TREATISE

ON THE

OFFICES

OF

JUSTICE OF PEACE; CONSTABLE;
COMMISSIONER OF SUPPLY;
AND
COMMISSIONER UNDER COMPREHENDING ACTS,
IN

SCOTLAND;

WITH
OCCASIONAL OBSERVATIONS
UPON
OTHER MUNICIPAL JURISDICTIONS.

TO WHICH ARE ADDED,

APPENDIXES,

CONTAINING
SOME OF THE STATUTES, FORMS OF PROCEEDINGS, AND
WRITS, REFERRED TO IN THE WORK.

By GILBERT HUTCHESON, Esq. Advocate.

THE SECOND EDITION.

VOL. II.

EDINBURGH:
PRINTED FOR WILLIAM CREECH.
1809.

Printed by Mundell, Doig, and Stevenson, Edinburgh,

CONTENTS

OF THE SECOND VOLUME.

BOOK IV. RURAL POLITY.

TREATISE

ON THE

OFFICES

OF

JUSTICE OF THE PEACE,
CONSTABLE,
COMMISSIONER OF SUPPLY,

AND COMMISSIONER UNDER
THE COMPREHENDING
ACTS,

IN SCOTLAND.

BOOK III.

OF THE POLICE.

Chap. I.—Of Police in general.

§ 1. POLICE DEFINED.

I. Mr. Colquhoun remarks, that police, in this country, may be considered as a new science; understanding by it, those powers and duties, which we have already considered as branches of preventive and remedial justice, as well as "those other functions which "relate to internal regulations for the well ordering and "comfort of civil society;" [a] or (to use the words of

Mr. Colquhoun's definition.

[a] Treatise on the police of the metropolis, preface.

§ 1. POLICE DEFINED.

judge Blackstone) " to the due regulation and domestic or-
" der of the kingdom; whereby the individuals of the state,
" like members of a well governed family, are bound to
Black-stone's definition. " conform their general behaviour to the rules of propriety,
" good neighbourhood, and good manners, and to be de-
" cent, industrious, and inoffensive, in their respective
" situations." [a]

THE duty of justices of peace, with respect to this class of offences, is equally various and delicate.

ON the committing of murder, robbery, or other such offences, we have already seen what steps must be taken by the magistrates as guardians of the public peace, which has been broken. We are now to consider their jurisdiction, in relation to such actions and line of conduct, as, though they do not, like the other malpractices, strike at the existence of civil society, yet are inconsistent, at least, with its well being. Under this book, therefore, fall to be noticed, such regulations as have been made concerning idleness, vagrancy, forestalling, and regratting; weights and measures, &c. which will be explained in different chapters.

§ 2. ANCIENT REGULATIONS.

II. THE Scottish legislature appears to have been early prone to exercise jurisdiction in matters of police; and thus has afforded many warnings of the vanity of attempting to regulate things beyond the grasp of human legislation. Of their multiplied enactments, intended for encouraging trade, manufactures, and agriculture, and checking luxury and extravagance, few have served any purpose, but to afford the historian and antiquary curious insight into the manner of living, and state of society, in those days. [b]

Their inefficacy

[a] B. iv, c. 12.

[b] Pinkerton's Retrospects at the several periods of his history of Scotland.

§ 2. ANCIENT REGULATIONS.

CONSIDERING the mistakes of more enlightened ages, we need not be surprised at the reiterated enactments "*for holding money within the realm*," [a] and against the having "of victualles,[b] sheep and nolt,[c] salt,[d] wool,[e] coal,[f] and almost every other article, in those days, deemed valuable, "furth of the realm." But" (says a learned author) "a man acquainted with the native qualities of the Scotch "horse, will smile to find, that those sorry palfries were "not suffered to be sold out of the kingdom." [g]

Anxiety to hold money within the realm.

ONE object, which the Scottish legislature long attempted with as little success as any, was the regulation of female dress: that the ladies might not put their fathers and husbands to more expence than suited their rank and fortune; or, in the statutory language, that "they make their "wives and daughters in like manner be abuilzied, *ganand*, "*and correspondent fra their estate*; that is to say," (in "the case of the wives and daughters of citizens, not in the magistracy, and of "barones, and uther puir gentlemen, within fowrtie pound of auld extent,") "on their "heads short curches, with little hudes, as ar used in "Flanders, England, and uther cuntries; and as to their "gowns, that na women wear mertrickes, nor letteis, nor "tailes unfit in length, nor furred under, bot on the halie "daie." [h] In these prohibitions, that the saving of expence to the "puir gentlemen" was chiefly in view, and not any dislike to the shewy dressing of ladies, appears not only from the above exception in the case of the "halie "daie," but also from the still minuter directions to wives, "within ane hundred poundes" (of land rent), to "wear

Attempt to regulate dress.

Female apparel.

[a] 1425, c. 49; 1436, c. 149; 1449, c. 29; 1451, c. 34; 1466, c. 8; 1540, c. 108, &c.
[b] 1555, c. 45.
[c] 1581, c. 114.
[d] 1573, c. 58.
[e] 1577, c. 250,
[f] 1597, c. 253,
[g] Wallace's Peerage, p. 47. 1424, c. 34.
[h] James II, parl. 14, 1457, c. 70.

§. 2. ANCIENT REGULATIONS.

" na *silk in lyning*, bot allenarlie in coller and slees, under the samin paine," (a fine of twenty pounds to the king[a]); and to the husbandmen's wives, to dress " in courchies of " their awin making." [b] Regulations were also made respecting the dress of the men; so particularly, indeed, that directions were given both for the halie day and work days dress of the commonalty, " that na laboures nor husband- " men weare on the *warke* daye, bot gray and quhite; " and *in the halie day* bot licht blue." So late as the reign of James VI, these regulations were still farther extended by a statute,[c] which mentions what privileged persons should wear silk, clothing, or silver; and very minutely describes in what manner apparel should be ornamented; and concludes, with statuting and ordaining, that " *the* " *fashion of cloaths now presently used* be not changed by " men nor women, and the wearers thereof, under the " paine of forefaultrie of the cloaths, and of an hundred " pounds, to be paid by the wearer, and as much by the " maker of the said cloaths."[d] And, stranger still, even subsequent to the Revolution, we find in the parliamentary minutes, an " overture for an constant fashion for " cloaths for men, and another constant fashion for cloaths " for women, read, and remitted to the *committee for elec-* " *tions*:"[e] which commission appears to have been executed with all due attention and dispatch; for there soon follows another minute in these terms, " Draught of an " act, brought in by *the committee for controverted elec-* " *tions*, ordering an constant habit of cloaths for men, and " another constant habit of cloaths for women;—read the " first time, and ordered to lie on the table. [f]

Wives and daughters directed to dress in courchies of their own making.

[a] James III, parl. 6, 1471, c. 45.
[b] James II, 1457, c. 70.
[c] James VI, parl. 23, 1621, c. 25.
[d] Ibid.
[e] Sept. 22, 1696. Parliament held at Edinburgh by the earl of Tullibardine, as high commissioner to king William.
[f] 5th Oct. 1696.

§ 2. ANCIENT REGULATIONS.

BUT what seems to have given the greatest uneasiness, was the use of the veil; which, however, for ages, continued in defiance of the legislature. [a] Many and anxious are the prohibitions, "that na woman cum to kerk nor "mercat with her face muffaled, or covered, that she may "not be kend, under the pane of escheit of the courchie." [b] Veil prescribed. Trains, or "tailes, unfitt in length," [c] were also prohibited; and, what is amusing, while in Scotland pains were taken to shorten the "tailes of the ladies," in England equal pains were taken to lengthen those of the men. [d] Trains too long.

AMID this attention to public manners, the pleasures of the table were not overlooked. Statutes were passed "against "superfluous banqueting, and the inordinate use of con-"fectous and drogges;" on the narrative of "the inordi-"nate consumption, not onlie of sik stuff as growes with-"in the realme, bot alswa of drogges, confectours, and "spiceries, brocht from the pairts beyond sea, and sauld "at dear prices to *monie folke that are very unabill to sus-"tene that coaste*." [e] Luxury of the table.

BUT that we may not be led from such enactments to entertain too high ideas of the wealth and refinement of our ancestors, sir George Mackenzie, in his observations on one of them, remarks, "that the laws of the twelve tables "contained several sumptuary laws, *though there was then "little luxury*." [f]

IN like manner, government undertook the regulation of the amusements likewise, and recreations of youth. After the return of James I from England, enactments were repeatedly made, "that fute-ball and golfe be utterly cried Amusement and recreation. Golf, foot-ball.

[a] Pinkerton, vol. ii, p. 435.
[b] 1457, c. 71.
[c] Ib.
[d] 3 Edw. IV, Henry's Hist. v. 2, 309.
[e] 1581, c. 114; 1621, c. 25.
[f] Observations on parl. 23, James VI, act 25.

§ 2. ANCIENT REGULATIONS.

down;" [a] and "that in na place of the realme, there be "used fute-ball, golf, or other sik unprofitable sports. [b]

UNDER the same superintending care, with a view to public and private happiness and comfort, parliament sometimes restricted individuals even in the use of their own property; for example, they prohibited "the laying of "lint in lochs and burns," as "not only hurtful to all "fishes bred within the samine, and bestial that drinks "thereof, but also the haill waters of the said lochs and "burnes, thereby being infected, is made altogether for "the use of man, and very noysome to all the people "dwelling there about: Which exercise of property, sir George Mackenzie observes, it seems that the parliament alone can restrain, "else this act had been needless; [d] "wherefore he states it as questionable, whether *paritas* "*rationis* should extend this act against such as lay stink-"ing hides, or other such noysome things in the loches "or burns." [e] But what limitations in the use of property, whether within or without borough, proprietors are under for the sake of their neighbours or of the public, being a subject of practical importance, settled by many later decisions, will come more particularly under our notice in the chapter relative to the public health and convenience. In the meanwhile, we proceed to those other branches of the police, to which we have devoted separate chapters.

Nuisance. Steeping of lint.

Sir George M'Kenzie's opinion of common law right.

[a] 1424, c. 17; 1457, c. 65.
[b] 1491, c. 32.
[c] 1606, c. 13.
[d] Observatoins, p. 234.
[e] Ibid.

CHAP. I.

Of the Laws relative to the necessitous Poor.

§ 1. GENERAL VIEW AND HISTORY.

1. THE poor are noticed by the Scottish statutes under two classes. The one are unable to work: the other, unwilling. The latter are checked and punished by many severe enactments: the former are suitably maintained by a tax, which is levied from the other members of the community; this religious duty appearing likewise a prudent and necessary measure of polity.

BUT the severe and salutary discipline can neither, justly nor effectually, be inflicted upon the one class of poor, while the support of the other is neglected. Thus intimately connected together, both these branches of political economy are generally regulated by the very same statutes. And both furnish various and important duties to justices of the peace; to the vigilance and activity of which magistracy the execution of the penal enactments against idleness and vagrancy is principally intrusted; while the regular establishment of parochial assessments for helpless indigence, has, in more than one place of the country, been

§ 1. GENERAL VIEW AND HISTORY.

first accomplished by the laudable interposition of the sessions of the peace.

IN the ancient Heathen world, the duty of providing for the *collective poor*, scarcely appears to have ever occurred as a subject of speculative inquiry; still less of practical policy.[a] In the Jewish law it was reduced into a system. The general duty was inforced; and various provisions were made for its effectual accomplishment.

Jews.

Mosaical law not elsewhere obligatory.

THE Mosaical institutions, addressed and adapted to the Jews in Canaan, are, strictly speaking, not elsewhere obligatory.[b] However, "in the constitution of human laws, "chief respect ought to be had to the judicial laws of God; "and they assumed, where the inclination of the people "and their condition do not render them inconvenient.[c]

Lord Stairs' opinion of its use.

[a] "In what is called the body of "the Roman law, we meet with ordinances for the regulation and "protection of hospitals for the sick, "for the aged, for orphans, for widows, for travellers, for infants, "and for almost every kind of charity encouraged among ourselves; "but it is not amongst the laws of "the Roman kings, nor among those "of the twelve tables, nor amongst "the decrees of the republican senate, nor amongst the edicts of "the *heathen*, but amongst those of "the Christian emperors, that we "meet with them." See bishop Watson's Sermons, p. 40.

[b] Many eminent divines and lawyers, and, among others, the famous Scotus, thought it unlawful to punish any crime capitally, which the Mosaical law punishes arbitrarily. Even Grotius does not very decidedly condemn this opinion. *Est autem valde probabilis Scoti sententia fas non esse quemquam ad mortem damnare, nisi ob delicta quæ lex per Mosem data morte punivit, additis duntaxat aut quæ his sunt paria recta æstimatione; neque enim videtur notitia divinæ voluntatis quæ sola animum tranquillit, aliunde in hoc negotio tam gravi haberi posse quam ex illa lege, quæ certe mortis pœnam in furem non constituit. (De Jure Belli et Pacis.)*

This question, whether the Mosaical institutions respecting punishments, are, to the extent above mentioned, perpetually binding, was considered by the court of justiciary on a learned argument in the case of John Macpherson, tried capitally for stealing two horses. The court condemned the pannel to death. Dec. 1743, Maclaurin, No. 48, p. 744.

[c] Stairs' Inst. b. i, tit. 1, § 9.

Throughout Christendom, accordingly, those commands that are of a more general import, as being the written law of nature, often become the ground work of the common law. And (to use the language of a learned English judge, in a question where the Jewish code was pleaded in support of a particular custom, in this very matter of poor laws), "what better fountain could it be drawn from than the "Holy scriptures?" [a] § 1. GENERAL VIEW AND HISTORY.

PERHAPS, therefore, it may not be improper to consider the charitable provisions of that venerable dispensation more minutely.

FIRST, certain subjects were expressly reserved as a fund for maintaining the poor. 1, Poors fund.

ONE source from which they derived a maintenance, was the corners of the fields. "*And when you reap the "fields of your land, thou shalt not wholly reap the corners "of thy field.*" [b] Liberally construed, this precept included all annual productions, the fruits of the trees, as well as corn. What precise proportion of the field came under this description, is not mentioned in scripture; but, in practice, was fixed at a *sixtieth* part,[c] which (the *minimum*) the poor could by law exact from the most churlish, while the charitable gave more, according to their respective inclinations and abilities.

ANOTHER fund, set apart for the poor, was the gleanings of the harvest and vintage. "*Neither shalt thou gather "any gleanings of thy harvest.*---"*Neither shalt thou glean "thy vineyard; and thou shalt not gather every grape of "thy vineyard.*" [d] If three or more stalks of corn, or three or more clusters of grapes, fell at once to the ground, they Gleanings.

[a] See below, p.

[b] Levit. c. xix, v. 9, c. 23, v. 22.

[c] Seld. *de Jure Naturali, & Gentium*, &c. lib. 6, c. 6, p. 692.

[d] Levit. ibid. Deut. c. xxiv. v. 20, 21.

§ 1. GENERAL VIEW AND HISTORY —JEWISH CODE.

could be taken up as still the property of the owner of the crop; but if less than three happened to fall as gleanings, they belonged to the poor.[a] Under the last clause, clusters of an inferior quality are to be left to the poor.[b]

Forgotten fruits, or corn.

IN like manner, whatever sheaves of corn, or other fruits, were forgotten in the field, belonged to the poor. "*When "thou cuttest down thine harvest in thy field, and hast for-"got a sheaf in thy field, thou shalt not go again to fetch "it.*"[c] Like the first precept, this was not confined to corn, but was liberally extended to grapes and fruits.[d] If the workmen forgot, when the master did not, or *vice versa*, or though both the workmen and the master forgot, yet if a passenger timely put them in remembrance, in such cases this precept was not understood to apply.[e] But as those regulations were not intended for the benefit of the "beasts of the field, and birds of the air," so, if the poor did not collect them in due time, according to the usage of the place, they forfeited their exclusive right to such gleanings, and forgotten fruits; which, in that case, became the property, either of the husbandman again, or of any other person,[f] though not among the number of the poor, who chose to take them.

Tithe every third year.

THE most important provision in favour of the poor, appears to have been their right to a tenth of every third crop. "*At the end of three years, thou shall bring forth all the "tithe of thine increase the same year, and shalt lay it up "within thy gates. And the Levite, (because he hath no "part nor inheritance with thee) and the stranger, and the*

[a] Seld. ibid.

[b] Such, for example, as neither had *scapulos densiores nec uvas conjunctiores sed tam has quam illas ita invicem dispersas et distantes ut reliquerum ubertatem densiorem haud imitarentur. Ibid.*

How far this provision respecting gleaning is obligatory now, and how the law respecting it stands here and in England, see below, § 2.

[c] Deut. c. xxiv, v. 19.

[d] Seld. ibid.

[e] Ibid.

[f] Ibid. p. 699.

§ 1. GENERAL VIEW AND HISTORY —JEWISH CODE.

"*fatherless, and the widow, which are within thy gates,* "*shall come, and shall eat, and be satisfied,*" [a] &c. As the Greeks divided time into periods of *four* years, and the Romans into periods of five years, so did the Jews into periods of seven years. The *seventh* year they paid no tithe; for there was no crop. But each of the other six years they paid two tithes; one to the Levites, whereof the latter, again, yielded a tenth to the priests, called *decima decimarum*. The other, a tenth of the remaining nine parts of the produce, in distinction to the *first*, or Levites' tithe, was called the *second* tithe. Every first, second, fourth, and fifth, year, this second tithe "was spent at the temple "in feasts, not unlike the *agapæ* of the primitive Christi-"ans." [b] Every third and sixth year, it was "*bestowed* "*at home, within their own gates, upon the poor and the* "*Levites.*" [c]

Tithes, how many kinds.

1st tithe.

2d tithe.

Poor's tithe.

THE only other fund to be noticed, is almsgivings. "*If* "*there be among you a poor man, of one of thy brethren,* "*within any of thy gates in thy land, which the Lord thy* "*God giveth thee, thou shalt not harden thy heart, nor shut* "*thy hand from thy poor brother; but thou shall open thy* "*hand wide unto him, and shall surely lend him sufficient* "*to his need, in what he wanteth,*" &c.—"*Thou shall sure-*"*ly give him; and thine heart shall not be grieved when* "*thou givest unto him.*" [d] Among the other funds, it is correct here to enumerate alms, which the Jewish magistrate had authority to compel the churlish and reluctant to give suitably to their circumstances and the exigency of the case.[e]

Alms.

Alms, compulsory.

[a] Deut. c. xiv, v. 28, 29.

[b] Forbes's Treatise on tithes, c. 5.

[c] But whether this poor tithe really was a different application of the *second* tithe, as Selden and Pool (*Synopsis Criticorum, &c. ad loc.*) think, "or a third extraordinary "tithe, distinct from both the Le-"vite's tithe and it;"—"they're "(says Mr. Forbes, ibid.) wiser than "I can tell,"

[d] Deut. c. xv, v. 8, 9, 10.

[e] *Si quis autem eleemosynam erogare, juxta quod oportuit, detrecta-*

§ 1. GENERAL VIEW AND HISTORY —JEWISH CODE.

Collectors for the poor.

Arca.

Scutella.

IN each town, or district, it became usual, in practice, to appoint collectors, to whom, on the evening of the Sabbath, individuals (if they did not choose to be dispensers wholly of their own charity) paid their weekly offering, and by whom, after careful scrutiny, distribution was made among the poor, according to their several necessities; of money from the box *(arca)*; of provisions from the dish or porringer *(scutella)*.[a] The former was used universally; the latter in some particular places only.[b]

Strangers not liable.

IT is remarkable that none of the above regulations were understood to be binding on wealthy strangers living among them, even though they had attained the degree of *proselytus justitiæ*.[c] So far was this carried, that if a Jew and stranger were joint partners of a field, the law respecting the corner, gleanings, as well as forgotten sheaves and fruits, applied to the one half only.[d] Alms, again, instead of be-

Common property between stranger and Jew.

ret, sententia forensi coercendus erat *in id præstandum quod foro placeret, idque* non sine plagarum pœna *nisi pareret. Quod si demum non faceret, e bonis suis id quod erat præstandum in pignus sustulere judices.* So far Mr. Selden. (Ibid. p. 695.)

The following are the words of the Talmud itself respecting this remarkable regulation. *Qui non voluit eleemosynam dare, aut minorem dederat quam erat ei par*; cogebant eum judices fori seu synedrium, irrogata etiam pœnâ verberum, *quæ contumacibus debita, usque dum id præstaret quod ipsi estimarent.* Quin et irruebant in bona ejus eoque præsente *quantum oportuit eum erogare, ut in pignus eleemosynæ, eripiebant.* Ibid.

[a] Seld. ibid.

[b] *Neque vidimus neque audivimus in ecclesia aliqua seu universitate Israelitarum, defuisse arcam eleemosinæ. Sed scutellam quidem loci alii habent, alii non habent pro moris diversitate.*" (Maimonides apud Selden, ibid. p. 698.)

[c] *Si Gentilis in ditione Israelitica postquam segetem messuerat, proselytus justitiæ factus fuisset, ex segete illa neque angulus neque spicilegium neque manipulus per oblivionem derelictus, pauperibus relinquendus; tametsi manipulis jus non inciperet ante tempus quo manipuli avehi soliti. Id est etiam postquam proselytus esset factus.* (Ibid. 701.)

[d] *Ubi Israelita et Gentilis socii erant vineæ in parte Israelitæ (divisa) relinquendi erant acini decidui et racematic. Sed pars Gentilis immunis erat.* (Thalmud, c. iv, ibid. 701.)

ing legally exigible, were not allowed to be taken from a pagan, although he offered them. However, the case of absolute necessity was excepted: If the charity of their countrymen did not suffice for the support of the poor, they were allowed to receive alms from strangers;[a] and *propter regiæ dignitatis æstimationem*, it was held lawful to accept of donations from princes and great men;[b] which, however, they generally gave away to the heathen poor among them, when they could do so without danger of discovery.[c] This delicacy, Scaliger remarks, they still retained after their dispersion. By supplying their wants, the richer Jews took care to keep the poor of their nation from begging.[d]

§ 1. GENERAL VIEW AND HISTORY —JEWISH CODE.

Donations sent by heathen kings, &c.

IN some places, however, they do not appear to have observed the same delicacy; if, at least, we may credit the satyrist, who, among the evils of a residence in Rome, specifies the unceasing and trained importunity of Jewish beggars: *Nec turba cessat*, &c. *A matre doctus nec rogare Judæus.*[e]

SECONDLY.—The description of persons intitled to take the benefit of those funds, appears to have been accurately fixed. Moses, indeed, says generally, the "fatherless, "widow, and stranger." But certain rules seem to have

2. Who intitled to charity.

[a] *Fas non erat Israelitæ accipere Eleemosynam a Gentilibus palam ac in aperto. Adjecta tamen exceptione hac. Si Eleemosynæ suorum vitæ suæ necessariis non sufficerent, nec Gentilium Eleemosynam clam accipere posset: tunc quidem licuisse. (Thalmud, apud Selden, ibid. 701.)*

[b] *Quin, si rex aut princeps e Gentilibus pecuniam in Eleemosynam ad Israelitas mitteret, eam sane rejicere mos non fuit, propter regiæ dignitatis observantiam. Ibid.*

[c] *Recipiebant ergo, sed clanculum erogabant pauperibus Gentilium, adeoque ut rex nescirit. Ibid.*

[d] *Veri Judæi non mendicabant, neque mendicant hodie propter Φιλοδοξίαν eorum, quod divites non patiuntur tenuiores mendicare aut esurire. Elon. Trib. ext. cum Drusio de Sectis Judaicis.*

[e] *Martial, lib.* xii. *epig.* 57.

§ 1. GENERAL VIEW AND HISTORY —JEWISH CODE.

been acknowledged by their courts. Thus, 1, those were not permitted to partake of the poor funds, who had either fifty sacred shekels (200 *zuzi*) not out on trade, or twelve shekels (50 *zuzi*) out on trade.[a] If he had less than fifty shekels not out at trade, he was intitled to the benefit of all the above-mentioned funds.[b] 2. In estimating what a man had, the debts (even his wife's dowry) which he owed, were deducted.[c] 3. A man was not obliged to sell his house and furniture, to intitle him to take the benefit of these provisions.[d] But if he was reduced to the lowest state, of deriving his subsistence from the common box, or weekly distribution of alms, he was obliged to dispose of all articles of any value, and be content with such in their place as were cheapest and strictly necessary.[e] 4. As, in those days, they had little conveniency for obtaining remittances, it was specially provided, that if any traveller run out of money in the course of his journey, he should be intitled to take the benefit of all the kinds of poor funds, without being obliged, on his return home, though in good circum-

Pauper, when obliged to sell his furniture, &c.

Travellers.

[a] *Qui haberet in bonis ducentos zuzos, (id est quinquaginta siclos sacros) licet cum iis non negotiaretur; aut qui quinquaginta et cum eis negotiaretur, is in eis non erat habendus quibus licuit spicilegio, frugibus per oblivionem in agro relictis, Angulo et Decima pauperis gaudere. (Maimon. apud. Seld. ibid. 697.)*

[b] *Si cui pauciores quam ducenti essent (nec in negotiationibus eis uteretur) tametsi mille homines simul eum dona præberent, nihil omnino et jam dictis gaudere fas erat. (Idem. Ibid.)*

[c] *Si pecuniam seu opes quidem haberet, quæ tamen ære alieno aut doti uxoriæ essent obnoxiæ, fas erat ei sibi ea etiam sumere. (Idem. Ibid.)*

[d] *Si egenus esset qui villulam, et ædas instructas haberet etiam rebus argenteis et aureis, mos non erat ut is cogendus esset vendere ædas suas et res ei inservientes (ut scilicet inde viveret et a jam dictis arceretur, sed) ea accipiebat, et ex præcepto eis gaudere debuit. (Idem. Ibid.)*

[e] *At vero si ei essent utensilia aurea vel argentea qualia strigilis aut pistillum et quæ sunt similia (lautioris et splendidioris vitæ instrumenta) vendenda ea erant atque id genus minoris pretii alia ei inde supplenda. Quæ tamen exceptio locum tantum habuit antequam ex eleemosynis publicis seu eleemosynarum ærario ali inciperet.* Similac enim incipiebat inde ali (seu alimenta inde petebat) cogendus erat vendere res illas pretiosas et viliores accipere. *Ec dein fortuna angustiori contentus esse debuit. (Idem. Ibid.)*

stances, to repay the supply which he thus had received when he truly was in need.[a] 5. Under the term *stranger*, no heathen, it has been said, but proselytes only, could claim relief by law: It seems, at least, however, to be the import of the rabbinical constitutions, that heathen strangers, when there was a sufficiency for all, should be supplied indiscriminately with the native poor, without any other scrutiny, except as to the reality and degree of their necessities.[b] The satyrist, therefore, exaggerates, when he represents them so unsociable as *non monstrare vias eadem nisi sacra colenti.*[c]

§ I. GENERAL VIEW AND HISTORY —JEWISH CODE.

Strangers. Heathen strangers.

THIRD. In order to direct the exercise of charity, where there was not a sufficiency for all the poor, it was laid down, that poor relations, the poor of the neighbourhood, or city, or county, or nation, &c. were respectively preferable.[d]

3, Rules respecting charity.

Preference among the poor.

IN commanding the duty of almsgiving, Moses uses the expression "*sufficient for his need in that which he*

[a] *Si patrifamilias, per urbes aliquot et oppida proficiscenti, commeatus primo suffecerat; et dein (ante reditum) indiguerat ille quod comederet, ei competebat sumere spicilegium, fruges per oblivionem relictas, Angulum et decimam pauperis, atque etiam ex ærario eleemosynarum ali. Neque postquam domum redierat, obligatus erat ad restituendum.* Nam tunc temporis (quo acciperet) pauper seu pauperum numero censendus erat. *(Maimon, ibid. 697.)*

[b] *At vero tum proselytis domicilii tum aliis Gentilibus ex jure superinducto permiserunt (quod secundo hoc animadvertendum) in omnibus jam dictis sortem, si pauperum, qui e Judæis, turbæ se commiscerent.* Mr. Selden then quotes from the Talmud the following sentence: *Ceterum tametsi ex ipsa lege res ita habebat, nihilominus non arcebant pauperes Gentilium a donis jam dictis, ex illis scilicet prioribus. Sed ii commisti turbæ pauperum ex Israelitis ea acceperunt. Causa redditur ob vias pacis, id est officiosæ humanitatis seu charitatis causa. (Ibid. p. 700.)*

[c] Juvenal Sat. xiv. 103.

[d] *Inops qui fuerit cuiquam propinquus, præferendus aliis quibuscunque; inopes domestici inopibus urbis; urbis suæ, inopibus urbis alienæ; juxta quod in lege scriptum est, "fratri tuo pauperi tuo Inopi, tuo, in terra tua."* (Deut. xv, c. 11. Thalm. ibid. p. 696.)

GENERAL VIEW AND HISTORY —JEWISH CODE.

wanteth."[a] This precept the rabbins branched out into anxious and minute directions, to proportion the supply, as much as possible, to the pauper's former station and circumstances.[b]

Rule for determining the measure of supply.

BUT neither former rank, nor any other circumstance, was sustained as an apology for the poor living in idleness. No one was entitled to charity, who did not, by some useful industry, so far as he could, contribute to his own support.[c] By the fruits of their industry, together with the assistance they obtained by means of the privilege of gleaning, corners of the fields, and forgotten sheaves, many, it is said, so comfortably subsisted, that they refused to accept of alms, whether offered to them by private individuals, or by the collectors of the weekly box.[d]

Poor behove to work.

THE Christians, though consisting of all nations, and languages, were early celebrated for their care of the poor. There was none "*among them that lacked.*" The weekly contributions were laid down "*at the apostle's feet:*" "*and distribution was made unto every man according as*

[a] Deut. c. xv. v. 7.

[b] *Sed mirum est quod tradunt de Eleemosynæ hcic tum qualitate tum quantitate. Neque enim suffecisse volunt, ut quis opulentus inopibus rogantibus vitæ simpliciter necessaria donaret, compararetve, veluti vestitum et alimenta. Etiam utensilia* domestica, uxorem item et maritum (cælebibus qui indigerent, pauperum nomine heic venientes) quin et ea insuper quæ ad pristinæ unde decederant vitæ sortisque splendorem) *spectarent, ex legibus hisce sacris docent fuisse submiuistranda.* (Selden, p. 695.)

[c] *Ceterum tametsi pristini splendoris et anteactæ vitæ unde inops deciderat, ratio erat ut paulo ante dictum est, habenda, et juxta eam eleemosynæ submini-strandæ, attamen in mandatis dederunt sapientes ut,* qualiscunque fuisset antè dignitatis inops, artificio alicui jam sedulo incumberet, ut inde minus esset aliis seu eleemosynarum ærario oneri. (Selden, ibid. p. 698.)

[d] *Quod et ita feciste aliquot viros aiunt insigniores ad paupertatem alias summam redactos ut nec rogarent ab universitate seu populo (id est ab exactoribus illis qui populi eleemosynam corroga-rent erogerentque) nec acciperent ab quando ipsis donare volebant.* (Ibid.)

§ 1. GENERAL VIEW AND HISTORY.

"*he had need.*"[a] In the reign of Constantine the Great, Christianity becoming the religion of the empire, its charities assumed the more splendid appearance of hospitals for the aged, for orphans, for the sick, for travellers, &c. besides endowments in favour of the church. And in most parts of Christendom, the poor were long too abundantly perhaps, and too indiscriminately, supplied by the alms and hospitality of the monasteries. In those periods, therefore, a legal assessment for the support of the poor would have been superfluous.

BUT when the pious foundations, and charitable institutions, of the Romish establishment in this country were dissolved, the destitute poor found no adequate supplies, either from the barons, who were enriched with the spoil; or from the presbyterian clergy, who had with difficulty obtained a scanty subsistence for themselves. Then first, therefore, the poor required, and generally (wherever the same causes operated) obtained legislative aid. In England, accordingly, abundance of statutes were made in the reign of the first reforming monarchs, king Henry VIII and his children, for providing for the poor and impotent.[b] And in Scotland, soon after the Reformation, the act 1597, c. 74,[c] still the basis of our poor laws, was passed, amid those violent contentions between the laity, on the one hand, resolute to maintain their acquisitions; and the clergy, on the other, clamorously reclaiming the ancient patrimony of the church, as sacred to the support of the poor, of schools, and other charities, which the former incumbents, notwithstanding their ostentatious and luxurious extravagance, had rarely neglected. This weighty and popular topic of complaint was removed by providing another fund for the maintenance of the poor.

[a] Acts, c. iv, v. 35.

[b] Blackstone, b. i, c. 9.

[c] Appendix I.

§ 1. GENERAL VIEW AND HISTORY.

IN the reign, indeed, of James I, we meet with statutes[a] concerning the age and mark of beggars, and idle men;[b] which, however, merely describe who are proper objects of private and ecclesiastical charity; their principal object, as well as that of all the enactments prior to the period already mentioned, appearing to have been the prevention and punishment of vagabonds.

THE statute 1579 seems to have been intended for a general code, adapted to all classes of poor. A plan so extensive in an untried and difficult path of polity, could scarcely be expected to appear at once perfect in all its parts. More fortunate, however, it has been than its contemporary the 43d of Elizabeth, the basis of the English poor laws. For while our neighbours in England loudly complain, that, "in pro- "portion as the wise regulations, that were established in "the long and glorious reign of queen Elizabeth, have "been superseded by subsequent enactments, the utility of "the institution has been impaired, and the benevolence "of the plan rendered fruitless,"[c] we, in this country, have reason for congratulating ourselves, that any defects in our original enactment, have, as we shall see, been happily remedied, and the system matured by successive improvements. Originally, indeed, the benevolent plan seems, in both countries, to have commenced with equal advantages; and to have been as much alike, as it is now dissimilar and opposite, in its spirit and effect. In Scotland, the assessment, in particular, is imposed with every possible precaution, and in strict conformity to the principles of the British constitution. In England, the case is said to be, in both respects, quite the contrary.

[a] Appendix I, No. 31.

[b] Appendix I, No. 31 and 33.

[c] Mr. Pitt's speech on Mr. Whitbread's bill for reforming the English poor laws. Apud Eden's State of the Poor, p. 311, vol. 3.

A late writer does not join in the eulogy which has been bestowed on Queen Elizabeth's enactment. (See Malthus on Population, v. 2, p. 178, Ed. 3d.

§ 1. GENERAL VIEW AND HISTORY.

There a tax, to the extent of millions, is yearly imposed, at the discretion, in the first instance at least, of church-wardens and overseers, for the relief and support of the poor. Here, again, in each parish, the minister, landholders, and elders, persons of the first respectability, and who, in laying on an assessment, impose a tax on themselves, hold regular and public meetings, for scrutinising, from time to time, the list of the poor, and ascertaining the sum necessary to be raised for their support.

THE effect of each system is just what might be expected. Under the former, "more than one half of those "millions are thrown away in suits relative to parish set-"tlements, *and squandered by the church-wardens and over-"seers* in their feasts, &c. with several other species of "misapplication and fraud;" [a] whereas, amid all the heat and controversy respecting the propriety of any compulsory provision for the poor, it has never been insinuated that a sixpence of the moderate fund, cautiously raised under the latter, has in any one instance been misapplied. In England, while "the real purpose for which that heavy tax "is laid, viz. the maintenance of the indigent and neces-"sitous poor, is but little regarded, great sums are spent in "maintaining the idle and profligate;" [b] whereas the strict scrutiny of the heritors and elders, personally both acquainted with the parishioners, and interested to prevent imposition, renders the Scottish poor list, as far as human foresight can go, inaccessible to any but the truly necessitous. "The able and idle, it is said, get upon the roll. A "pretty numerous roll of pensioners," says one, eminently qualified to judge of the effect of our poor laws, "whose "cases have for many years been under my eye, is made "up of the old, the sick, the widow, the orphan, the im-"becile, the insane." [c]

[a] Lord Lyttleton's Speech on the English Poor Laws, Parl Reg. 1775.

[b] Mr. Gilbert, ibid.

[c] Dr. Charters' Sermons, vol. 2.

§ I. GENERAL VIEW AND HISTORY.

THE English poor rates, therefore, may perhaps have been justly complained of as rewarding vice, and discouraging industry. But with us, "I can discern no relaxation of industry from the hope of an aliment: the aliment is so scanty and humiliating, that it rather operates as a standing admonition to the industrious and frugal. Instances are not unfrequent of such as recover strength, resigning the pensions; of widows resigning it as their children grow up; and of children resuming the charge of their parents when providence puts it in their power."[a]

IN England, it is said to be a question, whether the poor or rich are more dissatisfied with the poor laws? which burden the latter with exactions to so little purpose; and harass the former, as well as indeed all the lower ranks, by removals, "at the caprice of parish-officers;"[b] "which have at once increased the burdens of the poor, and taken from the collective resources of the state to supply wants which their operation had occasioned, and to alleviate a poverty which they tended to perpetuate."[c] Whereas the ablest writers against a compulsory provision for the poor, find nothing particularly exceptionable in the Scottish system.[d] Even Lord Kames himself, the great enemy of poor rates, is compelled to do homage to its excellency. "But if there be such a tax, I know of none" (says his lordship) "less subversive of industry and morals than that established in Scotland, obliging the landholders in every parish to meet at stated times, in order to provide for the poor; but leaving the objects of their charity, and the measure, to their humanity and discretion. In this plan, there is no incroachment on the natural duty of charity, but only that the minority must submit to the judgment of the majority."[e]

[a] Dr Charters' Sermons.

[b] Mr. Pitt's speech *apud* Eden's State of the Poor, v. 3, p. 311.

[c] Mr. itt, ibid.

[d] Dr. Macfarlane's Inquiry.

[e] Sketches of the history of man, book ii, sk. 10.

§ 1. GENERAL VIEW AND HISTORY

IF then the poor's laws of England, "however wise in "their original institution, have been "obscured by such "corruptions;[a] if they have thus contributed to fetter the "circulation of labour, and to substitute a system of abuses "in room of the evils which they humanely meant to re- "dress, and by ingrafting upon a defective plan defective "remedies, have produced nothing but confusion and dis- "order;"[b] their unpopularity, even among that opulent and munificent nation, need not surprise us: but we may reasonably complain, that the natural fruits of so faulty a plan should ever be mistaken for necessary consequences of all compulsory provisions for the poor, or involve the Scottish system likewise in one indiscriminate blame and obloquy.

HENCE, however, in some parishes, whose other funds are insufficient for the support of the necessitous poor, this unphilosophical prejudice against poor rates, as if there were a spell in the very name, has too successfully prevented the execution of our system of poor laws; which, so far from partaking a common nature with the *English poor rates*, has providentially avoided the very source whence *derivata clades*, and evinces its sound principles by its salutary operation. "In those parts of Scotland where this "law is obeyed the good effects are manifest. The poor "are delivered from wandering under the infirmities of "age, and their children from hopeless ignorance, idle- "ness, and shamefulness: they enjoy domestic comfort, "and the fruits of their remaining strength, without be- "ing obliged to overstrain it: their children are educated "under their own eye, &c.; the rich and the poor meet "together in reciprocal sentiments of kindness and grati- "tude, and unite in attachment to a constitution whose "laws are so consonant to the Christian law of love."[c]

Unreasonable prejudice against the execution of the Scottish poor laws.

[a] Mr. Pitt, ibid.

[b] Eden's State of the Poor, p. 83.

[c] Dr. Charters' Sermons on Alms.

§ 1. GENERAL VIEW AND HISTORY.

IT is the general system only of the Scottish poor laws to which this praise belongs. It must be confessed, that, on the spur of the moment, many enactments have passed, partial in their view, erroneous in their plan, and some of them even bringing us within imminent danger of those very evils which have proved so fatal in England. Hence, therefore, on opening this part of the statute book it is not the practical excellence of the system that first strikes us, but rather an appearance of inconsistency, intricacy, and confusion. Hence, accordingly, inquirers, who are not conversant in the learning of statutes, have sometimes been betrayed into harsh and disrespectful language. They do not consider, that no branch of any jurisprudence, depending upon successive enactments, which have been framed in the course of ages, amid the perpetual change of men, and in the manner of thinking and circumstances of the country, either is, or, in the nature of human affairs, can be exempt from appearances of incongruity. But if occasional errors have either been speedily remedied, or have never at all taken effect, while the leading principle, originally sound, has throughout maintained its ground, governing the decisions of the courts, and the general practice of the country this is the criterion of a wise and happy legislation. This praise, notwithstanding the acknowledged defects of particular statutes or perhaps of some part of almost every statute, may, without presumption be arrogated to the Scottish system of poor laws. But the number of those unwise, inconsistent, and forgotten, regulations, makes it proper and necessary to consider the subject, not chronologically downward, but rather under such general heads as may bring under our view the whole practical doctrine of this branch of our law.

§ 2. FUND FOR MAINTAINING THE POOR.

II. THE ordinary collections at the parish churches are frqueently termed the natural and proper fund for maintaining the poor. It was determined in one case, that collec-

tions at dissenting meeting-houses make no part of this parochial fund.[a]

§ 1. GENERAL VIEW AND HISTORY.

THE fund for maintaining the poor is sometimes increased by the kirk-sessions letting out a hearse, mortcloth (pall), to hire; by the interest of mortified money, or land,[b] &c. The kirk-session may acquire, by *use and wont*, the exclusive privilege of letting out the hearse, mortcloth, &c. for hire within the parish. If they have immemorially been in the practice, and still are able, to accommodate the public, nobody can enter into competition with them; nei- Collections. Mortcloth, &c.

[a] 1739, June 19th, Hill against Thomson. At a fast, observed by a congregation of seceders within the parish of St. Ninian's, there was collected 51l. Scots; for which the kirk-sessions, as administrators for the poor, brought an action before the sheriff, who ordained the defenders to make payment of the money. This decreet the seceders brought under review by suspension. The court of session "sustained the reasons of "suspension." (Clerk, Hume, No. 119.)

In some instances dissenting congregations act more justly and reasonably, either by maintaining their own poor, or allowing their collections to make part of the general fund; and thus preventing or diminishing the necessity of recurring to the less agreeable plan of an assessment, which dissenters must pay as well as others.

[b] From the concurring statements from many parishes in Sir John Sinclair's Statistical Accounts, it would appear that mortifications, when not for some *extraordinary* charity, out of the sphere of legal provision, but for relief of the parochial poor, are more commendable for their piety than for their wisdom or utility. They benefit not the indigent, but the rich; less relieve the wants of the aged, diseased, and fatherless, than merely discharge landlords and others of a tax which the law carefully proportions to the ability of each.

This is not all. The number of poor has been generally found to increase in proportion to the extent of such mortifications; not so much from their relaxing the industry of the native parishioners, as by attracting strangers from other quarters.

Even this is not all. The undeniable mischiefs of provisions for the poor, in the way of mortification, are frequently, without discrimination, employed as arguments against all legal provisions for the poor. But neither evil arises from those parochial assessments, which the wisdom of the Scottish law makes to depend yearly or its increase, or diminution, or continuance, upon the discretion of the heritors, minister, and elders, on a judicial and public examination of circumstances. Thus, improper claims

§ 2. FUND FOR MAINTAINING THE POOR.

ther corporations, nor the sessions of dissenting congregations.[a]

BUT only immemorial usage can give the kirk-session this exclusive right, or entitle it either to prevent individuals from letting out hearses and mortcloths for hire; or, still less indeed, to interrupt the ancient usage enjoyed by any corporation, or other body of men.[b]

are rejected and prevented; and no unfair influx can burden any one parish, when the same arrangement is common to all.

[a] 10th August, 1756, Mr. Andrew Turnbull, minister, and the kirk session, of Keppan, against John Macclaws and others.

The kirk-session of Keppan, a landward parish, had been in use, from time to time immemorial, of keeping and letting for hire, mortcloths for the funerals of persons dying in the parish, and of applying the money for the use of the poor.

A congregation of the seceders, within the bounds of this parish, bought mortcloths, and let them out to hire among those of their own persuasion.

The kirk-session brought a process of damages against them for using those mortcloths, and thereby diminishing the produce of the mortcloths of the kirk-session.

The court of session found, "that "the kirk-session have the sole right "of keeping, and letting for hire, "for the use of the poor, mortcloths "within the bounds of the parish; "and that the defenders have no "right to keep mortcloths, and give "the same out to hire, or even to "lend the same gratuitously for bury-"ing any of the dead within the "said parish, with certification that "they shall be accountable to the "kirk-session for the ordinary dues "of their mortcloths in the like "cases."

In a case in 1718 betwixt the kirk-session and the trades of Kilwinning, the court had found, "that the kirk-"session of Kilwinning had the sole "power of lending out of mort-"cloths, upon hire, for the benefit of "the poor; and that the poor of "the said parish have right to the "money arising from lending of "mortcloths upon hire within the "said parish; and sicklike that the "kirk-session there hath the sole "right to administrate the same, "but prejudice to private persons, to "make use of their own mortcloths "belonging to themselves; and de-"cerned the defenders to forbear "using mortcloths of their own, or "lending out the same for money, "or otherwise, to others through "the said parish, or any part thereof "in time coming, but prejudice al-"ways to private persons to make "use of their own mortcloths be-"longing to themselves as said is." (Fac. Decis. vol. i, No. 215.)

[b] 18th February 1783, kirk-session of Dumfries against the incorporation of squaremen there.

In Dumfries, the incorporation of

§ 2. FUND, &c.

ON immemorial usage, in like manner, depends the kirk-session's title to exact fees at marriages and baptisms; for kirk-sessions have no power to impose taxes. [a]

—FEES, OR MARRIAGES, &c.

KIRK-SESSIONS, however, being a part of the ecclesiastical government, expressly authorized by law, are intitled to appoint proper officers; and, in order to defray that expence, have power to ordain such fees and perquisites to

squaremen had been in use, from a very remote period, to let out mortcloths for hire. In 1781, the kirk-session instituted an action for having it found that they had the sole and exclusive right of doing so. In support of this action, they referred to the following decisions, 10th August 1756, Turnbull and kirk-session of Keppan against M'Claws; Fac. coll. and kirk-session of Kilwinning againſt trades, ibid. cit.

Observed on the bench. The right which the kirk-sessions in Scotland enjoy of letting out mortcloths for hire, when followed with immemorial possession, has been found to establish an exclusive right to the emoluments arising from this sort of traffic. Here, however, the defenders having been beyond the years of prescription in the practice of lending out mortcloths, there is no foundation for the present action.

The court of session "assoilzied "the defenders, in respect of the "long possession had by them."

[a] 26th June 1765, Beveredge, precentor, and session-clerk of Dunfermline, against James Bayne and others.

"The kirk-session of Dunfermline, by an act, 23d January 1681, "ordained, that whoever, in that "parish, should give up their names "to be proclaimed for marriage, "should give half dollar to the poor "before their proclamation." This act was renewed, 8th November 1719. "Upon the narrative, that the cus-"tom of paying the said sum was "much worn out." The pursuer, authorized by the kirk-session, brought an action before the sheriff against the defenders, all dissenters of different denominations, and mostly seceders, for payment of this sum, founding his claim upon the acts of the kirk-session, and use of payment. As to the last, the sheriff allowed a proof to both parties. The pursuer limited his to the period from 1718 to 1738, i. e. from the date of the last act of the kirk-session to the secession. It appeared from the proof, that the use of payment had been pretty general, though not universal; that the kirk-session, on account of the reluctance of the parishioners, had resolved to accept what they would voluntarily give; that numbers had paid less than the half dollar, and many, though people of substance, had paid nothing.

The sheriff gave judgment for the pursuers. The cause was brought

§ 2. FUND, —FEES, OR MARRIAGES, &c.

be paid, as the circumstances of the parishes may respectively require.[a]

BUT the "needful sustentation" of the poor is not intrusted solely to those scanty and precarious supplies. When they prove insufficient to enable the poor, in the language of our statutes, to "live unbeggand," the law directs the deficiency to be supplied by an assessment on the parish; it being the leading principle of the Scottish poor laws to avoid any fixed or permanent tax, which might increase the number of the poor, by affording an encouragement to idleness, improvidence, and dissipation. No assessment is to be imposed, till, on due inquiry, it appears necessary to meet the exigency of the moment. The law does not direct any *particular* sum to be annually levied, but only *meetings, from time to time*, to be held, in order to "take "inquisition of all aged, poor, impotent, and decayed, "persons,[b] according to their number, to consider what "their needful sustentation may extend to."

A permanent fund reprobated by the Scottish poor laws.

THUS the statutes order nothing peremptorily, but "to "take inquisition." They neither say, *what tax;* nor that *any tax at all* shall be levied: they only enjoin inquiry to be made into the circumstances of the poor; the number and wants of those already upon the list; and the

Statutes direct only meetings to be held, and inquisition to be made.

under review by advocation; and, after a hearing, taken to report.

The pursuers brought evidence of a decision in the year 1746, in a case between the kirk-session and seceders in the parish of Falkirk (not reported), wherein such an exaction had been authorized.

Answered, inter alia, for the defenders. The plea of immemorial use is excluded by the act of the kirk-session 1719, as well as by the parole evidence. In the case of Falkirk, which is but a single decision, immemorial usage was proved.

The court of session "sustained the defences." Fac. Coll.

[a] In the case last quoted, the libel concluded also for certain dues to the kirk-beadles, on occasion of marriages and baptisms; which claim also was founded upon an act of the kirk-session, and immemorial usage. "The "lords found the beadles intitled to "the dues claimed by them."

In the argument it was said, that in the case of Falkirk the same point had occurred, and been similarly decided.

[b] 1579, c. 74.

pretensions of those who wish to be added to it. If the weekly collection, or other funds, already mentioned, appear adequate to supply those intitled to charity, it is neither the direction, nor purpose, of the statutes, to assess the parish. And in many places those funds have proved sufficient to enable the poor to "live unbeggand." So far is a poor tax, when sound and correct in principle, moderate in extent, and under careful management, from producing that rapid increase of the number of the poor, and those other evils so much, and, to all appearance, so justly complained of in England, as the consequence of their poor rates.

§ 2. FUND ASSESSMENT

Assessment in many places unnecessary.

BUT many causes have conspired to prevent the weekly collections, in particular, from keeping pace with the increase of the expence of maintaining the poor, to whose just demands upon the public, those funds are, in many parishes, utterly inadequate.

Diminution of the collection, &c.

THE law, in that case, directs the precise deficiency, to be ascertained by inquiring into the several claims, and making out a list of those entitled to parochial aid, in whole or in part; and next directs this deficiency to be provided for by an assessment on the parish. Such a sum must be raised as seems adequate to the supply of those "poor "people, who must necessarily be sustained by alms."

THIS adjusting of the list of the poor, and fixing of the assessment, our law, with happy selection, has committed to two very respectable bodies of men, of all others best qualified for the proper discharge of so important and sacred a trust; to the heritors, or landholders, who are liable in one half of the assessment;[a] and to the kirk-session (consisting of the parochial clergyman and elders), whose

[a] While householders are liable in the other half. See below p. 42.

§ 2. FUND —ASSESSMENT.

official situations acquaint them with all, and particularly, the most needy and afflicted parishioners.

Who are members of this meeting.

