signet.

5. By our former practice, when a summons passed the signet, it contained little more than the pursuer's name, the date of signing, and some words of style ; and even when it was executed or served against the defenders, nothing more needed be filled in it, except their names, and the diets or terms of appearance. It was judged sufficient, if the libel was engrossed in it at any time before calling of the summons in court. But as defenders could not possibly come prepared to answer, till they were apprised of the nature and ground of the demand to be made against them, all summonses were, for the greater dispatch of business, directed to be fully libelled, before the citation given to the defenders. This was provided, first by some temporary acts of sederunt, *Feb. 16. 1723,*

* It has been found, that a brief of division among heirs-portioners cannot be advocated from the sheriff of the county where the lands lie, to the court of session ; *Fac. Coll. Feb. 22. 1772, Cathcart, Dict. p. 7663.*

Book IV.

Calling of the summons.

Edictal citation.

styled, *the certification of the summons*, which is the penalty to be inflicted on the defender, if he shall neither comply with the will of the summons, nor shew a reason why he is not bound by law to comply with it; and it is so called, because it certifies or gives notice to the defender what the judge is to do, if he shall refuse obedience to the will or command of the summons. The defender's contumacy, when reiterated, was, by an old temporary act, 1449, c. 29, punished with the forfeiture of his lands and goods to the King; and if he had no estate, with an outlawry. But now the certification is milder; and in general amounts to no more, than that if the party cited shall not appear, the judge shall proceed to take cognisance of the cause, as if he had appeared. A special certification is established by custom against pursuers, who, after commencing a suit, neglect to prosecute it: The defender may, in that case, take protestation against the pursuer for not insisting; which, after it is admitted by the judge, has this effect, that the depending process falls, *instantia perit*; but still the pursuer does not lose his right of action, but may bring a new action upon the same ground of right³.

8. All executions of summonses must express the day of compareance, which, however, is commonly left blank, till the summons be called in court⁴. The last diet of compareance⁵ must be within a year after the date of the summons, where the summons bears, as is frequently the case, the days of appearance to be, "the and days of next to come:" but if the words *next to come*, are omitted, the first diet of compareance⁵ may be made within a year of the date of the summons, and the second diet within a year of the first diet. The summons must be called by the clerk of the process within a year after the last diet, otherwise the depending process falls. This calling of the cause in the outer-house, by the clerk of the process, after elapsing of the days of compareance, was the first step taken in it by the pursuer. The most ancient practice required this form to be gone about in the presence of a judge: And though no judge has for a long time past interposed his authority to it in person, yet he is in the judgment of law considered as present; so that it is still to be deemed a judicial step⁶. For this reason, a summons becomes, after being called, depending process, and, as such, though it should lie quite neglected for years together, may be afterwards wakened and insisted at any time within the years of prescription; *Fac. Coll.* ii. 12-3, (*Ross, &c. July 22. 1758, Dict.* p. 11996); *Act of sederunt, Feb. 26. 1718**. Though the defender be under age, he must be cited on the summons as a party to the suit; but because a minor cannot stand in judgment by himself, his tutors or curators must also be made parties; not indeed by their special names and designations personally, because it is possible the pursuer has no means of knowing who they are, or where they can be found; but edictally at the market-cross of the county-town of the minor's residence. These edictal citations are frequently used, even where the minor has no tutors or curators, to cut off all ground of cavilling from such defenders

* See *Fac. Coll. June 25. 1778, Wilsons, Dict.* p. 12003.

³ Where the action has been ill laid, or the closed record inaccurately or defectively made up, the pursuer may at any time abandon the cause on paying full expenses to the defender, and bring a new action if otherwise competent; 6. *Geo. IV. c. 120. § 10.*

⁴ See *Fac. Coll. M'Donald, 26. Nov. 1825, (S. & D.)*

⁵ *Vid. supr. not. 2.*

⁶ This matter is now regulated by *A. S. 11. July 1826.*

defenders as lay hold of the smallest appearance of a plea to cast actions on a no-process⁷. The forms required by law in the execution of summonses against defenders have been set forth, *B. 2. t. 5. § 55*¹.

9. Sundry actions proceed upon a citation by warrant of the court of session, without any summons issuing from the signet, and are therefore denominated *summary actions*. Thus bills of complaint exhibited against members of the college of justice, or other practisers in the court, relating to the exercise of their employment; or against factors on sequestrated estates, or other persons named into any office by the court; or against inferior judges for their contempt of authority, in exercising jurisdiction in an action after an intimated suspension or advocation; or against officers of the law⁸ for oppression*; or against litigants in any action brought before the court, who have been guilty of any wrong, pending the suit⁹; may be all tried by a summary action. When reasons of suspension are ordained to be discussed summarily upon the bill, without issuing letters of suspension under the signet, *vid. infr. t. 3. § 19*, that sort of process may without impropriety pass also by the name of a summary action.

Summary actions which proceed without summons.

10. Actions are divided both by the Roman law and ours into real and personal. A real action, or *actio in rem*, is that which arises from a right in the thing itself, or a *jus in re*; and is grounded, either upon the right of property, which is the highest right that one can have in a subject; or on a right of servitude, hypothec, pledge, &c. which are inferior real rights. A personal action is that which is founded merely in a right of obligation against a person, or a *jus ad rem*. From this difference in the ground of the actions, arises also a difference in their forms and properties. In personal actions, the pursuer can direct his suit against no other than the person who stands obliged to him, or his heirs; but actions that arise from a right in a subject, may be directed against all possessors of that subject, though they should not represent the granter. Though the epithet of *real* actions is, in vulgar speech, applied only to such as relate to heritable rights; yet every action founded on a right in any subject, though it should be moveable, is, in a legal sense, real, and therefore may proceed against every person who holds the possession or custody thereof. An heritable bond completed by seisin, being in different respects both a real and a personal right, may be the foundation of both a real action and a personal. The first, a real action upon that security, may be directed against all possessors for the arrears of interest due upon the bond; see § 11: The other, a personal action, is competent against the granter of the bond, or his representatives, for the principal sum, in virtue of the obligation of payment which is therein contained.

Actions are real or personal.

11. Poining of the ground, though it be properly a diligence or execution, is generally considered by lawyers as a species of real action; and it is styled *poining of the ground*, to distinguish it from *personal poining*, which proceeds on obligations merely per-

Poining of the ground.

* See *Angus*, Feb. 1751, Dict. p. 14976; Dec. 7. 1793, *Duff's*, Dict. p. 14981².

⁷ In such a case it is necessary to have a *curator ad litem*, to support the minor in his defence; otherwise any decree taken against the minor, though not absolutely null, is no better than a decree in absence;—see Opinions of Judges in *Stark v. Sinclair*, still in dependence, (Nov. 1827), as fixing the construction of the brocard, *Sententia contra minorem indefensum lata, nulla est*; *supr. B. 1. t. 7. § 13*.

⁸ *Vid. A. S. 6. March 1783; Seller, &c. 11. Feb. 1809, Fac. Coll.; Campbell, 10. July 1824, (S. & D.);—A. S. 16. March 1748; Murray, 15. Dec. 1824, (S. & D.); Sheriff-Clerks, 9. Dec. 1783, Dict. p. 7393; Campbell, 17. May 1810, Fac. Coll.;—Home, 7. Feb. 1806, Dict. v. SUM. APPLIC., App. No. 2; Gardner, 11. Dec. 1823, (S. & D.) &c. &c.*

⁹ *Fraser, 6. July 1808, Dict. v. SUMMARY APPLICATION, App. No. 3.*

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sonal, and can therefore be directed only against the goods belonging to the debtor in the obligation. Every person who has a debt secured upon land, or, as it is commonly expressed, a *debitum fundi*, whether the security be constituted by law or by paction, is entitled to an action for poinding all the goods on the lands burdened¹⁰, in order to his payment, even though the original debtor should have been divested of the property in favour of a singular successor after granting the creditor's security. This action is therefore competent to an annual renter for the arrears of interest due upon his infestment, to a superior for his feu-duties, or for the retour duties due to him before citation of his vassal's heir in an action declarator, according to the distinction already stated, *B. 2. t. § 42*; and, in general, to all creditors in debts which constitute real burden or *lien* upon lands¹¹. But it is not competent to proprietors, nor even to possessors, though not strictly proprietors, adjudgers, liferenters, or other real creditors, who possess under their different titles; for there is a natural impropriety in poinding the ground of lands possessed by the poinder himself. The only proper process competent to such, for the recovery of their rents, is that of mails and duties; *Durie, Feb. 26. 1631, L. Gartland, (Dict. p. 10546)*. As no man can poind the ground of lands of which he is already in possession, neither does a poinding of the ground afford any title of possession to him to whom such poinding is competent: For the poinder has no right to enter into the possession of the lands in consequence of his diligence; he can only levy such part of the rents, in the character of a real creditor, as amounts to his claim: and, in the particular case of poinding on an infestment of annual rent, the diligence can only proceed for the past interest of the principal sum; which, as hath been already taught, *B. 2. tit. 8. § 32*, is the only part of the debt that is secured upon land by the infestment. A creditor therefore in a *debitum fundi* is not entitled to the benefit of a possessory judgment; *Stair, Jan. 9. 1668, La. Clerkington, (Dict. p. 16093)*; *Pr. Falc. 44, (Cant, Jan. 17. 1683, Dict. p. 10643)*.

Who must be made parties to the action.

12. In an action of poinding the ground, not only the tenants and possessors, but the proprietor of the lands, must be made a party to the suit; for he has an obvious interest to shew cause why the diligence ought not to proceed. Hence, where lands are wadset, it is the wadsetter, who is the proprietor, that must be cited, and not the reverser: But the superior need not be called. There is no personal conclusion in the summons against the defender; for the sole intent of the action is, that the goods on the ground may be subject to the pursuer's diligence. And therefore, when a decree is once recovered upon an action of poinding the ground, and letters of poinding issued in consequence thereof, the letters are put to execution, without any previous charge on the decree against the tenants to make payment; for as there is nothing decreed against the tenants, there can be no warrant for such charge. Upon the same principle, a poinding of the ground may

¹⁰ But without poinding of the ground, the holders of such securities have no preference over the moveables found on the ground, in competition with personal creditors claiming in a sequestration of the proprietor's estates under the bankrupt act; *Fac. Coll. Hay, 7. July 1824, (S. & D.)*, affirmed on appeal 22. Mar. 1826, 1. W. & S. 71;—with which compare *supr. B. 2. t. 8. § 32*; *B. 3. t. 5. § 5*; *Principles, B. 2. t. 8. § 15*. See also *infr. not.*¹²

¹¹ On a resale by a vassal to his superior, the latter having completed his title by resignation *ad remanentiam*, wherein the price was declared a real burden on the lands, it was found that this was a competent mode of constituting a lien, and therefore effectual to authorise real diligence by poinding of the ground; *Fac. Coll. Wilson, 13. Feb. 1822, (S. & B.)*.

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The reason of the difference is, that though an heir is considered as *eadem persona cum defuncto*, yet that fictitious identity does not reach to delicts or crimes, and therefore not to penalties, the inflicting of which necessarily supposes a delict or transgression. It is a never-failing axiom, *Culpa tenet suos auctores*; every one is accountable only for his own delicts, and not also for those of his ancestors*. An exception, however, from the rule concerning the transmission of penal actions, will be explained before finishing this title, (§ 70.)

Spuilzie.

15. Actions of spuilzie, ejection, and intrusion, are penal where they include the violent profits, which have been treated of *B. 3. t. 7. § 16.* Spuilzie may, by the definition there given of it, be committed, not only by strangers, but even by the owner of the moveable goods carried off; because a right of property itself cannot justify the proprietor in assuming a power of judging in his own cause, or of turning one out of possession who had acquired it lawfully. The pursuer, therefore, in an action of spuilzie, need prove no more, than that he was in the lawful possession of the subject libelled, which gives him a right to be *ante omnia* restored to the possession; for the action is grounded on this plain principle, That no man is to be stripped of his possession, but by the order of law. This action, when it is pursued recently, and includes the violent profits, being penal, is elided by the defender's having a probable ground of excuse; *quilibet titulus excusat a spolio*, *Stair, Jan. 27. 1665, L. Bearford*, (DICT. p. 1817), *Harc. 860, (Thin, Nov. 1683, DICT. p. 14753)*; or by his voluntary restitution *de recenti* of the goods illegally carried off, *cum omni causa*. But these defences afford no protection to the defender, except as to the penal consequences of the action; they are utterly ineffectual in so far as concerns simple restitution and damages. The administering of oaths *in litem*, is, in the general case, peculiar to the court of session, as being an act *nobilis officii*; yet as, by special statute, 1503, c. 65, recent spuilzies are left open to the cognisance of sheriffs, sheriffs may not only put an oath *in litem* to the pursuer, but modify the extent or quantity of the goods sworn to by him. Spuilzie is not only competent against the *spoliator*, or principal defender, but against all abettors, each of whom is liable *in solidum*, without recourse against the rest, which is indeed the rule in all actions arising *ex delicto*.—Ejection and intrusion are in heritable subjects what spuilzie is in moveable. The difference between the two first has been already explained; and the actions arising from all the three are of the same general nature.

Ejection and intrusion.

Lawborrows, and contravention of it.

16. The action of contravention of lawborrows is likewise penal. It proceeds on letters of lawborrows, obtained at the suit of him who is disturbed in his person or goods by another, and containing a warrant to charge the party complained of to give security, that the complainer shall be kept harmless from illegal violence¹⁴. The word is derived from *borrow*, or *borgh*, an old word for cautioner. These letters do not require the citation of the party complained of; because the security which the law requires is only for his good behaviour, which is a duty incumbent on every one as a member of society: But because few persons of estate or credit are

* In a case where an action was brought against an heir of a person who was said to have incurred the passive title of vitious intromission, the court, while they held that the ancestor would have been liable universally, subjected the heir *in valorem* only; *Fac. Coll. Dec. 15. 1775, Penman, &c. DICT. p. 9836; (supr. B. 3. t. 9. § 54.)*

¹⁴ Where security is not given, the letters of lawborrows may be followed by caption and imprisonment. Such a caption was, on showing proper cause, obtained by a husband against his wife; *Thomson, 7. Mar. 1815, Fac. Coll.*

Book IV.

Actions principal and accessory.

Rescissory actions.

Reduction-improbation.

Title to pursue in this action.

action of suspect tutory, *St. B. 1. t. 6. § 26*, or insist in a reduction of such deeds as are granted by the minor to his hurt, and ratified by his oath, 1681, c. 19. See also on this head, *Act of sed. Feb. 13. 1703*

18. The most comprehensive division of actions, is of principal actions, which subsist by themselves, and accessory, which are not so properly actions, as judicial steps of proceeding, subservient to other actions, either previous to or concomitant with them. Principal actions are either rescissory, declaratory, petitory or possessory. Rescissory actions are those which our law has established for the voiding of deeds, services, decrees, or other writings, or of illegal acts done by any body-corporate or society of men; *ex. gr.* the election of magistrates, or other public officers. They are sometimes called *extraordinary*, because they are extraordinary remedies provided by the law for the security of the subject, and are seldom used till ordinary remedies fail. Rescissory actions are either, *1^{stly}*, actions of proper improbation, in which the pursuer concludes, that a deed ought to be declared improbate, *i. e.* set aside upon real grounds of forgery and falsehood; but this falls to be explained under *tit. Crimes*; or, *2^{dly}*, actions of reduction-improbation, which are brought for declaring writings to be false and forged, *fictione juris*, only; or, *3^{dly}*, actions of simple reduction, in which the only conclusion is, that the deeds or writings called for by the pursuer shall have no effect, till they be exhibited or produced in judgment.

19. The most effectual method of setting aside deeds granted to one's prejudice, is by the action of reduction-improbation. As no reduction of the deeds under challenge can proceed, till they be first produced before the court of session, who have the sole cognisance of rescissory actions, the pursuer of this process lays his libel upon alleged grounds of falsehood, the more effectually to force the production of the writings called for; and a certification is annexed to the summons, that if they be not produced before elapsing of the terms assigned for that purpose by the judge, they shall be declared false and forged; for which reason the action gets the name of *improbation*, though there should be no ground to suspect real forgery. Because the writings called for are libelled to be false, his Majesty's Advocate, who is the public prosecutor of crimes, must concur in the action; but as this is a mere point of form, he may, notwithstanding his concurrence, appear as counsel for the defender, if the writings be not challenged upon grounds of proper falsehood. The certification of this summons is not grounded on a presumption of falsehood arising from the not exhibiting the writings in court; for certifications are most frequently pronounced against deeds which appear from the clearest evidence to have once truly existed. It is merely a fiction of the law; so that the pursuer does not really mean that the deeds are forged, though in the form of words says so; but he uses the legal remedy of compelling the defender to exhibit them, that they may be either annulled upon sufficient legal grounds, or their true nature and import ascertained. For this reason, though the deeds called for, and not produced, be declared false, it is only to this special effect, that they shall not afterwards bear faith against the pursuer; but in all questions with third parties, they continue genuine in the judgment of law, and give them the same force and validity as if no certification had been granted against them.

20. A pursuer is entitled to this action, in consequence of a personal interest or a real. Every one who apprehends hurt or affected by a deed, though barely personal, *ex. gr.*

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are inserted in that record after the great seal is appended to them, and therefore the registration in it cannot prove the existence of a charter actually sealed*.—An extract from the session register itself is no bar to certification, either, *first*, where the pursuer insists upon proper grounds of falsehood, in which case the principal writing which lies in the register must be exhibited in court; or, *2dly*, if, after search in the register-office, the principal or authentic writing cannot be found. Yet where a deed has been recorded in that period of time in which the writings there recorded have been lost upon occasion of some public commotion, the extract itself will save from certification, without the necessity of producing the original deed, which is in that case presumed to have once truly existed, but to have been destroyed in the public calamity; *Fount. Dec. 28. 1704, Wilson*, (DICT. p. 6706) †.—As writings registered in the books of session are to be considered as in the hands of the clerk of court, being in the custody of the keeper of the records of session, certification cannot be granted against these, even though no extract of them should be produced from the record, provided a condescence or particular state of them, specifying the several register-books in which they are inserted, with the dates of their registration, be exhibited by the defender, before extracting the act for the second term; *Forbes, MS. Nov. 24. 1713, E. Leven*, (DICT. p. 6712), compared with *Stair, Jan. 11. 1681, Monro*, (DICT. p. 6700).—In deeds registered in the books of an inferior court, no extract of them can defend against certification: The defender must, in order to satisfy the production, apply for an order of the court of session to transmit the original or principal writing to the clerk of the process, *Dirl. 285; Dunmuir, June 30. 1675*, DICT. p. 6699.—In the reduction-improbation of decrees, no certification passes against their warrants, such as summonses, executions, &c. unless they be recently called for; because these, being truly no other than the joinings of a person's title-deeds, consisting merely in form, are not commonly preserved so carefully as proper deeds; *Forbes, Feb. 20. 1713, Morison*, (DICT. p. 5181).

defender
exclude the
on, by pro-
ing a prefer-
title.

23. If the defender in this action produce a title preferable to that of the pursuer, he cannot be compelled to take a term to produce any of the writings called for; for where the pursuer's title is excluded, the action must fall. This plea of the defender to exclude the pursuer's title, ought regularly to be made before his taking a term to produce, because that carries in it an implied acknowledgment of the pursuer's title: Yet that defence is sustained, even after his taking a term, provided it be instantly proved and verified ‡. But if it be once pleaded and repelled, the defender will not be allowed to avail himself of it a second time, upon a new production, in order to exempt himself again from the necessity of taking a term.

ple reduc-

24. Simple reductions, where improbation is not also libelled, are now seldom made use of; because the certification in these is only temporary, that the deed called for by the pursuer shall be held as void till it be produced. In consequence of certification obtained by the pursuer, he will enjoy all the fruits or other benefit formerly carried by that deed, till he be put *in mala fide* by the production of it; for after it is produced, at whatever distance of time after pronouncing the decree of certification, that decree loses

* See *Stair*, B. iv. tit. 20. § 21.

† As to extracts of seisins, *vid. supr.* B. ii. tit. 3. § 49; *Stair*, B. iv. tit. 20. § 21.

‡ See *Fac. Coll.* ii. No. 264, *Grant, &c. Dec. 23. 1760*, DICT. p. 6724.

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ving any special circumstance of fraud or circumvention on the part of that contractor¹⁷. Thus, in the case of a creditor lending money to an eldest son, which is not made payable by the debtor till he shall succeed to his father, there is *dolus in re*, if the sum payable to the creditor, upon the existence of that condition, be so great, that the risk he runs of the father's survivance bears no just proportion to the premium which he stipulates to himself on account of that risk; and therefore the obligation will be either annulled totally, *in pœnam* of the creditor, or restricted, according to equity, without the aid of any evidence of circumvention to be brought from collateral facts. But though a deed under challenge should appear hurtful to the granter, and irrational for one in his situation, if it do not carry in its bosom plain marks of oppression, it is not reducible, without an actual proof of dole, even though the granter should appear to be of a facile temper, *i. e.* apt to be imposed upon: For let one be ever so subject to imposition, yet if he has understanding enough to save himself from a sentence of idiotry, the law makes him capable of managing his own affairs; and consequently his deeds, however hurtful they may be to himself, must be effectual, unless evidence be brought that they have been drawn or extorted from him by unfair practices. Yet where lesion in the deed, and facility in the granter, concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside.

Reduction on 1621, of deeds granted to the prejudice of creditors.

28. Another ground of reduction is, That the deed under challenge is granted to the prejudice of creditors; which is borrowed from the Roman law, *L. 1, et seqq. Quæ in fraud. cred.*; and made part of ours, after having been accommodated to the genius and system of our law, by 1621, c. 18¹⁸. This statute is entitled, *Act against unlawful alienations made by bankrupts* *. A bankrupt, in the meaning of this act, is one who has no visible fund for the payment of his creditors, over and above the special subject alienated to their prejudice. The creditors who are entitled to the benefit of it, have sometimes the epithet of *just*, sometimes of *true*, and frequently of *lawful* given to them in the statute. Conditional creditors are therefore creditors in the true sense of it; for they are properly entitled to all these characters: And even gratuitous creditors; for donation infers a just, true, and lawful obligation against the donor, and carries an implied warrandice against his future deeds.

First part of the act. Gratuitous alienation to confident persons, after contracting just debts.

29. By the first part of this act, all alienations granted after contracting lawful debts, in favour of conjunct or confident persons, without true, just, and necessary causes †, may be declared null at the suit of the creditor. A first assignation therefore of a bond or obligation, whether onerous or even gratuitous, affords to the assignee a right of action for voiding a second gratuitous assignation granted by the creditor to another, in breach of the warrandice implied in the first, though it should be intimated before the first; *Stair, July 15. 1675, Alexander, (Dict. p. 940)*. Though the word *alienation* is, in the strict acceptation, applicable only to dispositions, and assignments of deeds, practice has extended it by analogy

* The statute referred to is a ratification of an act of sederunt of the court of session, dated July 12. 1620, of which the full tenor is recited in the statute.

† See note §, subjoined to § 35.

¹⁷ See *M^cDiarmid*, 17. May 1826, (*S. & D.*); *Berry, &c.* 13. June 1821, *Ibid.*; *M^cIlwham*, 22. Feb. 1823, (*Ibid.*)

¹⁸ See a valuable commentary on this statute, 2. *Bell Comm.* 189. *et seq.*

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logy also to bonds, and even to the consent of the husband interposed to a right granted by his wife, by which his *jus mariti* was cut off, to the detriment of his creditors; *Ibid. July 27. 1673, Cred. of Scot.* (DICT. p. 702). To found action of reduction upon this branch of the statute, *first*, the deed to be reduced must be granted after contracting the debt due to the pursuer; *2dly*, it must be granted in favour of conjunct or confident persons; *3dly*, it must be gratuitous.

30. As to the *first*, one is deemed a prior creditor, whose ground of debt truly existed previously to the alienation or right granted by the debtor, though the written voucher of it should bear a date posterior thereto. Thus, where a debt, arising from the sale of goods by a shopkeeper, is afterwards constituted, either by the purchaser's bond, bearing the special cause of granting, or by parole evidence, such debt is considered to have existed as far back as the sale of the goods, without regard to the date of the bond, or decree of constitution; *Stair, Jan. 21, 1669, Cred. of Pollock*, (DICT. p. 1002); *Ibid. July 27. 1669, Street*, (DICT. p. 1003).

Who are esteemed prior creditors in the sense of this act.

31. *2dly*, The deed must be granted to a conjunct or confident person. A conjunct person is one connected with the granter by blood or affinity; and none are accounted conjunct persons in the meaning of this statute, whose relation is not so near as to bar them from judging in the granter's cause; and therefore neither uncles nor nephews by affinity, nor cousins-german, whether by blood or affinity, fall under it, *Forbes, Feb. 8. 1712, Lord Elibank*, (DICT. p. 12569); *Forbes, MS. June 8. 1714, Macdoul*, (DICT. p. 12569)*¹⁹. By confident persons, are meant those in whom the granter is presumed to place an uncommon trust, from his employing them in certain offices about his person or estate, as a doer, steward, or domestic servant †. If a right purchased with the bankrupt's money be taken in the name of a conjunct or confident person, it falls within the statute, in the same manner as if the bankrupt had first taken the right to himself, and had afterwards made it over to the trustee; *Stair, July 2. 1673, Street*, (DICT. p. 4914). A right taken in the name of the bankrupt's son, if he be minor, and have no employment or estate independent of his father by which he might have been enabled to acquire it, is presumed to be purchased with the father's money, and is therefore reducible at the suit of the father's creditors, to whom the right alienated will be declared to belong²⁰.

Who are held conjunct and confident persons.

32. The act requires, *3dly*, That the deed under challenge be granted gratuitously, or without any valuable consideration given for it by the grantee. But though all gratuitous rights *inter conjunctas personas* are expressly declared reducible by this branch of the act, yet practice has so explained it, agreeably to its title, as to support even gratuitous rights granted to conjunct persons, if the granter had at the time a sufficient fund for the payment of his creditors. And indeed the voiding of donations granted by solvent

What are gratuitous deeds in the sense of the statute.

* See *Fount. Jan. 16. 1695, Mercer*, DICT. p. 12563; *Ibid. June 18. 1712, Ker*, DICT. p. 2715; *Stair, June 22. 1680, Sinclair*, DICT. p. 12562.

† See *Mack. Obs.* on this statute, p. 22.

¹⁹ Persons married to sisters are not conjunct and confident—that connexion being merely *affinitas affinitatis*; *M'Gowan, 24. Feb. 1826, (S. & D.)*.

²⁰ See *Young, 14. Dec. 1824, (S. & D.)*; and compare *Anderson, 15. June 1826, (Ibid.)*

Book IV.

Provisions in antenuptial marriage-contracts; and provisions to wives after marriage;—whether accounted gratuitous.

Provisions to children already existing.

persons would resolve the act into an interdiction or inhibition, and make persons of good substance incapable of gratifying the friends to whom they have been the most obliged; *Kames*, 9. (*Meldrum*, Dec. 11. 1717, Dict. p. 928); *Dirl.* 287, (*Clerk*, June 30. 1675, Dict. p. 917).

33. Provisions in marriage-contracts, either by the bride to the bridegroom in name of tocher, or by the bridegroom or any of his relations to the bride, are accounted onerous deeds; because it is on the faith of suitable provisions secured to the parties in marriage-contracts, that they enter into the married state. Such deeds therefore are not subject to reduction upon this act, even supposing the granter to have been truly insolvent at the time, *Forbes*, MS. Jan. 22. 1714, *Lockhart*, (Dict. p. 956); Nov. 18. 1729, *Creditors of Thoirs*, (Dict. p. 984), cited in (*Folio Dict.* i. p. 72²¹). Yet if his insolvency was notorious, or publicly known, fraud is presumed in the person for whose behoof the right was granted, from his contracting with a bankrupt; *Stair*, Nov. 23. 1680, *Wood*, (Dict. p. 977). Neither do provisions to wives after marriage, though granted by the husband under a consciousness of his own insolvency, fall under the prohibition of the statute, either where the wife was not otherwise provided, or where her former provision could not avail her in a competition with creditors; for the wife has seldom any fund of subsistence, except what she receives from her husband, whose natural obligation to provide for her becomes more forcible from that consideration. But, *first*, Such postnuptial provision to the wife must be rational; and, *2dly*, There must be no circumstances whence to presume an intention in the husband to prefer his wife to his other creditors; Jan. 11. 1738, *Robertson*, (Dict. p. 957); Feb. 17. 1738, *Mackenzie*, (Dict. p. 958); both cited in (*Folio Dict.* i. p. 70^{* 22}).

34. Provisions to children already existing²³, are, in the judgment of law, gratuitous, and of consequence may be annulled in competition with creditors, if the granter was not solvent †²⁴. In these, and the like cases, where the validity of the deed depends on the solvency of the granter, the period at which he must be proved to have been solvent, is the date, not of the deed, but of its delivery, when the deed becomes effectual to the grantee. Though therefore a bond of provision to children is effectual to them without

* See July 26. 1744, *La. Auchinbreck*, *Kilk.* No. 4, voce BANKRUPT, *Clerk Home*, No. 273, Dict. p. 988; *Fac. Coll.* Feb. 14. 1778, *Campbell, &c.* Dict. p. 1000, (*Hala*, 788.); *Ibid.* Feb. 2. 1796, *Creditors of Fergusson*, Dict. p. 1001.

† See *Kames*, *Rem. Decis.* No. 72, *Murray-Kinninmond*, June 18. 1746, Dict. p. 990, *Fac. Coll.* August 5. 1783, *Creditors of Cult*, Dict. p. 974.

²¹ *Blackburn*, 29. May 1816, *Fac. Coll. Scott*, 12. June 1822, (*S. & D.*); *Garda*, 26. Nov. 1822, (*Ib.*).

²² *Jeffrey*, 24. May 1825, (*S. & D.*)

²³ Or rather, more generally, all postnuptial provisions to children, whether existing or *nascituri*.

²⁴ Even under an antenuptial contract, and where the granter was solvent, such provisions are not good in competition with creditors, if so made as not to take effect against the father's estate, either as to principal or interest, until after the father's death. *Vid. sup.* B. 3. t. 8. § 40, and *not.* 4⁵⁸.

Provisions to natural children stand on a somewhat different footing. These provisions are not good in competition with creditors, though the term of payment be postponed till the father was solvent at the date of delivering the obli-

out delivery, in a question with the granter's heir, it is reducible by creditors on this statute, even after delivery, though the granter should have been solvent at the date of the right, if he was not also solvent at the time of delivery, when he first put it out of his power to revoke it. It has been explained, *B. 3. t. 2. § 43*, what it is that in our law proves or presumes the delivery of deeds, and from what time deeds are held for delivered*. In questions concerning the granter's solvency, no regard is had to an estate strictly entailed, because the property of such estate cannot be affected by creditors; *arg. Forbes, June 17. 1712, Ker*, (Dict. p. 690). Neither was a personal estate in bonds or moveables, which are not discoverable by any search or inquiry of creditors, computed as part of the granter's funds; it must have consisted in lands or heritable rights, which may be known by a search in the public records; *Harc. 226, (Children of Mouswell, July 20. 1688, Dict. p. 932)*. But it may be doubted whether this doctrine would be found to suit with the present times²¹, when there are numbers of considerable estates, consisting wholly, or for the greatest part, in money.

35. The only manner directed by the act for proving the deed to be gratuitous, or without a just or competent price, is by the writing or oath of the grantee. But this has been so altered by practice, that the grantee, if he be a conjunct or confident person, must support the onerous cause or valuable consideration of the right, not barely by his own oath, but by some collateral evidence; *Stair, July 15. 1670, Hamilton*, (Dict. p. 12555); *Ibid. Dec. 15. 1671, Duff*, (Dict. p. 12428) †. Where there is no ground however to suspect fraud, the slightest adminicles of the onerosity are admitted in support of the deed; *Kames, 105, (Skene, Feb. 15. 1728, Dict. p. 12572)*. Though no deed can be set aside by the words of the statute, which is not granted to conjunct or confident persons, that ground of reduction is, from the reason of the act, extended against gratuitous deeds, though granted to strangers, if the granter was not solvent at the time: Yet with this difference between the two, that in deeds to children, or other conjunct persons, the onerosity, though asserted in the narrative, must be supported by some collateral evidence ‡; but in deeds in favour of strangers, the narrative, expressing an onerous cause, is sufficient *per se* to support the deed, unless its onerosity be disproved by the writing or oath of the grantee; *Stair, June 22. 1680, Trotter*, (Dict. p. 12561)²² §.

How the deed must be proved to be gratuitous.

36.

* As to the date from which the acceptance or indorsation of bills shall be reckoned, see *Fount. July 25. 1702, Man*, Dict. p. 1006; *May 15. 1794, Thistle-Bank of Glasgow against Leny*, (not reported).

† See *Fac. Coll. ii. 162, Boswell, Feb. 7. 1759*, Dict. p. 12578; *Ibid. July 26. 1766, Gibb*, Dict. p. 909.

‡ It is not required even of conjunct persons to bring any evidence in support of the narrative of the deed, after a long lapse of time; *Fount. Dec. 23. 1692, Spence*, Dict. p. 1014; *Forbes, Feb. 2. 1711, Guthrie*, Dict. p. 1020; *Kilk. No. 10, voce BANKRUPT, Blackwood, Jan. 18. 1749*, Dict. p. 904; *Kilk. No. 13, voce BANKRUPT, and 2. Falc. 93, Elliot, Nov. 10. 1749*, Dict. p. 905, and 11315; (*2. Bell Comm. 201*).

§ See, however, *Stair, eodem die, Sinclair*, Dict. p. 12562; *Dirl. 432, Carriber, Jan. 1677*, Dict. p. 12324.

We are told by Lord Kilkerran, No. 9, *voce BANKRUPT, Grant, Nov. 10. 1748*, Dict. p. 952, that it was agreed among the Lords, "that though the words *true, just, and necessary causes* would appear as they stand to be conjunctive, they have always been considered as *disjunctive*; so that if either the deed be granted in consequence of a previous obligation, or, though there be no such previous obligation, if the deed be granted for a true and just cause, it is not reducible."

²¹ It certainly would not.

²² *Vid. contr. 2. Bell, 204.*

BOOK IV.

Gratuitous deed
inter conjunctos,
when onerously
transferred to a
third person.

36. A gratuitous deed *inter conjunctas personas*, which is subject to reduction upon this act, if it be conveyed to a third party for an onerous cause, subsists as a lawful deed in the person of the purchaser, who is not partaker of the fraud. If the conjunction or confidence appear from the deed itself, *ex. gr.* if the deed of alienation express that the grantee is brother, son, or steward to the grantor, the purchaser is presumed to be privy to the fraud, since he could not but know *ex facie* of the right acquired by himself, that it was a prohibited alienation, unless he elide this presumption by positive evidence, that the right was assigned to him * for a valuable consideration; *Stair, Jan. 24. 1680, Craufurd, (Dict. p. 1012); Forbes, June 15. 1710, Leslie, (Dict. p. 1018)*. Where the conjunction or confidence cannot be perceived, either from the tenor of the right, or the conveyance of it to the purchaser, the right, though reducible in the person of the trustee, is effectual to the *bona fide* purchaser; *Jan. 9. 1730, Allan, (Dict. p. 1022)*, observed in *Dict. i. p. 75*. But the price stipulated to be paid for the right must in that case be made forthcoming to the bankrupt's creditors, either by the purchaser, if the price be still in his hand, or was in it when he was legally interpellated from paying it, or by the conjunct or confident person, in so far as it has been paid by the purchaser to him.

Second branch
of the act.

Voluntary pay-
ments by a
bankrupt to
one creditor, in
prejudice of the
more timely
diligence of
another.

37. Hitherto of the first branch of the statute, which relates to the case of creditors who have used no diligence against their debtor. It is enacted by a posterior clause in the same statute, for preventing the debtor's partial preference of one creditor to another, that voluntary payments or securities granted by the bankrupt, or any interposed person for his behoof, to any grantee, to the hurt or prejudice of the more timely diligence of another creditor, shall be subject to reduction at the suit of the creditor who had used the prior diligence; and that the creditor who carries on the action of reduction shall be entitled to the sum which was voluntarily paid by the debtor to the other creditor. Rights granted by the debtor for a sum of money instantly advanced to him by the grantee, cannot be declared void upon this clause of the act; *ex. gr.* a disposition of lands in consideration of a price presently paid, *Stair, Feb. 8. 1681, Nelson, (Dict. p. 1045)*; see *Ibid. Jan. 25. 1681, Bathgate, (Dict. p. 1049)*; or a bond granted for borrowed money, *Ibid. June 28. 1665, Monteath, (Dict. p. 1044) †*; for these are not voluntary rights granted in favour of one creditor to the prejudice of another, but contracts entered into between parties who were perhaps strangers to one another, in the common course of business, and not for the securing any former debt. Neither does a seisin taken by one creditor on the debtor's heritable bond, after diligence used by another creditor, fall under this prohibition, if the bond upon which the seisin proceeded was prior in date to that diligence, *Fount. Dec. 16. 1696, Creditors of Hunter, (Dict. p. 1023)*; for there the bond is to be considered as the voluntary deed of the debtor, and that is supposed to be granted previously to the diligence of the other creditor; for seisin may be taken upon the bond at any time, whether the debtor will or not, and therefore cannot be accounted his deed ‡.

38.

* The word "him" seems to mean "his author."

† *Fac. Coll. March 9. 1781, Blaikie, Dict. p. 887*. Payments in specie are in the same situation; *Kilk. No. 15, voce BANKRUPT, Forbes, Jan. 26. 1751, Dict. p. 1128*.

‡ A bond of corroboration falls under this branch of the act; *Fac. Coll. June 18. 1793, Creditors of Dunbar, Dict. p. 1027*.

BOOK IV.

to his. If, for instance, a creditor who had arrested a subject, shall get a conveyance of it from the common debtor, another creditor, though he should have used a second arrestment previously to that assignation, has no right to impugn that conveyance, because it was not granted to his prejudice; for the first arrester was preferable, without drawing any support from the conveyance, which could serve no other purpose than to prevent the trouble and expense of a forthcoming; *Stair, Nov. 20. 1677, Archb. of Glasgow*, (DICT. p. 1060); *Fount. Jan. 14. 1703, Deans*, (DICT. p. 1062). Though the act declares all alienations which shall be granted in contradiction to it null, by way either of action or exception; yet the nullity, in so far as it concerns complete feudal rights of heritage, is in practice received only by way of reduction; *Stair, July 22. 1664, L. Lour*, (DICT. p. 2733); because infeftments are not by their nature voidable, without production, and the calling of authors, *St. B. 1. tit. 9. § 15, vers. Secondly, though*. Nay, personal rights of land cannot, in the general case, be set aside but by way of action; *Stair, Jan. 5. 1669, Sims*, (DICT. p. 2733); because heritable rights are of greater importance than moveable rights, and therefore require greater solemnity, both to their constitution and dissolution; *Mackenzie, Observ. on this statute*. Dispositions of moveable subjects are, in every case, reducible by way of exception, according to the letter of the act; *Stair, June 16. 1671, Bowers*, (DICT. p. 9859.)

Reduction on act 1696, of deeds granted within 60 days of bankruptcy, in prejudice of creditors.

41. There is still a later statute against the fraudulent alienations of bankrupts, 1696, c. 5.²⁵, entitled, *Act for declaring notour bankrupts*; by which all deeds granted by the bankrupt, either at or after his bankruptcy, or within sixty days before it²⁶, either towards the payment, or for the farther security of any creditor, in preference to the other creditors, are declared null²⁷. Fraudulent alienations by the bankrupt, though granted in England, fall within the statute; for not only is the expression in the enactment unlimited, *all and whatsoever voluntary dispositions*; but the obvious meaning and intention of the law strikes with equal force against every fraudulent grant to the prejudice of creditors, in whatever place or country it may be signed; *Fac. Coll. ii. 116, (Sym, July 6. 1758, DICT. p. 1137)*²⁸. The characters marked out by this statute for distinguishing a bankrupt, are diligence by horning and caption, and insolvency, joined to either of the following alternatives, imprisonment,

²⁵ See a very full commentary on this statute, 2. *Bell Comm.* 214. *et seq.*

²⁶ In computing the sixty days, both under the *Stat. 1696* and the existing bankrupt acts, the analogy of the case of deathbed, *supr. B. 3. t. 8. § 96. not.*³⁴¹, has been followed:—The day of the bankruptcy is excluded; and, counting from it, the sixty days are held as complete, provided there intervene, 1. Fifty-nine entire days, reckoning backwards from midnight to midnight, and, 2. Any portion, however small, of the sixtieth free day. This will be more intelligible on attending to the cases. In *Blaikie*, 21. Jan. 1809, *Fac. Coll.*, the document under challenge was dated 31. March, and the bankruptcy took place on 30. May:—In *Anderson*, 2. March 1818, *Ibid.*, the diligence challenged bore date 9. Dec. and the subsequent sequestration, 7. Feb.:—In both cases the court held the challenge excluded, in respect that the bankruptcy had not occurred within the sixty days. The result, as stated by Mr Bell, seems, therefore, to be inaccurate,—that “any deed granted at any time subsequent to the sixty-first midnight from the completion of the bankruptcy, falls under the rule;” 2. *Comm.* 184. From the above examples, (which are likewise cited by Mr Bell,) it is obvious, that a deed executed at any time between the sixty-first and the sixtieth midnight, would be unchallengeable.

²⁷ How far, after reduction of the preference, the original right held by the creditor revives, see 2. *Bell Comm.* 244;—and compare *Fac. Coll. Black*, 15. Dec. 1814; *Ritchie*, 27. Nov. 1821, (S. & D.); *Balfour*, 18. June 1822, *ib.*

²⁸ *Blackburn*, 22. Feb. 1810, *Fac. Coll.*

Book IV.

What are the characters of bankruptcy.

a debt thus extinguished cannot revive by the debtor's subsequent bankruptcy, if he was not, when the payment was made, bankrupt according to the description of the act; *Jan. 26. 1751, Forbes* (DICT. p. 1128).

42. One single caption is sufficient to constitute bankruptcy in the sense of this act; *Fount. Feb. 8. 1705, Cleland*, (DICT. p. 1086) though it had proceeded on general letters of horning; *Dalr. 30 (Man, July 24. 1702, DICT. p. 1083)**. Nor is it required that the letters of diligence which have issued against the debtor be executed, if he has fled, or retired to shun their execution against the person; *Feb. 24. 1737, Lo. Kilkerran*, (DICT. p. 1091); *Cleland Home, 64, (Davidson, June 29. 1737, DICT. p. 1092)†*. The detention of a debtor for some time in a messenger's custody, if he was discharged from that restraint without imprisonment, has been adjudged not equivalent to imprisonment, in the sense of the act we are now explaining; *Fac. Coll. i. 139, (Woodstone's Creditors, Feb. 18. 1755, DICT. p. 1102)*; because that act having made several innovations and alterations from our former law, ought to receive a strict interpretation, so as it may not affect any debtor who falls not under the precise description of it: But this judgment was reversed upon an appeal, probably from this consideration, that the act being made to prevent frauds, ought to extend to all similar cases, that carry as strong marks of bankruptcy, as most of those specified in the statute ‡. If the debt on which diligence was used for constituting the debtor bankrupt, be paid by him before granting the right in favour of his creditor, such right is secure against any action of reduction upon the statute; but if diligence be only superseded for a while by the creditor, all rights granted by the debtor, during that suspension of diligence, may be set aside; *Kames, Rem. Decis. 118, (Hopeton, Nov. 9. 1750, DICT. p. 1190)*.

43.

* An act of warding, (explained *infra*, tit. 3. § 16), though a warrant of imprisonment, is not, as to this question, equivalent to letters of caption; *Kilk. No. 5, voce BANKRUPT, in fine, Snodgrass, Nov. 13. 1744, DICT. p. 1209*; (see another report, DICT. p. 1095; also 2. *Bell Comm. 174*).

General letters of horning, (*vid.* 1690, c. 13,—having been followed by caption),—were found sufficient; *Fount. July 25. 1702, Man, DICT. p. 1006, (Bell, Ibid.)*.

† *Fac. Coll. June 25. 1782, Ross, DICT. p. 1111; Ibid. July 4. 1783, Young, DICT. p. 1112; Ibid. August 9. 1785, Spedding, DICT. p. 1113, (2 Bell Comm. 178.)*

‡ This judgment of the House of Lords was followed, *Fac. Coll. Nov. 23. 1771, Macadam, &c. DICT. App. voce BANKRUPT, No. 8; Ibid. July 5. 1774, Fraser, DICT. p. 1109*. Where the debtor was apprehended, but liberated before imprisonment, and even without having been taken into custody, this was held not to bring him under the description contained in the statute; *Fac. Coll. March 3. 1768, Elliot, DICT. p. 1108; Ibid. Nov. 17. 1785, Gibb, DICT. p. 1113³⁵*. See a special case, *Ibid. March 1. 1791, Mackellar, DICT. p. 1114*.

The debtor's imprisonment, retiring, absconding, or resistance, may be proved, not merely by the messenger's execution, but *prout de jure*; *Fount. Feb. 8. 1705, Creditors of Cleland, DICT. p. 1086; Fac. Coll. July 4. 1775, Carron Company, DICT. p. 1110; Ibid. Jan. 14. 1789, Richmond, &c. DICT. p. 1113; Ibid. March 1. 1791, Mackellar, DICT. 1114³⁶*. See *Ibid. Jan. 21. 1767, Finlays, DICT. p. 1106, (commented on, 2. Bell Comm. 178.*

³⁵ See to the same effect, *Ewing, 17. May 1808, Fac. Coll.; Stewart, 17. June 1808, Ibid.; Blaikie, 21. Jan. 1809, Ibid.* In all of these cases, it was held, that, to infer an effectual imprisonment, in the sense of the statute, it is essential that the taking into custody shall be, not a mere placing of the debtor under a certain measure of constraint, but a formal and completed act, attended with certain known and customary solemnities, as to which see *Stair, B. 4. t. 47. § 14; Bankt. B. 3. t. 5. § 15; 2. Bell Comm. 523; Duty of a Messenger, p. 6*. "It is not sufficient custody that the messenger come into the presence of the debtor, or even declare him his prisoner; unless he shall do so with the solemnities requisite to an effectual taking into custody;" 2. *Bell Comm. 176*. But the act of taking into custody being once duly completed, the shortness of the period of detention is immaterial:—"There is no room for going into a distinction as to the time or number of hours of a bankrupt being in the messenger's custody;" *Fraser, supr. not. †; Bell, ubi supr.*

³⁶ See to the same effect, 2. *Bell Comm. 177, et seq.*

Book IV.

Remedies competent to creditors whose debts are contracted after the alienation, or prior to it, where fraud appears from the face of the right.

ii. 151, (*Maxwell*, Dec. 20. 1758, DICT. p. 1242) ⁴¹. Where seisin is taken upon a bond or disposition more than sixty days before the bankruptcy, but not registered till within the sixty days, the words of the act are strictly adhered to, which make the date of the seisin, and not of the registration, the rule by which to judge of the constructive date of the bond: Such bond therefore being in the judgment of law granted more than sixty days before the bankruptcy, cannot fall within the limiting clause of the statute; *Br. 73*, (*Menzies*, Feb. 17. 1715, DICT. p. 1226) * ⁴².

44. Creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the two statutes now explained, are not excluded from the remedies competent to them by the common rules of law ⁴³. They are therefore entitled to an action for setting aside every right granted by the debtor to their prejudice, though previously to their own ground of debt, if it carry in it evident marks of fraud; such as a disposition *omnium bonorum*, especially if it be granted to a son, or where the granter, notwithstanding the right, continues to act as proprietor; *Stair*, July 2. 1673, *Street*, (DICT. p. 4914) ⁴⁴. Much more is this right of reduction competent to creditors, whose grounds of debt are prior to the alienation, if fraud appear *ex facie* of the right, though their reasons of reduction can receive no support from any of the two statutes before mentioned. Thus a security granted by a debtor knowing himself insolvent, in favour of one set of creditors, to the exclusion of another creditor equally onerous, without being pressed to it by diligence, was adjudged to lay no foundation of a preference to the creditors favoured; *Kames, Rem. Decis. 95*, (*Grant Nov. 10. 1748*, DICT. p. 949). In that case it was admitted, tha

* The same judgment was pronounced, *Fac. Coll. Dec. 13. 1782*, *Douglas, Hero and Company*, DICT. p. 1244. If the conveyance is made in favour of the granter superior, in the form of an instrument of resignation *ad remanentiam*, the date and the registration of the instrument is in like manner the rule; *Kilk. No. 12, voce BANKRUPT*, *Dickson*, Nov. 7. 1749, DICT. p. 1241. An assignation of a personal right, regulated by its own date, not by that of the intimation; *Fac. Coll. July 8. 1788*, *H* DICT. p. 1194 ⁴².