THE heritors, ministers, and elders of every parish, are directed "to meet on the first Tuesday of February and "first Tuesday of August yearly, to consult and deter- "mine hereiu, as shall be thought fit, for every ensuing "half year, as they shall conclude."[a] The meeting is called by public intimation, made in the parish church (and in extensive parishes, by advertisement in the public papers) ten or more free days before.

THUS stands the law, according to the statutes, as explained by the decisions of the supreme court, and understood in practice.

Who assess?

THESE important powers, now lodged in such safe hands, the original act, 1579,[b] had, in the case of landward parishes, intrusted to judges, to be named by the king. To place the purse of the lieges at the discretion of any officer, in the nomination of the crown, was none of its wise or commendable regulations. This error was first corrected by the act 1592,[c] which, in case sheriffs or judges ordinary should be found remiss or negligent, appointed such justices "to be named by the ministers, elders, and deacons, "of every parochin, or of so manie parochines as shall "concur together." But those justices did not exercise their office with due attention: wherefore, on the narrative of their negligence and oversight, the act 1600, c. 19,[d] gave their powers to the kirk session, who, if needful, were to be assisted by one or two of the presbyteries. The presbyteries were commanded to take trial of the obedience of the sessions there-anent. The general statute,

Improvement of the system by act 1592.

Farther remedy by 1600, c. 19.

[a] King William's first proclamation, 1692, 12 Aug. (Appendix I, No. 50.) ratified by statutes 1695, c. 43, and 1698, c. 21.

[b] Appendix I, No. 40.

[c] Ibid, No. 41.

[d] Ibid, No. 43.

1661, respecting justices of peace, ordained those magistrates, on the first of December, and first of June, "to "take up" a list of the poor of every parish within burgh or land, and to appoint overseers, who were to call for the collections of said parish, or other sums appointed for the maintenance of the poor. Whether justices of peace were authorized or not, under this act, to assess the parish, certain it is, that this power was by the next statute, 1663, c. 16,[a] far better, and more constitutionally, vested in the heritors, or proprietors of land, who were themselves liable in the burden. This statute says nothing of elders or kirk-sessions, who had been employed by former statutes in this business. But the statute 1672, c. 18,[b] again employed that respectable body of men, so eminently qualified to be the dispensers of parochial charity.

§ 2. FUND—ASSESSMENT, BY WHOM? Order made by act 1661. Farther improvement by 1663. c. 16, and. 1672, c. 18.

THIS act put the law upon the footing on which it presently stands. It associates the kirk-session with the "heri- "tors, who, and the possessors of their land, are to bear "the burden of the maintenance of the poor persons of "each paroch, or *any of them, who shall meet with said* "*minister and elders.*" And the first proclamation by the privy council,[c] extremely explicit as to the procedure in landward parishes, which alone it respects, enjoins "the "minister, heritors, and elders, of every paroch, to meet, "&c.;" and the following year it was ratified and enlarged by the second proclamation,[d] which particularly regulated the stenting of boroughs, and the case "where "parishes are vacant, and have no elders;" as to both of which the first proclamation had been silent.

First proclamation, 1692, 11 Aug. *Second* proclamation, 1693, 29 Aug.

WITH respect to the last case, of vacant parishes without elders, it enjoins the heritors to meet, "and stent "themselves for the maintenance of their respective poor;

Vacant parishes.

[a] Appendix I, No. 47.
[b] Ibid. No. 48.
[c] Ibid. No. 50.
[d] Ibid. No. 51.

§ 2. FUND — ASSESSMENT, BY WHOM?

" and to appoint the uplifting, ingathering, and applying " the same, in the same manner as the heritors and elders " are appointed by our said former proclamation."

IT need scarcely be observed, that, under this proclamation, the heritors " were empowered to assess, not " themselves merely, but the whole parish." The first proclamation neither speaks of the persons from whom, nor of the mode, in which the assessment was to be levied. It must, therefore, be supposed to refer to the law as previously settled by the acts 1579 and 1663, &c. viz. that one half was to be laid on the heritors, " according " to their valued rent, or otherways," and the other half on the inhabitants, according to their substance. In this manner, under the second proclamation, are the heritors to proceed in vacant parishes. It provided for a case omitted by the former. [a]

[a] In the Encyclopædia Britannica, *v.* Poor, *vacant* is supposed to be synonymous with *landwart*; hence an inconsistency is imagined and blamed, with which, however, the two proclamations, when understood, are not chargeable.

Mr. Eden, in his valuable publication relative to the poor, has taken his account of the Scottish poor laws from this article of the Encyclopædia; and thus is betrayed both into this particular mistake, and to believe that, in Scotland, to use the words of the Encyclopædia, there " is no law in force on the subject of " a compulsatory assessment for the " poor.' In this mistake he is further confirmed by the expressions of some clergymen in their statistical accounts, which he quotes. Mr. Malthus, in his celebrated work on population, has fallen into the same mistake, he say, " The poor, in Scotland, " are in general supported by voluntary contributions, distributed under the inspection of the minister " of the parish; and it appears upon " the whole, that they have been " conducted with considerable judg- " ment. Having *no claim of right* to " relief, &c." (Ed. 1806, v. . 495.) And Mr. Rose, in his observations on the English poor laws, remarks, that the same erroneous assertion " is very confidently made, and very " generally received, in England." See his pamphlet annexed to Noland's Treatise on the English Poor Laws.

This is, however, so far from being true, that a train of decisions, on different branches of the poor laws down to the last session, all assume the existence of a compulsory assessment for the maintenance of the poor. The case quoted in the Ency-

§ 2. FUND—ASSESSMENT, BY WHOM?

THE third proclamation,[a] which had chiefly in view the erection of houses for the reception of vagrants, also gives power and warrant to the minister and "elders of "each parish, with advice of the heritors, *or so many of* "*them* as can concur with the minister and elders, upon "intimation to be made from the pulpit upon the Sabbath "day before, to decide and determine all questions that "may arise in the respective parishes, in relation to the "ordering and disposing of the poor, so far as the same "are not determined by the acts of parliament, and former "acts of our privy council, which are ratified by the acts "of parliament foresaid."

Third proclamation.

Result of the acts.

THESE proclamations of the privy council, were ratified by statutes 1695, c. 43, and 1698, c. 21. Under these statutes and proclamations, the minister, heritors, and elders, are intitled and bound to meet, make up the list of poor, and assess the parish for their "needful sustentation." The title of this joint body to appear in questions relative to the poor, has frequently had the sanction of the supreme court; judgments have been repeatedly pronounced against them, as bound to provide a subsistence for the poor.[b] Notwithstanding, therefore, some seeming variance and discrepancy in the enactments, the powers of the meeting constituted, as already mentioned, are, as much as any other part of our law, beyond doubt or controversy.

clopædia, in support of this, is misapprehended. The party there, an inhabitant of the parish of South Leith, refused to pay the assessment, and presented a bill of suspension, both on the general ground of the acts being not in force; and stating also, that at any rate the assessment was erroneous. The bill was passed by the lord ordinary, but no discussion took place. The party's quota was a trifle. The managers did not think it worth while to insist in the action: and thus the court had no opportunity of deciding either on the one point or the other.

[a] Appendix I, No. 52.

[b] 1779, 28th July, heritors and kirk-session of Coldinghame against heritors and kirk-session of Dunse; 1784, John Runchiman against heritors and kirk-session of Mordington.

§ 2. FUND—ASSESSMENT, BY WHOM?

THUS has the Scottish system of poor laws avoided that error so fatal in England. The right to enrol the pauper, and modify the allowance, being, in the first instance at least, vested in the very persons who pay the tax, and who can exercise those powers only in their public and regular meetings, held after due notice given, and with all advantages for scrutinising each claim, ample security is thereby afforded against any extravagance of management or misapplication of the money. Publicly met for the discharge of so serious and important a duty, this respectable body of men cannot, on the one hand, be suspected of unduly rejecting persons truly necessitous; still less, on the other, are they under any temptation to relax industry, and encourage idleness, by inrolling persons of a contrary description; for that would be taking money out of their own pockets. No otherwise, then, seems this assessment exceptionable, than any other plan whatever of providing for the poor, whether legal or voluntary, temporary or permanent. Charity must needs dispense her alms without that rigid scrutiny which here occurs. Of all the public funds of Europe, none is managed, it has been often remarked, with so little expence to the fund itself, none so frugally, none so impartially, and none is laid out more to the purpose for which they were raised, than the poor's funds under the care of the kirk-sessions of Scotland. "Never, perhaps, will Scotland find a more proper jury to determine the objects of public charity, nor the *quantum* necessary for their supply."[a] This praise, it is believed, is in general merited. Even where the heritors discharge their duty, by attending the regular meeting for laying on the assessment, and making up the list, still the execution of the business must fall on the session; who, for the benefit of the poor, in some places, submit to the trouble of making a weekly distribution, in place of a monthly. In most parts of Scotland, the minister "and elders are left by the heri-

Wisdom of the law. Precaution against extravagant assessment, or undue management.

[a] Statistical Account, vol. vi. p. 43.

"tors, some of whom are commonly members of the "kirk-session, to make the weekly distributions to the "poor, according to their discretion."[a] § 2. FUND-ASSESSMENT, BY WHOM?

BESIDES, the advantages of this arrangement are reciprocal. Safe for the public, and consolatory to the poor, the employing the parochial minister and elders in this religious and honourable duty, adds, moreover, to their personal consideration and professional usefulness. It gives weight to their exhortations, popularity to their characters, and favour with all men.

THE statutes do not specify how the members shall vote. It is therefore understood that they shall vote *per capita*, without regard to the class to which they respectively belong; that is, each individual, whether minister, heritor, or elder, has equally one vote. The members vote *per capita*.

HENCE, moreover, if intimation be duly made, the presence of none of those bodies, in particular, is indispensible to the validity of the meeting. There is no foundation for the contrary opinion, either in the reason of the thing, or the statutory language. If the minister should not be present, there can be no doubt that the heritors and elders; or, if the latter also be absent, the heritors, by themselves, can proceed to business. There is no reason for supposing the heritors to stand in a different predicament. "With the advice of the heritors, or as many as "can attend," is the expression used in the statutes;[b] and by no means represents the actual presence of the heritors, as more *sine qua non* than that of the others. If the minister has taken the usual and regular mode of giving intimation from the pulpit, which yet the heritors choose to neglect, the meeting, though consisting of minister and elders only, is possessed of its whole statutory powers; Presence of the heritors not indispensible to the validity of the meeting, if duly advertised.

[a] Hill's Theological Institutes. [b] 1672, c. 18.

§ 2. FUND ---ASSESSMENT, BY WHOM?

and is not only authorized and bound to adjust the list, but must proceed farther to assess the parish in whatever sum may appear necessary, to enable the necessitous poor to "live unbeggand."

THUS, then, the execution of this excellent provision for relief of the poor, depends not upon the heritors alone. The legislature's humane and christian intention cannot be frustrated, unless the minister also betray the sacred trust reposed in him, and, as well as the elders, concur with the heritors in disobeying the public law, and neglecting the anxious injunctions of so many successive enactments. This is a wise security. The heritors, when they attend, will always do their duty. But, absence from the country, ignorance of the state of the poor, and other causes, may prevent them from calling meetings, and taking any lead in the business. This, therefore, is intrusted also to the ministers and elders, whose official situation affords them the best access to know the state of their respective parishioners.

THERE is reason to believe, from several communications in Sir John Sinclair's valuable repertory, that this matter, important though it be, is unhappily misunderstood; particularly in the northern parts of the country, where the regular execution of the law is perhaps most indispensible. The non-residence of the heritors; their omission to supply, by donations to the poor, the want of their weekly offerings; the insufficiency of the other funds to enable the poor to live "unbeggand;" and, of course, the absolute necessity of permitting them to recur to that miserable and pernicious mode of life, against the express words and general intendment of the statutes: these evils the ministers lament with a warmth and eloquence becoming their sacred character.

BUT the remedy, as already mentioned, lies with them-

selves. And the application of that remedy is not of choice, but necessity. *Powers always infer duties.* Public functionaries are clothed with jurisdiction, not for their own sakes individually, but for the sake of the community. If a clergyman tamely suffer such injustice to be done to his necessitous parishioners, without taking the regular steps to call periodical meetings for making up the list of the poor, and ascertaining and raising the sum necessary for enabling them to live "unbeggand," he neglects an important duty committed to him by that constitution which establishes and supports his order.

§ 2. FUND—ASSESSMENT BY WHOM?

BUT should the minister and kirk-sessson, as well as the heritors, neglect this (in our statutory language) "Christian duty," even this case is not without a remedy. The proclamation, 31st July, 1694,[a] commands and requires "that the sheriffs of the several shires, and their "deputes, justices of peace, and magistrates of royal "burghs, within their several jurisdictions, to take trial "how far, and in what manner, the said acts of parlia-"ment, and proclamations of the privy council, have "been obeyed, and put to execution, conform to the "tenors thereof. And where any have neglected, or "been deficient in what is required of them by the said "acts and proclamations, to amerciate and fine them "therefore in manner therein specified and prescribed."

If the kirk-session also fail in their duty?

The remedy lies with justices of peace.

ON the idea of a permanent controul being thus vested in those magistrates, the quarter-sessions have more than once interfered, in order to obtain a legal assessment, when that appeared to have been improperly neglected.[b]

THIS meeting, in the first instance, has the exclusive power of adjusting the roll, and modifying the allowance.[c]

Powers of the meeting.

[a] Appendix I, No. 52.

[b] Stat. Account, vol. vi. p. 477.

[c] November 20, 1772, William Paton, minister, and others, concerned

§ 2. FUND—ASSESSMENT, BY WHOM?

But their judgment is not final. If they either refuse to admit one truly necessitous on the roll, or allow him what is utterly inadequate to his support, it is competent to crave redress from the courts of law. Seldom, however, is there occasion, (and little inclination, therefore, have courts of law) to interfere with this respectable meeting in the exercise of their discretionary powers.

Exclusive in the first instance.

If the meeting does wrong, will the courts of law afford redress

BUT a remark of Mr. Erskine, in his short section on poor laws, and the practice which still prevails in some places of the country, of giving a scanty supply, which the poor must eke out by common begging, make it necessary

ed in the maintenance of the poor of the parish of Eckford, against Patrick Adamson, eggman, in Rutherford.

Poor.—Sheriff has no power to fix the quantum of parochial aliment to indigent persons out of the poor's funds, and pass decree therefore, in the first instance.

In an action brought against two parishes for aliment to an indigent person, the sheriff of the county of Roxburgh having not only determined which of the two parishes were liable in the burden, but likewise fixed the *quantum* of aliment to be paid by the parish burdened, at the rate of so much money per week, according as the market price of oatmeal should be at certain prices, and decerned for payment of such aliment out of the poor's fund, a reduction was brought of the last part of the sheriff's decree, as being *ultra vires*.

Pleaded.—The sheriff did wrong in proceeding to modify a liquid sum for the aliment. The statutes have not committed this power to any judge, *in the first instance*, but to the minister, elders, and heritors, of the parish, by which the indigent person is to be alimented; they know best whether or not those who apply for the benefit of the public charity be proper objects of it, and what is necessary to supply their wants: therefore the legislature has empowered them to judge who are to be received upon the poor's roll; to impose the tax for maintenance of the poor, and to distribute that tax according to the necessities of the several indigent persons who are intitled to share it.

Observed on the bench.—The matter of distribution *de jure*, as well as from expediency, belongs to the heritors and kirk-session. The sheriff had no power touching it; and therefore the application, and consequent decree, as to this particular, fall to be regarded as totally inept and incompetent.

"The lords sustained the reasons "of reduction; and in respect of the "defender's being on the poor's roll, "find no expences due."

to explain, that the discretion intrusted to this meeting is limited to these inquiries: first, is the claimant a proper object of parochial charity? and, secondly, what is sufficient to maintain him in the manner in which a pauper ought to live? These two points being once ascertained in favour of the claimant, it is not discretionary, but necessary, to inrol him, and procure the money. § 2. FUND—ASSESSMENT, BY WHOM? In what respects their power is discretionary.

The practice, therefore, of those parishes who are at pains to prevent their poor from begging, is not only politically wise and expedient, but agreeable to the object and expression of the legislature. For the statute 1579, which was intended as a general code, and still is the leading regulation concerning every description the poor, anxiously introduced the *legal assessment* as a substitute for *authorized begging;* scarcely tolerable at a period when the peasantry were the natural charge of their feudal chiefs, as the poor in general were of the opulent monasteries. Assessment devised in place of authorized begging.

This is plain from the words of that enactment, "to "inquire the men and women quhair, &c. and quhat they "get commonly on the daye by their begging; and sikas "necessarily mon be sustained be almes, to see quhat they "may be maid *content of their awin consentis to accept* "*daily to live unbeggand,* and to provide quhair their re-"maining sall be be themselves, or in house with others, "with advice of the parochiners quhair the saids pure "peopil may be best ludged and abyde. And thereupon, "according to the *number, to consider quhat their neidful* "*sustentation will extend to everie oulk, and then be the* "*gude discretions, &c. to taxe and stent, &c. to sik oulkie* "*charge and contribution as sall be thocht expedient and* "*sufficient to sustcine the saidis pure peopil.*"

This is not all. According to the statute 1661, the duty of the overseers is to "take tryal of the good behaviour

§ 2. FUND—ASSESSMENT, BY WHOM?

" and carriage of the poor person, listed and inrolled as " aforesaid, that *if any of them so provided shall go abroad* " *to beg*, or otherwise miscarry themselves," &c. they are to be punished. Unless, however, by enabling the poor to live without alms, or, in the statutory language, giving them what their " needful sustentation extended to," how could the statute either justly punish them for begging, or gain its humane and salutary purpose of enabling them to " live unbeggand ?"

Badges for begging.

BUT, little accustomed as the country then had been to any permanent tax, great caution was necessary. The statute accordingly concludes with this exception: " *And* " *quhair collecting of money may not be had, and that it is* " *over great ane burden to the collectours to gadder victuals,* " *meet, drink, and ather things for reliefe of the pure in* " *some parochines to landwart:* that the provost and bail- " lies in burrows, and the said judges in parochines to " landwart, be advice of certaine of the maist honest paro- " chiners, give licence under their hand writs to sik and " sa many of the saidis pure people, or sik uthers of them " as they sall think gude to ask and gadder the charitable " alms of the parochiners at their awin houses, sa as al- " ways it be speedily appointed and agried how the pure " of that parochin sall be susteined within the same, and " not be chargeable to uthers, nor troublesome to stran- " gers." No parish, then, where money may be had, can " plead this exemption, or justify the raising by assessment " a less sum than is necessary for maintaining their poor " without begging."

Import of that act.

ACCORDINGLY, the idea of the statute 1579, to prevent begging by parochial assessment, is steadily pursued throughout all the subsequent acts and proclamations. The proclamation 1692, in particular, ordains them " to make " up the list of the poor within the parish, and cast up the

" quota of *what may entertain them according to their re-* § 2.
" *spective needs.*" FUND—ASSESSMENT, BY WHOM?

AMID this course of enlightened legislation, there appears an attempt in the third session of the second parliament of Charles II, to divert the parochial assessment to the maintenance of work and correction houses, which were to be erected over the kingdom. The poor, who could not be admitted into those houses, being thus deprived of their usual provision, the statute allowed them to supply the deficiency by begging. It provides,[a] that if the " same (con- Work and correction houses thought of.
" tributions at the paroch kirk) be not sufficient to enter-
" tain them, that they give them a *badge or ticket to ask* With badges or tickets
" *almes at the dwelling-houses of the inhabitants of their*
" *own paroch only, without the bounds whereof they are not*
" *to beg;* and that they do not at all resort to kirks, mer-
" cats, or any other places where there are meetings at
" marriages, baptismes, burials, or upon any other publick
" occasion."

But this attempt to revive licenced begging, which the wise policy of the parliament 1579 had anxiously exploded, was merely *accessary* to the other regulations of this statute; all which, also, fortunately proved abortive: the work-houses never were erected; the parochial funds were not so misapplied; and we thus providentially escaped what in time, like the English poor rates, might have grievously burdened one part of the community, without proportionally benefiting the other.

THIS statute, then, which is not only obsolete, but never at all appears to have taken effect, affords no countenance or apology to those managers and kirk-sessions who, against the general scope of our poor laws, and the particular direction of the statutes already mentioned, still continue to

[a] Appendix I, No. 48.

§ 2. FUND—ASSESSMENT, QUANTUM.

give the parochial poor badges as a title to beg, instead of supplying the deficiency of the other funds by a parochial assessment.

Mode of assessing.

Act 1579, c. 74.

IN order to raise the sum necessary for the ensuing year, or half year, the statute James VI, parl. 6, 1579, c. 74, ordains "to tax and stent the hail inhabitants within the "parochin, according to the estimation of their substance, "without exception of persones."

Precaution to prevent iniquity in the heritors

IN the case of landwart parishes, the power of assessing, was (as we have seen) intrusted to the heritors and kirk-session, who are themselves liable in the tax. Some precaution, therefore became necessary to prevent them from doing injustice to the tenants and other parishioners, who are not constituent members of the meeting. The danger to be guarded against was, the heritors relieving themselves of their proper share of the burden, by laying too much on the other parishioners. In order to prevent any possibility of this, the statute 1663, c. 16,[a] fixes the proportion between the two classes of parishioners, making one half payable by the heritors, and the other half by the *tenants* and *possessors*, or (as the proclamation 1692, terms them) *householders*; all which are various modes of expressing what the statute 1579 means by the "hail inhabitants within the parochin," exclusive of the heritors.

Heritors, how they pay.

THE heritors are assessed, either "conform to the old "extent of their lands within the paroch, conform to the "valuation by which they last payed assessment: *or other-ways* as the major part of the meeting shall agree; life-renters and wadsetters always, during their rights, paying as heretors."[b]

[a] Appendix I, p. cxxxii.

[b] 1663, c. 16, Appendix I, p. cxxxii.

AGREEABLY to this suggestion, the rule, wherever it can be adopted without manifest impropriety, is the valued rent. § 2. FUND—ASSESSMENT, HOW?

BUT, under the words, "or otherways," it is discretionary to assess by the real rent where that appears more conducive to the great end in view,—equality.[a] When the Valued usually the rule, or otherways.

[a] January 19, 1773, James Scott, collector of the assessments of Westkirk parish, and the heritors and session thereof, his constituents, against John Fraser, wright in Cabbagehall, in that parish.

Poor.—Power of heritors sustained to lay on an assessment for maintenance of the poor by the real rent, although formerly levied according to the valued rent, as being an expedient alteration from the particular situation of the parish.

A charity work-house, built at the expence of the heritors and parishioners of West kirk, was opened in the year 1762.

The parish funds being found insufficient to defray the whole expence of the house, the deficiency was made up by an assessment, which was at first laid on in proportion to the valued rent, one half to be paid by the heritors, and the other by their tenants.

At a meeting of the heritors, ministers, and elders, upon 24th July 1769, they assessed the inhabitants for the maintenance of the work-house, for one year, in twopence per pound sterling of real rent both of lands and houses, one half to be paid by the heritor, and the other half by the tenant. This mode of assessment was afterwards agreed to be continued.

Fraser, and some others, proving refractory, and refusing payment of their quota, agreeable to this mode, an action was brought by the collector against Fraser, and other two heritors, for payment of the proportion imposed on them, and for having it found and declared that the heritors of this parish are authorized to lay on this assessment.

Pleaded, in support of this last objection: the law adopts the valued rent as the rule in imposing all sorts of taxes and parochial burdens, as well as in regulating every parochial question. If it gives rise to inequality, it may be reasonable that it should be corrected by the proper authority, which is that of the legislature, who will take care, in remedying the abuse, to fix certain rules, that will do justice to all.

Answered. In the parish of West Kirk, the houses have of late greatly increased, and are still increasing; so that the rents of the houses are nearly three times more than the rents of the lands; whereas the valued rent of the lands is near ten times more than the valued rent of the ground of the houses which is valued; of that, if this rent was to be the rule, the rural tenant would pay near forty times more, in proportion, than the others, though these last furnish almost

§ 2. FUND—ASSESSMENT, HOW?

assessment is laid on by the real rent, the proprietors should be allowed deduction for repairs.[a] It is the landlord who gets the deduction.[b]

What heritage pays.

IN like manner, it is not merely heritable property paying cess to government that is rateable. The discretionary powers bestowed on the general meeting by the statute 1663, are sufficiently broad to apply to coal-works, mills, manufacturing establishments, and other subjects which yield a revenue to the proprietor or undertaker.

the whole poor. It is believed, that in no parish in Scotland where a town makes the principal part of the parish, the valued rent is admitted as the rule of assessment; for, in this case, (however well it may answer in parishes purely rural), it would be very oppressive upon the country heritors, and their tenants.

Observed on the bench.—The proclamations of the privy council are undoubtedly part of our law in this matter; and in them there is no limitation as to the mode of laying on assessments for maintenance of the poor. Where the valued rent can, it ought to be followed as the rule. This is a new case, where it would be unconscionable and unequal to lay it on by valuation; and the discretionary power, which heritor, have by these acts of privy councils was properly exercised here *ex necessitate*.

"The lords adhered to the lord "ordinary's interlocutor," which found the heritors at liberty to levy the assessment upon the real, and not upon the valued, rent in the parish, upon two several reclaiming petitions and answers.

N. B. The pursuer, in his answer to the last petition, joined issue with the defender's request to the court, at any rate, to lay down regulations for fixing the time of holding meetings that shall have power to make assessments, and other particulars; but the court waved their interposition, which, it was observed, had been refused in other cases; and that if they chanced to differ among themselves, it would be more proper to resort to the judge ordinary in the first instance.

[a] In the above case of St. Cuthberts, that arrangement which obtained the sanction of the court, was one fourth for repairs.

[b] Thus, suppose the assessment 6d. in the pound of real rent, a house of 20l. sterling would pay

Proprietor, deducting 1-4th for repairs, - - - -	3s. 9d.
Tenant, - - - -	5s.
	8s. 9d.

But if the proprietor possesses the house himself, then he pays only on a rent of 15l. or 7s. 6d.

§ 2. FUND—ASSESSMENT, HOW?

As in the case of houses, so, in rating mills, &c. an allowance ought to be made for repairs, or, which is the same thing, a free rental ought to be taken, after deducting such allowance; and sometimes it is necessary to fix a suppositious rental, in the case of subjects, which yield an annual profit, though not, properly speaking, a tack duty; and sometimes the poor's rate has been levied upon the valued rent as to the general body of the heritors, and upon the real rent, or supposed annual value upon subjects, which cannot be rated according to the valued rent; and when the case happens to be thus of a complicated nature, difficulties may occur; yet the discretionary powers of the heritors and session have been sustained in such instances, when exercised in a fair and equitable manner, and agreeably to the general spirit of the law.

THUS in the case of Inveresk, 28th May 1794, the rate imposed was partly on the valued rent, and partly on the real rent, and even upon a fictitious or conjectural rent, as to some of the subjects, such as collieries.[a]

[a] May 28, 1794, the collector of the poor's rates in the parish of Inveresk, against the magistrates of Musselburgh and sir Archibald Hope. Poor.—Proprietors of mills, and of coal and salt works, are liable to be assessed for the maintenance of the poor.

The heritots and kirk-session of the parish of Inveresk, some years ago, imposed an assessment for the maintenance of the poor. The magistrates of Musselburgh, who have mills within the parish, which they let in lease, and sir Archibald Hope, the proprietor of extensive coal and salt works, also within the parish, refused to pay any part of the poor's rate or these subjects.

The collector, appointed to levy it, brought an action, concluding against them for a proportion of the assessment, corresponding to the yearly rent or value of these respective subjects.

The lord ordinary reported the cause on information.

Observed on the bench.—The discretionary powers vested in the heritors by the statute 1663, are sufficiently broad to reach coal-works, and the other subjects under consideration; and as all of them add greatly to the number of poor, it is reasonable that they should contribute to their maintenance. In rating mills, however, a considerable deduction should be made from the rent for repairs.

§ 3. FUND—ASSESS-MENT, HOW?

The other half is to be laid upon the tenants, "according to their means and substance."[a] The rule generally adopted, is the rents of their respective farms.[b]

The court unanimously pronounced the following judgment: "Find, "that the coal-works, salt-works, "and mills, in question, are liable to "be assessed for the maintenance of "the poor; remit to the lord ordinary to proceed accordingly, to hear "parties further upon the mode or "rate of assessment, and the particular circumstances of each case, "and to do as he shall see just."

Thus far the decision, as reported in the Faculty collection, goes; the sequel of it, as appearing from the record, is as follows.

It was represented to Lord Craig, ordinary, to whom the cause had been remitted, that the sum of 215l. would be necessary to maintain the poor of the parish for that year; that the heritors and session had agreed that 5l. Scots should be levied from the 100l. Scots of valued rent from the heritors; that 40l. sterling should, as usual, be paid out of the collections at the church doors: and with respect to the town of Musselburgh, and other towns and villages in the parish, possessed of lands, mills, and other subjects, yielding revenue, that 4d. on each 1l. sterling might be considered as a fair and just proportion to be laid upon such subjects.

Upon advising a condescendence, with answers, replies, and duplies, his lordship pronounced the following interlocutor: "Finds, that the "mills, coal, and salt, works, be"longing to the town of Musselburgh, and to the heirs of the late "sir Archibald Hope, lying within "the parish of Inveresk, fall to be assessed as follows, viz. the mills of "Musselburgh at the rate of 4d. per "pound of the stipulated rent, as "settled and ascertained by the tacks "thereof at the time; finds, with "regard to the coal-works, that "every open or working pit, either "in the respondent's own hands, or "in those held under lease, must be "presumed to yield a profit or rent "of 50l. annually, and consequently "finds that these fall likewise to be "assessed at the same rate and proportion of 4d. per pound of rent, valuing each pit so open and working, "at said sum of 50l.; and as to the "salt-works, estimates them at a rent "of 40l. sterling a year; and finds "that the same must in like manner "be assessed at the aforesaid rate of "4d. per pound of the rent; therefore finds that the said several subjects, or properties, are to be burdened or assessed on the above principles annually in all time coming, "for the support and maintenance of "the poor of Inveresk, and decerns "and declares accordingly."

A short representation against the above interlocutor was preferred for the trustees of sir Archibald Hope, which was refused without answers; and then the judgment pronounced appears to have become final.

[a] 1663, c. 16.

[b] In the parish of Pentland, the assessment was laid upon the tenants, according to an estimate of what their respective farms would bring, if let at rack-rent. William Scoon objected

§ 3. FUND—ASSESSMENT, HOW?

IN boroughs, where the power of assessing still remains vested in the magistrates, there was not the same reason for dividing the quota in certain proportions between the proprietors and tenants. Under the original statute, 1579,[a] the hail inhabitants are to be assessed "according to the "estimation of their substance, without exception of per- "sons." A subsequent statute, 1597, c. 279,[b] on the nar- rative "of their being diverse inhabitants that dwells with- "in the free burrows with their families, and are of rea- "sonable substance, as alswa hes rents and livings within "the samin burgh, zit refusis to contribute for the enter- "tainment of the puir, watching and warding within the "burgh, with the rest of the nichtboures, or to bear their "part of sik uther dewties as concerns his majesties serv- "ice, statutes and ordains, that all sik as hes their resi- "dence and dwelling within the saids burrows be their "families, and may spend one hundreth pounds of zeirly "rent within the same, or stented be the discretion of the "neichtboures to be worth twa thousand marks in free "guades, sall be subject to be burdened with the rest of "the inhabitants."

According to the substance of each,

those spending 100l. of yearly rent,

or 2000 merks.

WHO are included in the description of *inhabitants*, has sometimes been the subject of controversy.

Inhabitants, who?

THE assessment, in particular, was determined to be payable by the partner of a mercantile concern within the borough; where he neither resided, nor kept servants, or any family establishment, but only had a furnished house for his occasional accommodation when he came there to do business.[c]

Substance, how ascertained in burghs.

No precise mode is specified by the statute for ascertaining the substance of individuals. Various modes have

to this. The court passed the bill of suspension, 16th May 1807. The case will be stated in appendix III.

[a] Appendix I, No. 40.

[b] Ibid. No. 42.

[c] 1798, Collector of Glasgow poor rates against Andrew Buchanan of Arconnel.

§ 2. FUND—ASSESSMENT, HOW?

therefore been adopted in the different royal boroughs. In Edinburgh the house-rent has been adopted as the rule of assessment. In Glasgow the tax is levied according to what is supposed to be the fortune or wealth of individuals, exclusive of heritable property without the borough; so that the magistrates assess them according to their heritable property within the borough, and their personal funds, wherever situated. In one case, where this last method was objected to as arbitrary and oppressive, the court did not find it illegal; but, in general, seemed to think "the "rule adopted in Edinburgh, of making every person pay "according to the rent of the house which he inhabits "preferable, as affording a *datum* sufficiently accurate, "and in no case liable to partiality." [a]

[a] December 2, 1797, Thomas Laurie, collector of the poor's rates for the city of Glasgow, against Robert Dreghorn.

"In Glasgow, a committee from "the town-council, and from the "merchants and trades-houses, have, "by immemorial custom, been an- "nually appointed by these bodies "for superintending the maintenance "of the poor. The first step taken by "the committee, is to make an esti- "mate of the sum necessary for this "purpose during the year of their "management. They afterwards "appoint a certain number of the "inhabitants (commonly fifteen), "who are neither members of the "town-council, nor of the commit- "tee for the poor, as assessors, to "proportion it, upon oath, among "the inhabitants at large, according "to the best judgment they can "form of their fortunes, exclusive of "heritable property situated without "the town.

"Mr. Dreghorn refused to pay "his assessment, contending, that "poor's rates can only be levied on "stock in trade and heritable proper- "ty within the town."

In an action brought against him before the magistrates in name of the collector of the poor's rates for his full assessment, they found, "that the "magistrates and council of Glasgow, "by whose authority the assessment "in question has been ascertained, "by means of sworn assessors ap- "pointed by them, for ascertaining "each inhabitant of the city's pro- "portion, according to his estimated "wealth, of this necessary public "burden for the maintenance of the "city's poor, have title, by express "statutes, to ascertain and levy the "due proportions of such assess- "ments; and in respect of said as- "sessor's apportionment of the sum "of 19l. on the defender Mr. Dreg- "horn; and, *separatim*, as Mr. Dreg- "horn has not denied that the ex- "tent of his fortune locally within "the city, and of his personal estate "wherever situated, which are the "legal measures of such public bur-

§ 2. FUND— GLEANING.

Another fund said to belong to the poor, is, the privilege of gleaning. In England this practice seems to have obtained, as well as in this country: for "it hath been "said, that by the common law and custom of England, "the poor are allowed to enter and glean upon another's "ground, after harvest, without being guilty of trespass; "which humane provision seems borrowed from the Mo-"saical law."[a] But the court of session, when that practice came under judicial discussion, pronounced a judgment against its legality. A field, where the farmer and his servants were busied in binding sheaves and loading carts with them, was entered by some people, men, women, and children, for the purpose of gleaning, or *gathering*. The farmer ordered them away, alleging they might pilfer as well as glean. They insisted on their right. A

"dens, which last is not subject to "such a burden without the city, are "adequate to sustain his proportion "of the said assessment, according to "the same proportion imposed on "the like estates of the other inha-"bitants, repelled the defences, and "decerned for the sums libelled."

The defender brought this judgment under review by advocation; and, *pleaded, inter alia*, there is an evident expediency in confining the application of the burden in this manner. The assessors may ascertain with tolerable precision the value of the heritable property and stock in trade, belonging to each individual within burgh; but when they attempt to fix the amount of a man's whole personal property, their computations must necessarily be liable to much uncertainty; an evil which can only be removed by a full disclosure of a man's affairs, rather than make which, many mercantile people would submit to great oppression.

Answered. The alleged inexpediency of this mode of assessment, if at all well founded, applies more strongly to taxing mercantile stock, than personal fortune not employed in trade. A person, though engaged in great commercial concerns, may be worth nothing; but the extent of a man's fortune, when realised, is commonly pretty well known to his fellow-citizens. The danger of disclosing his affairs, too, is incomparably greater to the one than the other. Supposing, however, there were objections to this mode of taxation, it is surely better than allowing persons, like the defender, with large personal fortunes not employed in trade, to be almost wholly exempted from paying any share of the poor's rates.

The lord ordinary "remitted the "cause to the magistrates, and found "the defender liable in expences."

The lords unanimously adhered.

[a] Black. vol. iii, c. 12.

§ 2. FUND—GLEANING.

scuffle ensued. One woman, who was hurt, sued the farmer for damages. He brought a counter action against her and the others for invading his property. The sheriff allowed a proof; and afterward's dismissed the woman's complaint; and fined some of the defenders in 10s. to the fiscal, and the same to the farmer; and ordained three of the defenders to be imprisoned for six days. The lord ordinary reversed this judgment: but the court altered the judgment of the ordinary; "on the general principle, that "the poor had no right to glean or gather; and that the "practice ought to be discouraged, on account of the op- "portunities it affords for pilfering."[a] And, notwith- "standing the above observation of judge Blackstone, the court of common pleas, in the time of Lord Loughborough, pronounced a similar judgment.[b]

Under whose management.

ALL those various funds above-mentioned, as well as the parochial assessment, are under the joint management of the kirk-session and heritors, or rather the ordinary administration and application of the money lies with the kirk-session, under the controul of the heritors. So the law was laid down in an interlocutor of the court of ses-

Rule laid down in the case of Humbie.

[a] Maclaurin, p. 744. 1771, John Wilson.

[b] "Two actions of trespass have "been brought in the common pleas "against gleaners, with an intent to "try the general question, viz. whe- "ther such a right existed. In the "first, the defendant pleaded, that "he being a poor, necessitous, and "indigent person, entered the plaint- "iff's close to glean. In the second, "the defendant's plea was, as before, "with the addition that he was an "inhabitant, legally settled within "the parish. To the plea, in each "case, there was a general demurrer. "Mr. J. Gould delivered a learned "argument in favour of gleaning; "but the other three judges were "clearly of opinion that this claim "had no foundation in law; that "the only authority to support it "was an extrajudicial dictum of lord "Hales; that it was a practice in- "compatible with the exclusive en- "joyment of property, and was pro- "ductive of vagrancy, and many "mischievous consequences." 1 Henry Black. rep. 51. Christian's Black. b. iii, c. 12, p. 212, N. 3.

sion;[a] by which this matter has ever since been understood to be regulated. § 2. FUND—MANAGEMENT OF.

IT was as follows: "The lords found, that the heritors "have a joint right and power with the kirk-session in "the administration, management, and distribution, of all "and every of the funds belonging to the poor of the pa- "rish, as well collections as sums mortified for the use of "the poor, and stocked out upon interest, and have right "to be present, and join with the session, in their admi- "nistration, distribution, and employment, of such sums, "without prejudice to the kirk-session to proceed in their "ordinary acts of administration, and application of their "collections to their ordinary and incidental charities, "though the heritors be not present nor attend: but for "the better preventing the misapplication, or embezzle- "ment, of the funds belonging to the poor, they found, "that when any acts of extraordinary administration, such "as uplifting of money that hath been lent out, or lend- "ing, or re-employing the same shall incur, the minister "ought to intimate from the pulpit a meeting for taking "such matter under consideration, at least ten days before "holding of the meeting, that the heritors may have op- "portunity to be present and assist, if they think fit; and "declare accordingly."

ANY of the heritors can call the minister and kirk-session to account for their management.[b] This appropriation of

[a] Kilkerran, tit. Poor, No. 3. The heritors of the parish of Humbie, against the minister and kirk-session, Feb. 13, 1751; which decision was approved of, and its principle followed in the late case of Black against the minister and kirk-session of Orwell, 20th Decem. 1803.

[b] 23d Nov. 1752, Hamilton against the minister and kirk-session of Cambuslang. F. C.

The pursuer brought his action as an heritor of this parish against the minister and kirk session for exhibition of the accounts and count-books of the money and funds belonging to the

§ 2. FUND—MANAGEMENT OF.

the funds to purposes strictly charitable, must, however, be taken under one equitable exception. As every fund is primarily chargeable with the expence of collection and management, so, in parishes where it has been found necessary to appoint a collector for the poor, his salary, and in all cases that of the session-clerk, who keeps the books and accounts relative to the poor money, are properly payable out of the first end of those funds. This principle was recognized in the case of Cambuslang, where the court "sustained the defence as to the articles laid out for the "purchase and after repairs of the tent, and also the articles paid to the session-clerk;" while it found, "that "the salary paid to the presbytery clerk *was illegal*; but, "in respect of the universal custom, found that the defenders are to have allowance thereof in time past, but "*not in time coming*; and repelled the defences to the "hail other articles." [a]

the poor of said parish; with a conclusion, that in case it should appear that the defenders had misapplied the poor's money to other ends and purposes than the law directs, they might be decerned to repeat the same to such person as the lords should appoint for behoof of the poor. It occurred as a doubt to some of the judges, whether this action was competent to one *single heritor* of the parish. 'The court of session "found, that it is competent to one "heritor to bring a process against "the kirk-session for accounting for "their management of the poor's "money."

[a] 1752, Nov. 26, Hamilton against the minister and kirk-session of Cambuslang. Upon production of the accounts, the following articles appeared stated to the discharge of the poor's money.

1, To a new tent for the field-preachings.

2, To the expence of repairing said tent from time to time.

3, To communion forms, tables, and table-cloths.

4, To rent for a preaching-field.

5, To constables and officers for attending to keep the peace at the sacrament.

6, To damages done to an heritor's dike adjacent to the preaching-field.

7, To the presbytery and session-clerks.

Excepting articles 1, 2, and (so far as relates to the session-clerk) 7, all the rest were condemned as misapplications of the poor's money. The general principle on which the interlocutor proceeded, seems not reconcilable with the particular findings. There was no other public fund for defraying

III. THE persons intitled to parochial charity, though not particularly enumerated by any statute, are comprehensively described by the oldest enactment touching the

§ 3. OBJECTS OF PAROCHIAL CHARITY.

defraying the expences of articles 3, 4, 5, and 6, any more than of articles 1 and 2; one and all of these articles were expences incurred through the great crowd, whose contributions, however, constituted the very fund in question. There appears no better reason for making articles 1 and 2, than articles, 3, 4, 5, 6, a charge on the collections. So far the interlocutor seems not quite consistent.

With respect also to disallowing the expenditure of part of the collections towards paying the salary of the presbytery clerk, doubts, which seem entitled to attention, have been entertained of the justness of the decision.

It is the opinion of very respectable clergymen, that the cases of Humbie and Cambuslang were not sufficiently considered, particularly in so far as the act of council 1693 does not appear to have been taken under view, or indeed, it may almost be said, pleaded on by the parties concerned. This and the other acts of council and proclamations concerning the poor, were expressly ratified by the act of parliament 1695, c. 43; and therefore ought to be considered as having the force of legislative enactments. The act of council 1693, "for preventing of any question that "may arise betwixt the heritors and "kirk-session about the quota of the "collections at the church-doors, and "otherwise to be made by the said "session, to be paid to the heritors "for the end foresaid, ordains the "same to be the half of the said col-"lections, and ordains the said kirk-"session to pay in the same from "time to time to the said heritors;" (appendix I, p. cxlvi,) which seems necessarily to suppose that the other half is to remain with the session, to be applied at their discretion alone, to certain incidental purposes to which it had previously been the practice of the kirk-sessions to apply some part of the collection. These were private occasional charities, the salaries of beadle, session-clerk, presbytery and synod clerks (who existed even in times of episcopacy), and any other fair object of customary application, to which no other fund was by law applicable. It is not disputed, that even as to this part of the fund the session may be called to account for embezzlement, or gross misapplication.—But so may the heritors, if they abuse their trust. The late case of Orwell did not come to any precise determination upon this subject, as in general the management of the minister and session was approved of, and the action dismissed.

They farther observe, with regard to the expences incurred for the clerks and other officers of kirk-sessions, presbyteries, and synods, that these courts are not only established by law, but form an essential and fundamental part of the constitution of the kingdom. That it is impossible to suppose them established

§ 3. OBJECTS OF PAROCHIAL CHARITY.

poor,[2] as "those who may not win their living otherways". In the other statutes, they are termed "poor, aged, lame, "and impotent;" and the statute 1579 describes them as "poor, impotent, and decayed, persons, whilk, of necessi- "ty, must live by alms."

UNDER these general expressions, the managers of the poor's funds have been in the practice of affording relief to infant children, idiots, or persons insane, and other classes of poor persons, who are not expressly mentioned in any of the statutes.

Temporary distress relieved. Wisdom of doing so.

As the best remedy against a numerous list of permanent poor, it has always been the practice to assist persons who, by misfortune, or disease, or other circumstances, are dis-

lished, without the means of providing for the officers they require: That their expences have been, at all periods, defrayed from the weekly collections, under the management of the kirk-sessions: That this, as well as the other articles before specified, was directly in the view of the legislature, in confirming the proclamations of William and Mary, by the act 1695; which gives to the kirk sessions the disposal of one half of the collections, in conformity with the practice which had prevailed before: That the same practice has been uniformly followed from 1695 to the present time, if a few instances are excepted, in which the clergy have been intimidated by the threatenings of prosecutions by heritors, in consequence of the decisions given in the cases of Humbie and Cambuslang, and have been persuaded to pay the presbytery and synod officers from their own pockets; a usage, which can neither be justified nor warranted by any law existing, and which would impose a permanent burden on the parochial stipends, which no court af law would venture to lay on them.

They at least think, that these circumstances afford some reason to question the authority of the decisions, in the cases of Humbie and Cambuslang, as precedents; and, if the statement is correct, some ground for suspecting, that they are decisions against principle, and against positive statute. And they observe that, at any rate, it is incumbent on those, who think these decisions ought to be supported, to shew from what funds the officers in the inferior ecclesiastical courts, and the other purposes specified in this note, are, or have been, legally provided for.

[2] 1424, c. 25. Appendix I, p. cir.

abled, for a time, from maintaining their families. And even when the necessary relief is not of such extent, or for such a period of time as makes it worth while to place the distressed individual on the roll, still it is usual, in practice, to afford such supplies as the exigency requires. By means of these seasonable supplies, many, who would have been irretrievably ruined, or prematurely cut off, leaving their families a permanent burden on the public, are restored to the exercise of their lawful industry; and afterwards, instead of needing farther aid, sometimes thankfully repay the money so seasonably advanced to them.[a] But, of this, particular charity, farther afterwards.

§ 3. OBJECTS OF PAROCHIAL CHARITY.

IN like manner, parochial aid is afforded to those who, though willing to work, yet, with their utmost exertions, cannot earn enough for their subsistence; as, for example, to widows, left unprovided with large families of young children.

[a] By the failure of the two successive crops of 1799 and 1800, Scotland was afflicted for two years with an extreme dearth of provisions. To relieve the lower classes of the community, the heritors of some parishes, imposed, with the assistance of their kirk sessions, an assessment under the poor laws, payable one half by themselves, the other by the tenantry or householders of the parish.

In the parish of Dunse, a poor's-rate had been established for almost a century, there never being fewer than from one hundred to one hundred and twenty persons on the roll. During the two years of scarcity, it was necessary to raise a further sum, to afford them meal at reduced prices; and it was also thought necessary to provide for many who were not upon the poor's-roll, but who from the pressure of the scarcity required temporary assistance, the price of labour not bearing any proportion to the increased price of provisions. For the sake of distinctness, two lists were made up; the one containing this last class of poor, called the industrious poor; and the other containing the ordinary poor, who, from the circumstances of age and infirmity, independent of the peculiarity of the season, must have been maintained. The assessments for these two classes were also kept distinct.

John Darling, tenant in Chalkielaw, refused to pay his proportion of the assessment for those who were not the ordinary poor of the parish. He was cited at the instance of Adam Pollock, collector of poor's-rates, before the Justices of Peace, who decerned against him, with expences.

This judgment Darling suspended, and the case was reported to the court,

§ 3. OBJECTS OF PAROCHIAL CHARITY.

INDEED, such families are usually maintained in a better condition, and kept in a higher class of society than those poor who are utterly disabled from any sort of labour: That the former may not fall into a state of absolute poverty, like the latter, but may be in condition to do as much work for themselves as possible, they are fed, clothed, and accommodated, so as to keep them on a footing with their fellows, in that labouring and industrious class of the community to which they belong.

Wisdom of maintaining these better.

Partial aid.

IN like manner, partial assistance is afforded to those who, by reason of age or infirmities, are not able to earn the full rate of wages usually given in the place where they live, but are under the necessity of working at an inferior

court, when the bill was passed, (6th March 1801), "to the effect of trying the question, but without prejudice to payment of the assessment laid and charged for in the meantime."

Informations were ordered by the lord ordinary, upon hearing parties, and these he reported to the court; on advising which, a hearing in presence was ordered.

The court was not unanimous. Several of the judges expressed their opinion, that this case did not fall under the provision of our existing poor-laws, and that any extension of them would be dangerous. But, upon the whole, it (19th November 1802) "repelled the reasons of suspension; found the letters orderly proceeded, and decerned."

This judgment was submitted to review in a reclaiming petition upon advising which, with answers, the court (17th January 1804) adhered."

Even Mr. Malthus, the formidable opponent of a compulsory provision for the poor, allows the propriety of giving occasional assistance under temporary distress.

"At the same time, we must not forget, that both humanity and true policy imperiously require that we should give every assistance to the poor on these occasions, that the nature of the case will admit. If provisions were to continue at the price of scarcity, the wages of labour must necessarily rise, or sickness and famine would quickly diminish the number of labourers, and the supply of labour being unequal to the demand, its price would soon rise in a still greater proportion than the price of provisions. But even one or two years of scarcity, if the poor were left entirely to shift for themselves, might produce some effect of this kind, and *consequently it is our* interest, as well as our duty, to give them temporary aid in such seasons of distress." Principles of Population, B. 3, ch. 5, of Poor Laws.

rate of wages, insufficient for their own support, or that of their families.[a] § 3. OBJECTS OF PAROCHIAL CHARITY.

THE above descriptions of persons, who require parochial charity in consequence of some special visitation of affliction to the individual, have been denominated the ordinary poor, to distinguish them from those who need a temporary supply from the public, only in consequence of the dearth of provisions, or other extensive calamity, which presses upon a whole class or order of inhabitants of the country. Ordinary poor. Extraordinary.

THUS, then, under the denomination of ordinary poor, there are, we have seen, two different classes of people intitled to parochial aid: first, the poor, properly so called, whose wants, whether requiring partial or total supply, arise from a permanent cause, and of whom consists the list adjusted at the general meeting of the heritors and elders: secondly, those needing occasional charity, whether strangers passing through the country, or residenters, in the predicaments already specified. The latter are not considered as in the class of poor; on the contrary, the virtue and political necessity of occasional charity, is its tendency to keep such persons and families from falling into that unfortunate and unprofitable condition. As preventive, is, in many respects, preferable to vindictive, justice, so is this kind of charity to all other modes of it whatever. It prevents that mischief to the community and to the individual, which is the consequence of professional begging: but to preventive charity is to be ascribed all that private happiness and public benefit which arise from keeping such families from falling from that useful and respectable class of citizens who support themselves by their industry. Great benefit from occasional supplies to persons not on the roll.

[a] The utility of this last application of parochial charity has not escaped the notice of the statesmen of other countries. See Mr. Pitt's speech and bill. Apud Eden's State of the poor, vol. iii, append. No. II.

§ 3. OBJECTS OF PAROCHIAL CHARITY.

THE kirk-session had, from time immemorial, been principally entrusted with the dispensing of those occasional charities. Assuming this to be the fact, the proclamation 1693, as already mentioned, ordains the one half of the collections at the church door to be paid over, as part of the fund for the permanent poor; the remainder, of course, remains with the session, to answer occasional demands, according to use and wont. At the period of that act, the collections at the church-doors bore a greater proportion to the other funds than they do at present. Should this proportion of the collections, therefore, be at any time insufficient for those occasional demands, the heritors, upon a sound and liberal construction of the acts, allow the whole collections to be retained for that purpose. In like manner, wherever the whole collections are inadequate, it follows, that a part of the fund raised by assessment ought to be lodged with the kirk-session for the same indispensible purposes, not only a legal, but the most important, branch of parochial charity.

Fund for defraying occasional charities.

One half of the collection by proclamation 1693.

BUT, according to the rule laid down in the case of Humbie,[a] such funds, though consisting merely of the one half of the collections, are, as well as the rest, under the controul of the heritors, while the management, in the first instance, is at the discretion of the kirk-session. Such funds, lying in their hands for occasional charities, cannot be diverted by them to other purposes, how useful or public, or meritorious, soever, if they do not, *bona fide*, come under the description of parochial charity. Agreeably to the above-mentioned decision, therefore, the session can be called to account by any one of the heritors, to shew in what manner such fund has been expended, and will be personally liable to replace such part of the money as may have been applied by them to purposes not charitable. Because, if occasional charities did not occur sufficient to ex-

Under the controul of the heritors.

May be called to account for their expenditure thereof.

[a] See above, 49.

haust the whole sum so retained by them, such surplus would be poor's money, which, of course, would so far diminish next year's parochial assessment. § 4. PARISH, WHAT LIABLE.

WHETHER any part of it may be applied to the payment of the presbytery clerk, depends upon this other question, Whether by use and wont, or otherwise, such be a proper application of poor's money?[a] This at least is clear, that it is not in consequence of the kirk-session possessing any more discretionary power over the half of the collection than over the other funds, that such application of it can be justified. Their discretion lies in judging, *bona fide*, of the title of the claimant's as objects *of charity*, not in spending the money on other purposes than charity. If to the salary of presbytery clerk.

IV. THE poor person must be maintained by the parish either where he was born, or where he has resided during the requisite period without parochial assistance, or public begging.

A SETTLEMENT is obtained in a parish by residing there for the period of three years. The act 1579 uses the expression, "seven years bypast;" as does also the proclamation 1693, which is ratified by the statutes 1695, c. 43, and 1698, c. 54. The proclamation, however, cannot be presumed to be ratified in any sense inconsistent with the statute 1672, c. 18, which likewise is ratified; but requires no longer residence than three years.[b] Three years residence without charity.

[a] See above, p. 50, note a.

[b] June 6, 1745, Overseers of the Poor in the parish of Dunse *contra* the heritors and inhabitants of the parish of Edrom.

One M'Caul, an indigent person, born in the parish of Edrom, but who for six years last past had resided in the parish of Dunse, brought an action before the justices of the peace of the shire of Berwick, against the minister and treasurer to the kirk-session of Edrom, for having an alimentary provision settled by them upon him and his family; which the justices very improperly sustained, and modified half-a-crown a week.

This decree being brought before the

§ 4. WHAT PARISH?

THE three years residence must immediately precede the pauper's falling into poverty, and not merely his application for parochial charity.[a]

THE statute 1663, c. 16, "which only burdens the "place of the person's residence with his maintenance, in "case the place of his birth was unknown, respects the "case of vagrants and vagabonds alone, who had no fixed "residence any where."[b] It is only when the pauper has not acquired a settlement in any parish by residence, that

If the place of his birth be known?

the court of session by suspension, and at discussing thereof, appearance made for the parish of Dunse, the question turned upon these points; 1*mo*, whether the place of the person's birth, where that is known, ought not to be burdened with his maintenance, whatever time he may have resided elsewhere; or whether residence for a certain period does not intitle to maintenance? and, 2*do*, if it does, whether it be three years or seven years residence that entitles to it?

The decision was, "That the parish "in which persons indigent, or becoming indigent, have resided during the immediate three years preceding their application for charity, are bound to subsist and aliment such indigent and poor persons; and therefore suspended the letters." And in regard that the procurator for the charger appeared also for the parish of Dunse, in which the charger had resided upwards of three years, "found the parish of Dunse liable to subsist and aliment him, and decerned the heritors of the parish to meet and stent themselves accordingly." Kilkerran.

b Runciman against parish of Mordington; 1784, Jan. 24.

In the parish of Mordington, John Runciman had for many years supported himself as a labourer. He then removed to a neighbouring parish. Soon afterwards becoming blind, he lived in the latter parish for more than three years upon *private charity*. Thereafter he brought an action against the managers of Mordington poor money; who were found liable by the sheriff. His judgment the parish brought under review by suspension. Lord Monboddo, ordinary, suspended the letters simpliciter, i. e. found the parish not liable. "In respect it does not "appear that the charger's residence "was within the parish of Mordington for three years immediately "preceding the charge." But the court altered that judgment; finding, "that in respect the charger resided "in the parish of Mordington until a year prior to his blindness, "and afterwards acquired no funds "for subsistence, that parish was "liable for his aliment; and found "the letters orderly proceeded." F. C.

a Kilkerran, p. 406.

he must be maintained by the parish where he was born.[a] § 4. WHAT PARISH?

IN order to free the parish where the pauper was born of the burden of his maintenance, he must have acquired a settlement in some other parish *within Scotland*. It frequently happens that young men quit Scotland, and do not return till, in their old age, they fall into poverty. It seems hard that this country should be burdened with their maintenance, when other countries have had the benefit of their industry. But there does not seem to be any remedy. To return to one's native country, there to lay our bones beside our fathers, is natural and allowable. *Unusquisque senum optat in patria mori ut ubi vitam est ducatus, ibidem et corpus deponat. Apud altricem terram et majorum monumentis inferatur.* The pauper cannot be prevented from coming to his native country, but when he arrives there must be maintained by the parish where he was born, or had acquired a settlement before his departure.

IN this matter, as well as in all others, concerning municipal law, England is considered as a foreign country. A man can no more be removed into England, or prevented from returning from England, than he can be removed beyond seas. England a foreign country.

IN such questions it makes no difference, and cannot

[b] August 7, 1767; Baxter against parish of Crailing. F. C.

This case was decided on an inquiry into the practice. The court found "that John Baxter was intitled "to be maintained by the parish of "Roxburgh, as the parish where he "had resided during the immediate "three years preceding his application for charity." And in a still later case, Waddel against the heritors and kirk-session of Hutton, the court considered the law finally settled by the above decision; and therefore three years residence being proved, would not listen to any arguments from the birth-place being known. June 14, 1781. Ibid.

§ 4. WHAT PARISH?

enter at all into view, whether the pauper has acquired, or not, any legal settlement, in some English parish or other foreign country. It is not a just ground for refusing aid in this, that the pauper, if he goes back to another country, will be intitled to parochial aid there.

IT is material, however, to know that the English law concerning removals, extends only from one parish to another within England. A Scotsman falling into poverty in England, cannot, against his will, be sent back to Scotland to be maintained by his native parish; but, if he has not acquired a legal settlement in any English parish, he is intitled, as a casual pauper, to support from the parish where he resides; which has no recourse for indemnification against the Scottish parish. Accordingly, in the only reported case of this nature, the action was in the name of the pauper herself, claiming maintenance from the Scottish parish.[a]

[a] Mary Brown, residing in Berwick-upon-Tweed, and the overseers of the poor there, and their mandatory pursuers, against the heritors and kirk session of the parish of Mordington, defenders.

Mary Brown, and Alexander Brown her husband, acquired a settlement in the Scottish parish of Mordington, by residing there for more than three years without parochial aid. At Whitsunday, 1794, they removed to the town of Berwick, the husband working as a tailor, till the year 1798, when he enlisted as a soldier, leaving his wife and family in poverty. Though they had lived so long in Berwick, they had not, according to the laws of England, acquired a settlement. As casual poor, however, their present necessities were supplied from the poor funds of Berwick, till it should appear what parish was ultimately liable. For this purpose, an action was brought before the sheriff of Berwickshire against the parish of Mordington, as liable to maintain the said Mary Brown and her children, two of whom had been born in the parish of Foulden, two in the parish of Mordington, and one in the parish of Berwick. The sheriff substitute's decision was, "Finds, that "where parents have acquired a legal "settlement, they acquire not only "for themselves, but for such of their "children as are indigent, and with "them during the time of such acquirement: Finds, from Mary "Brown's declaration, she nor her "children have no claim to aliment "from the parish of Mordington; "and refuses the petition." This cause

MR. NOLAN says expressly, " This rule (of persons being irremovable in certain situations) " seems, upon the same " principle, to apply to the case of persons not born in

§ 4. WHAT PARISH? —CHILDREN.

cause came under the review of the court of session by advocation; and 5th March, 1803, " The lord ordi- " nary having heard parties procu- " rators, in respect the proclamation " fixing parish settlements requires " three years residence, immediately " preceding application for charity; " and that, in the present case, the " paupers resided in Berwick for " upwards of three years, after leav- " ing the parish of Mordington; " therefore repels the reasons of ad- " vocation; and remits the cause " simpliciter to the sheriff; supersed- " ing extract till May." Thereafter the following interlocutor was pro- nounced, December 8, 1803, " Hav- " having again considered this repre- " sentation, with the answers there- " to, and whole process, finds, that, " in the interlocutor of 5th March " last, in order fully to express the " opinion the lord ordinary enter- " tained upon hearing the cause, " there ought to have been added " after the word charity,—or rather " lays the burden upon that parish " where the pauper had last resided " for three years together;—but in " respect the present case contains " this speciality, that the interme- " diate residence, though for more " than three years, and such as " in Scotland would have subjected " the parish where that residence " took place, was in Berwick-upon- " Tweed, where, it is contended, " the residence specified is not suf- " ficient to establish a settlement; " and therefore involves the consider- " ation of the law of another coun- " try, makes avizandum with the " cause to the whole lords; and ap- " points the parties to prepare in- " formations against the box-day " in the ensuing Christmas recess, " and put printed copies thereof into " the lords boxes, in order to be re- " ported." The court, on advising mutual memorials, with the opinion of English counsel, " repelled the " reasons of advocation, and remit- " ted to the sheriff simpliciter; and " found the advocators liable in the " expence of extract."

This interlocutor, 6th July, 1805, was altered, after advising petition and answers; but by the narrowest possible majority. The judges who dissented from this judgment, put their opinion on these grounds, That the pauper neither had been, nor could be, removed from Berwick to Mordington; but was intitled to maintenance in Berwick as a casual pauper, i. e. one having no legal settlement in any other parish in England.

It does not seem possible to obviate this view of the case. What moved the other judges, was the circumstance that the pauper had not acquired a legal settlement in England. But whether she had or had not, appears to be immaterial, while the law and the fact above stated are admitted; viz. the fact that the pauper still continued to reside in Berwick; and, 2dly, The law that the

§ 4. WHAT PARISH? —CHILDREN.

" England or Wales, and not having gained a legal settle-
" ment there."[a]

AND the same author farther observes, " if the husband " is a foreigner, and has no settlement, the wife cannot " be removed without his consent, although she asks a " temporary relief, *because the husband* has no settlement " to which he can be sent, and he and his wife shall not, " against their will, suffer such a temporary division from " each other."[b]

CHILDREN being considered as part of the family, must be maintained by the parish which would have been liable in the maintenance of the father, had he been the claimant.

THE place of their birth is not liable, except the settlement of their parents be unknown.

THIS point was first decided in a competition between the parishes of Dunse and Coldinghame. In the former parish two children were born in lawful wedlock. Soon after the birth the parents removed to the latter parish, where the children lived for more than three years in

the pauper could not, against her will, be removed out of England, and while there, must be supported by the parish where she fell into poverty.

Even in the paper given in for the pauper, and for the overseer of the poor of Berwick, it was not maintained that the pauper could be removed out of England against her will.

Their statement was, " that when " the English parish in which a " Scots pauper resides, finds out the " parish in Scotland to which such " pauper belongs, the English parish " immediately requires the Scots " pauper to apply to his own parish " in Scotland for relief, in the man- " ner directed by the Scots law, by " petition or otherwise; and from " the time of such application, he " ceases to be considered as one of " the casual poor in the parish in " England in which he resides."

[a] Treatise on the English Poor Laws, vol. 2, 138.

[b] Nolan, ibid. 135.

family with them. On the father's death the mother applied for parochial aid towards their maintenance. It was decided that the latter parish was liable.[a] §. 4. WHAT PARISH? —CHILDREN.

THIS decision was quoted from the bench with approbation, in the subsequent case of a child born in lawful wedlock in the parish of Arbroath. Some days after the birth the parents removed to the parish of St. Vigeans. Two years after, on the mother's death, the child was taken by its maternal uncle to the parish of Alyth. The father, after residing upwards of three years in the parish of St. Vigeans, went abroad. On the uncle's death, the child becoming destitute, the question occurred, which of the three parishes was bound to maintain it? The court of session pronounced judgment against the parish of St. Vigeans, where the father had acquired a settlement.[b] The father's settlement, if known, is theirs.

IN the above case, the rule was laid down by the bench quite generally. The place of the father's settlement, therefore, must be equally liable to maintain even those children who neither were born, nor ever resided there.[c] If the child never was there?

THE point has long been settled in England: "It was "ruled by all the court of common pleas, upon argument, "that where the father gains a second settlement after the

[a] 28th July, 1779. F. C.

[b] 25th Jan. 1800; Anne Cuthill.

[c] It is no doubt true, that a different decision was once pronounced. John Robson acquired a settlement in the parish of Bowden. Thereafter he removed to Melrose; where a child was born to him. Within three years he went to reside in the parish of Stitchel, where another child was born to him. He died shortly after. According to the rule laid down in the text, the parish of Bowden should have been liable in the childrens aliment; wherein, however, the court of session subjected the other two parishes respectively. (Parishes of Melrose and Stitchel against parish of Bowden, 24th January, 1786.) But even at this time, when the rule was not so well understood, the case was thought to be attended with much difficulty; and were it again to occur, there seems to be no reason to doubt that it would be differently decided.

§ 4. WHAT PARISH? —CHILDREN.

" birth of his child, that settlement is immediately communicated to the child; and a child may be sent to the " place of his father's settlement, *without ever having* " *been there before.*"[a]

If the father be dead?

" THE death of the father does not alter the child's " settlement."[b] So, moreover, " if the father dies before " the child is born, yet the child shall be settled where " the father was settled before his death."[c]

AND the learned author of the latest treatise on this subject farther states, that " the manner in which the " parental settlement has been acquired is equally immaterial. It may be gained by the father's own act, or " derived from his father, or grandfather, or any other " remote relation, to whom a settlement is first traced in " the direct ascending line.[d]

[a] H. 10, G. St. Giles's, Reading and Eversley, Blackwater. 2 Sess. 3 c. 112. Str. 580. L. Raym. 1332. Burn Justice. (Poor, tit. 4.)

And in a question, " whether the " children, being above the age of " nurture, shall be removed with the " father to the father's settlement, " where the child had never inhabited?" it was observed by lord " chief-justice Lee: " In the case of " Eversley Blackwater, the court " was of opinion that a child might " be sent to the settlement of his father, though it never had been there " before, contrary to an opinion of " lord Parker, in a former case; and, " he said, the true distinction, I " think, is, that when children have " gained no settlement, but continue " part of their father's family, they " shall follow their father's settlement." (M. 12, G. 2. Sowton and Sydbury, 2 sess. c. 150. Andr. 345. Burn, ibid.)

[b] Howel and his wife were settled at Luckington, and came to St. Austins, where a child was born. The father died in the king's service. The question was, who shall keep the child? It was objected, that it was settled where born; for that it could not be sent to the father, when he was dead. But lord-chief-justice Holt ruled, that the death of the father does not alter the child's settlement. Comb. 380. 3. Burn. Just. tit. poor, § 2.

[c] M. 5. An. Q. and Clifton. 10 Vin. c, 382. 3 Burn, tit. poor, 42.

[d] Nolan's Treatise of the Laws for the relief and settlement of the Poor, v. 1, p. 164.

§ 4. WHAT PARISH? —CHILDREN.

THE same author farther remarks, that "as the father's "settlement, where he has one, must always fix that of "his child, it is obvious that recourse should be had to "the settlement of the father's mother, prior to that of "the pauper's own mother."

THE rule with us, therefore, is, that the child's settlement follows that of its father, if the latter can be found.[a]

BUT if the father's settlement cannot be found, or if he have no settlement, being a foreigner, and not having resided the requisite period in any parish, the children must be maintained by the parish where their mother had, before her marriage, acquired a settlement: during the coverture she could acquire none, being merely part of her husband's family.[b]

BUT after the father's death, the mother becomes, in his stead, the head of the family, bound by law and nature to provide for her children. If she, therefore, in her widowhood, shall reside within any parish for three years without parochial charity, she acquires a settlement for herself and children. Her right, in this case, descends to her children. Should she thereafter die, or fall into poverty, her children must be maintained by the parish where she thus, in her widowhood, had acquired a settlement; in preference both to the place of their father's settlement, and to that of her own before marriage.[c]

BUT the settlement which their mother acquires by a subsequent marriage, is not communicated to the children

[a] Burn, ibid, p. 430.

[b] H. 12. G. Westram and Chidingstone. An Englishman, whose settlement "was not known, married, "had a child, and ran away: the "child was then nine years of age. "By the court, the mother and children ought to be settled where the "mother was settled before marriage." Foley, p. 252. Burn, ibid. p. 429. Nolan, v. 1. p. 164.

[c] Burn, tit. poor, c. 2. Noland, v. 1, p. 166.

§ 4. WHAT PARISH? —ILLEGITIMATE.

of the first marriage; because it is not then her family, but her husband's.[a]

Two questions, concerning which nothing occurs in our books, are the subject of various decisions, and subtle distinctions in the English law. The one is, when a child may gain a settlement in its own right; the other is, when a subsequent settlement, acquired by the father, ceases to be communicated to the child.

As to the first, "The age at which a child is said to be "capable of acquiring a settlement by its own act, is seven "years and forty days."[b] If a child leave its parents, and for three years support itself in another parish, by earning wages or otherwise, the latter parish will be liable in its maintenance.

As to the other question, it seems to be held in England, that a new settlement acquired by the father, is not communicated to such of his children as were previously married, even though living in family with him;[c] or, who were previously separated from his family.[d]

[a] A man settled at St. Katherine's married, and had six children born there, and died. After his death, his widow goes into the parish of St. George with her six children. The question was, whether the children should be settled where their father was last settled, or have a settlement with the mother in the parish of St. George? and the whole court were of opinion that the six children were settled in the parish of St, George, where the mother's last settlement was. Foley, 254, 1 sess. c. 69. 3 Burn. Justice, p. 426.

[b] Nolan, v. 1, p. 167. 3 Burn's Justice, tit. poor, 3 & 4.

[c] A son being of full age and married, afterwards removed into another parish with his father, where he continued to live with him, was held not to follow the settlement which his father afterwards acquired there (Nolan, v. 1, p. 167.)

[d] A son, nineteen years old, went into another parish, married, and continued separate forty years previous to his father's gaining a new settlement, without having himself acquired one, he does not follow this new settlement of his father's. St. Michael's, in Norwich, *v.* St. Matthew's, in Ipswich, 2 Bott. 4 v. pl. 63. Noland, v, 1, p. 169.

§ 4. WHAT PARISH? —ILLEGITIMATE.

THE same must be the case with us: If a child leaves its father's house, but acquires no settlement of its own, from its never having resided three years in any one parish, and comes afterwards to fall into poverty, it must be maintained by the parish where its father had obtained a legal settlement at the time it left his family; and, although its father may have subsequently obtained another, the benefit thereof will not be communicated to such child; which neither was born, nor either really or constructively resided there.

IN the English law, the same rule does not obtain in the case of illegitimate children: their settlement does not depend upon that of their parents; they are *prima facie* held to be settled in the place of their birth.[a]

THE reason of this difference in the law respecting legitimate and illegitimate children is this: "an illegitimate "child is considered as the offspring of no one; or, as it "is sometimes termed, to cut off all idea and hope of pecu- "liar relationship, the child of the people. There exists "no privity of blood between it and the reputed parents, "through which it can lay claim to their settlement.[b]

THERE are no authorities nor decisions for stating, that the same distinction between legitimate and illegitimate

Likewise, the son of a Scotsman, "who inlisted in the army at nine- "teen years old, before the father "had acquired any settlement in "England, and who did not return "to Great Britain till after his fa- "ther's death, was held not to be "settled in the parish where the "father had gained one after sepa- "ration; for he was emancipated "some years before the father had "acquired a settlement, and had put "himself under the controul and "government of others; and *it is* "*immaterial whether or not he has* no "other settlement for himself." Rex *v.* Stanwix, 5 Term Rep. 670. 2 Bott. 55, pl. 77. Noland, v. 1, p 169.

[a] 3 Burn's Justice, p. 398.

[b] Nolan's English Poor Laws, v. 1, p. 174.

§ 4. WHAT PARISH? —ILLEGITIMATE.

children has been adopted in our law. And one late decision seems to have proceeded upon an opposite principle.[a]

MARION HUNTER, of the parish of Gladsmuir, left that parish at whitsunday, 1791, and entered into service in the parish of Salton, where, about the middle of August thereafter, she was delivered of a female bastard, which, together with the mother, were a few hours afterwards conveyed, by the maternal grandmother, to the parish of Gladsmuir. The mother, some time thereafter, left the parish of Gladsmuir, and entered into service in the parish of Preston; but the bastard remained still with her maternal grandmother, till the death of the latter in 1801. Being an ideot, and unable to provide for herself, she next resided for two years with her mother, who was married in the parish of Preston. Her mother dying in 1803, and the husband being no longer bound to keep her in his family, a litigation took place between the parishes of Salton, where she was born, the parish of Gladsmuir, where she had lived eight years with her grandmother, and the parish of Preston, where her mother was living with her husband at her death. The sheriff of Haddingtonshire found the parish of Gladsmuir liable. But the cause being advocated, the lord Methven ordinary, "In re- "spect that the said pauper, born in the parish of Salton, is "an ideot, and thus having no will of her own, could not "acquire for herself a legal residence anywhere, and that she "never acquired a legal residence by living in family with "her mother in the parish of Preston; finds, that the "kirk-session of the parish of Salton must be burdened "with the maintenance of this pauper."

March 1, 1805.

IT seems to have been admitted, that the mother had resided for more than three years in the parish of Preston,

[a] Rev. A. Johnson, minister, and kirk-session of Salton, against G. Hamilton, minister, and kirk session of Gladsmuir, and Daniel Maqueen, minister, and kirk-session of Preston, 11th June, 1802.

before her marriage. In the printed petition for the parish of Salton, it is stated, that "the mother, Marion Hunter, "went to the parish of Preston, where she again entered "into service. In this parish, after having resided about "three years, she was married." And in the printed answers given in for the parish of Preston, this statement is not controverted. It is stated, that "Marion Hunter, "the mother of the child, had removed into the parish "of Preston, where she was married." And in the paper for the parish of Salton, it is particularly stated, that she went in April, 1795, to the parish of Preston, and after having resided for upwards of four years constantly in that parish, was married on the 30th of May, 1799. § 4. WHAT PARISH? —ILLEGITIMATE.

ON these positive statements on the one side, without any express denial on the other, there seems to have been reason for holding it admitted in point of fact, that the mother had resided for three years, and thus acquired a residence in Preston before her marriage.

AND such must have been assumed to be the case, for if the mother's residence in Preston had been only when living in family with her husband, she could not have acquired a settlement for the child; for it is held with us, as well as England, that a woman under coverture cannot acquire her settlement for her children begotten of a former marriage.

IN this case, the pauper was separated from her mother before she went to reside in Preston. But this separation did not prevent the benefit of the new settlement from being communicated to the child, which was not only still under age, but all along a natural ideot.

EVEN in England, the rule that legitimate children are

§ 4. WHAT PARISH? —ILLEGITIMATE.

settled in the place of their birth, admits of various exceptions, which are very distinctly stated by Mr. Nolan.[a]

FIRST, by the common law. 1st, Where a woman with child of a bastard is removed out of one parish into another, through the fraud or collusion of its officers.

IN this case the child, wheresoever it is born, is settled in the parish from which the mother has been collusively removed. But the removal of the woman must have been effected with a fraudulent purpose; for if she should come accidentally into one parish, and in consequence of the self-suggested persuasions of a private parishioner go into some other, and be there delivered; or if she should, without fraud, leave her own parish with the knowledge of the overseers, for the purpose of finding the putative father of the child with which she is quick, and be suddenly delivered in some other parish, whilst endeavouring to reach her own, these form no exception to the general rule, and the birth decides the settlement.

THE 2d exception is, where a child is born after an order has been made for the mother's removal to some other parish; here, whether it is born in one of the contending parishes, or in some intermediate one, while the officers are in the act of removing, or using reasonable diligence to remove the woman, it is settled in the parish against which judgment is given, if the order is contested; or in that to which the removal is made, where it acquiesces without appeal.

THE third exception is, where the child is born while the mother is in actual custody of the law, as where she is in the house of correction, or in the county gaol; here it follows, the settlement of the mother, or, if that cannot be

[a] Treatise on the English Poor Laws, v. 1, p. 174.

known, it is to be provided for in the parish where she was apprehended. § 4. WHAT PARISH? —ILLEGITIMATE.

Secondly. There are exceptions by statute.

1. By 13 Geo. III, c. 29, for regulating the foundling hospital, no child received there, shall thereby gain a settlement in the parish where the hospital is situate.

2. By 17 Geo. II, c. 5, § 25, where a woman wandering and begging, is delivered of a child in any parish or place to which she doth not belong, and thereby becometh chargeable to the same, the church-wardens or overseers may detain her till they can safely convey her to a justice of the peace; and, if she shall be detained and conveyed to a justice as aforesaid, the child of which she is delivered, if a bastard, shall not be settled in the place where so born, nor be sent thither by a vagrant pass; but the settlement of the woman shall be deemed the settlement of the child.

3. By 13 Geo. III, c. 82, § 5, no bastard child born in a lying-in hospital shall be legally settled in, or entitled to relief as a parishioner from the parish wherein the hospital is situated; but every such child shall follow the mother's settlement, and shall immediately gain a settlement in the parish or parishes respectively, where his, her, or their mothers were last legally settled.

4. By 20 Geo. III, c. 36, bastard children born in the house of industry, of any hundred or other district incorporated by act of parliament for the relief and employment of the poor, shall be deemed to belong to the parish or place where the mother of such bastard child was legally settled.

5. By 33 Geo. III, c. 54, § 25, for the encouragement and relief of friendly societies, it is enacted, that every child which shall be born a bastard in any parish, township, or place, during the mother's residence therein, un-

§ 4. WHAT PARISH? —ILLEGITIMATE.

der the authority of this act, shall have, and be deemed to have the same settlement which the mother has, or is entitled to at the time of the birth of such child.

6. By 5 Geo. III, c. 101, § 6, if an order of removal has been obtained for the purpose of removing an unmarried woman who is with child, and it shall be suspended on account of the sickness or other infirmity of such person, and during such suspension the said woman shall be delivered of any child, which by the law of this kingdom shall be a bastard, every such child shall be deemed, and taken to be settled in the same parish, township, or place in which was the legal settlement of the mother at the time of her delivery.

NOTWITHSTANDING the child's settlement, yet, nevertheless, if the mother and the child have different settlements, it seems that the bastard child, even as all other children, shall go with the mother for nurture until the age of seven years, as a necessary appendage of the mother, and inseparable from her.[a]

During nurture?

BUT although the child may not be separated from the mother, yet if she voluntary desert it, it seems that the cause of nurture then ceasing, it may be sent to its place of settlement.

WHILE the child continues with its mother as a nurse child, and during that time not removeable to its place of settlement, yet the parish where the child's proper settlement is, shall maintain such child in that other parish.[b]

[a] As in the case of Skeffreth and Walford, M. 3, G. 2. The order was to remove a woman to her settlement; and her bastard child, of two years of age, to another parish at a distance from the mother, being the place of its birth. It was objected, that the child being a nurse child, they cannot separate it from the mother, by reason of the care necessary to nurture so very young a child; which none can be supposed so fit to administer as the mother of it; and therefore it should have been sent with her to the place of her settlement. And it was quashed by the court for that reason. (2 Sess. c. 90.) 3 Burns Justice.

[b] As in the case of Darlington and Hemlington (H. 17, G. 3), Eleanor Guy went with a certificate from the

§ 5. CONCLUSION.

This right of the mother to the custody of her illegitimate offspring has frequently been the subject of judicial controversy: but involving points not connected with the poor laws, it will be considered in a subsequent chapter of this book.

No removals in the Scottish law.

V. This very delicate, interesting, and salutary branch of municipal jurisprudence, so successfully cultivated by the Scottish legislature, has led us into more than our usual detail. We may, however, congratulate ourselves, that we have not occasion to touch on a subject to which Dr. Burn finds it necessary to devote near seventy pages of his esteemed account of the English poor laws,—the doctrine of removals, from which our sister kingdom has suffered such manifold evils, public and private, as have attracted the attention of her eloquent writers, and indeed repeatedly even of parliament itself; but are happily unknown to us. In the fullest enjoyment of civil liberty, and under circumstances that "promote the free circulation of labour, and remove the obstacles by which industry is prohibited from availing itself of its resources,"[a] the Scottish artizan or labourer may, at his own discretion, change his abode without challenge or controul, if only he avoid those idle and vicious habits, which expose him, as a rogue or vagabond, to the cognizance of the criminal magistracy.

township of Hemlington to the township of Darlington, in which last township she had two bastard children, and there became chargeable. An order being thereupon made for the removal of her to Hemlington, she took the two children who were born in Darlington with her, being both under the age of seven years. Two justices made an order upon the township of Darlington for the maintenance of the two children born in that township. Darlington appealed against the order of maintenance, and the sessions being of opinion that Darlington was not liable, quashed the said order: but the proceedings being removed into the court of king's bench, the court were of opinion that Darlington was obliged to maintain the two children at Hemlington, whilst residing there with their mother as nurse children, and therefore quashed the order of sessions, and affirmed the order of the two justices. (Douglas, 9 Cal. cas. 6.)

[a] Mr. Pitt's Speech, ibid. cccx.

CHAP. III.

Of Vagrants.

§ 1. SCOTTISH ACTS.

I. THE truly necessitous being legally provided in a maintenance, it becomes then equally just and necessary to punish those who, though able to work, yet choose rather to live idly at the expence of others; wandering about the country, without any fixed residence: such persons, under various descriptions, are punishable in this as in every well regulated state.

THE act 1617,[a] as already noticed, gives the justices of peace jurisdiction in this matter.[b]

OF those persons, one class, once very formidable, but now scarcely known to us, except by tradition and the books of adjournal, were sorners, described by lord Bank-

[a] Appendix I, No. 5.

[b] The previous acts, 1592, c. 147, and 1597, c. 268, at the date of which justices were not introduced into the country, speak only of magistrates of boroughs and sheriffs, who are enjoined to inquire; and lest the magistrates and sheriffs should be remiss, the kirk-session of every parish is appointed to name commissioners to hold courts within their bounds, and try the offenders. These powers are confirmed by act 1698, c. 21.

§ 1. SCOTTISH ACTS, —SORNERS

ton as "masterful, sturdy beggars," that went in companies, oppressing the people, by consuming victuals, and taking away goods, without consent of the owners.[a] The suppression of those pests to society was the object of many severe enactments, from the statute of Robert II, c. 12, downward; and indeed the statutes 1445, c. 45;[b] and 1477, c. 77, made the punishment capital; which, however, never appears to have been actually inflicted; unless where the general offence of sorning was aggravated by particular acts of violence.

SORNERS being a species of vagrants, are to be understood as subjected to the jurisdiction of the justices of peace, as well as to that of the other magistrates mentioned in the statutes.

—GYPSIES.

THE most notorious class of vagrants are the Egyptians, or gypsies, first noticed in Europe about the year 1417, and not like the other strollers an accidental association of vagabonds, but a distinct race of foreigners, who travelled into Europe from the East. They first appeared in Hungary and Bohemia, pretending they were pilgrims, and as such they at first received passes from the princes through whose territories they travelled; but their morals not being found to correspond to the sanctity of that character, and their numbers alarmingly increasing, as well from the idle and profligate of the different countries joining them, as from fresh swarms successively coming from the East, they were banished out of every European kingdom; out of Spain in the year 1492; out of Germany in the year 1500; out of France in the 1561 and 1612; and out of England in the reign of Henry VIII.

THE laws of Scotland likewise, in their numerous provi-

[a] Vol. I, book i, tit. 10. [b] Appendix I, No. 36.

§ 1. SCOTTISH ACTS, —GYPSIES.

sions for the restraint of rogues and vagabonds, never fail to enumerate Egyptians, as among the foremost and most incorrigible; they are described as a counterfeit kind of rogues, who disguise themselves in strange habits, who smear their faces and bodies, who frame to themselves a canting kind of language, and who, under the pretence of telling fortunes, curing diseases, and such like things, delude the common people, and steal and pilfer whatever they conveniently can. Under this description, they have been proscribed by several statutes both in this and our sister kingdom. They were, by parl. 1609, c. 13, expelled from Scotland, under the designation of "the vagabonds, sorners, and common thieves, commonly called "Egyptians;" with this penalty annexed, that if any of them were found within the kingdom, they might be imprisoned, and put to death. This act, Mr. Erskine says, is still in force, with this only exception, that persons so apprehended may bring witnesses to their character, in order that the jury may judge whether they fall under the designation of the statute. Indeed, so far back as the year 1698, the rigour of the statute began to be departed from. The general charge of being *habite and repute* a gypsie, was not *per se* sustained as relevant, but only along with one or other of the facts of "picking or little thieving" libelled. This lenient construction was carried still farther in a subsequent case, 1699, June 26, Baillie, where the interlocutor of relevancy expressly required several acts of violence; and considering the long disuse of the ancient severity which the present state of the country renders now no longer necessary, there seems reason to doubt whether this description of men, considered as a peculiar race, stand in any other predicament than that they are still punishable as vagrants, when guilty of any thing falling under the laws against that particular offence.[a]

[a] Hume, vol. ii, c. 22.

VAGABOND scholars may also be mentioned, i. e. those who are authorized to beg by a licence from their teachers; and in general, under this description of vagabonds, or vagrants, the statute 1579, c. 74, the leading regulation upon the subject, classes fortune-tellers, jugglers, players at unlawful and cunning games, people pretending to be prophets, all minstrels who have no fixed service, all who use forged licences to beg, or persons who, without sufficient testimonials, pretend to have suffered shipwreck, to have been burnt out of their houses, and such like; and, finally, all persons whatsoever, who can give no good account of themselves, or how they can lawfully earn their livelihood, or who, though able-bodied men, avoid every kind of work by which they might be supported. § 1. SCOTTISH ACTS, —VAGABOND SCHOLARS. —JUGGLERS, &c.

IN Scotland the legislature began early to enact laws for restraining idleness, and punishing those classes of offenders;[a] whereof the principal is the said act 1579, c. 74, by which all vagabonds, and strong and idle beggars, betwixt the age of 14 and 70, as has been already remarked, are to be apprehended,[b] and carried before the magistrates within borough, and in landward parishes, before any person whom the king shall constitute justice by his commission, or whom the lords of regality shall appoint within their jurisdiction, and to be by them committed to prison, in stocks, or irons, until they be put to the knowledge of an assize, to which they must be put, within six days after their imprisonment; and, upon conviction, they are to be scourged, and burnt through the ear with a hot iron, unless some person of credit and responsibility undertake, before the judge, under the penalty of *twenty pound*, to take and keep the offender in his service for a year, and to bring him to the head court of the jurisdiction at the year's end. If the offender desert his service, he is in that case to suffer the punishment already mentioned; and if, after sixty —PUNISHMENT.

[a] Parliament 1424, c. 42. [b] Parl. 1579, c. 74. Appendix I, No. 49.

§ 1. SCOTTISH ACTS, —PUNISHMENT.

days, he resume his former vagabond course of life, he is to suffer the pain of death as a thief; and in order that such offenders may be more easily apprehended, there were various regulations made by that and other statutes,[a] which, however, need not be here particularly mentioned, being, if not expressly repealed, yet in a great measure superseded by the British statute, commonly called the Vagrant Act, which regulates this matter all over the kingdom.

§ 2. GEO. II, 17, c. 5. VAGRANT ACT.

II. As this act is a general code respecting this subject, it was thought proper to give it entire in the appendix. Here, therefore, only a very general statement of its contents can be necessary, and the notice of such alterations and additions as have been introduced by subsequent enactments.

—CLASSES OF OFFENDERS.

THE statute specifies three classes of offenders, viz. *idle* and *disordorly* persons,[b] *rogues* and *vagabonds*,[c] and *incor-*

[a] Appendix I, No. 41.

[b] Besides the different descriptions of persons enumerated by this statute (appendix i, p. clvi,) as included in this first class, there are farther mentioned by 32 Geo. III, c. 45, § 8, "all persons who, by their wilful "default and neglect, permit their "wives and children to become "chargeable to their parishes or "places; and if it shall be made ap- "pear to two justices that such per- "sons do not use proper means to "get employment; or being able to "work, do neglect to work, or spend "their money in ale-houses, or pla- "ces of bad report, or in any other "improper manner, and do not em- "ploy a proper proportion of the "money earned by them towards "the maintenance of their wives and "families, by which they, or any of "them, become chargeable to such "parish or place."

[c] Who are included under the term *rogues* and *vagabonds*, see Appendix I, p. clvii. Farther, the statute 23d Geo. III, c. 88, enacts, that "any "person apprehended, having upon "him any picklock, key, crow, jack, "bit, or other implement, with an "intent feloniously to break and en- "ter any dwelling-house, ware-house, "coach-house, stable, or outhouse; or "shall have upon him any pistol, "hanger, cutlass, bludgeon, or other "offensive weapon, with intent fe- "loniously to assault any person; or "shall be found in or upon any "dwelling-house, ware-house, coach- "house, stable, or outhouse, or in "any inclosed yard or garden, or "area belonging to any house, with "intent to steal any goods or chat- "tels; hall be deemed a *rogue* and "*vagabond*, within the meaning of "the statute of 17th Geo. II."

rigible rogues,[a] who are all punished in the manner particularly therein set forth. § 2. GEO. II, 17, c. 5, VAGRANT ACT

IDLE and disorderly persons are punished with one month's imprisonment in the house of correction;[b] to be kept at hard labour. Any *one* justice may commit such offenders, being convicted before him, by his own view, confession, or oath of one witness; and, farther, may order any overseer, where such offender shall be apprehended, to pay five shillings to any person in such parish or place so apprehending them, for every offender so apprehended; to be allowed in his accounts, on producing the justice's order, and the person's receipt to whom it was paid. And if the overseer shall neglect, or refuse, to pay the same, the said justice, on oath thereof, may, by his warrant, order the same to be levied by distress and sale of his goods; in which case, he shall not be allowed the same in his accounts.[c] —CLASSES OF OFFENDERS. One justice. Payment of 5s. Penalty for neglecting to pay the 5s.

ROGUES and vagabonds are to be punished with whipping and imprisonment, not exceedingsix months; and incorrigible rogues with the like discipline and imprisonment, not exceeding two years. Any private person may apprehend a rogue and vagabond, and carry him to the Rogues and vagabonds,

[a] As to what persons are included in this description, see Appendix I, No. 41, the first class is, endgatherers offending against the statute of 13 Geo. I, c. 23, § 8, by which offence is meant, "the collecting, buying, receiving, or carrying, any ends of yarn, wefts, thrums, short yarn, or other refuse of cloth, drugget, or other woollen goods; and the punishment of such persons is in order to prevent their committing abuses by such practices in the woollen manufacture."

[b] 17th Geo. II, c. 5, § 1.

[c] This five shillings is another and quite different reward from the ten shillings which is given in an after clause for apprehending rogues and vagabonds: the latter is paid by the county; "but this is paid by the parish as a punishment for suffering their poor to beg, although within their own parish; for if they beg out of the parish, they incur a farther degree of guilt, becoming thereby rogues and vagabonds." Burn, tit. Vagrants, § 1.

§ 2. GEO. II, 17TH, C. 5, VAGRANT ACT, —PUNISHMENTS.

justice or to a constable; and the justice may order a reward of 10s. to be paid to the person, whether constable or private individual, who apprehends him.[a] But no justice shall order any reward to be paid to any constable or other person apprehending any rogue or vagabond, (women excepted), until he shall have been publicly whipped, or sent to the house of correction, as the act requires, and until the examination be actually transmitted to the next sessions.[b] The constable neglecting, or refusing, his best endeavours to apprehend any such offender, and convey him to some justice, or any other person being charged by any justice so to do, but refusing, or neglecting, to give obedience, shall, on conviction thereof, on view, or oath of one witness, before one justice, forfeit ten shillings to the poor by distress.[c]

No reward till the rogue be whipt.

Penalty for neglect.

One justice.

—PRIVY SEARCH.

A SEARCH, also, is directed to be made four times in the year;[d] and, by a subsequent statute,[e] *two* justices, in case any person apprehended upon a general privy search, or by a special warrant, shall be charged before them with being a rogue or vagabond, or an idle and disorderly person, or with suspicion of felony (although no direct proof be then made thereof), may examine such person on oath, as to his settlement, and means of livelihood; and the substance of such examination shall be put in writing, and signed by such person, and by the justices, and be transmitted to the next session to be filed; and if such person shall not shew that he has a lawful way of getting his livelihood, or shall not procure some responsible housekeeper to attest his character, and to give security, if required, for his future appearance at some other day, to be fixed for that purpose, the justices may commit him to some prison, or house of correction, for any time not exceeding six days; and in

Two justices, when necessary.

Examination of one charged to be a rogue, though not proved to be so.

a § 5, Appendix I, p. clviii.
b 32 Geo. III, c. 45, § 2.
c § 5, Appendix I, p. clviii.
d § 6, Appendix I, p. clviii.
e 25 Geo. II, c. 36.

the meantime, order the overseers of the poor to advertise in some public paper a description of his person, and any thing that shall be found on him, or in his custody, and which he shall be suspected not to "have come honestly by," and the place of his commitment, and the time and place appointed for his re-examination; and if no accusation shall be then laid against him, he shall be discharged, or otherwise dealt with according to law.[a] § 6. GEO. II, 17TH, c. 5, VAGRANT ACT.

THE justice, when any such offender is brought before him, must proceed to take his examination, wherein he must be guided by the directions contained in § 7.[b] Examination.

THE punishment, as already mentioned, is whipping or imprisonment. The statute 27 Geo. III, c. 11, directs the justice to order such persons so apprehended to be publicly whipt by the constable, petty constable, or some other person to be appointed by such constable or petty constable of the parish or place where such person was apprehended, or order him to be sent to the common gaol,[c] or house of correction, till the next sessions, or for any less time such justice shall think proper,[d] not under seven days.[e] Punishment.

BUT a statute, already quoted, 32 Geo. III, c. 45, has introduced two other exceptions: the one is, that no female, convicted of being a rogue, vagabond, or incorrigible rogue, before any justice, or at the sessions, shall be whip- No woman to be whipt.

[a] "But" (Mr. Burn observes) by "the shortness of the time limited "for advertising him, this seems "chiefly calculated for places within "the bills of mortality."

[b] Appendix I, p. clxi.

[c] In an English case, K. v. Brooke, H. 28. Geo. III, it was adjudged that the commitment of a vagrant by a justice for a certain time, as for fourteen days, under the vagrant act, is a commitment in *execution*, and that the party is not intitled to be bailed. Dunf. and East. 2 vol. 190. Burn, tit. Vagrant, § 7.

[d] 17 Geo. II, c. 5, § 7.

[e] 32 Geo. III, c. 45, § 1.

§ 6. GEO. II, 17TH, C. 5, VAGRANT ACT.

ped in any case whatever:[a] the other is, that no person shall be so whipped or imprisoned, who shall not have committed an act of vagrancy within the true intent and meaning of the act 17 Geo. II, c. 5, and been convicted thereof.

THUS, then, any one justice or magistrate, under these statutes, may punish rogues and vagabonds, either by whipping, or by imprisonment until the next general sessions; or for a shorter period. Commitments, under this act, are *in execution*.[b]

Sessions further punish.

WHEN offenders are, as already mentioned, committed till the next sessions, the justices at the sessions may further order the rogue and vagabond to be detained in the house of correction to hard labour for any time not exceeding six months.

Punishment of rogues.

Of incorrigible rogues

OR, if he be an incorrigible rogue, for a further time not exceeding two years, nor less than six months; and, during his confinement, to be whipped at such times and places as they shall judge fit. The offender, if a male above twelve years of age, may be sent to his majesty's service by sea or land.[c]

Transportation.

BY the 13 and 14 Charles II, c. 12, § 23, the justices, in sessions, may transport such rogues, vagabonds, and sturdy beggars, as shall be duly convicted and adjudged to be incorrigible.

THE statute contains also various directions concerning the conveying of rogues and vagabonds to their proper parish.[d] Which regulations being found insufficient, it was

[a] § 3.

[b] Dunf. and East. 4. v. 220. Burn, tit. Vagrants, § 7.

[c] 17 Geo. II, c. 5, § 9.

[d] § 7, 8, 10, 11.

afterwards enacted,[a] that the justices in sessions may order that all rogues and vagabonds, apprehended within their liberties, and ordered to be conveyed by pass, shall be conveyed by the master of the house of correction, or his servants, or by a constable, as they shall think proper; and they may make an order, that all constables, to whom rogues and vagabonds, brought from another county, are delivered, shall forthwith convey them to the nearest house of correction within their liberty, to be afterwards removed by such master or his servants. And another statute,[b] which recites, that poor persons are often passed to their settlements during sickness, to the danger of their lives, for remedy thereof, enacts, that in case any poor person shall be brought before a justice, for the purpose of being passed by a vagrant pass, and it shall appear to such justice that such poor person is unable to travel by reason of sickness or infirmity, or that it would be dangerous for such person so to do, the justice granting such pass may suspend the execution thereof until he be satisfied that it may be executed without danger; which suspension of, and subsequent permission to execute the same, shall be indorsed thereon, and signed by such justice. And by the statute already mentioned,[c] justices in sessions are authorized to limit what rates and allowances, by the mile or otherwise, shall be made for maintaining or conveying rogues, vagabonds, or incorrigible rogues, and make such other orders for the more regular proceeding therein as they shall think proper.

§ 6. GEO. II, 17TH, c. 5, VAGRANT ACT.

Conveying rogues, by 32 Geo. III, c. 45.

In case of sickness, power of suspending the conveying.

AND if any petty constable shall bring to any high constable such certificate as aforesaid, together with a receipt or note from the constable to whom the person was delivered, the said high constable shall pay the rates ascertain-

[a] 32 Geo. III, c. 45, § 5.
[b] 35 Geo. III, c. 101.
[c] 32 Geo. III, c. 45, § 6.

§ 6. GEO. II, 17TH, C. 5, VAGRANT ACT.

ed by such certificate, taking the petty constable's receipt; the high constable to be allowed the same by the treasurer on passing his accounts, on his delivering up such certificate and receipt, and giving his own receipt for the same to such treasurer; the same to be allowed the treasurer in his accounts, on his delivering up the vouchers aforesaid. And if the high constable shall refuse or neglect to pay the same on demand, it shall be lawful for one justice, by his warrant, to "levy double the sum by distress, and there-"out to allow the petty constable the sum ascertained by "the certificate," and such other recompence for his trouble, loss of time, and expences, as the judge shall think fit; the overplus to be returned to the constable, on demand. And in cities, towns corporate, and other places, where there is no high constable, the petty constable shall be allowed what he shall so pay pursuant to such certificate, in his accounts, on delivering up such vouchers: or if any master of a house of correction shall deliver such certificate and receipt to the treasurer, the treasurer shall pay the same to him, taking his receipt for the same, and be allowed the same in his vouchers.

One justice.

AND by the 26 Geo. II, c. 34, where the high constable hath not money in his hands sufficient to answer the said expences, the treasurer shall pay the same to such petty constable on his producing the certificate, and such other vouchers, as aforesaid.

What is to be done with them when carried to the place of remo

WHAT is to be done with such offender at the place to which he is sent, is stated very distinctly in clauses 11 and 19;[a] the case of Scottish and Irish vagrants in England, in clauses 13 and 14;[b] with respect to lunatic vagrants, in clause 20;[c] the penalty for lodging vagrants, in § 23;[d] for hindering the execution of the vagrant act in § 22.

[a] Appendix I, p. clxiv, clxx.
[b] Ibid. p. clxvii.
[c] Ibid.
[d] Ibid.

IN order to defray the expences necessary for the execution of the vagrant act, it empowers the justices in sessions to cause such sums as shall be necessary to be raised in the same manner as the general county rate.[a] In Scotland, the expence will be defrayed out of, what is called, the *rogue money*. 6. GEO. II, 17TH, c. 5, VAGRANT ACT. Expence of executing the act how defrayed.

BY clause 26th, it is provided, that any person aggrieved by any act of any justice out of sessions, in or concerning the execution of this act, may appeal to the next general or quarter-sessions of the county, liberty, riding, or division, giving reasonable notice thereof; whose order thereupon shall be final. Appeal.

BY persons aggrieved, are understood such persons as are by the several clauses of the act made subject to punishment and penalties. It was determined, therefore, by the court of king's bench, that an appeal does not lie to a parish against a vagrant pass.[b] The only way such parish has of obtaining redress, is by obtaining an original order of two justices to remove the vagrant to the place where he should be sent.[c]

[a] § 33, Appendix I, p. clxxx.

[b] K. v. Rengwould, and K. v. St. Lawrence Jewry. Burn, tit. Vagrant, § 18.

[c] § 11, Appendix I.

CHAP. IV.

Of that Jurisdiction which respects the Health, Safety, and Convenience of the Public.

§ 1. INFECTIOUS DISEASES.

I. THE general statutes [a] expressly commit to justices of peace to "set down order in the country for gouernance in time of the plague." An old statute [b] has prescribed certain rules to be observed on such occasions; with respect to shutting up infected persons in their houses, or assigning them some place without the town to reside; and providing for the support of those who "had na gudes "to finde themself." Justices of peace had jurisdiction in this matter under British statutes likewise. The leading one was 28th Geo. II, c. 6; which, however, was varied by so many other enactments,[c] that it was judged expedient to repeal the whole of them, and put this branch of the law into one act. This statute 39 and 40 Geo. III, cap. 80,[d] was afterwards repealed by the 45th Geo. III, c. 10, which contains the whole law concerning this subject.

[a] Appendix I, p. xxxvii.

[b] 1457, James II, parl. 13, c. 57. It may be noticed as curious, in the phraseology of this statute, that, without speaking of the king and parliament, it begins, "*the clergie thinks*," &c. The reason is, that this, as an affair to be governed by Christan charity, was referred to the regulation of the clergy; and it was usual in our acts of parliament to set down the report, without drawing it into the formality of an act of parliament. See 1483, James III, parl. 13, c. 90, 91. Sir Geo. Mackenzie's Observations, p. 51.