As to the effect of an absolute disposition, qualified by a back bond, as a security for future debt, see *Ibid.* 251, and vol. i. (5th edit.) p. 672 and 684.

⁴¹ See also *B. of Scotland*, 7. Feb. 1811, *Fac. Coll.*; 2. *Bell Comm.* 231. *et seq.*; But may it not be doubted, whether this doctrine of *novum debitum* has not been carried by the court somewhat beyond the reach of strict principle?

⁴² It has since been enacted, "That in all questions upon the said act in the year 1696, or this present act, the dispositions, heritable bonds, or other heritable rights, whereupon infestment may follow, shall, in time coming, be reckoned to be of the date of the registration of the seisin lawfully taken thereon, without prejudice to the validity or invalidity of the said heritable rights, in all other respects as formerly;" 54. *Geo. III. c. 137. § 12*. But a disposition or other conveyance, granted by one not himself infest, and holding only a personal title, which he assigns, with the unexecuted procuratory and precept, in favour of the disponee, is not, in the intention of the statute, a deed "whereupon infestment may follow," and therefore is not liable to challenge, although infestment on the assigned procuratory or precept have been delayed, until within the statutory period of sixty days before the granter's bankruptcy; *Wrights*, 19. Jan. 1809, *Fac. Coll.*; *Scott's Creditors*, *supr.* p. 947, *not.*; *Paterson's Creditors*, 10. Jan. 1738, *Elch. v. COMPETITION*, *App.* No. 5.; 2. *Bell Comm.* 241.

It has also been "enacted, That in all questions upon the said statutes, all dispositions, assignations, and venditions, which do not require seisin, but to which intimation or delivery are requisite, in order to render them complete as transferences or as securities, shall be reckoned to be of the date of the intimation, delivery, or other act, requisite for completing the same, without prejudice to their validity in other respects;" 54. *Geo. III. c. 137. § 13*.—See *Russell*, 3. Dec. 1822, (*S. & D.*) and after a remit from the House of Lords, *Fac. Coll.* 3. July 1827, (*Ib.*).

⁴³ See 2. *Bell. Comm.* 255, *et seq.*

⁴⁴ *July 1823*, (*S. & D.*); *Miller*, 31. May 1825, (*S. & D.*)

the creditors preferred were not privy to their debtor's fraud, and was thought sufficient *dolum inesse in re*. This seems contrary to the doctrine of the Roman law, where the *actio Pauliana* was not competent against creditors, unless they were *participes fraudis*, L. 6. 6. 8, & L. 10. § 16, *Quæ in fraud. Cred.* But however that may be, it is uncontroverted, that one who receives payment of his just debt, is not compellable to repay any part of it to the co-creditors, though the payment had been fraudulent on the part of the debtor, if the creditor to whom the payment was made had no knowledge of the fraud; *Fac. Coll.* ii. 243, (*Bean, Aug. 1. 1760, Dict. p. 907*)⁴⁵ *.

45. Dispositions are frequently made by bankrupts in trust for the behoof of their creditors⁴⁶; and our decisions are far from uniform, whether these trust-rights ought to have any effect against creditors who have not acquiesced in them. By the first upon this point, *July 12. 1734, Snee*, (*Dict. p. 1206*), it was adjudged that the bankrupt had no power by any deed of his, to deprive any one of his creditors, who had not consented to it, of the legal right competent to all creditors, of using diligence in the manner they judge most proper for their security or payment, or to impose upon him trustee not of his own choosing. Afterwards, because trust-rights, when executed fairly and without partiality to any one creditor, were frequently found profitable to all the creditors, as they prevented the exhausting the fund of payment by separate diligences, the court sustained them, if the granter of the trust-right was not bankrupt in the precise terms of the act 1696, which requires imprisonment, retiring or absconding from diligence, *Falc. i. Nov. 13. 1744, Snodgrass*, (*Dict. p. 1209, and 1095*); and consequently should not reduce a trust-deed granted by a corporation, *June 5. 1747, Grant*, (*Dict. p. 1097, and p. 1210*); because personal diligence by caption cannot be used against any corporate body. But in the latest decision, *Fac. Coll. ii. 193, (Leith, &c. July 25. 1759, Dict. p. 1212)*, they returned to their first opinion, that no trust-deed, let it be ever so unexceptionable, can stop the diligence of creditors who have not, by some approbatory act, signified their consent to it †.

Trust-dispositions by bankrupts for behoof of their creditors.

46. A declaratory action is that in which some right, either of property or of servitude, or some other inferior right, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender; as declarators of marriage, of irritancy, of the expiration of a reversion, actions for declaring certain feudal casualties to be fallen to the superior, &c. Under this class may be also comprehended such rescissory actions which merely conclude that the deed or right libelled be declared null, without any conclusion against the defender himself. Declarators of the property of heritable subjects are now seldom brought; because all deeds with which property may be charged or burdened, are more effectually forced into the field by an action of reduction or probation, in the summons of which the pursuer inserts a conclusion of his own right or immunity, as a consequence of the void-

Actions of declarator.

* Disposition of moveables by a debtor to a creditor, *retenta possessione*, presumed fraudulent. See *Dict. voce FRAUD*, Sect. 5, and *voce PRESUMPTION*, Division 9.

† There are other decisions to the same purpose; but that point appears now to be finally settled the other way, viz. that where a debtor, though insolvent, has not been rendered bankrupt in terms of the statute 1696, c. 5, a trust-disposition by him for behoof of his whole creditors will be effectual, *Kames, Sel. Decis. No. 249, Mackell, July 30. 1766, Dict. p. 894; Fac. Coll. Feb. 24. 1769, Watson, Dict. p. 1220; Ibid. Dec. 8. 1791, Hutchison, Dict. p. 1221*⁴⁷.

⁴⁵ *Broadfoot, 9. Dec. 1808, Fac. Coll.* ⁴⁶ See 2. *Bell Comm. 580, et seq.*

⁴⁷ 2. *Bell Comm. 586; see Fac. Coll. Strang, 12. May 1821, (S. & D.).*

Book IV.

Petitory and
possessory ac-
tions.

Action of mo-
lestation, and
action on a brief
of perambula-
tion.

ing that of his adversary. Decrees upon actions properly declaratory confer no new right; they only declare that an antecedent right was in the pursuer, and so have a retrospective quality, looking as far back as the period at which that right first commenced, as in the declarator of liferent escheat; but, as has been already observed, this character is not applicable to many of our decrees, which are improperly called declaratory. Actions of declarator, because they conclude nothing against the defender, may be prosecuted against an apparent heir, without any previous charge given him to enter heir unless special circumstances shall require a charge; *Dec. 11. 1638, Finlayson, (Dict. p. 2170); St. B. 4. t. 5. § 3 **.

47. Petitory actions are so called, not because something is sought to be awarded by the judge; for in that sense all actions must be petitory; but because some demand is made upon the defender, in consequence either of a right of property or credit in the pursuer. Thus, actions for restitution of moveables, actions of poinding, of forthcoming, and indeed all personal actions upon contracts, or *quasi* contracts, which the Romans called *condictiones*, are petitory. Possessory actions are those in which the point of right is not directly concerned, but barely that of possession. They are competent, either for attaining possession, for holding it after it is got, or for recovering it after it has been lost, analogous to the interdicts of the Roman law, *Quorum bonorum, Uti possidetis, and Unde vi*. The actions of our law for recovering possession, which come in place of the interdict *Unde vi*, are those of spuilzie, intrusion, and ejection; of which *vid. supr. B. 3. t. 7. § 16*. In some possessory actions, a title in writing must be produced, as in removing and molestations; others are grounded on possession alone as ejections and spuilzies.

48. An action of molestation is a possessory action, calculated for continuing proprietors of land-estates in the lawful possession of them, till the point of right be determined against all who shall attempt to disturb their possession. It is chiefly used in questions of commonty and controverted marches. Before the year 1580, much time was consumed in those actions by the court of session, who examined before themselves all the witnesses adduced by the parties, without being able to come at so distinct a knowledge of the facts, as if the proof had been taken upon the controverted grounds. An act of sederunt was therefore made that year, ratified by 1587, c. 42, by which all actions of molestation *in possessorio*, whether of property or commonty, were to be remitted by the session to the sheriff of the county where the lands lie, who was by the act empowered to take cognition of the marches, and to put the facts contained in the libel and defences to the knowledge of an inquest, consisting of those who resided in the parish, most of them landed men. This process was therefore called an action of *cognition*; but is now quite in disuse; for the session, in place of remitting the cause to the judge-ordinary, allow the proof to be brought before themselves, or appoint it to be taken by special commissioners, who afterwards report it to the court of session, in order to their determination †. Where a declarator of property is conjoined with an action of molestation, it falls under the proper or exclusive cognisance of the session. Actions upon brieves of perambulation, 1579, c. 79, have the like general tendency with actions of molestation, viz. the settling of marches between conterminous lands. The difference commonly stated between the two is, that

* See *Fac. Coll. June 13. 1795, Earl of Dumfries, Dict. p. 12008.*

† See *Historical Law-Tracts, vol. ii. p. 15.*

Book IV.

Accessory actions.

Exhibition.

title posterior to that of the pursuer, who must in such case obtain a decree annulling the defender's title of possession, before he can have access to the rents, *St. B. 4. tit. 26. § 3**.

52. The chief accessory actions which do not subsist by themselves, but merely prepare the way for, or are subservient to other actions, are those of exhibition of writings, of transumps, of proving the tenor, of transference, and of wakening. An action of exhibition, when it is grounded on a right of property in the deeds libelled, is without doubt a principal action, which subsists by itself; and, being real, may be insisted in by the proprietor against every one who holds the deeds in his custody, not barely that they may be exhibited in court, but that they may be delivered to him the pursuer, to be used by him as his own property; see *St. B. 1. t. 7. § 14⁵¹*. But such actions of exhibition as are intended for the sole purpose of forcing the production of writings for serving a special purpose of the pursuer, are barely accessory. Of this kind are exhibitions *ad deliberandum*; of which see *supr. B. 3. t. 8. § 56, 57*. Such also were exhibitions pursued by a party in a suit, who wanted to prove a special fact by writings in the possession of third persons, against these possessors or havers, that the writings might be exhibited in court, in proof of his allegation. This formerly required a tedious process; *St. B. 4. t. 41. § 4, 5*; but is now effected summarily, by way of incident diligence, which is granted in the principal action against the havers. The persons cited upon this diligence must either exhibit the writings called for, or must depose, that they neither have them, nor had them since the citation, nor have fraudulently put them out of their custody, to frustrate a future citation, nor suspect by whom they were taken away, or where they presently are⁵². If the user of the diligence be not satisfied with the defender's oath in those general terms, he may, by act of sederunt, *Feb. 22. 1688*, put special interrogatories to him, the better to discover the truth. Not only third parties, but the defender in the principal cause, may be compelled by the pursuer to exhibit the writings in his custody that are necessary for proving the libel; and, in like manner, the pursuer must exhibit such writings in his hands as may be proper to verify the defender's plea: But in these cases the writings called for must be particularly specified or described; for if a general description, or, in our law style, condescendence, were sufficient, one might, upon irrelevant or vague allegations, compel his adversary to expose to him his whole title-deeds, with all their defects; *June 26. 1735, Scot. (Dict. p. 3965) †*. Under this limitation the rule is to be understood, *Nemo tenetur edere instrumenta contra se*.

Transumpt.

53. An action of transumpt, which is also accessory, is competent to any person who has a partial interest in a writing, or immediate use for it to support his titles or defences in other actions, against him in whose custody the writing lies, to exhibit it, that so a transumpt thereof may be judicially made out, and delivered to the pursuer. This action may be pursued before the judge-ordinary.

* See *Fac. Coll. Jan. 17. 1766, Macadam, Dict. p. 2755*. As to the powers of an inferior court to judge in the question of possessory judgment, see *Kilk. No. 1, voce Possessory Judgment; Somervell, Dec. 11. 1739, Dict. p. 10653*.

† Reported by Clerk Home, No. 67, under date *July 8. 1737, Dict. p. 358; Fac. Coll. August 8. 1783, Lady Mary Campbell, Dict. p. 3973*.

⁵¹ See *Campbell, 25. Feb. 1824, (S. & D.)*; reversed on appeal.

⁵² Public officers are bound, as havers, to produce communications received from private informers, to be used as evidence against the latter, in an action at the instance of the party informed upon; *Leven, 8. March 1814, Fac. Coll.; Vass, 20. Feb. 1818, Ibid.*;—but not official reports, &c. made by themselves, or by other public servants, in the discharge of their official duty; *Young & Co. 27. Feb. 1816, Ibid.*

The pursuer's title in it is most commonly an obligation signed by the defender to grant transumps: But though there should be no such obligation, the action lies if the pursuer can prove that he has an interest in the writings, *ex. gr.* that they make part of the title-deeds of his lands; but in that case he must bear the whole expense of transuming. After the writings are produced in court, just duplicates of them are made out, collated, and signed by the clerk, which are called *transumps*, and are, by the decree of the judge, declared to bear as full faith or credit as an extract from the record of that court. As therefore an extract from a proper record is as effectual as the principal writing, except in an action of proper improbation, so is a decree of transumpt: And as when a deed, of which an extract is produced, is excepted to on the head of falsehood, a warrant is granted to bring the original deed from the register-office; so when a decree of transumpt is questioned upon a ground of falsehood alleged against the writing transumed, the user of the transumpt must produce the principal writing; for which purpose, he may obtain a diligence against havers for exhibiting it; and if it be not produced, certification will be granted against it. The parties chiefly interested in the deeds to be transumed, both granters and grantees, or their representatives, must either be made parties to the suit, or consent expressly to the transuming of the deeds; but all others who pretend interest may be cited edictally; *Fount. Dec.* 13. 1699, *Telfer*, (DICT. p. 2246); *Fac. Coll.* ii. 98, (*Duncans*, Feb. 14. 1758, DICT. p. 16161); *St. B.* 4. tit. 31. § 5.

54. The action of proving the tenor is sometimes carried on by itself, without a view to any other, and then it may be considered as declaratory, but it is most frequently used as an accessory action. It may be defined, An action, by which the tenor of a writing which is lost or destroyed is endeavoured to be made up. The Romans had a remedy of the same kind, by which one who had lost or mislaid a deed, might bring evidence of the accident whereby it was lost, and of its contents; *L. 18. in fin. C. De testib.* By our old law, such questions were tried by an inquest, whose verdict, that the deed truly existed, supplied the place of the lost deed; *Q. Attach. c.* 55. § 6; *Vid. supr. B. 2. t. 1.* § 11. Because it ought to appear to the court, not only that the deed said to be lost was once a genuine deed, but that it is a right or obligation not yet extinguished, the pursuer must libel and prove the *casus amissionis*, or the accident by which it came to be lost, before the tenor of it be admitted to proof. In obligations which are extinguishable barely by the debtor's destroying and cancelling them, *ex. gr.* in personal unregistered bonds, where the debtor who makes payment rests frequently secure by getting up the obligation from the creditor, and destroying it, such a special *casus amissionis* must be proved, as may shew that the bond was lost while in the creditor's hands by some particular accident, *ex. gr.* fire, robbery, shipwreck, or other such misfortune; otherwise bonds²⁶ truly paid might be again demanded from the debtor as obligations still subsisting; *St. B.* 4. tit. 32. § 3*. But in deeds which are intended to remain constantly

Proving the tenor.

Casus amissionis.

* See *Fac. Coll. Feb.* 22. 1780, *Campbell*, DICT. p. 15828; *Ibid. July* 21. 1787, *Donald*, DICT. p. 15831. See also *Kilk. No.* 3, *voce* TENOR, *A.* against *B.* Nov. 21. 1749, DICT. p. 15823.

²⁶ So also, as to bills; *Campbell, supr. not. **; *Carson*, 14. May 1811, *Fac. Coll.*; *McFarlane*, 1. March 1826, (*S. & D.*).

Book IV.

How the tenor
of a writing
may be proved.
Adminicles in
writing.

The whole con-
tents of the
deed must be
libelled.

Effects of ad-
minicles in wri-
ting.

with the grantee, or which require contrary deeds of renunciation to extinguish them, as dispositions, seisins, wadsets, &c. or where the debtor who makes payment does not commonly choose to rely for their extinction on the bare cancelling of them, as assignations, &c. a more general *casus amissionis* is sufficient; *St. B. 4. tit. 32. § 4*; insomuch, that most lawyers are of opinion, that it is sufficient to libel, that the deed was lost *any how*, even *casu fortuito* *⁶⁷.

55. The tenor of a writing may be proved, either by the oath of the granter, or by writing, or by parole evidence. When it is to be proved by the testimony of witnesses, the pursuer ought, in the general case, to produce some adminicle in writing, *i. e.* some collateral deed referring to that which was lost, in order to found the action before the tenor be admitted to proof; because writings, as they are seldom extinguished, neither ought they to be reared up against any one merely upon parole evidence. But in personal obligations, where a special *casus amissionis* is proved, *ex. gr.* that the writing, while in the creditor's possession, was taken from him by violence, or consumed by fire, adminicles in writing are dispensed with, from the necessity of the case; *St. B. 4. t. 32. § 7*; see *Durie, July 19. 1636, Lo. Frendraught*, (Dict. p. 15788). And indeed as personal bonds granted by debtors of good credit are seldom registered, nor have any posterior writings referring to them, the benefit of this action would be utterly lost to the creditor, if written adminicles were necessary in such cases, since relative writing cannot be produced, where none such ever existed. As adminicles in writing are designed merely *fidem facere judici*, that the deed libelled did truly exist, writings, though not probative, nay bare scrolls of writings, referring to the lost writing as a finished deed, are sufficient for admitting the tenor to a proof by witnesses, where it appears that they are framed before bringing the action, and so not calculated to serve that special turn; 1722, *Erskine contra Preston*, (not reported).

56. Where the tenor of an obligation, disposition, or other ground of debt or of right, is to be proved, the whole contents of the deed must be libelled, with all its limitations and provisos, otherwise a right might be reared up of a quite different nature or extent from that which is lost. If the writings produced as adminicles are in themselves probative, and recite the full contents of the deed lost, the tenor ought to be found proved upon these adminicles, without the aid of any parole evidence, *St. B. 4. t. 32. § 10*; *Fount. June 2. 1712, Inglis*, (Dict. p. 2744) †. And adminicles, though they should only refer to the deed lost in more general terms, since they afford a presumptive evidence of the existence of the lost deed, are a sufficient foundation for admitting the tenor to be proved by the testimony of witnesses; but if the witnesses adduced do not in such case depose, that they saw the deed signed agreeably to all the legal solemnities,

* *Kilk. No. 3, voce TENOR, A. against B. Nov. 21. 1749, Dict. p. 15823; Fac. Coll. June 29. 1781, Duke of Argyle, Dict. p. 15828.*

† *Dec. 11. 1766, Hon. George Mackay against Earl of Lauderdale, affirmed on appeal, March 21. 1770, (not reported.)*

⁶⁷ See a valuable discussion on this subject, *Forbes' Trustees*, 1. March 1827, *S. & D. (Fac. Coll.)*. See also *Moffat*, 31. Jan. 1809, *Fac. Coll.* In both of these cases, the court decerned in a proving of the tenor, though there was no special *casus amissionis* established. See also *Stair, B. 4. t. 32. § 6, 7; Bankt. B. 4. t. 29. § 2.*

TITLE I.

solemnities, and that it was of like substance with that which was libelled, the process must fall, notwithstanding these general references in the written adminicles.

57. It had been long held for a rule, not to sustain the proof of a tenor, without bringing evidence who the writer and witnesses to the deed were, because the want of these infers a statutory nullity, *Forbes*, July 17. 1713, *Blackwood*, (DICT. p. 15819); and the few judgments pronounced contrary to this rule, proceeded upon special circumstances; *Stair*, Jan. 13. 1681, *Calderwood*, (DICT. p. 15800); *Dalr.* 79. (*Trotter*, June 14. 1707, DICT. p. 15811). By this means the use of proving of the tenor was brought within too narrow limits; for it was seldom in a creditor's power to bring evidence of that fact, especially when the proof was to be brought at any considerable distance of time from the date of the lost deed. But as the decision in the case of *Blackwood*, sustaining that objection, was reversed upon appeal, it is not likely that it will be received for the future against a proof of the tenor*.

58. By 1579, c. 94, the tenor of letters of horning, and their executions, which are lost, and never were judicially produced, cannot be proved by witnesses; but the statute does not seem to exclude a proof of their tenor by written adminicles. This at least is certain, that the act being correctory, and designed to prevent the bringing again to life that diligence which drew after it such heavy penalties, is to be confined to letters of horning, and not to be stretched against every judicial act, such as decrees; *Dalr.* 53. (*Lord Register*, Dec. 26. 1704, DICT. p. 15810.) For though many solemnities are required in decrees, the defects of which might be covered by admitting a proof of their tenor, the same objection lies against extrajudicial deeds, that have also their peculiar forms, without which they are null; and indeed a more forcible one; for in judicial acts, public persons intervene *ex officio*, who are presumed to do their office agreeably to law. Nay, a proof is admitted, by our practice, of the tenor of decrees of apprising, though these are, of all others, the most encumbered with solemnities; *Dirl.* 283, *Birnie*, June 29. 1675, DICT. p. 15796) †. The cognisance of this action, from its importance, and from the dangerous consequences which might follow if the tenor of deeds were to be sustained, which either never existed, or laboured under nullities, or have been since extinguished, is appropriated to the court of session. The witnesses were, by the former practice, examined, not by any one ordinary, but in presence of the court; and when a witness could not, through age or other infirmity, be brought into court, the judges named

It is unnecessary to bring evidence of the writer's name and witnesses.

Whether the tenor of all writings can be proved.

* As to the proof necessary in proving the tenor of holograph writings, see *Fac. Coll.* June 16. 1784, *Fraser*, DICT. p. 15830.

† See *Dirlton's Doubts and Stewart's Answers*, p. 306. See also *March* 13. 1707, *Lady Airth*, *Fount.* vol. ii. p. 359, *Forbes*, p. 171, DICT. p. 15813. The court show still more indulgence in an action for proving the tenor of decrees of the commissary-court of teinds, brought in consequence of the statute 1707, c. 9, (see *supra*, B. i. tit. 5. § 22); and for this there is sufficient reason. A decree of valuation of teinds, in particular, does not, like a decree of apprising or adjudication, involve the interests of a great variety of parties: It is an act of property competent *de jure* to every proprietor; and it may fairly be presumed, that, at the time when the process of valuation of teinds was prescribed by law, all the landholders in Scotland would avail themselves of a right so important; *Feb.* 3. 1796, *Carre*, (not reported).

Similar to the regulations in *Statute* 1707, are those of 8. Geo. I, c. 28, as to the records of the commissary-court of Aberdeen. See the remedy prescribed to those whose title-deeds were destroyed by the rebels, *anno* 1745, 20. Geo. II. c. 20; 21. Geo. II. c. 17.

Book IV.

Effect of a
decree proving
the tenor.

Action of trans-
ference *activè*
and *passivè*.
Requisites in
each.

Statute 1693,
respecting
transference.

named one or two of their own number to examine him * ; but this strictness hath been of late overlooked ²⁸.

59. A 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 ²⁹. Improbation upon the head of falsehood may, without doubt, be offered against it ; for it ought to be in no man's power, by destroying a forged deed, and afterwards proving its tenor, to preclude the other party from insisting on the grounds which would have been competent to him for declaring it false, had it not been destroyed : But the pursuer, in such improbation, must have small hopes of success, if the tenor has been proved either by the writer and instrumentary witnesses, or even by the testimony of others, deposing that they saw a deed of the tenor libelled, without any appearance of vitiating or forgery, duly signed by the granter and witnesses †.

60. The action of transference is also accessory. Where, during the dependence of a suit, either party dies, the action, before it can be further proceeded in, must be transferred from the deceased to some person alive who represents him. If the pursuer be dead, it is called a transference *activè* ; because the title to pursue is an active title which must be transferred from the deceased pursuer to his representative. Where the defender dies, it gets the name of a transference *passivè* ; because there it is the title to be pursued, which is a passive title, that falls to be transferred. In a transference *activè*, the pursuer must be previously served heir ; or if the subject in dispute be moveable, he must make up such a title to it as is proper to moveables ; for till then he can have no interest to demand a transference. But an action may be transferred *passivè* against a defender's heir, whether he be served heir or not ; because the wilfulness of a debtor's heir ought not to bar the creditor from constituting his debt. Yet a transference cannot proceed against the debtor's apparent heir, till the *annus deliberandi* be expired : And the pursuer in the transference ought first to charge him to enter heir, if he cannot otherwise fix a passive title against him.

61. By 1693, c. 15, the necessity of transferring *activè* is taken away, so that the pursuer's representative in the subject may, without any new form of law, insist in the principal cause, as his ancestor might have done, upon producing his retour or confirmed testament, or special assignation ³⁰ : But transferees *passivè* continue on the former footing ; because it was necessary to give previous notice to the heir of the deceased defender, before he should be obliged to defend against a suit, of which perhaps he knew nothing before ‡. Transferees being only incidental to other actions,

proceed

* See *Kilk. No. 4, voce TENOR, Gordon, Feb. 28. 1752, Dict. p. 15823.*

† See cases in which a formal proving of the tenor was dispensed with ; *Kilk. No. 1, voce TENOR, Maxwell, Nov. 9. 1742, Dict. p. 15820 ; Kames, Sel. Decis. No. 56, Synod of Merse, Nov. 21. 1753, Dict. p. 15823.*

‡ See *Acts of Sederunt, July 26. 1688 ; Feb. 23. 1723, § 4 ; and Feb. 19. 1742.*

²⁸ The court, however, again refused to grant commission to an inferior judge for examining witnesses in a proving of the tenor ; *Ferrier, 14. May 1823, (S. & D.)*

²⁹ Where the original deed had been conditionally deposited with a third party, the court, reserving the rights of all concerned, ordained that only one extract should be given out of their decree, "and that one to be placed in the hands of the same depository, to be held by him under the same conditions as he held the said original," *Ferrier, 7. July 1824, (S. & D.)*

³⁰ In order to bring the case under the statute, it is not necessary that there be a special assignation of the action ; it is enough that there be such an assignation of the right, or subject to which the action relates ; *Kyle, 30. Nov. 1821, Fac. Coll. (S. & D.)*

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For though in some actions which are in part penal, the pursuer may either restrict his libel to the real damage, or, if he think fit, insist also for the violent profits, as in spuilzies; yet if he shall once restrict his demand to simple restitution, he cannot afterwards sue for the violent profits, though three years should not be elapsed after committing the spuilzie. Our law, however, admits a course of actions, in the special case of facts which may be prosecuted either criminally or civilly; for criminal actions have a different pursuer, and are designed to serve quite a different purpose from civil. Facts are tried criminally at the suit of a public prosecutor, to satisfy the public justice; but civil actions, even when they arise from a delinquency, are brought by the private party for his own redress or indemnification, from which it would be unjust to preclude him, merely because the public resentment is already satisfied. Nay, though in a criminal trial the pannel should be absolved, the private party may insist *ad civilem effectum*; because in criminal trials, nothing can be referred to the pannel's oath, who cannot be compelled to swear against himself, where either life, limb, or forfeiture of goods, is at stake. But as every fact may be referred to the pursuer's oath in a process which is pursued merely to a civil effect³², the pannel, though he should be absolved from the crime, for want of proper evidence by witnesses, may be sued by the private party for recovery of his debt and damages in a civil action, where the pursuer may have the benefit of his oath.

Accumulation
of actions.

65. Actions are said to be accumulated, where different actions are included in one libel. This was not admitted by the Romans, though the several actions had been founded upon the same ground of right, *L. 43. § 1, De reg. jur.*; for they had a different *formula* for every different species of action, which it behoved the prætor to observe, when he remitted the cause to the *judex pedaneus*: But where one had several distinct claims against another, all which proceeded on obligations of the same nature, and were productive of the same species of action, he might by that law have thrown all his claims into one libel; because there, all the actions being of the same species, one *formula* served for all. Thus, if Titius had entered into a copartnership with Seius, first in one branch of trade, and afterwards in another distinct from the first, he might have sued his partner upon both copartneries in one and the same libel, because it was the same action *pro socio*, which arose from both contracts; *L. 52. § 14, Pro soc.*; *L. 25. § 3, Fam. ercisc.* We who are strangers to the Roman *formulae*, daily comprehend in the same libel, different conclusions upon the same ground of right, rescissory, declaratory, and petitory, if they be not repugnant to each other. Thus, where a pursuer is to set aside a deed by which a consequential right accrues to himself, he may libel, not only a reduction of the defender's right, but a declarator of his own, in the same summons. And though my right of action against the defender should arise from different grounds of debt, *ex. gr.* if he was debtor to me in one sum by bond, in another by contract, and in a third for which I can bring no proof but his oath, all these separate claims may be engrossed in one libel. This holds, not only where the same person is debtor in all the grounds of debt, but where the debtors

³² *Vid. infr. t. 2. § 9, in fin.*

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is justly accounted to have passed from all his dilatory defences³⁶. Those dilatory defences, which are grounded upon informalities in the libel or executions, and are called *no-processes*, proceed frequently from a diffidence in the defender of the justice of his cause, or from an unjustifiable view of heaping up unnecessary costs upon the adverse party, and are therefore unfavourably received by the judge. Hence a defender cannot offer, first one dilatory defence, and after that another, but must make them all at once, *Act of sederunt, Nov. 20. 1711, § 16*: Hence, also, they must be instantly verified, unless they be offered *peremptorie*, *St. B. 4. tit. 39, § 13*; that is, as Lord Bankton explains it, *B. 4. t. 25, § 3*, the defender, if he fail in the proof of his dilatory defence, must submit to a sentence condemnatory, in the same manner as if the defence, in the proof of which he failed, had been peremptory. But as dilatory defences, when they arise from a right conferred by law on the defender, have nothing unfavourable in their character, he who pleads such a defence, if he should not be able to verify it instantly, is allowed a reasonable time to prove it; *Stair, Feb. 24. 1676, Kello*, (*DICT. p. 12068*). Lord Stair, *B. 4. tit. 39. § 14*, reckons the declinature of a judge as a species of dilatory defence: But a declinature is not a defence of any kind, but, on the contrary, an express refusing to make defences; for it is an intimation by the defender to the court, or a protestation entered there, that he does not acknowledge its jurisdiction, nor think himself bound to appear before it.

Peremptory defences are in general competent at any time before sentence.
Exceptions.

68. Peremptory defences, because they are drawn from the cause itself, need not be made at once, nor in any determinate or fixed order, but may be offered at any time before sentence, *L. 2. C. Sent. resc. non posse*³⁶. Though, therefore, a defender should deny the libel, he may, on the pursuer's proving it, enter a plea, that the debt is paid off or compensated, *L. 43. De reg. jur.*: Or though he should at first offer a defence, which takes for granted the truth of the libel, he may, if he fail in the proof of it, deny the libel itself, *L. 9, De except.*: Yet to discourage affected delays, a rule hath been established in our practice, that if an act before answer, of which *infra, § 69*, hath been extracted in a cause, admitting certain facts to proof, parties are precluded from founding a plea upon any new allegation, though it should be competent, which was neglected to be offered when the act was pronounced, *Act of sederunt, July 23. 1674*. After a defender has undertaken to prove, by way of exception, that any of the pursuer's titles are forged, no other exception is competent to him; and even when he insists upon any exception whatever against the libel, which implies an acknowledgment of it, *ex. gr.* payment or compensation, he must, in the opinion of Lord Stair, *B. 4. tit. 40. § 39*, when he offers it, reserve to himself the exception of improbation, otherwise he will be precluded from it; because where a defender has once acknowledged a libel to be true, he cannot afterwards deny it, unless he reserve to himself that special right of offering improbation against the grounds of debt libelled upon. In proper speech, nothing ought

³⁶ Every defence, both dilatory and peremptory, must now be stated at once, unless the contrary can be shown, in the pursuer's withholding of necessary documents, or otherwise; and, at all events, every defence must be stated before closing the record, parties being entitled to propone new pleas afterwards, only with leave of court; 6. *Geo. IV. c. 120. § 2, 5, 10, 11, &c.*—As to the mode of making up and authenticating the record, see *Ibid. § 4, 7, 10, &c. &c.*

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 Other effects
 of litiſcontesta-
 tion.

70. Besides this effect which our law hath given to full or proper litiſcontestation, *reo præſente*, it hath several other properties, both by the Roman law and ours. In consequence of the judicial contract implied in it, there arises a *nova causa obligationis*; a new quality is communicated to the action, by which, though it be penal, and consequently would, in the common case, fall by the death of the delinquent, it is perpetuated, and made transmissible against heirs; *Forbes, Feb. 7. 1712, Stuart, (Dict. p. 10351); Dec. 1726, Brebner, (not reported) * 38*. Upon the same principle, parties are considered, by litiſcontestation, as acquiescing in what shall be determined by the judge, according as the points contained in the act are or are not proved; *St. B. 4. tit. 40. § 8*. Litiſcontestation also does in sundry instances put the defender *in mala fide* with respect to the *fructus rei alienæ* gathered or received by him; *supr. B. 2. tit. 1. § 29*. And, lastly, the defender is barred from making any dilatory defence after litiſcontestation; *supr. § 67 †*.

Diligences.

71. All acts of litiſcontestation, and all interlocutors whatever, admitting a proof of special facts, whether by writing or witnesses, are carried into execution by letters issuing from the signet of the session, by which the possessors of the writings, and the witnesses, are required to appear before the court on the day fixed, there to make oath upon the points contained in the letters; and they are styled *diligences*, to be explained below, *tit. 2. § 30*. As to the forms observed in the proceedings of the court, during the dependence of a civil action, they seldom dip into points of law, and must in their nature be subject to frequent alterations. They may be collected chiefly from the statute 1672, c. 16, in that branch of it concerning the session, from the articles of regulation settled in the years 1695 and 1696, and from the several acts of sederunt made by the session for regulating the forms of judicial proceedings³⁹. It shall only be observed upon this head, that by the ancient practice, parties, after having been heard by themselves or their counsel, withdrew from the court; after which the judges reasoned on the cause, and pronounced judgment in it with shut doors: But now, by 1693, c. 26, all civil causes must be advised (*i. e.* considered and decided) with open doors, that parties may have an opportunity of setting right the judges in any fact which appears to have been either overlooked or misapprehended by them †.

Forms of court.

TIT.

* In an action which had originated in a complaint made to the dean of guild court by a private party, with concurrence of the procurator-fiscal, against an innkeeper, for using deficient measures, the dean of guild imposed a considerable fine, payable to the fiscal, for behoof of a public charity, and gave a sum of damages to the private complainer, besides awarding full costs of suit. During the discussion of a suspension the defender died; and the court found, that the action being purely criminal, could not proceed against his heir; *Fac. Coll. Feb. 18. 1773, Gray, Dict. p. 10361*.

† See remarks on this subject in *L. Kames' Elucidations*, art. 22, LITISCONTESTATION.

‡ Perhaps the conclusion of this comprehensive title is the most proper place to mention, that, since the death of Mr ERSKINE, a new system of distribution of the estates of merchants and manufacturers becoming bankrupts, has been introduced, and gradually improved in three successive statutes, 12. Geo. III. c. 72; 23. Geo. III. c. 18; and 33. Geo. III. c. 74; (continued by 39. Geo. III. c. 53, and by 44. Geo. III. c. 24)⁴⁰. The subject is fully and ably discussed in COMMENTARIES on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence in relation to Bankruptcy, Competitions
 of

³⁸ *Montgomery, supr. not. 37*. See also *supr. h. t. § 14*.

³⁹ *Vid. stat. 48. Geo. III. c. 151; 50. Geo. III. c. 112; 53. Geo. III. c. 64; 59. Geo. III. c. 45;—55. Geo. III. c. 42; 59. Geo. III. c. 35;—6. Geo. IV. c. 120.*

⁴⁰ The existing statute is 54. Geo. III. c. 137, since continued from time to time.

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Order in which
the different
modes of proof
are received.

3. The proper order in which the different methods of proof still received in our law ought to be undertaken by parties, is, first by the writing of the person against whom the proof is brought; for while there is any room for this manner of evidence, the putting of unnecessary oaths to the litigants or witnesses ought to be avoided. Under this head may be included any acknowledgment or confession made by the party, though it should be verbal; in which case, the allegation being instantly verified, needs no term for probation: But if it be a written declaration, not in the hands of him who pleads it, a term is allowed for recovering it by diligence. If the evidence which the party offers by writing be insufficient, he may have recourse, either to the testimony of witnesses, or to his adversary's oath: But if he should first betake himself to the proof by oath, he cannot afterwards use any other mean of probation, for the reason assigned, *infr.* § 8. And, on the other hand, a pursuer who had brought a proof by witnesses, upon an extracted act, was not allowed, after that proof was found insufficient, to have recourse to the oath of the defender; Clerk *Home*, 75, (*Macbrair*, Nov. 18. 1737, Dict. p. 12156)*. Evidence by writing hath not such undoubted force, nor does it secure the party who brings it, so strongly as a proof by oath or by witnesses; for the first writing pleaded as evidence may be rendered ineffectual by a posterior derogator from the first, or may be declared forged upon grounds of probable falsehood: But oaths are not subject to improbation, neither can any proof be received against the testimony of concurring witnesses, though reprobators may be admitted for proving the inability of witnesses; of which, *vid. infr.* § 29.

Proof by writing.

Private deeds.
Merchants' accounts.

4. As to proof by writing, the solemnities essential both to private deeds, and to public, as notarial instruments, and executions by the officers of the law, have been already explained, *B. 3. t. 2. § 15, et seqq.* Sundry private deeds, though not subscribed by the party, are in some respects probative. Thus books of accounts kept by merchants, manufacturers, shopkeepers, and other dealers in business, are, without subscription, probative against themselves whether they be holograph, or written by a clerk; because he who keeps books, is presumed to intend that they should pass for a legal evidence of the state of his affairs, and have the same force if he had signed a declaration subjoined to every article; *Fountain*, July 6. 1710, *Watson*, (Dict. p. 12628). Yet jottings in loose papers not subscribed, ought not to prove against him, though they be written by himself; because these are frequently designed as notes for the memory, where things may be marked as already finished.

* The former practice of the court was such as is stated in the text. It is now, however, understood to be established law, that a pursuer who has undertaken a proof by witnesses, and finds that evidence insufficient to establish his libel, may afterwards have recourse to the oath of the defender, upon renouncing all farther probation. This was the doctrine of the Roman law, *Voet*, Lib. 12. tit. 2. § 11, and it is now adopted into ours. The first decision that introduced the new law was, *Kilk.* No. 8, *voce Process*, Law, June 24. 1747, Dict. p. 12158; and it was farther confirmed by an unanimous judgment of the court, *Fac. Coll. Feb. 4. 1792, Dalziel*, Dict. p. 9407⁴¹.

⁴¹ Reference to oath has since been found competent, even after verdict in the Jury Court, *Clark*, 20. Nov. 1819, *Fac. Coll.*; but the oath was allowed only on payment of previous expenses. This judgment was recognised in *Kirkwood*, 26. June 1823

⁴²—In the general case, reference to oath seems to be competent, even in the House of Lords on appeal; *Reid*, 28. Jan. 1826, (*S. & D.*);

Book IV.

Extract by
clerk of court.

1540, c. 76, declared null, which were extended by such notaries as had not at their admission signed their names, according to their usual way of subscribing, in a book appointed to be kept by the sheriff for that purpose; but that act, if it was ever in observance, soon fell into disuse*. An extract signed by a clerk of court, containing the judicial proceedings that have been had in a law-suit, proves that there were truly such proceedings, because the extract is by the law presumed to be conformable to the interlocutors and other warrants of it: But, *first*, where the extract is challenged *de recenti*, the warrants must be produced, in order to support the legal presumption; and, *2dly*, though extracts should afford sufficient evidence of what was pleaded in judgment by the parties, they are never admitted as evidence of the truth of those pleas; which must be proved *aliunde* by proper vouchers †⁴³. No notarial instrument, execution by a messenger, or extract signed by a clerk of court, can be excepted to, upon an allegation that the subscriber was not a notary, or messenger, or clerk, without a formal action of reduction; for the admitting of such objections in the first instance, would be a great obstruction to the free and ready course of justice. And even in the case of reduction, the subscribers being habite and reputed notaries, &c. would sufficiently support those public instruments or executions against that conclusion; *St. B. 4. tit. 42. § 12.*

History is proof
of ancient facts.

7. In the proof of ancient facts, *ex. gr.* the proximity of blood, primogeniture, &c. histories compiled by writers of credit, near that age when the facts happened, are probative, if they be not contradicted by other historians as ancient, and of equal authority; *St. B. 4. tit. 42. § 16.*

Oath of party
on reference, or
oath of verity.

8. Though one's right may be taken away by his own oath, when, upon a solemn appeal to God, he is forced to acknowledge that his claim is ill founded, or cut off by a just exception; yet it is a self-evident proposition, that no man's right can, in the common case, be either proved by his own oath, or extinguished by that of his adversary; because these are no more than the averments of the parties themselves in their own favour. From this rule, however, there is an exception in the case of oaths, which are called *oaths of verity*, where the pursuer confiding in the defender's veracity, or perhaps sensible that he can bring no other evidence, refers the point in controversy to his oath: For if the defender shall, upon such reference, swear that the pursuer's claim was either groundless from the beginning, or is now extinguished by payment, it is entirely cut off by such oath, though the strongest evidence should be afterwards brought that his claim was good. In the same manner, the right of a pursuer may be proved by his own oath, affirming it to be good, when the defender refers the point in issue to it⁴⁴.

An

* The court of session are in use to authorise notaries public, on proper application being made, to change their names, or the spelling of their names. Of this many instances may be found among the acts of sederunt. See edition 1790, *passim*.

† See *Fac. Coll. Feb. 24. 1767, Machargs, Dict. p. 12541, Maclaurin's Criminal Cases, p. 690.*

⁴³ As to the proof of foreign judgments, see *Robertson, 15. Nov. 1814, Fac. Coll.*

⁴⁴ It is competent to refer to oath at any time before extract; *Aitcheson, 23. May 1823, (S. & D.); M'Lennan, 1. July 1826, (Ib.).* But in the Bill-Chamber, where a bill stands refused by a final judgment, a *subsequent* reference is incompetent, there not being, under such circumstances, any process in court; *Fac. Coll. Young, 16. Dec. 1826, (S. & D.).* As to the competency of a reference to oath in the Jury Court, see *3. Murray, 3.—Vid. supr. § 3. not. 41.* In

An oath of verity has so strong an effect, not because it can work any conviction in the judge from the nature of the evidence; for no single testimony upon oath, of the most unsuspected witness, can be received as evidence; but it depends entirely on the transaction that is supposed to intervene between the party referring, and him who deposes, by which they put the issue of the cause upon what shall be sworn. Accordingly, the Romans considered such oath as a species of transaction, *L. 2. De jurej.*, which consequently had the force of a final judgment: And by our usage also, this contract or transaction is so strictly regarded, that the party referring, cannot afterwards, in a civil action, ground a plea upon any deed against the party deposing inconsistent with his oath; *Kames, 31, (Ferguson, Feb. 2. 1722, Dict. p. 14042)*. It would indeed seem, that though the Roman law refused to admit of any proof by witnesses, in support of a claim that had been sworn to be groundless by an oath upon reference; yet where it appeared by writings afterwards recovered, of which the party deposing could not be ignorant, that he had sworn falsely, he was not allowed to avail himself of his perjury; *L. 13. c. De reb. cred.* But that doctrine, however agreeable it may have been to equity, was hardly to be reconciled to the transaction implied in a reference to a party's oath; for after the oath, the only point to be inquired into is the import of it, *quid juratum est*. Since therefore the party referring cannot afterwards control the oath, either by the production of writings, or the testimony of witnesses, it is a most reasonable practice, for preventing the snares that may be laid for perjury, that the party to whose oath of verity a point is referred, may refuse to swear, till the adverse party not only renounce all other methods of proof, but depose that he knows of none, and particularly, that he is possessed of no probative writing by which he may make good his plea; *St. B. 4. t. 44. § 2*. The party to whose oath a point is referred, sometimes defers it back to the oath of his adversary; but this is not indulged, unless it appear that the person deferring cannot himself depose in the matter with distinctness; so that the judge hath a discretionary power to ordain either of the two parties to make oath whom he has ground to think had the best opportunities of knowing the fact.

9. Stair affirms, *B. 4. t. 44. § 5*, that an oath of verity cannot be put to a party, for supplying the want of a written instrument, if that instrument be not barely a mean of proof, but a solemnity essential to the right, as in seisins, intimations, &c. Thus a debtor, who had made payment to the original creditor, cannot be compelled to swear whether he knew when he made the payment, that the sum was assigned to another; for supposing him to have known that it was, he also knew that intimation was a solemnity necessary for completing the conveyance, without which therefore he was not bound to regard the imperfect assignation; *Durie, March 14. 1626, L. Westraw, (Dict. p. 859)*. But if it be supposed, that the conveyance was properly intimated to the debtor, the written intimation

In what cases an oath of verity cannot be put.

In initio litis, a party may refer particular facts to his adversary's oath, though they do not exhaust the cause; but after a final interlocutor, any reference must embrace the whole cause, or at least such parts of it as will be conclusive of the matter in dispute; *White, 9. Jan. 1812, Fac. Coll.* compared with *Cowan, 21. Nov. 1811, ibi cit. in not.*; *Campbell, 15. June 1822, Ibid. (S. & B.)*; *Ogle, 5. March 1825, (S. & D.)*; *vid. infr. § 15, not. 55.*

In a late case, where the reference was made apparently for the sake of delay, the court sustained it only upon consignation of the debt; *Mainwaring, 4. Feb. 1813, Fac. Coll.*

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An oath of party affects only the litigants and their heirs.

mation of which was afterwards lost, it is hardly to be doubted, that the assignee might refer to the debtor's oath of verity, that the assignment was completed by an intimation made to himself, and that he was thereby put *in mala fide* to make payment to the cedent. Oaths of verity cannot be urged against a defender in any trial properly criminal, so as to compel him to depose against himself, *vid. infr. t. 4. § 94*⁴⁵; but in trespasses where the conclusion draws no deeper than the damage of the person wronged, or a pecuniary fine, a defender may be compelled to swear; as in bloodwits before an inferior judge, *Durie, Feb. 13. 1634, (Tait against Darling, Dict. p. 7300)*; in batteries, *Fount. July 24. 1678, Gordon, (Dict. p. 9397)*, cited in *(Folio) Dict. ii. p. 14*; and in injuries verbal or real, *Clerk Home, 5, (Fiscal of Edinburgh, Jan. 2. 1736, Dict. p. 9400)**.