[c] 29 Geo. II, c. 8; 12 Geo. III, c. 57; 28 Geo. III, c. 34; 38 Geo. III, c. 33; 39 Geo. III, c. 90.

[d] Appendix I, No. 59.

§ 1. INFECTION —PLAGUE.

THE regulating the occasions when, and, till the erection of a lazaret at Chetney hill, the places where quarantine is to be performed, is committed to the king and privy council, whose orders are to be published as directed by the statute.

King, and privy council.

THE erection of lazarets, and other expences, which some former statutes had defrayed by an assessment on the counties,[a] this statute more reasonably lays upon the ships which perform quarantine. Under certain exceptions, each ship, in that predicament, pays so much per ton, and double duty if it arrives without a clean bill of health.[b] This duty must be paid before the vessel is cleared out.[c] The vessel[d] and the goods[e] liable to quarantine are specified. When the plague appears in any vessels, the masters are directed what steps to take, which vary as the ship is within or without the straits of Gibraltar.[f] Vessels liable to the performance of quarantine, are directed to hoist a particular signal when they meet other vessels at sea or come within four miles of the coast.[g] On the arrival of ships in the circumstances described, directions are given for the masters announcing their arrival,[h] and for making inquiries at the masters, and compelling them to go to the appointed place.[i] While the plague is in any part of Great Britain, and some other countries specified, small vessels are prohibited from sailing, without giving security not to touch at the infected places.[k] Directions are given for discharging the vessels who have complied with the regulations.[l]

Punishment

THE observation of the regulations is enforced by various penalties, according to their respective importance; the shipmaster, or other person on board, neglecting the regu-

[a] 1 James, c. 31, § 23.
[b] § 3.
[c] § 5.
[d] § 10.
[e] § 11.
[f] § 13.
[g] § 14.
[h] § 15, 16.
[i] § 17.
[k] § 32.
[l] § 27 and 28.

§ 1. INFECTION —PLAGUE.

lations contained in the thirteenth section; concealment by the master that he has been at an infected place;[a] the refusing, or neglecting, within a convenient time after notice, to repair to the lazaret; the escaping thence, and refusing to return;[b] the wilful counterfeiting any certificate required by the statute;[c] the concealment, or clandestine conveyance, of letters or goods on shore,[d] from lazarets, or ships under quarantine, or embezzlement of goods performing quarantine;[e]---these offences are punished capitally.

death.

Penalty.

OTHER offences are punished with special pecuniary penalties, recoverable at the suit of the lord advocate, or any officer of the customs.[f] Thus, the master's quitting a ship, after notice of its being liable to quarantine;[g] or suffering others to do so;[h] or not carrying the ships in time to the place appointed;[i]---subject the respective offenders in the penalty of £500 sterling.

500l.

200l.

THE penalty is £200 sterling for omitting at sea to hoist the flag as required;[k] or hoisting the signal when not liable;[l] or, in the case of arrivals from foreign parts, omitting to inform pilots of the place where the ship was loaded;[m] or refusing to answer the inquiries of the proper officer;[n] or quitting a ship after it is known to be liable to quarantine;[o] or, without the order of the officer of the customs, landing goods from a ship which has performed quarantine abroad.[p] Pilots conducting vessels, liable to quarantine, to places other than those appointed, are subjected in a penalty of £100. In the case of any person landing goods or letters from a ship liable to perform quarantine;[q] or receiving the same so landed,[r]—the penalty is discretionary, not under £100 nor above £500.

[a] § 19. [b] § 23, 27. [c] § 30. [d] § 31. [e] § 26. [f] § 36. [g] § 21. [h] § Ibid. [i] § Ibid. [k] § 14. [l] § 15. [m] § 16. [n] § 16. [o] § 11. Together with six months imprisonment. [p] § 22. [q] § 31. [r] § Ibid.

§ 1. INFECTION — PLAGUE.

IN Scotland all these forfeitures and penalties are recoverable by summary action before the court of session, or by prosecution before the court of justiciary, at the suit of the lord advocate, or any officer of the customs, and the penalty shall belong, one moiety to the person who sues, and the other to the king.[c] Jurisdiction. Application of the penalty.

IN case any suit or prosecution be commenced at the instance of any officer of the customs, the lord advocate may stop proceedings therein.[d]

ALL other offences (not being felony) committed against the provisions of this act, and every disobedience to any act of council relative thereto, for which no specific penalty is provided, may be punished by any two justices of the county where it is committed, by a fine, not exceeding £50 sterling,[e] or imprisonment, not exceeding three months, at the discretion of the two justices, who have heard and determined the same.[f] Two justices their powers.

ALL offences concerning the performance of quarantine, whether committed within the body of any county, or on the high seas, or elsewhere, may be tried in any county in England or Scotland respectively.[g] Action is not competent after the lapse of two months.[h] If the defender is acquitted, he gets treble expences.[i] Forum.

II. IT is likewise the duty of justices of peace, and other magistrates, to prevent the exposure of unwholesome aliments to public sale. Our ancient legislature seems, in particular, to have been extremely anxious for the purity of their wine. The selling or buying corrupt wine; the mixing of wine or beer was prohibited under the pain of

[c] § 34.
[d] § 36.
[e] § 23. This penalty is to be recovered and divided in the same manner, with the specific penalties already mentioned.
[f] § 23. [g] § 42. [h] Ibid. [i] Ibid.

§ 2. VICTUALS.

death.[a] Innkeepers were prohibited from mixing their wines, under the pain of escheating, or forfeiting, all the wine belonging to them.[b]

§ 3. FORESTALLING AND REGRATING.

III. CARE was also taken that the public should not want a plentiful supply of provisions. Hence the various regulations for encouraging fairs and markets,[c] and the severe punishments denounced against forestallers and regraters; as to whom the general statutes ordain [d] justices "to inform the king's majesty's council, or high treasurer, "or advocate, at least once every year, that order may be "taken with them conform to the acts of parliament;" which acts, during the late calamitous circumstances of the country, were, for the moment, drawn from the happy obscurity in which they had long remained, in consequence of the improved state of our agriculture and manufactures, as well as of the more liberal and enlightened policy of the present age.[e]

FORESTALLERS, according to sir John Skene, are properly those "qua preocupies and byes merchandize before "it cum to the mercat, or stalle, or place quhair it suld "be, or the time of day statute and ordained thereto." Regraters, again, are they "quha byis ony merchandice "or other thing, and takis unleasomlie greater price for "the samin afterward."

BY chapter 73[d] of the Leges Burgorum, it is declared, that all *huxters*, who buy and sell for profit within burgh,

[a] 1482, 88.

[b] 1551, 11; 1581, 126.

[c] Leges Burgorum, 91, &c.

[d] Appendix I, p. liv.

[e] The word forestalling is the same with the Saxon *forestaller*, from *fore* (before) and *stall*, a standing place or department, and signifies, according to Burn, to market before the public, to prevent the public market, and metaphorically to interrupt in general.

Regrating, according to the same author, is derived from *re*, again, and the French, *grater*, to grate, or scrape; and ingrossing is from in and gross, great, or whole.

§ 3. FORESTALLING AND REGRATING.

shall buy nothing to sell again, "until thrie houres be "stricken;" nor any wrought wool, nor any kind of wool, except white wool, nor any thread; and that they shall not buy, nor receive any such thing, but in the time of fair; he, who is convicted of the contrary, is to forfeit *eight shillings Scots*, and is to lose also the thing which he has bought. And by chapter 78th of the same laws, intitled, "of forestallers within burgh," it is ordained, that no man dwelling within, nor without, borough, shall, in the market day, pass forth of the ports of the borough to buy any thing, before that thing be brought within the ports of the borough. And the penalty here, as in the former chapter, is fixed at *eight shillings*.

By the 35th statute also of king William, it is enacted, that the merchants of the realm shall have their merchant guild, and shall enjoy and possess the same, with liberty to buy and sell in all places, within the bounds of the liberties of boroughs, in such manner that each of them be contented with his own liberty, and that none of them occupy or usurp the liberty of another; that he may not be convicted and punished in the *chamberlain air* as a forestaller.

By act 1535, c. 21, it is enacted, that no forestallers be found buying victuals, fish, flesh, or other stuff, until the same be presented to the market, nor even in the market, until the time appointed for purchasing such goods, under the pain of imprisonment, and the escheat of all such goods bought or arled by them, of which two parts go to the king, and the third part to the sheriff, or officer of the shire, provosts, bailies, and officers of the boroughs, or to any other who finds them acting contrary to this statute. By 1540, c. 98, it is ordained, that no person, either to borough or to land, shall buy any kind of fish at market, nor in other places, "to packe or peile till eleven hours of

§ 3. FORESTALLING AND REGRATING.

the day;" and that from this time till two o'clock afternoon, it shall be lawful to buy fish, and to *packe and peile* the same, as they think most expedient. This act contains some other things unnecessary to be here mentioned, and concludes with enacting, that the provost, aldermen, and bailies, of boroughs, shall visit the markets every market day, and set a price on all kinds of fish, according to the time: and that they, besides, diligently inquire, if any person whatever gives arles or money on any kind of fish which is brought to market, for the purpose of making them to be sold at a higher price, and that they take and punish such persons as forestallers and regraters, contrary to the interests of the public. And by c. 113 of the same parliament, if any forestallers be apprehended, forestalling any kind of merchanize, victuals, poultry, or goods whatsoever, within the freedom of borough, the officers of the borough are to escheat, or forfeit, such goods, the one half to the king, and the other half to the borough. The magistrates of boroughs, and none other, are, by this act, to punish forestallers within the same. By 1579, c. 88, all these acts are ratified, and the magistrates of boroughs are constituted the king's justices for the execution of them.

NONE of these statutes, however, contained any proper definition of either of the offences of forestalling or of regrating. To remedy this defect, the act 1592, c. 150, which is a literal transcript of the English statute, 5 and 6 Edward VI, c. 14, on the narrative, "forasmuch as sundry acts of parliament have been made for punishment of "forestallers and regraters, being very pernicious members "in the common weal; yet, because it has not been ex- "pressed what was forestalling and regrating, therefore, &c. ordained, "that whoever buys, or causes buy, any "merchandize, victuals, or other things, coming by land "or water towards any fair or market, in borough or in "landward, to be sold in the same, from any parts beyond

" sea, or within the realm; or makes any contract, or § 3. FORESTALLING AND REGRATING.
" promises, for the having and buying of the same, or
" any part thereof, before the said merchandize, victuals,
" or other things, shall be in the fair or market-place, in
" borough, port, or road, ready to be sold, or shall make
" any motion, by word, writ, or message, for raising of
" the prices, or dearer selling of the things above men-
" tioned; or else dissuade or move any person coming to
" the fair, market, or town, to bring any of the things
" above mentioned to the market, fair, or town, shall be
" esteemed and judged a forestaller: and whoever gets in
" his possession, in any fair or market, any corn, victual,
" flesh, fish, or other vivers, that shall be brought to be
" sold, and sells the same again, in any fair or market,
" holden in the same place, or any other fair or market
" within four miles thereof; or who gets in his hand by
" buying, contract, or promises, the growing corn on the
" field, shall be reputed a regrater. And because there
" has so little effect followed in the execution of the said
" act, by the magistrates within boroughs, to whom the
" execution thereof was committed, therefore it shall be
" lawful, in time coming, to our sovereign lord's the-
" saurer or advocate, to call and pursue all persons suspect
" and delated of forestalling and regrating, in case they
" shall happen to prevene, by apprehending, intending,
" and executing first, as well as the said magistrates in
" boroughs: and it shall not be leasum for the magistrates
" within borough to repledge any persons challenged or
" pursued by the thesaurer or advocate, before his high-
" ness's justice, or his deputes, at justice airs, or par-
" ticular diets. And albiet there be no special dittay,
" but that the forestaller and regrater be only accused of
" common forestalling or regrating, so repute and hold-
" en; yet the libel, in that generality, shall stand rele-
" vant, and the person accused to be put to the knowledge
" of an assize: and if they come in will, or be convicted

§ 3. FORESTALLING AND REGRATING.

" by an assize, for common forestalling and regrating of " markets, they shall incur, for the first fault, the pain " and unlaw of fofty pundes, and shall find surety to ab- " stain in time coming, under the pain of a hundred " merks: and if he fall again in the second fault, the " principal, and his surety, to incur and pay the said sum " of a hundred merks; and for the third fault, the " offender being convict, or come in will, to tine and for- " feit all his moveable goods, to be inbrought to our sove- " reign lord's use as escheat: and the justice courts or " aires, for the effect foresaid, to be holden every year " twice."

SIR George Mackenzie says, forestallers are either, 1st, those who privately, or by entering into societies, buy up any goods, upon design, that, by making themselves masters of the commodity, they may exact such rates for them as they think fit; as, for example, a person offering to buy all the salmon in Scotland, and dealing with all persons who have any to sell; or purchasing up, in this manner, butter, cheese, eggs, &c. 2dly, Those who buy any commodities coming to market, before they are brought to the public stall, or place, where they ought to be sold. 3dly, Those who advise sellers to raise their prices, or dissuade them from coming to a public market. But it is happily unnecessary to follow him in the full discussion he gives this subject. The court of session lately delivered an unanimous opinion, that the statutory offence consisted entirely in buying up commodities actually on their way to market.[a]

§ 4. NUISANCES

IV. ON the same account, magistrates are authorized, on particular occasions, to restrict individuals in the use of their property; which " restraints of law are not designed " to hurt property, but rather to secure and strengthen it,

[a] 1801, February, town of Ayr.

§ 4. NUISANCES

Restraints on the right of property

" by inhibiting our licentiousness in the exercise of it," &c. " The law suffers no person to use his property wantonly to his neighbour's prejudice; *interest enim reipublicæ ne quis re sua male utatur.* But where the proprietor's act is of itself lawful, though it should be in its consequences detrimental to his neighbour, *utitur jure suo.* Hence he may lawfully drain his swampy or marshy grounds, though the water thrown off from them, by that improvement, should happen to hurt the inferior tenement; but he must not make a greater collection of water than is necessary for that purpose; seeing such use would be merely *in emulationem vicini*;[a]" or build a fence, by the side of a river, to prevent damage to his ground by the overflow of the water, though thereby a damage should happen to his neighbour, by throwing the whole overflow, in time of flood, upon the opposite side.[b]

Must not act *in emulationem vicini.*

In like manner, a proprietor was found intitled to build a draw kiln for burning lime, upon the very extremity of his grounds, although it made his neighbour's dwelling very unpleasant.[c]

[a] Ersk. b. ii. tit. 1, § 2.

[b] 25th June, 1741, Farquharson. Kilkerran. Supplement to the Dict. 148. But it was found not lawful to use any operation in the *alveus.* Accordingly, an inferior heritor was found not intitled to build a dam across the river, which thereby was made to regorge to the prejudice of the superior heritor's mill. Dictionary, vol. 4, Property.

[c] January 20, 1767, Dewar against Fraser. Dictionary, ibid. The principle of this decision must have been, that the kiln was only offensive and disagreeable. For a brick-kiln, situated on the extremity of one's property, having done real damage to another by scorching the garden, hedge, and trees, the court ordered it to be removed so far as necessary, to prevent such damage. July (29, 1768, Ralston against Pettigrew, Dictionary, ibid.) Lord Mansfield, however, has said, that it is not necessary that " the smell should be " unwholesome; it is enough if it " renders the enjoyment of life and " property uncomfortable;" and the court of session seemed to take a similar view of the law in the late case respecting a manufactory at Portobello, which was extremely offensive

§ 4. NUISANCES

WHAT use may be legally made of a running stream, is sometimes a matter of difficulty. We had before occasion to notice the act of parliament against steeping lint in running water, and sir George Mackenzie's idea, that no such prohibition would be competent at common law; but the court of session have since pronounced two decisions rather of an opposite tendency; considering that the "primary "use of water being in drink, no proprietor was intitled "to employ the water passing through his ground in any "purposes which could defeat that primary use to others "who had before enjoyed it.[a]"

Running water.

PROPERTY within borough is under still greater restriction; as the magistrates may there prevent uses of property which could not be interfered with in the country. Thus, a fencing-school;[b] a blacksmith's forge, in an upper storey, though vaulted;[c] a wright's shop, and timber-yard;[d] the slaughtering of cattle in a back area;[e] a printing-house in the floor of a tenement;[f] have been all found by the court of session to be nuisances within borough.

Nuisances within burgh.

offensive to the whole neighbourhood, by the operation of boiling bull's blood. Jamieson against Hillcoats, July, 1800.

[a] Nov. 1791, Miller against Stein, and Russel against Haig. In these cases the rivers were polluted by the refuse-water from a distillery. In the last case the interlocutor was, upon the circumstances of the case, appealed and reversed in the house of lords.

[b] February 24, 1756, Fleming against Ure. Falconer.

[c] June 20, 1756, Kinloch against Robertson. Fac. Coll.

[d] Feb. 26, 1762, Proprietors of Carrubber's close against Reoch. Sel. Dec.

[e] May, 1794, Palmer against Macmillan. In this case the court found the defender intitled to expose his meat for sale in the front area (about nine feet wide in front, divided from Nicholson's-street, Edinburgh, by a parapet wall) provided he erected a shed over the place on which it was hung, and paved the area with stones.

[f] March 2, 1802, Robertson against Pillans. But the learned reporter remarks, that "some of the judges "were moved by certain specialities "in the case." Still more any encroachment on the public street. Sir W. Forbes against Ronaldson, March 3, 1783. Sometimes even though supported by forty years possession; July 8, 1780. Dict. vol. iv. Pub. pol.

§ 4. NUISANCES

IN like manner the buildings are regulated. A special act, indeed, was passed, regulating the mode of building in the town of Edinburgh.[a] But, at common law, magistrates can prevent any thing taking place in the principal streets that is offensive. Thus, a building in a principal street, with piazzas below for the merchants to walk, and for commodities to be exposed to sale, was ordered to be removed, as an encroachment on the public street.[b]

BY the English law, no action lies for removing a public or common nuisance, but an indictment only. Our law does not adopt this principle; but here, as well as in the whole doctrine of servitudes, is guided by the very different principles of the civil law. Thus, the intrusion on the High street of Montrose, by piazzas, and the erection of shops in the piazzas, High street, Edinburgh, both above mentioned, were removed at the instance of private citizens.

[a] 1698, c. 8.

[b] Feb. 27, 1762, magistrates of Montrose against Scott.

CHAP. V.

Of the Fiars and Assize.

§ I. OF THE FIARS.

I. AMID other matters of this nature, the regulation of the grain and bread was not overlooked.

THE sheriffs and stewarts, in their respective jurisdictions, have been in the practice, for time immemorial, to strike, in February, the fiars that is to fix the price of grain for the preceding crop; according to which fiars all bargains are regulated, whether the parties have not fixed any price, or have expressly made a reference to the fiars. This matter is regulated by an act of sederunt of the court of session.[a] The purpose of striking is to ascertain the current medium prices.

[a] 21st December, 1723. Act declaring and appointing the manner of striking the sheriff-fiars.

The lords of council and session considering that the use of the sheriff-fiars is to liquidate the price of victual in divers processes that come before them and the subordinate judicatories; and that there is a general complaint that the said fiars are struck and given out by the sheriffs without due care and inquiry into the current and just

II THE assize of bread, again, is fixed from time to time by the magistrates within the respective royal boroughs. § 2. ASSIZE.

just prices; and that when some sheriffs proceed in striking the fiars by way of inquest, yet they get not sufficient evidence to the jury; and that other sheriffs proceed arbitrarily and without an inquest; and that some of them entirely neglect to strike fiars, which creates great uncertainty and much delay and expence in the administration of justice.

Therefore, the said lords do hereby appoint and require the sheriffs of Scotland, and their deputes, yearly, betwixt the 4th and 20th of February, to summon before them a competent number of persons, living within the sheriffdom, who have knowledge and experience of the prices and trade of victual in these bounds, and from them to chuse fifteen men, whereof not fewer than eight shall be heritors, to pass upon the inquest, and return their verdict on the evidence under-written, or their own proper knowledge concerning the fiars for the preceding crop, of every kind of victual, of the product of that sheriffdom: and the said sheriffs and their deputes shall, to the same time and place unto which the jury is called, also summon the properest witnesses and adduce them and all other good evidence before the said jury, concerning the price at which the several sorts of victual have been bought and sold, especially since the 1st of November immediately preceding, until that day; and also concerning all other good grounds or arguments, from whence it may rationally be concluded by men of skill and experience, what ought to be established as the just fiar prices for the said crop; and any persons then present may, in open court, and no otherwise, and observing due order and respect, offer information to the jury concerning the premises, and concerning the evidence adduced, or that might be adduced before them: and if it appear to the sheriff or his deputes or to the jury, that the adducing of proper evidence has been any way disappointed, or that the evidence adduced is defective, the said sheriff or his deputes shall adjourn the jury till a certain and proper day, that sufficient evidence may then be laid before them; and the jury being duly sworn before the evidence be entered upon, when the same is concluded, the said jury shall be and remain enclosed till they have finished their verdict, which they shall return, signed by their chancellor and clerk, to the sheriff or his deputes, at the time and place fixed for that purpose by the said sheriff or his deputes, when the said jury was inclosed: and the said sheriff or his deputes shall, on or before the first day of March, pronounce and give forth sentence according to the said verdict, determining and fixing the fiar prices for the crop preceding, of each kind of victual, of the produce of that sheriffdom. And, farther, in such shires, where the use and custom has been, or where it may now be found needful and convenient, to strike

§ 2. ASSIZE. And this matter being now entirely regulated by British statutes, we take this chapter from Dr. Burn.

Formeracts repealed. THE statute 31 Geo. II, c. 29, repeals all the former laws relating to the assize of bread, and re-enacts the same, with additions and amendments: Which, throughout the whole, "is a very regular and judicious act; so that, (says Dr. Burn) the author hath nothing more to do than to "abridge the same in the order as it stands: not being "able, in point of method, to alter it for the better."

Power to set the assize. To the intent that a plain and constant rule and method may be duly observed, in making and assizing of the several sorts of bread which shall be made for sale, in any place where an assize shall be thought proper to be set; it is enacted, that it shall be lawful for the court, or for the person or persons herein authorized to set the assize of bread, to set

different fiars, according to the different qualities of the several sorts of victual; the said use, which experience has shewn to be good and profitable, shall be continued or introduced by the several sheriffs respectively, and the said different fiars shall be fixed and determined as the other fiars in manner above appointed. All which fiars the said sheriff or his deputes shall forthwith record in their books, and their clerks shall give extracts thereof to any person who asks the same, and that for the payment of seven shillings Scots money, and no more, for the whole fiars of one year. And the saids lords of council and session, that the administration of justice in the court of session, and subordinate courts, may no longer suffer by the negligence and defects above mentioned, do hereby appoint, and strictly require, the sheriffs, and their deputes and clerks, punctually to observe the premises; and that the same be also observed by the stewards of Kirkcudbright, and of Orkney and Zetland, and their deputes and their clerks; and that the said sheriffs and stewards, their deputes and clerks, do begin the observation thereof in February next, as they regard and will be answerable for the due execution of their offices. And the said lords appoint this act to be forthwith printed and published; and the clerks of session are to give an extract thereof to each sheriff and steward clerk aforesaid gratis, to the end it may be recorded in the said sheriffs and stewards books, which the said sheriff and steward-clerks are hereby enjoined to do accordingly.

§ 2. ASSIZE.

or ascertain in any place within their jurisdiction, the assize and weight of all sorts of bread which shall be made for sale, or exposed to sale, and the price to be paid for the same, when and as often as they shall think proper.[a] And therein respect shall be had to the price, which the grain, meal, or flour, shall bear, in the market or markets, in or near to the places for which such assize shall be set;[b] and making reasonable allowance to the bakers for their charges, labour, and profit, as they shall deem proper.[c] Where an assize shall be thought proper to be set, no person shall make for sale, or sell, or expose to or for sale, any sort of bread except wheaten and household (otherwise brown bread) and such other sorts of bread as shall be allowed in the assize: but where it hath been usual to make, or the persons setting the assize shall allow the making of bread, with the meal or flour of rye, barley, oats, beans, or pease, or of any such different sorts of grain mixed together; the same may be there made and sold accordingly: and if any person shall offend in the premises, and be convicted thereof, by confession, or oath of one witness, before any magistrate or justice within the limits of their jurisdiction, he shall forfeit not exceeding 40s. nor less than 20s.[d] And in every place where an assize shall be thought proper to be set, the assize and weight of the several sorts of bread which shall be there made, shall be set according to certain tables.[e]

In proportion to the price of corn.

Allowance to the bakers.

Penalty of disobeying the assize.

One witness.

One justice

Tables of assize.

[a] 31 Geo. II, c. 29, § 2. [b] Idem. [c] Idem. [d] § 3.

[e] Of the assize and price of bread made of wheat:—

Price of the bushel of wheat and baking.		WEIGHT.				PRICE.									
		The penny loaf				Quartern loaf,				Half peck,				Peck loaf,	
		Wheat.		Housbd		Wheat.		Housbd		Wheat.		Housbd		Wheat.	Housbd
s.	d.	oz.	dr.	oz.	dr.	s.	d.	s.	d.	s.	d.	s.	d.	s d..	s. d.
2	9	22	4	29	4	0	3¼	0	2¼	0	6¼	0	4¾	1 0½	0 9½
3	0	20	4	27	1	0	3½	0	2½	0	7	0	5¼	1 1¾	0 10¾
3	3	18	9	25	4	0	3¾	0	2⅝	0	7½	0	5½	1 3	0 11
3	6	17	6	23	3	0	4	0	3	9	8	0	6	1 4	1 0
3	9	16	6	21	6	0	4¼	0	3¼	0	8½	0	6½	1 5	1 1
4	0	15	4	20	4	0	4½	0	3⅜	0	9	0	6¾	1 6¼	1 1¼

§ 2. ASSIZE.

EVERY assize which shall be set, in any city, town, corporate, hundred, division, liberty, rape, or wapentake, shall be

4	3	14	4	19	1	0	4¾	0	3¾	0	9¾	0	7½	1	7½	1	2½
4	6	13	9	17	15	0	5	0	3¾	0	10	0	7¾	1	8½	1	3½
4	9	12	12	17	1	0	5½	0	4	0	10¾	0	8	1	9¾	1	4¼
5	0	12	1	16	6	0	5¾	0	4¼	0	11¼	0	8½	1	11	1	5
5	3	11	9	15	7	0	6	0	4½	1	0	0	9	2	0	1	6
5	6	11	2	14	10	0	6¼	0	4¾	1	0¼	0	9¼	2	1	1	7
5	9	10	8	14	4	0	6½	0	5	1	1¼	0	9¾	2	2½	1	7½
6	0	10	2	13	9	0	7	0	5¼	1	1¾	0	10¼	2	3½	1	8½
6	3	9	11	13	1	0	7¼	0	5½	1	2¼	0	10¾	2	4¼	1	9¼
6	6	9	4	12	10	0	7½	0	5¾	1	3	0	11	2	6	1	10
6	9	9	0	12	1	0	7¾	0	6	1	3½	0	11½	2	7	1	11
7	0	8	11	11	9	0	8	0	6¼	1	4	1	0	2	8	2	0
7	3	8	7	11	2	0	8¼	0	6½	1	4½	1	0½	2	9	2	1
7	6	8	3	10	11	0	8½	0	6¾	1	5	1	1	2	10	2	2
7	9	7	14	10	6	0	8¾	0	7	1	5½	1	1½	2	11¼	2	2¾
8	0	7	10	10	2	0	9¼	0	7¼	1	6¼	1	1¾	3	0½	2	3½
8	3	7	5	9	15	0	9½	0	7½	1	7	1	2	3	2	2	4
8	6	7	2	9	9	0	9¾	0	7¾	1	7½	1	2½	3	3	2	5
8	9	6	15	9	4	0	10	0	7¾	1	8	1	3	3	4	2	6
9	0	6	13	8	15	0	10¼	0	8¼	1	8½	1	3½	3	5	2	7
9	3	6	9	8	12	0	10½	0	8½	1	9	1	3¼	3	6¼	2	7¾
9	6	6	7	8	8	0	10¾	0	8¾	1	9¾	1	4¼	3	7¼	2	8½
9	9	6	4	8	5	0	11	0	8¾	1	10¼	1	4¾	3	8½	2	9½
10	0	6	1	8	2	0	11½	0	8¾	1	11	1	5	3	10	2	10
10	3	5	15	7	15	0	11¾	0	8¾	1	11½	1	5½	3	11	2	11
10	6	5	13	7	11	1	0	0	9	2	0	1	6	4	0	3	0
10	9	5	11	7	9	1	0¼	0	9¼	2	0¼	1	6½	4	1	3	1
11	0	5	9	7	5	1	0½	0	9½	2	1	1	7	4	2	3	2
11	3	5	6	7	3	1	0¾	0	9¾	2	1¾	1	7¾	4	3¼	3	2¾
11	6	5	5	7	2	1	1	0	10	2	2¼	1	7¾	4	4½	3	3½
11	9	5	2	6	15	1	1½	0	10	2	3	1	8½	4	5	3	4
12	0	5	1	6	13	1	1¾	0	10¼	2	3½	1	8	4	7	3	5
12	3	4	15	6	10	1	2	0	10½	2	4	1	9	4	8	3	6
12	6	4	14	6	8	1	2¼	0	10¾	2	4½	1	9½	4	9	3	7
12	9	4	13	6	5	1	2½	0	11	2	5	1	10¼	4	10	3	8
13	0	4	11	6	4	1	3	0	11¼	2	5¾	1	10½	4	11½	3	8½
13	3	4	9	6	3	1	3¼	0	11½	2	6½	1	10	5	1	3	9
13	6	4	8	6	1	1	3½	0	11½	2	7	1	11	5	2	3	0
13	9	4	7	5	15	1	3¾	0	11¾	2	7¼	1	11½	5	3	3	11
14	0	4	5	5	13	1	4	1	0	2	8	2	0	5	4	4	0
14	3	4	4	5	11	1	4¼	1	0¼	2	8½	2	0½	5	5	4	1
14	6	4	3	5	9	1	5	1	0½	2	9	2	1	5	6	4	2

In the first column is the price of the bushel of wheat, Winchester measure, from 2s. 9d. to 14s. 6d a bushel, the allowance of the magistrates or justices to the baker for baking being included; and in the next two columns are the *weights* of the several loaves: then, in the other columns,

set in avoirdupois weight, and not troy weight; and in the proportions directed by the said tables, or as near as may be; and the said tables shall extend as well to such bread which shall be made of the flour of wheat mixed with the flour of other grain, as also to bread which shall be made with the flour of other grain than wheat, which shall be publicly allowed in any place to be made into bread; and

§ 2. ASSIZE.

are the *prices*. So that, for example, if the price of wheat is 5s. a bushel, and the magistrate's allowance 1s. 6d. to the baker for baking; then opposite to 6s. 6d. in the first column, will be found the weight and prices of the several loaves.

And as the weight of the penny loaf is here only specified, the weight of larger loaves may be easily ascertained by addition; as, for example a twopenny loaf (when wheat is at the same rate) is twice as much as the penny loaf, the sixpenny loaf six times as much, and the eighteen penny loaf eighteen times as much.

Note, the wheaten loaves are three fourths of the weight of the household loaves; and if the magistrates or justices shall think fit to allow any of the white loaves of the price of one penny or two pence, they are to weigh three fourths of the weight of the wheaten loaves of the same price.

And note, that the prices of the household loaves are always three fourths of the prices of the wheaten loaves; and where it shall be thought proper to allow of half quartern loaves, the prices of such loaves (if sold singly) are to be half a farthing higher than is allowed by this table when it shall so happen that the farthing is split.

And magistrates and justices being to set the assize and fix the price of the several loaves of bread, having respect to the price which the grain, meal, or flour, of which the same are made, shall bear in the market; but no provision being made how they shall know what price the respective sorts of meal and flour should be esteemed to bear, in proportion to the price of wheat; they are therefore to take notice, that the peck loaf of each sort of bread is to weigh, when well baken, 17 lb. 6 oz. avoirdupois weight (which consists of 16 drachms to the ounce, and 16 ounces to the pound), and the rest in proportion; and that every sack of meal or flour is to weigh 2 cwt. and 2 qrs. neat; and that from every sack of meal or flour there ought to be produced, on an average, 20 such peck loaves of bread; and, by observing the said rule, magistrates and justices may, at all times, know if the baker hath more or less than the allowance they intend to give him.

§ 2. ASSIZE. the assize of all such mixed bread shall be set as near as may be, according to the said tables (§ 5.)

TABLE II.—Of the assize and price of bread made of the several grains here under mentioned.

No. 1. Price of bushel and baking.		No. 2. Weight of the penny loaf										No. 3. Weight of the peck loaf.									
		Rye		*Barley*		*Oats*		*Beans*		*Maslin*		*Rye*		*Barley*		*Oats*		*Beans*		*Masl*	
s.	d.	oz.	dr.	oz.	dr.	oz.	dr	oz.	dr.	oz.	dr.	s.	d.	s.	d	s.	d.	s.	d.	s.	d.
1	0	62	8	67	8	81	4	83	12	70	0	0	4½	0	4¼	0	9	0	3¼	0	4
1	3	50	0	54	0	25	0	67	0	56	0	0	5½	0	5¼	0	11	0	4	0	5
1	6	41	10	45	0	25	14	5	12	46	10	0	6¼	0	6¼	1	1¼	0	5	0	6
1	9	35	1	38	9	17	11	17	14	40	0	0	7¾	0	7¼	1	3¼	0	5¾	0	7
2	0	31	4	33	12	15	10	11	14	35	0	0	8¾	0	8¼	1	5¾	0	6¾	0	8
2	3	27	13	30	0	13	14	37	4	31	2	0	10	0	9¼	1	7¼	0	7½	0	9
2	6	25	0	27	0	12	8	33	8	28	0	0	11	0	10½	1	10	0	8¼	0	10
2	9	22	11	24	9	11	6	30	7	25	6	1	0	0	11½	2	1	0	9¾	0	11
3	0	20	13	22	8	10	7	27	14	25	5	1	1	1	0½	2	2½	0	10	1	0
3	3	19	4	20	12	9	10	25	12	21	8	1	2¾	1	1½	2	4¼	0	10¾	1	1
3	6	17	13	19	4	8	15	23	15	20	0	1	3¼	1	2¾	2	6½	0	11¾	1	2
3	9	16	11	18	0	8	5	22	5	18	10	1	4½	1	3¾	2	8¾	1	6½	1	3
4	0	15	10	16	14	7	13	20	15	17	8	1	5¾	1	4¾	2	11¼	1	1¼	1	4
4	3	14	12	15	14	7	6	19	11	16	8	1	6¾	1	5¾	3	0¾	1	2¼	1	5
4	6	13	14	15	0	6	15	18	10	15	9	1	8	1	7	3	2½	1	3	1	6
4	9	13	2	14	4	6	9	17	11	14	12	1	8¾	1	8	3	5¼	1	3¾	1	7
5	0	12	8	13	8	6	4	16	12	14	0	1	10	1	9	3	8	1	4¾	1	8
5	3	11	14	12	14	5	15	15	15	13	5	1	11¾	1	10	3	11	1	5¾	1	9
5	6	11	5	12	4	5	11	15	3	12	11	2	0¼	1	11	4	1	1	7½	1	10
5	9	10	13	11	12	5	7	14	9	12	2	2	1¾	2	0	4	3	1	7¾	1	11
6	0	10	6	11	4	5	3	13	15	11	10	2	2¾	2	1	4	5½	1	8	2	0
6	3	0	0	10	13	5	0	13	6	11	3	2	3¾	2	2	4	7¼	1	8¾	2	1
6	6	9	10	10	6	4	13	12	14	10	12	2	5	2	3	4	9	1	9½	2	2
6	9	9	4	10	0	4	10	12	6	10	6	2	6	2	4	5	0	1	10¼	2	3
7	0	8	15	9	10	4	7	11	15	10	0	2	1	2	5	5	1½	1	11¼	2	4

This table is divided into three columns: column first contains the prices of the bushel of grain, the allowance for baking included; which prices are adapted so as to serve either for the Winchester bushel of rye, barley, oats, beans, maslin (otherwise miscellany, consisting of two thirds wheat, and one third rye) the price of either of which bushels in the market being known, the magistrates are to add the intended allowance thereto, the amount of which being found in column first, the weight which the loaves ought to be will be found under the column No. 2; and the price of the respective peck loaves (which are to weigh 17 lb. 6 oz. each) under No. 3.

Example: when the price of the bushel of barley in the market, with the allowance to the baker, is 4s. look for that sum in column first; and under their respective titles in the same

§ 2. ASSIZE.

THE prices which the several kinds of grain, meal, and flour, allowed to be made into bread, shall *bona fide* sell for in the market or places in London, where such grain, meal, and flour, shall be publicly sold during the whole market, and not at particular times thereof, or on particular contracts only, shall from time to time be given in, and certified on oath, on some certain day in every week, as the court of mayor and aldermen shall appoint, by the mealweighers of the said city, or such other persons as the said court shall direct; and shall also, on some certain day in every week, to be appointed by the said court, be entered by such mealweighers or other persons to be appointed as aforesaid, in writing under their hands, in some book for that purpose, to be provided by the said city, and kept at the town-clerk's office. And the next day, after every such price shall be so given in and certified, the assize and weight of all sorts of bread to be sold or exposed to sale, and the price to be paid for the same, shall from time to time be set by the said court, if then sitting; if not, then by the mayor of the said city. And the assize so set shall take place from such time as the said court shall order, and be in force for the said city of London and the liberties thereof, and the weekly bills of mortality (the city of Westminster and liberties thereof, the borough of Southwark, and weekly bills of mortality in the county of Surrey, excepted), until a new or other assize in London shall be set. And after the setting of every such

Prices of grain how to be certified in London.

line will be found the weights which the several assize barley loaves should be of, and the price of the peck barley loaf; and so of each of the other sorts,

Note, where bread is allowed at any time to be made for sale, of pease only, the assize and price thereof are to be set and fixed from the bean columns: and where bread is ordered to be made for sale, of a coarse sort of maslin or miscellany grain, consisting of one third rye, one third barley, and one third either pease or beans, the assize and price thereof are to be set and fixed from the barley columns.

Note also, that this table is framed for bread to be made of the whole produce of the said several grains, except the bran or hull thereof only.

§ 2. ASSIZE. assize by the said court, or by the mayor when the said court shall not sit, the assize so set shall, with all convenient speed, be made public, in such manner as the said court shall direct. But before any advance or reduction shall in any week be made by the said court or mayor, in the price of bread, the mealweighers or such other persons as aforesaid appointed to make return of the prices of grain, meal, and flour, shall leave in writing, at the common hall of the company of bakers, a copy of every return so made and entered by them as aforesaid, some time of the same day on which they shall make the said return and entry: to the intent that the said company may, in the morning of the next day after every such return and entry shall be made, and before any assize shall be set, have an opportunity to offer to the said court or mayor respectively, all such objections as they shall think fit, against any advance or reduction being that day made.[a]

How in other cities and towns corporate. THE court of mayor and aldermen of every other city where there shall be any such court, and when such court shall sit; and where there shall be no such court, or being any such, when the same shall not sit, the mayor, bailiffs, or other chief magistrate or magistrates of every such other respective city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magistrate or magistrates of every such town corporate or borough; or two justices in such towns and places where there shall be no such mayor, bailiffs, aldermen, or chief magistrates, shall and may from time to time as there shall be occasion, cause the respective prices which the several sorts of grain, meal, and flour (fit to make the different sorts of bread allowed there), shall *bona fide* sell for in the respective public markets in or near to such place, during the whole market, and not at particular times thereof, or on particular contracts only, to be

[a] § 6.

given in to them and certified upon oath, in such manner, and by such persons, and on such day in every week, as they shall respectively appoint. And the price which shall be so certified shall be entered by the persons who shall certify the same, in books to be provided and kept by them for that purpose. And within two days after every such price shall be so returned, the assize and weight of bread for such place, and the price to be paid for the same, shall be set by such court or magistrates respectively as aforesaid. And the assize so set shall commence on such day in every week, and be in force for such time not exceeding seven days from the setting of such assize, as such court or magistrates respectively shall direct.[a] § 2. ASSIZE.

How in places within counties at large.

IF two justices of counties at large, ridings, or divisions, shall at any time think fit to set an assize of bread, for any place within the limits of their jurisdiction, in such case it shall be lawful for such two justices, to cause the price which grain, meal, and flour (fit to make the several sorts of bread that shall be made for sale in any such place), shall *bona fide* sell for in the respective public corn market or markets in or near any such place, during the whole market, and not at any particular times thereof, or on special contracts only, to be given and certified on oath to them at their respective places of abode, on such day in every week as they shall appoint, by the clerks of the market or markets in or near such places, or such other person as they shall for that purpose appoint. And the price so returned shall be entered by the persons so returning the same in books to be provided by them and kept for that purpose. And within two days after such return, the assize may be by them set for every such place, for any time not exceeding fourteen days from the setting thereof. And the assize so set from time to time shall commence and be in force at such time after every such setting thereof, and be made

[a] § 7.

§ 2. ASSIZE. public in such places for which the same shall be so set, in such manner as the justices who set the same shall direct.[a]

Bakers may inspect the certificate. ANY maker of bread for sale in any such other city, town corporate, borough, or place, where the assize shall at any time be thought proper to be set, shall have liberty at all seasonable times, in the day time, the next day after such returns shall be made and entered as aforesaid, to see the said entry, without paying any thing for the same; to the intent every such maker of bread for sale may have an opportunity on the said next day after such entry made as aforesaid, to offer to any such court, mayor, bailiffs, aldermen, or other chief magistrate or magistrates, or justices as aforesaid, who shall think fit to set such assize within their respective jurisdiction; and before any such assize shall be set, such objections as he can reasonably make against any advance or reduction to be made in such assize so to be set as aforesaid.[b] No baker of bread for sale shall be liable to pay any fee, gratuity, or reward, to any person for, or by means of any assize to be set.[c]

Bakers to pay no fee for the assize.

[a] § 8. [b] § 9. [c] § 10. The form of the return or certificate, shall be to the effect following. The prices of grain, meal, and flour, as sold in the corn-market in in the of the day of

The beſt wheat at	by the buſhel.
The ſecond at	by ditto.
The third at	by the buſhel.
The beſt wheaten flour at	by the ſack.
Household flour at	by ditto.
Rye at	by the buſhel.
Ryemeal or flour at	by ditto.
Barley at	by ditto.
Barleymeal at	by ditto.
Oats at	by ditto.
Oatmeal at	by
White peaſe at	by the buſhel.
White pea flour or meal at	by
Beans at	by the buſhel.
Bean meal or flour at	by

To

AND the half peck and quarter of a peck loaves of wheaten and household bread are to weigh in proportion to the weight a peck loaf of wheaten or household bread ought to weigh; and to be sold accordingly in proportion. And when any bread shall be ordered to be made with the meal or flour of rye, barley, oats, pease, or beans, either alone, or mixed with the meal or flour of any other grain; the assize of such bread shall be made public, in such manner as the magistrates or justices who shall set such assize shall from time to time direct.[a] In places where any sixpenny, twelvepenny, and eighteenpenny, loaves shall be allowed to be made or sold, no peck, half peck, or quarter of a peck, loaves shall be allowed at the same time to be made or sold; to the

§ 2. ASSIZE.

Bread of different denominations not to be allowed at the same time.

To every of which returns the persons appointed to make the same shall sign their names or marks (§ 11.)

When an assize shall be set, the same shall be made public, in the form, or to the effect following:

To wit, { The assize of bread set the day of
for to take place on the day
of now next ensuing, and to be in force
for the said of

And in places where penny, twopenny, sixpenny, twelvepenny, and eighteenpenny, loaves, shall be made, as followeth:

	lb.	oz.	dr.
The penny loaf wheaten is to weigh -			
Ditto household is to weigh - -			
The twopenny loaf wheaten is to weigh -			
Ditto household is to weigh - -			
The sixpenny loaf wheaten is to weigh -			
Ditto household is to weigh - - -			
The twelvepenny loaf wheaten is to weigh -			
Ditto household is to weigh - - -			
The eighteenpenny loaf wheaten is to weigh -			
Ditto household is to weigh - - -			

And in places where quartern, half peck, and peck, loaves be made, then as follows:

	lb.	oz.	dr.		s.	d.
The peck loaf wheaten is to weigh -				and is to be sold for		
Ditto household is to weigh				and is to be sold for		

[a] § 12.

§ 3. Assize.

intent that one of those sort of loaves may not be sold, designedly or otherwise for the other sort thereof, to the injury of unwary people; on pain that every one offending in the premises shall forfeit not exceeding 40s. nor less than 20s. as the magistrate or justice before whom such offender shall be convicted shall think fit.[a] If the justices of any county, riding, or division, shall in their sessions think fit to ascertain that any hundred or other place within such division ought to be estimated as of or in any one particular hundred riding, or division, of any such county, riding, or division, in order that the assize of bread which shall be set for such particular hundred or place may extend to or comprise such other hundred or place; in such case it shall be lawful for them so to do: but by so doing thereof, no justice of any such county, riding, or division, shall be excluded from acting as a justice in any hundred, riding, or division, of any such county, in which any such particular towns, districts, or places, shall lie, or the assize for them shall be set.[b] An entry shall be made from time to time by the clerk of the market, or other person appointed to make return as aforesaid, in a book to be provided and kept by him, of every return by him made; and also of the rate at which the price, assize, and weight, of bread shall be set within his jurisdiction: which book any inhabitant may at all seasonable times in the day inspect without fee.[c] After the assize shall be set, no alteration shall be made therein in any subsequent week, either to rise or sink the same, except when the price of wheat or other grain shall be returned as having risen or fallen 3d. a bushel since the last return; no provision being made by the assize tables for altering any assize, when the variation in the price shall not have amounted to, and been returned, 3d. a bushel.[d]

Hundreds may be divided for setting the assize.

Clerk of the market to keep books

Assize not to be altered till the price of corn alters 3d. a bushel.

[a] § 13.
[b] § 4.
[c] § 15.
[d] § 16.

§ 2. ASSIZE.

Punishment of officers for default.

IF any mealweigher, clerk of the market, or other person appointed to make returns as aforesaid, shall neglect, omit, or refuse, to do any thing by this act required to be done by him, or shall designedly or knowingly make any false return; or if any constable or other peace officer shall refuse or neglect to obey any warrant in writing, delivered to him under the hand and seal of any magistrate or justice, or to do any other act requisite to be done by him for carrying this act into execution, he shall forfeit not exceeding 5l. nor less than 20s.[a] If any buyer or seller of, or dealer in, corn, grain, meal, or flour, on reasonable request to him made by the mealweighers of the city of London, or by the clerks of the market or other person respectively appointed to make returns as aforesaid, shall refuse to disclose and make known to them the true real prices which the several sorts of grain, meal, and flour, shall be *bona fide* bought at or sold by or for him, at any corn-market, or other place where corn, grain, meal, or flour, is usually openly or publicly sold; or shall knowingly give in any false or untrue price, or which hath been made by any deceitful means; he shall, on conviction thereof, by confession, or oath of one witness, or affirmation of a quaker, forfeit not more than 10l. nor less than 40s.[b] If any court, magistrate, or justices, who shall have ordered any return to be made as aforesaid, shall, within three days after such return, suspect that the same was not truly and *bona fide* made, they may summon before them any person who shall have bought or sold, or agreed to buy or sell any grain, meal, or flour, within their respective jurisdictions, or who shall be thought to be likely to give any information concerning the premises; and may examine them upon oath, touching the rates and prices which the several sorts of grain, meal, and flour, or any of them, were really and *bona fide* bought at, or sold for, or agreed so to be, by him, at any time within seven days preceding such summons.

Buyer or seller to declare the price of corn.

Magistrates may send for them.

[a] § 17. [b] § 18.

§ 2. ASSIZE. And if any person be summoned shall neglect or refuse to appear (proof of such summons being made upon oath); or if any person so summoned shall appear, and neglect or refuse to answer such lawful questions touching the premises as shall be proposed to him, without some just or reasonable excuse to be allowed by such court, magistrate, or justices; he shall, on conviction by oath of one witness, or by confession, forfeit not exceeding 10l. nor less than 40s. And if any person so examined shall wilfully forswear himself, he shall suffer as in cases of perjury.—Provided, that the party summoned be not obliged to travel above five miles from the place of his abode.[a]

Baker of bread made of other grain than wheat shall conform to the assize. WHENEVER any court, magistrate, or justices, as aforesaid, shall order any bread to be made with the flour or meal of any other grain than wheat, or to be mixed with the flour of wheat, or to be made with the flour or meal of any other sorts of grain, either separate or mixed together; all persons who shall make any bread for sale, in any place where such order shall be made, shall make bread with such mixed meal or flour, in such manner, and of such weight and goodness, and shall sell the same at such prices, as such court, magistrate, or justices, respectively, shall direct; on pain of forfeiting not more than 5l. nor less than 40s.[b]

Regulations by 36 Geo. III, c. 22, for making mixed bread. AND whereas it is expedient, in order to diminish the consumption of wheat, that bakers should be permitted to make and sell mixed bread, which they cannot now do in places where an assize is set: and whereas it is not expedient to apply to such sorts of bread the restrictions in the tables of the assize and price of bread now established. It is enacted, that any person in any place whatsoever, whether any assize of bread has been set or not, may make and sell *peck, half peck, quartern, and half quartern, loaves,* made of

[a] § 19. [b] § 20.

the whole produce of wheat, deducting only 5 lb. of bran per bushel; or made of any sort of wheaten flour mixed with meal, or flour of barley, rye, oats, buck wheat, Indian corn, pease, beans, rice, or any other kind of grain, or potatoes, in such proportions, and at such prices, as the maker and seller thereof shall deem reasonable.[a] § 2. ASSIZE.

WHEATEN bread of an inferior quality to the assized bread, must be marked with a large Roman H; and mixed bread with a large Roman X.[b]

IF any person omit to imprint, or distinctly mark, the bread, in terms of the act, or shall not well make, or shall adulterate it with any mixture or ingredient, not allowed to be used in the making of bread; or shall sell peck, half peck, quartern, half quartern, or other loaves deficient in weight, according to the assize of such denominations, respectively, he shall be liable to the like pains specified in the statute for such offences. See 31 Geo. II, c. 29. Marking. Penalty for not marking, or adulteration.

PROVIDED, that this act shall not affect the rights of the bakers company in London.[c]

[a] 36 Geo. III, c. 22, § 1. This act was repealed by the 41 Geo. III, c. 16, § 12, revived (and the latter repealed) by 41 Geo. III, sess. 2, c. 2, but ultimately repealed in part, and varied by the statute 41 Geo. III, (U. K.) c. 12; which makes it lawful to bake "peck loaves, half peck loaves, "quartern loaves, and half quartern "loaves, made of wheaten meal, or "flour, of the whole produce of the "wheat, or with the bran only, or "with the bran and pollards, or any "proportion of the bran and pollards, "or any other part of the produce of "such wheat taken therefrom," at any price less than the assize or price of wheaten bread. This act narrows the other so far, as to require the mixture to be not of different kinds of grain, but of the different parts of the produce of the wheat in any proportion. On the other hand, it would appear, to extend the 13 Geo. III, which allowed the making of the old standard wheaten bread, that is, of the whole grain, excepting the bran or hull.