10. The oath of a party upon reference has full effect in favour of, or against the litigants, their heirs and representatives; and hence, according to the opinion of Stair, *B. 4. t. 44. § 8*, the oath of a *correus debendi*, made upon the creditor's reference, extinguishes the creditor's claim, not only with respect to the swearer, but as to all the other *correi*; because the law considers him to have put the fate of his whole claim upon the oath of him to whom he had referred it. But it is certain, that an oath of verity, however it may be available to third parties in this particular case, (of which there seems great reason to doubt, notwithstanding the authority of Lord Stair,) cannot hurt them in any case, being *res inter alios acta*; *L. 9. § 7. L. 10, De jurej.* Thus, though the creditors of a person deceased may prove their debts by the oath of the executor, *in* so far as the executor's proper interest extends, since all debts may be proved by the oath of the debtor, yet a debt cannot be proved by the oath of the executor, to have been due by the deceased, so as to affect the shares belonging to the widow, next of kin, or creditors of the deceased. As to those portions of the debt, the executor cannot be considered as debtor, but merely as trustee for the debtors; and no debt can be fixed against a truster by the oath of the trustee. Hence also, a bankrupt's oath is not effectual to establish a debt as due by him, to the prejudice of his other creditors †⁴⁶. On the same principle, the reference by a bankrupt to whom a debt is due, to the oath of his debtor, cannot hurt the bankrupt's creditors; *L. 9. § 5, De jurej.* In like manner, a wife's oath, acknowledging

* The same was decided in a prosecution brought by the procurator-fiscal on the statute 1707, c. 13, "for preserving the game," where the prosecutor restricted his claim to one penalty of L.20 Scots; *Fac. Coll. June 27. 1787, Procurator-fiscal of Edinburghshire, Dict. p. 12442.*

† *Stair, Feb. 10. 1680, Morton, Dict. p. 12463; Kames, No. 62, Nairn, Nov. 25. 1725, Dict. p. 12468.* But, by later practice, the bankrupt's oath is admitted, *Kilk. No. 8, 8, and 12, voce PROOF, the cases of Pringle, Blair, and Sinclair, Dict. p. 12473—12475; Fac. Coll. Feb. 26. 1789, Halkerston, Dict. p. 12476; Ibid. Jan. 31. 1787, Buchan, Dict. 11128, (Hailes, 1017.)*

⁴⁵ Nor will they be readily sustained even in civil actions, wherever the tendency of the reference may be to oblige the party to swear *in suam turpitudinem*. See *Roger, 1. July 1823, (S. & D.)*; *M'Callum, 18. Feb. 1825, (Ib.)*; *M'Eachern, 13. May and 17. Dec. 1824, (Ib.)*; *Ritchie, 1. Dec. 1809, and 15. Feb. 1810, in note to Gordon, 22. Nov. 1809, Fac. Coll.*

⁴⁶ "This doctrine is now confined to those cases in which the debtor's evidence is "objectionable, on account of relationship or interest;" 1. *Bell Comm. (5th edit.) 334.* See to the same effect, *Tait, 275, et seqq.* The case of *Campbell, Fraser and Co. 22. Nov. 1823, (S. & D.)*, turned on specialties, and did not, as might otherwise seem from the general terms of the report, encroach on the general doctrine, *Sess. pap.*

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which was referred to oath *. If, on the contrary, the shopkeeper should bring his process after the expiration of the three years, he must prove, either by the writing or oath of the defender, not only that the goods were furnished, but that the price is still due ; consequently, though the defender, to whom the debt is referred, should acknowledge the receipt of the goods, yet if he depose at the same time that he paid the price, the quality contained in the last part of his oath, relating to the payment, must be deemed intrinsic, since not only the constitution, but the subsistence, of the debt, is understood to be referred to oath ; *Fount. Dec. 22. 1702. Nicolson*, (DICT. p. 13211) ; *Forbes, July 6. 1711, Clerk*, (DICT. p. 13213). But in the case of a holograph bond, the granter, who is sued upon it, after elapsing of the vicennial prescription, falls to be condemned in payment of the debt, if, on a reference to his oath he shall acknowledge that the debt † is genuine, though he adjudge a quality that he had made payment of the sum contained in it because the bond continues to be a good ground of debt, even after the twenty years, if it be acknowledged by the granter that he subscribed it, 1669, c. 9 ; and for that reason, it is barely the verity of the granter's subscription, and not payment made by him, which is the point in the libel understood to be referred to his oath. Where the quality which is adjoined to the oath of a defender does not import an extinction of the debt, but resolves barely into a counter claim or *mutua petitio* against the defender, it is considered as extrinsic : If, for instance, he should swear that the debt libelled was indeed just, but that he delivered goods or disbursed money on the pursuer's account to the full amount of it ‡ : for every one who lays his plea upon a counter claim, must bring legal evidence to support it other than his own oath, to which therefore it is not *in dubio* presumed that the pursuer hath referred it ; *Forbes, Dec. 23. 1707, Brown*, (DICT. p. 13224). Nay, though such counter claim were a sufficient ground of compensation, which by the Roman law is accounted an extinction of the debt, the quality has been by our practice adjudged to be extrinsic ; *Stair, Dec. 9. 1664, Learmont*, (DICT. p. 13201) ; because compensation does not operate *ipso jure* by the law of Scotland §.

12.

* It is thought that the author is here in a mistake, by not sufficiently distinguishing between oath of party and other means of proof. A shopkeeper may, within the three years, prove his furnishing by witnesses ; and then it will lie upon the defender to prove payment. Without the three years, witnesses are not admissible to instruct the furnishing, which, therefore, must be proved either by writing or by oath of the defender. A writing, by which the constitution of the debt is proved, is evidence, *per se*, of the debt ; and no farther proof is necessary on the part of the creditor, payment being a defence, which, if alleged, must be proved by the defender. But if the pursuer, for want of other proof of his furnishing, resorts to the oath of party, he, of course, must refer his libel to oath, in order to make a relevancy ; and if the defender acknowledges the furnishing, but adds that he has paid it, this is an *intrinsic* quality, whether within or without the three years, as the pursuer does not allege relevantly, if he only says that he furnished goods to the other party, without adding that they are still due. See the argument in the case, *Fac. Coll. Nov. 18. 1794, Douglas*, DICT. p. 11116⁵².

† This is inaccurately expressed : The author means the *document* of debt. See *supra*, B. iii. tit. 7. § 26.

‡ See this illustrated, *Maclaurin's Observations*, p. 155.

§ This doctrine is supported by *Fac. Coll. iii. 21, Mitchell, Feb. 11. 1761*, DICT. p. 13241 ; *Ibid. June 29. 1799, Rankine*, DICT. p. 13245. See also *Ibid. Nov. 19. 1784, Robertson*, DICT. p. 13244.

⁵² See also, in confirmation of this note, 1. *Bell Comm. (5th edit.) 333. Vid. infr. § 13 ; sup. B. 3. t. 7. § 18.*

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Oath in supplement.

they be judged relevant, insert them in the act for proving; for the particular circumstances on which the defender is to swear, ought to be specially mentioned in the act of court, which is the warrant for taking his oath; see *Act of sederunt*, Dec. 7. 1613, preserved by Spottiswood in his *Practics*, p. 244.

14. Oaths of verity, as they have been now explained, are oaths referred voluntarily by one party in a suit to his adversary; which therefore are finally decisive of the cause. But oaths of verity are sometimes put by the judge *ex officio*, without reference by either party to the other; which, because they are necessary, and not grounded on any implied contract between the litigants, are not final; so that sentences proceeding on them may be declared void upon proper vouchers afterwards recovered; or the cause may be brought from the inferior court to the session, on this ground. That the judge ought not to have ordained the party to swear. Such oaths are commonly put by the court where there is a *semiplena probatio*, to supply an imperfect or defective evidence by the parties' own oaths, and are therefore styled *oaths in supplement*; *ex. gr.* in the case of furnishings made by shopkeepers, &c. when the quantities furnished, or the prices of them, are not proved by two concurring testimonies; or in the case of disbursements by a factor or steward on account of his constituent, the nature of which does not well admit of legal evidence; for the articles, if they appear proper to the management, will be sustained, on the steward deposing that they were truly disbursed by him: But where the imperfect evidence laid before the judge does not, in his apprehension, amount even to a *semiplena probatio*, the party's oath in supplement ought not to be put; *Fount. Dec. 28. 1695, Thomson, (Dict. p. 9373)*⁵². Where one who makes oath as to a debt or payment, either upon a reference by his adversary, or by order of the judge, deposes *non memini*, such oath has, in the common case, the effect of an absolvatory sentence in favour of him who hath sworn, as the oath is no evidence of the point referred; but since, at the same time, it does not import a denial of it, he who made the reference is allowed to support his plea by other methods of proof. Such negative oath, when it is emitted upon a recent fact, of which the swearer cannot, from the circumstances of the case, be presumed ignorant, is considered as a concealing or dissembling of the truth; for which reason, he who swears is justly held as confessed, or *per confesso*, in the same manner as if he had refused to depose; *Stair Feb. 6. 1675, Irvine, (Dict. p. 12031); Harc. 738, (Littlegill, Feb. 1682, Dict. p. 12035)*,

Re-examination when the oath is in general terms.

15. Where an oath, either of verity or in supplement, is made in general or doubtful terms, particular interrogatories may be put to the deponent, upon a re-examination, for farther clearing the point; but he cannot be examined on any special fact which may involve him

⁵² See *Fac. Coll. Calder*, 20. Dec. 1825, (S. & D.); *Cuming*, 21. Dec. 1752, Dict. p. 10095, and 12366; *Buchanan*, 7. Feb. 1812, *Fac. Coll.*

⁵³ In questions as to the paternity of natural children, the mother's oath in supplement is allowed, or disallowed, according as the circumstances are held to amount, or not to amount, to a *semiplena probatio*. The following are examples of cases, in which the oath in supplement was received; *Wightman*, 17. Nov. 1807, Dict. v. PROOF, A, No. 5; *Hunter*, 15. Jan. 1811, *Fac. Coll.*; *Hunter*, 24. May 1814, *Ibid.*; with which compare *Stewart*, *supr. B. l. t. 6. § 50, nott. **, and 180; *Benny*, 14. Nov. 1821, (S. & J. Ailken, 10. July 1821, and 11. July 1822, *Ib.*); *M'Kenzie*, 23. Dec. 1826, (S. & J. —The following, of cases in which it was refused, *Bowie*, 1. Dec. 1808, *Fac. C. Craig*, 14. June 1809, *Ibid.*; *Cathie*, 29. May 1821, (S. & B.); *Durham*, 19. 1827, (S. & D.)

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the fact is against him : But in order to subject a party to this penal certification, he must have been either cited personally by a messenger to appear, or *apud acta*, i. e. the day of appearance must have been notified to him by the judge when he was present in court. If the party be forth of the kingdom, or have no fixed or known residence, an edictal citation at the market-cross of Edinburgh, and pier and shore of Leith⁵⁵, is sufficient⁵⁶. The effect, however, of being held *pro confesso*, is not in every case so strong as if the party had expressly acknowledged what was referred to his oath ; for he will be restored against the certification, upon his shewing good cause why he did not appear, either by proving the execution false, or by giving evidence of his sickness, or other reasonable ground of excuse ;—and slighter excuses are admitted, where the party offers *de recenti* to purge his contumacy, provided he refund to his adversary the expense he has brought on him by not appearing on the day to which he was cited. But no person can be restored *ex intervallo*, except on the most pregnant grounds ; because the adverse party might thereby lose the benefit of other evidence, by which he could have proved his allegation, *ex. gr.* by witnesses dying in the mean time or leaving the country. Where one is restored *ex justitia*, because, for instance, the citation given him laboured under some nullity, the effect of his being held as confessed is quite taken off ; but if he be restored *ex gratia*, and die before his making oath, the presumptive confession will militate against his heir ; *Harc.* 741, (*Wright, Feb. 1686, Dict. p. 2036*).

Oath in litem.

18. From the general rule set forth § 8, That no right can be proved by the oath of him who pleads it, an exception is universally admitted in the case of an oath *in litem*, which is an oath deferred by the judge to a pursuer, for ascertaining either the quantity or the value of goods that have been taken from him by the defender, without the order of law, or for fixing the extent of his damages⁵⁷. The oath, as it is the bare affirmation of a party in his own behalf, is not received, except where there is clear evidence that the defender hath been engaged in some illegal act, *ex. gr.* in a spuilzie, or in an unwarrantable intermeddling with the pursuer's goods, or where the public police has made the effect given to that oath necessary, as in the case of the edict, *Nautæ, caupones, stabularii*⁵⁸ : And it hath been introduced, both *per modum pœnæ* to the delinquent, and from the necessity of the case ; because the amount of the pursuer's damage does not admit of full evidence in any other way ; so that if it were not for this expedient, atrocious wrongs might be frequently perpetrated without any, or at least without an adequate redress. Because an oath *in litem*, as to the quantities, is in effect an oath of verity, it is not received as evidence, where a concurring testimony of witnesses is brought in proof of them ; see *Fount. Jan. 16. 1697, Fea, (Dict. p. 9367)* ; and upon this ground, when the oath was found competent for want of such concurring testimony, the court simply deferred the quantities to the pursuer's oath, and made it the rule of the decree condemning the defender, without assuming any discretionary power of taxing or

⁵⁵ As to the present form of edictal citation, *vid. supr. t. 1. § 2*.

⁵⁶ *M'Ewan, 20. June 1673, Dict. p. 12031 ; Buchanan, 4. July 1676, Ibid. p. 12034 ; Kinloch, 3. July 1704, Ibid. p. 12038*. But in such case, if the party be alive, he will be reponed upon his application, *Ibid. ; 2. Fol. Dict. p. 184*.

⁵⁷ See *Lyle, 12. June 1824, (S. & D.) ; Douglas, 16. Feb. 1825, (ib.) ; Fac. Coll. Calder, 20. Dec. 1825, (ib.)*

⁵⁸ *Scott, 16. May 1827, (S. & D.)*

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v. *mutuum*, where it did not exceed L. 100 Scots, was allowed to be proved by witnesses; *Durie, March 5. 1628, Hammermen of Glasgow*, (DICT. p. 2247 and 12408). This mean of proof is also received to the amount of L.100 in verbal and nuncupative legacies, and in such verbal agreements as are not distinguished by the name of any known contract, and where something is to be mutually given or performed by either party; *Forbes, June 26. 1706, Anderson*, (DICT. p. 12234 and 12414); a doctrine probably borrowed from an ordinance published by Charles IX. of France, *anno 1566*, which ordained all contracts for sums exceeding 100 livres to be reduced into writing; but it is absolutely rejected, let the sum be ever so small, in promises which are merely gratuitous; *Stair, Jan. 19. 1672, Deuchar*, (DICT. p. 12386)*. The reason why a stronger kind of evidence is required to the constitution of verbal agreements, which cannot be proved by witnesses, where the sum exceeds L. 100 Scots, than to that of contracts, seems to be this: In contracts which lay mutual obligations on both parties, naturally flowing from the contracts themselves, their meaning can hardly be misapprehended by witnesses; whereas in verbal agreements, in which the articles to be fulfilled by the parties do not necessarily arise from the nature of any known contract, but depend entirely on the import of the words uttered by the parties, inattentive hearers may, either by misplacing what was spoken, or by mistaking its true meaning, be apt to change the obligation into something quite different from what the debtor intended. Where writing is required as a solemnity, as in notorial instruments, and executions by messengers⁶⁴, the defect cannot be supplied by witnesses, more than by the oath of the party; *vid. supr. § 9*; because without these written instruments, the rights, of which they are the solemnities, are null⁶⁵.

With regard to the extinction of rights.

21. In the extinguishing of rights or obligations, we observe the rule of the Roman law, That the effect of writing cannot be taken off by the testimony of witnesses⁶⁶; and therefore our general rule is, that where a debt is constituted by writing, no payment, either of the whole or of part of it, can be proved by witnesses; *Durie, July 15. 1624, Nisbet*, (DICT. p. 12358); *Ibid. July 1. 1626, Hamilton*, (DICT. p. 12359)†⁶⁷. This rule, however, suffers the following limitations: *First*, Where the written obligation binds the party to the precise performance of special facts, the facts performed in consequence of that obligation, *ex. gr.* the delivery of corns, or other mercantile commodities by the debtor, have been frequently adjudged capable of a proof by witnesses; *Durie, Nov. 25. 1624, Bisset*, (DICT. p. 12358); *Stair, Jan. 7. 1662, E. Lauderdale*, (DICT. p. 10023); though one might reasonably conclude, that a debtor, where

* See on this subject, *Fount. Nov. 27. 1708, Fotheringham*, DICT. p. 12414; *Stair, B. i. tit. 10. § 4*; *Bankton, B. i. tit. 11. § 2*.

† *Fac. Coll. Feb. 26. 1787, Wilson, &c.* DICT. p. 12353.

⁶⁴ In the face of an objection, "that apprehension by a messenger was an *actus legitimus*, which could only be proved by a regular execution, it was held to be settled "law, that parole evidence was admissible" to prove an act of apprehension, when effected with a view to render a debtor bankrupt, by constructive imprisonment under the stat. 1696, c. 5; *Note to Ewing, 17. May 1808, DICT. v. BANKRUPT, App. No. 27.*

⁶⁵ See *Blackadder, supr. not. 59.*

⁶⁶ *Lawson, 16. Feb. 1825, (S. & D.)*

⁶⁷ See *Crawford, 25. Feb. 1823, (S. & D.)*

where he is bound by writing, ought to take care to get the discharge of his obligation also vouched by writing. *2dly*, Witnesses are received in evidence of such facts as hardly admit of a proof by writing, especially where they import violence or wrong, though such proof should have the effect to extinguish a written obligation. Thus, a bond may be declared null *ex dolo*, upon parole evidence; and thus a proof, by the testimony of witnesses, was admitted to set aside a bill, even against an onerous indorsee, with regard to facts which were not in their nature capable of a proof by writing; *Fac. Coll. ii. 73*, (*Farquhar, Dec. 16. 1757*, *Dict. p. 12341*). *3dly*, Payment of a debt, though constituted by writing, whether in grain, or even in money, if it be made, not by the debtor himself, but by another, may be proved by witnesses to the highest extent, *ex. gr.* the rents received from tenants by a creditor out of his debtor's state; for as the debtor himself had it not in his power to take written vouchers of the payments made by his tenants, it were hard to make him suffer for the tenants neglecting to do it; and such payments are *facti* as to the debtor, which he cannot possibly prove out by witnesses; *Stair, Feb. 4. 1671, Wishart*, (*Dict. p. 9978*); *Forbes, Jan. 25. 1711, Baillie*, (*Dict. p. 9990*)*. As for debts constituted without writing, the payment of the whole debt, if it be within L.100 (Scots,) or if it should amount to more, any partial payment within that sum, may be proved by witnesses; *Stair, Jan. 7. 1662, E. Lauderdale*, (*Dict. p. 10023*); see more upon this head, *supr. B. 3. t. 4. § 7.*

22. The next inquiry proper to this title, concerns the question, Who ought or ought not to be admitted to bear testimony? There is a full enumeration in *Stat. 2. Rob. I. c. 33*, of such as were then capable of being admitted as witnesses †; but our later practice is varied from the old in many articles. Objections against the admissibility of witnesses arise either, *first*, from their state, with respect either to age or sex; or, *2dly*, from their moral character; or, *3dly*, from such connection between the witness and the party as may create partial affection, or undue influence. As to the *first*: The testimony of pupils is rejected, because they are presumed ignorant of the nature, and incapable of the impressions of an oath: But a minor *pubes* may be received as a witness, in relation to occurrences which happened during his pupillage, if he was, at the time of such occurrences, of an age sufficiently capable of distinguishing facts. Women are admitted to bear testimony in criminal trials, *Pr. Falc. c. 31. 1732, Barber*, (*Dict. p. 16742*); in facts happening during a clandestine marriage, *Fount. Dec. 7. 1686*, (No. 105, p. 16697); in the maltreatment of wives by their husbands, and other facts of a domestic nature, *Fount. June 15. 1698, Duch. of Gordon*, (*Dict. p. 5902*); *Fount. Nov. 23. 1698, Fletcher*, (*Dict. p. 16701*); *Fount. Dec. 17. 1709, Neilson*, (*Dict. p. 16730*); but not in bargains proveable by witnesses, *Stair, July 21. 1675, Wilkie*, (*Dict. p. 16675*); nor in settling of marches, *Feb. 1730, Dunbar*, (*Dict. p. 16742*), collected in (*Folio*) *Dict. ii. p. 529*; nor in actions for voiding deeds, *ex capite*

Who may be witnesses. *1st*, Incapacity from the state of the person.

Pupils, women.

* Consignation in the hands of a clerk of court may be proved by witnesses; *Fac. Coll. June 21. 1794, Creditors of Rae*, *Dict. p. 3078*.

† See *Balfour*, Tit. ANENT PROBATIONE BE WITNESSIS, p. 373, *et seqq.*

‡ Trial of Captain *Green*, (see Note † subjoined to next section), p. 64; *Hume*, *il. iv. p. 137*, (*2d edit. vol. ii. p. 328.*)

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capite lecti, Jan. 13. 1736, *Wiseman*, collected *Ibid.* (DICT. p. 16743); nor in questions relating to the onerous cause of deeds, *Forbes*, June 18. 1706, *Birrell*, (DICT. p. 16711). It is absurd to affirm that the law hath rejected the testimony of women, in these last instances, from any supposed incapacity of judging rightly concerning them; since it allows them to be named tutrices, and even sole tutrices; an office which requires a much greater degree of judgment, than understanding the import of the most intricate of the above particulars. It would therefore be more agreeable to the character justly due to the softer sex, in point of capacity, to say not that women are debarred, but that they are excused from bearing testimony in courts of law, except where there is a penury of witnesses, in which case their giving evidence is necessary*.

2d, Incapacity from immoral character.

23. On the score of immorality or a bad character, the testimony of infamous persons is rejected, *i. e.* of those who have been either convicted of crimes which by the law infer infamy, or who have been declared infamous by a sentence of the session or justiciary; *Stair*, Jan. 31. 1671, *L. Milton*, (DICT. p. 16694) 69 †. Those are also improper witnesses who have been convicted of any gross crime which may infer a disregard to an oath, *ex. gr.* a known habitual liar, a scoffer at religion, one guilty of falsehood or oppression, or who has accepted of bribes, or concealed the offer of them, or who has prevaricated or deposed inconsistently; *St. B. 4. t. 43. § 7* ‡. But other crimes which are more consistent with the reverence of an oath, though they infer *infamia facti*, *i. e.* infamy in the opinion of the virtuous part of mankind, are no sufficient ground for rejecting the testimony of the persons convicted of them.

3d, Incapacity from partial affection, and undue influence.

24. As for the third class of objections, partial affection and undue influence, persons are rejected as witnesses in the causes of certain near relations. Mackenzie, § 8, *h. t.*, considers all those who are within the degrees of consanguinity or affinity forbidden in marriage, to fall under this objection; and *Stair*, *B. 4. t. 43. § 7*, extends it still farther against cousins-german, at least where other unsuspected witnesses may be had. It would appear from the analogy of our law, however, that all such relations as may lawfully sit in judgment in one another's cause, by 1681, *c. 13*, may be also received

* By our most recent practice, the testimony of women is admitted in every case.

† As to the effect of a pardon after conviction, see *infra*, B. iv. tit. 4. § 97, Note.

‡ Lord Bankton, B. iv. tit. 30. § 4, says, "An atheist-infidel cannot be a witness, but a Jew or Mahometan may, because he owns the being of God, to whom alone appeal is made in an oath;" and his Lordship refers to the case, *Jan. 17. 1712*; *Mennis*, reported by *Fount.* vol. ii. p. 708, and by *Forbes*, p. 576, DICT. p. 16732. In an action of divorce for adultery, it having been proposed to adduce a negro as a witness, the commissaries, before answer, appointed him to compare for examination as to the articles of his faith; and the court of session refused a bill of advocacy, *Fac. Coll. Dec. 6. 1770*, *Stewart-Nicolson*, (affirmed on appeal, *Feb. 18. 1771*), DICT. p. 16770. In the case of Captain *Green* and his crew, who were convicted of piracy in March 1706, the same course was followed by the High Court of Admiralty, in regard to two black slaves; and on their examination *in initialibus*, the one having deposed, "that he believes in God, was born of Christian parents, and is a Christian himself;" and the other, "that he believes there is a God, and his mistress at Pegu caused baptise him a Christian, and he owns the Christian religion," their testimony was received. *Trial*, (published in folio in 1705), p. 39, 42, 63, and 64. *Arnot* has a report of this case, p. 248. As to the law of England upon this point, see *Blackstone*, vol. iii. p. 369; *Gilbert's Law of Evidence*, p. 129; *Peake*, p. 89; (1. *Phillips*, 5th edit. p. 22.)

69 *Black*, 22. Dec. 1815, *Fac. Coll.*

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cates and agents for their clients, in the causes in which they are employed, but not in other causes⁷³. Tutors, however, may bear testimony against their pupils or minors; and advocates and agents against their clients. These last cannot indeed be compelled to discover upon oath such secrets of their client's cause, as they may have learned from himself⁷⁴; but in the case of an exhibition of writings, an advocate or agent may be compelled to swear to the contents of a deed, though it should have been shewn to him by his own client; *Stair, Dec. 21. 1675, Cred. of Wamphray*, (DICT. p. 347)*. If one cannot be witness in a cause where his near kinsman is to gain or lose by the decision, far less can his testimony be received, where his own pecuniary interest is concerned †⁷⁵; yet burgesses may be admitted in questions concerning the revenue of the community; for these are the rights, not of the individual burgesses, but of the corporation as such; *Stair, June 13. 1672, Bor. of Inverness*, (DICT. p. 16675) ‡: but where the private burgesses have any pecuniary interest at stake, their testimony is rejected; see *Fount. Jan. 17. 1679, Lo. Hatton*, (DICT. p. 16679) §. The testimony of menial or domestic servants is rejected⁷⁶, on account of their master's influence over them, which tends to cramp or restrain that freedom that witnesses ought to be possessed of at making oath; but masters may bear testimony in behalf of their servants. Tenants who had no written tacks, and so might be removed at the will of the landlord on the elapsing of every year, were, by our former practice, considered as inhabile witnesses for their landlord, on account of their dependence on him, and his influence over

* See *Macleod, Dec. 21. 1744*, DICT. p. 16754; *March Nov. 21. 1749*, DICT. p. 16757; *Fac. Coll. Nov. 27. 1771, Maclatchie*, DICT. p. 16776 † *Ibid. Dec. 19. 1786, Scott*, DICT. p. 16779.

† See *Edgar, Feb. 18. 1724, E. Wemyss*, DICT. p. 16739; *Kilk. No. 13, voce WITNESS, Falconer, June 23. 1750*, DICT. p. 16759; *Falc. vol. ii. p. 147, Falconer, July 13. 1750*, DICT. p. 16761; *Fac. Coll. ii. 190, Muschet, July 5. 1759*, DICT. p. 16768; *Ibid. Feb. 9. 1793, Sime*, DICT. p. 16781.

‡ *Kames, Rem. Decis. p. 182, Lang, Nov. 28. 1748*, DICT. p. 2515.

§ As to the competency of adducing such witnesses in an election cause, see *Wight*, 4to edition, p. 353.

⁷³ *Carmichael, 7. Dec. 1822, (S. & D.)*; *Richardson, 30. Nov. 1815, Fac. Coll. Hamilton, 24. Nov. 1818, 2. Murray, 41*; *Hackney, 20. Feb. 1820, Ibid. 193*; *Gilchrist, 10. Sept. 1823, 3. Ibid. 364*.

⁷⁴ The same principle regulates the extent of production that an agent may be called on to make, when examined as a haver:—and, generally, it may be laid down, that he cannot be required to disclose or produce any confidential communication, document, &c. connected with the subject of the suit,—which he may have received from his client, with a view to the conducting of the process, whether preparatory to its commencement, or during its dependence;—but that, on the other hand, he must make a full disclosure of every thing connected with the constitution, &c. of the *transaction* itself, out of which the suit arises, and which came to his knowledge or possession, with a view to the arrangement or completion of that transaction, while there was yet no purpose of taking any legal proceedings on the subject; *Bower, 26. May 1810, Fac. Coll.*; *D. Hamilton, 25. May 1819, Ibid.*; *La. Bath's Executors, 12. Nov. 1811, Ibid.*; *Campbell, 21. Jan. 1823, (S. & D.)*; *Thomson's Trustees, 4. March 1823, (Ib.)*; *Tait, 178, 393, et seq.*—But an agent is frequently received as a witness for his client, where he is, from the nature of the case, in some sort a *necessary* witness,—e.g. in proof of circumstances connected with “the concoction and preparation of a deed drawn by him;” *Tait, 385*, and authorities there cited; *M'Neill, 18. July 1822, 3. Murray, 150*; *March, Maclatchie*, as reversed on appeal, and *Scott, not. **, h. p.

⁷⁵ See *Fac. Coll. Padon, 10. July 1824, (S. & D.)*; *Robertson, 10. Feb. 1810, Fac. Coll.*; *Cowan, 10. July 1813, Ibid.*; *Nisbet, &c. 11. June 1813, Ibid.*; *Glendinning, 8. Dec. 1814, Ibid.*

⁷⁶ It is not so now, 2. *Hume, (2d edit.) 391*; *Tait, 380*; though due weight will be given to any circumstances in the witness's situation, which cast suspicion on his credibility.

over them: But as little of that influence now remains, it was established as a rule, upon the occasion of a question between *Colonel Erskine and Blackadder*, Jan. 15. 1735, (DICT. p. 16742), That no such objection should be sustained for the future, against the testimony even of such tenants as possessed by verbal tack*. Artificers, and labourers hired by the day or week, are deemed competent witnesses for the person who employs them; *Fount. Feb. 26. 1685, Erskine*, (DICT. p. 16693).

26. In occult or more private facts, where there must in most cases be a penury of unexceptionable witnesses, some of the disqualifications above mentioned are overlooked⁷⁷. Thus, domestic servants are received as witnesses in transactions that are managed within doors; *Forbes, Dec. 31. 1708, Smith*, (DICT. p. 16714); *Fac. Coll. ii. 70, (Fairly, Dec. 16. 1757, DICT. p. 16768)*; and even brothers and sisters may be produced in clandestine marriages, where frequently no other witness is called to attest them, *July 31. 1732, Barber*, DICT. p. 16742); Clerk *Home*, 107, (*Young, Dec. 8. 1738, DICT. p. 16743*) †. Such witnesses are said to be admitted *cum nota*; and their testimony, though it be not totally rejected, is not so credible as that of other witnesses, but is to have such a degree of weight given to it, as the judge shall think it deserves. And indeed there are some witnesses, who, though they be liable to no legal exception, may be more suspected than others, *ex. gr.* near cousins, intimate acquaintance, tenants, and even vassals, where the superior is a person of power or interest; so that there is in most cases place for the rule, *Testimonia ponderanda sunt, non numeranda*.

27. None of the objections derived from partial favour, undue influence, or the witness's immoral character, can be moved against instrumentary witnesses, *i. e.* witnesses who attest the subscription of parties; for these are called for that purpose, by the joint consent of both parties, which bars all challenge: But neither pupils, *Dec. 12. 1738, Davidson*, (DICT. p. 16899)⁷⁸, nor women⁸⁰, can be instrumentary witnesses; nor creditors nor executors, where the testament or bond attested is granted in their own favour; *Hope, TESTAMENT, July 1. 1613, La. Innerlieth*, (DICT. p. 16876); *Durie, Nov. 21. 1627, Robertson*, (DICT. p. 16879). As parties, when they concur in calling the instrumentary witnesses, have no other view but to get their own subscription attested, and of consequence the genuineness

* See *Kilk. No. 15, voce WITNESS, Cunningham, Feb. 22. 1751, DICT. p. 16761*.

† See two decisions of an opposite tendency, *Fac. Coll. July 10. 1790, Dalziel*, DICT. p. 16780; *Ibid. Jan. 21. 1797, DICT. p. 16786*⁷⁸.

⁷⁷ Where the *penuria* does not arise from the very nature of the case, but is rather created by the act of the parties themselves, the disqualification will be interpreted more rigorously; *Laings, 16. Nov. 1814, Fac. Coll.*; *Richardson, 30. Nov. 1815, Ibid*; *Watson, 8. Feb. 1825, (S. & D.)*; *Lindsay, infr. not.*⁷⁸ *L. Justice-Clerk dicente*.

⁷⁸ See to the same effect, *Stirling, 11. July 1704, DICT. p. 372; Fac. Coll. Lindsay, 23. Feb. 1826, (S. & D.)*, where "the court held the case of *Dalziel*, as an important precedent; and that any departure from it would be attended with dangerous consequences." The rule seems to be, that in cases of the description referred to, the evidence of near relations may be received in corroboration of other testimony, but that in no circumstances can a marriage be allowed to be proved, solely by the evidence of such relations.

The same seems to be the rule in questions as to the filiation of natural children, *Martin, 8. Feb. 1816, Fac. Coll.*

⁷⁹ See *D. Queensberry, 7. July 1810, Fac. Coll.*

⁸⁰ Nor blind persons, *Cunningham, 2. July 1824, (S. & D.)*

In occult facts, *ubi est penuria*, certain witnesses may be admitted *cum nota*.

These incapacities do not apply to instrumentary witnesses.

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Purgation of
partial counsel.*Initialia testi-
monii.*

genuineness of the deed supported, they may therefore object to the hability of those witnesses upon any sufficient ground, if they should be afterwards produced for the proof of extrinsic facts that may be pleaded for setting the deed aside, *ex. gr.* for proving the state of the granter's health when he signed the deed; *Forbes, June 19. 1713, Cred. of Orbiston, (Dict. p. 16734).*

28. All witnesses must, before they make oath*, be purged of partial counsel; that is, they must depose that they can neither lose nor gain by the event of the suit, nor have given advice how to conduct it; that they have not been taught how to swear; that they have got no bribe, nor promise of bribe or good deed, from any of the parties; and that they bear no enmity or ill-will to either of them. These particulars, because they are put to the witness previous to his making oath, are styled *Initialia testimonii*. If a party bring present evidence of a witness's partial counsel, in any of the above points, the examination cannot proceed, though the witness should offer to purge himself by oath; but bare expressions of ill-will, where the enmity hath not been pushed forth into action, is not sufficient to stop the examination. The character of a witness cannot be justly impeached, though he own he had been prompted how to swear, unless he has also undertaken to swear as he had been prompted; yet the testimony of such witness is rejected, *in odium* of the party who had thus attempted to corrupt him; *Stair, Jan. 31. 1671, L. Milton, (Dict. p. 16674).* The objection which is considered by some writers as one of the *initialia testimonii*, that the witness has told what he is to depose, is seldom sustained; for one of the most entire character may, without any reproach, acquaint his friend, either before or after his citation, what facts are consistent with his knowledge; *Gosf. Nov. 9. 1669, La. Towie, (Dict. p. 16669); Fount. Feb. 13. 1679, contra (Dict. No. 86. p. 16681), cited in (Folio) Dict. ii. p. 526.* And indeed it is often necessary for a party to inquire at third persons what they know of the matter in dispute, that they may be the better directed whom to produce as witnesses †.

39.

* The rule that all witnesses must be sworn, is not universal. 1. Peers have claimed the privilege of giving evidence on their word of honour, instead of making oath. See their pretensions, stated in *Acts of Sederunt, Dec. 25. 1708, and July 27. 1711.* It does not appear any where very distinctly laid down what is the precise extent of a Peer's privileges in this respect, though it seems to allow him merely to substitute his declaration upon honour for the oath of calumny, but not to give him a similar privilege in regard to an oath of verity on reference, or an oath as a witness or haver. See cases reported in the Dictionary, *voce PEER; Fac. Coll. Nov. 13. 1772, Campbell, Dict. p. 940.* By the 23d article of the Union between Scotland and England, the Peers of Scotland are entitled to all the privileges of British Peers, except that of sitting in the House of Lords; and the law of England, which would therefore appear to be the rule, is thus stated by Judge *Blackstone*, vol. i. p. 402: "A Peer, sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour: He answers also to bills in Chancery upon his honour, and not upon his oath; but when he is examined as a witness, either in civil or criminal cases, he must be sworn."⁸¹

2. Quakers are permitted to give a solemn affirmation instead of an oath, 8. Geo. I. c. 6; 22. Geo. II. c. 30 and c. 46. But by the last of these statutes, § 37, it is expressly provided, "That no Quaker shall, by virtue of this act, be qualified or permitted to give evidence in any criminal cases." *Hume*, vol. iv. p. 186, (vol. ii. p. 363, 2d edit.)⁸². The law of England is the same in this particular, *Blackstone*, vol. iii. p. 369.

† *Fac. Coll. Feb. 10. 1798, Durham, Dict. p. 16786.* But there ought to be no communication on the subject in dispute, after citation; *Kilk. No. 1. v. WITNESS, Geddes,*

⁸¹ See *Tait*, 180, 301, and 423; *Burnett, (Crim. Law.) 451.*

⁸² *Tait*, 300, and 423.

29. Where one offers a relevant objection against a witness, of which he cannot bring instant proof, it can be no bar to his examination; but in such case, the party objecting may, immediately before the party makes oath, protest for a reprobator, *i. e.* protest that he may be allowed afterwards to bring evidence of the witness's enmity to him, or of his partial counsel in some other article. Actions of reprobator were admitted by our former practice, though no such previous protestation had been entered, so long as sentence was not pronounced in the principal cause in which the witness had deposed: But in the case of the intermediate death of other witnesses who could have sworn to the same facts, that action was not admitted without such previous protestation, even where the principal cause was still pendent, *Fount. July 13. 1700, Goodwin*, (DICT. p. 12380); for there the producer of the witness, who saw no objection offered against his testimony, had reason to rest upon his evidence; whereas, if protestation had been entered by the adverse party, he might have brought others then alive in support of his allegation; *Stair, Feb. 6. 1679, Irvine*, (DICT. p. 12116). But by the present practice, which is not so favourable to actions of reprobator, they are received in no case where they have not been previously protested for, even though he who produced the witness cannot shew that he has suffered any prejudice by the intermediate death of others, *Clerk Home, 46, (Wright, Jan. 5. 1735, DICT. p. 12119) **; from a presumption, that the party who insists for the reprobator, if he truly had a sufficient objection against the witness, would have entered the usual protestation before his making oath⁸⁴. When protestation is properly made, the action of reprobator is competent, even after sentence pronounced in the principal cause, *Durie, June 26. 1623, Cochran*, (DICT. p. 12099); and in such case, that action may be properly included under rescissory actions; because the plain intention of it is, to set aside a decree grounded on the oath of an inhabile witness: But commonly the decision in the principal cause is put off till the reprobator be discussed. Where the principal cause is determined before discussing the reprobator, the party insisting must consign a sum, at the discretion of the judge, which he forfeits, if he fail to make good his ground of reprobator; *Durie, Dec. 3. 1635, Robertson*, (DICT. p. 12100). This action must have the concurrence of the King's Advocate, because the libel concludes, that the witness is guilty of perjury; and for this reason, the witness who is excepted to as inhabile, must be made a party to the suit; *Stair, Nov. 9. 1676, Paterson,*

Geddes, Jan. 16. 1741, DICT. p. 16744. An objection on this ground was sustained, *Fac. Coll. Jan. 19. 1799, Cadell*, DICT. p. 16789. There have been frequent instances of precognitions⁸³ taken by private parties in civil actions; but such practices have been uniformly reprobated by the court, *Durie, July 14. 1621, Livingston*, DICT. p. 6776; *Fount. i. 286, case of Sir Hugh Campbell*, a trial in the criminal court for high treason; *Fac. Coll. Aug. 4. 1778, Bogle*, DICT. p. 4899; *Ibid. Aug. 10. 1785, Fall*, DICT. p. 16777; *Ibid. Feb. 26. 1793, Wemyss, &c.* DICT. p. 16782. See *Ibid. June 7. 1793, Anderson*, against *Sproat*, DICT. p. 16783.

* See *Kilk. No. 1, voce REPROBATOR, Falc. ii. 293, Irvine, Nov. 22. 1751, DICT. p. 16762.*

⁸³ "Written declarations from the witnesses, in presence of a judge, as is usually done preparatory to prosecution for the greater crimes;" *Tait*, 391.

⁸⁴ *Glass, 15. May 1819, Fac. Coll.*; but "an opinion was expressed, that where the objection to the witness was not known at the time of examination, reprobators would be allowed without previous protest;" *Ibid.*—See also *Munro, Dec. 19. 1822, (S. & D.)*; *Elder, 19. June 1827, (ibid.)*

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Proof allowed either by way of act, or incident diligence.

Mode of examination of witnesses.

terson, (DICT. p. 12114). The ground of reprobator may be proved, not only by the oath of the party who produced the witness, to which mean of proof some of our ancient writers have confined it, but also by the testimony of witnesses, provided these witnesses be *omni exceptione majores*; *Stair*, July 14. 1671, and Feb. 20. 1672, *L. Milton*, (DICT. p. 12105).

30. The interlocutory sentence or warrant of the judge, by which parties are authorised to bring their evidence, is either by way of act or of incident diligence. In either case, where a witness does not appear on the day fixed by the warrant of citation, a second warrant is granted, called letters of *second diligence*, which is of the nature of a caption, and contains a command to the messenger, whose name is filled up in the warrant, to apprehend him, and bring him before the court*. If the witness answers on the first warrant, he is entitled to his expense from the party who cites him, which is ascertained at a certain rate *per diem*, as he travels on horseback, or walks a-foot; but if the party is put to the trouble of obtaining a second diligence, the witness must bear his own charges †.

31. By the ancient usage, parties were neither allowed to be present at taking the proof, or at the court's taking it under consideration; nor had they access to see the depositions or written testimonies of the witnesses, lest they might be cramped in deposing, from the apprehension of drawing on themselves the resentment of others on account of what they had deposed; *St. B. 4. t. 46. § 17*. But by 1686, c. 18, the witnesses are ordained to be examined in presence of the parties, to whom the clerks to the process are directed to communicate the depositions. If a witness be unable to travel, or reside in foreign parts, a commission is granted by the court for taking his oath at his own domicile; and in such case, the nomination of the commissioners for examining the witnesses cited by the one party, is commonly given to his adversary; and failing these, the magistrate, or judge of the jurisdiction where the witnesses reside, is generally named in their place *subsidiarie* ‡. A witness who swears either before the court, or upon commission, may, *ex recenti*, demand to have any mistake rectified, which he apprehends he may have made at emitting his oath; but it might be of dangerous example, if law allowed him to insist for a re-examination⁸⁶ upon that pretence; *Fount. July 16. 1701*, (*Sharp v. Murray*, DICT.

* As to the competency of this second diligence against a Peer, see *Bruce*, No. 43, *Young*, Dec. 13. 1716, DICT. p. 10030; (*Tait*, 180.)

† These rates are fixed by *Act of Sederunt*, Dec. 21. 1765. See *Fac. Coll. Dec. 3. 1794*, *Gordon*, DICT. p. 16785.

‡ Most of the existing regulations with respect to proofs are to be found in *Act of Sederunt*, March 11. 1800.

By stat. 41. *Geo. III. c. 105*, any one or more of the judges in Scotland, to whom bills, concerning heritable subjects situated there, shall be referred by the House of Lords, may examine witnesses upon oath relative to the subject-matter of such bills. The same regulation is made as to similar references to the Irish judges. When such references are made to the judges in England, the witnesses must be sworn at the bar of the House of Lords, "in order to be examined by the judges upon such oath, in relation to the bill before them." *Order of the House*, Dec. 18. 1706.—See a case where the court appointed a sworn interpreter to a witness; *Fac. Coll. iii. 129*, *Pollock*, Jan. 25. 1764, DICT. p. 16769.

⁸⁶ The court may, on motion of one or other of the parties, order re-examination of a witness *ex intervallo*, on questions not formerly put nor exhausted; *Tait*, 22. June 1815, *Fac. Coll.*

DICT. p. 16705)*. If after an action is commenced⁸⁶, either party apprehend himself in danger of losing the benefit of a witness's testimony⁸⁹, through his old age⁹⁰ or some growing infirmity⁹¹, the court⁹² are in use to examine the witness immediately, and ordain his oath to be lodged with the clerk of process, to lie *in retentis*, or with the other writings which concern that process, that it may be considered along with the rest of the proof, when the cause comes to be advised by the court; *Fount. Dec. 9. 1685, (Craigie against Moodie, DICT. p. 16695); Fount. Feb. 28. 1696, E. Lauderdale, (DICT. p. 12095)⁹³.*

32. Where a party, to whom a proof is granted, brings none within the term allowed by the warrant, an interlocutor is pronounced *circumducing the term*, i. e. declaring the time elapsed without any proof brought by him who had demanded it, and precluding him from bringing further evidence. The word *circumduce* is made use of nearly in the same sense in *L. 73. § 1, 2, De judic.* Where evidence is brought in proper time, if it be upon an act, the cause is called after elapsing of the term, not before the Lord Ordinary who was originally judge in the cause, for he ceased to be Ordinary in the cause after pronouncing the act or warrant for proving, but before the Ordinary upon the acts for the time, who declares the proof concluded; and thereupon a state of the case is prepared by the Ordinary on concluded causes, which must be judged by the whole Lords⁹⁴; but if the proof be taken upon an incident diligence, which is usually granted on points which do not exhaust the main question in dispute, the relevancy or sufficiency of it may be determined by the Ordinary in the cause, who, also, in this case, makes

Circumduction
of the term.

Procedure after
conclusion of
the proof.

* See *Kilk. No. 6, voce WITNESS, Murray, Feb. 21. 1744, DICT. p. 16752⁸⁷.*

⁸⁷ It was here "laid down as a rule, that no objection made by a witness against his own deponing was to be sustained, except where the fact put to him might infer infamy."

⁸⁸ See *Johnstone, 9. July 1824, (S. & D.); Blair, 16. June 1825, (Ibid.)—White, 11. July 1811, Fac. Coll.; Corbets, 8. July 1815, Ibid.*

⁸⁹ By his going abroad, *Brown, 26. Jan. 1825, (S. & D.); Mag. of Glasgow, 10. July 1827, Ibid.; Ferrier, 11. July 1822, (S. & B.)*

⁹⁰ See *Forbes, 11. March 1820, Fac. Coll.; Smeal, 22. Dec. 1821, (S. & B.);—Alston, 10. July 1823, (S. & D.); Harvey's Trustees, 5. July 1827, (Ibid.)*

⁹¹ In a late case, the court permitted the examination of an *instrumentary witness*, though in the prime of life and in good health, he being one of the only two witnesses who could know the facts;—but it was under reservation of all objections "against the competency, admissibility, or credibility of the proposed testimony;" *E. Fife, 11. Mar. 1815, Fac. Coll.* See to the same effect, but without any reservation of objections, *Fac. Coll. Bethune, 2. Feb. 1827, (S. & D.)*.

⁹² The Lord Ordinary, while the process is before him, may also authorise such examination; see *Elliot, 8. July 1823, (S. & D.); Bryden, 14. June 1825, (Ibid.)*

⁹³ In one case, the court refused to grant warrant for a proof to lie *in retentis*, "unless certificates of the age of the proposed witnesses, or other circumstances, which render their examination advisable, are produced to the court itself, so as to satisfy them of the propriety of the measure, and refused to delegate that power to the commissioner;" *Magistrates of Aberdeen, 11. July 1811, Fac. Coll.* But more lately, without the witnesses being even named in the application to the court, they have granted a general warrant, "for taking the depositions of such witnesses, as, by certificates to be produced to the commissioner, before examination," shall be proved to be above a certain age, in danger of life from infirmity, or about to leave the country; *Oswald, 9. Dec. 1824, (S. & D.); Ramsay, 10. March 1825, (Ibid.); Mag. of Glasgow, 10. July 1827, (Ibid.); Gardner, &c. 4. March 1825, (Ibid.); Livingstone, 10. March 1813, Fac. Coll.*

⁹⁴ See 2. *Form of Process, (1818), 127, et seq.*

BOOK IV.

Proof by verdict, and extraordinary means of proof.

makes *avisandum* to himself with the proof adduced, and declares it concluded.

33. Some lawyers reckon proof by verdict, or by the sentence of a jury, to be a distinct species of proof. But such sentence has no better title to that appellation, than the sentences of any judge; for the jury, in matters triable by jury, are truly the judges of the evidence laid before them. The sentences of a jury are indeed sometimes final, and so cannot be traversed by any court; in which case they get the name of *probatio probata*: But that in reality means no more, than that such sentences are not liable to any review; which is a character equally applicable to all sentences or decrees of any court, from which there lies no appeal.—Beside the above-mentioned ordinary means of proof, Lord Stair mentions two, which he calls *extraordinary*, without the intervention either of writing, oath, or witnesses.—*First*, Proof by a notoriety of the fact on which the libel or defence is grounded, *St. B. 4. t. 45. § 4*; that is, that the fact is notoriously known, either to the whole nation, or to the neighbourhood; and this evidence is not elided, though some few individuals should be ignorant of that fact. The knowledge which the judge himself may have of the truth of the fact makes no proof; for he cannot be both judge and witness in the same cause, and he must give forth his sentence *secundum allegata et probata*; but his knowledge of the notoriety is sufficient, unless it be overruled by pregnant contrary evidence. Thus, it is held for proved, barely from notoriety, that such lands lie in such a county, or are subject to such a jurisdiction, or that a wife who sues her husband stands to him in the relation libelled.—The *second* extraordinary mean of proof mentioned by Stair, is proof by the confession of the party against whom any fact is to be proved⁹⁵. By act of sederunt, *Feb. 1. 1715, § 6*, formerly quoted, if the party, on being required, either to confess or deny the fact, refuse, and if the fact be afterwards proved, he shall be condemned in costs. In the absence of the party himself, the judge may put it in like manner to the party's advocate to confess or deny; and his judicial confession, either in his pleading, if it be minuted by the clerk, or in the informations, petitions, or answers in the cause, is sufficient evidence that the fact is against his client; *St. B. 4. t. 45. § 5, 6*⁹⁶.

Circumstantiate and presumptive proof.

34. In all inquiries into facts, that kind of proof ought to satisfy the judge that is adapted to the nature of the facts of which evidence is to be brought. Where facts therefore do not admit of a direct proof, the laws of all nations allow of a proof by circumstances and presumptions, which in many cases carries as high a degree of conviction as the direct. Presumptions are consequences drawn from facts notorious, or already proved, which infer the certainty, or at least a strong probability, of other facts to be proved; and hence presumptive evidence is by Aristotle, and after him by Tully, called *artificial*; because it requires a *discursus*, or reasoning, to draw the conclusion from the premises.

35.

⁹⁵ A party in a civil suit cannot found upon depositions of *witnesses* taken in a criminal precognition, but he may found on the declaration emitted in that precognition by the other party; *Parker, 29. Nov. 1809, Fac. Coll.*; *Alison, 3. Dec. 1814, Ibid.*; *Maxwell, 8. July 1776, Dict. v. APPRENTICE, App. No. 1.*

⁹⁶ See 6. *Geo. IV. c. 120, § 2, 8, 10, 11, 13, &c.* with the relative clauses in the act of sederunt.

35. Presumptions are either, 1. *et juris et de jure*; or, 2dly, *juris*; or, 3dly, *hominis vel judicis*. The presumption *juris et de jure*, takes place where law or custom establishes the truth of any point on a presumption, so that its effect cannot be traversed by any contrary evidence. Thus, the testimony of a witness, who forwardly offers to depose without being cited, is, from a presumption of his partiality, rejected, let his character be ever so entire⁹⁷. Thus also a minor, because he is presumed, *præsumptione juris et de jure*, incapable of managing his own affairs, is deprived of the power of acting, without the consent of his curators, though it should be offered to be proved that he is master of the greatest prudence and discretion. Many such presumptions are established by the Roman law, and many by our statutes. Gifts of escheat, taken in name of the rebel, are presumed simulate and fraudulent; and on that presumption are declared null, 1592, c. 145. Gratuitous deeds are declared null in a question with prior creditors; upon a presumption that they are granted to disappoint or defraud them, 1621, c. 18. And all deeds of alienation of heritable subjects granted on deathbed, may be declared null, from a presumption, that persons under such heavy bodily distress cannot act with that firmness and judgment that they ought to be possessed of, in granting deeds of such importance; see 1696, c. 4, and 1690, c. 21.

36. *Præsumptio juris*, is that which is in general terms established by our law or decisions as a presumption, but without founding any consequence upon it, or statuting *super præsumpto*; so that it is taken for true, only till the contrary shall appear to the judge to be supported by stronger evidence. Of this kind the following are instances: The property of moveables is presumed from the possession of them; he who makes payment of a sum on account of interest is presumed to be debtor in a capital sum corresponding to it; the entertaining of one who is come of full age at bed and board, is presumed to be a gift, if there were no previous bargain for board; *Debitor non præsumitur donare*, &c. It is obvious, that many of the *præsumptiones juris* are not presumptions grounded on positive facts, but rather general rules, which, though they are in the form of words positive, may be easily converted into negative propositions, and derive their force entirely from the want of contrary proof. Thus the rules, That every man is presumed honest, That immunity from servitude is presumed, That life is presumed, with many others of the same kind, are, in other words, that guilt is not presumed, nor servitude, nor death: Which propositions are, without the aid of any presumption, supported upon this obvious principle, That without evidence brought of guilt or of servitude, or of death, by the pursuer who grounds his plea upon any of these allegations, the defender falls to be absolved. All *præsumptiones juris*, whether they be of this last kind, or proper presumptions arising from the supposition of certain facts, may be elided, not only by a direct contrary proof, but by contrary pregnant presumptions: For a presumption is nothing more than a conjecture, or strong probability, inferred from what commonly happens; and all conjectures built upon common events must lose their force, when others arising from extraordinary

TITLE II.
Different species of presumptions.
1st, *Præsumptio juris et de jure*.

2d, *Præsumptio juris*.

⁹⁷ But there is no room for the objection of *ultroneous*, where the witness merely comes to town by desire of the party, and then receives his citation; *D. Athole*, 28. Nov. 1809, *Fac. Coll.*

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extraordinary or uncommon occurrences afford a stronger degree of probability to the contrary. Many instances accordingly occur, both in the Roman law, and in our own practice, *Stair, Dec. 7. 1678, Sands, (Dict. p. 12645); Forbes, Dec. 20. 1710, Henderson, &c. (Dict. p. 12646)*, in which the presumptions of law have been elided by more forcible presumptions on the other side. The legal presumption for life was, by a late decision, *Fac. Coll. ii. 268, (Forrester, Feb. 12. 1760, Dict. p. 11674)*, overruled, barely upon fame or common report⁹⁸; which itself is no more than a presumption that may be elided by a direct contrary evidence*.

3d, *Præsumptio hominis vel judicis.*

37. The *præsumptiones hominis vel judicis* differ from the *præsumptiones juris* only in this, that the *præsumptiones juris* are those which are laid down in our statutes, or established by custom or decisions; whereas the last daily emerge from the various circumstances of the special cases, and on which it is the duty of a judge to lay more or less weight, according to the several degrees of evidence which they carry with them. They have frequently the force to overrule a *præsumptio juris*, especially when it is of that kind which owes its whole force to the want of contrary evidence. Thus a deed may be declared forged, from a concurrence of circumstances tending to invalidate it, notwithstanding the presumption of law, that all deeds are genuine.

Fictio juris.

38. A *fictio juris* is somewhat quite different from a presumption. Those things are presumed which are likely to be true; but a *fictio juris* is a supposition of law, that a thing is true, which is either certainly not true, or at least is as probably false as true: And it is defined by some doctors, An assumption of falsehood for truth in a possible thing, that it may have the effect of truth, in so far as is consistent with equity. Thus, in the Roman law, one was by adoption held for the son of him who adopted, though he was not his son: And because there is no place for fiction but in things possible, no person could adopt, who was not at least eighteen years older than him whom he adopted. One instance, however, occurs of a fiction of a thing impossible, which obtains both in the Roman law and ours, *viz.* that an heir is *eadem persona* with his ancestor. By the law of Scotland, deeds, against which a decree of certification is awarded in an action of reduction-improbation, are adjudged to be false *fictione juris*, though the most convincing proof should be brought, that they had once existed, and were genuine: But because fictions of law must be limited, in their effects, to the purposes of equity for which they were introduced, that fiction operates only in favour of the pursuer who called for the production of the deeds; for they continue to have the same legal validity which they had formerly in all questions with third parties.

The ancient form of appeals from inferior courts.

39. Before proceeding to the next title, which treats of final sentences or decrees, a short account may be given of the method competent by the law of Scotland, of reviewing interlocutory sentences pronounced by inferior judges, before they come the length of an extracted decree. The remedy of appeal from the sentence of an inferior court to a superior, has been admitted by the laws of all civilized states; but that law-suits might not be drawn out to perpetuity,

* See *Bank. i. p. 667; Fac. Coll. Jan. 28. 1779, Lade, Dict. p. 11681.*

⁹⁸ See *Ashburton, 7. Feb. 1811, Fac. Coll.; Campbell, 17. June 1824, (S. & D.); Fettes, 7. July 1825, (Ibid.); Tait, 481, et seq.*

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decree, apply to the court of session for letters of advocation, that is, as may be gathered from the name, letters for calling the action from the inferior court to themselves*. The grounds therefore on which a party may pray for these letters, are incompetency and iniquity. Advocation on the head of incompetency is regularly pleadable by the defender only; for a pursuer, who voluntarily brings a defender before a judge, in a matter which admits of a prorogated jurisdiction, appears thereby to pass from all objections which he might otherwise have urged against the competency. Under *incompetency*, in this sense of the word, is included not only want of jurisdiction in the judge, but every ground for declining a jurisdiction though in itself competent, flowing either from privilege in the party, or suspicion of the judge¹⁰². Advocations may be granted by the session, as the supreme civil court upon incompetency, even in causes of which they themselves have not the immediate cognisance, *ex. gr.* in maritime causes; and by the former practice, in causes which were entirely without their cognisance; *supr. B. 1. t. 3. § 34*, because the competency of a court is a point of civil jurisdiction. But in these they decide only upon the ground of advocation; and if they pronounce the court incompetent, they remit the cause itself to the competent court †; if they repel the ground of advocation, they send the cause back to the court from whence it came. Advocations are sometimes applied for on the head of intricacy, where the cause is involved in difficulties, by the variety either of facts or points of law: And this head coincides nearly with that of incompetency; for though the inferior court should be competent to causes of the same general nature, yet advocation may proceed, because that particular action is, from its intricacy, considered to be above the cognisance of inferior judges.

Nature of the ground of iniquity.

41. Where the defender has once acknowledged the judge's authority, in a cause in which his jurisdiction may be prorogated, advocation is not received, but on the head of iniquity; and this ground may be pleaded either by the pursuer or defender. A judge is said to commit iniquity, when he repels a plea or defence which

* In the case of *Wright and Graham*, Nov. 22. 1766, *Kames, Sel. Decis. No. 250, Dict. p. 375*, it is said to have been found, that advocation was competent after decree pronounced by the sheriff, but before extract¹⁰¹. This was contrary to former decisions. See *Dict. v. i. voce ADVOCATION*.

† See on this subject, *Fac. Coll. Feb. 6. 1802, Gordon, Dict. p. 12245*.

“ed, and the parties shall proceed to proof under the interlocutor of the inferior court, they shall be held to have waived their right of appeal to the House of Lords, against any judgment which may thereafter be pronounced by the Court of Session, in so far as by such judgment the several facts established by the proof shall be found or declared;” 6. *Geo. IV. c. 120, § 40.*; *A. S. 12. Nov. 1825, § 71*.

As to the present form and mode of proceeding in advocations, *vid. Ib. § 40, et seq.*

“In all advocations of interlocutors pronounced by *sheriffs*, it shall be competent to the inferior judge to regulate in the meantime, on the application of either party, all matters regarding interim possession, having due regard to the manner in which the mutual interests of the parties may be affected in the final decision of the cause; and such interim order shall not be subject to review, except by the Lord Ordinary, or the court, in the course of discussing the process of advocation; reserving to the Court of Session or Lord Ordinary full powers, during the course of discussion of the cause in the said court, to give such orders and directions, in respect to interim possession, as justice may require; *Ibid. § 42*;—see *Haldan, 21. Jan. 1826, (S. & D.)*.

Advocation is not now competent against a decree of removing; the remedy is by suspension, *Ibid. § 44*.

¹⁰¹ But an extract bars advocation, *Ibid. ; Bell, 10. June 1821, (S. & B.) ; 6. Geo. IV. c. 120. § 43.*

¹⁰² *Vid. supr. not. 100.*

which he ought to sustain, or sustains what he ought to repel; or, in general, when he either does, or neglects to do, any thing in the exercise of his jurisdiction contrary to law. If the Ordinary, to whom a bill of advocation is preferred, shall pass it, that interlocutory sentence, or, as it is called, deliverance, is a warrant for issuing letters of advocation from the signet, which have the effect, after being intimated to the inferior judge *, to stop his farther proceeding in the cause, unless it shall be afterwards remitted to him by the session. If he shall presume to go on, notwithstanding the intimated advocation, his sentence is null; and both he, and the private party insisting, are punishable by that court for contempt of authority. After advocation, the cause is carried on before the session, precisely by the same forms as if it had been originally brought before them: For which reason Lord Stair considers advocations as actions, and gives them the name of *actions extraordinary*, or, *in the second instance*, to distinguish them from those which are brought directly before the session, by a summons issuing from the signet.

42. Though the ground on which advocation proceeds is simply personal, respecting that judge alone who is incompetent, or hath committed iniquity; yet letters of advocation carry an injunction, by their usual style, not only to the judge from whom the cause is advocated, but to all inferior judges, not to take cognisance of it; and even where these words of style happen to be omitted, a general prohibition was adjudged to be implied in the nature of an advocation; *Durie, July 18. 1623, Cranston, (Dict. p. 366)*. But an advocation not intimated, can neither restrain judges from deciding, nor parties from insisting; for judges are, by their office, bound to take cognisance of the causes regularly brought before them, till they be interpellated by the order of a superior court.

43. That the session may not waste too much time in causes of smaller importance, no cause for a sum below two hundred merks Scots can be advocated to that court, from any inferior one which the law has made competent to it, 1663, c. 9; so that parties have no remedy against the iniquitous proceedings of an inferior competent court, in lesser causes, till after decree †. But causes carried on before an incompetent judge fall not within that statute; and therefore may be carried from the inferior court to the session, let the subject be ever so inconsiderable;—and were it not for this limitation, inferior judges might stretch their jurisdiction in lesser causes, without any possibility of control. This statute is now, by the aforesaid jurisdiction-act, 20. *Geo. II. c. 43. § 38*, extended to advocations of actions for sums not exceeding £.12 Sterling ‡.

Advocation without intimation does not interpel judges from proceeding.

No cause under £.12 Sterling can be advocated on account of iniquity.

TIT.

* In a late case, where a bill of advocation of a removing had been passed in absence, (after intimation to the clerk of the inferior court), and the letters expedite, the Lords, upon a reclaiming petition, allowed the landlord, pursuer of the removing, to answer the bill, on this ground, that it had not been intimated to the respondent; *July 11. 1804, Keith, Petitioner, Dict. p. 12021*.

† As to the remedy of appeal to the circuit-court of judicary in cases of the above description, *vid. supra, B. I. tit. 9. § 28*.

‡ The court cannot even remit with instructions in such cases, *Kilk. p. 320, No. 9, (Buchanan, 26. July 1750, Dict. p. 374)*; *Fac. Coll. July 6. 1775, Cunningham, Dict. p. 375*. The value of the cause is, as to this matter, estimated according to the conclusion of the summons before the inferior judge, whatever his decree may have been, and exclusive of expenses; *Feb. 11. 1761, Marq. Lothian, Dict. p. 374; Dec. 11. 1791,*

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decree, apply to the court of session for leave to appeal, as may be gathered from the name. It is not pleadable by the defender before a judge of session, which a party may pray for through an advocate, and of Decrees-
 which a party may pray for through an advocate, and of Decrees-
 quity. Advocation on behalf of a defender before a judge of session, which a party may pray for through an advocate, and of Decrees-
 pleadable by the defender before a judge of session, which a party may pray for through an advocate, and of Decrees-
 a defender before a judge of session, which a party may pray for through an advocate, and of Decrees-
 jurisdiction, appears to be a matter of course, which a party may pray for through an advocate, and of Decrees-
 might otherwise have been the case if debateable points

petency, in this sense, in the highest resort, whose judgments are irreversible. Upon this ground, the decrees of session, is limited to five years¹⁰⁵; *vid. supr.* B. 3. t. 7. § 21. When a writ of appeal to the House of Lords against a judgment of the session is served upon him in whose favour the judgment was given, and who is called the *respondent*, it bath the effect to stay execution of the sentence¹⁰⁶, till the appeal be

As superior courts have an inherent right of reviewing the decrees of inferior ones, except in so far as it may be limited by the decrees of usage, it is the supreme court alone, or the court of the highest resort, whose judgments are irreversible. Upon this ground, the decrees of session, is limited to five years¹⁰⁵; *vid. supr.* B. 3. t. 7. § 21. When a writ of appeal to the House of Lords against a judgment of the session is served upon him in whose favour the judgment was given, and who is called the *respondent*, it bath the effect to stay execution of the sentence¹⁰⁶, till the appeal be

1791, *Roberts contra Duncan*, not reported, mentioned in the case of *Macintosh*, Feb. 14. 1795, Dict. p. 377; Dec. 18. 1776, *Steel*, Dict. p. 375, & *voce* ADVOCATION, App. No. 1.¹⁰³

¹⁰³ *Brown*, 29. Jan. 1822, (S. & D.); *Ewing*, 17. Nov. 1822, (*Ibid.*); and see *M'Ewan*, 12. Feb. 1824, (*Ibid.*) But where the dispute involves a question of right, or the subject of the conclusion is otherwise of uncertain value, and may exceed L.12, advocation has been allowed; see *Steel*, and *M. Lothian. supr.*

¹⁰⁴ Appeal to the House of Lords is not competent from interlocutors or decrees of Lords Ordinary, which have not been reviewed by the court, nor from interlocutory judgments of the court, except, 1. where there has been a difference of opinion among the judges, or 2. with leave of the court, 48. *Geo. III. c. 151. § 15*; 6. *Geo. IV. c. 120. § 5. 14, &c.*

¹⁰⁵ The time is now limited to two years, 6. *Geo. IV. c. 120. § 25*. See the various provisions contained in that branch of the statute, noticed more fully, *supr.* B. 3. t. 7. § 21, *not.* 369.

¹⁰⁶ But the Court of Session have power, on application of the respondent, to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, &c. 48. *Geo. III. c. 151. § 17, et seq.* Accordingly, the reports are full of examples, where such interim execution has been awarded; *Murray*, 23. Nov. 1811, *Fac. Coll.*; *Johnstone*, 17. May 1815, *Ibid.*; *Alexander*, 5. Feb. 1820, *Ibid.*; *Sassen*, 22. Jan. 1824, (S. & D.); *Reid*, 7. March 1826, (*Ibid.*), &c. &c.;—as well as of others where it has been refused; *Grant*, 13. Feb. 1813, *Fac. Coll.*; *Moffat*, 7. July 1813, *Ibid.*; *Brodie*, 22. Nov. 1814, *Ibid.*; *E. Mansfield*, 2. Mar. 1815, *Ibid.*; *A. Smith*, 8. July 1824, (S. & D.), &c. &c. Appeal against a judgment allowing such interim execution is incompetent; *C. Hadinton*, 20. Nov. 1811, *Fac. Coll.*—See *Scougall & Co.* 8. Dec. 1814, *Fac. Coll.*; *M'Niel*, 24. May 1827, (S. & D.);—*Mag. of Montrose*, 16. Nov. 1825, (*Ibid.*).

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world was subject to the Roman empire, the judgment of the supreme court of one province must have had all the effects given by their law to a *res judicata* in any other province of that empire: But now that Europe is divided into many separate independent kingdoms, the question, What effect a *res judicata*, or definitive sentence pronounced in the dominions of one sovereign state, ought to have in any other? may be resolved by distinguishing between the *actio* and the *exceptio rei judicatae*. Where the obtainer of a decree given forth in one state, demands the execution of it, by an action brought before the court of another state, that court, who are not bound to interpose their authority to it *ex necessitate*, but only *ex comitate*, have a right, previously to their interposition, of inquiring into the merits of the question in dispute, that they may form a judgment, whether there be sufficient ground, either in law or in equity, for awarding execution upon the decree; *Kames*, 21. (*Edwards*, Dec. 29. 1720, Dict. p. 4535); *Fac. Coll.* i. 173, (*Wilson*, Jan. 7. 1756, Dict. p. 4549)*; and indeed the pursuer, by applying to the court for their aid, virtually submits the justice of his demand to their determination. But where one who hath been condemned by a sentence which hath received full execution in one state, brings a process of redress in another, the defender, in whose favour the decree was given, and who thereby acquires a right that cannot lawfully be taken from him, but by a court who hath the power of reversing the decree, excludes the action by his *exceptio rei judicatae*; for he does not in such case apply to the court for its aid, but, on the contrary, rests entirely on the sentence recovered by him in a foreign court confessedly competent in the cause; and so in effect excepts to the jurisdiction of the judge before whom he is called, as having no authority over that court, nor any right of reviewing its sentences; *July* 24. 1731, *Hamilton*, (Dict. p. 4584), collected in (*Folio Dict.* i. p. 324¹⁰⁸ †).

Limited time for reclaiming against judgments of the whole court, and of the Lord Ordinary.

5. As parties might, by our former practice, reclaim against the sentences of the session, at any time before extracting them, without limitation, their judgments were not final till extract; but by act of sederunt, *July* 9. 1709, no sentence pronounced in presence of the whole Lords, or in the Inner-house, can be reclaimed against, after six sederunt-days from its being signed; and by a posterior act of sederunt; *Nov.* 26. 1718, only one reclaiming petition is to be received against an interlocutor of the Inner-house; so that now an interlocutor *in præsentia*, if it be not either reclaimed against within the limited time, or if it be affirmed by a second interlocutor upon a reclaiming bill, has, even before extract, the full effect of a *res judicata*, as to the court of session, though it cannot receive execution till it be extracted †. Sentences, when pronounced by the

* This decision was reversed upon appeal; but the respondents did not appear. In Lord Kames's report of the same case, Dict. *ibidem*, the cause of the reversal is mentioned.

† A decree absolutor has a stronger effect, wherever it may be pronounced, as creating the *exceptio rei judicatae*, than a decree in favour of the claimant. See Lord Kames, *Princ. of Equity*, B. 3. c. 8. § 6; *Fac. Coll.* *July* 14. 1768, *Sinclair*, Dict. p. 4542; (as reversed on appeal, 4. *March* 1771, *Ibid.*) See also *Ibid.* *July* 22. 1767, *Laycock*, Dict. p. 4554.

‡ In the particular case, where the cause has been decided in the Inner-house upon a report from the Lord Ordinary on the Bills, as the interlocutor is signed, not by the Lord

¹⁰⁸ See *Fac. Coll.* *M^r Donald*, 6. Dec. 1825, (S. & D.); *Sellers*, 13. May 1825, (*Ibid.*); *Maxwell*, 2. July 1825, (*Ibid.*); *Pattison*, 17. Jan. 1827, (*Ibid.*); *Mauls*, 31. Jan. 1827, (*Ibid.*).

the Lord Ordinary, have the same effect, if not reclaimed against by a petition to the court, as if they had been pronounced *in præsentia* of the whole Lords; because parties are in that case understood to acquiesce in the judgment of the Ordinary: And therefore in all extracts of decrees, even when pronounced by an Ordinary, the style is the same as that of a *decree in præsentia, the Lords declare; the Lords adjudge*. All petitions to the court, against an interlocutor of the Ordinary, must be preferred within eight sederunt-days after it is signed, *Act of Sederunt, July 9. 1709* ¹¹⁰ *.

6. Decrees in absence of the defender have not the force of *res judicatae* against him; for where the defender does not appear, he cannot be said to have referred his cause to the decision of the court,

Decrees in absence, their effect.

Lord President, but by the Lord Ordinary on the Bills, "after advising with the Lords," *Fac. Coll. Jan. 20. 1803, Princ. Clerks of Session*, Dict. p. 12242, the unsuccessful party can reclaim against a second judgment, the first being considered only as an interlocutor of the Lord Ordinary; *Ibid. March 5. 1802, Lennox*, Dict. p. 12178 ¹⁰⁹.

* See *Fac. Coll. Aug. 4. 1761, Haldane*, Dict. p. 12187; *Ibid. Nov. 27. 1801, Millie*, Dict. p. 12176; *Ibid. Feb. 10. 1803, Young*, Dict. p. 12178.

¹⁰⁹ It is in no case competent now to reclaim against a second judgment; (*infr. not.*); and by *A. S. 14. Feb. 1826, § 2*, it was even declared incompetent to receive a reclaiming note at all "against any interlocutor of the Lord Ordinary on the Bills, pronounced after advising with the Lords," on the ground that such an interlocutor, although in point of form bearing to be the interlocutor of the Lord Ordinary, is in reality the judgment of the Inner-house." But it being afterwards found, that under the *Stat. 48. Geo. III. c. 151, § 15. (vid. supr. not. 104)*, "an appeal to the House of Lords from such interlocutor might be liable to objection in point of form," the above enactment was recalled, and the rule now is, "that a reclaiming note against any such interlocutor shall be immediately disposed of by the court, without any of the procedure thereon which is followed out in the case of reclaiming notes against other interlocutors of the Lord Ordinary on the Bills," *A. S. 11. July 1826*.

¹¹⁰ It is not now competent to bring any interlocutor of the Lord Ordinary under review of the Inner-house, by the form of reclaiming petition. The present form is to lodge a simple note, reciting the Lord Ordinary's interlocutor, and praying the court to alter the same in whole or in part; along with which note, the record, and cases, (if any,) upon which his Lordship decided, are printed and boxed for the court. The reclaiming days against an Outer-House interlocutor are twenty-one days from its date, *6. Geo. IV. c. 120. § 18, and relative A. S.*

In the Bill-Chamber the reclaiming days are different; but some new rules on the subject being under consideration, it would be of no use to set down the existing regulations:—for which, however, see *A. S. 14. June 1799; Snadon, 5. March 1819, Fac. Coll.; Lang, 3. Feb. 1824, (S. & D.); infr. 18, in note*.

Neither the Lord Ordinary, nor the court, have now power to review their own judgments, those of the former being at once final in the Outer, and those of the latter in the Inner-House; *Ibid. § 17, 19, 21:—5, 14, &c.*

If the reclaiming days against the interlocutor of a 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 petitioner shall be subjected in the expenses previously incurred in the process by the other party;" *48. Geo. III. c. 151. § 16*. This enactment extends to interlocutors pronounced in the Bill-Chamber; *Fac. Coll. Arnot, 4. Feb. 1826, (S. & D.)*. Its operation is excluded after extracted decree; *Stewart, 10. Dec. 1811, Fac. Coll.* The party applying to be reponed must pay his adversary's full expenses, even where there was a previous interlocutor in the cause finding no expenses due; *Thom, 24. May 1811, Ibid.* But where the party so reponed is ultimately successful on the merits, the court may not only award him his own expenses, but order repetition of those previously paid to his opponent under the statute; *Brumby, 14. Nov. 1822, Fac. Coll. (S. & B.)*. This point, however, is again under consideration, the First Division of the Court having, with a view to settle the rule definitively, delayed deciding until they shall have consulted with the Judges of the Second Division; *21. Dec. 1827, Stewart v. Lang, Sess. pap. pen. me.*

See *Ramsay, 22. Feb. 1823, (S. & D.); Fac. Coll. Brock, 8. July 1826, (Ibid.);—Gilbert's Representatives, 26. Jan. 1826, (Ibid.); Innes, 14. May 1822, (Ibid.);—Macra, 27. Feb. 1824, (Ibid.)*.

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court, in virtue of the contract implied in litiscontestation, *vid. supr. t. 1. § 69. 70*, which is the true ground upon which a decisive sentence becomes final: The defender, therefore, may be restored against such decree; but if he was personally cited, he must first make payment to the pursuer of the costs he has incurred in recovering it¹¹¹ *. It has been already observed, that where a defender, without offering peremptory defences, passes from his appearance before litiscontestation, the decree pronounced afterwards in the cause is considered as in absence; *supr. Ibid.*¹¹³. If, in the defender's absence, decree be given against the pursuer, it has as strong an effect as if the defender had appeared, because the pursuer, by bringing his action before the judge, is understood to subject himself to his determination; and a judgment in behalf of a defender ought not to have weaker effects, or the less force, that it is pronounced without any defence offered by him in support of his allegation, or for eliding the action.

No *res judicata* before an inferior court.

7. Sentences or decrees of inferior courts have so little the authority of *res judicata*, as to the supreme court, that though one should neglect to offer a relevant defence, and through such neglect should be condemned in payment, the sentence may be reviewed by the session upon that very defence which was competent before the inferior court, but neglected to be offered; because a *pia peritorum* is not presumed to be had before inferior court, and parties ought not to suffer for employing inexpert procurators when perhaps there are none other practising in the court.

Suspension and reduction of decrees of the court of session.

8. Suspension and reduction are not only remedies against the iniquitous or ill-founded decrees of inferior judges, but are also methods of redress competent to parties to get free of the effects of such decrees of the session given forth to their prejudice, as can be again brought under their own review on account of any essential defect. Reduction is the proper remedy, either where the decree hath already received full execution, by payment or satisfaction; or where it decrees nothing to be paid or performed, but barely declares a right in favour of the pursuer; for, in those decrees which have already had all the completion that their nature can admit, there can be no room for suspending them, or staying their execution. What has been already said on the reduction of writings, is for the most part applicable to the reduction of decrees. This is only observation may be added, that though a person who brings reduction of a deed or decree upon one ground, should be cast in his suit, it is competent to him to insist in a new action for declaring it null, upon different allegations in fact¹¹⁴. This Lord Stair

* See *Act of Sederunt, Aug. 11. 1787, § 4*, as to procedure on bills of suspension of decrees in absence, obtained before inferior judges, in causes under L. 12 Sterling value¹¹².

¹¹¹ *Smith, 9. March 1826, (S. & D.)*; compared with *Kirk, 6. July 1827, (Ib.)*.

¹¹² "When decree has passed in absence in any inferior court, or in the Court of Admiralty, and has been extracted, it shall be competent to apply to the court in which such decree was pronounced, to have the decree recalled; and on consignation in the hands of the clerk of court, of the expense incurred, the said court shall have power to stop execution, and repon the defender, and revive the action, as if the decree had not been extracted;" 6. *Geo. IV. c. 120. § 43*. See also relative acts of sederunt, 12. *Nov. 1825*.

¹¹³ *Millie, supr. § 5, not. †*; *Young, Ibid.*; *Leith, 7. June 1822, (S. & D.)*; *Clerk, 17. Nov. 1825, (Ibid.)*; *M'Donald, 19. Nov. 1822, (Ibid.)*;—See also *A. v. B. 19. May 1815, Fac. Coll.*

¹¹⁴ See 6. *Geo. IV. c. 120. § 10, supr. cit. t. 1. § 7. not. 3.*

BOOK IV.

Inducia of the charge in hornings.

Letters of hornings granted summarily,—and general letters of hornings.

mirals, by 1609, c. 15; and of commissaries, by 1612, c. 7*; and, lastly, on the decrees of the commission of tithes, by 1633, c. 8, not only on such as had been recovered at the suit of the minister himself who applied for the horning, but on those also obtained by any of his predecessors in office; *Act of Sederunt, June 22. 1687* †. Lord Bankton affirms in general terms, That letters of horning may issue upon the decrees of the justices of the peace: But the act 1661, c. 38, which is quoted in support of this opinion, expressly confines that privilege to sentences pronounced by them at the suit of their collector for fines upon delinquencies; and so extends not to decrees for servants' wages, or for other civil debts that may fall under their cognisance, with which their collector has nothing to do; see *Fac. Coll.* i. 198, (*Stevenson, Mar. 9. 1756, Dict.* p. 5747).

10. The number of days indulged to a debtor, within which he may make payment, after a charge given him on letters of hornings, varies according to the nature of the decree on which the diligence proceeds, or of the tenor of the debtor's obligation. If it be founded on a decree of session, the charge is given on fifteen days, which is also the term given in charges upon commissary decrees. Horning on the decrees of magistrates of boroughs, or of sheriffs, or of admirals, or of the commission of tithes, were, by the acts before cited, directed to proceed on ten days' charge: But, by the present practice, horning on the decrees of boroughs and of sheriffs pass also on a charge of fifteen days; probably from a notion taken up, as if the *inducia* in these had been lengthened by 1612, c. 7. When horning proceeds on a registered obligation, by which the debtor consents that diligence shall proceed against him on a determinate number of days therein mentioned, that consent must make the rule; and if no precise number of days be specified, the days of the charge must be fifteen, which is the term of law, unless where special statute interposes, *ex. gr.* in bills, upon which the debtor may be charged on six days, by 1681, c. 20. But if a debtor reside on the north of the river Dee, he cannot be charged on less than fifteen days, 1600, c. 25 †.

11. General letters are those which issue against societies or bodies of men, and contain a warrant directed in general against all of that society or corporation, without particularly mentioning their names;

* See *Fac. Coll. Feb. 23. 1793, Park, Dict.* p. 7580.

† By *Stat. 19. Geo. III. c. 20*, (amending and perfecting *statutes, 17. Geo. II. c. 11, and 22. Geo. II. c. 21*), which established a fund for a provision to the widows of the Scottish clergy, letters of horning are (§ 55 and 56), directed to be issued at the instance of the general collector against the contributors, &c. in the same manner as hornings at the instance of the Scottish clergy for payment of their stipends.

‡ Those who reside in Orkney and Zetland cannot be charged on less than forty days, 1685, c. 43. But this act contains an exception of letters to be raised on writs registered of consent; where, in the clause of registration, the party consents to a shorter time ¹¹⁷.

periors, that a change was made; and in these it would seem, that, as the baron or regality bailie can have no jurisdiction beyond what is competent to his superior, with whom, indeed, he only exercises a cumulative jurisdiction, so horning cannot proceed on his decrees, nor can he exercise, at all, any but the very limited jurisdiction pointed out § 17. of the statute; *Greenock, 27. May 1794, Dict.* p. 7714.

¹¹⁶ It was again found incompetent to grant letters of horning upon decrees of justices of peace; *Fairlie, 6. July 1805, Dict. v. PROCESS, App.* No. 7.

¹¹⁷ "All hornings against persons outwith the kingdom, (albeit the bond, or other ground upon which it is raised, bears 6, 10, or 15 days,) must be on 60 days;" *Dallas, 10.* See also *supr. B. 2. t. 5. § 34*;—and, as to the present form of the edictal charge, *B. 4. t. 1. § 6. not. 2*.

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Debtors imprisoned, must be strictly confined. Magistrates are liable for the debt, if they escape.

lity, or magistrates of royal boroughs. Hence a bailie of barony, because he lies under no such obligation, cannot be charged to concur in the execution of a caption; *Durie, March 13. 1623, Bailies of Dunse*, (DICT. p. 11691). A magistrate who is lawfully and regularly charged by the messenger to concur, and nevertheless refuses to assist him, or to receive the debtor into prison after he is seized, is liable *subsidiarie* for the debt in the caption; and if there be more than one, they are liable conjunctly and severally*. If the magistrates be not themselves solvent, the burden of paying the debt falls on the community; *Falc. i. 164, (Gall, Feb. 10. 1747, DICT. p. 11736)*. The magistrate thus refusing his concurrence, may, on the messenger's setting forth that fact in his execution, be charged by the creditor, upon second letters, to seize the debtor within three days, and, in default thereof, may be denounced, and letters of caption may issue against him. Before any caption can be put to execution within the city of Edinburgh, the magistrates must be applied to for their concurrence, which they grant of course †. Letters of caption contain an express warrant to the messenger, if he cannot get access, to break open doors, and other lock-fast places, where he suspects the debtor may lie concealed.

14. After a debtor is imprisoned, he ought not to be indulged with the benefit of the free air, either on his parole, or even under a guard; for every creditor has an interest that his debtor be kept under close confinement, that by the *squalor carceris* he may be brought to the payment of his just debt¹¹⁹. A magistrate, therefore, or jailor, having the charge of a prison, who suffers a prisoner to go abroad, though the state of his health should require it, and though he should return to prison, without either a warrant of the Court of Session, or an attestation upon oath of the prisoner's sickness by a physician, surgeon, or the minister of the parish, is liable *subsidiarie* for the debt, by act of sederunt, *June 14. 1671*¹²⁰ ‡: Magistrates become also obliged for the debt, if the prisoner shall make his escape through the negligence or connivance of the jailor; *Fac. Coll. ii. 68, (Chalmer, Dec. 14. 1757, DICT. p. 11746)*, or through the insufficiency of their prison, *Act of sederunt, Feb. 11. 1671* §:

But

* See *Fac. Coll. iii. 30, Mutter, March 6, 1761, DICT. p. 2542; Ibid. Dec. 7. 1780, Gray, DICT. p. 11754*. They are in like manner liable if any undue delay takes place in the imprisonment of the debtor; *Ibid. June 13. 1781, Bell, DICT. p. 11756*.

† This has gone entirely into disuse. No such concurrence is ever applied for; and a clause to that purpose very seldom or never occurs in the modern form of caption.

‡ This rule is exemplified by a very strong case, *Fac. Coll. June 8. 1790, Shortreid, DICT. p. 11760, (affirmed on appeal)*. See *Kilkerran, No. 1, voce SANCTUARY, Husband, 26. July 1749, DICT. p. 3. and Fac. Coll. March 7. 1781, Fullerton, &c. DICT. p. 11755; (Mutter, *supr. not.* *)¹²¹. But where the debtor has been imprisoned, in consequence not of a caption for payment of debt, but of a warrant proceeding upon an allegation of *meditatio fugæ*, the magistrates will not be liable by reason of his temporary enlargement or escape, provided his person is recovered before they are required to produce him; *Fac. Coll. Jan. 24. 1786, Gordon, DICT. p. 11756; Ibid. Nov. 16. 1792, Brown, DICT. p. 11763*¹²².*

§ *Fac. Coll. June 29. 1786, Purdie and Company, DICT. p. 11757*.

¹¹⁹ See 2. *Bell Comm. 522. et seq.*

¹²⁰ As to the extent of the magistrates' responsibility for the prisoner, after he has been regularly liberated on a sick bill, see *Ritchie, 25. Jan. 1814, Fac. Coll. affirmed on appeal, 5. Dow, 88, and the cases of Forbes and Fordyce in 1793, there referred to*. By these decisions, the strict rule of the act of sederunt is much relaxed in favour of magistrates.

¹²¹ See *Wilson, infr. § 26. not. **

¹²² *Vid supr. B. 1. t. 2. § 21. not. 33.*

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cient customs, to grant acts of warding, or imprisoning debtors, if they failed to pay within the days of the charge given them upon the magistrates' precept; but now diligence against the person of debtors may proceed upon all such decrees of inferior courts, to which a decree conform may be interposed by the session; and, in Bankton's opinion, *B. 4. t. 16. § 3*, horning may pass, even upon a baron-decree, if the sheriff shall adopt it for his own, by interposing his authority to it. Justices of the peace have no right to imprison debtors for civil causes, as it would be fruitless to confer that power on a court who have no proper civil jurisdiction; and even when they assume to themselves a cognisance in civil debts, which is frequently the case, where the debt or other subject is inconsiderable; they have no right to grant warrants of commitment, in default of payment, *Fac. Coll. i. 111*, (*Blaw, July 9. 1754, Dict. p. 7610*¹²⁴). In criminal cases, the justices of peace, in order to enforce their sentences against delinquents, may either order the offender to jail, till he make payment of the fine awarded against him, or the collector named by the justices may obtain letters of horning, upon which he may be charged, according to the directions of the act 1661. As to the diligences of poinding and arresting, all execution by these was, by our former practice, allowed to pass upon obligations registered in the court-books of boroughs, without any warrant other than the registration itself; but by act of sederunt, *Dec. 10. 1713*, execution upon such registered obligations is prohibited, unless the extract bear a special warrant for that purpose. Sheriffs and barons have been in use to insert in the precepts granted by them against debtors for charging them to pay within fifteen days, a warrant to their officers to poind and arrest their moveables in default of payment.

Letters of ejection, and of fire and sword.

17. If a tenant or other possessor who is decreed to remove from, or quit the possession of lands, shall forcibly oppose the execution of the decree, or shall obstinately refuse to give obedience to it, notwithstanding a charge given him upon letters of horning, the obtainer of the decree may procure letters of ejection issuing from the signet, and directed to the sheriff, who is required to dispossess him, and to put the pursuer in the possession; or if the decree be pronounced by a sheriff, he himself may grant a precept of ejection directed to his own officer for the same purpose. These letters or precepts are executed, by throwing out of the house some part of the defender's household-stuff, and extinguishing his fire. If a party was so obstinate as to oppose by force the execution of the letters of ejection, and still to continue his possession in despite of the law, the Scots privy council, while that court subsisted, granted letters of fire and sword, authorising the sheriff to call for the assistance of the county, and dispossess him by all the methods of force. But by our present practice, since the union of the two kingdoms in 1707, where one opposes by violence the execution of a decree or any lawful diligence, which the civil magistrate is not able by himself and his officers to make good, application is made to the military for assistance, who enforce the execution *manu militari*.

18. Having treated at some length of the several kinds of diligence

¹²⁴ Under the small-debt act, they have power to enforce execution of their decrees by imprisonment; 39. and 40. *Geo. III. c. 46. § 10.*; 6. *Geo. IV. c. 48. § 10.*

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Requisites to
the passing of
suspensions.

session, and by two in vacation-time; but other decrees may be suspended by any one of the judges, either in time of session or vacation ¹²⁸.

19. As suspension has the effect of staying the execution of the creditor's lawful diligence, it ought to be proceeded in with as little prejudice to the charger as possible. Hence, *first*, Suspensions are not to be passed, but upon reasons instantly verified; see *Act of Sederunt, Feb. 9. 1675*. This is, however, so softened in practice, that where a relevant ground of suspension is offered, which requires a proof or a diligence for the recovery of writings, execution is stayed for such time as may be necessary for bringing the proper evidence to support it; *St. Jan. 22. 1674, Sim, (Dict. p. 12321)*. *2dly*, No suspension is, in the general case, granted without security given by the suspender to pay the debt, if it shall be found due; *Act of Sederunt, Jan. 29. 1650* ¹²⁹; but where the suspender, from his low or suspected circumstances, cannot procure a sufficient cautioner, the suspension is allowed to pass on juratory caution, *i. e.* such security as the suspender swears is the best he can give, granting at the same time a disposition *omnium bonorum* in security to the charger; in which case the court are to consider the reasons of suspension with particular accuracy at advising the bill; *Act of Sederunt, Nov. 8. 1682* *. In special cases, suspension is refused, though the most sufficient security should be offered ¹³⁰. Thus, charges given by ministers for their stipends, by professors of universities, or masters of schools for their salaries, or by directors of hospitals for their rents, cannot be suspended, except either on the production of discharges, or on the consignation of the sums charged for, 1669, c. 6; 1696, c. 14 †. But this privilege is personal

costs, and to tax their amount, which may be recovered in the manner there pointed out; but it is incompetent to award costs by an interlocutor passing the bill; *Fac. Coll. Jan. 26. 1799, Smith, Dict. p. 8043* ¹²⁷.

* See the *Act of Sederunt, June 14. 1799, § 2*, which contains farther regulations as to the receiving of *juratory caution*, and which, in particular, dispenses with the disposition *omnium bonorum*, unless in cases where the suspender is possessed of heritable property; and there, if the charger requires it, a disposition of such property in security is to be made out by his own agent, and at his own expense.

† “ If the rent of the benefice or stipend consist in money; or of one hundred merks Scots for ilk chalder of victual where the same consists in victual, and proportionally if the victual charged for be less than a chalder, without prejudice to the Lords of Session to modify a greater or less sum for the chalder of victual, as they shall find cause at the discussing of the suspension.” The same consignation is necessary, in suspension of charges at the instance of the general collector of the fund for the widows of the Scottish clergy against the contributors, &c. by 19. *Geo. III. c. 20. § 55 and 56*.

¹²⁷ “ In the event of bills of suspension being passed of decrees of inferior courts, it shall be competent for the Lord Ordinary or the court to find the suspender entitled to his expenses in the inferior court, as well as in the Court of Session;” 6. *Geo. IV. c. 120, § 46*. But “ this power is to be exercised only after the letters have been executed, and are discussed before the Lord Ordinary in the Outer-house, or before the court;” *A. S. 12. Nov. 1825, § 77*.

¹²⁸ “ In all cases without distinction, the Lord Ordinary on the bills may pass bills of suspension, without requiring the concurrence of the Inner-house during session, or of one or more Ordinaries during vacation;” 6. *Geo. IV. c. 120, § 46*.

¹²⁹ *A. S. 14. June 1799, § 1*.

A private paction between debtor and creditor, that no suspension should pass, but on consignation, does not preclude the court from passing the bill on caution, or even without it, according to the real justice of the case; *Forrester, 27. June 1815, Fac. Coll.; supr. B. 3. t. 3. § 60*.

¹³⁰ See *Gibsons, &c., 13. Nov. 1810, Fac. Coll.; Ferguson, 18. Jan. 1815, Ibid. (No. 39.)*.

sonal to the minister, or other person privileged, and cannot be pleaded by their assignees; *Fount. June. 2. 1697, Exec. of a minister*, (DICT. p. 10325). A charger who is satisfied that his debt is secure without a cautioner, may, for the greater dispatch, apply to the court to get the debtor's grounds of suspension discussed summarily upon the bill, in which way no security can be demanded from the debtor*.

20. Though he in whose favour the decree suspended is pronounced, be always called the charger, yet a decree may be suspended before any charge hath been given to the suspender, if a decree be extracted, on which a charge may be given¹³¹. Nay, where there is no decree, there may be a suspension, though not in the strict acceptation of that word; for suspension is a process authorised by law, for putting a stop, not only to the execution of iniquitous decrees, but to all encroachments either on property or possession, and, in general, to every unlawful proceeding; *tit. ff. De nov. oper. nunc.* Thus a building, or the exercise of any legal power which one assumes to himself, is a proper subject of suspension: And though it might seem that the election of magistrates for a burgh cannot be suspended, because the right is fully perfected by the election, such suspensions are daily admitted¹³², suspension being in that case considered merely as a summary way of bringing the question under review, which would consume too much time, if the complainers were left to the ordinary method of reduction †.

21. Letters of suspension bear the form of a summons, which contains a warrant to cite the charger to appear before the court against a day therein specially mentioned, to hear sentence pronounced in the cause. This makes it likely, that those letters have been at first made use of in the way of summons; but now of a long time they have been considered as a diligence barely prohibitory, staying execution on the debt or right suspended, so as the suspender cannot by any citation compel the charger to appearance, though the letters contain a warrant for that purpose, but must, if he himself would turn provoker, bring his action of reduction in common form; as was adjudged in the suspension of election of magistrates, *Feb. 1722, Magistrates of Edinburgh*, (not reported) ‡.

By

* Since the *Act of Sederunt, June 14. 1779*, the effect of such a remit is to vacate the caution previously found.

† In all bills of this kind, caution for damages as well as for expenses must be found within the days of the sist. This was decided on an incidental petition for *Allan and Co. Feb. 16. 1796*, not reported; when the court also found, that a person not subject to their jurisdiction could not be received as cautioner in a suspension.

‡ It has, for many years, been usual to execute suspensions, and to call them as summonses.

¹³¹ Though, in the general case, suspension is incompetent before extract, *Fac. Coll. Turner, 9. July 1824, (S. & D.)*; *Ibid. Alexander, 9. July 1824, (S. & D.)*,—yet where, from the sums being below £.12, or otherwise the proper remedy of advocacy cannot be had, the court has so far relaxed the rule as to receive suspension in such cases; *Fac. Coll. Scott, 14. Feb. 1826, (S. & D.)*; *Swan, 17. May 1825, (Ibid.)*; *Galletly, 15. June 1825, (Ibid.)*; *Findlay and Co. 17. Dec. 1822, (Ibid.)*

¹³² There has been no late example of such suspensions, and it is doubted whether that form of proceeding would now be held competent. The objection of delay is obviated by the summary nature of the process introduced by the election statutes, *7. Geo. II. c. 16*, and *6. Geo. II. c. 11*; which are said to have been "intended by the legislature as a separate code in matters of that kind;" *Wight, 339*.

Generally, suspension is an incompetent mode of complaining of any election, after the individual elected has entered upon his office, and acted in his official capacity; *Mag. of Glasgow, 3. Dec. 1825, (S. & D.)*.

Suspension is a process for stopping all unlawful proceedings.

Form of discussing the reasons of suspension.

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By the forms of the court, the charger cannot insist to get the reasons of suspension discussed, till the expiration of the day against which he was by the letters of suspension cited to appear; and the suspender frequently took care to have a long day assigned, on purpose to postpone the payment of his debt. To remove this hardship on the creditor, he might have brought an action for shortening that term, which was therefore called an action *prævento termino*; and the same expedient was practised when too long a term was assigned in letters of advocation;—but a fixed rule came at last to be observed, in respect of the days of appearance, both in letters of suspension and advocation, which has superseded the necessity of those obsolete actions. If the suspender shall not, within the days mentioned in the letters for the charger's appearance, produce his suspension in court, that the reasons of it may be discussed, the charger may put up a protestation in the minute-book against him for not insisting; and this protestation, after it is duly extracted, gives him a right to proceed in his diligence, in the same manner as if the debtor had obtained no suspension*. A suspender is not confined to the special grounds of suspension set forth in his bill, but may add new ones; because suspension is in effect a process or action; and in all actions a party may, during the dependence of the suit, without limitation as to time, offer any relevant plea or defence, under the restrictions contained in acts of sederunt; *July 23. 1674, and Nov. 20. 1711, § 8. 16.*¹³⁴.

Consequences of a decree of suspension and a decree finding the letters orderly proceeded.

22. If, upon the court's considering the suspension, the reasons shall be sustained, sentence falls to be pronounced, *suspending the letters of diligence*, on which the charge was given *simpliciter*; which is styled in a proper sense, *a decree of suspension*, and hath the like effect with a reduction, as it takes off the force and validity of the decree suspended to perpetuity. But if the reasons of suspension be repelled, the court *finds the letters of diligence orderly proceeded*, *i. e.* warranted by law, and regularly carried on; and they ordain these letters to be put to farther execution; upon which sentence the charger may obtain an extract of the bond granted by the cautioner in the suspension, and afterwards use all diligence both against the debtor and his cautioner. If upon advising the suspension of a d

crees,

* The cautioner cannot be made liable for the principal debt, unless the suspender shall have *expede his suspension at the signet*; so that the charger may procure an extract of it, and proceed in the manner particularly pointed out by act of sederunt, *Jan. 1. 1726, § 8.* For, if the letters of suspension have not been expedite, the cautioner is liable merely for expenses, by act *June 14. 1799.* The reason for this important difference, which is so favourable for the cautioner, seems to arise from a strict adherence to that clause of the bond, which from time immemorial has been thus: "And that, in case it shall be found that he (the complainer) ought so to do, after discussing the letters of suspension to be raised by him in the said matter." A charger, no doubt, sometimes finds this to be a hard regulation, and, in some cases, may happen to lose his debt by the suspender's intervening bankruptcy, and refusing to expedite his letters; but since the very favourable provisions made by the act *June 14. 1799,* obliging a suspender to find sufficient caution within fourteen days, and to expedite his letters within ten days after the bill is passed, the ground of complaint is not, by any means, so great as formerly, when some months' delay could be obtained by means of a suspension before the caution was adjusted¹³³.