[b] 41 Geo. III, (U. K.) c. 12, § 2.

[c] Ibid. § 3.

§ 2. ASSIZE.

True making of bread.

THE several sorts of bread which shall be made for sale, or sold, or exposed to or for sale, shall always be well made, and in their several and respective degrees, according to the goodness of the several sorts of meal or flour whereof the same ought to be made; and no allum, or preparation or mixture in which allum shall be an ingredient, or any other ingredient or mixture whatsoever (except only the genuine meal or flour which ought to be put therein, and common salt, pure water, eggs, milk, yeast, and barm, or such leaven as shall be allowed to be put therein by those who have set the assize, and where no assize shall be set, then such leaven as any magistrate or justice within his jurisdiction shall allow to be used in making of bread), shall be put into, or in anywise used in making dough, or any bread to be sold, or as or for leaven to ferment any dough, or on any other account, in the trade or mystery of making bread, under any colour or pretence whatsoever; on pain that every person (other than a servant or journeyman) who shall knowingly offend in the premises, and shall be convicted hereof by confession, or oath of one witness, before any such magistrate or justice, respectively, shall forfeit not more than 10l. nor less than 40s.; or shall, by warrant of such magistrate or justice, be apprehended and committed to the house of correction, or some prison of the county, city, town-corporate, borough, riding, division, or place, where the offence shall have been committed, or the offender shall be apprehended, there to remain and be kept to hard labour, for any time not exceeding one kalendar month, nor less than ten days, from the time of such commitment, as such magistrate or justice shall think fit. And if any servant or journeyman baker shall knowingly offend in the premises, and be convicted thereof as aforesaid, he shall forfeit not more than 5l. nor less than 20s. or shall in like manner be committed to the house of correction or prison, as aforesaid. And it shall be lawful for the magistrate or justice, before whom such offend-

er shall be convicted, out of the money forfeited, when recovered, to cause the offender's name, place of abode, and offence, to be published in some newspaper, which shall be printed or published in or near the county, city, or place, where any such offence shall have been committed.[a] § 2. ASSIZE.

No person shall knowingly put into any corn, meal, or flour, which shall be ground, dressed, bolted, or manufactured for sale, either at the time of grinding, dressing, bolting, or in anywise manufacturing the same, or at any other time, any ingredient, mixture, or other thing whatsoever; or shall knowingly sell, offer, or expose to sale, any meal or flour of any sort of grain, as or for the meal or flour of any other sort of grain, or any thing as or for or mixed with the meal or flour of any grain which shall not be the real and genuine meal or flour of the grain the same shall import to be and ought to be; on pain of forfeiting not more than 5l. nor less than 40s.[b] Adulterating meal.

No person shall knowingly put into any bread which shall be made for sale, any mixture of meal or flour of any other sort of grain than of the grain the same shall import to be, and shall be allowed to be made of, in pursuance of this act; or shall put into any bread which shall be made for sale, any larger or other proportion of any other or different sort of grain, or the meal or flour thereof, than what shall be appointed or allowed to be put therein by this act; or any mixture or thing as, for, or in lieu of flour, which shall not really be the genuine flour the same shall import to be and ought to be, on pain of forfeiting not more than 5l. nor less than 20s.[c] Undue mixtures of meal.

If any person who shall make any bread for sale, or who Penalty for deficiency in weight.

[a] 31 Geo. II, c. 29, § 21.
[b] § 22.
[c] § 23.

§ 2. ASSIZE. shall send out, or sell, or expose to or for sale, any bread which shall be deficient in weight, according to the assize which shall be set for the same, he shall forfeit not exceeding 5s. nor less than 1s. for every ounce wanting in the weight every such loaf ought to be of; and for every loaf which shall be found wanting less than an ounce, shall forfeit not exceeding 2s. 6d. nor less than 6d. as such magistrate or justice before whom such bread shall be brought shall think fit: so as such bread which shall be complained of for wanting weight, in any city, town-corporate, borough, liberty, or franchise, having jurisdiction thereof, or within the weekly bills of mortality, shall be brought before some magistrate, or justice having jurisdiction in the premises, and weighed before him, within twenty-four hours after the same shall have been baked, sold, or exposed to sale; and so as such bread which shall be complained of for wanting weight, in any hundred, riding, division, liberty, rape, wapentake, or place, shall be brought before some justice within such jurisdiction, and weighed before him within three days after the same shall have been baked, sold, or exposed to sale; unless it be made out to the satisfaction of such magistrate or justice, on the behalf of the party complained of, that such deficiency in weight wholly arose from some unavoidable accident in baking, or otherwise, or was occasioned by some contrivance or confederacy.[a]

Mark. EVERY person who shall make for sale, or sell, or expose, or send out to or for sale, any sort of bread whatsoever, shall cause to be fairly marked on every loaf made, sold, carried out, or exposed to sale as wheaten bread, a large Roman W; and upon every loaf made, sold, carried out, or exposed to sale as household or brown bread, a large Roman H; on pain of forfeiting for every loaf not so marked, not more than 20s. nor less than 5s. (except as to such

[a] § 24.

loaves which shall be rasped after the bespeaking or purchasing thereof, by the particular desire of any person who shall order the same to be rasped for his own use.[a] § 2. ASSIZE.

No baker or other person shall ask or take, for any bread which he shall sell or expose to sale, any greater price than such bread shall be ascertained to be sold at by the assize as aforesaid; and no baker, or other person who shall make any bread for sale, shall refuse or decline to sell any loaf or loaves of any of the sorts of bread which, in pursuance of this act, shall be allowed or ordered to be made, to any person who shall tender ready money in payment for the same, at the price set for the same by the assize, when such person shall have any loaf in his possession to be sold, more than shall be requisite for the immediate necessary use of his family or his customers, and which it shall be incumbent on such baker or other person complained of to prove before the magistrate or justice to whom such complaint shall be made, if thereunto required by the party complaining, on pain of forfeiting, for every such offence, not more than 40s. nor less than 10s. Penalty for selling for a greater price than set by the assize.

No person shall sell or offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread shall be set at by the assize, on pain of forfeiting (being convicted thereof by confession, or oath of one witness, before one magistrate or justice) the sum of 20s.[b] Bread inferior to wheaten shall not be sold for a higher price than household.

[a] § 25.

[b] § 26.

And by the 2 and 3 Ed. 6, c. 15, if any baker shall conspire not to sell bread but at certain prices, every such person shall forfeit 10l. for the first offence; and if not paid in six days, he shall be imprisoned twenty days, and have only bread and water for his sustenance; for the second offence 20l. or the pillory; and for the third offence 40l. or the pillory, and loss of an ear, and to become infamous. And the sessions or leet may hear and determine the same.

[c] § 27.

§ 2. ASSIZE.

IT shall be lawful for any magistrate or justice, or for any peace officer, authorized by warrant of such magistrate or justice, at seasonable times in the day-time, to enter into any house, shop, stall, bakehouse, warehouse, or outhouse, of or belonging to any baker or seller of bread, to search for, view, weigh, and try all or any the bread which shall be there found: and if any bread, on any such search, shall be found to be wanting, either in the goodness of the stuff whereof it shall be made, or to be deficient in the due baking or working thereof, or shall be wanting in the due weight, or not truly marked, or shall be of any other sort of bread than shall be allowed to be made by virtue of this act; any such magistrate, justice, or peace officer, may seize the same; and such magistrate or justice may dispose thereof, as he in his discretion shall think fit, for the better carrying of this act into execution.[a]

Houses may be entered to search for bread.

IF information shall be given on oath, to any magistrate or justice, that there is reasonable cause to suspect that any miller who grinds any grain for toll or reward, or any person who doth dress, bolt, or in anywise manufacture any meal or flour for sale, or any maker of bread for sale, doth mix up with or put into any meal or flour ground or manufactured for sale, any mixture, ingredient, or thing whatsoever, not the genuine produce of the grain such meal or flour shall import and ought to be, or whereby the purity of any meal or flour in the possession of any such miller, mealman, or baker, shall be in anywise adulterated, it shall be lawful for any such magistrate or justice, and also for any peace officer, authorized by the warrant of such magistrate or justice, at all seasonable times in the day-time, to enter in any house, mill, shop, bakehouse, stall, bolting-house, pastry, warehouse, or outhouse, of or belonging to any such miller, mealman or baker, and to search and examine whe-

Mills and other places may be entered to search for adulterated meal.

[a] S. 28, 32 Geo. II. c. 18, § 2.

ther any mixture, ingredient, or thing, not the genuine produce of the grain such meal or flour shall import or ought to be, shall have been mixed up with or put into any meal or flour in the possession of any such miller, mealman, or baker, either in the grinding of any grain at the mill, or in the dressing, bolting, or manufacturing thereof, or whereby the purity of any meal or flour shall be in anywise adulterated; and if on such search it shall appear, that any offence hath been committed in any place allowed to be searched as aforesaid, it shall be lawful for any magistrate, justice, or officer, authorized as aforesaid, to seize any meal or flour which shall be deemed on such search to have been adulterated, and all mixtures and ingredients which shall be found and deemed to have been used or intended to be used for such adulteration; and such thereof as shall be seized by such peace officer shall, with all convenient speed, be carried to some magistrate or justice: and if any magistrate or justice, who shall make any seizure in pursuance of this act, or to whom any thing seized shall be brought, shall adjudge that any mixture or ingredients, not the genuine produce of the grain, any such meal or flour which shall have been so seized shall import and ought to be, shall have been put into any such meal or flour, or that the purity of any such meal or flour so seized was adulterated by any mixture or ingredient put therein; in such case, every such magistrate or justice is hereby required to dispose of the same, as he in his discretion shall think proper.[a] § 2. ASSIZE.

EVERY miller, mealman, baker, or seller of bread as aforesaid, in whose house, mill, shop, bakehouse, stall, bolting-house, pastry, warehouse outhouse, or possession, any mixture or ingredient shall be found, which shall be adjudged by any magistrate or justice to have been lodged there with an intent to have adulterated the purity of meal, flour, or Penalty of having in possession unlawful ingredients.

[a] 31 Geo. II, c. 29, § 29.

§ 2. ASSIZE. bread, shall, on conviction by confession, or oath of one witness before any such magistrate or justice, forfeit not exceeding 10l. nor less than 40s. unless the party charged with such offence shall make it appear to the satisfaction of such magistrate or justice, that such mixture or ingredient was not brought or lodged where the same was seized, with design to have been put into any meal or flour, or to have adulterated the purity thereof, but that the same was there for some other lawful purpose. And it shall be lawful for such magistrate or justice, out of the forfeiture, when recovered, to cause the offender's name, place of abode, and offence, to be published in some newspaper printed or published in or near the county, city, or place, where such offence shall have been committed.[a] If any person shall obstruct or hinder such search, or the seizure of any bread or ingredients as aforesaid, he shall forfeit not exceeding 5l. nor less than 20s.[b]

Penalty of obstructing search.

Person interested not to act as a magistrate. NO person who shall follow or be concerned in the business of a miller, mealman, or baker, shall act as a magistrate or justice in the execution of this act, on pain of 50l. to him who will inform and sue for the same in any court of record at Westminster.[c] If any person who shall follow the trade of a baker, shall make complaint to any magistrate or justice, and make appear to him, by the oath of any credible witness, that any offence which he hath been charged with, and for which he shall have paid any penalty by this act, shall have been occasioned by the wilful neglect or default of any journeyman or other servant employed by him, such magistrate or justice shall issue his warrant to bring such journeyman or servant before himself, or any magistrate or justice of the place where the offender can be found; and on his being apprehended and brought before such magi-

Journeyman offending.

[a] § 30.
[b] § 31.
[c] § 32.

strate or justice, the said magistrate or justice shall examine into the matter of such complaint, and on proof thereof upon oath, shall, under his hand, adjudge and order what reasonable sum shall be paid by such journeyman or servant to his master, by way of recompence for the money he shall have paid by reason of the wilful neglect or default of such journeyman or servant. And if he shall neglect or refuse, on conviction, to pay immediately, such magistrate or justice shall commit him to the house of correction, or some other prison, of the place where he shall be apprehended or convicted, to be kept to hard labour, not exceeding one kalendar month, unless payment thereof shall be made after such commitment, and before the expiration of the said term of one kalendar month.[a] § 2 ASSIZE.

Manner of convicting offenders.

IT shall be lawful for the mayor of London, or any alderman thereof, within the said city or liberties, and for one justice, within the several counties, ridings, divisions, cities, towns-corporate, boroughs, liberties, or jurisdictions, to hear and determine, in a summary way, all offences against this act; and for that purpose to summon before him the party accused; and if he shall not appear, or offer some reasonable excuse for his default, then on oath made of the offence by one witness, such magistrate or justice shall issue his warrant for apprehending the offender: and on appearance of the party accused, or if he shall not appear, on notice being given to or left for him at his usual place of abode; or if he cannot be apprehended on a warrant granted against him as aforesaid, such magistrate or justice shall proceed to inquire of the offence, and to examine any witness or witnesses who shall be offered on either side upon oath, and shall convict or acquit the party accused: and if the penalty, on such conviction, shall not be paid within twenty-four hours after such conviction, such magistrate or justice shall issue his

[a] § 33.

§ 2. ASSIZE. warrant, directed to any peace-officer, to make distress; and if any offender shall convey away his goods out of the jurisdiction of such magistrate or justice, or so much thereof that the penalty cannot be levied, then some magistrate or justice within whose jurisdiction the offenders shall have removed his goods shall back the said warrant, and thereupon the penalty shall be levied by distress; and if within five days the forfeiture shall not be paid, the distress shall be appraised and sold, rendering the overplus, after deducting the forfeiture and the costs, and charges of the prosecution, distress, and sale; which charges shall be ascertained by the magistrate or justice before whom the offender was convicted, or who backed the warrant, if either of them shall continue alive, and if not, then by some other magistrate or justice where the offender was convicted; and for want of such distress, every such magistrate or justice within whose jurisdiction such offender shall reside or be, shall, on application of the prosecutor, and proof made of the conviction and non-payment of the penalty and charges, commit such offender to the common gaol or house of correction of the division or place where the offender shall be found, there to remain for one kalendar month from the time of such commitment, unless payment shall be sooner made.[a]

AND if it shall be made out on oath, to the satisfaction of any magistrate or justice, that any one is likely to give material evidence on behalf of the prosecutor or of the person accused, and will not voluntarily appear to be examined, such magistrate or justice shall issue his summons to convene such witness before him, at such reasonable time as in such summons shall be fixed: and if any persons so summoned shall neglect or refuse to appear, and no just excuse shall be offered for such neglect or refusal, then (after proof, upon oath of such summons) such magistrate or justice shall

[a] § 4.

issue his warrant to bring such witness before him; and if, on his appearance, or on being brought before such magistrate or justice, he shall refuse to be examined on oath, without offering any just excuse for such refusal, such magistrate or justice may commit him to the public prison of the county, city, or other division, in which the person so refusing to be examined shall be, there to remain not exceeding fourteen days, nor less than three, as such magistrate or justice shall direct.[a] § 2. ASSIZE.

AND the conviction shall be in the form or to the effect following: Form of the conviction.

———*To-wit. Be it remembered, that on this day of in the year of the reign of* A O *is convicted before me, one of his majesty's justices of the peace for the said county of for and I do adjudge him to pay and forfeit for the same the sum of*

Given under my hand and seal the day and year aforesaid.[b]

BY a general clause in this same act,[c] all penalties and forfeitures, when recovered, shall be paid to the informer. Application of the forfeitures.

BUT by the 32 Geo. II, c. 18, such of the penalties by the aforesaid act, as thereby are not *particularly* disposed of, shall be applied, one moiety thereof, where any offender shall be convicted by confession, or oath of one witness, to him who shall inform and prosecute; and the other moiety thereof, and also all penalties and forfeitures incurred on the weighing, trying, or seizure, of any bread by any magistrate or justice, to the better carrying the said act into execution, as such magistrate or justice shall think fit.[d]

No certiorari, letters of advocation, or of suspension, shall Advocation

[a] § 35.
[b] § 36.
[c] § 34.
[d] § 2.

§ 2. ASSIZE. be granted, to remove any conviction, or other proceeding had thereupon.[a]

Appeal. IF any person convicted shall think himself aggrieved, he may appeal to the next sessions, and the execution shall in such case be suspended; such person convicted entering into recognizance, at the time of the conviction, with two sufficient sureties, in double the sum which he shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices at the said sessions, who shall finally determine the matter of the said appeal, and award such costs as to them shall appear just and reasonable, to be paid by either party: and if the conviction shall be affirmed, the appellant shall immediately pay down the sum adjudged, together with such costs as the justices in their said sessions shall award; and in default of payment thereof, any two such justices, or any one magistrate or justice having jurisdiction in the place to which such appellant shall escape, or where he shall reside, shall commit him to the common gaol of the county, city, division, or place, where he shall be apprehended, until he shall make payment of such penalty and of the costs and charges which shall be adjudged on the conviction, to the informer: but if the appellant shall be discharged, reasonable costs shall be awarded to him against the informer, who would, in case of such conviction, have been entitled to a share of the penalty; and which costs shall and may be recovered by the appellant against such informer, in like manner as costs given at the sessions are recoverable.[b] Provided, that if the conviction shall be within six days before the sessions, the party, on entering into such recognizance as aforesaid, shall be at liberty to appeal, either to the then next, or to the next following sessions.[c] Every action

[a] 31 Geo. II, c. 29, § 37.
[b] § 38.
[c] § 39.

which shall be brought against any magistrate, justice, or peace-officer, for any thing done under this act, shall be commenced within six months, and laid in the proper county; and the act of 24 Geo. II, c. 44, shall extend to such magistrate or justice acting under this act. And no action shall be commenced against such peace-officer, till seven days after notice in writing shall have been given to or left for him at his usual place of abode by the prosecutor's attorney; which notice shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action: and such peace-officer may within the said seven days tender satisfaction; and if the same is not accepted, the defendant may plead such tender in bar of the action, together with the general issue, or any other plea, with leave of the court; and if the jury shall find the amends tendered to have been sufficient, or if the plaintiff shall be nonsuit, or discontinue, or judgment be given for the defendant upon demurrer, or if the action be brought after the time limited, or not within the proper county, the jury shall find for the defendant, and he shall be entitled to his costs; but if the jury shall find that no such tender was made, or not sufficient, or shall find against the defendant on any plea pleaded, they shall give a verdict for the plaintiff, and such damages as they shall think proper, and the plaintiff shall thereupon recover his costs against such defendant.[a]

Indemnity of persons prosecuted for any thing done on this act.

AND other persons sued for any thing done on this act, may plead the general issue;[b] and if they recover shall have treble costs.[c] Provided always, that no person shall be convicted for any of the aforesaid offences, unless the prosecution be commenced within three days after the offence committed.[d] Provided also, that nothing herein shall extend to

Limitation of actions.

[a] § 40.

[b] This relates to a peculiarity of the English practice. See explanation of technical terms at the end of the volume.

[c] § 41.

[d] § 42.

§ 2. ASSIZE. Saving of the right of others.

prejudice any right or custom of the city of London; or of the lord of any leet; or clerk of the market; or the dean of Westminster, or high steward of Westminster, or his deputy, or of the universities.[a]

Proceedings where the assize hath not been set.

ALL that hath been said above, as to the price and weight of bread, and the like, proceeds upon the supposition of an assize being set. By the 3 Geo. III, c. 11, regulations are made, although no assize be set, and further provisions are enacted, as followeth:

§ 3. IF NO ASSIZE.

III. No loaf or loaves of bread, called or deemed assize loaf or loaves in the table of the assize and price of bread in the act of the 31 Geo. II, c. 29, and the weight of which varies according to the variation in the price of grain, shall be made for or exposed to sale, in any place where loaves

[a] § 43, 44, 45.

"Note.—The reason why the indemnifying statute of the 24 Geo. II, c. 44, is here particularly mentioned, seems to be upon the account of such magistrates or chief officers who are empowered to act in setting the assize, and otherwise carrying this act into execution, that are not justices of the peace; as, for instance, the court of mayor and aldermen, in most of the boroughs and towns corporate, consisteth of persons some of whom are not justices; and in others, especially the more ancient, not one of them is a justice of the peace (the corporation having been established before there were any justices of the peace in the kingdom): but yet they are enabled specially to proceed in this and in many other instances by act of parliament. Which observation is applicable also to the power herein given to them, to issue precepts, to examine upon oath, and the like; which power is implied in the general office of a justice of the peace, but is not applicable to those others, without special words granting the same. So also it was necessary for the act to be particular, with regard to the indemnification of constables and others acting under such warrants; as also of the meal-weighers, clerks of the market, and others appointed to make returns of the price of grain, flour, and the like, who are not under the general protection of the law for their proceedings in these matters, and therefore require an express declaration in the act itself of their authority and privilege in this respect." Burn.

called prized loaves in the said tables, shall be allowed to be sold at the same time; that is to say, no assize loaves of the price of three pence, and prized loaves called half quartern loaves, nor assize loaves of the price of six pence, and prized loaves called quartern loaves, nor assize loaves of the price of twelve pence, and prized loaves called half peck loaves, nor assize loaves of the price of eighteen pence, and prized loaves called peck loaves, shall at the same time in any place be made for or exposed to sale, to the end that unwary persons may not be imposed on by buying assize loaves for prized loaves, or prized loaves for assize loaves; on pain that every person offending shall forfeit not exceeding 40s. nor less than 10s.[a] § 3. IF NO ASSIZE. Assized and prized loaves not sold at once.

AND the justices in their general, quarter, or petty sessions, may from time to time appoint, which of the sorts of assize or prized loaves, and what other sorts of bread, and what sorts of grain, shall be allowed to be made and sold within their jurisdiction, or any part thereof: their order to be entered in a book, which may be inspected by the makers of bread for sale at all seasonable times of the day, without fee; and they shall cause a copy thereof to be put up in some market, or other public town of the place, or else be inserted in some public newspaper circulated there. Provided, that the justices shall not at any time allow the making for sale or selling any sorts of assize bread made of the flour of wheat, or other than wheaten and household bread, and loaves of white bread of the price of two pence or under.[b] Justices to appoint from time to time the sorts of bread and grain to be sold.

AND every maker of bread for sale shall observe the same proportion as to weight, as where the assize is set; that is to say, every white loaf of the price of two pence, or under, shall weigh three parts in four of the weight of the wheaten Proportion of weight to be observed.

[a] 3 Geo. III, c. 11, § 1. [b] Ibid. § 2, 3.

§ 3. IF NO ASSIZE. loaf of the like price; and every wheaten assize loaf, of whatever price the same shall be, shall weigh three parts in four of the weight of every household assize loaf of the like price; and every household assize loaf shall weigh one third part more than a wheaten assize loaf of the like price, on pain of forfeiting not exceeding 40s.[a] And every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for sale of the flour of wheat, and called *Wheaten Bread*, shall be sold in proportion to each other, as to price; and the like as to loaves of *Household Bread*, which shall be sold proportionably to each other, and for one fourth less than *Wheaten Bread* of the same denomination: on pain of forfeiting for every loaf, not exceeding 40s. nor less than 10s.[b] And the weight of every sort of bread made for sale shall be in avoirdupois weight, as follows: every peck loaf, seventeen pounds six ounces; half peck loaf, eight pounds eleven ounces; quarter of a peck loaf, four pounds five ounces and a half; half quarter of a peck loaf, two pounds two ounces and three quarters;[c] on pain of forfeiting for every ounce wanting not exceeding 5s. nor less than 1s. and for less than an ounce not exceeding 2s. 6d. nor less than 6d.; so as the same in any city, town corporate, or within the bills of mortality, be brought before a justice and weighed before him within twenty-four hours after the same shall have been baked or found in any person's custody for sale, and elsewhere within three days; unless it be made out to the satisfaction of such justice, that the deficiency in weight wholly arose from some unavoidable accident, or was occasioned by some contrivance or confederacy.[d] And no person shall sell or offer to sale any bread of an inferior quality to wheat bread, at an higher price than household bread, on pain of forfeiting not exceeding 20s.[e]

Wheaten bread,

Household bread.

Weight of bread.

[a] 3 Geo. III, c. 11, § 4.
[b] § 5.
[c] By 41 Geo. III, (U. K.) c. 12, the weight is 2 lbs. 2 oz. 12 drs.
[d] § 5.
[e] § 6.

§ 3. IF NO ASSIZE.

EVERY wheaten loaf shall be marked with a large Roman W; household with a large Roman H; and if any person shall sell or offer to sale any such loaf unmarked (except as to such loaves which shall be rasped by the desire of the purchaser for his own use), he shall forfeit for every such loaf, a sum not exceeding 40s. nor less than 10s.; unless it shall appear to the satisfaction of the justice to whom complaint shall be made, that the not marking arose from some unavoidable accident, or was occasioned by some contrivance or confederacy.[a] Marking.

AND bread made of any other grain than wheat shall be marked with some letter or letters, not more than two, as the justices in their general, quarter, or special, sessions, shall order; which order shall be entered in a book, to which the bakers may resort in the day-time without fee; and the justices shall cause a copy thereof to be put up in some market, or other public town or place within the division, or otherwise to be inserted in some public newspaper usually circulated there: and if the justices shall neglect to make such order, then the baker shall mark every such loaf with any two distinct capital letters as he shall think fit. And every person who shall make or have in his custody for sale any such loaf made of other grain than wheat, which shall not be so marked, so as the same may, on view thereof, be ascertained under what denomination it was made (except such loaves as shall be rasped by the desire of the purchaser for his own use), shall forfeit a sum not exceeding 40s. nor less than 5s. for every loaf not so marked.[b] Marking of bread of other grain.

AND it shall be lawful for any justice, or peace-officer, authorized by warrant of such justice, to enter into any Power to enter into any shop.

[a] 3 Geo. III, c. 11, § 8.

[b] § 9. This of the marking would seem to be superseded by 41 Geo. III, (U. K.) c. 12.

§ 3. IF NO ASSIZE.

house, shop, stall, bakehouse, warehouse, outhouse, or other place, of or belonging to any baker or seller of bread; and to search, view, weigh, and try, all or any bread which shall be there found: and if any bread shall, on any search or trial by any justice, or on proof made before him by the oath of one witness, be found to be deficient in weight, or not truly marked, or deficient in the due baking or working thereof, or wanting in the goodness of the stuff, or made with any mixture of meal or flour of any other grain than the same shall import to be made with, or with any larger or other proportion of any other grain than what ought to be put therein, or with any mixture or ingredient which by the aforesaid act ought not to be put therein, or with any thing in lieu of flour which shall not be the genuine flour the same shall import to be, or made with any leaven not allowed by the said former act; such justice or peace-officer may seize the same, and dispose thereof to poor persons as to such justice shall seem fit; and the maker or seller, whose bread shall be found wanting in the goodness of the stuff, or made with such undue mixture as aforesaid, or undue proportion, or made with any thing in lieu of flour which shall not be the genuine flour the same shall import to be, or with any leaven not allowed by the said act, shall forfeit a sum not exceeding £5, nor less than 20s.; unless the default shall appear to have wholly arisen from some unavoidable accident, or some contrivance or confederacy.[a] And if any person shall obstruct or oppose any such search, or seizure of such bread, he shall forfeit a sum not exceeding 40s. nor less than 20.[b] And no person, who shall follow or be concerned in the business of a miller, mealman, or baker, shall be capable of acting as a justice in the execution of this act; and if he shall presume so to do, he shall forfeit £50 to him who shall inform or sue for the same.[c] Provided, that if the baker shall

[a] 3 Geo. III, c. 11, § 10.
[b] § 11.
[c] § 12.

make it appear to any justice, that any offence for which he shall have paid the penalty, was occasioned by the neglect or default of his journeyman or servant, the said justice shall issue his warrant for bringing such offender before him or some other justice; and, on conviction, such justice shall order what reasonable sum shall be paid by the said offender by way of recompence; and if he do not immediately pay the same, the said justice shall commit him to the house of correction, or other prison of the place where he shall be apprehended, there to be kept to hard labour for any time not exceeding one kalendar month, unless payment be sooner made.[a] § 3. IF NO ASSIZE.

AND one justice may hear and determine offences in like manner as by the said former act.[b] And no certiorari, letters of advocation, or suspension, shall be granted, to remove any conviction or other proceedings had thereupon.[c] With like liberty of appeal as by the said former act.[d] And persons convicted on this act, shall not be prosecuted for the same offence under any other law.[e] And all penalties and forfeitures on this act shall go, half to the informer, and half as the justice shall order for carrying this act into execution.[f] Finally, it is provided that nothing herein shall extend to the universities.[g]

THE 13 Geo. III, c. 62 [h], on the narrative, that by the 31 Geo. II, c. 29, and 3 Geo. III, c. 11, only two sorts of § 4. GEO. III, 13, c. 62, —STANDARD W. BREAD.

[a] 3 Geo. III, c. 11, § 13.
[b] § 14, 15.
[c] § 17.
[d] § 18, 19.
[e] § 23.
[f] § 24.
[g] § 25.
[h] This standard bread is said, by learned inquirers, to be the most nutritive, most advisable, and most ancient, of any: in its calculation as to the wheaten and household, the 31 Geo. II, supposes the consumption of both equal. If the household be in greater demand, the bakers complain they lose; if the wheaten, again, the public. This inconvenience is avoided, and the greatest nourishment drawn from the grain, by preparing it for the standard bread.

§ 4. GEO. III, 13, c. 62, —STANDARD W. BREAD.

bread made of wheat are allowed to be made for sale; that is to say, Wheaten and Household: and whereas, according to the ancient order and custom of the realm, there hath been from time immemorial a STANDARD WHEATEN BREAD, being the whole produce of the wheat whereof it was made: therefore enacted, that from henceforth a bread made of the flour of wheat, which flour, without any mixture or division, shall be the whole produce of the grain, the bran or hull thereof only excepted, and which shall weigh three fourth parts of the weight of the wheat whereof it shall be made, may be made and sold, and shall be called and understood to be a *standard wheaten bread*.[a]

Standard, of what it consists?

Marking.

AND the maker shall mark every loaf thereof with the capital letters S W, and the same may be made and sold, although no assize be set, of the weight and in the proportions following; viz. that every standard wheaten peck loaf shall weigh 17 lb. 6 oz. avoirdupois; every half peck loaf 8 lb. 11 oz.; and every quartern loaf 4 lb. 5½ oz.: and every peck loaf, half peck loaf, and quartern loaf, shall always be sold as to price in proportion to each other respectively; and that when wheaten and household bread, made as the law directs, shall be sold at the same time, together with this standard wheaten bread, they be sold in respect of and in proportion to each other, as followeth; namely, that the same weight of wheaten bread, which costs 8d. the same weight of this standard wheaten bread shall cost 7d. and the same weight of household bread shall cost 6d. or seven standard wheaten assized loaves shall weigh equal to eight wheaten assized loaves, or to six household assized loaves of the same price, as near as may be.[b] Provided, that the said standard wheaten bread shall not be made into or exposed to sale as prized loaves, at one and the same time, together with assized loaves, of the same standard wheaten bread.[c] And the magistrates

[a] 13 Geo. III, c. 62, § 1. [b] § 2. [c] § 3.

may, whenever they think proper, fix the assize of this standard wheaten bread, according to the following tables: [a] § 4. GEO. III, 13, c. 62, —STANDARD W. BREAD.

[a] TABLE I,—Or the assize-table of standard wheaten bread.

The first column contains the price of the bushel of wheat, Winchester measure, from 2s. 9d. to 14s. 6d. the bushel, the allowance of the magistrates to the baker included: the other columns contain the *weight* of the several loaves.

Price of bushel of wheat and baking.		SMALL BREAD.						LARGE ASSIZE BREAD.								
		Penny			Two pence.			Sixpence.			Twelve pence.			Eighteen pence.		
s.	d.	oz.	dr.		lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.
2	9	25	4		3	2	9	9	7	11	18	15	5	28	7	0
3	0	23	3		2	14	5	8	11	0	17	6	1	26	1	1
3	3	21	6		2	10	12	8	0	5	16	0	11	24	1	0
3	6	19	14		2	7	12	7	7	3	14	14	5	22	5	8
3	9	18	9		2	5	1	6	15	4	13	14	7	20	13	11
4	0	17	6		2	2	12	6	8	4	13	0	9	19	8	13
4	3	16	6		2	0	11	6	2	2	12	4	4	18	6	7
4	6	15	7		1	14	4	5	12	11	11	9	6	17	6	1
4	9	14	10		1	13	4	5	7	13	10	15	10	16	7	7
5	0	13	14		1	11	13	5	3	7	10	6	13	15	10	4
5	3	13	4		1	10	8	4	15	7	9	14	14	14	14	5
5	6	12	10		1	9	4	4	11	13	9	7	11	14	3	8
5	9	12	1		1	8	5	4	8	9	9	1	1	13	9	10
6	0	11	9		1	7	3	4	5	8	8	11	1	13	0	9
6	3	11	2		1	6	4	4	2	12	8	5	8	12	8	3
6	6	10	11		1	5	6	4	0	3	8	0	5	12	0	8
6	9	10	5		1	4	10	3	13	13	7	11	9	11	9	6
7	0	9	15		1	3	14	3	11	9	7	7	3	11	2	12
7	3	9	9		1	3	3	3	9	8	7	3	1	10	12	9
7	6	9	4		1	2	9	3	7	10	6	15	4	10	6	13
7	9	9	0		1	1	15	3	5	13	6	11	10	10	1	7
8	0	8	11		1	1	6	3	4	2	6	8	4	9	12	7
8	3	8	7		1	0	14	3	2	9	6	5	2	9	7	11
8	6	8	3		1	0	6	3	1	1	6	2	2	9	3	3
8	9	7	15	0	15	14		2	15	11	5	15	5	8	15	0
9	0	7	12	0	15	7		2	14	5	5	12	11	8	11	0
9	3	7	8	0	15	0		2	13	1	5	10	3	8	7	4
9	6	7	5	0	14	10		2	11	14	5	7	13	8	3	11
9	9	7	2	0	14	4		2	10	12	5	5	9	8	0	15
10	0	6	15	0	13	14		2	9	11	5	3	7	7	13	2
10	3	6	13	0	13	9		2	8	11	5	1	6	7	10	1
10	6	6	10	0	13	4		2	7	12	4	15	7	7	7	3
10	9	6	7	0	12	15		2	6	13	4	13	10	7	4	6
11	0	6	5	0	12	10		2	5	15	4	11	13	7	1	12
11	3	6	3	0	12	6		2	5	1	4	10	2	6	15	4
11	6	6	1	0	12	1		2	4	4	4	8	9	6	12	13

§ 4. GEO. III. 13, c. 62, —STANDARD W. BREAD.

AND the bakers and sellers of the said standard wheaten bread shall be liable to all the penalties of the former acts.

11	9	5	15	0	11	13	2	3	8	4	7	0	6	10	8
12	0	5	13	0	11	9	2	2	12	4	5	8	6	8	4
12	3	5	11	0	11	6	2	2	1	4	4	2	6	6	2
12	6	5	9	0	11	2	2	1	6	4	2	12	6	4	2
12	9	5	7	0	10	14	2	0	11	4	1	7	6	2	2
13	0	5	6	0	10	11	2	0	1	4	0	3	6	0	1
13	3	5	4	0	10	8	1	15	8	3	14	15	5	14	7
13	6	5	2	0	10	5	1	11	11	3	13	13	5	12	1
13	9	5	1	0	10	2	1	14	5	3	12	11	5	11	0
14	0	4	15	0	9	15	1	13	13	3	11	9	5	9	6
14	3	4	14	0	9	12	1	13	4	3	10	9	5	7	13
14	6	4	13	0	9	9	1	12	12	3	9	8	5	6	5

TABLE II,—Or the price-table of standard wheaten bread.

The first column contains the price of the bushel of wheat, allowance to the baker included: the other columns contain the *prices* of the several loaves.

Price of bushel of wheat and baking.		Quartern Loaf.		Half peck Loaf.		Peck Loaf.		Price of bushel of wheat and baking.		Quartern Loaf.		Half Peck Loaf.		Peck Loaf.	
s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
2	9	0	2¾	0	5½	0	11	8	9	0	8¾	1	5½	2	11
3	0	0	3	0	6	1	0	9	0	0	9	1	6	3	0
3	3	0	3¼	0	6½	1	1	9	3	0	9¼	1	6½	3	1
3	6	0	3½	0	7	1	2	9	6	0	9½	1	7	3	2
3	9	0	3¾	0	7½	1	3	9	9	0	9¾	1	7½	3	3
4	0	0	4	0	8	1	4	10	0	0	10	1	8	3	4
4	3	0	4¼	0	8½	1	5	10	3	0	10¼	1	8½	3	5
4	6	0	4½	0	9	1	6	10	6	0	10½	1	9	3	6
4	9	0	4¾	0	9½	1	7	10	9	0	10¾	1	9½	3	7
5	0	0	5	0	10	1	8	11	0	0	11	1	10	3	8
5	3	0	5¼	0	10½	1	9	11	3	0	11¼	1	10½	3	9
5	6	0	5½	0	11	1	10	11	6	0	11½	1	11	3	10
5	9	0	5¾	0	11½	1	11	11	9	0	11¾	1	11½	3	11
6	0	0	6	1	0	2	0	12	0	1	0	2	0	4	0
6	3	0	6¼	1	0½	2	1	12	3	1	0¼	2	0½	4	1
6	6	0	6½	1	1	2	2	12	6	1	0½	2	1	4	2
6	9	0	6¾	1	1½	2	3	12	9	1	0¾	2	1½	4	3
7	0	0	7	1	2	2	4	13	0	1	1	2	2	4	4
7	3	0	7¼	1	2½	2	5	13	3	1	1¼	2	2½	4	5
7	6	0	7½	1	3	2	6	13	6	1	1½	2	3	4	6
7	9	0	7¾	1	3½	2	7	13	9	1	1¾	2	3½	4	7
8	0	0	8	1	4	2	8	14	0	1	2	2	4	4	8
8	3	0	8¼	1	4½	2	9	14	3	1	2¼	2	4½	4	9
8	6	0	8½	1	5	2	10	14	6	1	2½	2	5	4	10

provided, that if any information be laid against a baker, for making, marking, or exposing to sale, any bread purporting to be the standard wheaten bread aforesaid, made of flour, not being the whole produce of the wheat, the bran or hull thereof only excepted, and weighing three fourth parts of the weight of the wheat whereof it was made, and shall prove that he bought the said flour, as and for such flour, of the miller or mealman, naming his name and place of abode; in such case the baker shall be acquitted, and the miller or mealman shall forfeit as in the case of adulterating corn, meal, or flour, by the said act.[a] § 4. GEO. III, 13, c. 26, —STANDARD W. BREAD. Regulations for procuring good standard wheaten bread.

AND when the magistrates have set the assize of the said standard wheaten bread, they may, if they think proper, omit setting the assize of any other sort of bread.[b] And the justices, at any general or quarter sessions, may prohibit, for three months (unless they shall see cause sooner to revoke the prohibition, which they may do at any adjourned quarter sessions or any special sessions) the makers of bread for sale, for making or exposing to sale any other one or more sorts of bread, purporting to be of a superior quality, and sold at a higher price, than the standard wheaten bread aforesaid. Provided, that no such order of prohibition shall take place, until one kalendar month at least after the date of the making thereof. And such order shall be entered by the said justices in a book, to be inspected by the bakers at all seasonable times in the day time, without fee. And the justices shall cause a copy of such order to be put up in some market or other public town within the district, or shall cause the same to be inserted in some public newspaper published within such district. And provided, that the bakers may have an opportunity, whilst the said prohibition is under consideration, of offer- Magistrates may for three months prohibit the making of other than standard.

[a] 21 Geo. II. c. 29, § 5, 6. [b] 13 Geo. III, c. 62, § 7.

§ 5. GEO. III, 13. c 62, —STANDARD W. BREAD.

ing to the justices their objections against it.[a] Provided also, that nothing herein shall extend to prevent the magistrates, or others who have power, to set the assize of bread, from allowing (even during the time of such prohibition as aforesaid) if they think fit, any white loaves or wheaten loaves of the price of one penny or two pence, to be made and sold, so that they be made, marked, and sold according to the regulations of the assize table of § 10.

AND whereas in many places the inferior classes of people are used to be supplied with bread made of wheat, of a coarse and cheaper sort than the standard wheaten bread aforesaid; therefore it shall be lawful for the baker to make and sell such inferior and coarser bread, provided he sells the same at a price under that of household bread, as directed by the said act of 31st Geo. II, (although nothing in this act extends to setting any assize thereon.) But if he sells such inferior or coarser bread by weights and prices at which the household bread aforesaid is at this time assized, he shall be liable to the same penalties as bakers for any misdemeanour in making and selling any other sort of bread.[b] Provided always, that nothing herein shall extend to prejudice any right or custom of the city of London, or the dean of the collegiate church of Westminster, or the high steward of the city of Westminster, or either of the two universities.[c]

§ 5. ASSIZE IN SCOTLAND.

SUCH are the laws respecting the assize of bread, as stated by Dr. Burn, with the additional notice of some enactments subsequent to the last edition of that work.[d] Which enactments constitute a code of law, in general, obligatory over all

a 13 Geo. III, c. 62, § 8, 9.
b § 11, 12.
c § 14, 15, 16, 17.
d It did not seem necessary to notice mere temporary regulations, as the prohibition to eat new bread, (41 Geo. III, c. 17, repealed by 42 Geo. III, c. 4.

the kingdom; but in some particulars they have been varied in their application to this country. § 5. ASSIZE. IN SCOTLAND.

THUS, as there are here fewer markets for grain, a different method is appointed for fixing the price; 3 Geo. III, c. 6, enacts, it shall and may be lawful, in that part of Great Britain called Scotland, for the magistrates and justices of the peace, who are by the said act authorized to set the assize of bread, from time to time, and so often as they shall judge proper, within their respective jurisdictions, to inquire into and take proof of the prices which the several sorts of grain, meal, and flour, fit and proper to make the several sorts of bread which shall be allowed to be made by them, shall, *bona fide*, sell for in the public markets in or near the city, borough, or place, for which they are respectively authorized to set the assize of bread; or where there are no public markets for any particular species of grain, meal, or flour, in or near such city, borough, or place, to inquire into and take proof of the present or last selling price of such species of grain, meal, or flour, whether of the growth of the country, or brought from distant places; to which selling price or prime cost shall be added such an allowance for the expence and risk of carriage or transportation, as from the inquiry and proof shall, to the said magistrates and justices of the peace, appear just and reasonable; so as that the price of such grain, meal, or flour, be from time to time ascertained, according to what those several species do, or may truly cost the bakers, before they can manufacture the same into bread.

Magistrates and justices to inquire into, and take proof of, the prices which the several sorts of bread corn, meal, and flour, sell for in the public markets, and where there are no public markets, then to take proof of the present or last selling price thereof; so as to ascertain the price the same costs the baker;

BY section second it is further enacted, that, previous to the proof to be taken in the several cases aforesaid, notice in writing shall be given to the deacon of the incorporation of bakers, or where there is no such incorporation, to any two reputable bakers within the city, borough, or place, where such proof is to be taken, forty-eight

they giving previous notice to the deacon of the bakers company, &c.

§ 5. ASSIZE IN SCOTLAND.

hours at least before taking the same, to the end that the makers of bread within such city, borough, or place, may, if they think proper, attend the taking such proof, and suggest such questions as may be proper to be put to the witnesses summoned by the magistrates or justices of the peace respectively, or offer such other witnesses or evidence as may appear proper for proving the prices of the grain, meal, or flour in question.

The proof to proceed upon the oaths of two witnesses conversant in the prices;

AND the third section provides, that such proof shall only proceed upon the oaths of two or more credible witnesses, conversant in the prices of the several sorts of grain, meal, or flour, which shall be the subject of such inquiry, or by writings legally proved; and that it shall and may be lawful to the said magistrates and justices of the peace, within their respective jurisdictions, to summon such person or persons as to them shall appear most proper for that purpose, and to compel them to appear and give their evidence; and that either by such remedies, and under such penalties, as are provided by the said act, in the case of persons duly summoned to give evidence, touching the rates and prices of the several sorts of grain, meal, and flour, where the return of the prices of such grain, meal, or flour, shall be suspected as not truly and *bona fide* made, or by such remedies as are competent by the common law of Scotland, for compelling witnesses to appear and give evidence in any judicial trial before a competent court.

who may be summoned and compelled to appear and give evidence;

so as they be not obliged to travel above five miles from home.

PROVIDED always, that the person or persons so summoned be not obliged to travel above five miles from the place of his, her, or their abode.[a]

Evidence to be ingrossed in a book.

BY section fifth it is further enacted, that the whole evidence to be taken as above, shall be fairly ingrossed in a book, to be kept for that purpose, by the town-clerks of

[a] § 4.

§ 5 ASSIZE IN SCOTLAND.

the several cities and boroughs, where such proof shall be taken by the magistrates, or by the clerk of the peace, where the proof shall be taken by the justices of the peace; and the evidence, as taken down in such book, shall be duly signed by the several witnesses, and by the magistrates or justices of the peace who shall take the same respectively, according to the practice of the law of Scotland; and that so often as such proof shall be taken, the magistrates or justices of the peace, before whom the same shall be taken respectively, shall, immediately after closing the evidence, or as soon as it can conveniently be done, declare the prices of the several kinds of grain, meal, or flour, concerning which the inquiry has been made, according as these shall appear to them to be proved, from considering the whole evidence; and which declaration shall be ingrossed in the book appointed to be kept as aforesaid, immediately after the evidence, and shall be signed by the magistrates or justices of the peace respectively, before whom such proof shall be taken; and which book containing the evidence and declaration aforesaid, shall be open and patent to the inspection of the makers of bread, and all other persons, without fee or reward; and shall, to all intents and purposes, be deemed and taken to be equivalent to the returns or certificates of the market prices of all kinds of grain, meal, or flour, appointed to be taken by the said act: and the magistrates and justices of the peace in that part of Great Britain called Scotland, shall thereupon proceed to set, ascertain, and appoint, the assize and weight of all sorts of bread which shall be made for sale, or exposed to sale, and the price to be paid for the same within their respective jurisdictions, when, and as often, from time to time, as they shall think fit, according to the directions, and agreeable to the tables enacted and referred to by the said act.

and signed by the witnesses and magistrates taking the same;

and the respective prices to be declared,

and entered in the said book, and signed by the magistrates;

which is to be free to public inspection.

The assize and weight of bread for sale, to be ascertained according thereto.

PROVIDED always,[a] that when, and so often as any assize

[a] § 6.

§ 5. ASSIZE IN SCOTLAND.

of bread shall be set, ascertained, and appointed, for any city, borough, or place, within that part of Great Britain called Scotland, by the magistrates or justices of the peace empowered for that purpose, such assize shall not be limited to endure for any certain time, but shall continue and stand in force until a new assize of bread be set, ascertained, and appointed, by the said magistrates or justices of the peace, for such city, borough, or place respectively; any thing in the aforesaid act of the thirty-first year of the reign of his late majesty, to the contrary notwithstanding.

The assize not liable to be varied, but to continue in force till a new one is made.

SECTION seventh further enacts, that upon an application in writing by any two or more of the inhabitants or bakers, within any city, borough, or county, where such assize of bread shall be set, to the magistrates or justices of the peace who set the last assize, or to the magistrates or justices of the peace of such city, borough, or county, for the time being, setting forth, and offering to prove, by proper evidence, that the price of any of the species of grain before mentioned has risen or fallen since the last assize of bread was set, so as to authorize an alteration of such last assize, according to the aforesaid act of his late majesty, and tables therein referred to; in every such case, the magistrates or justices of the peace, to whom such application shall be made, shall, within their respective jurisdictions, be obliged to take evidence of the then current prices, in the manner before directed; and if, upon advising such proof, they shall find such a variation of the prices since the last assize, as described in the said act, they shall immediately set and ascertain a new assize of bread, which shall remain till altered, agreeable to the directions herein before given.

Upon application and proof offered of a sufficient variation of the price of any species of the said grain, by any two inhabitants or bakers, since the last assize,

fresh evidence is to be taken of the current price, and a new assize to be made conformable thereto.

AND by section eighth it is further enacted, that in case any person or persons shall be convicted of any of the offences mentioned in the said act, or in this present act, before any magistrate or magistrates, justice or justices of the

§ 5.
ASSIZE IN SCOTLAND.

peace, in that part of Great Britain called Scotland, such conviction shall proceed, and be drawn up in the form commonly used and practised before such magistrates or justices of the peace, in convictions for other offences of the like nature; any thing in the said act to the contrary notwithstanding.

Method of proceeding in case of conviction of offenders in the recited or present act.

AND whereas it may happen, that the magistrates of some of the cities or boroughs in that part of Great Britain called Scotland, may neglect to exercise the powers committed to them, of setting and appointing the assize of bread within their respective cities and boroughs; be it therefore enacted by the authority aforesaid, that in case of such neglect of the magistrates of any such city or borough to set an assize of bread, or to alter any former assize set by them by a new assize, when such alteration in the price of wheat or other grain shall occur as is sufficient to authorize an alteration of the last assize of bread according to the said act, it shall and may be lawful for any two or more of the justices of the peace of the county within which such city or borough lies, to require the chief magistrate of such city or borough, by a writing under their hands, to set the assize of bread, or to alter any former assize of bread, according as the case shall occur; and in case such chief magistrate, or the other magistrates of the said city or borough, shall refuse or neglect, for the space of ten days after such requisition, to set such assize, or to alter any assize then in force, when the alteration of the price of wheat or other grain does permit the same, then, and in every such case, any two or more justices of the peace of such county shall have power, and are hereby authorized, after taking proof of the prices of the several kinds of grain, meal, or flour, in manner above directed, to set, ascertain, and appoint, an assize of bread for such city or borough, which shall remain in full force until altered by the magistrates thereof, or in

Where the magistrates of any city or borough neglect their duty in setting the due assize of bread.

Two justices of the county, &c. may require them to set or alter the same;

and on their neglect to comply therewith within ten days, they may then settle such assize themselves.

§ 5. ASSIZE IN SCOTLAND.

case of their neglect, by any two or more of the said justices of peace.[a]

The recited act, where not altered by this act, to extend to and be in force within Scotland.

IT is further enacted, that every clause, matter, and thing, contained in the aforesaid act of the thirty-first year of his late majesty's reign, shall remain and continue in full force, in that part of the kingdom of Great Britain called Scotland, except in so far as the same is altered by this act.[b]

If the magistrates do not fix an assize.