¹³³ It has since been enacted, "that cautioners in a bill of suspension shall be liable to fulfil the obligation in their bond, although the letters of suspension shall not be expedite before the day of citation appointed in the deliverance, and also in the case of the charger's obtaining, and duly extracting, protestation for not enrolling, calling, and insisting;" 6. *Geo. IV. c. 120. § 47.*

¹³⁴ Under the late judicature act, parties are foreclosed, both in matter of fact and law, after closing the record; 6. *Geo. IV. c. 120. § 48, &c.; supr. t. 1. not.*³⁶.

Book IV.

Surcease from diligence, sometimes granted to debtors by a court, sometimes by creditors.

Protection from privilege against diligence.

the pursuer who makes payment agreeably to the directions of the decree, from the claims of all persons whomsoever¹⁴⁰. The creditors, or claimants, who were made parties to the suit, have no remedy left them; but as those who were neither called as defenders, nor appeared for their interest, cannot be hurt, as to their right of recovering from a third person what he has received in consequence of an erroneous decree, to which they were no parties, they are entitled, if they are found to have a right truly better than that of the creditor preferred, to an action against that creditor for recovery of the sums received by him; *Stair*, Nov. 29. 1679, *Bayne*, (Dict. p. 9131).

24. The execution of captions may be also stayed by special protections, either judicial or voluntary. Where a debtor under caption, who is concealing himself from the messenger, is upon any occasion cited to appear personally before the session, justiciary, or exchequer, *ex. gr.* to give testimony as a witness, the judges are empowered by 1663, c. 4.; 1681, c. 9, to grant him a protection for such time as may be sufficient for making his appearance in court, and for his return, not exceeding a month in all. And because the power of staying the execution of personal diligence might, if abused, greatly impair the right competent to creditors for the recovery of their debts, protections for every other cause are prohibited by those statutes; and the judges, if they grant any such, are declared liable for the debt*¹⁴¹. All judicial protections must be registered in the books of the court from whence they issue; and the person who applies for them must make oath, that the witnesses to be cited are material ones, said 1681, c. 9; and before a protection is granted, the creditor must be cited on fifteen days, that he may have an opportunity of shewing cause why it ought to be refused, 1698, c. 22. Creditors sometimes grant voluntarily a surcease of personal execution in behalf of their debtor, which is commonly called *a supersedere*; and the creditor who signs, or promises to sign it, if he use personal execution within the time indulged to the debtor, is for his breach of faith liable to him in damages. If such surcease be agreed to at a general meeting of creditors, all the creditors present, and not objecting, are understood to agree to the common measure there concerted¹⁴³: But creditors are at liberty to use all execution against the debtor's estate, notwithstanding this voluntary supersedere, if the surcease of diligence be not expressly extended to his estate as well as his person.

25. Execution of personal diligence is disallowed in many cases, without the debtor's either procuring sists upon bills of suspension granted by the session, or obtaining protections in the manner above explained. This may arise from privilege, belonging either to the person exempted from it, or to the place where he happens to

* See *Act of Sederunt*, Feb. 1. 1676. The bankrupt laws contain special regulations relative to personal protections¹⁴².

¹⁴⁰ *Haig*, 26. May 1812, *Fac. Coll.*; *E. Wemyss*, 11. June 1811, *Ibid.*

¹⁴¹ The Court, in various instances, have authorised the temporary enlargement of a debtor for the purpose of attending some proof or trial, affecting himself or others, but never without anxious provision for his safe custody; *Menzies*, 11. July 1826, (*S. & D.*); *Alison*, 9. July 1814, *Fac. Coll. Presbytery of Dumfries*, 7. July 1818, *Ibid.*; *Moodie*, 18. May, 1819, *Ibid.*;—with which compare *Duncan*, 25. June 1817, *Ibid.*

¹⁴² See 54. *Geo. III.* c. 137. § 58.; 2. *Bell Comm.* 463. *et seq.*

¹⁴³ See 2. *Bell Comm.* 592, and authorities *ibi cit.*

Book IV.

Cessio bonorum.

from it by a warrant from the court of session, and committed to prison.

26. Our law, from a consideration of compassion, has allowed insolvent debtors to apply for the liberty of their persons, upon a *cessio bonorum*, i. e. on making a full surrender to their creditors of their whole estate real and personal*. Before a debtor has right to make this demand, he must be under actual confinement, *Act of Sederunt, Feb. 8. 1688*¹⁴⁹; for it is in itself incongruous, and might be of bad example, that one should claim the privilege of personal liberty, who is not truly deprived of it. The benefit of *cessio* must be insisted in by way of action, in which the prisoner must make all his creditors parties to the suit; and it is cognisable only by the session. The pursuer must set forth in his libel the misfortune or accident by which he became insolvent, and bring proper evidence of it; *Act of Sederunt, Dec. 1. 1685* †. He must produce with the process a certificate under the hand of one of the magistrates of the borough where he is imprisoned, bearing, that he hath been a month in prison¹⁵⁰, without which certificate the process is not to be sustained; *Act of Sederunt, July 18. 1688* ‡¹⁵¹. He must exhibit upon oath, according to the directions of the act of sederunt, *Feb.*

* It is absolutely necessary that the debtor prove actual insolvency; *Fac. Coll. Feb. 4. 1775, Sharp, Dict. p. 11785*¹⁴⁸.

† See on this head, *Fac. Coll. July 12. 1785, Maccubbin, Dict. p. 11793; Ibid. March 10. 1786, Fraser, Dict. p. 11793, (vid. infr. not. 160)*.

‡ *Fac. Coll. March 9. 1798, Smith, Dict. p. 11799*. After the debtor has been imprisoned for a month, the incarcerating creditor cannot, by consenting to his liberation, frustrate his right to bring the process of *cessio*; *Fac. Coll. Feb. 3. 1779, Mackenzie, Dict. p. 11791*¹⁵¹. Imprisonment in the jail of the abbey, by warrant of the bailie, for a debt contracted there, does not found action of *cessio bonorum* under this act of sederunt; *Fac. Coll. July 11. 1799, Dunlop, Dict. p. 11800*¹⁵².

¹⁴⁸ This case, as fixing an absolute rule, was called in question, *2. Bell Comm. 572*; and a contrary judgment was pronounced, *Campbell, 19. Feb. 1825, (S. & D.)*,—it being held, “that, although a pursuer of a *cessio* might have funds, yet if they were not tangible, he could not be deprived of the benefit of the process.

¹⁴⁹ *Vid. not. † h. p.*

¹⁵⁰ “Under the description of imprisonment is included the custody in which a debtor remains, while freed from jail, upon a bill of health;” *2. Bell Comm. 568*. Accordingly, *cessio* was granted where the pursuer had been liberated on a sick bill, though the imprisonment did not exceed “nine hours;” *Ross, 5. July 1816, Fac. Coll.* See to the same effect, *Pickard, 16. Jan. 1813, Ibid.; Sheriff, 3. March 1814, Ibid.; M'Donald, 3. July 1817, Ibid.; and Bain, 23. Nov. 1816, Garnock, 6. March 1817, and M'Intyre, 31. May 1817, ibi cit.*;—*Snodgrass, 10. July 1822, (S. & D.)*; *M'Laine, 9. June 1821, Ibid.*: But in all of these cases, as well as in that of *Ross*, either there was no opposition, or that opposition had been withdrawn; see also *Houston, 6. July 1824, (S. & D.)*.

¹⁵¹ Nor is it necessary, as was once found, that the summons have been executed before the liberation; *Fac. Coll. Kely, 3. Mar. 1827, (S. & D.)*; compared with *Neilson, 25. Nov. 1809, Fac. Coll.* The debtor, however, must surrender himself to jail, or at the bar, so as to be within the power and custody of the court at the time of pronouncing decree; *Macgregor, 3. March 1809, Ibid.* It seems to have been, from imprisonment within the jail of the sanctuary not affording this full measure of control over the debtor, that the *cessio* was refused in the case of *Dunlop, not. † h. p.*

¹⁵² But see this case commented on, *2. Bell Comm. 556, 569 and 571, and supr. not. 151*.

¹⁵³ Where the *cessio* is libelled upon one imprisonment, and that imprisonment did not endure for the necessary period, a certificate that, before the summons was called, the debtor was again imprisoned at the instance of the same creditors, though this second imprisonment endured for more than thirty days, will not support the process; *Thom, 6. July 1820, Fac. Coll.*

The imprisonment must be on diligence for payment of debt. Imprisonment on a criminal

Feb. 8. 1688, a particular inventory of his estate, and depose, That he has neither heritage nor moveables, other than is contained in that inventory, and that he hath made no conveyance of any part thereof, since his imprisonment, to the prejudice of his creditors: He must also declare upon oath, whether he hath made any such conveyance before his imprisonment, and point out the persons to whom; and the cause of granting it; that the court may judge whether he has, by any fraudulent or collusive practice, forfeited his claim to liberty; and he must make over to his creditors the whole of his estate absolutely, and without the least reservation¹⁵⁴. The decree ordaining the prisoner to be set free, can have no effect as to future debts contracted by him, nor even as to posterior corroborations of former debts; neither can it affect creditors who were not called as defenders in the action upon which the decree proceeded; and therefore if the debtor shall, after his release, be again imprisoned upon any such debt, he cannot avail himself of his former decree¹⁵⁵, but must raise a new action of *cessio* *.

27. The disposition which is granted by a debtor to his creditors, upon a *cessio bonorum*, is not in satisfaction or *solutum* of the grantor's debts, but merely in farther security. If therefore the debtor shall acquire any estate after the decree recovered † by him upon the *cessio*, such new acquisition may be affected by his creditors, as if there had been no *cessio*: But still he may retain as much of it as is necessary for his own maintenance. This is agreeable to our ancient law, *Q. Attach. c. 7. § 3*, and likewise to the Roman, where it is called *beneficium competentiae*; *L. 4. pr. De Cess. bon. †*. No debtor

Does not protect the debtor who has made new acquisitions.

Who debarred from this benefit.

* If the debtor be liberated before this decree is extracted, the magistrates will be liable as for an escape; *Fac. Coll. July 8. 1788, Wilson, Dict. p. 11757*.

† It has been found, that a creditor of a person who has obtained a *cessio bonorum*, suing him for a debt which had been previously contracted, must show, that proper diligence has been done for recovering the debts contained in the general disposition granted by the defender to his creditors, when he got the *cessio*; and if the pursuer fail to do so, the defender will be entitled to set off the amount of these debts against the pursuer's claim; *Fac. Coll. May 16. 1798, Lamb, &c. Dict. p. 6576*¹⁵⁶.

‡ This doctrine is not supported by the course of decisions. The court, however, will prevent any attachment of the debtor's wearing clothes, or of such of his working tools as are necessary for the exercise of his calling; *Bankton, B. iv. t. 40. § 1, Fac. Coll. July 11. 1778, Reid, Dict. p. 1392; Ibid. August 5. 1788, Pringle, Dict. p. 1393, See Stat. Gul. c. 17. Lord Bankton, B. iv. tit. 40. § 5*, adds to the list of exceptions what is conferred on the debtor by third parties, expressly for his aliment¹⁵⁷. The court allowed to the pursuer of a *cessio*, retention of a small annuity which the donor had evidently intended as an alimentary provision, though he had not expressly declared it to be such; *Fac. Coll. Jan. 25. 1794, Mackay, Dict. p. 11794*¹⁵⁸. On the same ground, a married woman was permitted to retain a part of her jointure for her aliment; *Ibid. Jan. 15. 1794, Douglas, Dict. p. 11795*. It is believed similar judgments have

minal warrant will not do; *Isbister, 17. Dec. 1808, Ibid.; Thomson, 9. July 1822, (S. & D.)* Neither will imprisonment as *in meditatione fugæ*; *M'Laren, 8. July 1820, Fac. Coll.; 2. Bell Comm. 569, et seq.*, and see *Kennedy, 17. Dec. 1824, (S. & D.)*.

¹⁵⁴ The pursuer of a *cessio* was ordained to assign over a lease to his creditors, though it contained a clause secluding assignees and subtenants; *Martin, 17. Dec. 1808, Fac. Coll.; vid. infr. not.*¹⁵⁹.

¹⁵⁵ *Veitch, 28. Nov. 1821, (S. & D.)*.

¹⁵⁶ On the same principle, it has been found not competent to point the effects of a bankrupt who had obtained a *cessio*, till the inventory of effects given up in his general disposition be exhausted; *M'Kissock, 10. Feb. 1814, Fac. Coll.; Mackie, 5. Dec. 1826, (S. & D.)*. The debtor must, however, point out where the effects disposed may be got; *Ibid. 2. Bell Comm. 579*.

¹⁵⁷ But not the furniture of his house, though alleged to be necessary to enable him to carry on his profession; *Gassiot, 12. Nov. 1814, Fac. Coll.*

¹⁵⁸ See *M'Donell, 25. Feb. 1819, Fac. Coll.*

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debtor, whose debt arises from a crime or delict, is entitled to this privilege; which is also conformable, both to the Roman law, from whence we have borrowed it; *L. 1. 4, c. Qui bon. ced. poss.*; *L. 37. § 1, De minor.*; *arg. L. 51, De re jud.*; and to the analogy of the act of grace, to be immediately explained. Hence it is not competent to fraudulent bankrupts, nor to criminals liable in an assythment, *i. e.* in a sum in name of damages or indemnification to the party injured, though the crime itself should be extinguished by a pardon; *Falc. ii. 230, (Malloch, Nov. 19. 1751, Dict. p. 11774)*, nor to those whose debts have been contracted by fraud or breach of trust ¹⁶⁰ *.

Where have been given in the analogous cases of ministers, half-pay officers, and others ¹⁵⁹. See *supra*, B. iii. tit. 6. § 7, note.

* The general rule, as explained by later decisions, seems to be this, That where the debtor is imprisoned *in modum pœnæ*, he cannot obtain the *cessio*; but that where his incarceration is for payment of damages, though these arise *ex delicto*, the action may be sustained; *Fac. Coll. Small, Feb. 18. 1764, Dict. p. 11782; Ibid. March 5. 1791, Macdowall, Dict. p. 11793; Ibid. Jan. 15. 1794, Douglas, Dict. p. 11795; Ibid. Dec. 12. 1795, Law, Dict. p. 11798* ¹⁶¹. The contrary decision, *Fac. Coll. August 9. 1781, Stewart, Dict. p. 11792*, was disregarded in the last-mentioned cases.

¹⁵⁹ But wherever this exceeds what is necessary for a proper aliment to the debtor, the surplus must be assigned; compare *Mackay and Douglas, h. not.* It is on the same principle that half-pay officers,—*Davidson, 11. March 1818, Fac. Coll.; Thomson, 23. Feb. 1822, (S. & D.); Barr, 2. March 1822, (Ib.); Anderson, 27. Feb. 1824, (Ib.); Holywell, 5. June 1824, (Ib.); Scobie, 4. March 1825, (Ib.), &c. &c.*;—widows of officers, *Hyndman, 4. July 1818*, in note to *Davidson, supr.*;—ministers, *Scott, 25. Jan. 1817, Ibid.*,—and others of a like description, *Mill, 9. March 1824, (S. & D.), &c. &c.* are allowed the benefit of the *cessio*, only on assigning part of their half pay, stipends, &c.:—While tidewaiters, *Stewart, 5. July 1822, Fac. Coll.*; excisemen, *Chisholm, 21. June 1823, (S. & D.)*; sergeants on half pay, *Fraser, 12. June 1824, (S. & D.)*, and others of a similar class, whose scanty incomes are barely sufficient for their aliment, or who, as in the case of excisemen, would be turned out of office were any part of their salaries known to be attached, are not called upon to assign any thing.

¹⁶⁰ See *Johnstone, 5. Mar. 1822, (S. & D.); Ure, 5. Mar. 1822, (Ib.); Boog, 2. July 1822, (Ib.); M'Naught, 15. Feb. 1823, (Ib.); Jack, 5. July 1823, (Ib.); Stewart, 31. Jan. 1824, (Ib.); Sutherland, 25. May 1827, (Ib.)*

It would seem, however, not to be enough, that the debtor has been guilty of detached acts of fraud or delinquency, unless these have been the occasion of his bankruptcy.—See *Murray, 11. July 1811, Fac. Coll.; Smith, 6. Feb. 1813, Ibid.; 2. Bell Comm. 574.*

Extravagance, where gross and inexcusable, as being near akin to fraud, has been held a sufficient cause for refusing *cessio*; *Maccubbin, supr. § 26. not. †; Kennedy, 17. Dec. 1824, (S. & D.); Arnold, 5. Mar. 1827, (Ib.); 2. Bell Comm. 574.*

So also, where there has been abstraction or concealment of funds, or where,—from the absence or destruction of account-books, &c.—there is strong ground to suspect these, or other, fraudulent and improper practices, and the debtor is unable to account in a satisfactory manner for the disappearance of his property; *Fraser, supr. § 26. not. †; Reid, 28. Jan. 1826, (S. & D.); Spence, 3. Feb. 1824, (Ib.); M'Tier, 3. July 1821, (Ib.); Oddy, 8. July 1821, (Ib.); Lang, 24. May 1821, and 5. Mar. 1822, (Ib.); Steedman, 14. May 1823, (Ib.); Houston, 6. July 1824, (Ib.); Forman, 8. July 1824, (Ib.); Thom, 11. Feb. 1809, Fac. Coll.; 2. Bell Comm. 575.*

Even in the most unfavourable cases, however, though the *cessio* might be refused in the outset of the party's imprisonment, yet afterwards, when he has suffered an imprisonment proportioned to his culpability, the length of this confinement will be taken into consideration, “since such culpability as might deserve a denial of the *cessio* at first, might not be worthy of perpetual imprisonment, which must or might be the consequence of a total refusal of it.” *Per Lord President, (Blair,) in Thom, supr.; Smith, Ibid.*

¹⁶¹ *Murray, 11. July 1811, Fac. Coll. See Aitken, 18. June 1817, Fac. Coll.; Isbister, 17. Dec. 1808, Ibid.*

Where the debtor is imprisoned for the aliment of a bastard child, he has been held not entitled to *cessio*, *Ritchie, 20. Dec. 1811, Fac. Coll.; Steele, 4. July 1812, ibi cit. in not.; Fac. Coll. Baird, 2. Mar. 1827, (S. & D.)* But perhaps it may be doubted, whether the principle of these decisions would not be stated more correctly, thus,—that the *cessio*, though it may be granted so far as regards the prisoner's debts generally,

Where a prisoner is set at liberty upon a *cessio*, he must, if his creditors shall insist on it, wear for the future a particular habit appropriated by custom to dyvours or bankrupts; as to which, see *Acts of Sederunt*, May 17. 1606, quoted in *Statute-law abridged*, voce PRISONER, Feb. 26. 1665, Jan. 23. 1673, and July 18. 1688. The court of session, by the act last quoted, declared, that they would not dispense with the wearing of the habit, except in the case of mere misfortune; and they are, by a still later statute, 1696, c. 5, prohibited to dispense with that mark of reproach, if it be not libelled in the summons of *cessio*, and sustained and proved that the bankruptcy was owing to misfortune. Hence a bankrupt was condemned to wear the dyvour's habit, though no suspicion of fraud lay against him, because he had been a dealer in the smuggling, or running of goods, which is an illicit trade; *Fac. Coll.* i. 4, (*Drysdale*, Feb. 20. 1752, Dict. p. 11781) * ¹⁶².

TITLE III.
Dyvour's habit.

28. Anciently there was no legal provision for the maintenance of those imprisoned for debt; and as they could not be allowed to starve, it frequently happened, that royal boroughs who had received them into their prisons, were burdened with the expense of their maintenance. It was therefore provided by 1696, c. 32, usually called *the act of grace*, that where any prisoner for a civil debt shall make oath before the magistrate of the jurisdiction, that he has not wherewith to maintain himself ¹⁶³, the magistrate may require the creditor, upon whose diligence he is imprisoned, to provide and give security for an alimony to him, at a rate not under threepence a-day; and if the creditor refuse or delay, for ten days after ¹⁶⁴, to exhibit the alimony ascertained, it shall be lawful for the magistrate to set the prisoner at liberty ¹⁶⁵. The debt and diligence upon which the debtor was imprisoned, are not discharged by the magistrate's

Act of grace.

* The same judgment was given, *Fac. Coll.* Nov. 17. 1775, *Dick*, Dict. p. 11791.

nerally, will not be granted so as to affect such an alimentary debt. Accordingly, where the alimentary creditor was not the incarcerator, *cessio* was granted in spite of her opposition,—reserving her right to enforce the aliment; *M'Almand*, 4. Dec. 1824, *Ibid.*

¹⁶² Condemnation to the dyvour's habit, “is now undoubtedly done away. According to the state of the public feeling, it would be held a disgrace to the administration of public justice. It would shock the innocent. It would render the guilty miserably profligate. Therefore that remedy is out of the question.” *Per Lord Meadowbank*, in *Smith*, 6. Feb. 1813, *Fac. Coll.*

¹⁶³ The debtor's oath is *prima facie* evidence of his having no means of aliment, and aliment must therefore be awarded in the meanwhile, although afterwards, on a proof that the debtor is possessed of funds, it would seem that it may be recalled; *Hogg*, 9. June 1824, comparing the reports in *Fac. Coll.* and *S. & D.*

¹⁶⁴ “The debtor may be liberated on the tenth day from the date of the intimation,” no aliment having then been lodged; *Hood*, &c. 14. Dec. 1813, *Fac. Coll.*

¹⁶⁵ Before a debtor can legally be lodged in jail, a deposit of ten shillings must now be made in the jailor's hands, by the creditor incarcerator, “as a means of, and security for, the aliment of such prisoner;” 6 *Geo. IV.* c. 62. § 1.

It has also been enacted, “that every prisoner who shall claim the benefit of the act of grace, shall be bound, when desired to execute a disposition *omnium bonorum* in favour of the creditor at whose instance he is incarcerated, for behoof of all his creditors, the expense of such disposition being always defrayed by the creditor demanding the same:—And any such prisoner refusing to grant such disposition, after being duly required in writing so to do, shall not be entitled to aliment during the time he shall persist in such refusal;” *Ibid.* § 7. See *M'Donald*, 1. Feb. 1826, (*S. & D.*).

Independently of this statute, it was held, that “if a debtor have an annuity or pension, or any other fund settled on him as aliment,” he must give it up to his creditors; 2. *Bell. Comm.* 586; *Arnold*, 10. March 1825, (*S. & D.*).

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strate's setting him free upon this statute; and therefore the creditor may again use personal execution against him, upon the former caption; *Fac. Coll.* ii. 186, (*Abercromby*, June 19. 1759, *DICT.* p. 11811)*. But if he abuse that power in an oppressive manner, he may be condemned in a fine for that abuse; and the debtor will have relief by a suspension. This obligation upon creditors to support their indigent debtors, took its rise from the Romans, *Nov.* 135. c. 1, and was not altogether unknown in our ancient law, *St. 2. Rob. I.* c. 19. § 5. If the magistrates themselves shall, after the creditor's refusal to exhibit alimony to the prisoner, choose to be at the expense of his subsistence, rather than dismiss him from prison, they may continue his confinement¹⁶⁷; *Fount. Dec.* 28. 1710, *Durham*, (*DICT.* p. 7460); *Feb.* 20. 1713, *Grierson*, (*DICT.* p. 11805). This statute is expressly limited to the case of prisoners for civil debts¹⁶⁸; and therefore no person imprisoned, either for not performing a fact which was in his power, *Fount. Dec.* 2. 1709, *Turner*, (*DICT.* p. 11802), or for the not payment of a fine, or of a sum awarded against him in name of damages, upon a delict or penal law, *Nov.* 23. 1738, *Maclesly*, (*DICT.* p. 11810), observed in (*Folio*) *Dict.* ii. p. 174, can claim the benefit of it †.

Decrees-arbitral or submissions.

Bond obliging to submit.

29. A decret-arbitral or award, which is a sentence proceeding upon a submission or reference to arbiters, bears some resemblance to a judicial sentence, though in some respects the two differ. A submission is truly a contract, entered into between two or more parties who have debateable rights or claims against one another, by which they refer their differences to the final determination of an arbiter or arbiters, and oblige themselves to acquiesce in their decision¹⁷¹. Where there are two or more arbiters, the submission sometimes bears, that in case the arbiters shall disagree in their opinions, a certain person therein named, as oversman, shall have power to determine finally; and sometimes the nomination of the oversman is left to the arbiters¹⁷². If in either case the oversman shall pronounce a decree before the arbiters have differed in opinion, the decree is null; for the power of determination is, in the first place, given to the arbiters; it is only upon their disagreeing that it

* The same judgment was given, *Fac. Coll.* *Nov.* 17. 1769, *Pollock*, *DICT.* p. 11815¹⁶⁶.

† Decisions on this point have fluctuated. The case of *Maclesly* was followed, *Fac. Coll.* *Jan.* 5. 1754, *Will*, *DICT.* p. 11810¹⁶⁹; *Feb.* 24. 1768, *Wright, &c.* *DICT.* p. 11813; *Fac. Coll.* *Feb.* 5. 1783, *Stewart*, *DICT.* p. 11817. But it has been departed from; *Fac. Coll.* *Jan.* 18. 1776, *Smith*, *DICT.* p. 11816; *Ibid.* *Dec.* 7. 1787, *Clark*, *DICT.* p. 11818; *Ibid.* *May* 27. 1790, *Ailken*, *DICT.* p. 11819: And it seems now to be the received doctrine, that the act applies in all cases where the imprisonment is at the instance of an individual, whatever be the ground of the debtor's obligation; *Jan.* 15. 1794, *Douglas*, *DICT.* p. 11795¹⁷⁰.

¹⁶⁶ And again, *Boyd*, 21. *Dec.* 1811, *Fac. Coll.*; *Morison*, 3. *June* 1826, (*S. & D.*) See also 2. *Bell Comm.* 537.

¹⁶⁷ "This probably would not be allowed at present;" *Per Lord Robertson* in *Boyd*, 21. *Dec.* 1811, *Fac. Coll.*; and see to the same effect, 2. *Bell Comm.* 535.

¹⁶⁸ A debtor imprisoned as *in meditatione fugæ*, is entitled to the benefit of the act; *Smith*, 18. *Jan.* 1776, *DICT.* p. 11816.

¹⁶⁹ This case seems to be an authority to the very opposite effect.

¹⁷⁰ See to the same effect, *Edwards*, 11. *July* 1818, *Fac. Coll.*; 2. *Bell Comm.* 533.

¹⁷¹ See *Deas*, 25. *May* 1821, (*S. & D.*).

¹⁷² Under such a clause, as it is generally expressed, the arbiters may name the oversman, before proceeding, themselves, to consider the matter submitted. But in no case can the oversman thus named exercise his functions, until after the arbiters have differed in opinion; *Brysson*, 10. *June* 1823, (*S. & D.*).

it is transferred to the oversman; and the decret-arbitral must express specially that the arbiters differed in opinion; *Dalr.* 161, (*Gordon*, Nov. 30. 1716, *DICT.* p. 655)*. Where the day within which the arbiters are to decide is left blank in the submission, their powers of deciding have been by practice limited to a year. As this hath proceeded from the words of style, by which the arbiters are empowered to determine against the day of next to come¹⁷⁴; which clause, in what way soever the blanks shall be filled up, cannot possibly reach beyond the year¹⁷⁵; therefore, where the submission contains no blank, but refers indefinitely the subjects in question to the decision of arbiters, without limiting them to any determinate time, it ought, like other contracts or obligations, to subsist for forty years¹⁷⁶. Upon this ground, a bond obliging the granter to refer certain debateable questions between him and another to persons named in the bond, hath been by several decisions adjudged to be perpetual; so as the other party might, at any time within the years of prescription, bring his action against the granter for performance, if the arbiters should continue alive so long; *Durie*, Feb. 25. 1630, *Hay*, (*DICT.* p. 637) †; *Stair*, Feb. 3. 1669, *Boswall*, (*DICT.* p. 9152) ‡. The reason of these judgments is equally applicable to submissions themselves¹⁷⁶, which are as truly obligations, as bonds obliging the granter to submit. Submissions, like mandates, expire by the death of any one of the submitters; see said Feb. 25. 1630, (*DICT.* p. 637)¹⁷⁸. Submissions of debts or of money-claims are sometimes executed by the debtor granting a bond to the creditor, and the creditor granting a release or discharge to the debtor, both blank in the sums, which are delivered to the arbiter, with power to him to fill up the blanks as he shall find just: And though it has been affirmed, that such deeds

are

* *Fac. Coll.* Jan. 19. 1773, *Gardner*, *DICT.* p. 659¹⁷³. See *Act of Sederunt*, Dec. 17. 1783.

† *Ibid.* March 14. 1639, *Hepburn*, *DICT.* p. 638.

‡ In one case, a building contract bore this clause: "In case any difference shall arise betwixt the parties relative to the execution of the work, or the meaning or intention of these presents, the same shall be referred to two neutral persons, who shall be tradesmen or artists conversant in such works; with power to them, in case of variance, to choose an oversman, whose decision shall be final therein." To an action on the contract for implement, this clause was opposed, as affording a dilatory defence; but it was overruled by the court, Dec. 16. 1769, and Jan. 18. 1770, affirmed on appeal, Feb. 15. 1770, *Magistrates of Edinburgh* against *Mylne*, &c. (not reported.) The court decided on similar principles, *Fac. Coll.* June 25. 1799, *Buchanan*, *DICT.* p. 14593, (and *v. ARBITRATION*, *App. No. 7.*)¹⁷⁹.

¹⁷³ *Vid. infr.* § 34. *not.* ¹⁹¹.

¹⁷⁴ The same has been decided (in regard to a prorogation,) where the words "next to come" did not follow the blank; *Stark*, 23. Dec. 1820, *Fac. Coll.*

¹⁷⁵ The submission generally confers on the arbiters a power to prorogate the term of its endurance. The term of such prorogation is regulated by the same rules as in the case of an original submission.

A devolution to an oversman does not import a prorogation; *Thomson*, 28. Jan. 1818, *Fac. Coll.*

¹⁷⁶ So, accordingly, it was found, after consultation of the whole court, *Fac. Coll.* *Fleming*, 7. July 1827, (*S. & D.*). See also *Brysson*, 10. June 1823, (*S. & D.*); *Halket*, 16. Dec. 1826, (*Ibid.*).

¹⁷⁸ But this may be prevented by a clause, declaring that the submission shall not fall; *Ewing and Co.* 19. Dec. 1820, *Fac. Coll.*

A submission does not fall by the bankruptcy and sequestration of the parties; *Anderson*, 25. May 1821, (*S. & D.*). But a decree-arbitral pronounced after the sequestration is inept, where no intimation had been given to the trustee and creditors of the party to appear for their interest; *Barbour*, 21. Nov. 1811, *Ibid.*:—the contrary, where such intimation had been previously given; *Grant*, 23. June 1820, *Ibid.*

BOOK IV.

Their decrees subject to reduction, if *ultra vires compromissi*.

Whether partial decrees are valid.

vourable purpose, the amicable composing of differences, ought to receive the most ample interpretation of which the words are capable. A submission, therefore, drawn in general terms, of all controversies and questions between the parties, is understood to authorise the arbiters to decide upon questions, not only of moveable, but of heritable bonds; *Durie, Dec. 15. 1631, Kincaid, (Dict. p. 5064)*. This, however, ought not to be so stretched, as to include rights that cannot be presumed to have fallen under the view of the submitters, *ex. gr.* an heritable right, of which one of the submitters had been in the possession, without any challenge or interruption made by the other party prior to the submission ¹⁸⁵.

33. From this rule, That submissions ought to be liberally interpreted, it has also arisen, that where arbiters in a special submission decree general discharges to be granted mutually by each of the parties to the other, the decree is nevertheless valid, in so far as relates to the special subjects falling under the submission; and the effect of the general discharge is restricted to these special subjects, that so the decreet-arbitral may not be utterly ineffectual; *Fount. Dec. 25. 1702, Crauford, (Dict. p. 6835)**. But where arbiters in a special submission take upon them expressly to determine in points not referred to them, there is no room for a large or favourable interpretation; and the decreet-arbitral may be declared null, upon an action of reduction, as being pronounced *ultra vires compromissi* ¹⁸⁸. An award or decreet-arbitral, by which a part only of the claims submitted was determined, and the rest left open to the decision of the judge-ordinary, was wholly void by the Roman law *L. 25, pr. § 1, De rec. qui arb.*; because the presumed intention of the parties to have the whole claims submitted finally determined, was in this way defeated. Such partial decree, however, is valid by our practice, in so far as it goes; *Durie, March 20. 1630, Stark, (Dict. p. 6834)* ¹⁸⁹ †: But if the arbiters in a submission of this kind should

pression in their decreet-arbitral; *Fac. Coll. Feb. 4. 1794, Woddrop, Dict. p. 628*. See a special case, *Ibid. July 16. 1773, Arthur, Dict. p. 667* ¹⁸⁶.

It has been made a question, Whether a decreet-arbitral can be altered by the arbiters, after having received their signatures, but before being delivered to the parties, or put upon record? The court decided in the affirmative, *Fac. Coll. June 20. 1782, Robertson, Dict. p. 653*; in opposition to an older decision, *Clerk Home, No. 41, Simpson, Dec. 10. 1736, Dict. p. 17007* ¹⁸⁷.

* See *Kilk. No. 4, voce ARBITRATION, Gairdner, July 10. 1741, Dict. p. 627*.

† See *Kilk. No. 1, voce ARBITRATION, Lovat, June 22. 1738, Dict. p. 625*.

¹⁸⁵ It was found, that the meaning of a general submission might be explained, by reference to a previous undetermined process touching the subjects in dispute between the parties; *Steele, 22. June 1809, Fac. Coll.*

¹⁸⁶ *Hailes, 534*. See also the case of *Carse, A. S. 17. Dec. 1783*.

¹⁸⁷ These decisions are not properly opposed to each other: *Vid. supr. B. 2. t. 2. § 44, not. 99*. At all events, the rule adopted in *Robertson* has been confirmed; *Fac. Coll. M'Nair, 31. May 1827, (S. & D.)*. This last case is now under appeal.

¹⁸⁸ *Steele, supr. not. 185*. On this point, as has been well observed, there is "room for a distinction. Where the matters contained in the decree are capable of a separation, then the decree will be permitted to subsist, in so far as it is within the meaning of the parties in their submission, and will be restricted quoad the excess;" *Per Lord Robertson, with the concurrence of the court, in Kidd, 19. June 1801; Fac. Coll.*; and so, accordingly, the case was decided. See to the same effect, *Johnston, 9. June 1817, in the House of Lords, 5. Dow, 247; Stewart, 21. Nov. 1822, (S. & D.); Bankton, B. 1. t. 23. § 20; infr. § 35, not. 192*;—and compare *Reid, 15. Dec. 1826, (S. & D.)*.

An error *calculi* may be rectified without reducing the decree; *Heitherington, 21. June 1771, Dict. v. ARBITRATION, App. No. 3*.

¹⁸⁹ But see *M'Nair, supr. not. 187*; compared with *M'Kessock, 14. Nov. 1822, (S. & D.); Taylor, 19. Jan. 1822, Ibid.*

Book IV.

The oath of a party in a submission may be received in a subsequent process.

ing on written submissions, should, for the future, be reducible on any ground, but those of corruption, bribery, or falsehood*.

36. Where the term of a submission hath expired, without any decree pronounced by the arbiter, an oath made by one of the submitters, upon a reference by the other, while the submission was current, may be received as evidence in any subsequent process. This arises from the transaction implied in a reference by one party to the oath of another, which has been already explained. The testimony of witnesses on points where a proof by witnesses may be received, is also sustained in any after-process, with this proviso, or restriction, that the party against whom such evidence is brought, may be admitted to offer objections against the hability or competency of the witnesses. But depositions taken by arbiters upon points which our law does not allow to be proved by parole evidence, cannot be received afterwards by any judge; for judges ought to lay no weight whatever upon that kind of proof which the law rejects.

TIT. IV.

Of Crimes.

Order of treating of crimes.

HITHERTO of the law of Scotland, as it concerns questions of private and civil right. This treatise shall be concluded with a summary view of that part of our public law which relates to crimes, after the example of Sir George Mackenzie, the order of whose titles has been precisely followed. All that is proposed is, *first*, To give an account of the nature and properties of a crime in general: *2dly*, To enumerate the chief facts that are considered by our statutes or usage as criminal; and, in some particular instances, to compare the punishments inflicted by us upon offenders, with those that obtained by the Jewish or Roman laws: And, *lastly*,

* By falsehood in this act is meant forgery or vitiation; *Dec. 18. 1724, Hardie*, Dict. p. 664; *Clerk Home*, No. 136, *Williamson*, *Dec. 12. 1739*, Dict. p. 665; *Fac. Coll. June 21. 1771, Hetherington, &c.* Dict. voce ARBITRATION, App. No. 3. See *Kames, Elucid.* art. 40; *Fac. Coll. Nov. 15. 1798, Logan*, Dict. voce ARBITRATION, App. No. 6. The act of regulations referred to in the text will be applied to a decree-arbitral pronounced in a foreign country, if execution is sought upon it in Scotland; *Sel. Decis.* No. 68, *Auchterlony*, *August 8. 1754*, Dict. p. 4470; *Dec. 13. 1776, Johnstone*, Dict. voce ARBITRATION, App. No. 4.

Arbiters cannot *decern* for a sum to be paid as a reward to themselves; and if they do, however innocently, the decree-arbitral will, to that extent, be ineffectual; *March 6. 1777, Jack against Cramond*, Dict. voce ARBITRATION, App. No. 5; *Fac. Coll. June 13. 1798, Montgomery*, Dict. p. 631; *Kilk. in Napier*, *Nov. 20. 1746*, Dict. p. 5730¹⁹³.

effect, *Heggie*, 1. *Feb. 1825*, (S. & D.); and compare *Johnstone*, 9. *June 1817*, 5. *Dow*, 247; *Kirkaldy*, 16. *June 1809*, *Fac. Coll.*; *Colquhoun*, 18. *Jan. 1825*, (S. & D.); *Gleasonie*, 24. *Feb. 1825*, (*Ibid.*).

Instrumenta noviter reperta afford no ground for setting aside a decree-arbitral; *Sharp*, 17. *May 1813*, 1. *Dow*, 223; *Livingston*, in not. to *Kirkaldy*, *supr.*—See *Maule*, 10. *May 1816*, 4. *Dow*, 363;—*Telfer*, 31. *Jan. 1823*, (S. & D.)

¹⁹³ *Stewart*, 21. *Feb. 1822*, (S. & D.) Neither, in a case of proper arbitration, can arbiters insist by way of *action*, for payment of any sum, in name of fee, or remuneration for their trouble, unless, (which would seem to be competent,) they had expressly stipulated for such remuneration, before undertaking the office; *Kennedy*, 20. *Jan. 1819*, *Fac. Coll.*; *Paterson*, 19. *Feb. 1819*, *ibi cit. in not.*; compared with *M'Callum*, 26. *Jan. 1810*, *Fac. Coll.*

Book IV.

Whether all transgressions of law are punishable.

There can be no crime without *dolo* or malice.

though there should be no statute forbidding it, is accounted a crime by our practice, and may be punished, even with death, if the nature of the criminal act deserve it: Thus bestiality and sodomy are, by our usage, capital crimes, and single adultery is punished arbitrarily, though none of these crimes are declared criminal by statute.

4. Acts, though not of their own nature immoral, if they had been done in breach of an express law, to which no penalty was annexed, and which, in the Roman law, got the name of *crimina extraordinaria*, having been by them deemed criminal, were punished as proper crimes; and indeed it seems to be a rule founded in the nature of laws, that every act forbidden by law, though the prohibition should not be guarded by a sanction, is punishable by the judge according to its demerit, as a transgression of law, and a contempt of authority, *supr. B. 1. t. 1. § 57*, otherwise all such prohibitory statutes might be transgressed with impunity. Lawyers, however, are generally of opinion, that the transgression in that case, though it ought not to escape all censure, is not punishable as a proper crime, unless the act be in itself criminal, *i. e.* contrary to the law of nature, though there had been no such prohibition. If the law forbid any act to be done, or deed to be granted, under any special penalty of a civil kind, the transgression of it cannot be tried criminally, though the act done in breach of the prohibition should be in its nature criminal; because the law, by annexing a special civil penalty to the transgression of it, appears to have excluded all other punishment. Hence a disposition granted by a debtor *in fraude* of his creditors, contrary to the prohibition of the act 1621, cannot in the general case be prosecuted as a crime.

5. There can be no proper crime without the ingredient of *dolo*, *i. e.* without a wilful intention in the actor to commit it; for an act, where the will of the agent hath no part, neither deserves the name of *virtue* nor of *vice*, and so is not a just object either of rewards or punishments. Hence arises the rule, *Crimen dolo contrahitur*. When therefore there is no malice in the mind, which invites to, and is productive of the criminal act, the essential character of a crime is wanting; and consequently mere negligence, let it be ever so gross, as it is not equipollent to *dolo* in criminal questions, *L. 7. Ad leg. Corn. de sic.* cannot constitute a proper crime. Yet supine negligence, which surely carries some degree of blame in it, ought not to escape all punishment: A person, for instance, through whose gross neglect or omission his neighbour has been killed, or his house burnt down, though he cannot be tried as a murderer or a wilful fire-raiser, is punishable arbitrarily, or, as the Roman law speaks, *extra ordinem*; see *L. 11. De incend. ruin. naufr.* If negligence, though highly blameable, does not come up to a proper crime, far less can actions which proceed from ignorance, or whose consequences are merely casual: If, *ex. gr.*, a huntsman, who aimed a dart at a roe or a buck, should casually kill a man who happened to be passing by, chance alone is to be blamed, not the huntsman; for, as Tully expresses himself in his *Topics*, *Jacere telum voluntatis est; ferire, quem nolueris, fortuna.* Neither can such involuntary actions be accounted criminal, the first cause of which is without the agent, and does not depend upon him; as if one man, forcibly impelled by another, should push a third over a precipice. But care must be taken, not to reckon in this class the sudden sallies which flow from passion, drunkenness, or the like: For though after one's anger is worked up to a certain height, or after he is intoxicated

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be discovered by the outward circumstances from which it is presumed. In palpable criminal acts, as in blasphemy, rape, murder, &c. dole is presumed from the act itself; because it cannot possibly bear a favourable construction: And in actions which are either innocent or criminal, according to the good or bad intention of the agent, dole must also in that case be either presumed or not, from the circumstances previous to, or concomitant with the action.

9. When we speak of a crime, we necessarily understand some outward expression of one's thoughts or intentions, by word, writing, or action. A thought, when it is not put forth into action, however offensive it may be in the sight of God, is not cognisable by any human tribunal as a crime: For though mere thoughts were capable of proof, they are not hurtful to society; and crimes are punished, only in so far as they affect society, and the police of the state. It is not so clear, how far a bare attempt, or *conatus*, to commit a crime, may be the foundation of a criminal prosecution. Doctors incline generally to the favourable opinion, that it ought not to be punished *pœna ordinaria*, with the same punishment which the law has inflicted on the crime itself: But Mackenzie, *Crim. Part. 1. tit. 1. § 4*, asserts, that in atrocious crimes, the attempt, *si deventum sit ad actum maleficio proximum*, ought to be punished as severely as if the crime had been actually committed; both because such attempt is a lesser degree of that very crime to which it so nearly approaches, and because the state cannot be otherwise secure from the person who has discovered such a wicked and mischievous disposition.

accessory, art
part.

10. One may be guilty of a crime, not only by perpetrating but by being accessory to, or abetting it; which is called in the Roman law, *ope et consilio*, and in ours, *art and part*. By *art* is understood, the mandate, instigation, or advice, that may have been given towards committing the crime; *part* expresses the share that one takes to himself in it, by the aid or assistance which he gives the criminal in the commission of it. One therefore may become art and part, either, *first*, by giving a warrant or mandate to commit the crime; *2dly*, by giving counsel or advice to the criminal how to conduct himself in it; or, *3dly*, by his assistance in the execution of it.

accessory by
giving a man-

11. *First*, By giving a mandate to commit it; for one is not less guilty that he does not himself perpetrate the crime, if he employ another to do it. As the mandant is the first spring of action, he seems rather to be more deeply guilty than the instrument he uses in executing it; yet the principal actor's plea, of having gotten orders, which it was his duty to have rejected with indignation, will not be admitted, even to the effect of alleviating the punishment. Though the mandant should not give an explicit warrant to the mandatory to commit the crime, yet if he direct him to do what may probably be productive of it, he is guilty art and part. If he shall give a mandate to wound one, who happens to die of the wound, the mandant is, in the general case, guilty of murder: if the order was given to beat him with a small cane, or other instrument not likely to inflict a mortal wound, the mandant perhaps be found liable only in an arbitrary punishment, though the instrument should have been so indiscreetly used as to draw after it.

12. Art and part is inferred, *2dly*, by advising the criminal

Book IV.

more hurtful to society, or that have a more immediate tendency to throw the state into violent convulsions, are punished by death: Others less heinous escape with a gentler punishment, sometimes fixed by statute, and sometimes arbitrary, *i. e.* left to the discretion of the judge, who may exercise the power intrusted to him either by fine, imprisonment, or corporal punishment. Where the law declares the punishment to be arbitrary, the judge can in no case extend it to death; for where it intends to punish capitally, it says so in express words, and leaves no liberty to the judge to modify. In several of our ancient laws, *Leg. Burg. c. 132; 1457, c. 77*, the life of the offender is put in the mercy or will of the King; which expression, some lawyers have maintained, ought never to have been stretched into a capital punishment, either by the judge before whom he was found guilty, or by the sovereign himself, from the presumed benignity of the supreme power. But it appears more probable, that the judge himself had no jurisdiction, in such case, to pronounce sentence against the criminal; the parliament having declared, that the ascertaining the punishment to be inflicted on those offenders should be left to the King alone; and that the sovereign, to whom the judge remitted the cause, sometimes inflicted a capital, and sometimes a slighter punishment on the criminal, according to the nature of the crime. In all trials of crimes confessedly capital, the single escheat of the criminal falls upon conviction though the sentence should not express it: For if the bare non-appearance in a criminal prosecution draw this forfeiture after it, *vid. sup. B. 2. t. 5. § 57*, much more ought the being convicted of capital crime to infer it: And this is agreeable to the Roman law, *L. 1. pr. De bon. damn.*—Some of the characters which distinguish capital crimes from others, whether they relate to the personal liberty of the criminal before trial, or to the distance of time between the sentence and the execution, are to be explained afterwards.

Crimes against God, blasphemy, atheism.

16. Certain crimes are committed more immediately against God himself, others against the state, or the public peace, and a third sort against particular persons. The chief crime in the first class, cognisable by temporal courts, is blasphemy, which is the crime of treason against the Deity; and upon this account is sometimes called *divine lese-majesty*. Under this crime may be comprehended Atheism: And it is cognisable by the civil magistrate; because it has a most direct tendency to extinguish the natural sense of the essential difference between good and evil, the belief of which is the firmest foundation and support, and the strongest cement, of civil society. The punishment of blasphemy was capital, both by the Jewish law, which enacted, that the blasphemer should be dragged out of the city, and stoned to death, *Levit. xxiv. 16*, and by the Roman, *Nov. 77*. In blasphemy, doctors distinguish between that kind which ascribes any thing to God, inconsistent with his perfections, as injustice, cruelty, resentment, &c.; and those oaths and imprecations, which, without any deliberate design of exposing the divine attributes, tend to throw contempt upon religion. It is the first sort only which is punishable by death; the last escapes with an arbitrary punishment proportioned to the circumstances and aggravations of the crime*.

17.

* *Mackenzie*, (Tit. BLASPHEMY, *in fine*), and *Arnot*, p. 322, mention a case in 1671, where a woman was fined 500 merks at a circuit-court, for *drinking the devil's health*. There

Book IV.

Crimes against
the state.

Treason proper
and statutory.

19. Of the crimes committed against the state, some are levelled immediately against the supreme power, and strike at the constitution itself, while others merely discover such a contempt and disregard to the law, as may contribute to baffle its authority, or slacken the reins of government. Of the first sort is treason; which is that crime that is aimed against the state itself, and so has a direct tendency to subvert the constitution, and set the whole nation in a flame. It was in the Roman law styled *crimen majestatis*; because it was pointed against the majesty and dignity of the state; and with us it has the name of *treason*, from the French *trahison*; it being an act of treachery against the commonwealth.