THE magistrates and justices of peace are to take a proof of the price in the manner directed by the statute. It is specially directed that the assize is not to be limited to any particular period, but to continue till a new assize be set. If the magistrates neglect to fix an assize, any two justices of the peace may require them to fix one; and, in case of their refusal, the two justices may proceed to fix it themselves. But the remedy is carried no farther. If the justices do not interfere, no private individual, on the one hand, or baker, on the other, is authorized to interfere. The application by any two of the inhabitants or bakers, mentioned in clause § 7, relates to the raising or lowering it, and not to the establishing it, where it is thought advisable to dispense with it altogether. And in the statutes above mentioned, the case is figured of their being no assize, and regulations are adapted to that situation of things; for wherever there is no proper market for corn, it is extremely difficult to learn the prices correctly. Accordingly, in some places of the country, it has, on this account, been judged advisable, by way of experiment, to discontinue the assize, and to confine the interference of the magistrate to the preventing of any deficiency in the weight, or any thing unwholesome in the quality of the bread. The weight of the bread is still regulat-

[a] § 9.

[b] § 10.

[c] Or, contrary to the regulations of § 21 of the leading statute, 31 Geo. II, c. 29.

ed as before, and its quality examined: but its price, and the species of it, as wheaten, household, standard, or other, is left entirely at the discretion of each particular dealer.[a] And, from a comparison of the average prices of bread there, with the prices where there is an assize, it has not appeared that the interests of the public may not, in this instance, as in most others, be safely intrusted to the natural competition of the trade. It is almost unnecessary to add, that, in such a state of things, any meetings or agreements, or understanding among the bakers, as to regulating the prices, would be not only blameable, but severely punishable, under the laws against combinations.

UNDER the above statutes one general question occurs: is it competent to bring the legality of the manner of fixing an assize under review? In such a case the court of session sustained its jurisdiction.[b]

[a] About the time of the late scarcity, the magistrates of Edinburgh, with the advice and concurrence of the judges of the court of session, agreed to try this experiment. As Edinburgh "is the capital city of the "nation, where the chief judicatories "reside," the act 1686, c. 12, gave jurisdiction to the "lords of session, "with advice and consent of the ma-"gistrates," in certain matters touching police. On this footing, and also as successors of the daily council, a parliamentary committee, the lords of session have been in the practice of concurring with the magistrates, not only regularly in the fixing an assize, but occasionally in other branches of police. See acts of sederunt, 15th January, 1669, 29th January, 1687, 16th January, 1736, 25th February, 1743, 26th July, 1748.

[b] 27th January, 1803, Ro. Pearson. The magistrates of Cupar, on a proof of the fall in the price of grain, lowered the assize. The bakers complained that the price of the last year's crop, and of foreign grain, which were necessary in the baking of bread, had not entered into the calculation. A bill of suspension was refused by the lord ordinary, on the ground, that, by 3 Geo. III, c. 6, an assize once fixed remained till a new assize. But the court seemed rather to think that those clauses had in view an assize regularly fixed, but could not exclude the cognizance of courts of law as to the previous question, whether that had been done or not. The bill was passed.

CHAP. VI.

Of Weights and Measures.

§ 1. OF WEIGHTS AND MEASURES IN GENERAL.

I. "IT is sene speidful" (says an ancient statute),[a] "that "sen we have bot *a* king and *a* law universall "throughout the realme, we sould have bot *a* met and "measure to serve all the realme."

WEIGHTS and measures ought indeed to be universally the same throughout the kingdom, being the criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced into some fixed rule or standard; which standard it is impossible to fix by any written law or oral proclamation; for no man can by words only give another an idea of a foot-rule or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard, by forming a comparison with which all weights and measures may

[a] James II, 1457, c. 82.

be reduced to one uniform size, and from which it is held a punishable misdemeanor to deviate. § 1. OF WEIGHTS &c.

II. THIS offence, accordingly, is acknowledged as a point of dittay in the Leg. Burg. c. 74, which place the offender's life and limb in the king's will for the fourth offence. Such offenders are also declared to be punishable "as falsars,"[a] and with escheat of moveables.[b] And the general statute commits the care of this matter to the justices of the peace, magistrates of boroughs, and more especially to the dean of guild.[c] § 2. PUNISHMENT OF USING FALSE WEIGHTS AND MEASURES.

TO constitute this offence, it is necessary, 1st, "That "the deficiency of weight or measure be manifest and "material; such as is injurious to the one party, and can- "not be imputed to mere mistake on the part of the "other."[d] 2dly, The false weights must have been used "and given out for the true ones (but this may be done "tacitly, and will be presumed against the user) and the "traffic have been carried on accordingly." 3dly, "They "must be charged to be different from the legal standard; "for if the charge is only of a deviation from the custo- "mary weight or measure of that neighbourhood or dis- "trict (a thing for which there is no rule nor authority); "this of itself, and without farther accusation of some "special device and dole, by which deception has been "occasioned, does not seem to be a relevant charge."[e] What constitutes the offence. Different from the legal standard.

III. THE punishment of false weights and measures supposes the existence of a legal standard. The attainment of such a standard has been the subject of more copious than successful legislation in both parts of the united kingdom. § 3. ANCIENT SCOTTISH STANDARDS.

[a] James IV, parl. 4, 1493, c. 47.
[b] James VI, parl. 19, 1607, c. 2.
[c] Appendix I, p. 57.
[d] Hume, vol. i, p. 256.
[e] Sir James Dunbar and John Forsyth, Aug. 11, 1714. Hume, ibid.

§ 3. ANCIENT SCOTTISH STANDARDS.

IN Scotland, the regulation of weights and measures never was referred to the king's prerogative, but was a matter of parliamentary jurisdiction.

IT was early enacted, that "all burgesses may have in "their housis measures to measure thair cornis, and eln, "stane, and wecht, to met, measure, and wey, thair gudis "and geir; and all measures and weichts sould be seilet "and markit with the common mark or seill of the burgh: "and quha beis funden havand fals wechtis or mesowris, "he sall pay to the burgh an unlaw of viij S.[a]

IT was also ordained, "that the chalmerlan clerk sall "carrie with him wechtes and measures in ilk chalmerlan "air, and cause the trone wechtes to be maist sharplie exa- "menat, and that they agrie with his wechtes, in na mair "nor na lesse."[b] It was "statute be king David, that ane "common and equall weicht, quhilk is called the weicht of "Cathness, in buying and selling, sall be keiped and used "be all men within this realm of Scotland. 2, The law of "God commands, thou sall not have in thy bagge twa ma- "ner of weichts, ane mair, and ane other les; nether sall "thou have in thine house divers measures, ane great, and "ane small; but thou sall have ane richt and just weicht."[c] But the most accurate assize of our ancient weights and measures is contained in the following statute of king Robert III.

Assize of weights and measures by Robert III.

"1, King David's common elne conteines threttv-seven "measured inches, with the inches of thrie men; ane meik- "ill, ane middill, ane lytill; and sall stand conforme to the "middill inch, or conforme to thrie grains of bear without "the tailis. 2, The stane to wey woll and other things, "sould have fivetene punds; ane stane of walx aught;

[a] Balf. Pr. 88.

[b] Iter Camerarii, c. 30,

[c] Stat. David II, c. 111.

" twelve London pundes makes ane stane. 3, Ane pound § 3.
" sould wey twentie-five schillings: and this was in the ANCIENT SCOTTISH STANDARDS.
" time of the assizes foresaid; and the pound conteines
" fivetene unces. 4, In the time of umquhill king Robert
" Bruise, the great conquestour, first of that name, the
" pound of silver conteined twenty-sex schillings and four
" pennies; in respect of the minoration of the pennie, or
" money of that king fra the money of king David fore-
" said. 5, The unce conteined, in the time of king David
" foresaid, twentie pennies; in the time of the said king
" Robert I, it conteined twentie-ane pennies; but now, in
" our days, that is, of king Robert III, in the zear of grace
" 1393, the unce of money conteines threattie-twa pen-
" nies. 6, The stirlin, in the time of the said king David,
" did wey threttie-twa graines of gude and round quheat;
" but now it is otherwaies, be reason of the minoration of
" the money. 7, Ane *waw* sould conteine twelve stane;
" the wecht quhereof conteines aucht pound. 8, The boll
" sould conteine ane sextarius, that is, twelve gallons; and
" sall be in the deipness nine inches, with the thickness of
" the trie, in beath the sides; and in the roundness above,
" it sall conteine thriescore and twelve inches in the middis
" of the ower trie; and in the inferior roundness, it sould
" conteine thrie score eleven inches. 9, The gallon sould
" conteine twelve pound of water; that is, of sea water
" foure pound; of rynnand water foure pound; and of
" standand water in stankis foure pound. *Item*, the gal-
" lon sould conteine in deipness six inches, and ane halfe
" inch; and in the inferior braidness aucht inches and an
" halfe inche, with the thikness of the trie of beath the
" sides; and in the roundness above, it sould conteine
" twentie-seven inches and ane half; in the inferior round-
" ness, twenty-thrie inches. 10, The inche, in all mea-
" sures, sould be measured at the ruit of the naill; and

§ 3. ANCIENT SCOTTISH STANDARDS.

"sould be in length conform to thrie grains of good bear.[a] Certain measures were appointed to be made, of boll, firlot, half firlot, peck, and gallon; and that none other be used, under the pain that may follow.[b]

Of our later statutes regarding weights and measures.

AND by parl. 3, James I,[c] a stone, weighing 15 lib. troy, is ordained to be made for all goods sold by weight; this stone is to be divided into 16 Scots pounds; and a half stone, a quarter, a half quarter, a pound, a half pound, and other lesser weights, are to be formed according to that standard. And by cap. 69 of the 4th parliament of the same prince,[d] each troy pound is to contain 16 ounces. By cap. 68 of the same parliament, the ell is to contain 37 inches; and the 70th chapter regulates the division and quantity of the boll, firlot, and water weights.

FARTHER regulations respecting the same subject, were made during the succeeding reigns,[e] which need not be particularly noticed.

Commissioners appointed for fixing a standard of weights and measures.

BY the general statute which passed in the 22d parliament of James VI, c. 80,[f] the regulation of weights and measures was made a part of the jurisdiction of the justices of peace; and, for the purpose of fixing a standard of weights and measures, commissioners were appointed, who gave in, upon the 19th of February 1618, a very full report, containing the regulations for ascertaining a standard for weights and measures. This act and report was ratified and confirmed by parl. 23, James VI, c. 16.[g] The standards fixed by these commissioners are shortly as follows.

Regulations reported by them, and their ratification.

[a] For a fuller account of our ancient weights and measures, see Balfour, pp. 88-95, and 520, 521; and the late lord Swinton on weights and measures, 2d edit.

[b] Black acts, 1425, 63.

[c] 1425, c. 57.

[d] Anno 1426.

[e] James II, parl. 14, 1457, c. 73; and James IV, parl. 3, 1491, c. 96; and parl. 6, 1503, c. 96; James V, parl. 7, 1540, c. 114, and James VI, parl 11, 1587, c. 114.

[f] Anno 1617. Appendix I.

[g] Anno 1621.

§ 3. ANCIENT SCOTTISH STANDARDS.

THE Stirling pint, or jug, was made the unit of liquid measure, and was ascertained by the weight of water contained in it. The keeping of this standard jug was committed to the borough of Stirling. The firlot of Linlithgow was made the unit for dry measure; but, as formerly, wheat, rye, beans, pease, meal, and white salt, had been measured by the firlot simply, while malt, barley, and oats, had been in use to be measured by heaping it; so a separate firlot was, upon this account, made for malt, barley, and oats, and containing the same quantity as the other firlot did when heaped.

THE forms and dimensions of both firlots [a] were ascertained by the number of Stirling jugs or pints which they contained; and the keeping of them was committed to the borough of Linlithgow. The ell of Edinburgh was made the unit of lineal measure, and committed to the charge of the city of Edinburgh. The French troy stone weight was made the unit of weights, and committed to the keeping of the borough of Lanark. And the weight, called the trone weight, was declared to be abolished for ever. Double standards of all these weights and measures were ordained to be made, and two of each of them to remain in the register in the castle of Edinburgh, and other two to remain in the castle of Dumbarton to serve as a warrant for the measures and weights. The other doubles were ordered to be deposited with the four boroughs mentioned in the act, and employed for the purpose of assizing those weights and measures, which were to be delivered, under the mark of these boroughs, for the use of the public: which weights and measures were ordained to be received and used; and all firlots used in markets to be burned, and sealed, either with the marks and seals of the borough of Linlithgow, or with the

[a] These dimensions, owing to an error in calculating or guaging, were erroneous: to make their contents agree with the quantities prescribed by the same act, the wheat firlet should have been seven inches and six-tenths in deepness, instead of seven inches and one third, and the barley eleven inches and something more than one-tenth, instead of ten and one half.

§ 3. ANCIENT SCOTTISH STANDARDS.

burning-iron of the head-borough of that shire in which such markets are held.

THE act, Cha. II, 1663, c. 17,[a] ordains that the measure of coal sha'l be by the Culross chalder; and, c. 18, that the foot measure shall contain twelve of those inches of which the ell contains thirty-seven; that this standard foot be made and preserved by the magistrates of Edinburgh; and that all boroughs have a measure made according to it, under the penalty of £100. Scots. By act[b] 1681, c. 24, bread and butcher-meat are ordained to be sold by weight. The penalty of transgression is fixed at £100. Scots, *toties quoties*. By act[c] 1685, c. 44, the mile is ordained to consist of 1760 yards, as in England. The last Scottish statute on the subject of weights and measures, which deserves to be noticed, is the act[d] 1696, c. 6, which enacts, "that all "sorts of meal, bought and sold within this kingdom, "shall be sold and delivered by weight, at eight stone "troy weight, in place of the boll of Linlithgow measure, "and so proportionally, under the pain of confiscation of "all meal sold otherwise than is hereby appointed, and im- "prisonment of the seller thereof for a week, *toties quoties*."

The same measures and weights to be used both in Scotland and England.

SUCH are the principal Scottish statutes made upon this subject before the Union. But by the 17th article of the treaty of Union, "it is declared, that the same weights and "measures shall be used throughout the united kingdom as "are now established in England; and standards of weights "and measures shall be kept by those boroughs in Scotland "to whom the keeping the standards of weights and mea- "sures does of special right belong; all which standards "shall be sent down to such boroughs from the standards "kept in the exchequer at Westminster, subject to such re- "gulations as the parliament of Great Britain shall think fit."

[a] Charles II, parl. 1.
[b] Charles II, parl. 3.
[c] James VII, parl. 1.
[d] William and Mary, parl. 1, sess. 6.

IV. THE English weights and measures being thus become our statutable standards, require to be shortly explained. § 4. ENGLISH WEIGHTS AND MEASURES.

TWO kinds of weights, both warrantable, are used in England, viz. *troy* weight, which, by law, has twelve ounces to the pound; and whereby are weighed silk, gold, silver, pearl, and precious stones:[a] and *avoirdupois*, which is by custom, yet confirmed by statute; and whereby are weighed all kinds of grocery wares, drugs, butter, cheese, flesh, wax, pitch, tar, tallow, wool, hemp, flax, iron, steel, lead, and all other commodities, which bear the name of Garbel, and whereof issueth a refuse or waste (and also bread, by the 31 Geo. II, c. 29); and this hath to the pound sixteen ounces, and twelve pounds over are allowed to every hundred.[b] By 12 Hen. VII, c. 5, every bushel shall contain eight gallons of wheat, and every gallon eight pounds troy, and every pound twelve ounces, on the penalty of £20 upon every city, borough, town, or place, having the keeping of common measures, that shall keep any other bushel or gallon. And by 13 and 14 Will. III, c. 5, a legal Winchester bushel, according to the standard in the exchequer, shall be round, with a plain bottom, eighteen one half inches wide throughout, and eight inches deep.[c]

Two kinds of warrantable weights.
Troy, what? In what used.
Avoirdupois.
In what things used.
Bushel, what?

THE standard of these weights was originally taken from corns of wheat; whence the lowest denomination of weights is called a grain, thirty-two of which are directed by statute to compose a pennyweight, whereof twenty make an ounce, and so upwards, as already mentioned.[d]

[a] Burn, tit. Weights and Measures, § 1.
[b] Ibid.
[c] Ibid.
[d] By a bill, founded on the report of a committee of the house of commons, which in the year 1765 was brought into parliament, and printed,

§ 4. ENGLISH STANDARDS.

THE English historians inform us, that king Henry I commanded that the ulna, or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying; those of less, by subdividing that original standard. Thus five yards and a half are required to make a perch, or pole, and one yard is subdivided into three feet, and each foot into twelve inches, which inches will be each of the length of three grains of barley. By the bill already mentioned, a straight brass rod, made by direction of the committee, was to be the only standard yard and unit, and only standard measure of extension. Superficial measures are derived by squaring those of length, and measures of capacity by cubing them.

Measures of length.

Ell.

Measures of capacity.

Winchester bushel.

THE Winchester bushel is the legal English measure for all sorts of grain. A legal Winchester bushel, according to the standard in the exchequer, must be round, with a plain bottom, eighteen one half inches wide throughout, and eight inches deep.[a] And every bushel must contain eight gallons of wheat, and every gallon eight pounds troy, and every pound twelve ounces, on the penalty of £20 upon every city, borough, town, or place, having the keeping of common measures, that shall keep any other bushel or gallon.[b] And if any person shall sell any sort of corn or grain, ground or unground, or any kind of salt usually sold by the bushel, by any other bushel or measure than agreeable to the Winchester measure, containing eight gallons to the bushel, strucken even by the brim by the seller, he shall forfeit 40s. on conviction before one justice, mayor, or other head officer, on oath of one witness, to be levied by the church-wardens and

it was proposed that a piece of fine copper, made by direction of the committee, and described in the bill, should be the original and genuine standard of the troy pound, and should be the unit and only standard measure of weight.

[a] 13 and 14 William III, c. 5.

[b] 12 Henry VII, c. 5.

§ 4. ENGLISH STANDARDS.

overseers, or some one of them, to the use of the poor by distress, and in default of distress, imprisonment till paid.[a] And whoever shall sell any corn, ground or unground, or salt in any other measure, and that without shaking the bushel by the buyer, shall forfeit beside, all the corn, grain, or salt, to the person or persons complaining.[b] And if any mayor, or other head officer, shall suffer any other measure to be used, than according to the standard, and sealed, he shall forfeit £5, half to the prosecutor, and half to the poor, on conviction, by presentment or indictment at the county sessions, by distress: in default of distress, to be imprisoned by warrant of the justices till paid.[c] And whosoever shall sell by any other weight, measure, or yard, not according to the standard, or keep any such, whereby any thing is bought or sold, shall forfeit 5s. on conviction before one justice, mayor, or other head officer, on oath of one witness, to be levied by the overseers and churchwardens, or some or one of them, to the use of the poor, by distress; in default of distress, imprisonment till paid;[d] but water measure, viz. five pecks to the bushel, in sea-port towns, to continue as usual;[e] except in the measuring of corn or grain, ground or unground, and salt.[f]

One justice has power to proceed on oath of one witness.

BUT it does not seem necessary here to go into any longer detail of those numerous enactments, by which that uniformity of weights and measures, so much wished for, has not been effected. This fact was assumed in the above-mentioned bill, grounded upon the report of the parliamentary committees; and as that bill, though printed, has not been further followed out, the same still remains to be the subject of future legislation. In the meantime, it may suffice, for practical information, to insert in Appendix III, from lord Swinton's Treatise on weights, Tables of the

[a] 22 Charles II, c. 8, § 2.
[b] Ibid. § 2.
[c] Ibid. § 3.
[d] 16 Cha. II, c. 19, § 2.
[e] Dalt. 112.
[f] 22 Cha. II, c. 8, § 2.

§ 4. ENGLISH STANDARDS. English and Scottish standard weights and measures, and for converting them into each other.

§ 5. BRITISH STANDARDS. V. UNDER the above clause of the articles of Union, there cannot be any doubt of the English standards having been intended to supersede the Scottish, that uniformity might obtain over the united kingdom. Excepting, however, that in some counties the Winchester bushel is beginning to be used, the practice has continued as formerly; chiefly, lord Swinton thinks, from due pains not having been taken to enable the people to convert the one into the other. Besides, the legislature has countenanced this practice, by adopting, on more than one occasion, our ancient Scottish standards.[a] In like manner, the supreme court has occasionally interfered for their more correct regulation.[b] And in modifying ministers stipends, the teind court, to this day, uniformly employs the Linlithgow measure.

Union.

IN this country, as well as in England, there are also separate local weights and measures still used in the differ-

[a] Thus, by the 24 Geo. II, c. 31, § 4, it is enacted, that all lintseed and hempseed shall be sold by the Linlithgow barley measure, streaked, under the penalty of 40s.; and this, notwithstanding the duties on import are all paid according to English weights and measures.

[b] Thus in Finlay, &c. v. Magistrates of Linlithgow, the court of session (July 5, 1782) found the method presently used in adjusting the firlot measure was erroneous, and "remitted to the lord ordinary to direct a standard to be made conform, &c. to be held in all time coming as the standard firlot measure." His lordship (13th July 1782) accordingly directed, &c. The report in the Fac. Col. and Dict. goes no farther; but his lordship (4th Feb. 1783), "in respect the pursuers have never yet got the standard firlot measure made, &c. recalled the interdict, and allowed the magistrates of Linlithgow to cause make firlots from the old standard measures." Thereafter, the standards, as directed, having been made, the pursuers insisted in the cause. But the court, in general, entertained doubt, whether the interlocutor, 5th July 1782, was not *ultra vires*; and therefore (19th May 1791), instead of following out the previous order, as to the adoption of the new standard measure, only corrected the practice of the magistrates of Linlithgow in the way of filling the jug, as disconform to the statute.

§ 5. BRITISH STANDARDS.

ent counties; which, however, are so far from being countenanced by law, that in the case of a criminal trial, as we have seen, it is not a relevant charge that there has been a deviation from the customary measure or weight of the district or neighbourhood.[a] Nay, in strictness, it is even inditeable to make use of any weight or measure different from those which national authority has established; and if this appointment cannot everywhere "be executed, by "reason of the long practice and known custom of cer- "tain counties or districts to the contrary, it is not there- "fore to be imagined that the law is therefore obsolete, "nor that in other quarters of the kingdom, or with re- "spect to other commodities which have not been subject "to any such irregularity, a licence has been gained, of "dealing, by various or arbitrary weights or measures, "such as are of no known proportion, and are not reduci- "ble to any standard."[b]

Local weights, &c.

UPON this grievance, which is felt in England as much as in this country, there are one or two late decisions of the court of king's bench, which merit attention. One was, that although there had been a custom in a town to sell butter by eighteen ounces to the pound, yet the jury of the court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight.[c] In the other, it was deter-

[a] Aug. 11, 1714, Sir James Dunbar and John Forsyth. Hume, vol. i, p. 257; 1503, c. 96.

[b] Hume, ibid.

[c] Christian's Blackstone, b. i, p. 276, n. 17.

Lord-chief-justice Kenyon, said: "In deciding this question, I wish "not to be understood to say that a "custom may not prevail that but- "ter shall be sold in lumps, or yards, "containing any given number of "ounces; but the question now be- "fore the court, is, whether a cus- "tom in Southampton, that a pound "shall contain 18 ounces, can be "supported in law. To say that it "can, would be to violate all the "rules of language, as long as the "acts of parliament, which have "been cited, are to regulate this sub- "ject."

Mr. justice Ashhurst said: that "the "only ground on which this custom

§ 5. BRITISH STANDARDS.

mined that no practice or usage could countervail the statutes 22 Car. II, c. 8 and 22, and 23 Car. II, c. 12; which enact, that if any person either sell or buy grain or salt, by any other measure than the Winchester bushel, he shall forfeit forty shillings, and also the value of the grain or salt so sold or bought; one half to the poor, the other to the informer.[a]

" can be supported, is a supposition " that the legislature did not intend " to interfere with the customs of " any particular place; but that is " totally unfounded: for the legis- " lature supposed that at the times " when the several acts passed, dif- " ferent weights and measures pre- " vailed in different towns, to reme- " dy which inconvenience they pass- " ed those acts."

Mr. Justice Buller: " I have never " seen any thing in the acts of par- " liament requiring persons not to " sell more or less than a pound. " But the question here, is, whether, " when a person is selling butter, un- " der the specific denomination of a " pound, he shall be compellable to " sell more than a pound? I am of " opinion that the custom cannot be " supported." May 15, 1789, Noble against Durell: Termly reports, vol. iii, p. 271.

[a] Christian's Blackstone, ibid.

This was a conviction on the 22 Car. II, c. 8, § 2 and 22 and 23; Car. II, c. 12, § 2, for buying corn on the 23d July 1791, at Newport, in the isle of Wight, which contains a pint more than the Winchester measure. The defendant was convicted in 40s. and 10l. 15s. being the value of the wheat sold.

" The court said, that as this was " a question of very general concern, " they would take time to consider " of it."

" Lord Kenyon, chief-justice, now " delivered the opinion of the court. " We have hitherto delayed giving " judgment in this case, in the hopes " of discovering that the farmers in " general have been acting under a " mistake; for it is a matter of no- " toriety, that in different parts of " the country corn is sold by differ- " ent measures, some greater and " others less, than the Winchester " measure. This question depends on " the statute, 22 Car. II, c. 8, and the " 22 and 23 Car. II, c. 12. The former " imposes a penalty of 40s. on any " person who shall sell corn or grain, " usually sold by bushel, by any other " bushel or measure than the Win- " chester measure. The statute 22 " and 23 Car. II, c. 12, recites the " former act; and, in order to en- " force it, subjects both the buyer " and seller to an accumulative pe- " nalty, the value of the corn sold. " These acts of parliament are ex- " pressed in the most positive terms; " and it was admitted in the argu- " ment that there was no subsequent " law which directly repealed them. " But several other statutes for the " regulation of the corn trade were " referred to, directing returns of the

§ 5. BRITISH STANDARDS.

AND on deciding another case of the same kind, lord-chief-justice Kenyon observed, "I am sorry that the obstinacy of the farmers, in some parts of the kingdom, has partly defeated the provisions of the statutes of Charles II; because, after the case of K. *v.* Major was decided, we had an opportunity of knowing, from the grand juries in different counties, that that decision gave great satisfaction. In order to decide this case, we have only to look at the very words of the statute 22 and 23 Car. II, which expressly subject the buyer to both the penalties; for it is thereby enacted, that the buyer shall forfeit and lose, beside the penalty of the former act, all corn bought, &c.; that is, he is to forfeit the value of the corn, in addition to the penalty of forty shillings imposed by the former act." And justice Buller observed, "The statute 22 and 23 Car. II, c. 12, instead of saying expressly that the buyer shall be liable to the penalty of forty shillings, and to the forfeiture of the corn so bought, has said the same thing impliedly; for it says, that he shall forfeit and lose, beside the penalty of the former act (which is a penalty of forty shillings) the corn so bought, &c."[a]

"average price of corn to be made, and noticing in those returns a customary measure. These, it was argued obliquely, though not directly, repealed the statutes of Cha. II. We have considered this matter very fully, and are of opinion that the argument does not lead to that conclusion. We cannot get rid of those positive laws by a reference to subsequent statutes, which were passed for another purpose, and which leaves the former ones still in force. Conviction affirmed." The king against J. Major, 15th June, 1792. Termly reports, vol. iv, p. 752.

[a] Termly reports, vol. v, p. 356.

CHAP. VII.

Of Masters and Servants.

§ 1. WHO COMPELLED TO SERVE?

I. SERVICE, a species of *locatio operarum*, arises, in general, from consent. Yet the police magistracy, as we have already seen, compel various descriptions of persons to go to work, viz. indigent children, who, if declared such by the magistrates of the borough, or kirk-session, where they are seized, may be compelled to serve any of the king's subjects, without wages, till the age of thirty ;[a] vagrants and sturdy beggars, who may be compelled into service by any manufacturer within the kingdom, at the sight of the magistrate of the place where they are laid hold on ;[b] and "if labourers, workmen, servants, shall refuse to work at the rates fixed by the justices of peace, the justices may compel them to it by imprisonment, or further punishment, at their discretion."[c]

Indigent children.

Vagrants.

Labourers, &c. refusing to work at the rates.

§ 2. VOLUNTARY SERVICE.

II. THE relation of master and servant may be entered into either verbally or in writing. The wages or hire,

[a] 1617, c. 10; Appendix I, Ersk.

[b] i, tit. 7, § 61.

[b] Ersk. 1663, c. 16; Appendix I.

[c] Ersk. ibid. 1661, c. 58; Ap. I. "By labourers or servants, in this "clause of the act, may be understood" (says Mr. Erskine) "all "able-bodied men or women, who "have neither a sufficient stock for "their maintenance, nor any settled

§ 2. VOLUNTARY SERVICE.

as well as the time, are usually fixed. If no time be stipulated, it will be understood to be for the period, whether year or half year, at which servants of the particular description are usually engaged.[a] An engagement for a long period of years, even for life, does not constitute the state of slavery; and cannot therefore be pronounced illegal;[b] though a slave, setting his foot on Scottish ground, becomes free.[c]

Verbal engagement. If no time be specified.

Warning necessary.

When a servant is hired from one term to another, warning is required forty days previous to the term; otherwise the master, on the one hand, will be liable in wages, and (in the case of domestic servants) in board-wages to the term; or the servant, on the other, may be compelled to serve out his time; or if that has become impossible, to pay damages.[d]

By the statute 1621, c. 21, "one who has served dur- "ing the winter half a year, cannot go at liberty the en- "suing summer half year."

Earnest, or arrels.

In engaging a servant, it is usual to give earnest, or

"employment, though they should "not have at any time formerly "earned a livelihood by service." Mr. Erskine adds another class, viz. colliers and salters, who were formerly *annexi fundo*; but those classes of men are now restored to the full enjoyment of the privileges of other British subjects, by the statute Geo. III.

[a] "If a person retain a servant "generally, without expressing any "time, the law shall construe it to "be for one year; for that retainer "is according to law." Coke, 2 Inst. 42. Burn.

[b] Ersk. b. i, tit. 7, § 62; Black. ed. Christ. b. 1, c. 14, p. 425. In the case of M'Vicar, to be mentioned below, lord Kames ordered an argument on the point; but it did not take place; for there the master, and not the servant, wished to be free of the engagement. In the late case of M'Kenzie, to be mentioned below, an engagement for 18 years was not thought illegal.

[c] Jan. 1778, Dict. vol. iv, p. 282.

[d] July 14, 1779, Baird against lady Don. Dict. vol. iv, p. 18. A quarter's warning is required in England by 5 Eliz. c. iv, § 7. Burn, tit. Servant, § 1.

§ 2. VOLUNTARY SERVICE, —HIRING.

arrels;[a] which, however, are not necessary to the validity of the agreement: if really concluded, it is binding without any such solemnity; neither party is entitled to resile, the servant by offering back, or the master by forfeiting the arrels.

False characters.

As masters may suffer so much by the dishonesty or unskillfulness of their servants, the statute 32 Geo. III, c. 56, empowers two justices of peace, on the oath of one witness, to award damages against persons giving false characters.[b]

[a] So called from the Roman *arrhæ*.

[b] By the 32 Geo. III, c. 56, after reciting, that false and counterfeit characters of servants, have either been given personally or in writing by evil disposed persons, contrary to truth, and to the peace and security of his majesty's subjects: after 1st July 1792, if any person shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant, of any such master or mistress, and shall, either personally or in writing, give any false, forged, or counterfeited character of any person offering to hire; every such person so offending shall forfeit 20l. § 1, 6.

And if any person shall knowingly and wilfully pretend, or falsely assert in writing, that any servant has been hired or retained for any time, or in any capacity whatsoever, other than that for which he was hired or retained; or for the service of any other person; or that any servant was discharged or left his service at any other time than that at which he was discharged or actually left such service; or that any such servant had not been hired or employed in any previous service contrary to truth; or if any person shall offer himself as a servant, pretending that he hath served in any service in which he hath not actually served, or with a false, forged, or counterfeit certificate of his character; or shall in anywise add to, or alter, efface, or erase, any word, date, matter, or thing contained in, or referred to in any certificate given to him by any former master, or other person authorized by such master; or having before been in service, shall, when offering to hire as a servant, falsely and wilfully pretend not to have been hired or retained in any previous service; he shall, for every such offence, forfeit 20l. § 2, 3, 4, 5, 6.

All which penalties aforesaid may be recovered before two justices, on conviction, either on confession, or the oath of one witness; half to the informer, and half to the poor: and if such offender shall not immediately pay the same, together with 10s. for the costs attending such conviction; or shall not give notice of appeal, and enter into recognizance in

§ 2. VOLUNTARY —OBLIGATIONS.

IF a servant be retained for any special work, or certain time, and depart before the conclusion of his agreement, action will lie against both him, and any one who seduces him, or, knowing his previous agreement, hires him.[a] From this sort of property, which one is supposed to have in the labour of his domestics,[b] a master may maintain an action against another for beating his servant,[c] or justify assaulting another in defence of his servant, as the latter may in defence of his master,[d] or assist his servant in supporting the expence of any action at law against a stranger; whereas,

Rights in consequence of the hiring.

manner herein after mentioned, such justices shall commit him to the house of correction, or other prison, there to remain and be kept to hard labour, without bail, for any time not exceeding three, nor less than one month, until he pay the sum so forfeited, together with such costs as aforesaid. § 6.

And such informer shall be a competent witness, notwithstanding he is entitled to a part of the penalty. § 7.

Provided, that if any servant who shall have been guilty of any of the offences aforesaid, shall, before any information has been lodged against him, inform against any person concerned with him in any offence against this act, so as such offender be convicted thereof, such servant shall thereupon be discharged from all penalties and punishments to which at the time of such information given, he might be liable. § 8.

And the conviction may be drawn up in the following form, or to the same effect, viz.

Be it remembered, that on the day of A O is convicted before us J P and C P, two of his majesty's justices of the peace for the county of . [Here specify the offence, and the time and place when and where committed.] Given, &c.

And any person who may think himself aggrieved may appeal to the next sessions, upon entering into a recognizance with two sureties in 20l. each, to try such appeal, and abide the order of, and pay such costs as shall be awarded at such sessions: and on proof of such notice and recognizance, the justices shall hear and finally determine such appeal in a summary way, and award such costs to either party as they shall think proper, which shall be binding and conclusive to all intents and purposes; and no such conviction, order, or other proceeding as aforesaid, shall be quashed for want of form, or removed by *certiorari* into any other court. § 10.

[a] Cowper, 54. Burn, tit. Servants, § 271.

[b] 1 Black, Com, 429.

[c] 1 Roll. Abs. 115, Laws of master and servant, 14.

[d] Ibid. 1 Black. Com. 429.

§ 2. VOLUNTARY —OBLIGATIONS.

in general, it is in some countries held to be an offence against public justice to encourage suits and animosities by such assistance.[a]

HENCE, also, a master is bound to fulfil the bargains, and repair the damage, done by his servants in things committed to their charge: In other matters the master is not answerable for the conduct of his servant.[b] So if a servant creates any nuisance,[c] or does other injury on the highway;[d] if a smith's servant lame a horse whilst shoeing him;[e] or a carrier's servant lose goods; or a pawnbroker's servant, the pawn entrusted to him;[f] in all such cases, the master, as well as the servant, is liable in damages.[g]

Master liable for his servant.

[a] 1 Roll, Abs. 115, Laws of master and servant, 14.

[b] Bankton, b, i. tit. 2. § 54.

[c] As throwing dirt on the highway, L. Raym. 264. Burn, tit. Serv. § 26.

[d] A servant with a cart ran against another cart whereon was a pipe of sack, and spoiled the sack. An action lies against the master. 2 Salk. 441. A gentleman's servant brought a coach and two ungovernable horses of his master's into Lincoln-inn fields, in order to break them; and they, from the carelessness of the driver, ran over a passenger. Action was found against both master and servant. 3 Kel. 65; 1 Vint. 295; Law of master and servant, p. 7.

[e] Black. Com. 431.

[f] Wood, b. i, c. 6; 2 Salk. 441.

[g] H. 8 G. Mead and Hammond. The plaintiff, according to the common course of dealing, delivered to the defendant's servant an ingot of gold to assay; and it not being returned, he brought an action against the master; and Pratt, ch. j. directed the jury, that the delivery to the servant was sufficient to maintain the action against the master, on proving a subsequent demand and refusal; so the plaintiff had a verdict. Str. 505.

M. 8 G. Carey and Webster. The defendant was a clerk of the South-sea company, and took in payments. The plaintiff paid him 60ol. and he paid it to the company; Pratt, ch. j. ruled no action in this case lies against the servant. If he had not paid it over, the plaintiff would have had his option either to charge him or the company; as in the common case of payment to a goldsmith's servant, who doth not carry it to the account of his master, the party hath an election to go against either; he may charge the servant, because till the money is paid over, the servant receives it to his use; or he may pass by the servant, and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master. Str. 480. See debated at large, whether one, the carelessness

§ 2. VOLUNTARY OBLIGATIONS.

WHETHER a master shall be liable or not for goods taken up by his servant in his name, depends upon the manner of his former dealing. If, therefore, I pay money to the servant of a banker, and he embezzle it, the banker will be answerable; but it is otherwise if I pay money to a physician's servant, whose proper business is not to receive money for his master.[a]

Servant taking up goods.

FREQUENT permission to do a thing is equivalent to a general command. If a person has been in the practice of dealing with his merchants and tradesmen himself, always paying ready money, he will not be answerable for what his servant takes up in his name, unless it be *in rem versum*; but if the servant (or other person) be usually sent on trust, or come sometimes with money, and at other times on trust, the master is liable to the tradesman, who cannot know when the servant comes by his own authority, and when by his master's command; or when with, or when without, the money; and has no controul over him whether he shall carry the goods home, or dispose of them otherwise.[b]

Edict nautæ caupones stabularii.

As *nautæ, caupones, stabularii* were, by the prætor's edict, answerable for whatever the traveller brought into the inn, or ship, or stable, and of course for the dishonesty, as well as ignorance and carelessness, of those in their employ;[c] so with us the same class of persons, viz. shipmas-

of whose servant occasioned the burning of a house belonging to another, should be liable in the damage. Feb. 13, 1685, sir R. Sibbald against lady Rossyth. Fount. vol. i, 341.

[a] 1 Black. Com. 430.

[b] This distinction was laid down by the late lord-justice-clerk Macqueen, and approved by the court in the case Inches against Elder, 22d Nov. 1793. The same distinction obtains in England. See Bac. Abridg. 61, and Law of master and servant, p. 6.

[c] Ff. lib. iv, tit. 9, l. 1. *Ait prætor nautæ, caupones, stabularii. quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.*

§ 2. VOLUNTARY —OBLIGATIONS.

ters, inn-keepers,[a] vintners in boroughs,[b] householders letting lodgings,[c] carriers and proprietors of stage-coaches,[d] are subjected in the like responsibility; which extends to all losses not arising *damno fatali* or *vi majori*.[e]

If the master die before the term.

IF the master die before the term, the servant is entitled to full wages, and (if he was maintained at bed and board in the family) to aliment to the term.[f] This rule is without exception in the case of engagements for half a year. But if the master who has engaged a servant for the whole year or longer period, die during the currency of the first half year, the servant having sufficient time to look out for another place, and being in *mala fide* if he does not do so, will not be entitled to more than the first half year's wages and aliment.[g]

Servant sick, Is he entitled to board wages if he leaves the house.

IF the servant die before the term, his executors are entitled to his wages only for the time he has served. "A "workman, or the servant, who is hired to a precise day "or term, is entitled to his full wages agreed on, though "he should by sickness, or other accident, be disabled "from his service for a part of that time."[h] *Servire enim "nobis intelliguntur etiam hi* (as Paulus humanely express-

[a] Erskine, b. iii, tit. 1, § 28, 29.

[b] Feb. 17, 1687, Master of Forbes. Fountainhall.

[c] July 5, 1694, May, ibid.

[d] Feb. 6, 1787, Macausland. Fac. Col.

[e] 13th Feb. 1801, Ja. Hay against Wordsworth, stabler and horse-breaker. A horse was given in charge to Wordsworth to break A strange dog attacking it as the hostler was leading it out of the stable, it took fright, run off, and received a hurt, in consequence of which it became lame. Wordsworth was subjected in the value of the horse. The edict was found to apply.

[f] Bank. vol. i, p. 58; Ersk. b. iii, tit. 3, § 16.

[g] Punchin against the trustee for Haig's creditors, Nov. 17, 1790.

Punchin was hired by Haig for seven years as engineer for his distillery, at a salary of 150l. per annum. At the expiry of the fourth year, Haig became bankrupt. Punchin brought an action for his full salary during the remaining three years; but the court found him entitled to a proportion only, viz. for such time as he remained unemployed.

[h] Ersk. b. iii, t. 3, § 16; & l. 9, § 5; l. 13, § 1, 2 ff. Locat.

es it) *quos curamus ægros, qui cupientes servire, propter adversam valetudinem impediuntur.*[a] Perhaps, therefore, it may appear to follow, that if it be found proper and necessary to remove the servant, to be under the care of his friends, the master is liable in board wages; because he may insist on keeping the servant in the house, if he choose it. § 2. VOLUNTARY —OBLIGATIONS.

IF, without a just cause, the master shall dismiss his servant, he will be liable in full wages, and, if the servant lived in the family, in board wages: The servant, on the other hand, if he break his service, will not only forfeit all claim to wages for the time he has served, but may further be compelled by imprisonment to return;[b] or, if that has be- Master dismissing his servant. Servant leaving his master without a just cause.

[a] L. 4, § 5. Ff. De statu lib. Paulus here was speaking of an engagement for a year, and uses the expression *quibusdam diebus.* M. Pothier, therefore, is for limiting the rule to an indisposition of that short continuance, observing, that if it be for a more considerable portion of time, and if masters in such a case insist not on a proportional deduction from the year's wages, "*c'est une générosité de "leur part, qui à la vérité est de bien-"séance à l'égard des personnes riches et "d'une profession noble.*" (De Droit Civil, &c. t. 2, p. 253.) Our practice inclines to the humaner side. Even for an illness that had laid aside the servant for 11 weeks, the court of session allowed no deduction from the year's wages. (29th Nov. White, 1794. Fac. col.)

[b] This right of compelling the servant by imprisonment to finish his engagement, arises from a maxim, that it is only in *locum facti impresta-bilis*, that *succedit damnum et interesse.* Instances daily occur of warrants of imprisonment being granted in the case of apprentices; and there is no principle of common law to distinguish their case from that of other servants. In England, it is said common law gives the master no right to imprison either apprentice or servant, *ad factum præstandum.* Particular statutes have therefore been passed for enabling masters to compel apprentices to perform their engagement. (5 G. I, c. 4, 20 G. II, c. 19. 6 G. III, c. 25.) And in France, the same seems to have been the case with all servants, but sailors, and menial servants, whom M. Pothier mentions as an exception to the general rule. *Par une exception*, &c. *les matelots qui ont loué leurs services pour un navire, peuvent être contraints précisément à les rendre*, (t. 2, p. 432.); and, in another place, says, *Serviteurs qui louent leurs services aux bourgeois des villes, ou*

§ 2. VOLUNTARY —OBLIGATIONS.

come impossible, will be liable in damages, and fine, *in pœnam.*

Just causes for dismissing a servant.

IF a servant be not qualified for the place he undertook, or give the master or mistress abusive or disrespectful language,[1] or refuse to do his master's business; ("which is in "law a departure from his service, though he still continue "under his master's roof;"[b]) or be guilty of dishonesty; or

même à la campagne aux gentilshommes pour le service de la personne du maître, &c. il ne leur est pas permis de quitter le service du leur maître sans son congé, et ils doivent être condamnés à retourner, ou jusqu' au jour du prochain terme auquel il est d' usage dans le lieu de louer des serviteurs, ou seulement jusqu' à ce que le maître ait le temps de se pourvoir d'un autre serviteur lequel temps lui est limité par le juge. (Ib. 255.)

[a] Both in the one case and the other, the master must be able to prove something specific against the servant. His own averment, in general, as to either ignorance or impertinence, will not be sustained. A wet nurse was discharged by her mistress for being insolent and subject to passion; which was insisted to be a reasonable cause to discharge her. This case having come before the court of king's bench, lord-chief-justice Mansfield said, "No person can "be judge in his own cause; and this "principle could never be meant to "be overturned by any law or usage "whatsoever." The servant had a verdict for the whole year's wages. Temple *v.* Preston. Burn *v.* servant.

[b] Dalt. 187. But the disobedience must be with regard to something which it was reasonable in the master to command him to perform. July 1775, Fairie against M'Vicar. In April 1769, a written agreement was entered into betwixt John Fairie, coalmaster in Rutherglen, and Neil M'Vicar, designed his servant. The latter became bound and obliged as a "servant and grieve and "overseer to the said John Fairie of "his other servants and works and "services, whereuntil he the said "Niel M'Vicar has formerly been "employed by the said John Fairie, "and is in use to serve, and that for "all the days, years, and space, of "the said John Fairie his lifetime, or "the joint lives of the said John "Fairie and him the said Niel Mac-"vicar; and obliges himself that he "shall faithfully, diligently, and obe-"diently serve, obtemper, and obey, "his said master in his said service; "and that he shall not absent or di-"vert himself therefrom without li-"berty asked and given, except in "case of sickness."

On the other part, Fairie became bound to pay him, in name of fee and reward for his said service, by quarterly payments, 18l. 4d. besides discharging a debt of 82l. sterling, which the latter owed him. In March 1771, Fairie desired M'Vicar

§ 2. VOLUNTARY—OBLIGATIONS.

according to the English lawyers, of any other "moral turpitude, even though it be not such for which the servant may be prosecuted at common law,[a]" such servant may be dismissed, and, according to circumstances, will either be entitled to no wages, or only for the time he has actually served. It is laid down, therefore, by the English lawyers, not only that a maid servant who falls with child,[b] but even a man servant who debauches any of the maid servants may be dismissed, without being intitled to more than wages for the time he has served.[c]

Immorality

to go and assist at the windless wheel, or click the coals at a pit, that being the only work he had for him. Macvicar replied he would do neither. On the 4th of April he called upon his master, under protest, to employ him in terms of his agreement. In answer, Mr. Fairie again desired him to assist at the windless wheel, or the clicking the coals at the pit. This was refused; and the parties gave each other mutual charges upon the contract. Both the charges were suspended, and the suspensions conjoined; and Lord Kames "found, "from the terms of the contract, "and other circumstances of the "cause, particularly the rate of "wages, and a discharge of a great "sum owing to the master, that "M'Vicar was hired by Fairie as "an overseer, not as a common ser-"vant, and must be employed ac-"cordingly." And upon a representation his lordship adhered. On advising a reclaiming petition, and answers, the court adhered to this interlocutor. March, 1775.

[a] Burn, tit. Servants.

[b] In the English case of Ashover and Brampton, the question occurred, whether a master, of his own authority, was entitled to dismiss a maid servant who had fallen with child.

Lord Mansfield said, "the ques-"tion is, has the master done right "or wrong in dicharging his ser-"vant for this cause? I think he did "not do wrong in discharging his "servant for this cause: shall the "master be bound to keep her in "his house? To do so would be "*contra bonos mores*: and in a family "where there are young persons, "both scandalous and dangerous." Cal. cas. ii; Burn, ibid.

[c] 18 G. 3, K. v. Welford. John Dyer was hired for a year, and continued in his service till within three weeks of the end of the year, when his master, on account of a *supposed* criminal intercourse with a servant girl, then big with child, discharged him, and offered him his whole wages except 4s. which he insisted to keep back for the three weeks; but the servant refused to allow it, and said he was willing to stay out his year, if his master would let him. After he was discharged, he went to a justice; but

§ 2. VOLUNTARY —OBLIGATIONS.

ON the other hand, if the master does not allow the servant "competent sustenance,[b]" or uses him "with immoderate severity,[c]" or employs him in a capacity different

the justice telling him he could not recover the whole, and having no money to subsist upon, he accepted the money his master had offered him, abating the 4s. for the three weeks: that no order, in writing, was made by any justice to discharge him. Bearcroft and Caldecott insisted that the case of the K. v. Brampton was in point, for that the offence was equally *contra bonos mores* in the case of a man as of a woman; that however reluctantly he consented to the discharge, it was only to an act, the effect of which, if refused, the law has given to the master by compulsion, and against the servant's will; that the fact of criminality was fully proved below, and was meant to have been stated.

By lord Mansfield.—Had the fact of criminality been positively stated, to be sure it would have fallen within the principle of K. v. Brampton. Cal. cas. 57. Burns, ib.

But in the case of K. v. Westmeon, M. 22 G. 3. it was said by lord Mansfield, that a servant being the father of a bastard child, prior to the master's hiring him, and the crime not committed when in his own house, the master shall not discharge him under this pretence: it is not debauching of his servant, or turning his house, as it were, into a brothel. Cal. cas. 129, Burn, ib.

[b] Bank. b. i, tit. 2, § 55.

[c] Ibid. "All masters have a power "of moderate chastisement over their "servants, whether voluntary or necessary; and the masters of public "workhouses are, by 1672, c. 18, "allowed to go all lengths in correcting, life and torture excepted." Ersk. b. i, tit. 7, § 62.

But with us now, as it seems to be in England, this power of chastisement must rather be confined to the case of servants under age. "If a "a master or mistress beats any servant of full age, it may be a good "cause of discharge, on complaint "to the justices." Dalton, c. 58; Black. 428; Burn, tit servants, § 10.

"Where a master, in correcting "his servant, happens to occasion "his death, it shall be deemed homicide by misadventure, yet if in "his correction he be so barbarous "as to exceed all bounds of moderation, and thereby occasion the servant's death, it is manslaughter at "least; and if he makes use of an "instrument improper for correction, and apparently endangering "the servant's life, it is murder." 1 Haw. 73, 74. "And if the servant "shall depart out of his master's "service, and the master happen after to lay hold of him, yet the "master in this case may not beat "or forcibly compel his said servant, "against his will, to return or tarry "with him, or do his service; but "either he must complain to the justices, for his servant's departure, "or he may have an action of covenant against his servant." Dalt. c. 121.

from what he was particularly engaged for,[a] or charges him, though not maliciously, with some act of dishonesty, or other offence which he does not prove; in such cases the servant may quit his service without being liable in damages, and will be intitled to wages during the time he has served, or to full wages and board wages also, as the case may be.

§ 2. VOLUNTARY OBLIGATIONS.

Why the servant may leave the service.

IT is a common notion with us, that a female servant, by her marriage, becomes free from her engagement; and it must be owned, that the inclination of our law is great in favour of marriage; yet this question, it is believed, remains still undecided by the supreme court.[b]

THE mutiny act, 1805, and the subsequent ones, authorize the enlistment of servants, without any exception, except apprentices.[c] This is against the principles

[a] As ordering one hired as the housekeeper to dress victuals as the cook, &c. On this principle the court of session found a housekeeper intitled to wages and board wages, althogh she had not been dismissed the house; but had voluntarily left it on being allowed no longer to act as housekeeper, but being deprived of the keys (or, as one judge expressed it) the *insignia* of her office. Christian Gun, June, 1801.