20. Treason was by the law of Scotland either proper or statutory. Those facts which were treasonable by the common law, constituted the crime of proper or high treason; such as, contriving the death of the sovereign, or laying him under restraint in his person, or in the exercise of the government; raising a fray in the host without a cause, (from the Latin *hostis*, which, in the middle ages, was used to signify an army or encampment; see *Du Cange, v. Hostis*); levying war against him, or inciting others to invade him; the assaulting of castles where he resided; the endeavouring to alter the succession; impugning the authority of the estates of Parliament; the making of treaties either with subjects or with foreign states, or maintaining any forts without the King's consent; and the resetting or concealing of traitors; 1449, c. 24; 1455, c. 54; 1584, c. 130; 1661, c. 5; 1662, c. 2. On the other hand, all facts, which, though they do not of their own nature carry in them any of the distinguishing characters of proper treason, were, from their enormous guilt, and mischievous consequences, punishable by statute with the pains of treason, got the name of *statutory treason*, viz. theft by landed men, 1587, c. 50; murder under trust, *Ibid.* c. 51; wilfully setting fire to coal-heughs, 1592, c. 146; or to houses or corns, 1528, c. 8; and assassination, 1681, c. 15. The punishment of treason, whether proper or statutory, was death, and the forfeiture to the crown of the traitor's estate, both real and personal; and the extinction of all the heritable dignities, honours, or privileges, that the King had conferred on him. The year immediately ensuing the union of the two kingdoms, *anno 1707*, the British parliament, judging it reasonable that the whole united kingdom should be governed by the same law in the matter of treason, as their obligations of loyalty were the same, declared, by 7. *Ann.* c. 21. § 1, 2, and 3, That the laws of high treason that then obtained in England should also take place in Scotland, not only with respect to the facts which constituted that crime, but in relation to the forms of trial, the corruption of blood, and all the other penalties and forfeitures consequent on it. The facts which, by the former law of Scotland, inferred statutory treason, are by this British act declared to be simply capital crimes.

Compassing the
death of the
King, Queen,
or heir of the
crown.

No treason to
adhere to the
King reigning
for the time.

21. It is declared high treason by 25. *Edw. III. stat. 5. c. 2*, to compass or imagine the death of the King, or of the Queen-consort, or of their eldest son, the Prince, who is, for the time, heir-apparent to the crown. By the King, is to be understood the sovereign, whether King or Queen: For though a queen who is such in her own right, is not included in the words of the act; yet the spirit and intendment of it plainly comprehends every person invested with the royal dignity: and this hath been so little doubted, that neither Q. Mary, Q. Elisabeth, nor Q. Anne, thought it worth
while

while to get the act extended to Queens-regnant. It was by the same statute made treason to violate the Queen-consort, or the wife of the King's eldest son, or the King's eldest daughter unmarried, or to levy war against the King, or to adhere to his enemies, or to counterfeit the great or privy seal, or to kill the chancellor, treasurer, or any of the twelve judges, while in their places doing their offices; because judges and magistrates of the highest rank, while they are in the actual exercise of their functions, are considered as more immediately representing the sovereign: And this last part of Edward's statute is by the aforesaid act 7. *Ann.* applied to Scotland, in the case of slaying any lord of session or of justiciary while they are sitting in judgment. After a period was put to the desolating civil war between the houses of York and Lancaster, it was equitably enacted by 11. *Hen. VII. c. 1*, That no person should be accused of treason, for having adhered to that king who should be in possession for the time, though he should be afterwards declared an usurper. This act, which stands unrepealed, affords a just security to well-disposed persons, in those turbulent times, when the claimant to the crown, who is this day in possession, may be turned out of it the next. It is also declared treason, 13. *Gul. III. c. 3*, to hold correspondence with the Pretender, (now deceased,) or any employed by him; and, by 6. *Ann. c. 7*, to affirm advisedly, by writing or printing, that the then Queen, and her successors, are not the lawful sovereigns of these realms, or that the Pretender hath any title to the crown, or that the King and Parliament cannot limit the succession to it*.

22. Several treason-laws have been from time to time enacted for preserving the purity of the coin. The before-mentioned statute of Edward III. makes it treason to counterfeit the King's coin, or to import false money; which is extended by 1. *Mariæ, Sess. 2. c. 6*, to the counterfeiting any foreign coin that shall be current in England; and by two statutes, 5. & 18. *Elis.* to the washing, clipping, or lightening of the proper money of the realm †. Whoever shall have in his possession any press for coining, or shall convey out of the King's mint any instrument of coinage, is declared guilty of treason by act 8. & 9. *Gul. III. c. 26*; but this kind of treason does not draw after it the corruption of blood. Soon after the English reformation from Popery, several acts were passed in the reign of Elizabeth for the better securing the Protestant religion, by which

Counterfeiting or debasing the coin of the kingdom.

* By statute 36. *Geo. III. c. 7, § 1*, (*Dec. 18, 1795*.) it is made high treason, if any person shall, either "within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint, of the person of our sovereign lord the king, his heirs and successors; or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his Majesty's dominions or countries; or to levy war against his Majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate, or overawe, both Houses, or either House of Parliament; or to move or stir any foreigner or stranger with force to invade this realm, or any other his Majesty's dominions or countries, under the obedience of his Majesty, his heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any other overt act or deed." This statute endures, however, only during the life of his present Majesty, and until the end of the next session of Parliament after a demise of the crown¹⁹⁴.

† See *Hume*, ii. p. 448, (*2d edit. vol. i. p. 524*.) et seq., and *Ibid.* p. 499, (*2d edit. vol. i. p. 552*.) et seq.; *Blackstone*, iv. p. 99; *Stat. 37. Geo. III. c. 126*.

¹⁹⁴ The enactment quoted above, as also § 5. and 6. of the same statute, were declared perpetual, 57. *Geo. III. c. 6. § 1*. The rest is expired.

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In all trials for treason there must be an overt act.

The pains and forfeitures of treason.

Consequences of treason to claimants under a preferable title to the person attainted.

which many points which bore not the proper treasonable character, were declared treason; such as maintaining, by reiterated acts, the Pope's jurisdiction, by speaking, writing, or acting, 5. *Elis. c. 1*; the putting to execution any of the Pope's bulls, 13. *Elis. c. 2*; the perverting others, or being perverted to Popery, with a view of withdrawing from the sovereign's obedience, 23. *Elis. c. 1*; 3. *Jac. I. c. 4. § 22, 23, &c.*

23. The statute of Edward III. requires, that in all trials for treason, evidence be brought against the pannel of some open deed, or overt act, manifesting the crime. Thus, if one be indicted for imagining the King's death, which is an act of the mind, the treason must appear by some outward act done by him, which may indicate an intention to kill. Some English lawyers have affirmed, that the bare emission of words makes an overt act, as words are the most natural means of expressing the thoughts: But Lord Coke, and most of their other writers, maintain the negative; both because the stretching of points of treason is unfavourable, and because, in common speech, words, and acts or deeds, are opposed to one another, and therefore ought not to be explained into each other, so as to infer the severest penalties. As to the second point, the forms of proceeding in trials upon treason, it shall be shortly explained, after finishing the detail of the several kinds of crimes.

24. The pains and forfeitures consequent on treason, are now also the same in Scotland as in England, by the aforesaid act 7. *Anno c. 21. § 1, 2, and 3**. These relate either to the forfeiting person himself, or to third parties. The person convicted of treason forfeits to the crown by the law of England, not only all his heritable estate, whether in fee-simple or fee-tail, *i. e.* whether he possesses the lands as absolute proprietor, or be limited by an entail, but also his moveable effects, or, in the English law-style, *his goods and chattels*. He forfeits also all his honours or dignities; for he becomes ignoble, by his conviction or attainder. The corruption which his blood thereby suffers, renders him incapable of succeeding to any ancestor; and the estate, which he himself cannot take, falls, not to the crown by forfeiture, but to the immediate superior as escheat, *ob defectum hæredis*, without distinguishing whether the lands hold of the crown, or of a subject; *Coke, 1. Instit. vol. 1. l. 1. c. 1. § 4; Hale, Plac. Coron. vol. 1. c. 27.*

25. Third persons who may be affected by the conviction of the traitor, are either, *first*, claimants under a title preferable to that of the attainted person; or, *2dly*, his heirs at law; or, *3dly*, his creditors and singular successors; or, *4thly*, his heirs of entail. As to the *first*, Every estate, of which the attainted person had been possessed for five years immediately preceding the attainder, fell by the law of Scotland to the crown, though evidence should have been brought that the lands truly belonged to another proprietor; and thus the right owner was stripped of his property, upon a prescription of five years, in place of forty: But that rigorous statute was repealed by 1690, c. 33, whereby forfeited estates were subjected to all real actions and claims against them, though such actions had not

* As to the sentence for high treason, see *Hume*, ii. p. 470, (2d edit. vol. i. p. 537); *Blackstone*, iv. p. 376; 54. *Geo. III. c. 146*. By *Statute 30. Geo. III. c. 48*, it is enacted, that in all cases of high and petit treason, women, instead of being, as formerly, sentenced to be burnt, shall have sentence to be drawn and hanged; that, in petit treason, they shall, moreover, with regard to dissection and the time of execution, be subject to such judgment as is appropriated to cases of murder, by 25. *Geo. II. c. 37*; and that they shall continue liable to forfeitures and corruption of blood, as formerly.

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would seem, ought to have the effect of preserving in force so beneficial a statute, till at least it had been expressly repealed by a British statute: But it is now held for an agreed point, that the rights of the traitor's creditors must be determined by the law of England, notwithstanding the foresaid act 1690. All real creditors upon a forfeited estate, are, by the English law, secured against the consequences of their debtor's attainder; but personal creditors seem to have but little security by that law. By special statutes, however, passed after the two rebellions in 1715 and 1745, the courts to which the parliament referred the determination of the claims on the forfeited estates in Scotland, were empowered to sustain the claims of all lawful creditors, whose debts were contracted before a certain period, previously to which it could not be suspected by the lenders, that the debtors had a view to rise in arms against the King*. The consequences of treason, in so far as they affect the traitor's singular successors, and even his heirs, are made temporary by the aforesaid act 7. *Ann. c. 21. § 10*, which declares, That after the Pretender shall be three years dead, no attainder for treason shall have the effect to disinherit the heir, or hurt the right of any person, other than that of the offender himself during his natural life: But the term of this law is, by 17. *Geo. II. c. 39*, prorogated during the lives of any of the Pretender's sons †. Though by the English law, an estate tail becomes forfeited to the crown by the attainder of the present heir or tenant; yet where the deed of entail contains substitutions or remainders over, in default of the attainted person, and the heirs of his body, such forfeiture is only temporary, limited to the life of the attainted person, and of such issue of his as would have been inheritable to the estate, had he not been attainted. A case occurred lately, that the heir to such an estate had issue born in France after his attainder, and died, leaving that issue. The question in debate was, Whether the estate or interest which was forfeited to the crown, determined by the death of the attainted person, so that it vested immediately in him who was substituted to the attainted person, and his issue; or whether it continued in the crown during the life of that issue? The crown-lawyers argued, that the estate continued forfeited, in regard that the issue, though born without the liegeance of the sovereign, were naturalized, and consequently inheritable to the estate by 7. *Ann. c. 5*, by which all the children of natural-born subjects, though born out of the kingdom, are naturalized. The substitute to the attainted person's issue pleaded a posterior statute, 4. *Geo. II. c. 21*, which expressly excludes the children of persons attainted of high treason from the benefit of the former statute of Anne. The court of session pronounced judgment for the crown, *Feb. 18. 1752*; but upon an appeal, the House of Lords, after an unanimous opinion given by the judges, that the crown's right determined in the case above stated, adjudged, that the substitute had right to enter into the immediate possession of the estate; *Fac. Coll. i. 3, (Gordon, Nov. 16. 1750, &c. Dict. p. 4728) ‡*.

Misprision of treason.

28. The act 7. *Ann.* makes the English law ours, not only in treason, but in misprision of treason; by which is understood the overlooking or concealing of treason, from *meprendre*, to overlook or neglect.

* See *Rem. Decis. and Falc. Baron, Nov. 8. 1750, Dict. p. 4666.*

† See statute 39. and 40. *Geo. III. c. 93.*

‡ See *Elucidations, p. 368, et seq.; Hume, vol. ii. p. 474, (2d edit. vol. i. p. 539.)*

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Corruption of judges, *crimen repetundarum*, baratry, theft-bote.

tutes gets the name of *leasing-making*, is inferred from the uttering of words tending to sedition, or the breeding of hatred and discord between the King and his people. This crime was declared capital by 1424, c. 43; 1540, c. 83: But because these statutes, from the various glosses that might be put upon them by partial affection, or the workings of resentment, proved extremely ensnaring to the subjects, that crime was, by 1703, c. 4, declared punishable, either by imprisonment, fine, or banishment, at the discretion of the judge.

30. The wilful perverting of judgment by judges or magistrates, whose office and duty it is to protect the innocent, and punish the guilty, may be classed under this head. By the Roman law, all judges and magistrates of provinces, who received money which they ought not to have received, were said to be guilty of the *crimen repetundarum*; which term was at last applied to every case where the judge accepted of a bribe to pervert judgment, *L. 1, Ad leg. Jul. repet.* It was punished, either by banishment, or more severely, according to the nature of the crime; but where the bribe was received in the trial of a capital crime, the criminal suffered death, *L. 7. § 3, eod. tit.* This crime of exchanging justice for money, was afterwards called by the doctors *baratria*, from the Italian *barattare*, to truck or barter: *Baratriam committit qui propter pecuniam justitiam baractat.* This vocable is used in 1427, c. 107, to denote the crime of clergymen, who went abroad to purchase benefices from the see of Rome with money. No special punishment was by that act inflicted on the offenders: But by an act passed soon after the Reformation, 1567, c. 2, those who apply to the see of Rome for benefices are to be punished with the pains of baratry; which are there described to be prescription, banishment, and an incapacity to enjoy any honour or dignity. Judges who, through wilfulness, corruption, or partial affection, use their authority as a cover to injustice or oppression, are to be punished with the loss of honour, fame, and dignity, by 1540, c. 104. Theft-bote is a crime of this nature; which comes from *bote*, a Saxon word, which we use to this day for compensation, and consists in taking a gratuity in money or goods from a thief, to shelter him from justice, and in substituting *that* in place of the punishment*. It is styled in 1436, c. 137, the selling of a thief, or the fining with him, *i. e.* taking a ransom, or fine, or composition from him, for favouring his escape, or otherwise screening him from punishment. By the last-quoted statute, lords of regality who stood convicted of this crime, were to suffer the loss of their jurisdictions; and sheriffs, justices, and barons, the loss of life and goods. By a posterior act, 1515, c. 2, private persons who take theft-bote are to suffer the like pains with the principal thief.

31.

Jan. 20. 1743, Dict. p. 13158; *Fac. Coll.* iv. 15, *Mowat*, June 19. 1765, Dict. p. 13176; *Ibid.* Feb. 17. 1775, *Myln*, Dict. p. 13180¹⁹⁶.

* See *Fac. Coll.* ii. 93, *Warrant*, July 2. 1757, Dict. p. 3446.

¹⁹⁶ But now, by 57. *Geo. III. c. 19. § 38*, it is enacted, that, in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be, in any manner, damaged or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever, which shall be therein, shall be destroyed, taken away, or damaged, by the act or acts of any riotous or tumultuous assembly of persons, or by the act of any person engaged in or making part of such assembly, the inhabitants of the city, town, or hundred shall be liable to pay the damages, as in the case of riots under *St. 1. Geo. I. c. 5*.

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gaged in the exercise of their offices. Its criminal nature consists in the affront thereby aimed against the law itself, and the supreme power, from which all these officers derive their authority. Different punishments have been from time to time inflicted upon offences of this kind: By a statute of William the Lion, the criminals were to be imprisoned, c. 4. § 5; afterwards, by 1581, c. 118, their persons were to be punished at the King's will, and their moveables to be escheated, with the burden of the debt due to the person injured, and of a further sum to be paid to him in name of damages; by a still posterior statute, the lives and goods of deforciers were declared to be in the King's will; and at last, by 1592, c. 150, their moveables were forfeited, the one-half to the King, and the other to the party at whose suit the diligence was used. The benefit of this last statute is not confined to messengers, but expressly includes the officers of inferior courts; for it mentions all persons whomsoever, who are executing any summons, letters, or precept, directed by any judge within the realm.

Deforcement of
a messenger.

33. In the trial of deforcement of a messenger, the libel will be cast if it do not expressly mention, that the messenger, previously to the deforcement, displayed his blazon, which is the badge of his office: For as messengers are distinguished by a particular badge, the lieges are *in bona fide*, till the badge be shewed, to treat them as if they were no messengers. A messenger must also shew to the party, against whom the diligence is directed, the warrant against him if he desire to see it; for as the blazon authorises the user of it to act as a messenger, the warrant gives him authority to execute that particular diligence. A messenger may be resisted without a crime, not only when he acts without a warrant, but when he evidently exceeds the bounds of it; for in either case, he is not so properly an executor of the law as a perverter of it, by making it a cover to oppression¹⁹⁹. Hence a landholder was absolved, from a charge of deforcement, who had, in the right of hypothec, stopped a messenger *via facti* from pouding, *Nov. 18. 1667, Mack. Crim. Part 1. tit. 26. § 4.* This decision is censured by that author: And it must be allowed, that where the proceedings of a messenger are not glaringly illegal and oppressive, it might be of bad example to leave debtors at liberty to judge in their own cause, whether a messenger, whom the law hath intrusted with the execution of lawful diligence, has truly put the diligence to execution according to law.

Action on the
statute 1592,
both penal and
civil.

34. The statute 1592 requires blood to be spilt in the deforcement, in order to found an action against the deforcier: And without doubt, where that action is penal, concluding for escheat of moveables, the defender, who ought, in a criminal trial, to have the full benefit of every legal defence, falls to be absolved, if effusion of blood be not libelled and proved. But if the action be carried on merely *ad civilem effectum*, for payment to the pursuer of his debt and damages, the statute is to be more amply interpreted, and action will be sustained, if the messenger be any how hindered in executing the diligence, though no blood should have been drawn in the deforcement. Upon the same ground, though the words of the act are levelled against the debtor, or such as shall be hounded out, or commanded by him; yet where the conclusion of the libel is barely civil, our practice has extended the act against all those who shall have

¹⁹⁹ *Vid. supr. B. 3. t. 6. § 22. not. 329.*

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tione; and the poorer were condemned to the public works; *L. 6. pr. De extraord. crim.* It gets the name of *forestalling* or *regrating* in our law, and several statutes have been made to punish it, 1535, c. 21; 1540, c. 98, and 113; 1579, c. 88: but as these acts did neither sufficiently describe the facts from which that crime was to be inferred, nor imposed any higher punishment on it, than the escheat of the goods that were bought or sold contrary to the directions of the law, it was enacted by 1592, c. 148, That whoever bought any corn or merchandise that was coming to any market or fair, to be there sold, or made any contract for it, before the said merchandise should be in that market, or should attempt to raise the price thereof, or dissuade any person from bringing such merchandise to the market, should be adjudged a forestaller; and that whoever got into his possession in a market, corns, flesh, fish, or other vivres brought thither to be sold, and sold the same at any market, either holden in the same place, or within four miles of it, or who got to his possession the growing corn on the field, by sale, contract, or promise, should be reputed a regrater. The statute declares, that a general indictment against the pannel, that he is guilty of forestalling or regrating, shall be held sufficient, without any special adjection of time or place, when or where the crime was committed; and that the offender shall, for the first offence, be fined in forty pounds Scots; for the second, in one hundred merks; and for the third shall suffer the escheat of his moveables. Mackenzie, *Crim. Part 1. t. 23. § 7*, observes, that though two or three instances appear in the books of adjournal, of persons convicted of this crime, yet no punishment followed upon it, and thence concludes for a punishment gentler than the statutory: But few who have duly reflected on the enormity of this crime, and its mischievous consequences to the commonwealth, will be forward to condemn the legislature for the severity of the penalties inflicted on it by this statute. Where one buys goods that are carrying for sale to a public market for his own private use, he commits no crime; for the sale of goods to a private buyer can have no tendency to enhance the price of them, and the buyer can have no sinister intention to hurt the community, which yet is essential towards constituting the crime.

Punishment of sturdy beggars and vagabonds.

39. Several acts have been passed for restraining idleness, and punishing sturdy beggars and vagabonds. All between the ages of fourteen and seventy, who begged without a badge or testimonial given them by the magistrate, were, by 1424, c. 42, to be burned on the cheek, and banished; and by 1535, c. 22, none were permitted to beg in any other parish than that of their birth, under the pains of the act 1424. Vagabonds, who shall be found begging contrary to the provisions in the foresaid acts, are to be imprisoned by the judge-ordinary, and put in the stocks or irons, till their trial: Upon conviction, they are to be scourged, and burnt on the ear; and upon a repetition of the crime, to suffer death, by 1579, c. 74. Under the description of vagabonds in this act, are expressly included all who go about pretending to foretell fortunes, and playing at subtle and unlawful plays, as jugglery, &c.; all who give no good account how they can lawfully earn their bread, or who, though they be able bodied, are idle, shunning labour; all minstrels, not in the service of some lord of parliament, or borough; all who use forged licences to beg, or who, without sufficient testimonials, allege that they have been shipwrecked, burnt out of their houses, or her-

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Casual homicide, and in self-defence.

41. The act 1661 statutes, That neither casual homicide, nor homicide in self-defence, shall be punished capitally, but barely by an arbitrary punishment. It is certain, that homicide, if it be merely casual, and committed without any degree of blame on the part of the agent, deserves not the least animadversion: And, in the same manner, one who kills another in self-defence, without carrying the measure of his defence beyond just bounds*, or, in the Roman style, without exceeding the *moderamen inculpatae tutelae*, is in no respect the object of punishment. Where therefore the legislature entrusts the judge with the power of inflicting an arbitrary punishment on casual homicide, and on homicide in self-defence, that sort must be understood where the agent was in some degree blameable. The slaughter of night-thieves and house-breakers, being a necessary act done in self-defence, is accounted lawful by the statute and that likewise which is committed against such as assist in, defend masterful depredations, or in pursuit of rebels denounced for capital crimes. But this last clause is not to be so explained, as if private persons were thereby empowered to pursue and put to death declared rebels by their own authority: It is to be confined to such officers of the law as pursue them upon a proper warrant.

Malice is the essence of the crime of murder.

42. Dole is presumed merely from the act of killing, otherwise no person could be convicted of murder; yet this presumption may be excluded by special circumstances. Thus a blow struck by a weapon which is not likely to draw death after it, takes off the presumption of deadly malice, and consequently has the effect of mitigating or restricting the punishment; agreeably to the Mosaical law, *Numb. xxxv. 16, 17, 18*, which pronounces him to be a murderer, who smites his neighbour with an instrument of iron, or with a stone, or an hand-weapon of wood, wherewith he may die, *i. e.* who strikes with an instrument which may probably inflict a mortal wound. This defence, from the want of dole, becomes stronger in the special case of *homicidium in rixa*, or of slaughter committed in an accidental fray or sudden tumult, where there is hardly room to suppose a malicious design previous to the fray. Yet where the blows or wounds have been given with a mortal weapon, or aimed even with a slighter one at the more tender parts, and repeated over and over by the striker, law presumes an intention in him, taken up at the time he struck the blows, though the scuffle should have been only casual. Where a number of persons have been engaged in the *homicidium in rixa*, and mortal wounds given, they who are proved to have given the wounds, are all of them liable to the pains of death, according to the known rule in crimes, that every one of many offenders is subject to the same punishment, as if there had been but one. But if no proof can be fixed against any one of them, they are all punishable at the discretion of the judge. It admits of no doubt, that where the homicide was committed, not *in rixa*, but upon malice prepense, or a preconceived intention, all of them are punishable as murderers, though no evidence should be brought which of them gave the mortal wound.

Where the murderer intending to kill one, kills another.

43. It has been debated, whether it be truly murder, where the slayer appears to have had an intention to kill one person, but has killed another? The question may perhaps be solved by the following

* See the case of *Green*, in the criminal court, *March 10. 1684, Fount. vol. i. p. 280*, where it was found, that the aggression of a single cuff was not a sufficient ground of provocation to kill.

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a self-murderer fall, whereby his whole moveable estate that would otherwise have gone to his next of kin, accrues as escheat to the King, or his donatary. In order to ascertain this right, the donatary must bring an action of declarator, to which the next of kin of the deceased must be made a party, for having the self-murder declared. In this action, the court of session, not of justiciary, are the proper judges; because it is only pursued *ad civilem effectum* to procure a confiscation of moveables; and a proof of every fact material in the cause, though of its nature criminal, may be brought before them, *ratione incidentiæ*, because such proof is necessary for explicating their jurisdiction. The admitting this action of declarator into our law, has been censured by some lawyers, as being truly the authorising of a crime to be tried after the death of the criminal, to the detriment of his innocent next of kin²⁰⁴. Mackenzie, *Crim. Part 1. tit. 13. § 3*, gives his opinion, That one who hath attempted to put himself to death, though without effect, ought to be tried as a murderer. But this doctrine is not only rigorous, but appears ill-founded; for a simple attempt to kill is not accounted murder except in the particular cases of assassination, *supr.* § 45, and haimesucken, *infr.* § 51, and suicide, which is a species of murder, ought to be governed by the common rules of murder. Furiosity, when it amounts to a total alienation of mind, is a good defence against this action of declarator; for the person labouring under it hath no will, which nevertheless is a requisite essential to all crimes.

Parricide.

47. Parricide, in the sense of the law of Scotland, is the murder of any parent in the direct line of ascendants, male or female, however remote. Not only the person himself who is guilty of this crime, is, by 1594, c. 220, disinherited, and declared incapable of succeeding to the parent's estate, but all his posterity in the right line; and the succession is declared to devolve on the next collateral heir. The motive to this extension against the innocent issue of the murderer, probably was an apprehension, lest it might have proved an incentive to the commission of the crime, if any of his descendants might have received benefit from it, by entering immediately upon a succession, which perhaps would not otherwise have opened to them for many years. Though by the Roman law natural parents seemed to be included, in so far as they could be known with certainty, and even the murder of children by their parents, *L. 1. pr. Ad leg. Pomp. de par.*; *L. un. c. De his qui par. vel lib.*, it is obvious, that in neither of these cases is there place for the punishment inflicted by this statute, of disabling the posterity of the parricide from inheriting the estate of the person murdered. Upon this head it may be observed, that our law hath enforced the duties of children to their parents so strongly, that the cursing or beating of a parent infers death, if the guilty child be above sixteen years of age; and an arbitrary punishment, if he be under it 1661, c. 20.

Presumptive or statutory murder.

48. Where certain facts which do not of their own nature constitute murder, are by statute declared to be murder, the crime thence arising may be called *presumptive* or *statutory murder*. The importers of any kind of poison, by which bodily harm may be taken, are, over and above the pains of death, to forfeit lands and goods, by 1450, c. 30. & 31: But these acts have been long quite in disuse; for poisons of sundry kinds have been for above a century imported without challenge, as drugs or medicines, by those whose

²⁰⁴ See 2. Hume, (2d edit.) 296. See also the English statute, 4. Geo. IV. c. 32.

business it is to dispense them. Another species of statutory murder is constituted by 1690, c. 21, which enacts, That any woman who shall conceal her being with child during the whole time of her pregnancy, and shall not call for, or make use of help in the birth, is to be reputed the murderer, if the child be found dead or amissing*. This act was intended, though with small success, to prevent, or at least discourage, the unnatural practice of women making away with their children begotten in fornication, in order to avoid church-censures. The mother's concealment of her being with child, and her not calling for assistance in the birth, being negative propositions, prove themselves, unless the pannel shall bring positive evidence that she discovered her pregnancy and called for help.

49. Duelling, *bellum inter duos*, is justly accounted a species of murder: and is the crime of fighting in single combat, upon a previous challenge given by the one party, and accepted by the other. The first statute making the single combat a crime, is 1600, c. 12²⁰⁴, in which may be perceived the last remains of our ancient law, explained above, t. 2. § 2, admitting the singular combat or duel as a method of proof, both in civil actions and criminal prosecutions; for in that statute a power is reserved to the Sovereign to authorise duels; which power was, without question, intended to be exercised in those doubtful accusations, where it was thought that providence never failed to interpose in bringing the truth to light, and vindicating innocence. The crime of duelling is, by this statute, made to consist in the actual fighting with mortal weapons, though no slaughter should ensue; for where the fighting is attended with slaughter, the crime is punishable capitally as murder, without borrowing aid from this statute. The duel must be fought, in consequence of a previous challenge, either written or verbal, given and accepted, by which the preconceived purpose in both parties to fight may appear, otherwise the crime falls under the character of a rencounter, which is not punished capitally, without actual slaughter. Both he who challenges and he who is challenged to fight, are to suffer death by the statute; but the provoker is to suffer a more ignominious one, at the pleasure of the King. It is no good defence against a libel upon this act, that the pannel, though he went to the place appointed, refused to fight till he was attacked; for his going thither is to be considered as an acceptance of the challenge, and his refusing to fight, only as a colour or pretext for a defence in the case of a trial. This act is ratified by 1696, c. 35²⁰⁴, which provides farther, That what person soever, principal or second, or other interposed person, gives a challenge to fight a duel or single combat, or whoever accepts one, or engages therein, shall be punished with banishment, and escheat of moveables, though there should be no fighting in consequence of

* *Lord Fountainhall*, mentioning the case of one *Smith*, a midwife, in the criminal court, vol. i. p. 47, expresses a wish for a statute which shall make it murder for the mother not to call for help in the birth, or to conceal the death of her child. It appears from the records of the Justiciary, that trials for child-murder were very frequent in 1679, 1680, and 1681.

By 49. Geo. III. c. 14, the act of William and Mary, in 1690, which formerly regulated such trials, is repealed, and it is enacted, "That if, from and after the passing of this act, any woman in that part of Great Britain called Scotland, shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be amissing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years, in such common gaol or prison as the court before which she is tried shall direct and appoint."

²⁰⁴ Repealed by 59. Geo. III. c. 79.

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the challenge. Every person falls within this act, who carries a challenge, either by a letter, or verbal message; and such as are barely present at a duel, appear to be comprehended under it, if their presence has not been accidental; for those who countenance the crime, though it should be merely by their presence, may be said to be in some degree engaged therein, in the terms of the statute.

Demembration
and mutilation.

50. The crimes directed against a man's limbs, or the other members of his body, without any intention of killing, are chiefly mutilation, demembration, and haimesucken. Demembration, or the cutting off a member, seems to be declared a capital crime, by 1491, c. 28; but its punishment has in practice been restricted to the forfeiture of moveables, and to an assythment, *i. e.* an indemnification to the party maimed for his damages: And Lord Pitmedden, in his treatise of demembration, § *ult.* mentions a letter from the King to his privy council, recorded in the Journal-book, Sept. 14. 1608, recommending to them to punish one guilty of demembration with banishment, in regard it was not usual to inflict capital punishment upon the committers of that crime. Mutilation, or the disabling a member, is also, in the opinion of Mackenzie, a capital crime; but neither our statute law, nor practice, have made it so. By *St. Rob. II. c. 11*, he who mutilates or wounds another, was indeed to be punished by the same form of process that was used against a manslayer; but his punishment was not to be capital: He was to redeem his life from the judge, and satisfy the party damnified; *i. e.* he was to purchase to himself an indemnity, by the payment of such a sum as the judge should modify in name of damages.

Haimesucken.

51. Haimesucken, from *haim*, *hame*, and *soecken*, to pursue, is the crime of beating or assaulting a person within his own house. A man's house is considered as his sanctuary; and for that reason the violence that is committed there, is deemed an aggravation of the crime, both by the Jewish law, 2 *Sam. iv. 11*, and by the Romans, *L. 23, De injur.* On this ground, the punishment of haimesucken is, by the books of the Majesty, declared to be the same as that of a rape, *L. 4. c. 9, 10*; and the pains of death have been, by our constant practice, inflicted on the committers of it. To constitute this crime, the attack or assault upon the person injured must be made in his own house where he resides day and night; *Reg. Maj. L. 4. c. 9. § 1.* A public house, therefore, where one lodges as a passenger, or even a private house, where one is merely for a visit, falls not under the appellation of a *house*, in the meaning of this law; nor a shop, unless it be part of the dwelling-house. But as a ship is the place of the master's proper residence, the beating of the master, or any of the crew in that ship, infers the crime of haimesucken. This description answers also to let rooms, where the lodger hath his constant residence for a certain period, though no part of the house should be his property. Not only what is within the walls of a house, but what is within its precincts, is considered as a part of the house, or as an accessory; *ex. gr.* the garden or the court before the house. The bare aiming a blow, or offering to strike, though no blow be actually given, has been found sufficient to infer this crime.

Adultery.

52. The crimes which are directed against our neighbour's chastity, are chiefly four, adultery, bigamy, rape, and incest. Adultery is that crime by which the marriage-bed is polluted or corrupted. This crime could not be committed by the Roman law, except with a wife or married woman, *L. 6. § 1. Ad leg. Jul. de adult.*; for a married man, who is guilty with an unmarried woman, though he indeed violates his marriage-vows, does not adulterate any conjugal

Book IV.

on the part of the man and of the woman. When a woman marries, while a former marriage subsists, it is doubtless the most criminal of the two: For where the use of the same woman is common to two men, the issue of that promiscuous conjunction cannot know their proper father, nor the father his child: This sort has therefore been reprobated by the laws of all nations. The other kind, which is the relation of two or more wives to the same husband, has been tolerated, both by the Jews and the Romans; but all bigamy is prohibited by the precepts of the gospel: and it is punished by our law, whether on the part of the man or of the woman, with the pains of perjury, by 1551, c. 19.

Rape.

55. Rape, or the ravishing of a woman, is a capital crime by the Roman law, *L. unic. C. De rapt. virg.*; but the special facts which constitute it are not there described. The text indeed seems to suppose, that the woman's body must be abused by the ravisher in these words, *cum virginitas vel castitas corrupta restitui non possit*; but by the general opinion of civilians, founded perhaps on the proper signification of the word *raptus*, the crime consists in the forcible carrying off or abduction of the woman's person, with a view to violate it, though there should be no actual violation. In the books of the Majesty, *L. 4. c. 8. § 1*, it is described to be the violent oppression of a woman by a man, contrary to the King's peace; the gloss would have the reading to be *suppression*, but the true reading appears to be *compression*, the proper Latin term for deflowering); and § 9. of the aforesaid passage of the Majesty seems to require, that the woman be *foedata* or *polluta*. Mackenzie is therefore of opinion, *Crim. Part 1. tit. 16. § 4*, that by the law of Scotland, the punishment of rape ought not to be inflicted, unless where the abduction hath had its full effect. There is no explicit statute making this crime capital; but it is plainly supposed by 1612, c. 4, by which the only defence competent to the ravisher, sufficient to exempt him from the pains of death, is declared to be the woman's giving her subsequent consent, or granting a declaration that she went off with him of her own free will; and even in that case he is subject to an arbitrary punishment, either by imprisonment, confiscation of goods, or a pecuniary fine. The aggravating circumstance, which raises up the violence attending this crime to a capital punishment, is that a woman is thereby robbed of that which of all things she is presumed to value most, her chastity and reputation. Rape therefore cannot be committed on common prostitutes²⁰⁵, who have already lost both, conformably to the Roman law, *d. L. unic. C.*; by which no rape was punished with death, except upon maids of a fair character, and widows.

Incest.

56. Incest, from *incastus*, impure, may be defined, An unnatural commixtion of the bodies of man and woman, contrary to the reverence due to blood. Incest could not be committed by the law of Moses, but by those who stood within the degrees either of consanguinity or affinity, in which marriage was forbidden, *Levit. xviii. 7—16*; and it was punished capitally, *ibid. vers. 29*. This law hath been adopted by us in all respects, by 1567, c. 14. And though an act was passed during the Usurpation, *July 1649, c. 16*, which extended the former to certain degrees more remote, it was repealed by the act rescissory of Charles II. and never revived. It hath been maintained, that the commixtion of brothers with sisters cannot be adversary to any law of nature; for that God would not in the first propagation

²⁰⁵ *Sed vid. contra, 1. Hume, (2d edit.) 300.*

BOOK IV.
 Small theft, or
 pickery.

59. Our ancient law, *Leg. Burg. c. 121*, proportioned the degrees of punishment for theft to the value of the thing stolen, rising gradually, from scourging to the loss of an ear, from that to the loss of both ears, till at last the crime was made capital, in case the goods stolen amounted in value to thirty-two pennies Scots, which, in the reign of David I, when the borough laws were enacted, and the books of the Majesty composed, was equal to the price of two sheep, *Reg. Maj. L. 4. c. 16. § 3*. Agreeably to this doctrine, the stealing of trifles, which in our law-language is styled *pickery*, has never been punished, by the usage of Scotland, but with imprisonment, scourging, or other corporal punishment, unless where it was attended with aggravating circumstances. The breaking of yards and orchards, and the stealing of green wood, are punishable barely by a pecuniary fine, which rises in proportion as the crime is repeated; but where the subject stolen is more valuable, many of our statutes have assumed it for the law of Scotland, that the theft is to be punished capitally; 1579, c. 74; 1587, c. 82; 1606, c. 5*. It must be admitted, that the loss of life is much too severe a punishment for the loss of our goods; but that crime, from its frequency and impunity, wrought such mischief and disorders in the state, and rendered property so precarious, that the heaviest penalties were found necessary to suppress it.

Stealing vic-
 tuals. Burden
 sack.

60. The taking of meat, or other necessaries, without consent of the proprietor, to satisfy hunger or preserve life, is not in any degree criminal, according to Grotius, *De jur. bell. L. 2. c. 2. § 6, vers. 2*; because every indigent person hath, from the law of necessity, a perfect right to use whatever is requisite for the subsistence of life, as if it were common. Puffendorf admits only, in that case, of an imperfect right, founded in humanity; *L. 2. c. 6. § 5, et seqq.* And this last opinion nearly coincides, not only with the Roman law, *arg. L. 39. De furt.*, but with the laws of the Majesty, *L. 4. c. 16. § 1*, where it is affirmed, that the carrying off as much meat as one can carry on his back, is not triable as theft.

Aggravations of
 theft.

61. Theft, even of smaller things, may be so aggravated as to render the punishment capital. Those aggravations arise, *first*, From the frequent repetition of the crime. Thus a thief who had been twice convicted before, suffered, by our ancient law, a more severe punishment than was inflicted on simple theft, *Leg. Burg. c. 21*, and is, by our present practice, punishable with death for the third theft. *2dly*, From the offender's condition or station in life. Thus, theft committed by a landed man was, by our old law, punished as treason, *supr. § 20*, and still continues, by 7. *Ann. c. 21*, to be punished with death. This circumstance aggravates the theft; because

* It is made a capital offence for any persons employed in the service of the Post-office, to secret, embezzle or destroy, any letter intrusted to their care, or coming to their possession, containing any bank-note, or note of any description for payment of money, (of which the statute contains a very anxious specification,) or to steal and take therefrom any note of the above descriptions; or for any person whatsoever to rob the mail of any letters, or to steal letters from any mail or bag, or from any Post-office, or house, "although such robbery, stealing, or taking, shall not appear, or be proved, to be a taking from the person, or upon the King's highway, or to be a robbery committed in any dwelling-house, or in any coach-house, stable or barn, or any out-house belonging to a dwelling-house; and although it should not appear that the person or persons were put in fear by such robbery, stealing, or taking;" *Stat. 5. Geo. III. c. 25; 7. Geo. III. c. 50. 206.*

²⁰⁶ See also 52. *Geo. III. c. 143. § 2, 3, 4.*

because men of estates are farther removed from suspicion, and their greater fortune and interest flatter them more with the hopes of escaping from justice. *3dly*, Theft is aggravated from the nature of the thing stolen, or the place from which it was carried off. Upon this head Mackenzie affirms, *Crim. Part 1. tit. 19. § 11*; that not only sacrilege, *i. e.* the theft of things set apart for sacred or public uses, but the stealing any thing even of common use, out of a church, is punished capitally. *4thly*, Theft may be aggravated from the time of committing it. Thus, the master of an house may, by our law, put a thief to death who steals in the night, even *brevi manu*; for this is plainly taken for granted in 1661, *c. 22*. The instruments used in perpetrating the theft may be also considered as an aggravation of it, as, if it was committed by the means of false keys; *Mack. ibid. § 13*.

62. Certain facts, though they fall not under the description of proper theft, are by statute declared to be punishable as theft, and are therefore sometimes styled *statutory theft*. Thus, houghers of oxen or of horses in the time of carrying the corns to the barn-yard, destroyers of ploughs or plough-graith in the time of tillage, the cutters of growing trees and of corns, 1587, *c. 82*, and the slayers of salmon in forbidden time, are to underlie the pains of theft and death, 1606, *c. 5*. Colliers who desert their master's service, are also to be held and reputed as thieves, by 1606, *c. 11*; but by the words of the act immediately following, the punishment of these last is declared to be simply corporal.

Statutory theft.

63. The crime of reset of theft consists either in harbouring the person of the thief after the goods are stolen, or in receiving or disposing of the goods. They who barely conceal or harbour the criminal, (who are properly the *receptatores* of the Roman law,) cannot be said to be partakers of the crime itself, more than the concealer of a murderer can be said to be art and part of the murder: But as the crime of theft, which was formerly committed with great licentiousness and frequency in the more remote parts of Scotland, received too much encouragement from the criminal's hopes of being concealed or screened from justice, it was enacted, by 1567, *c. 21*, that whoever harboured or maintained a thief, within forty-eight hours, either before or after committing the theft, should be tried as partaker of the crime. Those who receive the stolen goods, knowing them to be such, are in a proper sense accessory to the crime, and therefore were to suffer as thieves, by *Stat. Alex. II. c. 21*. Such as sell goods, belonging either to thieves, or to other lawless persons who dare not themselves appear at a public market, may be justly considered, not only as resetters of the goods, if they were stolen, but as concealers of the thieves or other offenders from justice, and are therefore punished with banishment, and the escheat of moveables, 1587, *c. 109*. In aggravated theft, *ex. gr.* in theft committed by a landed man, or by any man who had been twice before convicted of that crime, which two kinds are punishable by death, the resetter's punishment does not rise with that of the principal offender, because these aggravations are personal to the thief himself. On the contrary, if the resetter should be a landed man, or if he should have been before found twice guilty of theft, or of the reset of theft, the resetter would suffer death, though the principal thief should have no land-estate, or should have committed no former theft; for since these circumstances affect the resetter, it is against him whose crime is thus aggravated, and him alone, that they ought to have any operation.

Reset of theft.

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Robbery.

64. Robbery is truly a species of theft ; for both are committed on the property of another, and with the same view of getting gain ; but robbery is aggravated by the violence with which it is attended. It is in our old statutes called *rief*, 1477, c. 78, or *stouth-rief*, 1515, c. 2, from *stouth*, or *stealth*, and *rief*, the carrying off by force ; and it is in all cases punished capitally. The crime became at last so frequent, and was committed so audaciously by whole bands of men associated together, that it was judged necessary, at that time, to vest all the freeholders of the kingdom with a power of holding courts for their trial, and executing them to the death, 1594, c. 227. Nay, the law punished with death such as, under the pretence of securing their lands against the rieviers, paid to them a yearly contribution in money ; which got the name of *black-mail*, 1567, c. 21 ; 1587, c. 102 ; the reason of which severe enactment was probably the observing, that a great addition was made to the weight and authority of those public spoilers, by exacting and receiving tribute-money from so many persons of influence, and perhaps a suspicion that several of the gentlemen who subjected themselves to that tax, were secret abettors of the depredations, and sharers in the unlawful spoils. Under this kind of theft may be comprehended her ship, or the masterful driving off of cattle from the proprietor's grounds ; and sorning, which is the taking meat and drink from others by force or menaces, without paying for it. An act was passed, 1609, c. 13, condemning to banishment such sorners as were known by the name of *Egyptians*, or *gypsies*, and adjudging to death all who should be habite and repute Egyptians, if they should be afterwards found within the kingdom. It appears, by some ordinances made about the middle of the 16th century, preserved in our public records, that those gypsies were originally from Egypt, a band of whom applied to our sovereign for licence to come to this kingdom, probably under the colour of introducing some art which might tend to the public interest, and that, for some time after their arrival, they lived peaceably, under the protection of our laws ; but having at last become notorious robbers, and public nuisances, it was thought necessary to expel them from this country. That act is still in force ; but the pannels are allowed to bring witnesses to their character, that the jury may be the better able to judge whether they fall under the description of the statute.

Leviers of black-mail.

Sorners and gypsies.

Piracy.

65. Piracy is that particular kind of robbery which is committed on the seas. It is declared, by 18. *Geo. II. c. 30*, to be piracy for a natural-born subject to commit any act of hostility against his Majesty's subjects, under the colour of a commission from any of his enemies ; and by 8. *Geo. I. c. 24*, made perpetual by 2. *Geo. II. c. 28. § 7*, any person who shall trade with a pirate, or furnish him with provisions, or shall fit out a ship knowingly for that purpose, or any person belonging to a ship, who shall, upon meeting with a merchant-ship, either on the seas or in port, forcibly enter her, or shall throw overboard, or destroy any of the goods, shall be punished as a pirate. This crime is capital, and is triable before the high court of admiralty ; and the sentences pronounced by the judge in such trials, are generally executed within the flood-mark*.

66.

* See as to an analogous crime, "the plundering of stranded vessels," *Blackst. v. i. p. 293* ; *Hume, v. ii. p. 366* ²⁰⁷, (*2d edit. vol. i. p. 480.*). In regard to the wilful and fraudulent destruction of ships, *vide supra, B. iii. tit. 3. § 17* ; *Hume, ii. p. 369*, (*2d edit. vol. i. p. 482*) ; *Abbot's Maritime Law, p. 130.*

²⁰⁷ *Vid. supr. B. 2. t. 1. § 13.*

66. The crime of falsehood may be defined with Mackenzie, *Crim. Tr. Part 1. tit. 27, pr.* A fraudulent imitation or suppression of truth, to the prejudice of another. In order to constitute this crime, something that is false must be substituted in the place of something true, to make it pass for true. The grosser kinds of falsehood were, by the Roman law, punished with the loss of life, *L. 1, 22, C. Ad leg. Corn. de falsis*; the less heinous were punished *extra ordinem*, at the discretion of the judge, *L. 31, ff. eod. tit.* Nay, the same specific crime, the using of false weights, which was frequently practised by the Dardanarii, is declared punishable in one text of the Pandects arbitrarily: And in another, the offender is subjected to the pains of the *lex Cornelia*, *L. 6. § 1, De extr. Crim. i. e.* to the loss of citizenship, which the Romans accounted a capital punishment. By our ancient law, the lives and goods of those who were convicted of using false weights and measures were put in the King's mercy, *Leg. Burg. c. 74*, and their heirs could not inherit, except upon a remission, *Ibid. c. 132*; but the act 1607, *c. 2*, after establishing an uniformity of weights and measures over the whole kingdom, declares the penalty of the crime to be the confiscation of moveables.

TITLE IV.
Crime of falsehood.

67. Falsehood is most usually committed by the imitating of the subscription of another, and setting that false name or subscription to a writing; which species of falsehood is, in our law, distinguished by the name of *forgery*. Our statutes have varied much with regard to the punishment to be inflicted on forgery, and have, after all, left it uncertain. The forging of a charter was, by *Stat. Alex. II. c. 19*, punished with the amputation of an hand. The act 1540, *c. 80*, does no more than refer the punishment of false notaries, and the users of false instruments, to the disposition of the Civil and Canon laws, and of our own statutes. False notaries, and the falsifiers of writings, are, by 1551, *c. 22*, to be punished with proscription, banishment, dismembering of the hand or tongue, joined with the other pains inflicted by the common law; and our latest statute relative to this head, 1621, *c. 22*, leaves the punishment indefinite, mentioning only in general terms, the pains due to the committers of falsehood. Our usage since that statute hath been conformable to the Roman law; for gross forgeries are punished capitally, in consideration of their mischievous consequences to society. But where either the forgery is of writings of lesser importance, *ex. gr.* of executions, *Act of Sederunt, Feb. 23. 1739*, or where the evidence of the crime, though it afford a moral conviction to the judge, is not so pregnant as to be the foundation of a capital punishment, the criminal escapes with an arbitrary one.

Forgery.

68. The reasons have been already assigned, why the court of session, though its jurisdiction be not properly criminal, is competent to the trial of forgery, *supr. B. 1. tit. 3. § 21*. Where improbation is moved against a deed by way of exception, even in an inferior court, the judge, before whom the action lies, has the cognisance of the grounds of falsehood moved by the defender *ad civilem effectum*, in order to determine the legal effect of the deed, *arg. 1557, c. 62*; but no inferior court is competent to a criminal trial for forgery. The method of proceeding in an action of improbation or forgery before the session, is either summary, *per modum simplicis querelæ*, without any summons, or by a formal summons of improbation. The summary method is used, either, *first*, where the

Mode of procedure before the session in forgery.

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the forgery hath been committed by a member of the college of justice: or, 2dly, where the seal of the signet, or any part of a process, is falsified *de recenti*: or, 3dly, where the forger is already in custody; but where he is not in custody, an action of improbation must be brought, in which two terms are indulged to the defender, as in an action of reduction-improbation, of which *supr. t. 1.*

§ 21. By our more ancient practice, he who pleaded falsehood against a deed, whether by way of action or exception, was, by 1557, c. 62, ordained to give security for the payment of a sum, to be fixed at the discretion of the judge, in case he should be cast in his plea; and by a posterior act of sederunt, Jan. 8. 1583-4, in place of giving security for the sum modified, it behoved him to consign it. These acts appear to be now in disuse, where the improbation is pursued by way of action; but when it is moved by a defender *per modum exceptionis*, the judge, by our present usage, decrees he to consign the precise sum of forty pounds Scots, which he forfeits to his adversary, if his allegation shall appear calumnious.

Forgery requires not only that the writing be fabricated, but put to use.

69. It is not the bare fabricating of a writing, or the being accessory to it, that constitutes forgery: If the writing be not put to use, one of the essential characters of the crime is wanting, the bringing damage to another, or prejudicing his estate. A writing may be put to use, in any way which discovers an intention in the forger of drawing from thence some advantage to himself; as by producing it in judgment, either as a title to sue, or as a defence for eliding the pursuer's libel, or by making it over to another. A party who, in any process, founds upon a writing suspected of forgery, may be compelled by the adverse party to declare in judgment whether he is willing to abide by it as a true deed. If he decline to abide by it, the deed is declared improbable or false: But he himself, notwithstanding his passing from it, continues subject to the pains of falsehood, if positive evidence be brought of his accession to the crime, *L. 8. c. Ad leg. Corn. de fals.*; 1621, c. 22. If he in whose favour the false deed is granted, shall abide by it as genuine, he will be made liable as a forger, though there should be no evidence brought that he knew the deed to be false. As it would be hard to fix this presumption against an heir or singular successor, as to deeds found in the charter-chest of his ancestor, or which were assigned by himself to others, and thereby to reduce him to the severe alternative either of losing the benefit of those deeds, or of being accounted the forger, if they should be declared false; he was by our former practice allowed to abide by deeds *qualificatè*, or under protestation, that they came fairly into his hands, and that if they should be pronounced false, he had no accession to the crime; which quality had the effect of screening him in all events from the penalties due to falsehood, unless a positive proof was brought that he was accessory to it: But as this indulgence gave too great encouragement to forgery, therefore, though the party be to this day allowed to adject to his declaration a protestation of his own innocence, the court need give no more weight to it than they shall judge proper.

Direct proof in forgery.

70. The proof in trials of forgery, is either direct or indirect. The direct proof arises from the testimony of the writer, (where the deed was written by a third party,) and of the instrumentary witnesses,

²⁰⁸ See *Wilson*, 25. Feb. 1826, (*S. & D.*); *Paterson*, 25. Nov. 1826, (*Ib.*); *Bruce*, 3. March 1827, (*Ib.*); *Wilson*, 9. Feb. 1827, (*Ib.*).

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Book IV.

Direct usury.

law²¹¹. It is commonly divided into *usura manifesta*, or direct, and *usura velata*, or covered. One may be guilty of direct usury, not only where he stipulates to himself, by a clause in an obligation, a sum above the lawful interest, but even where he takes interest before it becomes due²¹², though it should be no higher than that which the law warrants; *ex. gr.* where he accepts of a full year's interest before the year be elapsed; for in that case he takes more than he ought, because he takes it sooner; he receives a consideration for the use of money before the debtor has got that use of it. To infer this species of usury, it is enough that the creditor hath received the interest before the term, 1621, c. 28*. It would afford no defence, therefore, that it had been voluntarily paid without any demand on the part of the creditor. Indeed the statute was so conceived, on purpose to obviate the pretence of voluntary payment; see a decision, Nov. 28. 1668, observed by Mackenzie, *Crim. T. Part 1. tit. 24. § 3.* If however there was no usurious intention in the receiver, *ubi aberat animus faenerandi*, he ought not to be liable in the pains of usury. Where a creditor's right to interest is clogged with an uncertain condition, by which he runs the hazard of losing his whole debt, if the condition should never exist, he may stipulate for himself an higher rate of interest than the legal, without the crime of usury. In such case, the interest is not given merely in consideration of the use of the money, but of the risk which is undertaken by the creditor. Hence a lender of money upon bottomry, explained above, *B. 3. t. 3. § 17*, the repayment whereof depends on the safe return of the ship on which it is lent, may lawfully take a rate of interest, proportioned to the risk, called in the Roman law *faenus nauticum*²¹³.

covered usury.

77. Covered usury is that which is committed under the appearance, not of a loan, but of some other lawful contract, *ex. gr.* a sale, or an improper wadset, in order to disguise the criminal nature of the bargain. Thus a back-tack, which is given by a wadsetter to the reverser for a yearly tack-duty exceeding the legal interest of the sum lent, is declared usurious, by 1597, c. 247; because, though the bargain be covered under the mask of a contract of wadset, and of a lease of the wadset-lands, yet it is truly the contract of a loan; for the tack-duty payable by the reverser can have no onerous cause, other than that it comes in place of the interest of the money borrowed, which, since it exceeds the legal interest, is usurious. But this doctrine has no room in proper wadsets, where the wadsetter takes his hazard of the fruits, though the lands wadset should yield a rent higher than the interest of the wadset-sum; because the wadsetter, in a proper wadset, undertakes the hazard of the accidents which may diminish the rent; and the surplus rent, which

* See *Kilk. No. 2, voce Usury, Clerk Home, No. 176, (Cleland, 15. July 1741, Dict. 16428).*

²¹¹ *Strachan, 12. June 1823, (S. & D.).*

²¹² The custom of trade allows this to be done in discounting a bill, 1. *Bell Comm. 5th edit. 309*: But even in transactions of discount, "it is usury if a higher interest than 5 per cent. is taken, unless in so far as the additional sum can be justified, as not for forbearance of money, but as a fair compensation for trouble, or an usual allowance for a banker's interference, the keeping up of an establishment for such transactions wherever the money is to be paid, and the expense of remittance." *Ibid. 310*; and see *Fac. Coll. Paul, 20. Jan. 1824, (S. & D. Nos. 599 and 560).*

²¹³ So also, in loans on redeemable annuity, *Glen, 6. March 1817, Fac. Coll.; Clark, 24. Jan. 1826, (S. & D.). See Farquharson, 31. Jan. 1827, (ib.).*

Book IV.
Stellionate.

79. Stellionate, from *stellio*, a serpent of the most crafty kind, *Plin. Hist. Nat. L. 30. c. 10*, is a term used in the Roman law, to denote all such crimes, where fraud or craft is an ingredient, as have no special name to distinguish them by. It is chiefly applied, both by the Roman law and that of Scotland, to conveyances of the same right granted by the proprietor to different disponees, *L. 3. § 1. Stellion.*; 1592, c. 140. The punishment of stellionate, in the large acceptation of the word, must of necessity be arbitrary, in order to adapt it to the various natures and different aggravations of the fraudulent acts, *L. 3. § 2. ibid.* Those who are guilty of that particular species of it, which consists in granting double conveyances, are, by our statutes, declared infamous, and to be punished in their persons and goods at the King's pleasure, 1540, c. 105. Fraudulent bankruptcy may be accounted a particular kind of stellionate, the cognisance of which is by special statute, 1696, c. 5, appropriated to the session ²²⁰, who may inflict any punishment on the offender that shall to them appear proportioned to his guilt, death excepted * ²²¹.

Verbal injuries.

80. It has been said, that crimes may be also aimed against one's good name and character. Though every wrong may, in some sense, get the appellation of *injury*, yet the crime of injury, in a strict acceptation, consists in the reproaching or affronting our neighbour. Injuries are either verbal or real. A verbal injury, when directed against the King, is truly leasing-making, of which *supr.* § 29. A verbal injury, when it is pointed against a private person, consists in the uttering of contumelious words ²²², which tend to vilify his character, or render it little or contemptible. As one may be sensibly hurt by reproachful words, though they should have no tendency to blacken his moral character, sarcastical nicknames and epithets, or other such strokes of satire, are accounted injurious:

been found, that the statute 31. Eliz. c. 5, introducing a general limitation of penal statutes, applies to Scotland in questions respecting usury; *June 24. 1808, Morison, Dict. App. voce USURY, No. 2* ²¹⁹.

* There are two other statutes against fraudulent bankruptcy, 1621, c. 18. and 33, Geo. III. c. 74. § 27. (54. Geo. III. c. 137. § 33). See *Kilk. No. 8. voce BANKRUPT, Mackenzie, July 29. 1748, (5. Brown's Suppl. 235, and Elch. v. BANKT. No. 23); Hume ii. p. 402, (vol. i. 2d edit. p. 503); Acts of Sederunt, July 26. 1748, Feb. 4. 1757; Feb. 14. and 27. 1776; March 8. and June 14. 1782; and June 2. 1791.*

²¹⁹ *Walker, 30. June 1807, Ibid. No. 1.; Paul, 20. Jan. 1824, (S. & D. Nos. 599. and 600.); vid. infr. § 110.*—Where an action is raised within the statutory period, (12 months,) but irrelevantly, an amendment of the libel to cure the irrelevancy after the year has expired, is incompetent. *Paul, supr. compared with Nisbet, 1. Feb. 1811, Fac. Coll.*

Though the penalties cannot be insisted for beyond the limited time, this does not bar reduction *quandocunque* of the usurious transaction; *Meal, 27. Nov. 1810, Fac. Coll.*

²²⁰ Who accordingly exercise therein an *exclusive* jurisdiction; *Fac. Coll. Duncan, 21. Jan. 1823, (S. & D.); affirmed on appeal.*

²²¹ "A petition and complaint is a competent mode of procedure in cases of fraudulent bankruptcy;" but "it requires the same strictness and precision in the detail of the alleged acts, as a criminal indictment;—and a list of witnesses is equally necessary." The Court "refused to allow any of these irregularities to be waved by the respondents, or to be remedied by a condescence;" *Macdonell, 12. June 1824, (S. & D.)*.—An ordinary outer-house action is not a competent mode of procedure, *Aitken, 11. Dec. 1810, Fac. Coll.*:—where it was also found, that though individual creditors might, the trustee on a sequestrated estate, as having no title, could not, even with concurrence of the Lord Advocate, pursue the bankrupt for fraudulent bankruptcy *ad criminalem effectum*.

²²² Compare *Miller, 26. Nov. 1811, Fac. Coll.; Christie, 14. May 1824, (S. & D.); Reid, 12. May 1825, (Ibid.)*.

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 Punishment of
 injuries, verbal
 and real.

81. As to the judges who have the cognisance of this crime, see *supr. B. 1. t. 5. § 30.* Verbal injuries are generally punished by a pecuniary fine, to be ascertained according to the different conditions of the injuring and injured, and the circumstances of time and place; *L. 7. § 8, De injur.* If the offender be poor, the commissaries usually ordain him to do penance, by making a public recantation in the church, or at the church-door: And sometimes these two penalties of fine and penance are conjoined. One may call his neighbour a *bankrupt*²²⁵, without reflecting either on his honour or moral character; for men of the greatest honour and strictest honesty may become bankrupts by unavoidable misfortunes: Yet as such an imputation may have the effect of ruining one's credit, and, of course, losing the means of his subsistence, founds him in an action of damages, which must be pursued, not before the commissary, but before the sheriff, or other judge-ordinary. Real injuries are committed, by doing whatever may either hurt one's person, as giving him a blow; or may affect his honour or dignity, as, the bare aiming of a blow, without striking; assuming a coat of arms, or any mark of distinction proper to another, spitting in his face, &c. This offence is also punished arbitrarily by the judge-ordinary, according to the circumstances attending it, either by fine or imprisonment. Scandal, reduced into writing, and published²²⁶, may be considered rather as a real than a verbal injury; and because it is of all others the most public and permanent, it ought to be punished by the judge with greater severity than the slighter injuries.

What persons
 may or may
 not be criminal-
 ly prosecuted in
 this country.

82. After having given a short account of the different crimes punishable by our law, this treatise may be concluded with a few observations relating, *first*, to the persons against whom a criminal accusation can or cannot be brought; *2dly*, to the forms of proceeding in criminal trials; and, *3dly*, to the various methods by which crimes may be extinguished. As to the *first*, Foreigners, who are residing here occasionally, may be prosecuted criminally, on such facts as reason itself may discover to be criminal; but it were hard to subject them to the statutory punishment inflicted on offenders in points which are made criminal barely by statute, unless they relate to trade, or to other articles which foreign merchants ought to be fully apprised of before their entering into this kingdom, or sending their goods hither. No criminal trial can proceed against those who are incapable of making their defence. Hence, where a crime was committed by a minor, the prosecution of it was put off by the law of the Majesty, *L. 3. c. 32. § 15*, upon his giving security to answer to the charge after majority, *L. 2. c. 42. § 11*: But this indulgence to nonage was limited by the Roman law to such minors as had no curators, *L. 4, C. De auct. prest.* lest the minor should, from the forwardness or heat of youth, either speak out, or conceal unseasonably, that which, if it had not been spoken or concealed, might have turned to his advantage. By our present practice, all minors, if they be old enough to be capable of dole, and consequently of committing a crime, are also deemed qualified to defend themselves in a criminal trial; which doctrine appears not only to be just in itself, but removes an inconvenience

²²⁵ See *Craig*, 29. *June 1809, Fac. Coll.*

²²⁶ See *Hutchison*, 18. *May 1808, Dict. App. v. DELINQUENCY, No. 4.*

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The jury take under consideration the evidence offered in support of the indictment: And if twelve or a greater number of them concur, in judging the evidence laid before them to be a sufficient ground for a trial, the bill is returned to the court, with the word *billa vera*, indorsed upon it; on which a warrant is directed to the Sheriff, to seize and imprison the person presented, in order to his trial: But if the jury be of opinion, that the evidence does not amount to a charge of high treason, they write on the back of the bill, *ignoramus*; upon which the court discharges the person charged without farther proceeding, and tears the bill, as not being a sufficient foundation for a trial. In adopting this part of the English law, we have made a profitable exchange; for before the act 7. *Ann.* the King's advocate might, by himself, have brought any person to a trial for treason. He indeed took a previous recognition of the facts with which the party was charged, *i. e.* he examined those who were present at the treasonable act, on the special circumstances attending it; and the Advocate was the sole judge, whether these facts or circumstances were truly sufficient for supporting a criminal prosecution; whereas by the institution of grand juries, the previous point, Whether the party presented ought to be put to a trial? is not left to the discretion of a single person, and of one too who is an officer of the crown, but must be determined by a jury of one's own countrymen. He against whom a bill of indictment is found, must, five days before his trial, be furnished with a list of the jury which is to be impanelled upon him, called *the petty jury*, or *the jury of life and death*; and though twelve only are sworn to be of the jury, the sheriff returns sixty or seventy because the prisoner has the privilege of challenging thirty-five of them, without assigning any special ground of challenge. After the witnesses on both sides are examined, and charges given to the jury, the jury are carried into a room by themselves, where they are shut up, without meat, drink, or fire, till they be unanimously agreed in one verdict. Treason is triable in that county alone where it is committed; but by 19. *Geo. II. c. 9*, all treason committed in the year 1745, might be tried in any county the King should appoint; and by another temporary statute, now expired, 21. *Geo. II. c. 19*, treason committed within certain counties of Scotland, might be tried by the court of justiciary, wherever it should sit. A particular account of the forms observed in trials upon treason, is given in a small treatise published by the order of the House of Peers in 1709*. We now proceed to the forms of proceeding observed by the law of Scotland in the trial of other crimes.

Bail in offences not capital.

Statutory time for bringing on trials.

85. No person can be imprisoned, in order to trial for any crime, without a warrant in writing, expressing the cause, and proceeding upon a signed information, 1701, c. 6, unless in the case of indignities done to judges, riots, and some other offences specially mentioned in the statute. Every prisoner committed to gaol in order to trial, if the crimes of which he is accused be not capital, is entitled to a release upon bail, the extent of which is to be fixed by the judge. By the above act, it could not exceed six thousand merks Scots for a nobleman, three thousand for a landed gentleman, one thousand for any other gentleman or burghess, and three hundred

* These forms are to be found in *Lothian's Form of Process before the Criminal Court of Scotland*.

by other person of inferior rank ; but, by 11. *Geo. I.* judge may extend the bail to the double of those as, either from the nature of the crime with ed, or from their low circumstances, cannot lie for ever in prison untried, it is made law- act 1701, to every such prisoner to apply to the hat his trial may be brought on without unneces- Within twenty-four hours after such application, that issue letters directed to messengers, for intimating to ecutor that he may fix a diet for the prisoner's trial within days after the intimation, under the pains of wrongous imprime- ent. If the prosecutor do not insist within that time, or if ue trial be not finished in forty days more, when prosecuted be- fore the justiciary, or in thirty, if carried on before any other judge, the prisoner is, upon a second application, setting forth that the statutory time is elapsed, entitled to his freedom, under the same penalty. This act, so favourable to personal liberty, in so far as it requires the carrying on and finishing the prisoner's trial within a precise time, is not applicable to trials upon forgery, when prose- cuted before the session by the indirect manner of proof, according to the rule, *Nunquam concluditur in falso* ; for the variety of cir- cumstances and facts that are frequently brought in evidence *hinc inde*, makes it impossible to limit such trials in point of time, espe- cially in a court where the diets are not peremptory, and may in some cases lengthen it out for months, or even years, beyond the time limited by the statute ; *Fac. Coll. i. 115, (King's Advocate against Cameron, Aug. 9. 1754, Dict. p. 11742).*

86. Upon a person's committing any of the grosser crimes, it is usual for a justice of the peace, sheriff, or other judge, to take a precognition of the facts, explained *supr.* § 84, in order to know whether these facts be truly criminal, and to serve as a direction to the prosecutor how to lay his libel or indictment conformably to them ; but those who are examined in the precognition may insist to have their declarations cancelled before they give testimony at the trial †. Justices of the peace, magistrates of boroughs, and sheriffs, are also authorised to receive informations concerning crimes to be tried before the circuit-courts ; which informations are to be by them transmitted to the Justice-Clerk forty days before the sitting of the respective courts. This method of taking up of dittay or indictments is substituted, by 8. *Ann. c. 16. § 3. 4,* in place of the old

Precognition of facts.

* By statute 39. *Geo. III. c. 49,* judges and magistrates are authorised to extend the bail, where, in the circumstances of the case, they see cause for it, to the sum of L.1200 Sterling for a nobleman ; L.600 for a landed gentleman ; L.300 for any other gentleman, burgess, or householder, (a description which does not appear in any of the former acts) ; and L.60 for an inferior person. By the same statute, in cases of commitment on a charge of sedition, it is made competent for any one of the lords of justiciary, on an application for that purpose in the name of the Lord Advocate, to extend the bail to such sum as, on the whole circumstances of the case, he shall see cause for.

† Notwithstanding some judgments, (see *Hume*, vol. iv. p. 190), (2d edit. vol. ii. p. 366), finding that a witness is disqualified if he was present at the examination of any of the other witnesses, this cannot be laid down as a general rule, nor as applicable to those cases where the thing happened accidentally, and without any evil purpose. On mature deliberation, the Lords repelled such an objection, in the case of *William Macleod*, Dec. 14. 1801, " where it appears that no improper motives, either on the part of the said Alexander Williamson, (the witness,) or of the public prosecutor, gave rise to such attendance."

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Trials proceed either on indictment, or on criminal letters.

old one, by the stress (*traistis*) and porteous rolls mentioned in 1487, c. 99; see *Skene, De verb. sign. voce Traistis*.

87. The form of trial in criminal questions differs much from those which are observed in civil actions, if we except such crimes as the court of session is competent to, and the lesser offences pursued before inferior courts. The trial of proper crimes by the court of judicatory proceeds either on indictment, which method is generally observed where the accused person to be tried is in prison, or upon criminal letters issuing from the signet of the court. In either case the defender is entitled, when he is cited, to a full copy of the indictment or letters, together with a list of the witnesses to be produced against him, and of the persons who are to pass upon the quest, 1672, c. 16. § 11, of that branch of the statute which relates to the justice-court*; and fifteen days must intervene between the defender's being thus cited, and the day of appearance. When the trial proceeds on criminal letters, the defender, if he be not already in prison, is, by the letters, required to give security that he shall make his appearance in court upon the day fixed for his trial; and if he gives none within the days of the charge, he may be denounced rebel, which infers the forfeiture of moveables. To secure persons from groundless criminal prosecutions, where there is no real intention to insist against them, the prosecutor must, at the issuing of the criminal letters, give security, according to his degree and quality, that he will report them to the court duly executed, 1535, c. 35. This obligation extended farther by our old law, *Mod. ten. cur. c. 74*; *St. Rob. III. c. 29*, which laid the prosecutor under a necessity to make good his accusation; and was at once more agreeable to the Roman law, and better adapted for preventing calumnious accusations. As a farther discouragement to these, all prosecutors, where the pannel was absolved, were condemned in costs, modified by the judge, 1587, c. 87; and were, over and above, amerced in a fine of ten pounds Scots; to be divided between the fisk and the defender: And where the King's advocate was the only prosecutor, his informer was burdened with the payment of it, 1579, c. 78. These statutes are justly considered as a sufficient warrant for the present practice of condemning vexatious prosecutors in fines far exceeding the statutory sum.

All persons to be cited, must be mentioned in the body of the criminal letters.

88. Formerly, accomplices in crimes, or associates, were not cited in virtue of any special warrant contained in the criminal letters: Their names were only inserted in a bill or writing to which the letters referred; so that they might have been struck out at the messenger's pleasure. As messengers were frequently corrupted by money to abuse the trust thus committed to them, and suffer criminals to escape, all persons to be cited must, by 1579, c. 76, be specially mentioned in the body of the criminal letters.

Nature of the libel, its terms and conclusions.

89. That part of the indictment, or of the letters, which contains the ground of the charge against the defender, and the nature and degree of the punishment that he ought to suffer, is called *the libel*. All criminal libels must be special, setting forth the particular facts inferring the guilt, and the particular place where they were done or committed. The time of perpetrating the delict may be libelled in more general terms, with an alternative as to the day or the month, in the following words, *upon one or other of the days of one*
or

* In regard to the mode of carrying this regulation into effect, see *Hume*, vol. iii. p. 429, (2d edit. vol. ii. p. 240); *Act of Adjournal*, July 12. 1803.

*or other of the months specially libelled**: But that the person accused may not be cut off from the defence of *alibi*, he will be allowed to prove, that upon such particular days of the time libelled, he was not in that place where the crime is said in the libel to have been committed; and such proof will elide the force of the libel against him as to these special days. When one was accused, not as principal actor, but as guilty art and part of a crime, the special circumstances inferring that conclusion ought also, by our former law, to have been libelled: But this opened a door to the escape of many accessories; for in most cases it was impossible to know, before examining the witnesses, the precise facts that were to come out upon the proof; and though the clearest evidence of circumstances sufficient to infer art and part should have been brought, yet the accessory fell to be absolved, if that evidence did not precisely tally with the facts laid in the libel. It was therefore declared sufficient, if the libel mentioned in general, that the persons libelled were guilty art and part, 1592, c. 153. By our most ancient usage, *Reg. Maj. L. 4, c. 26. § 4*; *St. David. II. c. 29*, the principal criminal was to be tried before the accessories; both because it is in the nature of that which is accessory to follow after that which is principal, and because, if accomplices could have been tried first, it might happen that defences known only to the actor could be neither pleaded nor proved. It may therefore be concluded, that this continues to be our law, notwithstanding the statute 1592; for though that act has declared all libels relevant which bear art and part, without the necessity of setting forth special facts, yet it does not repeal, either in words or intendment, our former law, as to the order of time required in the trial of accessories †. The accessory is supposed by the statute to be brought to his trial agreeably to our former customs: All that it enacts is, that in such case it is not necessary to libel the special circumstances of accession.

90. In civil actions, as the summons bears continuation of days, the judge may continue his courts from the day of appearance to a more distant one. In the criminal court of justiciary, the diets of appearance are peremptory; so that if the criminal letters be not called on the very day to which the defender is cited, their effect is lost, *instantia perit*, 1587, c. 79. But as the right itself of prosecuting continues, the prosecutor may instantly raise new criminal letters, or a new indictment. If the prosecutor shall either not appear on that day, or not insist, or if any of the executions appear informal, the court deserts the diet, by which the instance also perishes; but

In the criminal court the diets are peremptory. Letters of exculpation.

* See the manner in which the *time* of committing the offence must be libelled in a criminal indictment, amply discussed in *Hume*, vol. iii. p. 374, (*2d edit. vol. ii. p. 218.*) In the case of *James Steven* alias *Douglas*, accused of theft, the libel, which charged the act to have taken place upon the evening of *Thursday* the 23d *July* 1799, was objected to, as there was no such day in the kalendar for that month; but as the libel contained the farther specification, that the act was committed on the evening of one or other of the days of *July* last, or of *June* preceding, or of *August* following, it was found relevant, *Dec. 26. 1799.*

† See a contrary decision observed in *Mackenzie's Criminal Tr.* Part 1. tit. 35. § 9; see also the trial of *James Stewart* for the murder of *Campbell of Glenure*, *Sept. 25. 1752.* Mr Erskine's doctrine seems to be applicable only to the case where the principal actor is known, and in custody, so that he might be tried; and even in that case he may be tried at the same time, and on the same libel, with his accomplice. If he be not in custody, all that can be required of the prosecutor is to call and fugitate him. If he be dead, or unknown, the objection seems not to apply at all. (See 1. *Hume*, *2d edit. p. 117.*)

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but if he shall move for a delay upon the absence of a necessary witness, or other reasonable cause, the court may continue the diet to another day*. It has been already observed, that a defender, in default of his appearance on the day to which he is cited, is declared a fugitive from the law; *supr.* § 83. The defender is, after his appearance, styled *the pannel*. Letters of exculpation are granted of course, in proof either of the defender in a criminal trial, for citing witnesses, against any of the defences against the libel, or of his objections to the clearing of his innocence; which letters must be executed to the same day of appearance as that in the indictment or criminal letters. Mackenzie, *Crim. Tr. Part. 2, tit. 22. § 2*, affirms, that the defender ought not to be admitted to prove defences grounded on facts directly contrary to the libel; because the allowing a proof of facts inconsistent with one another, might prove a great occasion of perjury. But it is a just rule, especially in criminal trials, that *partes rei sunt favorabiliores*: The pannel's right therefore to prove his defences ought to be at least as ample as that of the prosecutor to prove his libel. Agreeably to this, exculpation is not by our present practice refused on any relevant defence, though it should import a flat contradiction to the libel: And if the law stood otherwise, libels might be so laid as to deprive the pannel of every article of exculpation, let it be ever so sufficient. 91. The two things to be chiefly regarded in a criminal libel are the relevancy of the facts libelled, *i. e.* their sufficiency to infer the conclusion; and, 2dly, their truth. The consideration of the first belongs to the judges of the court; that of the other, to the justices otherwise called the jury or assize. In trials before the court informations *hinc inde* on the relevancy, after hearing counsel both sides, were, by 1695, c. 4, directed to be exhibited to the court in writing: But by the late jurisdiction act, 20. *Geo. II. c. 43*, the pannel is directed, the day before the trial, to exhibit in writing state of the facts, and subjoin thereto the heads of his defence and after pleadings on the relevancy *viva voce*, and minutes thereof made up by the clerk, the court may forthwith pronounce their verdict; reserving, however, a power to them, in cases of the import of a special verdict, either on the relevancy of the other matter that may be alleged for the pannel in arrest of judgment. The court, if they find the facts libelled not relevant, they remit the pannel to the knowledge of an assize whose presence the witnesses produced on both sides are by the court. By the ancient forms of the justiciary, a

Relevancy of the facts, and sufficiency to infer the conclusion.

* It is understood to be law, that any criminal prosecution raised at the Lord Advocate, may, on his removal from that situation, be insisted for; *Hume*, vol. iv. p. 11, (2d edit. vol. ii. p. 259); case of *Richard Mendham*, Dec. 3. 1804. *Mr Hume*, vol. iv. p. 245, et seq. (2d edit. lays it down as a general rule, that no adjournment of the trial can take place, unless the assize have been sworn. The only exception which he mentions is from the extraordinary length of the trial, rendering it impossible to have a single diet. In the case of *Provost Stewart*, October 29. 1747, mentioned in the assizes were made to sign an enactment in the record for the next diet, each under the penalty of L. 500 Sterling. (See *pri* *kenzie and others*, under trial for murder, Jan. 8. 1803, in the *Trial*, p. 71. As to the law of England on this point, see *Ho* *Nov. 1794.*) 8vo, vol. i. p. 252; *Stone's Case*, 6. *Term. Rep.* 52.

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upon crimes of a more mischievous nature, whether tried by the supreme or by inferior criminal courts, must proceed by jury, in whose opinion, if the pannel stands clear, no stretches of law or prepared evidence can hurt him. And even where a slighter offence, if it were but a riot, is prosecuted before the justiciary, where the forms of criminal trials are preserved in their first purity, the pannel is remitted to the knowledge of an inquest*. In the trial of crimes cognisable by the session, the judges may be properly enough considered in the characters both of court and of jury. Mackenzie, *Crim. Tr. Part 2. tit. 23. § 4*, disapproves of this institution of juries, because it is hardly possible in many cases to separate the proof of facts from their relevancy, the last of which is frequently of too high a disquisition for such as are not learned in the law. But no man's life or fortune ought to depend upon too refined reasoning; and if discerning the nature of crimes be beyond the reach of juries, which are presumed to consist of men of common understanding, how can our criminal law be accounted a rule by which every artificer and farmer ought to square his conduct?

Crimes cannot be proved by the defender's oath.

94. Crimes cannot, like civil debts, be proved by the defender's oath; both because the law ought to compel no person to condemn himself, and because the severe penalties consequent on one's being convicted of a crime, lay him under the strongest temptations to perjury. This rule, *Nemo tenetur jurare in suam turpitudinem*, is not however, applicable in slight offences, which are punished only by a moderate fine, or a short imprisonment; but is limited to the more flagitious crimes, where the life, limb, liberty, or estate of the criminal lies at stake, and to those which infer infamy; because a person's good name or character is, in right estimation, as valuable to him as his life †. Sir George Mackenzie, after putting the case, that a criminal judge shall examine the pannel upon the prosecutor's reference to oath, and on his denying the crime, absolve him, affirms, that that sentence has not the effect of extinguishing the crime; because a power in the prosecutor of referring a crime to the pannel's oath, imports a power of remitting it, which is a prerogative inseparable from the crown. This assertion may perhaps be founded in law: But the case is not to be put; for the judge ought not to examine the pannel, even upon a reference by the prosecutor to his oath, otherwise the worst of criminals, though the clearest

being called before the justices of peace for Argyleshire, in a complaint at the instance of the supervisor of excise, for distilling without a licence, had been put to his oath as to the verity of the charge; and for gross prevarication in this oath, (as was alleged,) the justices had sentenced him to stand publicly in the jugs, on a Sunday, at his parish-kirk, with a label on his breast, bearing his offence. The Lords suspended this sentence *simpliciter*.

* Mr Hume, iii. p. 227, (2d edit. vol. ii. p. 139,) *et seqq.* lays it down, that in the supreme criminal court, the judges determine on many at least, if not on all, of those pleas, which the pannel may advance in bar of trial. Among others he mentions this plea, That the pannel is at the time insane, and incapable of providing for his just defence. Concerning such a plea, Mr Hume mentions several cases in which the court had decided differently, though his own opinion plainly is, that the determination of such pleas is the province of the court. In a late case, that of *David Hunter*, the court ordered informations, for the purpose of settling the point; and on advising them, Feb. 16. 1801, found, "that the plea of insanity, pleaded in bar of trial, ought to be tried by this court, without the intervention of a jury."

† It is one of the articles of the Claim of Right, (1689, c. 13), "That the forcing the lieges to depone against themselves in capital crimes, however the punishment be restricted, is contrary to law."

Book IV.

Proof by witnesses.
Socii criminis,
&c.

he be not possessed of a degree of fortitude beyond the common run of mankind, he will, though innocent, be soon brought to take upon himself the guilt he is charged with. Torture was therefore declared contrary to law by the Claim of Right in 1689; and by the foresaid 7. *Ann. c. 21. § 5*, no person accused of any crime can be put to torture.

97. All objections relevant against the competency of a witness in civil causes, are also relevant in criminal. No witness ought to be admitted who may gain or lose by the event of the trial. Hence, in the crime of usury, the testimony of the debtor who hath given the unlawful or usurious profits is rejected, because he becomes a gainer by the conviction of the usurer, 1600, *c. 7. Socii criminis*, or associates in the same crime, are not admitted to bear testimony against one another; not so much because they are accounted infamous, as because they have an obvious interest in the event of the suit; for if the pannel be condemned, the other associates may be afterwards prosecuted as guilty art and part of the same crime²²⁸ *. But from this rule we must except, *first*, crimes committed against the state, as treason; *2dly*, occult crimes, where there is a penury of witnesses, as forgery; *3dly*, special crimes, which are made an exception from the rule by statute or custom. Thus *socii criminis* are, by 21. *Geo. II. c. 34*, admitted in the trial of thefts and depredations committed in the highlands of Scotland †. An associate, after he has got a remission, ceases to have any interest in the event of the trial; for his pardon screens him from prosecution: As therefore he lies no longer under a bias to swear falsely, his testimony is received ‡. Neither ought the person, against whom the crime or wrong was committed, to be admitted as a witness against the pannel, unless in the special case where the King's Advocate is the only prosecutor, and where, from the nature of the crime, there must be a *penuria testium*, as in rape, robbery, &c. In the crime of deforcement, the persons employed by the messenger, or other officer, to attest the execution of the diligence, have the best opportunities of knowing the facts by which the deforcement may be proved; but these are in some sort parties, violence being commonly used against them, as well as against the messenger. Nevertheless, as the proof of that crime would be frequently rendered impracticable

* In an action of divorce for adultery, at the instance of the husband, the party accused may be adduced as a witness either for the pursuer, *Fac. Coll. Dec. 6. 1770, Stewart Nicolson, Dict. p. 16770*, (affirmed *Feb. 18. 1771*); or for the defender, (in *Dom. Proc., 8. April 1799*, reversing) *Fac. Coll. June 26. 1798, Hay Marshall, Dict. p. 16787*.

† The same rule is observed in the *crimen falsi*, *Kilk. No. 14, voce WITNESS, Royal Bank, July 3. 1750, Dict. p. 16760*.

‡ These observations apply to the case of remissions before conviction and sentence. In regard to remissions obtained after sentence, many authorities may be found to justify the opinion, that the effect of such remissions should be confined to screening the obtainer from punishment, without restoring his credibility as a witness. See statute 2. *Rob. I. c. 33. § 1; Mack. Crim. p. 532; Dirleton and Stewart, voce WITNESS*. Mr Hume, with reference to these authorities, states it as a subject of doubt, whether a pardon should have the effect of rehabilitating a witness, (vol. iv. p. 392.) And at p. 160. he says, that a pardon of a Scots sentence is not attended with any such effect, by our custom. But it is now quite a settled point, that a pardon has this effect whether the original conviction took place in England, (case of *Brodie, August 27. 1788*); or in Scotland, (case of *Samuel Bell, July 22. 1800*)²²⁹.

²²⁸ *Socii criminis* are now in all cases held admissible; objection lying only to their credibility; 2. *Hume, (2d edit.) 354*.

²²⁹ It is accordingly so laid down, 2. *Hume, (2d edit.) 344 and 482*.

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Exculpatory witnesses admitted, though not cited.

Proof when taken in writing.

Verdict of the jury.

so that the same evidence which would be judged sufficient to procure a sentence of divorce before the commissaries, may be cast, should the crime be afterwards tried criminally. Mackenzie, *Crim. Tr. Part 2. tit. 25*, quotes sundry instances in which the court of justiciary pronounced sentence of death upon thieves and forgers, where the evidence was barely presumptive; but he concludes that title, with giving his opinion, that such proof ought to be admitted, solely to the effect of inflicting an arbitrary punishment, unless where the trial was carried on before our Scottish privy council, who were, in such extraordinary cases, fettered by no rules.

100. Witnesses may be received for the pannel's exculpation, though they should have got no formal citation upon the criminal letters. If, *ex. gr.* a pannel, on his trial for murder, saw one in court who could swear that what he did was in self-defence, forms must in that extraordinary emergency give way to justice, in order to save an innocent life, and the pannel may from the bar call on such witness to make good his defence, without a previous summons. Formerly the depositions of witnesses in criminal trials were all reduced into writing; but by the present practice, writing is not used, unless the libel conclude for either death or demeritation against the pannel, 21. *Geo. II. c. 19* *.

101. After all the witnesses have been examined in court, the jury are shut up in a room by themselves, where they must continue, excluded from all correspondence, till their verdict be signed²³⁰ by the foreman or chancellor, and the clerk, 1587, c. 91. 1672, c. 16. § 8, *concerning the justice-court*; and according to the verdict, the court pronounces sentence, either absolving or condemning. It is not necessary, by the law of Scotland, that a jury should be unanimous in finding a pannel guilty; the narrowest majority operates as strongly against the pannel as for him. Though the proper business of a jury be to inquire into the truth of facts, it is certain, that, in many cases, they judge in matters also of law or relevancy. Thus, though an objection against a witness should be repelled by the court, the jury are under no necessity of laying greater stress on his testimony than they think just: And in all trials of art and part, where special facts need not be libelled, the jury, if they return a general verdict, thereby make themselves truly judges of the relevancy, as well as of the truth of the facts deposed upon by the witnesses †. A general verdict is that which, without descending to particular facts, finds, in general terms, that the pannel is guilty, or not guilty; or that the libel or defences are proved, or not proved. In a special verdict, the jury find some special facts contained in the libel proved, without determining their effect against the pannel; the import of which verdict is to be afterwards considered and judged of by the court ‡. Juries could not,

* The same provisions are extended to prosecutions for capital crimes, in the justiciary and circuit courts, by a temporary statute, 23. *Geo. III. c. 45*, made perpetual by 27. *Geo. III. c. 18*. See *Hume*, vol. iv. p. 194. (2d edit. vol. ii. p. 368.)

† See the powers and privileges of juries excellently laid down by Lord Chief-Justice *Hale*, *History of the Common Law of England*, c. 12. § 11.

‡ In the following instances it was found, that no judgment could pass on the verdict, as not corresponding, or not fully amounting, to the crime charged in the libel:
The

²³⁰ Where the jury are unanimous, their verdict may now be delivered *vis voce*, 54. *Geo. III. c. 67*.

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by our old law, be called to account for finding a pannel guilty, (and this continues to be our law to this day); but they might be punished for absolving a pannel against clear evidence; upon this ground, that though no jury is to be presumed capable of fixing guilt upon one who is truly innocent, from any motive, yet they may, from an ill-judged and criminal compassion, strain a point to save a person's life or fortune, who ought to be condemned. When a jury was brought to answer for wilful error in absolving a criminal, they were remitted to the knowledge of a second or grand assize, consisting of twenty-five noble persons, 1475, c. 64; *i. e.* as it was explained by act of sederunt, June 1. 1591, mentioned by Skene, *voce* ASSISA, landed gentlemen; and if found guilty, were punished with infamy, and the forfeiture of moveables, and imprisonment for a year at least; *Reg. Maj. L.* 1. c. 14. § 2, *et seq.*; 1475, c. 64. But as no judge ought to lie under any restraint that may cramp his judgment, assizes of error were seldom summoned, even when they were authorised by law, *Skene, Ibid.*; *Fount.* vol. i. p. 143. They were by *Conv. Est.* 1689, c. 18, declared a grievance; and though no statute was afterwards enacted for redressing it, no assize has been, since that time, remitted to the knowledge of another for an erroneous verdict*.

102. It has been observed, *supra*, B. 1. tit. 4. § 4, that sheriffs were in special cases confined to a precise time, within which it behoved them to exercise their jurisdiction upon criminals, not only by pronouncing sentence, but by carrying it into execution against them. On the contrary, sentence of death was not permitted by the Roman law to be executed upon any criminal, till the elapsing of thirty days after pronouncing sentence, *L. 20, c. De pænis*; *L. 13. c. Theod. eod. tit.*, that so condemned criminals, whose cases deserved favour, might have an opportunity of applying to the Emperor
for

Within what
time sentences
are executed.

The case of *Stuart and Irving*, July 25. 1800, who were charged with theft and house-breaking, and convicted only of having the stolen articles in their possession; case of *William Tarras*, June 10. 1802, (certified from the circuit-ayre at Aberdeen,) who had been indicted of theft, committed by means of shop-breaking, and aggravated by habite and repute, and who was convicted of the shop-breaking libelled, but without any mention of the theft.

In the case of *George Elliot*, July 18. 1800, the assize found the pannel guilty of uttering "certain of the notes libelled, knowing the same to be forged." Now the libel had charged the uttering of certain notes in England, and certain others in Scotland. With respect to the former, the court, at advising the debate on the relevancy, had given their opinion, that the uttering in England did not fall under their jurisdiction; but no notice was taken of this in the interlocutor of relevancy, which, in general terms, found the libel relevant to infer the pains of law; neither did the prosecutor, by any entry on the record, restrict his charge to the acts of uttering in Scotland. In these circumstances, the court, considering that the verdict, as written, might apply to either set of acts, and that it was *ex facie* uncertain which set of acts the jury meant, found, (*Feb.* 9. 1801), that no sentence could pass on the verdict.

* It is now a point settled by repeated judgments of the House of Lords, that the sentences and proceedings of the court of justiciary, are not, in any case, subject to review in that high judicature: case of *Mungo Campbell*, *Feb.* 7. 1770; of *Murdison and Miller*, *March* 10. 1773; of *Bywater*, in spring 1781; and of *Robertson and Berry*, *May* 6. 1793.

Neither has the court of justiciary the power of reviewing their own sentences and proceedings, nor those even of particular judges on their circuits. On the 28. *July* 1801, the court refused, as incompetent, a petition of the procurator-fiscal of Lanarkshire, praying them to augment the amount of the bail, which they had modified on the application of Robert Brown, a person charged with the malicious destroying of young trees. On the 14. *March* 1803, the court also refused, as incompetent, a bill of suspension, complaining of a judgment of one of their number, who, on advising a bill of suspension, had found the procurator-fiscal of the county of Lanark liable in expenses.

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for mercy. Upon this ground, it was also enacted by a British statute, 11. *Geo. I. c. 26. § 10*, that no sentence of any court of judicature, south of the river Forth, importing either capital or corporal punishment, should be put to execution in less than thirty days; and if north of it, in less than forty, after sentence pronounced. This act, in so far as it relates to corporal punishments, less than death or dismembering, *ex. gr.* whipping, pillory, &c. is altered; so that these may be now inflicted by the judge eight days after the date of the sentence, if pronounced on the south side of the Forth, and twelve days after sentences which are pronounced on the north of it, 30. *Geo. II. c. 32*.

Crimes, how extinguished.
1st, By the death of the criminal.

103. It still remains to be explained, how crimes may be extinguished. And upon this head, *first*, It is a received rule, *Crimina morte extinguuntur*; crimes are extinguished by the death of the criminal. From this rule, the crime of treason was excepted, which might be tried after the death of the traitor, not only by the Roman law, *L. 8. pr. c. Ad leg. Jul. maj. L. 4. § 4. c. De hæret.*, but by ours, 1540, c. 69. It is true, that by an unprinted act in 1542 (for which see *Hist. law-tracts, tit. Process in absence*), it was upon a recital that the act 1540 was too general, enacted, that it should have no place for the future except against the heirs of such should notoriously commit treason; which heirs it behoved the crown to prosecute within five years after the traitor's death. But the rule even when it is thus limited, is not reconcileable to any rule, either of law or equity: For, *first*, A dead person can make no defence; so that his trial is truly a judging the cause upon hearing only one side: *2dly*, Though the traitor's guilt should be notoriously known, he is, after death, carried beyond the reach of human penalties, and consequently continues no longer an object of correction, which is one of the great purposes of punishment: And, *3dly*, If the criminal himself cannot be punished, what can justify the absurd trial of a dead traitor, with no other view than to forfeit his innocent children or heirs, contrary to that never-failing rule of equity, *Culpa tenet suos auctores*? By the law of England, which is now become ours in matters of treason, there can be no criminal trial, even of treason, after the death of the offender: For, as hath been observed, *supr. § 83*, that law warrants no proceeding against such as do not appear upon an accusation of treason, farther than to outlaw them for contumacy; and after death, there can be no contumacy.

2dly, By the sentence of the law.

104. *2dly*, Crimes are extinguished, by the criminal's undergoing the punishment inflicted by law, in the same manner that civil obligations are extinguished by the debtor's payment of the debt. But, though the diet against the pannel should be deserted through any informality in the libel, the crime still subsists against him, and he may be tried *de novo*; for the same reason that a debtor in a civil debt continues bound, though his creditor should be cast in an action for payment, upon some dilatory defence, or no-process. A sentence absolving the pannel after trial, has, without all doubt, the effect to secure him against all the penalties imposed by law upon the crime; but it cannot be so properly called the extinction of a crime, as a declaration by the judge, that the person accused was never guilty of it.

3dly, By pardon, which however does not exeem from asythment.

105. Crimes are extinguished, *3dly*, By pardons or remissions. A pardon may be either special; which is for the most part granted by the sovereign himself, without the interposition of parliament;

or

or general, by an act of indemnity passed in parliament. The King, though he may, by a special pardon, secure the offender from public justice, the exercise of which is a right of the crown, cannot discharge any private interest arising to the party hurt against the criminal, or cut him off from his claim of damages²³¹. For this reason it was not competent to any one charged with a crime to plead a remission, till he had given security to indemnify the private party, 1457, c. 74; 1528, c. 7; and in the case of slaughter, it behoved the wife or executors of the deceased, who were entitled to that indemnification, or, as it is called in the style of our statutes, *assythment*, to subscribe letters of slams, acknowledging that they had received satisfaction, or otherwise to concur in soliciting for the pardon, before it could be obtained, 1592, c. 155, No. 1. And by a posterior act, 1593, c. 174, all remissions granted for slaughter, robbery, theft, oppression, &c., are declared void, if granted before the party injured be satisfied; which act is so softened by practice, that such pardons are not considered as absolutely null, but barely that they cannot be pleaded by the criminal, till satisfaction be made to the party wronged. Whoever therefore founds on a special remission, takes guilt to himself, and is liable in damages to the private prosecutor, as if he had been actually tried and found guilty. It may be observed, that assythment is not due to the next of kin of a person slain, where the offender hath, by the exertion of public justice, suffered the punishment due to his crime; but whether it can be demanded from the King's donatary, where the criminal hath fled from justice, and forfeited his moveable estate upon a sentence of fugitation, may be doubted*. No instances are to be found upon record, of recovering an assythment in a judicial way, but in the special case where the offender hath obtained and founded upon a remission to screen himself from trial †.

106. Though acts of indemnity passed in parliament, even general ones, secure offenders against such penalties as the law inflicts on them *per modum pœnæ*, July 1. 1713, *Stuart*, (DICT. p. 6829); yet as the only view of the legislature in general indemnities, is to protect them against trials where the conclusion is criminal, it seems hard to stretch them, so as to weaken or encroach upon the civil right of third parties: And for that reason, they ought not to screen criminals

Acts of indemnity.

* Abernethy of Mayen having been pursued before the circuit court for the murder of Leith of Leith-hall, was fugitated for non-appearance; and the Earl Fife obtained a gift of his single and liferent escheat, for behoof of his wife and children. Mr Leith's widow and children brought a process against Mr Abernethy for an assythment, where compearance was made for the donatar. The court sustained action for an assythment, Feb. 1768, *Mrs Leith against Earl Fife*. See *Maclaur. Crim.* p. 718.

† Colonel Campbell of Kilberry was tried by a court-martial for the murder of Captain Macharg in the island of Martinico, and was found guilty; but there not being a sufficient majority of voices to punish with death, the court adjudged him to be cashiered. The Captain's father and brother pursued Colonel Campbell for an assythment. The court of session found the defender liable to the pursuers in an assythment, Feb. 24. 1767, *Machargs against Campbell*, DICT. p. 12541, reported in *Fac. Coll.* iv. p. 282; and by *Kames, Rem. Decis.* No. 253. It is also reported by *Maclaurin*, p. 673. Where a prosecution for murder was brought by the son and father of the deceased, the jury brought in a verdict of culpable homicide; and the court, while they inflicted an arbitrary punishment on the prisoner, found him liable in an assythment to the nearest of kin of the deceased; June 25. 1788, *Stewart*, (a case in the court of justiciary, which will be found in the Appendix to vol. ix. of *Fac. Coll.*). See *Hume*, voi. i. p. 448, (2d edit. vol. i. p. 279.)