[b] In the case of sir George Home against Cunningham and Simpson, which respected the enlistment of an apprentice, one of the judges used the illustration, "suppose a woman under "an engagement for personal service "marries, she will be free." And in like manner, another respectable judge stated generally, "that no "personal engagement can prevent "a servant from marrying." But such observations, which are termed by the English lawyers *obiter dicta*, have not the same authority with opinions delivered touching the point which the court is actually deciding. In England it seems to be held that a female servant, though she marries, must still fulfil the period of her engagement. (Dalt. 58.) And in France, the same thing obtains, according to Pothier, who says, "*Quand même ce* " *seroit pour une cause honnête qu'un* " *serviteur quitteroit avant le temps* " *le service de son maitre, putà*, pour " se marier, *ou* pour aller assister " ses pere et mere, *il ne lasseroit pas* " *d'être tenu des* dommages et intérêts " de son maître; *car c'est* par son fait " *et* volontairement qu'il ne *remplit* " *pas son obligation: mais ils doiventen* " *ce cas être estimés moins rigoureuse-* " *ment que lorsqu'il quitte sans sujet,* " *par paresse, par libertinage, ou par* " *l'espoir de gagner davantage ailleurs.*" (Ib. 254.)

[c] As to the enlistment of apprentices, see under the writing act, b. v, c. 3, § 2.

§ 2. VOLUNTARY —OBLIGATIONS.

of our common law, by which the voluntary enlistment of a hired servant would be suspended till the expiration of his engagement with his master, who, should he join his regiment, might compel him to return, *squalore carceris*, or might, at his option, insist for damages.[a] For, engagements incompatible with each other, are *cæteris paribus*, regulated by the maxim *prior tempore potior jure*.[b]

[a] 19th January 1799, John Clerk againſt lieutenant Kenneth Murchison, and M'Kenzie against Dixon, 1st March 1805.

[b] So the law was laid down by the late justice-clerk Macqueen in the noted case sir George Home against Cunningham and Simpson, 16th March 1795.

That case respected the enlistment of an apprentice, in virtue of the statute 35 Geo. III, c. 9, relative to supplying the navy. But the law was laid down generally; and the same principle has governed the decisions of the court in the case of servants also.

In delivering his opinion in this case of Cunningham, the lord president, who agreed with the lord justice-clerk as to the common law, though he differed from his lordship as to the construction of the particular statute, observed, that he recollected only one case to have occurred respecting an engagement for personal service, and that it had been decided in the bill-chamber in favour of the rights of the master.

This case of Cunningham was *heard in presence*, and very maturely considered by the bench. The eminent counsel, who argued on the part of the public, maintained, that the right of the king to the military service of the lieges, could not, at common law, be prevented by their engagements with others, whether as servants or apprentices. The king, it was said, could compel specific performance *manu militari*. And two of the judges adopted that idea, viz. that "apprentices may be enlisted, "because the master has no real lien, "but only a personal claim against "them for performance. *Prior tem-* "*pore potior jure*, therefore, does not "apply in the case of rights so dis- "similar as that of a master over his "apprentice, and his majesty over "recruits."

This argument was therefore completely before the court, and had been ingeniously and learnedly maintained from the bar, when the late lord justice-clerk Macqueen laid down the law as above mentioned.

This same principle was in the late case of M'Kenzie against Dixon, 1st March 1805, maintained very strongly by one learned judge, who, in the case of Cunningham, had argued it as counsel from the bar. His lordship observed, that the opposite opinion, as supposing something like property over the servant and his services, was contrary to the principles of the civil law, and the spirit of the constitutional law of this country; that the right of the crown which differed from that of other masters, as it could compel spe-

§ 2. VOLUNTARY—OBLIGATIONS.

AN enlistment must be regulated by the same principle with other engagements. The public service, indeed, in general is necessary: yet it is not at all necessary that any one hired servant in particular should enlist without his master's consent. The onerous obligations of a *bilateral* contract, a servant cannot get rid of by *his own* voluntary act.

UNDER the French monarchy, the royal prerogative, and the distinction of the military service, were certainly carried to an extreme. But a municipal jurisprudence, built, like our own, on the solid learning and enlightened equity of the civil law, corrected and restrained the despotism of the government. The king's service, accordingly, in relation to the onerous contracts of third parties, had no privilege beyond that of any of his subjects: the voluntary enlistment of a hired servant stood on the same footing with any other unlawful engagement.[a]

cific performance *manu militari*, or by force of military discipline, for reasons of expediency, weakened and qualified by the mutiny act, so as not to interfere with masters in their right to apprentices with whom they received more than 20l. of apprentice fee; but the other judges observed, that all masters were entitled to enforce specific implement by imprisonment; insomuch, that a person in prison, *ad factum præstandum*, has not been thought entitled to the benefit of the *cessio*.

This seems to be farther confirmed by a clause in the militia act, providing, in the case of ballots falling upon hired servants, that they shall be entitled to wages for the time which they have actually served. At the same time, in a competition between two masters, the first engagement in point of time, may not always be entitled to a preference; for, if it rests in *nudis finibus contractus*, and the posterior engagement has been completed by possession, the first master must be satisfied with a claim of damages against the servant. So the court thought in the cases already mentioned; and so far the rule *prior tempore potior jure* cannot have effect.

[a] *Quelque favorable que soit le service de l'Etat, je crois* (M. Pothier observes) *que le serviteur qui quitte avant le temps le service de son maître pour s'enrôler volontairement dans les troupes, est tenu des dommages et intérêts de son maître. Il en est autrement du cas où ce serviteur seroit tombé à la milice: c'est en ce cas par une force majeure qu'il n'acheve pas le temps de son service; c'est pourquoi il ne doit point à son maître de dommages et intérêts.* De Droit Civil, &c. t. 2, p. 254.

§ 2. VOLUNTARY —OBLIGATIONS.

A MASTER cannot prevent his servant from being arrested either for debt or on a criminal warrant. In such a case, has the master any claim against the servant for damages? That question, it is believed, remains still undecided. In the case of arrest on a criminal warrant, M. Pothier makes this distinction, that, if judgment go against him, he will be liable; but not if he be acquitted. A man certainly does not voluntarily leave his service, who is dragged to prison, on whatever account; he is not guilty of the offence of leaving his service: yet, in relation to damages merely, the distinction seems just.

INDEED, much deference is due to every thing advanced by that "venerable professor and judge," as he is styled by Sir William Jones, who honours him with this eulogy: "If my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the "public, than barely the introduction of POTHIER to the "acquaintance of my countrymen, I should think that I "had in some measure discharged the debt, which *every "man*, according to Lord COKE, *owes to his profession.*"[a]

—WAGES.

SERVANTS wages are not arrestable, except as to any surplus beyond what is necessary to maintain them in a condition suitable to their service.[b] Like physicians fees, funeral charges, and other privileged debts, the wages (for the current term) of menial servants,[c] and those kept for the pur-

[a] Law of Bailments, 29.

[b] Ersk. b. iii, t. 6, § 7.

[c] In the Dict. v. Privileged Debt, it is said, "servants' fees are so far "privileged, that they may warrantably be paid before confirmation or dissolution of the family to "free the executors; *but not being paid, "they were found no privileged debts.*" Gosford, 24 Nov. 1675. And lord Dirleton, in reporting the same case, says still more generally, "it was "found that a servant for his fees is "not privileged and preferable to "other creditors." Dec. 302. But it is material to observe that, in that case, the servant was claiming a preference, not for the current term's

pose of husbandry, are preferable debts.[a] This preference has not been extended to the wages of mechanical servants, but for arrears, as appears from lord Gosford's report, which is as follows, "alleged that being a *servant for many years* to James Masterton, and to his wife *after his decease;* for which he had obtained decree, that he ought to be preferred to the creditors." (See MS. in the Advocates Library.) He was claiming a preference on his deceased master's effects, for those bygone wages contained in the decree.

§ 2. VOLUNTARY —WAGES.

At any rate, if this distinction ever obtained, it was soon dropt. In the case of Crawford, Nov 25, 1680, reported by lord Stair, servants were found preferable in a competition. Crawford obtained decree against Hutton, as intromitter with the defunct's goods, for payment of the defunct's funeral charges, and servants' fees, and some furnishing, to the defunct. Hutton suspended pleading, that "as *executor creditor*, he was preferable for his own debt to the charger." *Answered*, "That funeral charges and servant's fees are privileged debts, preferable to all other creditors, whether they confirm themselves executors or not. The lords preferred the funeral expences, and a year's fees of the servants, which came current at the defunct's death, and the term not come, unless the suspender instructed, that the servants were only feed for half years, in which case only they preferred the current term; but as to the other furniture, preferred the executor creditor, and found him liable for the surplus, if any were." Lord Stair, quoting this decision, lays down the law generally, "executors may safely pay funeral expences, comprehending medicaments to the defunct, because these have a privilege from the common obligation of humanity to the dead, and, therefore, are preferable to all other debts of the defunct, and so may be paid at any time. Dec. 16, 1674. L. Kelhead. Servants' fees for a year, or term as they are hired, and a term's house mail, or drugs to the defunct on death bed, have the like privilege." B. 3, t. 8, § 72. Lord Bankton say, "that a servant is preferable on the executry for his current wages." (B. 1, t. 2, § 55.) And Lord Kilkennan, v. Privileged debt, observes, "house rent for one year, found to be a privileged debt on the same principle with a servant's fee." In like manner, Mr Erskine, among other privileged debts, mentions, "servants wages either for a full year, or half a year, according to the time for which they were hired." (B. 3, t. 9, § 43.) So that the point may be supposed to be settled on these concurring authorities.

[a] 23d Jan. 1779, Alexander Melville against James Barclay. (N. B. The court ordered the following state of the question betwixt these parties, with their judgment upon it, to be inserted in the books of sederunt.)

In a competition among the arrest-

§ 2. VOLUNTARY —WAGES.

vants;[a] nor of the overseer of a distillery;[b] but the reapers who have been employed on days wages to cut down the corn were found preferable to the other creditors.[c]

SERVANTS wages fall under the triennial prescription.[d] Each term's wages run a separate course. But our short prescriptions, different from the long prescription, as well

ing creditors of a bankrupt tenant upon the price of his effects, which had been sold by authority of the sheriff, a question having occurred, how far the wages due to the farm servants of a bankrupt tenant, for the term current at the bankruptcy, were to be considered as privileged debts, and preferable to arresters? The lords, before answer, ordained an inquiry to be made into the practice of the sheriffs of the different counties of Scotland as to that point. And reports having been accordingly received of said practice from the sheriffs of Edinburgh, East-Lothian, Perth, Ayr, Aberdeen, Lanark, Roxburgh, Renfrew, Dumbarton, Dumfries, Selkirk, Ross, and Kincardine, the lords, yesterday, proceeded to take the same into consideration; and thereafter pronounced an interlocutor, finding, that the wages due to the servants of a bankrupt tenant, that is, to the servants kept for the purposes of the farm, are privileged debts on the price of the bankrupt's effects, and are preferable to arresters.

[a] Dict. vol. ii, Privileged debt.

[b] Jan. 31, 1781, White against Christie.

Christie having been appointed factor on the sequestrated estate of James Small, a bankrupt tenant, but who likewise exercised the trade of a wright, and employed servants in both these capacities, applied to the court, by petition, praying them to authorize a division of the funds among the several creditors; particularly, the landlord, the farm-servants, and the mechanical servants.

The lord ordinary on the bills "found, that, on the proceeds of the "stocking, the landlord was preferable *primo loco*, the labouring servants *secundo loco*, to the extent of "half a year's wages; but that the "servants, the artizans, were only to "be ranked as common creditors."

A petition, reclaiming against this judgment, was refused by the court, without answers.

[c] 3d February 1789, Ridly against Haig's creditors. Fac. Col.

[d] Paterson's petition, Nov. 1804. Observed from the bench.—Shearers cutting down the grain must be paid for their trouble, before the fruits thereof can be divided by the creditors. Their preference arises from the nature of the thing, not from the act of sederunt; and one judge considered them preferable even to the landlord's hypothec.

[e] Ersk. 565, 17.

as from the English statutes of limitation, are founded on the presumption of payment, which, therefore, it is always competent to refer to the debtor's oath, or to disprove by his writ.

A DUTY is payable for each male servant, at a rate which rises in proportion to their number. This tax commenced during the American war. It was afterwards farther modified, and its execution intrusted to the commissioners of excise. On this tax first one additional 10 per cent., and then another additional 10 per cent. was granted. After farther alterations by three subsequent statutes, this tax, together with the whole assessed taxes, presently stands as settled by the general statute, 43 Geo. III, c. 161.[a]

APPRENTICES (excepting poor parish children, or other children by any public charity) can be bound only by written indentures, on stamped paper, containing the true date and premium given by the apprentice for instruction in the art and mystery.[b]

[a] It seems not necessary to enter into any detail of particulars. Revenue acts seldom remain any time without alterations; and an abstract is given in the yearly almanacks. Only in the case of gardeners, it will be observed, that if the person is employed either under a head gardener, or in a garden not requiring the constant labour of one person, the duty is only 5s.; and even this is not exigible from any person employed by the day or week, to work as a day-labourer, at the usual rate of wages for day-labourers in agriculture in any garden belonging "to a dwelling-"house, and exempted as such from "the duties mentioned in the act, (schedule B.) "or in any garden be-"longing to a dwelling-house not "chargeable to the duties mentioned "in the said schedule, such garden "not requiring the constant labour "of one such labourer."

[b] The duties on stamped paper, which were the subject of "numer-"ous, intricate, and complicated, en-"actments," are now contained in "one statute, 44 Geo. III, c. 98, § 8. The stamp duty on the indenture varies (from 14s. to 19 guineas) as the premium is more or less, according to a table to be seen in the yearly almanacks. Besides, for every apprentice, where the premium is above 20l., the master pays 1l. 1s. per annum, under the 43 G. III, 161.; and for two or more, 2l. 2s. each.

§ 2. VOLUNTARY —APPRENTICES.

Printed indentures.

INDENTURES ought to be regularly executed; that is, before witnesses, whose designations, and that of the writer, ought to be inserted in the testing clause. In the case of printed indentures, the person who fills up the blanks must be mentioned.[a]

INDENTURES being generally entered into by persons under age, are therefore subscribed by the father, or guardian likewise, who "takes burden" for the apprentice duly performing the service stipulated. But the apprentice himself may be compelled by imprisonment to serve out his time.[b]

§ 3, 42 Geo. III, c. 73.

III. IN order to secure the health, education and morals, of children employed in large manufactories, a special statute has been framed; and its execution is intrusted to justices of the peace. This valuable enactment is appointed to be hung up in every manufactory, that it may be generally known. Here, therefore, it is only necessary to give a summary of its most important regulations.

[a] 8th December 1804, Buchanan, Hopkirk, and Company, against William Guthrie and serjeant Love.

Guthrie, with his uncle as his cautioner, in October 1802, became bound for seven years as apprentice to Buchanan, Hopkirk, and Company. In September 1804 he enlisted. His masters reclaiming him, he pleaded the nullity of the printed indenture, which did not mention the name of the person who had filled up the blanks. Answered—That the plea was barred by homologation. Here the serjeant, with whom he had enlisted, replied, that he, as a third party, could not be affected by such homologation. The sheriff "found the indenture defective in "the solemnities required by law, "and that the master had no right "to claim Guthrie as an apprentice." A bill of advocation of this judgment was passed. Some of the court expessed doubts how far homologation, while the boy was under age, could take place.

[b] In England, it is held that infants cannot be bound by their indentures beyond the age of twenty-one years. "Every indenture of an infant is "void at his election; and, in such "cases, the master must trust to the "covenant of those who engage for "the infant." Lord Kenyon, C. J. 5 term, rep. 715.

[c] 42 Geo. III, c. 73.

THE act includes all mills and factories where three apprentices or twenty persons are employed.[a] In order to prevent injury to the health, it lays down regulations for insuring a supply of fresh air; for keeping the apartments clean;[b] for the proper clothing of the children;[c] for preventing their being over-wrought, or at unseasonable hours;[d] for medical attendance;[e] for instructing them in reading, writing, and accounts;[f] for instructing them in the principles of the Christian religion, and making them attend divine service on the Sunday.[g] § 3. 42 Geo. III, c. 73. —APPRENTICES. Health. Education.

JUSTICES of the peace are directed, at their midsummer meeting, yearly, to appoint two inspectors of the mills and factories, within their respective districts, to report their state to the quarter-sessions.[h] The mills and factories must be entered with the clerk of the peace. Justices of peace appoint inspectors.

THESE regulations are enforced by penalties, viz. any sum not exceeding £50 sterling, nor under £5, for obstructing the visitors or inspectors;[i] and for masters offending against this act, any sum from £5 to 10s; which penalties go, one half to the informer, and the other to the minister and elders, for behoof of the poor of the parish.[k] But the action prescribes in one month.[l] Penalties.

AN extraordinary jurisdiction is vested in any two justices of peace, for the recovery of these penalties. The mode of proof is either the confession of the parties, or oath of one credible witness.[m] The decree is enforced by distress and sale, or, (if distress cannot be found) by imprisonment in the common gaol or house of correction, for any time not exceeding two months.[n] Two justices. One witness, or confession.

[a] § 1. [b] § 2. [c] § 3. [d] § 4 and 5. [e] § 10. [f] § 6. [g] § 8. [h] § 9. [i] § 13 [k] Ib. [l] Ib. [m] § 13. [n] Ib. The warrant of distress shall not be issued

§ 4. 42 Geo. III, c. 73. —WAGES.

IV. WE had formerly occasion to mention the jurisdiction which Scottish justices of peace have always been in the practice of exercising with respect to the fixing "the "wages of labourers, workmen, and servants,[a] the prices "for all handicrafts," [b] and the wages of craftsmen or artisans, within borough.[c]

Statutory jurisdiction therein.

THIS very delicate jurisdiction they have hitherto exercised with much discretion. Questions between the master and their journeymen, touching the rate of wages, have frequently been remitted by the Supreme Court to the justices of the peace, as having better access to take the necessary information in the first place;[d] and, in such questions, they have been resorted to in the first instance, and have made such allowance as the expence of living and other circumstances of the case rendered necessary. If either party be dissatisfied with the judgment of the justices, the question then comes, properly prepared, before the supreme tribunal.

Menial servants,

THE statutes for the regulation of wages, do not extend to menial servants; "it being impossible for any magistrate "to be a judge of the employment of menial servants, or, "of course, to assess their wages."[e] A menial servant, therefore, on the one hand, may exact, and the master, on the other, may offer, what wages he pleases. In like manner, the former may stipulate to give the master no obedience except in his particular department; and the latter may insist on his being generally subject to his command.

combining,

YET, were a number of menial servants, on the one hand,

issued until six days after conviction. The decree cannot be removed into any court by advocation. But it may by suspension or reduction.

[a] Vol. i, p. 104; and App. I, p. 1.

[b] App. I, ib.

[c] Vol. i, p. 106.

[d] Case of the printers, 1804, Nov.

[e] Blackstone, b. i, c. 14, 92.

or of masters, on the other, to combine, such combination, whether on the part of the servants or of the masters, would be punishable at common law. § 4. 42 Geo. III, c. 73. —WAGES.

THE most common combination is that of journeymen to obtain an advance of wages. By the common law, any one workman may refuse to work till he be paid the price he pleases to fix upon his own labour: But if two or more enter into an agreement of this kind, the common law will punish such associations, as being injurious to the interests of the public.[a] for advance of wages.

DR. SMITH remarks, that we hear much of the combination of journeymen, but little of that of the masters.[b] Common law, however, reprobates and punishes combinations in the one description of persons as well as in the other.

SUCH combinations, as an offence against the common law, are triable by the sessions, who may inflict the punishment of fine and imprisonment. If a severer punishment be deemed necessary, the aggravated case may be tried before the judge ordinary, who employs a jury, or before the court of justiciary. Combinations punishable at common law. By what courts triable.

V. IN England, combinations among workmen having become frequent and alarming, a general enactment respecting combinations was thought necessary, in aid both of previous statutes, which respected only particular classes of workmen, and of the common law. The first attempt of this kind was by the 39 Geo. III, c. 81, which was soon after supplanted § 5. 39 & 40 Geo. III, c. 106. —COMBINATION.

[a] Just as by the civil law those were punishable—"*qui illicitis habitis conventionibus conjuravere ut* ne "quis, quod alteri commissum sit, "opus impleat, aut injunctam alteri "solicitudinem alter intercipiat; *or*, "ut *species* diversorum *corporum negotiationis* non minoris quam inter se "statuerunt venundentur." (Cod. de Monop. et conventu illicito, &c.)

[b] Wealth of Nations, B. 1. c. 8.

§ 5. 39 & 40 Geo. III, c. 106. —COMBINATION.

by the 39 and 40 Geo. III, c. 106, which, however, does not repeal or abridge the powers which justices had previously, touching combinations;[a] but, in addition thereto, creates an extraordinary jurisdiction in any two justices, not being masters in the trade in which the offence is said to have been committed.[b] It is optional, therefore, either to take the benefit of this statute, or to bring the prosecution upon some previous act, which may relate to the particular case, or before the justices or judge ordinary, upon what may be termed the common law jurisdiction.

Offences.

THE offences punishable by this statute are, all combinations touching the rate of wages, and the quantity of work or power of working.[c]

Punishment.

The punishment varies with the degree of criminality. For combining to lower the wages, or alter the hours of working, the penalty is £20, or confinement in the common gaol or correction house within the jurisdiction of the justices, for any time not exceeding three, nor less than two, calendar months; for contributing for any expences incurred in acting contrary to this act, £10; for collecting or receiving such money, £5, or confinement in the common gaol for three calendar months, or in the correction house, at hard labour, for two;[d] for combining to raise the wages,[e] or endeavouring to prevent any unhired person from hiring himself with any manufacturer,[f] or to persuade him to leave his work,[g] for any purpose contrary to the provisions of this act, or the attending, or making any person attend, any meeting held for such illegal purpose,[h] the punishment is confinement in the common gaol for three, or in the correction house, to hard labour, for two, calendar months.

Recovery of penalties.

The pecuniary penalties are recoverable by distress and

[a] § 14. [b] § 16. [c] § 3, 4, 5, 17. [d] Ib. [e] § 2. [f] § 3. [g] § 3. [h] § 4.

sale; and where no distress can be found, the confinement takes place as respectively above mentioned.[a] § 5. 39 & 40 Geo. III, c. 106. —COMBINATION.

THE proof is by confession of party, or oath of one credible witness.[b] Offenders are indemnified on giving evidence against others.[c] This proof and conviction may take place in the offender's absence, if he cannot be apprehended.[d] On complaint or oath, any one justice may grant warrant for citing him at a certain day and place, before any two justices. In case of his not then appearing, and of oath being made to the service of the summons, at least twenty hours before the diet of appearance, personally, or at his usual place of abode, these justices shall issue their [e] warrant for apprehending him; or, without issuing any previous summons, they may at once grant warrant for apprehending him; and, if the offender appear, or if oath be made of his absconding, they may proceed in the cause. They may commit witnesses for refusing to appear, or give evidence. Convictions and commitments are drawn up in the form of a shedule;[f] they must be transmitted to the next quarter session to be filed. Proof. Oath of party. One witness.

APPEAL is competent to the next quarter session, on finding security, the offender in £10 and two sureties in £5 each, that he shall be forthcoming to abide judgment. The judgment of the quarter sessions is final. Appeal. Quarter sessions final.

[a] In Scotland, confinement in the correction house supposes hard labour. This does not appear to be the understanding of some British acts, which do not require the imprisonment in the gaol to be double the duration of that in the correction house, unless where the words "to "hard labour" are expressly added.

[b] § 2, 3, 4, 17.

[c] § 9.

[d] § 10.

[e] In the act, it is *their* or *his*: This seems an inaccuracy. The only antecedent is the *two justices*; and the meaning of the statute seems to be, that the warrant for summary apprehension should be granted by two.

10.

[f] App. 11.

§ 5. 39 & 40 Geo. III, c. 106. —COMBINATION.

IF the conviction be affirmed, the appellant, if he does not pay the forfeiture or penalty, and costs, or, if the judgment contained a warrant of imprisonment, shall be immediately committed to gaol, or house of correction, agreeably to the judgment, without bail, and also till payment of the costs.

Immediate commitment when?

CLAUSES 18—22, inclusive,[b] are expressly limited to England. The other enactments, being worded generally, must extend over all the island. Yet the phraseology is entirely English. Neither the word Scotland, nor any technical term of our law, occurs from beginning to end of the statute. Some of its regulations, therefore,[c] cannot be carried into effect in this country.[d] Prosecutions must be brought within three calendar months after the offence has been committed.

§ 6. 43 Geo. III, c. 151. —COTTON WEAVERS.

VI. As already observed, that part of the 39 and 40 Geo. III, c. 106, which regarded the settlement of disputes between masters and servants by arbitration, was confined to England. The statute, therefore, 43 Geo. III, c. 151, was

b Touching the settling of disputes between masters and workmen by arbitration.

c Clauses 6 and 7.

d For example, money subscribed for purposes prohibited by the statute is made recoverable by actions before the courts at Westminster; to which, however, persons resident in Scotland are not amenable. In Scotland, therefore, such sums cannot be recovered under the statute at all.

The little attention to the peculiarities of our law, that appears in the phraseology of this, and indeed most of the other British enactments, touching disputes between masters and workmen, is not perhaps very much to be regretted. In England, those statutes certainly may be expedient and necessary; but Scottish magistrates have jurisdiction to restrain the same offences, at common law. Complaints, therefore, in such cases, are generally laid on the common law as well as on the statutes; and are followed out in virtue of the former, as their English phraseology seldom makes it possible to execute the latter. The oath of one witness, and the party's confession, are indeed new means of proof. But whether we derive any benefit from such innovations, opposite to the principles of our common law, has been doubted.

framed for the purpose of settling, with us, in the same expeditious manner, disputes between masters and weavers in the cotton manufacture, and persons engaged in ornamenting cotton goods by the needle. As this statute is framed for this country alone, it is inserted in the Appendix 1. Here, therefore, a very general analysis will suffice. § 6. 43 GEO. III, — COTTON WEAVERS.

IN case of any application to any one justice, touching any dispute between a master and those employed by him in the cotton manufacture, he is directed to summon the defender on a certain day, not exceeding two days, exclusive of Sunday; and, in case of his not appearing, or not settling the dispute, the justice is then to nominate referees, one a master or foreman, the other a workman. Both parties have two peremptory challenges.[a] The form of the nomination is contained in section first. The periods within which the complaint must be made,[b] places of meeting,[c] penalty on persons not attending,[d] the term within which the referees (or if they fail to do so, the justices[e]) must settle the dispute, are all stated very distinctly in the act. The determination of the justice is not reviewable.[f] The justice may decide the dispute on the representation of one referee;[g] and, if the persons named by him do not choose to act, he may appoint other referees.[h] In every case of a second nomination, the referees must meet within twenty-four hours; and the expence of the application must be borne by the party, the default of whose referee made it necessary.[i] If such second referee does not attend, the other may give an award, which shall be final.[k] In like manner, the referees may proceed, notwithstanding the absence of one or both of the parties.[l] The penalty of witnesses not attending;[m] the power of the parties to extend

One referee.

If those named will not act.

Second nomination.

Absence of a referee.

Witnesses.

[a] § 1. [b] § 2. [c] § 3. [d] § 4. [e] § 5. [f] § 5. [g] § 1. [h] § 7. [i] § 7. [k] § 8. [l] § 10. [m] § 9.

§ 6. 43 Geo III, c. 56. —COTTON WEAVERS.

the period of the award;[a] the mode of writing the award,[b] and the acknowledgment of the fulfilment of it,[c] and the penalty for not fulfilling it;[d] the mode of proceeding in cases of bankruptcy;[e] and in the case of complaints by married women or infants,[f] how costs shall be ascertained;[g] the fees or expence of the procedure;[h] what measure shall be the rule,[i] are all specified in the respective clauses.

Award.

Bankruptcy, children, &c.

Ticket.

IT is farther ordered, that, with every warp given out by a manufacturer to a workman to be wove, there shall be delivered a ticket, denoting the work to be done, adapted to each branch of the manufacture, stating the quantity and fineness of the warp, in plain warps, whether white or coloured; and, in all cases, the quantity and denomination of the work to be performed, and the rate and price to be performed for the same;[k] and in the case of new patterns, specifying the manner the workman is to be paid for mounting.[l] This ticket is evidence of all matters which it mentions.[m] The penalty for refusing to give it is not to be under 5s nor more than 10s;[n] against which there is no appeal.

—ORNAMENTING WITH THE NEEDLE.

THE second part of the statute relates to disputes between weavers and persons employed by them in the ornamenting of cotton goods with the needle. The only difference is, that in this case, there is not, as in the former case, a nomination of a referee for each, viz. one a master, and the other a journeyman. The justice appoints two referees, both of them manufacturers, foremen, or other persons, as he pleases.[o] In other matters, the procedure is precisely the same as above. Either party may appeal to the quarter sessions, on giving immediate notice of such appeal, and finding security, himself in £10, and two sureties in £5 each, to prosecute said appeal.[p] The judgment of the sessions is final

Referees.

Appeal.

Review.

[a] § 11. [b] § 12. [c] § 13. [d] § 14. [e] § 15. [f] § 16. [g] § 17. [h] § 18. [i] § 19. [k] § 20. [l] § 22. [m] § 20. [n] § 21. [o] § 23. [p] § 25.

and conclusive. No bill of advocation or suspension shall be competent. The statute does not say that a reduction is not competent. No master cotton weaver shall act as a justice.[g] Proceedings are not to be quashed for want of form. § 6. 43 Geo. III, c. 56. —COTTON WEAVERS. Master cannot judge.

THIS statute concludes with a reservation in favour of all former statutes, relative to the power of justices of peace, and particularly 1 Anne, ff. 2, c. 18;[h] 13 Geo. II, c. 8; 22 Geo. II, c. 27; and 23 Geo. II, c. 13, § 9; and 17 Geo. III, c. 56; which we will have occasion to notice in the next section. Reservation in favour of former statutes.

VII. THE British statute-book contains a multiplicity of enactments touching all the different classes of manufacturers and workmen. Statutes in these cases have not been framed for Scotland in particular: yet those other statutes, for the reason above mentioned, are often not intelligible in this country. Therefore they are seldom resorted to; complaints being generally laid on the common law also; in virtue of which, our magistrates find themselves, in most cases, competent to attain the object of those enactments without their aid. However, being most of them expressed generally, they are of course obligatory here also; so far, at least, as their exclusive adaptation to the peculiarities of a foreign law, happens not to make it impossible to execute them. On this account, and as their execution is intrusted principally to justices of the peace, they cannot be omitted in a treatise on the jurisdiction of that magistracy. § 7. BRITISH STATUTES.

BESIDES their foreign phraseology, another circumstance, which discourages our magistrates from intermeddling with them, is their immense number, and their multiplied differences in minute particulars, which do not appear to be go-

[g] 28.

[h] This is an English statute, but expressly extended to Scotland by 13 Geo. II, c. 8.

§ 7. BRITISH STATUTES.

verned by any general rules. This obscures and perplexes a branch of law, which, to be useful, ought to be familiar to all; to masters, and servants, and magistrates to apply on the spur of the moment. But the legislature has not thought fit, by one or two general statutes, to lay down rules for all the variety of manufacturers. On the contrary, this part of the statute-book wears such an aspect, as if each particular enactment, like a private act, had been passed *periculo petentis*. without any sufficient examination either of general principles or former enactments. Hence, where the offence is the same, sometimes one justice, sometimes two justices, have jurisdiction; sometimes the punishment is one thing, sometimes another, while it is not easy to say why it was not *mutatis mutandis;* or rather, why the statutes were not, in such particulars, one and the same. And, as those enactments have been repeatedly explained, altered, amended, there is scarcely any one trade or manufacture that is not the subject of as many statutes as would form a bulky code for the whole. Thus, various enactments have been passed touching silk masters and workmen;[a] clothiers and their workmen;[b] masters and servants in the woollen, linen, fustian, cotton, and iron manufactures;[c] in the leather manufactures;[d] persons employed in the making of hats, fur, hemp, flax, and mohair manufactures;[e] in the bone and thread lace manufactory;[f] the clock and watch makers;[g] paper makers;[h] persons employed

[a] 13 and 14 Car. II, c. 15, § 6; 20 Car. II, c. 6; 8 and 9 Will. c. 36. These, being English acts, cannot have any force in this country, unless specially extended, which has sometimes been done:—22 Geo. II, c. 27; 32 Geo. III, c. 44.

[b] 4 Edw. IV, c. 1, 7; J. 7; 13 Geo. ff. 2, 6, 15; 13 G. II, c. 23, 30; 29 Geo. II, c. 33; 30 Geo. II, c. 12; 14 Geo. III, c. 25.

[c] 1 Anne, 1, 2, c. 18; and 13 Geo. II, c. 8; 22 Geo. II, c. 27.

[d] 13 Geo. II, c. 8.

[e] 22 Geo. II, c. 27; 14 Geo. III, c. 44; 15 Geo. III, c. 14; 17 Geo. III, c. 56; 22 Geo. III, c. 40.

[f] 19 Geo. III, c. 49.

[g] 27 Geo. II, c. 7.

[h] 36 Geo. III.

in husbandry, artificers, handicrafts, miners, colliers, pitmen, glassmen, potters, and other labourers.[i] § 7. BRITISH STATUTES.

THE punishment chiefly employed by these statutes is fine and imprisonment; which, in point of *quantum* and duration, are as various as the enactments themselves. Where the case requires it, imprisonment is sometimes aggravated by hard labour in the correction house; sometimes the fine goes to the king, sometimes to the poor; sometimes it is divided (and sometimes in one proportion, and sometimes another) with the informer. And where no fine, properly so called, is inflicted, the justices are authorized to award a sum in name of damages, and sometimes double, and sometimes triple the real damages, by way of forfeiture; and payment is enforced by imprisonment. PUNISHMENTS. Fine and imprisonment. Damages.

WHIPPING is another punishment appointed by those statutes to be summarily inflicted on offenders; sometimes, too, by one justice; on the oath, and sometimes (in the case of quakers) on the solemn affirmation, of a single witness. This has been regretted and disapproved of by judge Blackstone, and other writers, as equally inexpedient and unconstitutional. And, in the present reign, the inclination seems fortunately to be to dispense with this base and infamous punishment, and rather increase the severity of imprisonment; sometimes by solitary confinement, sometimes by hard labour. For which salutary purpose, later statutes have been enacted, so far altering earlier ones. Some of these later statutes still permit corporal chastisement; but they make this important improvement, that it is not to be inflicted as a matter of course, but at the discretion of the magistrate; who will weigh well all the circumstances before he inflicts a punishment, of which, it has been often remarked, Whipping.

i 20 Geo. II, c. 19; 31 Geo. II, c. 11; and 6 Geo. III, c. 25.

§ 7. BRITISH STATUTES —PUNISHMENTS.

that those, whom it does not already find, it renders, hardened and incorrigible.

DEATH.

THOSE statutes farther punish some offences capitally; as the breaking, by night or by day, into any house or shop, to cut or destroy any woollen goods, or tools,[a] or any silk,[b] or linen or cotton manufacture, or tools.[c]

Transportation.

TRANSPORTATION, the next punishment in severity, is appointed in the case of any person assaulting any master wool-comber, master weaver, or other person concerned in the wool manufactory;[d] which provision is extended to journeymen dyers, hot-pressers, and all other persons employed in the woollen manufactory; and also to journeymen, servants, workmen, and labourers, in the making of felts or hats, and in the manufacture of silks, mohair, fur, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another;[e] or for any person sending any letter or message to any master wool-comber, or

[a] 22 Geo. III, c. 40, § 1.

[b] § 2.

[c] § 3.

In all these clauses of this statute the expression is, shall be "felony without benefit of clergy." This is neither common English language nor the technical language of the Scottish law. As an antiquary or scholar, a Scottish judge may understand its meaning. But, sitting on a Scottish bench, he is not entitled to understand it. Having no legal meaning in our law, it cannot be applied. The presumption is, that had the legislature intended to inflict a capital punishment in this country, they would not have spoken a language which we do not understand; and, by the explanation of the phrase, the moral sense of the people would not be much ameliorated. This presumption is increased by the example of other statutes, which, in the case of Scotland, use the expression, "shall be "punished with death." The preservation of our municipal law, at the union, would not have been of any significancy, had it been understood that we were to learn the technical phraseology of the English law. It would have been experiencing the inconveniences of both systems without the advantages of either.

[d] 12 Geo. I, c. 34, § 6.

[e] 22 Geo. II, c. 27, § 12.

other person employed in any of the above trades, or pulling down or destroying any of their out-houses, trees, or maiming their cattle, for not complying with any demands of their workmen.[a] § BRITISH STATUTES—PUNISHMENTS.

THE form and manner of exercising this jurisdiction are equally various. Sometimes one justice, sometimes two, are empowered to act. Sometimes their award is final; sometimes it is reviewable in one way, and sometimes in another.[b] —PROCEDURE.

THE chief offence is unlawful combinations. But the general statute, 39 and 40 Geo. III, c. 106, though it does not repeal, yet seems very much to supersede the numerous enactments respecting combinations in the different trades: as, for example, 2 and 3 Edw. VI, c. 15; 12 Geo. I, c. 34, touching wool-combers:---22 Geo. II, c. 27; 17 Geo. III, c. 55; and 36 Geo. III, c. 111; touching paper makers. —OFFENCES. Combination.

EMBEZZLEMENT and other frauds, are the subject of various enactments applicable to the different trades, as in the case of the silk-workers[c] or clothiers;[d] of the woollen, linen, Embezzlement, fraud, &c.

[a] 22 Geo. II, c. 27, § 12.

The person lawfully convicted thereof upon an indictment, to be found within twelve months; after any such offence, shall be adjudged guilty of felony, and shall be transported for seven years to some one of his majesty's colonies.

[b] In 17th Geo. III, c. 56, the following clause occurs: "that no order "touching the matter contained in "this act, nor any proceedings to "be had touching the conviction of "any offender against the said act of "the 22 of Geo. II, or this act, or "shall be quashed for want of form, "be removable by *certiorari* into his "majesty's court of king's bench."

It is clear, that whatever may be supposed from analogy to be the intention of the legislature, this clause cannot exclude the ordinary review of the court of session.

[c] By the 13 and 14 Car. II, c. 15, every silk winder and doubler, who shall unjustly, or deceitfully and falsely, purloin, embezzle, pawn, sell, or detain, any part of silk delivered to them to wind or double, in every such case, as well the winder or journeyman so offending, as the buyer and receiver thereof, being lawfully convicted, by confession, oroath of one witness, before one justice (or

§ 7. BRITISH STATUTES —OFFENCES.

mayor), shall render to the party grieved such satisfaction for his damage and loss and charges, as the justice shall order. § 6.

But no more damages shall be given, than the party grieved shall prove he is damnified, and hath expended; and if the party shall not be able, or do not make recompence in 14 days after conviction, he shall for the first offence be apprehended and whipped, or set in the stocks, where the offence was committed or in some market town near, in the said county; and for the second offence, to incur the like, or such further punishment, by whipping or being put in the stocks, as such justice shall think convenient. § 7.

And by the 20 Car. II, c. 6, if any silk winder or doubler shall be found faulty, in unjustly, deceitfully, or falsely, purloining, embezzling, pawning, selling, or detaining, any silk committed to his trust; any justice, or mayor, shall immediately on conviction by confession, or oath of one witness, commit him to prison or to the house of correction, till satisfaction be given to the party wronged, or punishment inflicted as by the 13 and 14 Car. II, is appointed.

And by the 8 and 9 Will. c. 36, every person that shall embezzle, pawn, sell, or detain, any silk delivered to him to be wrought, or after it is wrought up, and also the receiver and buyer thereof, or such as take the same to pawn, shall be subject to all the penalties of the 13 and 14 Car. II, c. 15, and the 20 Car. II, c. 6.

And by 32 Geo. III, c. 44, if any person shall buy, receive, accept, or take, by way of gift, pawn, pledge, sale, or exchange, or in any other manner whatsoever, from any person employed to work up the silk manufacture, or silk mixed with other materials, any silk, whether the same be or be not first wrought up, and whether the same be or be not mixed with other materials, knowing such person to be so employed as aforesaid, and not having first obtained the consent of the person so employing him, or whether any silk shall have been purloined or embezzled by any person, shall buy, receive, accept or take from any person, any such silk, whether wrought or unwrought, mixed or unmixed, knowing the same to have been purloined or embezzled, the person so buying, receiving, accepting, or taking, any such silk, may be proceeded against as directed by 22 Geo. II, c. 27, and 17 Geo. III, c. 56 or may be prosecuted for a misdemeanour, and punished by fine, imprisonment, or whipping, as the sessions, (who are impowered to try such offenders), or other court, when tried, may think fit, although no proof upon such trial be given to whom such silk doth belong. § 4.

And if any person shall sell, pawn, pledge, exchange, or otherwise unlawfully dispose of any silk, wrought or unwrought, mixed or unmixed, knowing the same to have been so purloined or embezzled; he shall be liable to the same punishment as persons convicted of receiving purloined or embezzled silk would be liable to by virtue of this act. § 5.

And by the 22 Geo. III, c. 40, if any person shall, by day or night, break into any house or shop, with

intent to cut or destroy any velvet, wrought silk, or silk mixed with any other materials or other silk manufacture, in the loom, or any warp or shute, tools, tackle, or utensils; or wilfully and maliciously cut, break, or destroy the same, he shall be guilty of felony without benefit of clergy. § 2.

d By the 14 Geo. III, c. 25, if any picker, scribbler, spinner, or weaver, or other person employed in the manufacturing of woollen cloth, or in preparing materials for that purpose, shall not return all working tools or implements wherewith he shall be intrusted, and all wool, yarn, chain, woof, or abb, delivered out to be wrought, or shall not give a satisfactory account of the same to his employer; or shall fraudulently steam, damp, or water the wool or yarn delivered to him to be wrought (thereby to increase the weight); or shall take off, cut, or pick out the list, sorrel, or other mark of any piece of cloth; he shall, on conviction before one justice where the offender shall reside, by confession or oath of one witness, be committed to the house of correction for one calendar month. § 1.

And if any such offender shall abscond, or cannot be found; or shall sell or otherwise dispose of any of the said tools, implements, or materials; or if any person shall fraudulently buy or receive any of the same; or if any person shall be charged on suspicion with having embezzled and kept back, by means of fraudulently damping, steaming, or watering the wool and yarn delivered out to him, or with having sold, bought, or otherwise received the same,—and oath shall be made thereof before one justice where the offence was committed; such justice shall issue his warrant to the constable, to enter into and search in the day time the dwelling house of such person, and also such other house or place, of which the clothier or his servant shall make oath that he hath just cause to suspect (it appearing to the said justice to be reasonable suspicion) that the said tools or materials, or some part thereof, may be secreted: and if, upon search, any of the said working tools, wool, yarn, chain, woof, or abb, or any cloth, with the list, sorrel, or other mark taken off, cut, or picked out, shall be found; the constable shall seize the same, and apprehend the person in whose custody they shall be found, and bring him before the same or some other justice; and unless he can give a good account how he came by the same, to the satisfaction of such justice, he shall be thereof convicted, and suffer the like punishment as for not returning the tools or materials as aforesaid. And all such tools and materials so seized and not accounted for, shall, upon such conviction, be delivered over to the churchwardens or overseers of the poor of the parish where the same were seized, to be by them sold for the use of the poor of the said parish. § 2.

Provided, that if the person accused shall request of the justice to appoint a reasonable time to produce the person of whom he bought or received the same, or any witness to prove the sale or delivery thereof, the said justice shall appoint such time as aforesaid, and shall issue a summons to the constable where such person or wit-

§ 7. BRITISH STATUES—OFFENCES.

ness shall reside, requiring them to appear at such time and place as the justice shall appoint, in order to be examined on oath of the several matters aforesaid; but such person, at the time of making the said request, shall enter into recognizance for his appearance at the time so to be set; or for want of such recognizance, he shall be committed until the said time. § 3.

And upon information on oath made to any justice, that there is just cause to suspect, that any ends of yarn, wefts, thrums, short yarn, or other refuse of cloth, drugget, or of other woollen goods, or of goods mixed with wool (flocks and pinions only excepted) have been collected and received, and are lodged or concealed in any dwelling-house, warehouse, out-house, yard, or other place, such justice shall by his warrant cause every such place to be searched in the day time; and if any of the said goods or materials (flocks and pinions only excepted) above the quantity of three pounds shall be found therein, he shall cause the person in whose house or other place the same shall be found, to be brought before him or some other justice: And on proof made upon oath before such justice, that such goods or materials were found in the house or other place of such person so brought before him; the said person, not exculpating himself to the satisfaction of such justice, shall suffer the like punishment as for not returning the tools or materials as aforesaid. § 4.

And the conviction shall be in the manner and form following:

Be it remembered, that on the day of in the year of our Lord A. B. *is convicted before me one of his majesty's justices of the peace in and for the of of having* [here specify the offence, and the time and place when and where the same was committed.] *Given under my hand and seal the day and year first above mentioned.*

And the justice shall cause the same to be written on parchment, and filed at the next sessions. § 8, 9.

And the justice, at the time of the conviction, shall make known to the party convicted, that he hath a right to appeal to the next sessions. And if such person intends to appeal, he shall, at the time of the conviction, give notice thereof in writing to the justice, and at the same time enter into recognizance with sureties, conditioned to try the appeal, and to abide the judgment of, and pay such costs as shall be awarded by the justices at such sessions. And the justices there, upon proof of such notice and recognizance, shall hear and determine the matter, and may award costs to either party. § 7.

But if, upon information on oath before a justice, it shall appear to him that the person informed against hath been already convicted of any offence against this act; such justice shall not proceed to convict him, but shall commit him to the house of correction till the next sessions, or until he shall have entered into recognizance with sufficient sureties to appear at such sessions, and abide the order of the justices there; and the justice shall also bind over the informer to prosecute at such sessions. And if the person informed against shall be found

fustian, cotton, and iron manufactures;[c] leathern manufac- § 7. BRITISH STATUTES —OFFENCES.

guilty at the said sessions, the justices there shall commit him to the house of correction for any time not exceeding three calendar months. But if it appear to the said justices, that such person hath been already convicted at some sessions of any offence against this act; then they shall, upon conviction, commit him to the house of correction for any time not exceeding six calendar months, and also order him to be once publicly whipped at such time and place as they shall appoint. § 5, 6.

Provided always, that no person shall be proceeded against upon this act, unless information upon oath be made before a justice, within three calendar months after the offence committed. § 10.

Finally, no proceedings on this act shall be quashed for want of form, or removed by *certiorari*, or other writ. Id.

[c] By the 1 Anne, st. 2, c. 18, if any person employed in the woollen, linen, fustian, cotton, or iron manufactures, shall embezzle or purloin any wefts, thrumbs, or ends of yarn, or any other materials of wool, hemp, flax, cotton, or iron, or shall reel short or false yarn, and shall be convicted by oath of one witness, or confession, before one justice, he shall forfeit double the value of the damages: And if he shall neglect or refuse to pay the same, the justice shall commit him to the house of correction until satisfaction shall be made: And if it shall appear to the justice, that he is not able to make satisfaction, he shall be there publicly whipped and kept to hard labour not exceeding 14 days. § 1.

And by the 13 Geo. II, c. 8, if any person employed in the working up of any woollen, linen, fustian, cotton, or iron manufactures, shall purloin, embezzle, secrete, sell, pawn, exchange, or otherwise illegally dispose of any of the materials, whether the same or any part thereof be or be not first wrought up, or shall reel short, or false yarn, and shall be convicted thereof, as by the 1 Anne, st. 2, c. 18, he shall forfeit double value of the damages, together with such costs as the justice shall judge reasonable; and if not paid immediately, the said justice shall cause him to be committed to the house of correction, to be whipped and kept to hard labour, not exceeding 14 days; and for a second or other subsequent offence, for such embezzling or purloining, he shall forfeit four times the value of the damages, together with such costs as the justice shall judge reasonable; and if not paid immediately, then such or any other justice shall cause him to be committed to the house of correction, to be kept to hard labour for any time not exceeding three months, nor less than one month, and also during the time of such commitment shall cause him to be publicly whipped in the market town where he shall be committed, at the market place or cross, once or oftner, as to such justice shall seem reasonable. § 1,

And the receivers of the same shall be subject to the like penalties. § 2.

And the forfeitures by both these acts

§ 7. BRITISH STATUTES. —OFFENCES.

tures;[f] of persons engaged in the making of hats, or in the woollen, linen, fustian, cotton, iron, leather, furr, hemp, flax, mohair or silk manufactures;[g] of workmen in the manufacture of clocks and watches.[h]

acts shall be half to the party injured and half to the poor; with the like liberty of appealing on this act, as on the 1 Anne, Id. § 3.

[f] If any person employed in cutting, paring, washing, dressing, sewing, making up or otherwise manufacturing of gloves, breeches, leather skins, boots, shoes, slippers, wares, or other goods or materials to be made use of in any the said employments, or in any branch or particular thereof, shall fraudulently purloin, embezzle, secrete, sell, pawn, or exchange all or any part of the gloves, breeches, leather, skins, parings, or shreds of gloves, or leather, boots, shoes, slippers, or other the said wares, either before or after they shall be made into wares, and be thereof convicted by the oath of the master or owner, or other credible witness, or confession, before the justice where the offence shall be committed or the offender shall reside; such justice may award him to make satisfaction to the party injured, not exceeding double the value of the goods so purloined or disposed of, half to the party grieved, and half to the poor, together with full charges attending the conviction: to be levied by distress and sale; and if he shall not have goods sufficient, and shall not pay immediately, such justice shall commit him to the house of correction or other public prison, to be kept to hard labour for fourteen days, and whipped in such manner as the justice shall direct; and for a second, or other subsequent offence, he shall forfeit four times the value of the damages, together with such costs as the justice shall judge reasonable; and if not paid immediately, to be committed to the house of correction or other public prison, to be there kept to hard labour not exceeding three months, nor less than one month, and also during such commitment to be publicly whipped in the market town where he shall be committed, at the market place or cross, once or oftner, as to such justice shall seem reasonable. § 4. 13 Geo. II. c. 8.

And every person who shall knowingly or willingly receive any the said goods or materials, either from the person offending, or from any other person (except the owner) or offer so to do, he shall, on like conviction, make such recompence in two days, or else be subject to such distress, and for want of sufficient distress be liable to the like punishment, as the person so purloining or otherwise disposing thereof as above; and so in like manner for the second and every subsequent offence. § 5.

[g] If any person hired or employed to make any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, furr, hemp, flax, mohair, or silk manufactures, or any manufactures made up of wool, furr, hemp, flax, cotton, mohair, or silk, or of any the said materials mixed one with another, shall purloin, embezzle, or otherwise unlawfully dispose of any of the materials with which

which he shall be intrusted, whether the same be or be not first wrought up, and be convicted thereof by the oath of the owner, or other credible witness, or confession, before two justices, he shall for the first offence be committed to the house of correction or other public prison, there to be kept to hard labour, for not less than fourteen days, nor more than three months; and for a second or any other subsequent offence, not less than three months, nor more than six months; and the justices may likewise, for the first or any subsequent offence, order the offender to be once publicly whipped, if such additional punishment shall by them be deemed proper. 22 Geo. II, c. 27, § 1. 17 Geo. III, c. 56, § 1, 2.