²³¹ As to the effect of pardon in rehabilitating the party as a witness, *vid. supr.* § 97. *not. †.*

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criminals from the payment of any pecuniary fine, to which the party injured is legally entitled, *Feb. 22. 1712, Robertson, (DICT. p. 6827)*; nor consequently from the demand of any claim competent to him in name of damages. But as a general indemnity is a public law, not made to screen this or the other person from punishment, but calculated for the common benefit of all the King's subjects, one may offer that plea, without taking any particular guilt on himself; and, of course, the person founding on it, before he can be condemned in damages, must be tried and convicted of the facts from which the damage is said to arise. A general indemnity, passed after a rebellion, since it secures the rebels themselves from the pains and forfeitures inflicted on treason, where they are not specially excepted, must by stronger reason secure those employed in the service of the government, who have committed acts of violence, or wrong, against any action at the suit of the party suffering, which has a conclusion properly criminal; but whether it ought to save them also from a civil action of damages at his suit, upon pretence that irregular practices are unavoidable in times of public commotions, may well be doubted, unless it shall appear that what they did was necessary for the service of the government*.

The consequences of attainder can only be taken off by act of parliament.

107. By the English law, which now governs us in matters of treason, a simple pardon granted by the King does not take off all the consequences of the attainder or conviction: It may indeed restore the person attainted to his estate, and give him a capacity of acquiring other lands; but nothing can restore him against the corruption of blood, and so entitle him to his former rights and dignities, but an act of parliament, restoring him against the forfeiture. One who is restored to his estate *per modum justitiæ* against an attainder, either on account of its injustice, or of some legal nullity in the proceedings, recovers his whole estate, though the King should have made a grant of all or part of it over to a donatary, after the forfeiture †; for, the attainder itself being rescinded, all such grants, as consequential rights, fall of course: But, for the same reason, the estate to which he is restored, is subjected to all its former debts and burdens; for by the voiding of the forfeiture, the person restored is put in the same condition as if there had been no attainder; and consequently a son, who is thus restored against his father's forfeiture, must, if he enter into the possession of his father's estate, be, by the common rules of law, liable in the payment of his debts. On the other hand, where one is restored to his estate *per modum gratiæ*, merely in the way of favour, the attainder is presumed to have been legal, and is accounted such in law; for which reason, all grants of the forfeited estate made in consequence thereof by the crown, in the intermediate period between the attainder and the restitution, must stand good: see 1606, c. 4. But an heir who is thus restored against his ancestor's forfeiture recovers the whole estate that was in the ancestor at the time of the attainder, in so far as it remained in the crown not disposed of to donataries, without being subjected to such of his debts as the King was not bound to pay to the creditors; for the King, who by the attainder got the estate free from the payment of such debts, can transfer that right entire to any donatary.

108.

* See *Fac. Coll. i. 8*, and *Sel. Dec. No. 5. Strachan, Feb. 28. 1752, DICT. p. 4726*, and p. 11663.

† See *Mack. Obs. p. 322, 333.*

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penal statute ²³³, made or to be made, where the penalty is appropriated to the crown, expire in two years after committing the offence; and where the penalty goes to the crown, or other prosecutor, the prosecutor must sue within one year, and the crown within two years from the end of that one, 31. *Elis. c. 5. § 5*; for though this be a statute enacted by the parliament of England before the Union, yet it affects Scotland, as it limits all the British statutes passed since the Union, which concern this part of the united kingdom *. Certain crimes are, without the aid of any statute, extinguished by a shorter prescription than twenty years. By our old law of the Majesty, *L. 4. c. 10*, the party hurt or suffering by the crimes of rape, robbery, or haimesucken, was not heard after a silence of twenty-four hours, from a presumption, that no person could be so grievously injured without immediately complaining; and it is probable that a prosecution upon those crimes, if delayed for any considerable time, would be cast even at this day, or at least the punishment restricted. It would seem, that petty riots, and other slighter delinquencies, ought also to suffer a short prescription, without either any express forgiveness by the party injured, or a reconciliation; law presuming forgiveness from the nature of the offence, and the silence of the party. The precise space of time sufficient for establishing this presumption, must vary according to the nature of the crime, and the circumstances attending it, and is to be fixed at the discretion of the judge.

* See, as to the application of this statute, *Bankton*, B. ii. tit. 12. § 22; *Jan. 19. 1737*, *Murray*, DICT. p. 4508; *Falconer*, vol. i. No. 152, *Booksellers of London*, *Jan. 13. 1747*, DICT. p. 11143, (*supr. B. 2. t. 1. § 16. not. **); *Fac. Coll. iv. p. 275*, No. 47, *Mackenzie*, *Dec. 2. 1766*, DICT. p. 11144; *Walker and others against Allan*, *June 30. 1807*, DICT. App. voce USURY, No. 1; *Morrison against Connel*, *June 24. 1808*, DICT. App. voce USURY, No. 2 ²³⁴.

²³³ As to the prescription of the statutory action for wrongous imprisonment, *vid. supr. § 31, not. 197*.

²³⁴ *Fac. Coll. Paul*, 20. *Jan. 1824*, (*S. & D.*); *Meal*, 27. *Nov. 1810*, *Fac. Coll. ; supr. § 78, not. 219*.—Edition 1805 refers also to the unreported "case of *Sinclair and Wil-liamson v. Allan*, decided in the Court of Session, *May 15. and July 2. 1800*, and "in the House of Lords, *March 2. 1802*."

APPENDIX.

I.—*Charter of Lands held Soccage. (Referred to B. 1. t. 1. § 35.)*

From the original.

SCIANT presentes et futuri, quod ego Rogerus, filius Filippi Deu, dedi et concessi, et hac carta mea spontanea voluntate confirmavi, Dunecano, filio Edwardi de Nevelyn*, totum pratum inter divisas de Kinglas, et inter pratum monacorum de Culenross, in territorio de Karedene, per easdem divisas per quas probi homines de Karedene, in presentia Filippi Deu patris mei, perambulaverunt: Tenendum et habendum in libero sochagio sibi et heredibus suis, vel suis assignatis, et assignatorum heredibus, predictum pratum, et unum toftum et croftum ex opposito condam domus patris mei, de me, et heredibus meis, in feudo et hereditate, libere et quiete, plenarie et honorifice, et cum communi pastura totius tenementi, et cum omnimodo jure quod in predictis terris habui, vel habere potui; et cum libertatibus et assiamentis predicto tenemento pertinentibus, vel pertinere valentibus, libere, integrè, et quiete, ab omni seculari servitio, auxilio, et exercitu, et quiete, ab omni escaeta et custodia heredum suorum, vel heredum suorum assignatorum, preterita, presentia, vel futura, penes me et heredes meos: Reddendo inde annuatim unum denarium argenti ad festum Sancti Servani, pro omni seculari servitio, exactione, et demanda: Preterea do et concedo, in quantum possum, pro me et heredibus meis, Dunecano, et heredibus suis, vel suis assignatis, et assignatorum heredibus, liberam potestatem ad edificandum, hospitandum intra predictas terras, prout melius et plenius ad eorum placita voluerint; una cum rationabilibus viis factis per visum proborum hominum, in eundo cum plautris, quadrigis, et aliis rebus, et avariis, versus predictas terras, et redeundo quotienscunque voluerint: Ego etiam Rogerus Deue, et heredes mei, predicto Dunecano, et heredibus suis, vel suis assignatis, contra omnes homines et feminas in perpetuum warrantizabimus hæc. Hiis testibus, Rogero Avenel Vicecomite de Linlitqu tunc Radulfo Nobili—serviente Regis, Laurencio Lunel, Petro filio Hahilbrid, Henrico, Waltero, Daniel, tingtoribus, Ricardo socio Regis, Steffano de Aula, et aliis.

No. I.

II.—*Charter by James IV. to Lady Margaret Stewart, by which, as well as by the charter mentioned in Mr Hay's Vindication of Elizabeth More, it appears that legitimation per subsequens matrimonium was rejected by the ancient law of Scotland.—(B. 1. t. 1. § 35.)*

From the record of charters in the laigh Parliament House, B. 15, NO. 90. (Now removed to the Register-House.)

JACOBUS, Dei gratia, Rex Scottorum, omnibus probis hominibus totius terre sue, clericis et laicis, salutem. Sciatis nos dedisse, concessisse, et hac presenti carta nostra hereditarie confirmasse, dilecte consanguinee nostre Margarete Stewart, filie dilecti consanguinei et consiliarii nostri Mathei Comitis de Levenax, Domini

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(A)

Dernlie,

* f. Strevelyn.

APPENDIX.

Dernlie, totas et integras terras et baronias de Bigar et Thankertoun,
 cum tenentibus, tenandriis, libere tenen. servitiis, patronatum juri-
 bus, advocationibus et donationibus ecclesiarum et capellaniarum
 earundem, cum suis pertinent. infra vic. nostrum de Lanark;
 que fuerunt dilecti consanguinei nostri Johannis Domini Flemyng
 prius hereditarie, et quas ipse per fustem et baculum, ac procura-
 tores suos ad hoc legitime constitutos, et suas paten. literas, in ma-
 nibus nostris, apud Edinburgh, sursum reddidit, pureque simpliciter
 resignavit, ac totum jus et clameum que in eisdem habuit, seu ha-
 bere potuit, pro se, et heredibus suis, omnino quietum clamavit im-
 perpetuum: Tenendas et habendas totas et integras predict. terras et
 baronias de Bigare et Thankertoun, cum suis pertinent. dicte Mar-
 garetæ Stewart, et heredibus masculis, et patronatum juribus
 ecclesiarum et capellaniarum earund. cum suis pertinent. dictum Johan-
 nem Dominum Flemyng procreatis, seu procreandis, de nobis, et suc-
 cessoribus nostris, in feodo, hereditate, ac liberis baroniis, imperpe-
 tuum; qua Margareta, et dictis heredibus suis masculis, prout jacerent
 cum suis pertinent. dicto Johanni Domino Flemyng, et heredibus suis masculis,
 in longitudine et latitudine, in boscis, planis, moris, maresiis, viis, et
 mitis, aquis, stagnis, rivolis, pratis, pascuis et pasturis, molendinis,
 multuris, et eorum sequelis, aucupationibus, venationibus, piscatibus,
 libus, brasinis, turbariis, carbonariis, lapicidiis, lapide et calce, fabris,
 herezeldis, bludwitis, et merchetis mulierum, cum furca, fossa, sok,
 sak, tholl, theme, infangthief, outfangthief, pitt, et gallows, cum
 communi pastura, libero introitu et exitu, ac cum omnibus aliis et
 singulis libertatibus, commoditatibus, et asiamentis, ac justis suis
 pertinent. quibuscunque, tam non nominatis quam nominatis, tam
 sub terra quam supra terram, procul et prope, ad predictas terras
 et baronias, cum tenentibus, tenan. libere tenentibus ecclesiarum et
 vocacionibus, donationibus, et patronatum juribus ecclesiarum et
 capellaniarum earundem, cum suis pertinent. spectan. seu juste spec-
 tare valen. quomodolibet, in futurum, libere, quiete, plenarie, in
 tegre, honorifice, bene, et in pace, sine aliquo impedimento, revoca-
 catione, contradictione, aut obstaculo aliquo: Reddendo inde
 nuatim prefata Margareta, et heredes sui masculi predicti, qui
 deficien. dictus Johannes Dominus Flemyng, et heredes dictarum
 que, nobis et successoribus nostris, jura et servicia dictarum
 rarum et baroniarum, cum omnibus suis pertinent. predict.
 prefatam resignationem nobis inde fact. debita et consueta
 res, inter ipsos Johannem et Margaretam procreari, anteq-
 gitima dispensatio matrimonii inter eosdem ad istas partes
 Romana devenerit, et desuper executum fuerit, et ante
 mentum et solemnizationem contractis predicti matri-
 monii, nos, ex nostris nostris, nunc prout extur-
 bis, heredibus et successoribus nostris, et hac presenti carta no-
 verso, dedimus et concessimus, et concedimus, unum a-
 et concedimus, dicto filio et filiis, et prolibus masculis
 pluribus, inter predict. Johannem et Margaretam, ut
 procreatis, seu procreandis, liberam facultatem, plenarie
 tem, et licenciam specialem, ut ipsi, et eorum aliqui
 cite disponere valeant, et valeat, ad eorum libitum vo-
 to tempore vite ipsorum, sive egri fuerint, sive sani, et
 mortis eorum, de omnibus et singulis terris suis,

redditis, possessionibus ubicunque, infra regnum nostrum ten. ac de omnibus et singulis bonis, mobilibus et immobilibus, sitis seu querendis, cuicunque persone, sive quibuscunque pers, prout eis, sive eorum alicui, magis videbitur expediens, conveis, et optimum, non obstan. quod si contingat ipsos bastardos reari, et privilegiis juris nobis super eschaetis bastardorum, con.; ac eciam dict. filium et filios, ac proles legitimos fecimus et timavimus, et hac presenti carta nostra facimus et legitimamus, is terris et baroniis de Bygar et Thankertoun, cum tenentibus, andriis, libere tenen. serviciis, patronatuum juribus, advocacioni- et donationibus ecclesiarum et capellaniarum earundem, libere dend. et possidend. et post prefate Margarete eorum, matris æsum, secundum tenorem carte nostre desuper conficiende le- ne eisd. succedend. ac omnes actus legitimos in iudicio et ex- judicium exercend. ac omnibus aliis hereditatibus, terris, pos- sionibus, dignitatibus, honoribus, officiis, et privilegiis libere dend. in omnibus et per omnia, ac si de legitimo thoro es- procreati; eciam ex nostre regie Majestatis plenitudine dict. m seu filios, et proles masculos, legitimum et legitimos feci- s, sic quod eorum alter alteri, licet bastardi fuerint, succedere at, deficient. heredibus suis legitimis de eorum corporibus le- me procreandis, in omnibus et singulis terris suis, tenemen- annuis redditibus, hereditatibus, possessionibus, et bonis mo- bus et immobilibus, haereditariis, quesitis seu querendis, obstan. bastardiis suis, et privilegiis juris, predict. Ac m nos, pro nobis et successoribus nostris, dedimus et con- imus, et hac presenti carta nostra damus et concedimus, dict. s, et prolibus masculis, et eorum alicui, omne jus, clameum, lum juris, et eschaetam, que nos, aut successores nostri, emus, seu habere poterimus, aut poterint, aliquibus terris, te- tentis, annuis redditibus, possessionibus, bonis, mobilibus et nobilibus, dictorum filiorum, et prolium masculorum, aut eo- alicujus, ut nostra eschaeta, ratione bastardie, ac eisdem re- ciavimus, et quietum clamavimus, et hac presenti carta nostra unciamus, et quietum clamamus, hujusmodi prolibus masculis, orum alicui, pro perpetuo; cum plenaria potestate eis, et eorum ui, desuper disponend. prout eis ut videbitur magis expediens optimum, sine aliquo obstaculo, clameo, impedimento, et revo- one, per nos, heredes aut successores nostros, dictis filiis, et pro- is masculis, aut eorum alicui, seu persone aut personis, cui vel bus, ipsos de dictis terris suis, tenementis, annuis redditibus, seu is, disponere contigerint aut contigerit quovismodo inde faci- l. in futurum. In cujus rei testimonium, presenti carte nostre gnum sigillum apponi, precipimus. Testibus, &c. apud Edin- gh, duodecimo die mensis Martii, anno Domini millesimo quin- tesimo octavo, et regni nostri vicesimo primo.

—*Declaration by a Bailie, in a separate writing, that he had given possession to the vassal.*—(B. 2. t. 3. § 33.)

From the original in the hands of James Erskine of Cardross, Esq.

JNIVERSIS quorum intererit, ad quorum notitiam presentes litere pervenerint, Willielmus de Prestoff de Benyne, et ballivus gnifici et potentis Domini, ac Domini mei metuendissimi, Do- ni Archibaldi Comitum de Douglas, in hac parte, de terris de Tul- on, cum pertinentiis, per suam literam ballivi constitutus, salu- tem.

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tem. Quia carissimus consanguineus meus Dominus Johannes de Edmonston, Miles, Dominus ejusdem, quinto die mensis Aprilis, anno Domini millesimo quadringentesimo decimo, apud forsletum de Tulyalon, quandam literam saysine, sigillo dicti Domini mei Comitis de Douglas roboratam, et mihi in hac parte ballivo constituto pro saysina hereditaria dicto Domino Johanni adhibenda directam presentavit: Quibus vero literis, tam ballivi quam saysine, in presentia plurium testium subscriptorum perlectis, predictus Dominus Johannes a me petiit, ut de dicta auctoritate ballivi michi in hac parte commissa, de predictis literis plenariam facerem executionem, et sibi saysinam hereditariam de predictis terris de Tulyalon, cum pertinentiis, et de forsleto ejusdem, cum secundum formam et tenorem cartarum dicti Domini Comitis de Douglas inde sibi confectarum, adhiberem; et incontinente ego dictus Willielmus de Preston, ad instanciam dicti Domini Johannis de Edmonston, virtute dicti officii ballivi michi in hac parte ordinati, ipsum predictum Dominum Johannem de Edmonston, in predictas terras de Tulyalon cum pertinentiis, et in forsletum ejusdem cum pertinentiis, secundum formam et tenorem dictarum cartarum hereditarie saysivi et investivi, et in corporalem possessionem introduxi, hiis testibus, Domino Johanne Senescallo de Innermeth, milite, Domino Willielmo de Hutton, rectore ecclesie parochialis de Tulyalon, Andrea Isaak, Johanne de Preston, Roberto de Preston, et Alexandro de Cragy, cum multis aliis. In cujus rei testimonium, sigillum meum presentibus apposui, et ad majorem hujus rei evidentiam sigillum dicti Domini Johannis Senescalli, gratia testimonii, presentibus apponi cum instancia procuravi, anno, die, mense, et loco supra dictis.

IV.—*Notorial Instrument of Seisin before the return of James I. from England, the period when these instruments are supposed to have been introduced into this country.*—(B. 2. t. 3. § 34.)

From the original in the hands of the Earl of Strathmore.

IN Dei nomine Amen. Per presens publicum instrumentum cunctis pateat evidenter, Quod anno ab incarnatione Domini m^o cccmo quarto, mensis Novembris die xvi. indictione xiii. pontificatus sanctissimi in Christo patris, ac Domini nostri Domini Benedicti, divina providentia Pape, XIII^{mi} anno ximo. In mei notarii publici, et testium subscriptorum, presencia, personaliter constituti nobiles et discreti viri, viz. Willielmus de Arnote, filius et heres Domini Henrici de Arnote, militis, Domini ejusdem, tanquam attornatus Georgii de Abernethy, filii et heredis quondam Johannis de Abernethy de Kynnalty, ut per litteram de attornato de capella Domini nostri Regis, testimonio magni sigilli sui sigillatam, et per me notarium hic subscriptum, in presencia testium subscriptorum, lectam et publicatam, clare apparuit manifestum, et Willielmus Wysschart, ballivus in hac parte nobilis Domini et potentis Domini Willielmi de Abernethy, militis, Domini de Sawletoun et de Rethy, sicut per litteram dicti Domini Willielmi, suo sigillo sigillat. cum affixione cere rubre, infra cujus sculpturam continebatur quoddam scutum, continens quendam leonem, cum una benda, cujus circumscriptio erat *S. Willi de Abernethy*, ut prima facie apparuit; cujus tenor, de verbo ad verbum, sequitur, et est talis. “ Wills de Abernethy,

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ayris to umq^{ll} Thomas Gowbrayt of Ballindroch, and be ryght thairof hes diverss actionis to persew, and thair pertiis objectis to answer to yam thairinto, becauss yei haif not in wryt documentis to shaw to verife yat they ar the saidis ayris, and yai may not enter be brevis of inquest ayris to na lands yat pertenit to the said Thomas, for he analeit all his heretage under reversionis, and sa wes dissesit quhan he decesit, as is allegt; chargeand thairfor the sherriff of Dunbarten, and his deputis, to take cognitioun in that mater, and to warn all perties thairto haifand enteres therintil, be oppin proclamatioun, and giff it beis fundin that the saidis Andro and Elizabet ar neirist and lauchfull ayris to the said umq^{ll} Thomas, that they giff to tham thair rolment of court, as beis fundin be the said cognitioun ottentyklye on the saids Andro and Elizabethis expensis, for verification of thair interest; as at mair lyntht in the saidis letteris ar contenit; for executioun of quhilk, the said sherriff-deput had passit himself to the mercat-croce of the said burgh, the nynt day of the said moneth, and gart proclaime and reyd oppinlye the saidis letteris, for warnyng of all personis haifand entres, that the cognitioun wald be taken after the form thairof be hym, the said penult day of Nouember, as his indorsatioun, wretten on the back of the saidis letteris, buyr; at qlk day the saidis Andro comperit, for hymself, and as procuratour for the said Elizabet, be hyr mandat shawin be hym in judgment and admittit; and thair desyrit that the said shereff-deput wald tak the said cognitioun efter the form of the saidis letteris; the quhilk petitioun the sayd shereff-deput thocht resonabil, and maid call giff onye uther perteis haifand entres wald compeir; and nane uther compeirit; quharfor he tewk cognitioun in the said mater, and fand that the saidis Andro and Elizabet wor neirest and lauchfull ayris to the said umq^{ll} Thomas Gowbrayt; and thairfor ordanit that ane rollment of court sould be extrakit and given to them attentiklye thairupon. *Extractum de libro actorum dicte curie, per me Thomam Bischoep notarium publicum, clericum ejusd. sub meis signo et subscriptione manualibus.*

THOMAS BISCHOP,
Notarius publicus, et clericus dicte curie.

VI.—*Service of the Heirs-Portioners of Duffgal, in 1271, by which it appears that general services were then in use, though from the preceding article it would seem that they were not known about the middle of the 16th century.*

From the chartulary of Paisley, fol. 114.

Litera Domini Regis et vicecomit. de Dunbarton de inquisitione.

OMNIBUS Christi fidelibus presens scriptum visuris vel audituris, Walterus Senescallus, Comes de Menthet, salutem in Domino sempiternam. Noverit universitas vestra, me mandatum Domini mei Alexandri, Dei gracia, illustris Regis Scocie recepisse, in hec verba. “ Alexander, Dei gracia, Rex Scocie, Waltero Comiti de Menthet dilecto et fideli suo vicecomiti, et ballivis suis de Dunbretan, salutem. Mandamus vobis et precipimus, quatenus per probos et fideles homines patrie, diligenter et fideliter inquire faciat, si Maria sponsa Johannis de Wardroba, et Elena sponsa Bernardi de Erth, ac Forveleth sponsa Norrini de Monorgund,
“ filie

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in the natural possession of the proprietor ; and that building-leases be not granted of any lands within 300 yards of the manor-place.

4. Provided, That no lease be granted till the former lease be determined, or if for a term certain, be within a year of being determined ; that the rent in the new lease be not under that in the former, and that no fine or grassum be taken by the granter.

5. Enacted, That every proprietor of an entailed estate, who lay out money in inclosing, planting, or draining, or in erecting farm-houses, and offices for the same, shall be a creditor to the succeeding heirs of entail for three-fourths of the money so laid out.

6. Provided, *1mo*, That the claim against the succeeding heir shall not exceed four years' free rent of the entailed estate as at the first term of Whitsunday after the death of the heir who expended the money.

7. *2do*, That notice of the intended improvements be made writing, three months at least before they are begun, to the heir after the heirs of the proprietor's body ; or if that heir be within Great Britain or Ireland, to his nearest relation by the father, or to his factor or attorney ; and a copy of the notice lodged with the sheriff or steward clerk of the county where the lands lie.

8. *3tio*, That annually, within four months after Martinmas, an account of the sums expended during the year preceding that term, with the vouchers, be lodged with the sheriff or steward clerk.

9. *4to*, That when a sum equal to four years' free rent shall have been expended, and shall remain a subsisting charge against the succeeding heirs, it shall not be lawful for the subsequent heirs to expend any more under the authority of this act.

10. Enacted, That the sheriff or steward clerks shall record the said accounts, vouchers, and copies of notice, and either make the record patent, or give extracts when desired.

11. Enacted, That the executors or assigns of the heir who expended the money in improvements, may, after one year from his death, demand payment from the succeeding heir, with interest from the term when that heir's right to the rents commenced, and, in case of non-payment, sue him before the court of session, and on obtaining decree, use all diligence for recovering payment, except adjudication against the entailed estate improved : And in all questions of competition for the rents of the entailed estate, those in the right of this claim shall be preferred to the other creditors of the heir in possession.

12. Provided, That the heir in possession shall be discharged, upon his effectually conveying to the creditor in the sums laid out in improvements, one-third of the clear rents of the entailed estate during his life, or till the money so due shall thereby be paid off.

13. Enacted, That if the money due for improvements be not recovered from the heir immediately succeeding, those in the right of it may sue either the successors of that heir in any other estate, or the heir of entail succeeding to him, and use all kinds of diligence for recovery, except adjudication against the entailed estate ; and shall be entitled to a preference upon the rents of the entailed estate to the personal creditors of the heir in possession ; and in like manner they may sue every succeeding heir of entail, and with the same preference.

14. Provided the heir first succeeding to him who expended in improvements, and the successors of that heir, shall be bound to relieve all subsequent heirs of such part of the debt incurred by improvement

provement of the entailed estate, as shall be paid by them, to the extent of one-third of the rents which have come to the use of the first succeeding heir, or of his heirs or executors; and when that is exhausted, then the next succeeding heir, and his successors, shall be bound to relieve all subsequent heirs, to the extent of one-third of the rents which have come to their use; and the same relief shall be competent to every succeeding heir against the successors of the preceding.

15. Provided, That the successors of an heir of entail in any other than the entailed estate, sued on account of improvements, shall be discharged, upon making payment of one-third of the rents of the entailed estate which have come to the use of that heir or his successors.

16. Enacted, That the person having a claim on account of improvements, shall be obliged, within two years after the death of him who made the improvements, to demand payment from the succeeding heir; and in case of non-payment within six months after the elapse of said two years, to institute an action in the court of session, and proceed, without delay, to recover decree, and do exact diligence for making payment effectual: And if he fail, or allow the succeeding heir to die without recovering to the amount at least of one-third of the rents that may have become due to that heir, then, though he may sue the heir's successors in any other than the entailed estate to that amount, he shall have no claim against the subsequent succeeding heir of entail, except for the surplus.

17. Enacted, That if the heir first succeeding to him who made the improvements, shall not live long enough to be indemnified of what he has paid on that account, by one-third of the rents that shall come to his use, or that of his successors, they shall be creditors for the balance to the succeeding heir of entail; and relief shall, in like manner, be competent to the successors of every heir of entail in the same circumstances.

18. Enacted, That the money expended for improvements shall not be made a ground for adjudging the estate improved.

19. Enacted, That if the succeeding heir of entail shall have right to the claim for improvements, then the claim shall be extinguished, and never set up against the succeeding heir.

20. Enacted, That if any heir of entail shall refuse to pay the money required of him for improvements, and if decree shall be recovered for the full sum demanded, then the defender shall be liable for full costs of suit.

21. Enacted, That an heir of entail, after having completed the improvement of all or any part of the estate, may bring an action before the court of session, or the sheriff, in which he shall call the heir next entitled to succeed after the heir of his own body, for ascertaining the amount of the charge against the succeeding heirs of entail; and the decree, if pronounced by the sheriff, shall be final, unless suspended within six months; and if by the court of session, whether in the first instance or upon review, final, unless an appeal is brought within twelve months.

22. Enacted, That every heir of entail who lays out money in building or repairing a mansion-house, or offices, upon his estate, or in adding to them, shall be a creditor to the next succeeding heir of entail for three-fourths of the money expended by him.

23. Provided, *Imo*, That the sums so laid out shall not be effectual

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tual to constitute a claim against the succeeding heir for more than two years' free rent of the estate, as at the first term of Whitsunday after the death of the heir who expended the money claimed.

24. *2do*, That notice be given, and the copies recorded, in the same manner as directed with regard to improvements of the lands.

25. Enacted, Those in the right of the claim on account of that expense, may demand payment from the succeeding heir, after one year from the death of him who expended the money, with interest from the term at which the heir's right to the rent commenced; and, in default of payment within three months of such requisition, may sue the heir, in the same way as directed with regard to improvements.

26. Enacted, That the same rules of relief among succeeding heirs of preference, and in subjecting defenders to the payment of costs, and for ascertaining the amount of the sum laid out, shall take place with regard to the money laid out in this way, as with respect to the expense of improvements.

27. Enacted, That it shall be lawful for heirs of entail to make exchanges of land for the conveniency or advantage of their estates, and for the improvement of the country.

28. Provided, That no more than thirty acres of arable land, or one hundred acres of grounds improper for culture by the plough, of such entailed estates, shall be given in exchange; and that an equivalent in land contiguous to the entailed estate with which the exchange is made, shall be received in place of that given in exchange; and for ascertaining the value of the lands to be exchanged, application shall be made to the sheriff or steward of the county where the entailed estate lies, who thereupon shall appoint two or more skilful persons to adjust the value of the lands; and upon their settling the marches, and reporting upon oath that the exchange will be just and equal, the sheriff or steward shall authorise the exchange to be made by a contract of excambion; and that being executed, and recorded in the sheriff or steward books within three months after the execution thereof, shall be effectual: The land given in exchange to the entailed estate shall thenceforth be held a part thereof, and that given from it held as out of the entail.

29. Enacted, That this act shall extend to all tailzies, whether made prior or posterior to the act 1685.

VIII. *Abridgment of "an Act" (39. and 40. Geo. III, C. 46, passed May 30. 1800) "for the more easy and expeditious recovery of small debts, and determining small causes, in that part of Great Britain called Scotland."*

THIS statute is an improvement upon the temporary one of 35. Geo. III, C. 123, quoted in a note subjoined to B. 1. t. 4. § 13.; and

§ 1. Provides, That all causes depending at the date of the latter enactment, shall be determined agreeably to the rules of the former.

§ 2. Directs, That after 1st June 1800, (which is declared the commencement of this act), any two or more justices, in their respective counties or stewartries, may determine in a summary way, as shall appear to them agreeable to equity and good conscience, all causes and complaints brought before them, concerning the recovery of debts, or the making effectual any demand, provided the debt or demand, exclusive of costs, shall not exceed in value L. 5 Sterling.

§ 3, 4, and 5, Appoint a precise and specific form of procedure for bringing such causes into court, and for securing the attendance of witnesses for both parties.

§ 6. Enacts, That the justices shall hear the parties *vivá voce*, examine them by declaration, or upon oath, and examine witnesses upon oath; but no practitioner of the law is allowed to plead either *vivá voce* or by writing; nor are any of the pleadings, or minutes, or evidence, to be taken down in writing, or entered upon any record.

§ 7. If the defender, after being personally cited, or after a second citation for non-appearance on the first, shall still fail to appear, or to send a satisfying excuse, he shall be held as confessing; but on cause shewn, the justices may adjourn the meeting.

§ 8. Though decree have gone in absence, the defender, upon consignation of the sums decreed for, and making intimation to the pursuer once personally, or twice at his dwelling-house, before expiry of the charge, may have the cause heard at the following court-day. Where absolvitor has passed in absence, the pursuer may have the same redress, on giving to the defender a similar notice, and consigning 2s. 6d. to be paid to the defender for defraying his previous expense.

§ 9. Empowers the justices to punish officers for failure in duty, by fine not exceeding 20s. Sterling, or imprisonment not exceeding ten days.

§ 10. Directs the clerk to enter in a book a copy of the complaint, and of the interlocutory orders and final decree; which last shall be signed by the justices present, or by their preses, if more than two are present. A copy of the decree, subjoined to the original complaint, and signed by the clerk, shall be delivered to the prevailing party, as his warrant for arrestment, or poinding, or imprisonment. Such execution may proceed within six free days after decree, if the defender has been present in court; otherwise not till six free days after a charge on the decree given by an officer, who must certify the fact on oath if required.

§ 11. Enacts, That the form of the poinding shall be summary, viz. by carrying the effects poinded to the nearest market-town or kirk-town, or village within the parish, and after getting the same duly appraised, selling them between the hours of eleven and twelve forenoon, at the cross or most public place, after one hour's notice given by a crier, by public roup, to the highest bidder, returning the overplus (if any) to the owner, after deducting what is allowed by this act for poinding and sale; and if the effects are not sold, delivering them over at the appraised value to the creditor, to the amount of the debt, and the allowance for poinding: Provided always, That in case the place of sale is not a market-town, but only a kirk-town or village, the place and time of sale shall be advertised two days at least before the day of sale, at the door of the parish-church, upon *Sunday* after the forenoon-sermon.

§ 12. Gives the justices a discretionary power of directing the sums found due to be paid by instalments, weekly or monthly, according to the circumstances of the parties found liable, and under such conditions or qualifications as they shall think it fit to annex.

§ 13. The decree is not subject to advocacy; and no suspension, appeal, or other stay of execution, is competent. Reduction may be sued before the Court of Session, if within a year from the date of the decree; but in that case the pursuer of the reduction

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must, before being heard, lodge with the clerk of court sufficient caution for payment of such expenses as may be awarded against him.

§ 14. Contains a table of fees for the clerk, officer and assistants in the execution of the act; directs a copy certified by the clerk to be hung up in the court-room and in his office; and subjects the fees to the modification of the justices in very small cases, or where one petition and complaint is directed against different defenders.

§ 15. Appoints the penalties on witnesses for non-appearance to be paid to the party summoning them; and the clerk to keep account of all other fines, which shall be paid to the poor at the direction of the justices.

§ 16. Ordains the justices, at their quarter-sessions, to divide their county or stewartry into districts, within which meetings shall be held, for the execution of this act, at 11 o'clock forenoon, either on the first Monday, or on some other lawful day in the first week of every month, at the discretion of the quarter-sessions, by whose authority also the places of meeting shall be fixed, upon advertisements at every church-door in the county or stewartry, at least two *Sundays* after the places are certified. The monthly meetings may be adjourned, if necessary, to a future day, at the same place.

§ 17. Empowers the justices at a district meeting, in case the justice of peace clerk shall not name a deputy, to name a district clerk, removeable by subsequent quarter-sessions, who have also the power of appointing such clerks from time to time, at discretion.

§ 18. Authorises the justices at the quarter-sessions, to make rules and orders for the better execution of this act, to be observed by all concerned, until altered by the same authority, or by the Lords of Session or Justiciary in Edinburgh, or by the Circuit Court of Justiciary, upon application of any two or more justices.

§ 19. Enacts, That no privilege shall exempt from this jurisdiction any party, on account of his being a member of any other court of justice.

§ 20. Declares, That the act shall not comprehend “ any debt for
“ rent, upon a tack, or lease, or real contract, where the title of any
“ lands, tenements, or hereditaments can or may come to be brought
“ in question, nor any other debt, matter, or thing, that shall or
“ may arise upon or concerning the validity of any will, testament,
“ or contract of marriage, although the same shall not amount to
“ the sum of L. 5 Sterling, nor any debt for any money or thing
“ won at or by means of any horse race, cock match, or any kind
“ of gaming or play, or any debt or demand for or on account of
“ any spiritous liquors.”

§ 21. and 22. Extend the jurisdiction of the magistrates of *Edinburgh*, in what is there called the weekly *Ten-merk-court*, to cases where the debt or demand brought against any person residing within the city and liberties (as described in the city's royal charter 23d October 1636) does not exceed L. 40 Scots; and in these cases, the magistrates act as justices of peace, subject to the regulations hereby prescribed for other justices.

§ 23. Saves the jurisdiction of Scottish justices, so far as not regulated by this act.

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schoolmaster's salary shall be fixed as after directed; and that the sheriff or steward clerk shall transmit a certificate thereof signed by him, to the minister of each parish within the county or stewartry to be by him submitted to the meeting directed to be called in the manner specified in § 4.

§ 4. Enacts, That within three months after the date of such certificate, the qualified heritors, and the minister of every parish in Scotland, shall hold a meeting, on being called by intimation from the pulpit immediately after forenoon service; by circular letter from the minister to such qualified heritors as are non-resident and by leaving a written notice at the mansion-house of every heritor, whether resident or not, at least thirty free days before the day of meeting: That, on due consideration of the circumstances of the parish, in respect of extent, population, and valued rent, such meeting shall determine whether the schoolmaster's salary shall be equal to the average price of one chalder and a half, or to that of two chalders of oatmeal, according to the amount thereof, ascertained by the aforesaid certificate, or to such proportion betwixt these as to such meeting shall seem most suitable to the circumstances of the parish, and shall determine the amount of the schoolmaster's salary, to be paid pursuant to such average, and their resolution thereupon: That a copy of such resolution, signed by the preses of the meeting, shall be delivered to the schoolmaster of the parish as his authority for levying the salary thereby appointed: And that such salary shall be paid to him by the heritors at the same terms, apportioned among them in the same manner, and with the same relief against their tenants, as is provided by 1696, C. 26.

§ 5. Provides, That if the heritors and minister shall neglect or refuse to determine the amount of the salary to be paid to the schoolmaster, according to the provisions of the act, or if any heritor or schoolmaster shall be dissatisfied with the determination made, the person so dissatisfied may, within three months after such meeting ought to have been held, or such determination shall have been made, apply or appeal to the next quarter-sessions for the shire or stewartry, whose judgment shall be final; and that no appeal by advocation, suspension, or otherwise, shall be admitted against the judgment given at such quarter-sessions: Provided always, that no heritor of the parish from whence the appeal comes, shall vote upon such appeal to the quarter-sessions.

§ 6. Provides, That, after twenty-five years from the time the amount of a schoolmaster's salary shall have been so fixed, the sheriff or steward, within three months after again determining the average price of a chalder of oatmeal in the manner directed by this act, shall, as above directed, return the same to the office of King's Remembrancer in Exchequer; the Lord Chief-Baron, and Barons, being again, by an order of court, to fix the average price for all Scotland: That the King's Remembrancer shall again transmit a copy of such order of court to the sheriff or steward clerk, who shall again publish the same in the Edinburgh Gazette and Scots newspapers, and transmit a certificate of said average and order of court to the minister of each parish within his shire and stewartry: That the heritors and minister shall again fix and determine the schoolmaster's salary, according to such average; such salary never being less than the value of one chalder and a half, nor more than two chalders for the next twenty-five years; and so *toties quoties* at the end of every twenty-five years for ever, unless altered by Parliament:

liament: And that every such determination of salary shall be liable to appeal to the quarter-sessions, in manner and to the effect above directed.

§ 7. Provides, that in every parish where there is only one heritor duly qualified (*vide* sect. 22.) such heritor shall have two votes at every meeting directed to be held pursuant to this act; and that in all meetings where no preses has been chosen, the heritor present possessed of the highest valuation shall have the casting vote.

§ 8. Enacts, That in every parish where a commodious house for a school has not already been provided, pursuant to 1696, C. 26., and where there has not been already provided a dwelling-house for the residence of the schoolmaster, with a portion of ground for a garden to the extent hereafter mentioned, the heritors shall provide a commodious house for a school, and a house for the residence of the schoolmaster, (such house consisting of not more than two apartments, including the kitchen,) together with a portion of ground for a garden to such dwelling-house, from fields used for the ordinary purposes of agriculture or pasturage, as near and convenient to the schoolmaster's dwelling-house as reasonably may be: That such garden shall contain at least one-fourth part of a Scots acre, and shall be inclosed with such fence as is generally used for such purposes in the district of country where it is situated: And that the expense of providing such school-house, dwelling-house, and garden, and supporting the same, shall be defrayed in the manner prescribed for providing a house for a school, by the foresaid act 1696: Providing, that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great loss and inconvenience, it shall be optional to them, with the authority of the quarter-sessions of the county or stewartry, to assign to the schoolmaster, in lieu of such garden, an addition to his salary, at the rate of eight bolls of oatmeal *per* acre, to be computed according to the average ascertained in manner before directed.

§ 9. Enacts, That if the heritors shall neglect or refuse to provide the accommodations of house, school-house and garden, or additional salary in lieu thereof, to schoolmasters, according to the provisions of this act, or if the schoolmaster shall not be satisfied with the accommodations afforded him, it shall be competent for him to bring the same by representation or petition before the quarter-sessions for the shire or stewartry to which the parish-kirk belongs, or within which the parish-kirk is situated; and that, in all such cases, the judgment of the quarter-sessions shall be final, without any further appeal by advocacy, suspension, or otherwise: Provided that no justice of the peace, who shall be an heritor in the parish of such schoolmaster, shall vote upon such representation or petition.

§ 10. Provides, That the heritor from whose estates any ground shall be taken for the purpose of such school-house, dwelling-house, and garden, shall have relief against the other heritors of the parish, for the value of the ground so to be taken, in proportion to the valued rent of the lands belonging to the whole heritors in the parish: such relief to be settled only by the sheriff or steward of the county or stewartry, without appeal by advocacy, suspension, or otherwise.

§ 11. Enacts, That, in the case of those parishes which consist of districts detached from each other by the sea, or arms of the sea, or otherwise, as where a parish consists of two or more islands, (of which there are several instances in the Highlands, North Isles, and Hebrides),

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Hebrides), or where it is otherwise of great extent or population, so that one parochial school cannot be of any effectual benefit to the whole inhabitants of such parishes, the heritors and minister, if they shall see cause, may, on fixing a salary of six hundred merks, or the value of three chalders of oatmeal, to be computed according to the provisions of this act, divide the same among two or more teachers, according to the extent and population of the parish: That these proportions so divided shall be paid to teachers of schools, in the same manner, and under the same conditions, as hereafter are specified, for supplying vacant parochial schools with masters (the heritors of such parishes, in respect of their being thus bound to pay an higher salary, being hereby exempted from the obligations of providing school-houses and gardens for the teachers among whom the salary is to be so divided): That in case a difference of opinion shall arise among the heritors, respecting the propriety and usefulness of such division of the salary, the same shall be submitted by petition or representation to the quarter-sessions of the shire or stewartry within the bounds of which the parish or parish-kirk is situated: And that the judgment thus obtained shall be final, without appeal by advocacy, suspension, or otherwise.

§ 12. Provides, That none of the provisions of this act shall apply to the case of a parish which consists only of a royal burgh, or part of a royal burgh.

§ 13. Declares, That where a parish consists of a royal burgh, or part of a royal burgh, and a landward heritor or heritors, the schoolmaster shall be appointed and maintained by the burgh, or by the landward heritor or heritors, or by the burgh and landward heritors, in the same manner, and according to the same proportions, that have hitherto been observed in such parish: the salary and accommodations being always equal in value to those provided by this act; the same remedy, in case they are otherwise, being to be allowed and to be applied for in the manner already specially pointed out; and the addition, if there is any addition, being paid in the same proportions by the parties from whom the present salary is received.

§ 14. Enacts, That, after the passing of this act, in case of vacancy in the office of schoolmaster, by death or otherwise, the minister of the parish shall, within fifteen days, intimate the vacancy, or cause it to be intimated from the pulpit, immediately after forenoon service, and give notice of the same by letter to the non-resident heritors: That the qualified heritors, with the minister of the parish, shall hold a meeting, of which intimation shall be given by the minister, by edictal citation and circular letters to the non-resident, at least thirty free days before it takes place: That such meeting or adjourned meeting shall elect a person to the vacant office of schoolmaster: And that, in the event of the parish being vacant, the presbytery shall appoint some one of their number to make the intimations, and give the notices hereby entrusted to the minister.

§ 15. Provides, That if the heritors so qualified, and the minister, shall fail to elect a schoolmaster within four kalendar months from the time the vacancy shall have taken place, then the presbytery of the bounds shall apply to the convener of the commissioners of supply of the county or stewartry, who, or any five of them, at a meeting to be called by the convener upon thirty days' notice, shall have power, *jure devoluto*, and are hereby directed, to elect a person to supply the vacancy.

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§ 16, Enacts, That every schoolmaster elected under the provisions of this act, shall carry to the presbytery the minutes, or an extract or certified copy of the minutes, of his election, with attestations of his having taken the oaths to his Majesty before any of his Majesty's justices of the peace : That the presbytery shall thereupon take trial of his sufficiency for the office, in respect of morality and religion, and of such branches of literature as by the majority of heritors and minister shall be deemed most necessary and important for the parish, by examination of the presentee, by certificates and recommendations in his favour, by their own personal inquiry or otherwise, and shall see him sign the confession of faith and formula of the church of Scotland : That their determination, as to the qualifications of such presentee, shall not be reviewed or suspended by any court, civil or ecclesiastical : That provided they are satisfied with the same, he shall be furnished with an extract from their minutes, bearing that he had appeared, had produced the attestations required, and had been found, on trial, duly qualified for discharging the duties of the office to which he had been elected : And that such extract shall complete his right to the emoluments provided by this act.

§ 17, Provides, That, in case the person elected is not found duly qualified, the heritors and the minister shall be allowed only what remained of the four months, at the time of his election, with so many days more as required by this act.

§ 18, Enacts, That the heritors so qualified, and the minister in a meeting, called by notification of thirty days from the pulpit, by letter from the minister to the non-resident heritors, and by notice to be left at the mansion-house of each heritor, whether resident or not, shall have the power of fixing the school-fees from time to time as they shall judge expedient ; and that a table of such fees, signed by the preses of the meeting, shall be hung up in the school-room : provided, That the schoolmaster shall be obliged to teach such poor children of the parish as shall be recommended by the heritors and minister at any parochial meeting.

§ 19, Enacts, That the superintendence of schools shall continue with the ministers of the Established Church as heretofore, according to the several acts of Parliament respecting the same, except in so far as altered by this act.

§ 20, Enacts, That, as often as presbyteries, in the course of their visitation, shall find any thing wrong with respect to the hours of teaching, or the length of the vacation annually given, or when any complaint shall be made to them upon those subjects by parties concerned, they shall have the power of regulating the same in the manner they may judge most consistent with the particular circumstances and general good of the parish ; and that the schoolmaster shall conform to and obey all regulations so made by the presbytery, under pain of censure, or suspension from or deprivation of his office, as to the presbytery shall seem proper.

§ 21, Enacts, That the presbytery, on complaint from the heritors, minister or elders, against the schoolmaster, charging him with neglect of duty, (either from engaging in other occupations, or from any other cause), or with immoral conduct, or cruel and improper treatment of the scholars under his charge, shall forthwith take cognisance of the same, and serve him with a libel, if the articles alleged appear to them to be of a nature which requires it : That, after having taken the necessary proof, they shall acquit, or pass sentence of censure, suspension, or deprivation, as shall appear to them proper, upon the result of such investigation : That such judgment shall be final, without appeal to, or review by, any court, civil or ecclesiastical : That, if they shall depose the incumbent from his

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office, his right to the emoluments and accommodations of the same shall cease from the time of his deposition: That in case he shall fail or refuse to remove from the school, school-house, and garden, within three months from the date of such sentence or deposition, the sheriff or steward, upon having an extract or certified copy of the sentence of deposition laid before him, shall forthwith issue against the schoolmaster letters of ejection, of which no bill of suspension or advocation, nor action of reduction, shall be competent: And that in case of such deposition, the school shall immediately be declared vacant, and the election of another schoolmaster shall take place.

§ 22, Provides, That it shall not be lawful for any heritor, who is not a proprietor of lands within the parish, to the extent of at least one hundred pounds Scots of valued rent, appearing in the land-tax books of the county, to attend or vote at any meeting held pursuant to this act; but that every heritor so qualified may vote by proxy, or by letter under his hand.

§ 23, Ratifies and confirms all former acts and statutes with regard to parish-schools or schoolmasters, in so far as they are not altered by the express provisions of this act.

X.—Abridgment of “*An Act*” (39. and 40. Geo. III. c. 98, passed 28th July 1800), “*to restrain all Trusts and Directions in Deeds or Wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited:*” Referred to p. 882, note *.

§ 1, **E**NACTS, That no person shall, after the passing of this act, by any deed, surrender, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than the life of the granter; or the term of twenty-one years from his death; or during the minority of any person living, or in *ventre sa mère*, at the time of the granter's death, or during the minority only of any person who, under the uses or trusts of the deed, &c. directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, profits, or in the interest, dividends, or annual produce so directed to be accumulated: And that wherever any accumulation shall be directed otherwise, such direction shall be null and void, and the rents, issues, profits and produce, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to, and be received by, such person or persons as would have been entitled thereto, if such accumulation had not been directed.

§ 2, Provides, That the act shall not extend to any provision for payment of debts of the granter, or other person or persons, nor to any provision for raising portions for any child or children either of the granter, or of persons taking any interest under the settlement, nor to any direction touching the produce of timber upon any lands or tenements.

§ 3, Provides, That the act shall not extend to any disposition respecting heritable property in Scotland.

§ 4, Provides, That the above restrictions shall apply to wills and testaments made before the passing of this act, in such cases only where the testator shall be living, and of sound and disposing mind, after the expiration of twelve kalendar months from the passing of this act.

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