Any if any person shall be convicted as aforesaid, of buying, receiving, or taking, by way of gift, pledge, sale, or exchange, or in any other manner, from any person whom he knows to be employed to make or prepare any the said manufactures, any thrums, or ends of yarn, or any other materials of wool, furr, hemp, flax, cotton, iron, or any leather, mohair, or silk, whether the same be or be not first wrought up, the consent of the employer not being first had; or of buying or receiving in any manner whatsoever, from any other person, any of the said materials, whether the same be or be not first wrought up, knowing them to be purloined or embezzled, he shall, for the first offence, forfeit not more than 40l. nor less than 20l.; the same to be applied, by direction of the justices, in the first place to defray the expences of the prosecution; next to make such satisfaction to the party injured as the justices shall think proper; afterwards to the informer, a sum not exceeding 10l.; and the remainder to the poor of the place where the conviction shall be, or to such other public charity as the justices shall appoint: And if the said penalty shall not be paid on conviction, the justices shall commit the offender to the house of correction or other public prison, there to be kept to hard labour, for any time not more than six months nor less than three months, unless the penalty shall be sooner paid; or the justices may send him to the house of correction or other public prison, for three days exclusive of the day of commitment, with an order that within the said time the offender shall be once publicly whipped at the market place, or some other public place where the offender shall be committed. For a second offence, if a person brought before the justices shall be charged therewith upon oath, they shall not proceed to convict him, but shall commit him to the house of correction or other public prison, till the next general, or general quarter sessions, or till he shall have entered into recognizance to answer for such offence at the said sessions; and the justices there shall hear and determine the matter; and if the person shall be convicted, he shall forfeit not more than 100l. nor less than 50l. to be recovered and distributed in like manner as the penalty for the first offence. 22 Geo. II, c. 27, § 2; 17 Geo. III, c. 56, § 3, 4.

§ 7. BRITISH STATUTES—OFFENCES.

And if any person shall sell, pawn, exchange, or otherwise dispose of any such

§ 7. BRITISH STATUTES —OFFENCES.

such materials knowing them to have been purloined or embezzled, he shall suffer like punishment as for receiving the same. 17 Geo. III, c. 56, § 5.

And although the purloined materials be worked up, or otherwise disposed of, so that it may be difficult to convict the offender; two justices as aforesaid, or the justices in sessions respectively, on proof upon oath that such person hath purloined or embezzled, or received such materials, knowing them to be purloined or embezzled, may convict the offender, although no proof shall be given to whom such materials belong. Id. § 6.

All which provisions, in respect of materials, shall extend to all tools and implements for manufacturing the said materials; and also to all drugs or ingredients wherewith any person shall be intrusted for dying, preparing and manufacturing the same. Id. § 16.

If any person shall wilfully damnify, spoil, or destroy, any work committed to his charge; he shall, on conviction as aforesaid, forfeit to the owner double value, by distress; for want of sufficient distress, the offender shall be committed to the house of correction, to be kept to hard labour, for any time not exceeding three months, or till satisfaction be made. 22 Geo. II, c. 27, § 12.

And two justices, on complaint upon oath, that there is cause to suspect that any embezzled materials, whether mixed or unmixed, wrought or unwrought, are concealed in any dwelling house, out-house, yard, garden, or other place, may by their warrant cause the same to be searched in the day time; and if any such materials shall be found, they may cause the same, and the person in whose possession they were found, to be brought before them or any other two justices of the district; and if such person shall not give an account to the satisfaction of the justices how he came by the same, he shall be convicted, although no proof shall be given to whom the materials belong: And every peace officer and watchman during the time he is upon duty, may apprehend any person who may be reasonably suspected of carrying, after sun-setting and before sun-rising, any such materials, and the same, together with such person, may carry before two justices; and if he shall not produce the party of whom he bought or received the same, or some person to testify upon oath the sale or delivery thereof, or shall not give a satisfactory account how he came by the same, he shall be convicted in like manner, although no proof shall be given to whom such materials belong.—Provided, that in either of these cases, if the person who shall be brought before the justices shall request them to appoint a reasonable time to produce the person of whom he bought or received the same, or a witness to prove the sale or delivery thereof, the justices may appoint such time, and issue a summons to the constable where such person or witness shall reside, requiring him to appear and give evidence: but such person, at the time of his request, shall enter into recognizance for his appearance at the time; or, for want of such recognizance, shall be committed until such time appointed. 17 Geo. III, c. 56, § 10, 11, 12.

And when a person shall be convicted

victed in either of the cases aforegoing, the justices may cause the materials so found or seized to be deposited with the churchwardens or overseers, for any time not exceeding thirty days; and in the meantime shall order them to advertise the same in some newspaper usually circulated there, or otherwise to cause notice to be given by some public cryer, and by fixing such notice on the church or chapel door, that those who have lost such materials may come and claim the same; and if any person can prove them to be his, the justices shall order them to be restored to the owner, he paying the charges of removing, depositing, and giving notice. But if before the end of thirty days no person shall prove his property, the justices shall order the same to be sold, and after deducting such charges as aforesaid, together with the charges of sale, one moiety of the money arising from such sale shall be given to the prosecutor, and the other moiety either to the poor where the conviction shall be, or to such public charity as the justices shall appoint: And the offender shall forfeit, for the first offence 20l. for the second offence 30l. and for every subsequent offence 40l. All which said respective forfeitures shall be levied by distress, and distributed, half to the informer, and half to the poor where the conviction shall be, or to such public charity as the justices shall appoint: if no sufficient distress shall be found, the justices shall commit the offender to the common gaol or other prison, or to the house of correction, for one month for the first offence, for two months for the second offence, and for six months for every subsequent offence. Id. § 13, 14.

If any person employed as a journeyman dyer, servant, or apprentice, in the dying of any felt or hat, or any woollen, linen, fustian, cotton, leather, furr, flax, mohair, or silk materials, shall, for his own profit, and without consent of the master, dye any of the same, whether wrought or unwrought; he shall, for the first offence, forfeit 10s. for the second offence 20s. and for every subsequen offence 40s.: Or if any person shall procure any such materials to be dyed by any such journeyman, servant, or apprentice, without consent of the master; he shall forfeit for the first offence 5s. for the second offence 20s. and for every subsequent offence 4l.: to be recovered as aforesaid before two justices, on the oath of one witness, to the use of the informer; and in case of non-payment on conviction, the offender to be committed to the common gaol or house of correction for any time not exceeding one month. Id. § 17.

By the 14 Geo. III, c. 44, if any person shall reel false or short yarn, and shall be thereof convicted *by the oath of the owner of the yarn*, or of one witness, or by confession, before one justice where the offence was committed, or the offender shall reside; (*he*) shall, for the first offence, forfeit not exceeding 20s. nor less than 5s.; for the second offence, not exceeding 5l. nor less than 40s.; and for the third and every other offence, he shall be committed to the house of correction or other public prison, to be kept to hard labour for one calendar month, and be once publicly

§ 7. BRITISH STATUTES —OFFENCES.

whipped at the market town nearest to the place where the offence was committed, on a market day. All which forfeitures shall go to the party aggrieved. § 2.

And the conviction shall be in this form:

Be it remembered, that on the day of in the year of our Lord A. B. *is convicted before me one of his majesty's justices of the peace for* [specifying the offence, and the time and place when and where committed, and also specifying that it is the first, second, or third offence against this act.] *Given, &c.*

h By the 27 Geo. II, c. 7, if any person employed by any one practising the trade of clock-making, or watch-making, or any part or branch thereof, to make, finish, alter, repair, or clean any clock, watch, or part thereof; or entrusted by any person practising the said trade or trades, with any gold, silver, or other metal or material, to be, or that shall be, in the whole or in part, wrought or manufactured for any part of a clock or watch, or any diamond, or other precious stone, to be, or that shall be, set or fixed in or about any clock or watch; shall purloin, embezzle, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any clock, watch, gold, silver, or other metal or material, or any part thereof, or any diamond or other precious stone, with which he shall be so entrusted; and shall be thereof convicted by the oath of the owner, or other credible witness, or confession, before one justice, where the offence shall be committed, or the person so charged shall reside, he shall for the first offence forfeit 20l. and if not forthwith paid, the justice shall commit him to the house of correction or other public prison, there to be kept to hard labour for the space of fourteen days, unless the forfeiture shall be sooner paid; and if within two days before the expiration of the said fourteen days, such forfeiture shall not be paid, the justice may order him to be publicly whipped at the market place, or some other public place of the city, town, or place, where he shall be committed; and for a second, or other subsequent offence, he shall forfeit 40l. in like manner; and if not paid forthwith, the justice shall commit him as aforesaid, to be kept to hard labour for any time not exceeding three months, nor less than one month, unless the forfeiture shall be sooner paid; and if within seven days before the expiration of the time for which he shall be committed, the forfeiture shall not be paid, the justice may order him to be whipped in like manner, twice or oftener, as to such justice shall appear reasonable.

And if any person shall buy, receive, accept, or take by way of gift, pawn, pledge, sale, or exchange, or in any other manner, of or from any person whomsoever, any clock or watch, or part thereof, of any gold, silver, or other metal or material as aforesaid, whether the same, or any part thereof, be or be not wrought or manufactured, or any such diamond or other precious stone, knowing the same to be so purloined or embezzled; he shall, on the like conviction, for the first offence, forfeit 20l. and if not forthwith paid, the justice

justice shall commit him in like manner, to be kept to hard labour for fourteen days, unless the forfeiture shall be sooner paid, and if within two days before the expiration of the said fourteen days, the said forfeiture shall not be paid, the justice shall order him to be publicly whipped as aforesaid, once or oftener, as to such justice shall appear reasonable; and for a second or other subsequent offence, he shall forfeit 40l. and if not forthwith paid, the justice shall commit him as aforesaid, to be kept to hard labour, for any time not exceeding three months, nor less than one month, unless the forfeiture shall be sooner paid; and if within seven days before the expiration of the time for which he shall be committed, the forfeiture shall not be paid, the justice shall order him to be publicly whipped as aforesaid, twice or oftener, as to him shall appear reasonable.

And one justice on complaint to him made upon oath, of any offence against this act, may issue his warrant for apprehending and bringing before him, or before any other justice of the same place, the person so charged.

And the conviction shall be in this form:

Be it remembered, that on the day of in the year of his majesty's reign, A. B. *was convicted before me* (or *us*) *of his majesty's justices of the peace for the said county of or for the riding* (or *division*) *of the said county of or for the city, liberty, or town of in the said county of* (as the case shall be) *of purloining, embezzling, secreting, selling, pawning, exchanging, or unlawfully disposing of, or of buying, receiving, or taking to pawn* (as the case shall happen to be) specifying the respective goods, materials, or effects) *the property of* C. D. *of in the county of Given, &c.*

If any person shall think himself aggrieved by the judgment of the justice, he may appeal to the next sessions: in which case the execution of the judgment shall be suspended, the person so convicted entering into a recognizance at the time of the conviction, with two sureties, in double the sum adjudged, to prosecute the appeal with effect, and to be forthcoming to abide the judgment and determination of the justices in such sessions; and the justices there shall hear and determine the same, and award such costs to either party, as to them shall appear just and reasonable; and if the judgment shall be affirmed, the appellant shall immediately pay the sum adjudged, together with such costs as shall by the court be awarded; or in default thereof, shall suffer the penalties as for purloining, embezzling, or receiving as aforesaid.

The said forfeitures, after satisfaction made thereout to the party injured, together with such costs of prosecution as the justice shall judge reasonable, shall go to the use of the poor where the offender shall reside.

And the justice shall cause the conviction to be fairly written upon parchment, and transmitted to the next sessions, there to be filed and kept among the records

And the same shall not be removed by *certiorari*.

N. B. This does not prevent it being so by advocation or suspension,

§ 7. BRITISH STATUTES —REGULATIONS.

THERE are other regulations touching the different trades, as concerning the settlement of wages, and paying the same in money, in the case of clothiers;[i] in the woollen, linen,

Wages.

i By the 10 Anne, c. 16, every clothier, clothworker, cardmaker, or other person concerned in the trade of the woollen manufacture, shall pay his workmen in money, and not in goods, on pain of 20s. on conviction in thirty days, before one justice, on oath of one witness, half to the informer, and half to the poor: If he shall not pay in fourteen days after conviction, the same to be levied by the constable by warrant of such justice, by distress; and where no sufficient distress can be found, to be committed to the gaol or house of correction, to be kept to hard labour not exceeding three months. § 6, 7, 8.

Persons aggrieved on this act may appeal to the next sessions, who may allow costs. § 9.

By the 1 Geo. ft. 2, c. 15, every clothier, clothworker, cardmaker, or other person concerned in the trade of the woollen manufacture, shall pay his workmen in money, and not in goods; on pain of 40s. on conviction (in forty days) before one justice, on oath of one witness; to be disposed, if in London, to the benefit of Christ's hospital, elsewhere to the poor where the offence shall be discovered; and if he shall not pay in thirty days, to be levied by the constable, by warrant of such justice, by distress; and where no sufficient distress can be found, to be committed to the common gaol or house of correction, to be kept to hard labour for three calendar months. § 7, 8, 12.

By the 29 Geo. II, c. 33, if any clothier, serge maker, woollen or worsted stuff-maker, worsted or woollen yarn stocking master, or person concerned in making any woollen cloths, serges, stuffs, worsted or woollen yarn stockings, or any other person any way concerned for himself or another, in employing weavers, combers of jersey or wool, worsted combers, spinners, knitters, or other labourers, in the woollen manufactures, shall pay any person his wages in goods, or by way of truck, bill, or note, or in any other manner than in money; he shall (on prosecution in three months) forfeit 20l. to be recovered by action of debt, by any person who shall sue for the same. Or otherwise, before two justices, by confession, or oath of one witness, by distress, (if not paid in fourteen days); and to be distributed, half to the informer, and half to the poor: And for want of sufficient distress, to be committed to the house of correction for any time not exceeding three months or until satisfaction shall be made. Persons aggrieved by the order of the justices may appeal to the next sessions, first entering into recognizance with sufficient security before the justices to prosecute and abide by the order that shall be made on such appeal, and giving eight days notice in writing to the party in whose favour the order was made. And the sessions may award costs and damages, and by their order or warrant may levy such costs and damages by distress; and for want of sufficient distress,

fustian, cotton, and iron manufactures; [k] in the leathern manufactures; [l] of workmen in the making of hats, or in the woollen, linen, fustian, cotton, iron, leather, furr, hemp,

tress, may commit the party to the common gaol, for any time not exceeding three months, or until satisfaction shall be made. And the order of sessions shall be final: and no proceedings of the justices out of, or in the sessions, shall be removed by *certiorari*, or otherwise.

By the 30 Geo. II, c. 12, if any clothier or maker of any mixed, medley, or white broad cloth, shall refuse or neglect to pay to the weaver employed by him his wages or price agreed on in money, within two days next after the work shall be performed and delivered to such employed or some person on his behalf (the same being demanded of such employer or person employed on his behalf); every such clothier or person so offending shall forfeit 40s. to be recovered and disposed of as by the said act of the 29 Geo. II, c. 33.

[k] And all payments to the said workmen, shall be in money, and not in cloth, victuals, or commodities; and all wool delivered out to be wrought up, shall be delivered with declaration of the true weight thereof; on pain that every offender in either of the said cases, shall forfeit double the value of what shall be due for such work; and if any such workman shall be guilty of any such fraud or default, in the work by him done, he shall answer double damages. § 3.

And all wages, demands, frauds, and defaults of labourers, in the said manufactures, concerning work done, shall be determined by two justices, who may summon and examine witnesses on oath: Persons aggrieved may appeal to the sessions to be holden next after notice of the order of the said two justices: and if the sessions give judgment against the appellant, they shall order him to pay such costs as to them shall seem meet. § 4.

[l] And all payments to workmen employed in the said manufactures, shall be in money, and not in goods, except by their own request and consent; and all materials delivered out to be wrought in such manufactures shall be delivered with a declaration of the true weight, quantity, or tale, thereof; on pain of forfeiting to such manufacturer double value of what shall be due for his work; and if such labourer or manufacturer shall be guilty of any fraud, abuse, neglect, or default, in the work by the undertaker to be done, he shall answer to the owner double damages. § 6.

And all wages, demands, frauds, abuses, neglects, and defaults of labourers and manufactures in the said trades, concerning any work done in such manufacture, shall be determined by two justices, who may summon and examine witnesses upon oath. § 7.

§ 7. BRITISH STATUTES —REGULATIONS.

and flax manufactures;[m] of workmen in the bone and thread manufactory.[n] There are also regulations respecting the length and weight of goods delivered out to workmen,[o] and for detecting embezzlements, giving extraordinary powers to justices;[p] to masters.[q] Indeed some of these

[m] The master shall pay his workmen in money, and not otherwise, and shall not make any deduction on account of any goods sold or delivered previous to the agreement: and for the more easy recovering the said wages, two justices, upon complaint (in three months, 13 Geo. c. 23) shall summon the party offending, and for non-payment shall issue their warrant to levy the same by distress; and for want of sufficient distress, shall commit the offender to gaol for six months, or until he shall pay, or give full satisfaction for the same, to the good liking of the party grieved. And every person paying the same otherwise than in money, shall forfeit 10l.; half to the informer, and half to the party grieved, by distress as aforesaid. 22 Geo. II, c. 27, § 12.

[n] All lace merchants and dealers in lace, and all other persons who shall employ any person or persons in the making of bone or thread lace, or who shall buy any bone or thread lace of the maker thereof, shall pay such persons for their labour, and for all the lace bought of them, in money only, and not with goods, or by way of truck, or in any other manner, either in the whole or in part, on pain of 10l. to the party grieved; by warrant of one justice by distress; for want of sufficient distress, to be committed to the common gaol or house of correction for six calendar months, unless such penalty, and the charges attending the recovery thereof, be sooner paid. 19 Geo. III, c. 49, § 1, 2.

And if any money shall be owing to any person employed in the making of any bone or thread lace, for his labour, or for the purchase of any such lace, the same may be recovered in like manner as the aforesaid penalty. § 3.

Persons aggrieved may appeal to any sessions to be holden within six months after the cause of complaint shall arise, giving fourteen days notice; and the sessions shall hear and finally determine the same, and may give costs to either party, and levy the same by distress. § 4.

[o] 13 Geo. I, c. 23; touching clothiers and their workmen.

[p] As 13 Geo. III, c. 23; touching clothiers and their workmen.

And one justice, on information on oath, that any person is, or is suspected to be, guilty of any the ill practices aforesaid, may issue his warrant to the constable or other peace officer, or to any churchwarden or overseer, directing him in the day time to enter into any house, shop, warehouse, or other suspected place, to search for and examine all such bars and weights as shall be made use of for the purposes before mentioned, by any such clothier or maker of woollen goods; and if such person

enactments go very great lengths in favour of the owner. Thus the 14th of Geo. III, c. 44, authorizes any *one* justice to convict a person of false reeling by the oath of any *one* witness, even *of the owner of the yarn*, who is entitled to the penalty; "which (says Dr. Burn) is a singular instance of a conviction on the oath of a person doubly "interested; namely, both as owner of the goods, and as "entitled to the whole forfeiture."[r]

son shall interrupt the officer, he shall forfeit 5l. § 7.

And every maker of mixed, medley, or white broad cloath, shall pay the weaver according to the number of yards that the chains are laid on the warping bars, and not otherwise, on pain of 5l. § 9,

[q] As 17 Geo. III, c. 56, § 15; touching disputes between masters and their workmen in the making of hats, or in the woollen, linen, fustian, cotton, iron, leather, furr, hemp, flax, mohair, or silk manufactures; which statute makes it "lawful for the "owner of the materials to enter at "all seasonable hours in the day "time, into the shop, out house, or "other place, of any person employ-"ed by him to work up any the said "materials, and there to inspect the "condition thereof; and if any per-"son shall refuse to permit such en-"trance or inspection, he shall for-"feit any sum at the discretion of "the justices, not less than 40s.; to "be levied and applied as for having "materials, and not being able to "give a satisfactory account how he "came by them." Id. § 15.

[r] Tit. Servants, § 18.

And yet in England, it seems in general to be held, that a witness receiving part of the reward is not credible, for "a conviction on the game "acts was quashed, because the in-"former was witness."—L. Raym. 1545. Andr. 240. And in the statute of the 2 Geo. III, c. 19, respecting the game, it is recited, that in prosecutions on the act of 8 Geo. I, c. 19, in the courts at Westminster, where a part of the penalty is given to the poor of the parish, the inhabitants of such parish had been disallowed to give evidence; and, therefore, in that case, to remedy the same, the act gives the whole penalty to the prosecutor, in order to enable the inhabitants to give evidence. Burn, tit. Game.

CHAP. VIII.

Husband and Wife.

§ 1. CONSTITUTION OF MARRIAGE—WHO MAY MARRY.

I. THE law concerning marriage is necessary to be known by justices of peace, who not only are competent to punish its irregular celebration, but likewise occasionally take cognizance of questions depending on its legal constitution or consequences.

Kindred. Jewish law Kindred what, a bar to marriage

IN Scotland, since the Reformation from Popery, the holy band of marriage "has been as lawful and frie as the law of "God has permitted the samin to be done."[a] The Mosaical institutions, therefore, must be our text; under which, nearness of kin is no bar to marriage, excepting, *first*, between ascendants and descendants in the direct line, *ad infinitum*; and *secondly*, even in the collateral line, either where one of the parties is *loco parentis*, as uncle, grand-uncle, aunt, or grand-aunt, to the other;[b] or where they are more nearly related

[a] 1567, c. 15.

[b] The text (c. 18, v. 12, 13, 14) mentions only aunt and aunt-in-law; however, upon manifest sense and reason, our law understands it, by implication, to prohibit also the marriage, 1*st*, of uncle

to each other than the fourth degree, according to the computation of the civil law, and the second according to that of the canon law;[a] and equally whether the relation be by

§ I. CONSTITUTION OF MARRIAGE —WHO MAY MARRY.

uncle and niece, and 2*dly*, of the grand-uncle and grand-niece, and grand-nephew and grant-aunt; just as, in the direct line, we extend the prohibition, which mentioned parents and children, to all the *posteri* and *proavi*.

In England, Dr. Christian says, "it "is certainly true that a man may "marry his grand-aunt. Gibs, 413." (Black. b. i, c. 15, note 2.) But in Scotland a man was beheaded for marrying his grand-aunt, even by affinity; 13th April 1629, John Weir.

[a] A degree of propinquity is the distance there is between two persons related to each other. This depends on the number of generations which form their relation; so that a degree is counted for each generation.

In the collateral line, the manner of counting these degrees, according to the civil law is different from that of the canon law. The civil law counts each generation upward from one of the parties to their common ancestor, and downward from the same ancestor to the other party, without counting their common ancestor himself.

Thus, if there be three degrees of the one side, and two of the other, that makes relations in the fifth degree.

According to this mode of computation, there is no *first* degree of propinquity in the collateral line. Brothers who are the nearest collateral kindred, are related in the second degree; uncle and nephew in the third, and cousins in the fourth.

The canon law again, counts the generations on one side only. Thus brothers are in the first degree, and cousins in the second. In the unequal line, that is, where the one party is nearer the common ancestor than the other, it counts the generations from the person farthest removed from that common ancestor. Thus uncle and nephew, as well as cousins, are in the second degree.

The canon law computation was used in regard to marriages only; in successions, the civil law computation, always. For which the canonists give this whimsical reason, that succession goes from *one* person to *another* person; whereas marriage requires *two* persons, *ideo sacri canones duas in uno gradu constituêre personas*. (Corp. Jur. Can. Decret. II, Pars. Caus. 35, quæst. 5, c. 3, § 1.)

At what precise period the church first departed from the civil law computation is not very accurately known. The most ancient example of it is said to be a letter of Pope Gregory concerning St. Augustine of Canterbury's mission to England, written about the beginning of the seventh century. (Smith's edit. of Bede's Eccles. History, App. N° 6.)

In France, according to M. Pothier, there is evidence of its having been in use in the middle of the eighth century. (V. iv, p. 185.)

§ 1. CONSTITUTION OF MARRIAGE —WHO MAY MARRY.

full or half blood ;[a] by marriage or illicit intercourse, *quoniam in contrahendis matrimoniis naturale jus et pudor inspiciendus est ;*[b] and by affinity as well as consanguinity.[c]

At length, Alexander II, who mounted the papal throne in 1061, in a letter addressed to all the bishops and judges of Italy, prohibited the use of the civil law computation in regard to marriage under the penalty of excommunication. Corpus Juris Can. Decret. II, Pars. caus. 35, quæst. 5, c. 2, § 1.

The Scottish statute 1567, 15, follows the rule of the canon law, which "was the common way of computing degrees in Scotland at that time, and continues to this day among the vulgar." (Ersk. b. i. c. 6, § 9.)

"It is said that the canon law computation has been adopted in England; yet I do not know a single instance" (Professor Christian remarks, Black. b. ii, p. 208) "in which we have occasion to refer to it. But the civil law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares, of intestate personal property."

[a] Ersk. b. i, t. 6, § 9; Hume, v. ii, p. 290, &c.

The laws of many nations, however, on the matter of marriage, made a distinction between half and full blood. The Athenian laws allowed marriages between brother and sister by the father's side; but not between brother and sister uterine: whereas, in the latter case, the Spartan laws permitted it, but not in the former. (Potter's Antiquities, v. i, p. 159, and v. ii, p. 292.) But, as to this provision of the Athenian law, doubts have been entertained. The authors, and arguments *pro* and *con*, are detailed by Bayle, in his Dictionary, in the life of Cimon.

[b] L. 14, § 2. ff. de Rit. Nup. Bank. b. i, c. 5, § 42.

Thus brother and sister, both bastards, can no more intermarry than when they are both legitimate; so also in the case of other prohibited degrees of consanguinity.

[c] Ersk. b. i, l. 6, § 9.

The general rule is, that in whatever degree of consanguinity a person is related to one of the spouses, he is related to the other in the same degre of affinity. This is supposed to be implied in verse 14th, which forbids connection with the uncle's wife, "*because she is thine aunt.*"

In the canon law *(jure civili quodammodo*, says Voet, *sed magis jure canonica ;* l. xxii, f. 2, § 29.) three kinds of affinity are mentioned. The first arose from one marriage; the second from *two* marriages; the third from *three* marriages.

The first subsisted betwixt one of the spouses and the other's *consanguinii ;* the second, was that affinity which the canonists imagined to subsist betwixt one of the spouses and the *affines* of the other; and the third was that which was imagined to subsist between one of the spouses, and the other's *affines* of the second kind.

For example—Titius, *by marrying*

§ 1. CONSTITUTION OF MARRIAGE —WHO MAY MARRY.

IT is only the spouses themselves that are connected by affinity with the *consanguinei* of each other. The *consanguinei* of the one spouse are not connected by affinity with those of the other. Hence a father and son may marry a mother and daughter; or two brothers two sisters; or a man the widow of his brother-in-law; or a woman the widower of the sister of her brother's wife.

Sempronia, becomes stepfather to her children; son-in-law to her parents; brother-in-law to her brothers. But if the step-son, or father-in-law, &c. marry, Titius was supposed to be related to their wives by affinity, *secundi generis*, which arose from *two* marriages, viz. Titius's own marriage, and that of his step-son or father-in-law.

In like manner, if, on the death of his step-son, &c. the widow should marry, there then took place between Titius and such husband, affinity of the *third* kind, which arose from *three* marriages: viz. 1st, his own; 2dly, his step-son's; 3dly, that of his step-son's widow.

These three different classes of affinity were long considered by the canon law equally with consanguinity a bar to marriage. But the second and third kind were afterwards abolished by the Lateran Council; (apud Mabil. Musæum Ital. tom. ii, p. 576.)

Even in popish countries, therefore, as well as with ourselves, the only species recognized is, affinity of the first kind.

Whether affinity arises from an illicit intercourse, has given rise to much discussion and numerous distinctions among lawyers. The civil law does not afford any express text condemning the marriages of persons connected only by bastard affinity. Children were indeed expressly forbid from marrying their father's concubines. But in those days concubinage was recognized by the law. At the same time, the marriage of a woman with the father or son of the same person with whom before she had been criminally connected, would be too repugnant to the feelings of nature, to be permitted in any civilized country, and far less among a nation so religiously observant of propriety, with regard to matrimonial connections, as the Romans. But the canon law carried the matter to the contrary extreme, putting bastard and legitimate affinity on the same footing. This, however, was corrected. Amidst other improvements, the Council of Trent, in the case of bastard affinity, limited the prohibition to the second degree, that is, cousin-germans; while, in the case of lawful affinity, it extended to the fourth.

In punishing for incest, our courts of justice, even after the Reformation, adopted the severe view of the canon law. Which severe construction, however, did not govern two of the latest cases. See the whole decisions on this subject stated by Mr Hume, who entertains doubts whether there be any just principle for supposing any such relationship to result from *pure views*.

§ 1. MARRIAGE VALID — BETWEEN WHOM.

THE lawfulness of one marrying his sister-in-law has sometimes been the subject of doubt and controversy. The Mosaical law contain no such express prohibition; but it seems to imply it.[d] And to use the words of Paulus, on another occasion, *in re dubia certius et modestius est hujusmodi nuptiis abstinere.*[e] Our practice, accordingly, holds such marriages unlawful. The intercourse of persons standing in that degree of relation to each other, has been punished as incest.[f]

Spiritual affinity.

DURING the Popish superstition, another obstacle to lawful marriage, arose from what was termed spiritual affinity, viz. 1*mo*, that subsisting betwixt the person baptized, on the one hand, and the person who baptized him, and also, his god-father and god-mother on the other; 2*do*, between the person who administered baptism, and the god-father and the god-mother on the one hand, and the natural parent of the person baptized on the other; 3*tio*, between the person baptized and the children of the god-father and god-mother; 4*to*, between the god-father and god-mother. The two last were abolished by the Council of Trent.

BY the Roman law, marriage was not permitted betwen an adulterer and adulteress.[g] Agreeably to this, our act 1600, c. 20, disables a party, divorced on the head of adultery, from marrying him or her with whom the adultery is said by the sentence of divorce to have been committed.[h]

d The marriage between a woman and her husband's brother is expressly prohibited. (ver. 16th.) But the husband's relation to his wife's sister is identically the same with that of the wife to her husband's brother. The prohibition in this case, therefore, stands on the same footing with that of uncle and niece; which in like manner is forbidden by implication only. In one case, indeed, a man was expressly ordained to marry his brother's widow. (Deut. c. xxv, v. 5.) But that was a special exception for a particular purpose, and rather confirms the general rule. In that case, the first born was considered the child of the defunct, and inherited his fortune.

e Ff. l. 14, § 3; De Rit. Nupt.

f Hume, v. ii, c. 18.

g Ff. l. 13, lib. 34, tit. 9.

h Ersk. b. 1, 71, § 41.

§ 1. MARRIAGE VALID —BETWEEN WHOM,

MARRIAGE cannot be entered into by persons already married, for this would be the crime of bigamy; nor by impotent persons; nor, in general, by those who cannot consent, as lunatics, unless during a lucid interval; ideots, and persons under age, though in the latter case, should they adhere, on arriving at puberty, a second celebration is not requisite. If one of the parties should be under pupillarity, and the other of age, even the latter also may resile; for both must be bound or neither.

§ 2. MARRIAGE —ITS CONSTITUTION

II. "THE present consent, whereby they accept each "other for husband and wife,"[g] constitutes a marriage: Yet "the public solemnity is a matter of order, justly in- "troduced by positive law, for the certainty of so import- "ant a contract."[h] But it is "not essential to marriage. "Thence arises only the distinction of public or solemn, "and private or clandestine marriages."[i] Both are equally valid; but the former alone are approved of; the latter are discountenanced and punished; though "they can- "not be declared void and annulled."[k] Just as the ancient church professed to *detest* such marriages, while, nevertheless, it held it an article of faith to believe that they truly constituted the *sacrament of marriage*.[l]

Consent constitutes marriage.

Public solemnity, matter of order only; not essential.

Clandestine marriage valid.

HOWEVER, our law, notwithstanding its inclination in favour of marriage, punishes clandestine and irregular marriages by pains and penalties; but careful not to confound what is accidental merely with what constitutes a marriage in *foro poli*, it holds such marriages, to every effect, as valid as the most regular. And so, too, stood anciently

Scots law still retains the ancient principles.

g Stair, b. 1, t. 4, § 6.

h Ibid.

i Ibid.

k Ibid.

l *Les mariages clandestins, c'est à dire, ceux qui ne sont pas contractés en face d'Eglise, mais secrétement*, per sponsalia de præsenti, *continuerent, toujours depuis à être regardés comme valables, ils étoient encore regardés comme tels au temps du Concile de Trente; et ce Concile va même jusqu'* à frapper d'anathême ceux qui *nieroient que ces mariages fussent de vrais mariages, tant que l'Eglise n'a pas encore jugé à propos de les déclarer nuls, quoiqu'elle* les ait toujours détestés. Pothier, t. 3, p. 290.

§ 2. CONSTITUTION OF MARRIAGE

the law throughout all Christendom; till positive enactments,---in some countries sooner and in others later, in some more and in others less, changed and corrupted the principle; which, however, with us, happily, remains entire still. Marriage, then, with us may be constituted validly--

—CONSENT DE PRESENTI

1st, By "any contract made *per verba de presenti*, or in "words of the present tense. The matrimonial union may "be accomplished, not only without any assistance of reli- "gion or the church, but even without the use of any ap- "pointed civil form; so the couple themselves, though "unauthorized by the will of parents or guardians, do ex- "plicitly, fully, and deliberately consent."[a] This consent of parties, therefore, "may be expressed before a civil ma- "gistrate, or even before witnesses; or declared in writing, "provided the writing is so conceived as necessarily to im-

[a] Hume, Criminal Law, v. ii, c. 20.

This doctrine, that marriage may be constituted by a verbal consent before witnesses, was approved of by the Court in a late case which underwent very full discussion; that of Al. Macadam against El. Walker, and the trustees of Quintin Macadam, of Craigengillan, 13th Nov. 1806. Elizabeth Walker had lived with Mr. Macadam, of Craigengillan, for some years, as his mistress, and had borne him two daughters. On the morning of the 22d March, 1805, after breakfast, Mr. Macadam, in the presence of several of his own servants, called into the room for the purpose of witnessing the transaction, desired Elizabeth Walker to stand up and give him her hand, and she having done so, he said, "this "is my lawful wife, and these my "lawful begotten children;" About four that same day, and without having been alone with Elizabeth during the interval, he put a period to his existence by a pistol. The Court held the children to be legitimate. Such of the Judges as dissented, did not dispute the law as above laid down; but doubted of its application to this case, 1st, As they entertained doubts of his sanity at the time of the marriage, from the suicide following it so soon. 2d, They considered that when he made the said declaration, he had formed the resolution of suicide; he therefore did not mean to live with her as his wife: He meant, it was said, to make her his widow, not his wife; they conceived, therefore, that the proper matrimonial consent had not taken place.

In this case, also, it was keenly argued, that a verbal declaration could not be proved by witnesses; this also was disregarded.

§ 2. CONSTITUTION OF MARRIAGE —CONSENT DE PRESENTI. The consent must be free, &c.

"port their present consent."[a] But such private consent must have been freely emitted and seriously intended by both parties to constitue a marriage. From a defect in this particular, it has been decided that a marriage was neither constituted by a written acknowledgment;[b] nor by a series of

[a] Ersk. b. i, t. 6, § 5.

[b] 25 June 1782, M'Innes against More. In this case, the commissaries and the court of session found the marriage proven. But it appeared that the man, at the woman's desire, had copied over and signed the acknowledgment, not for the purpose of making a marriage, but for a different purpose understood between them. It was on this ground that the interlocutors were reversed, as appears from the judgment of the house of peers. "It is declared, that the "written acknowledgment is not sufficient proof of any marriage or "matrimonial contract having passed "between the pursuer and defender; "and it is therefore ordered and adjudged, that the interlocutors complained of be reversed; and that "the court of session do remit the "cause to the commissaries, with directions to find, that the said written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed "between the pursuer and defender; "and to proceed accordingly."

So, too, in the case, Taylor *ag.* Kello; Feb. 16, 1786. There were mutual declarations in writing, which the commissaries found sufficient to constitute a marriage. But the court were much divided; and, from the Faculty report, it appears that not one of the judges expressed any doubt that, by the law of Scotland, consent made a marriage. But, from the circumstances of the case, the minority considered the writing, as meant by the defender, to signify no more than "her willingness merely to enter into a regular "marriage with the pursuer;" and that neither of the parties understood themselves to be married persons. On this view, it appears to have been that the house of peers reversed the interlocutor. Their judgment was as follows: "It is declared, that the "two letters insisted on in this process, signed by the parties respectively and mutually exchanged, "were *not intended by either, or understood by the other, as a final agreement*, "nor was it so understood or intended that they had thereby contracted the state of matrimony or the "relation of husband and wife, from "the date thereof; on the contrary, "it was expressly agreed that the "same should be delivered up; if the "purpose they were calculated to "serve, proving unattainable, such "delivery be demanded; which last "mentioned agreement is farther "proved by the whole subsequent "conduct of parties: therefore, ordered and adjudged that the interlocutors complained of be reversed, "and that the court of session do remit to the commissaries to assoilzie "from the declarator of marriage."

§ 2. CONSTITUTION OF MARRIAGE —CONSENT DE PRESENTI.

letters from the parties, addressed to each other as husband and wife, together with a verbal acknowledgment before witnesses;[d] nor, in more than one case, even by the regular performance of the ceremony by a clergyman;[e] nor by marriage contracts, though the parties therein profess, *de pre-*

d Dec. 6, 1796; M'Lachlan. In this case, at first, the marriage was found to be proven; which interlocutor was afterwards altered, under the very particular circumstances of that case, the court did not think there was sufficient evidence of a real *de presenti* matrimonial consent. It was generally admitted, that had there been consummation, it would have been decisive in favour of a marriage. In so nice a case, that circumstance would have turned the balance.

e One other case may be mentioned: Anderson against Fullerton, 13 Nov. 1793, F. C. In Mr. Fullerton's repositories were found, after his decease, the following holograph letter: "My dear Jean Anderson, "as you and I have cohabited toge- "ther, as man and wife, for up- "wards of twenty years (though "pride and connections prevented "my declaring to the world that "you was my wife) yet on account "of your unspeakable attention to "my health, and interest in my fa- "mily affairs, and above all, the "love I bear to you and the three "children you have born to me, viz. "Margaret, Jean, and Maria, Ful- "lertons, your and my daughters, "I think it a duty incumbent on me "to subscribe, what I truly am, "my dear Jean, your affectionate "husband, George Fullerton.' First in the commissary court, and afterwards in the court of session, it was determined, that this writing, not having been delivered in Mr. Fullerton's life-time, did not afford evidence of any matrimonial consent having passed between the parties, in Mr. Fullerton's life-time.

June 29, 1756; Cameron against miss Malcolm. "A person having "planned an advantageous match for "his son with an heiress just turned "of twelve years of age, brought the "parties together at supper in a re- "lation's house, where the young "lady's mother was likewise pre- "sent. A clergyman was introduced, "the match proposed, and upon the "mother's leaving the room, the "ceremony was performed, and the "parties subscribed marriage-lines. "On the mother's return to the "room, a bedding was proposed, to "which the mother objected, and a "dispute taking place, she carried "her daughter home with her. In "a declarator of marriage, the com- "missaries found the marriage pro- "ven; but the lords, taking into "consideration the whole circum- "stances of the case, altered that "judgment."--Dict. vol. iv, tit. Proof, p. 171.

In

senti, to take each other respectively for husband and wife, —their real meaning appearing sufficiently from their likewise obliging themselves to celebrate a marriage.

§ 2. CONSTITUTION OF MARRIAGE —CONSENT. —PROMISE CUM COPULA.

2*dly*, MARRIAGE may be validly constituted, "in case "of cohabitation *per verba de futuro* also." [f] Or, in the words of lord Stair, "by natural commixtion, where there "hath been a promise or espousals preceding, for therein "is presumed a conjugal consent *de presenti*." [g]

In the case of Allan, schoolmaster in Edinburgh, against Anne Young, in 1773, a similar decision was given. The marriage ceremony had been regularly performed by a clergyman, and the girl turned twelve years of age; but she was under Allan's care as a teacher; and it appeared from the proof, that undue influence, and a train of fraud and imposition had been used in order to obtain her consent. In these cases no consummation had taken place.

[f] Black. b. i, c. 15, in speaking of the law of England, which, before the marriage act, was nearly the same with our own.

[g] B. i, t. 4, § 6; and Ersk. b. i, t. 6, § 4. Lord Gardenston's MS. tit. Marriage: where his lordship adopts the above passages from lord Stair, as to consent *de presenti* and promise *cum copula*, constituting a marriage.

A very strong instance occurred of the effect given to marriages of this last description, 15 Dec. 1752, Alison Pennycook against John Grinton, and Anne Graite. Alison bore a child to John Grinton, and concluding for aliment to the child, and 100l. sterling of damages merely, she brought a process before the commissaries; which, however, was discontinued till 1751. In the interval, Grinton openly married Anne Graite, but without proclamation of banns. They cohabited as man and wife, and a child was born. Thereafter Alison brought a new process, libelling on the promise and copula, and concluding, 1mo, that she and Grinton should be declared married persons; 2dly, their child lawful; 3dly, that she was entitled to obtain a divorce on account of his connection with Anne Graite: who, on the other hand, brought a declarator of her marriage, and pleaded that she, and not Alison, was his lawful wife; she argued that a promise and copula did not constitute a marriage, but *rebus integris* founded the party in an action, merely to oblige the other to complete a marriage. The commissaries declared Alison Pennycook and John Grinton lawful husband and wife, and the child a lawful child, The court of session affirmed the judgment. Cases of similar hardship occurred in England. "A contract *per verba de presenti* "*tempore* used to be considered in the "ecclesiastical

§ 2. CONSTITUTION OF MARRIAGE —COHABITATION.

3dly, "MARRIAGE is presumed or inferred from cohabitation, or parties living together at bed and board, joined to the parties being *habite*, or held and reputed man and wife."[h] If the cohabitation take place abroad, no more effect will be given to it here than it would have had in the country where it happened.

EVEN in England, indeed, long cohabitation and repute presume a marriage. In like manner, in France, before the Revolution, marriages, celebrated by any other person than the *propre curè*, or by orders from him, were null. Yet such questions were not listened to after any considerable interval.[i]

LORD KAMES, in his tract on the form of completing marriage by the law of Scotland,[a] says, "in Scotland this "proclamation" (bans) "is useful for the greater solemnity, and to give opportunity for objecting to the marriage; but *the priest's blessing appears to be the only solemnity that is indispensible*."

LORD KAMES thus admits that no *civil* form is essential to the validity of marriage; but he considers the priest's blessing indispensible.

"ecclesiastical courts *ipsum matrimonium*; and if either party had afterwards married, this, as a second marriage, would have been annulled in the spiritual courts, and the first contract enforced. See an instance of it 4to, 29. But, as this pre-engagement can no longer be carried into effect as a marriage, I think we may now be assured that it will never more be an impediment to a subsequent marriage actually solemnized and consummated."—Christian's Black. b. i, c. 15, Note 3. See Cochran against Campbell, App. III.

h Ersk. b. i, t. 6, § 8.

i The answer was, "*L'appellant etoit indigne d'être écouté et reçu à entrer dans la discussion qu'il alléguoit; et qu'on devoit présumer que les choses s'étoient passes dans les regles.*"—Pothier, de Droit, t iii, p. 297.

a Elucid. art. 5.

§ 2. CONSTITUTION OF MARRIAGE

THE opinion of so learned and ingenious an author, in a point of such interest, is entitled to particular attention. It is no disrespect to lord Kames to examine his doctrine. He deprecated nothing so much as "excess in deference to the "authority of men of eminence."[b] He professed it to be his "intention only to give examples of reasoning free from "the shackles of authority;" "wishing, hoping, to rouse "that spirit in others."[c] That philosophical lawyer placed his fame on another basis than the number of implicit followers, or the practical justness of all his opinions: he truly predicted that our bar would "be indebted to" him "even for" his "errors."[d]

LORD KAMES observes, that "marriage required no so-"lemnity before the time of Pope Innocent III. The bride-"groom went to the house where the bride lived, and led "her home to his own house; by which simple form they "became man and wife. But a ceremony so slight, giving "rise to many questions about marriage, both with regard "to the parties and their issue, marriage in the church be-"fore the priest, was established as an *essential* solemnity."

Antiquity of the nuptial blessing.

THE celebration of marriage, *in facie ecclesiæ*, and the priest's blessing, were of much greater antiquity than the times of Innocent the third. Tertullian, in the second and third century,[e] S[t]. Ambrose, in the fourth,[f] and in the fifth cen-

[b] Preface to Elucidation, p. x.

[c] Ibid.

[d] Ibid.

[e] "*Unde sufficiemus*," says he, "*ad* "*enarrandam felicitatem ejus matrimonii* "*quod ecclesia conciliat, confirmat oblatio.* "*obsignat benedictio.*"—Lib. ii, ad Uxor, c. 8.

[f] Thus, in one of his letters to S[t]. Virgil of Salisbury (his 19[th] letter) speaking of the unlawfulness of Christians marrying infidels, that father expresses himself as follows: "*Quum* "*ipsum conjugium velamine sacerdotali* "*et benedictione sanctificari oporteat quo-*"*modo potest conjugium, dici ubi non est* "*fidei concordia?*"

§2. CONSTITUTION OF MARRIAGE.

tury Pope Innocent the first,[a] all speak of the priest's blessing, as usually taking place in the case of christian marriages.

Its import not necessary to the validity.

BUT it was merely a pious usage, by no means necessary to the marriage, which was validly contracted by the consent of the parties, testified by their relations to whom they had declared it, *etsi Pompa aliaque nuptiarum celebritas omittatur.*[b]

LORD KAMES farther observes, "that, among the protestants marriage is not held to be a sacrament; from which "it has been rashly inferred that there is no necessity for a "minister. But this is an erroneous opinion."[c]

The sacrament of marriage required no priest.

NEITHER is this expressed with his lordship's usual accuracy. For even where marriage was considered as a sacrament, still the presence of a minister, though customary and approved of, was not deemed essential to its validity, either civilly as a contract, or spiritually as a sacrament. This appears from a very unexceptionable witness. Pope Nicholas I being consulted upon this very point by some Grecians, distinguishes what was usual and proper from what was essential. The usual solemnities he describes, adding *sicque demum benedictionem et velamen cœleste suscipiunt.* But he remarks that those solemnities were not essential, concluding as follows: "*ac per hoc sufficiat, secundum leges, "solus eorum consensus de quorum conjunctionibus agitur.*"[d]

[a] His holiness speaks of the "*benedictio quæ per sacerdotum nubentibus "imponitur.*" Epist. II, § 6, apud Labbei Concilia, t. ii, p. 1251.

[b] Cod. de Nuptiis, l. xxii.

Or, as it is expressed by Justinian in Novelle 74th, c. 4,—"*Antiquis "promulgatum est legibus, et a nobis "ipsis sunt hæc eadem constituta, ut "etiam nuptiæ extra dotalia instrumenta, ex solo affectu valeant et ratæ "sunt.*"

[c] Ibid. p. 34.

[d] Responsa ad consulta Bulgar. § 3, apud Labbei Concil. t. viii, p. 518.

§ 2. CONSTITUTION OF MARRIAGE —CONSENT

Now, it is material to take notice, that it was concerning the sacrament of marriage that the pope had been consulted: which, therefore, he must have been speaking of, when he said consent alone constituted it.[a]

SUCH continued to be the case till the time of the council of Trent;[b] which first determined the nullity of clandestine marriages.

Council of Trent.

BUT the Council of Trent did not pretend to pronounce a declaratory act, founded upon any idea, such as that of lord Kames, of there being any *a priore necessity* in the nature of the thing that rendered celebration in *facie ecclesiæ*, or the priest's blessing, essential to the validity of marriage. Both parties assumed the reverse; and concurred in putting the regulation upon the footing of the positive authority of the church alone. Nay, those who, on any other ground than this declaration of their nullity by the church, pretended to deny the validity of clandestine marriages, or marriages contracted by consent alone, without any solemnity, were declared by the council to be guilty of a damnable heresy.[c]

Heretical to call clandestine marriages null.

[a] M. Pothier, taking notice of this very passage, says—"*Que c'est du "mariage considéré comme sacrement, "que le pape entend parler: c'étoit sur "ce qui* étoit necessaire pour le ma- "riage comme sacrement, que les "bulgares l'avoient consulte."—Pothier de Droit, &c. t. iii, p. 287.

[b] The frequency of clandestine marriages was one of the evils which that council attempted to remedy. Among various remedies proposed, one was to declare such marriages *null*. As the English house of commons has seldom been adorned with more animated eloquence than on occasion of the strenuous opposition to their marriage act, so this celebrated council was hardly so much divided on any other subject as this. Against the motion for declaring such marriages null, there were no fewer than 56 prelates who answered by *non placet*. And it was strongly urged that it was not lawful, on account of the want of solemnities, to declare that marriage invalid, which at the time had been, *foro poli*, validly constituted by the *de presenti* consent of the parties.

[c] *Tametsi dubitandum non est, clandestina matrimonia libero contrahentium consensu facta, rata esse et vera matrimonia*

§ 2. CONSTITUTION OF MARRIAGE

Therefore, even in the very act of declaring clandestine marriages null, this council, as to the general point, is an authority against the opinion of lord Kames.

Clergy have no power as to the validity or invalidity of marriages.

IN annulling clandestine marriages, M. Pothier remarks, that the council exceeded the province of clerical jurisdiction; for it belongs to the secular power alone to determine as to the validity or invalidity of marriages.

Council of Trent altered the law where it was received.

THE Council of Trent was received in many parts of Europe; where therefore, of course, the priest's blessing became, thenceforward, essential to the validity of marriage; while, in those countries, again, which did not embrace it, the law still continued as formerly.

In France edicts passed.

IN France, however, where the Council of Trent was not received, king Henry the third judged it proper to make a special enactment annulling clandestine marriages;[a] which regulation was confirmed and farther followed out in the subsequent reigns. In France, then, clandestine marriages came to be null, and the priest's blessing necessary, *vi statuti*.

In England also, solemnities necessary *vi statuti*.

IN England, in like manner, similar statutes have been passed; and in particular the 26 Geo. II, c. 33, commonly called the marriage act, which Sir William Blackstone terms an innovation on the ancient laws and constitution.[b]

IN Ireland, "the marriage act, 26 Geo. II, never was

matrimonia quamdiu Ecclesia ea irrita non fecit, et proinde jure damnandi sunt illi, ut eos synodus anathemate damnat qui ea vera ac rata esse negant.

It passed the 24th session of the council. See father Paul's history of it; and Pothier, vol. ii, p. 291.

[a] It is the 40th article of his ordinances to the estates of Blois. "*Avons ordonné que nos sujets ne pourront valablement contracter mariage sans proclamations précédentes;—apres lesquels bans, seront épousés publiquement; et pour témoigner de la forme, y assisteront quatre témoins dignes de foi, dont sera fait registre, &c.*"—Pothier, de Droit Civil, &c. l. iii, p. 292.

[b] B. i, c. 15, p. 437.

" enacted; but certain acts have passed, particularly 9 Geo. II, c. 2, and 23 Geo. II, c. 10, to invalidate by suit in the ecclesiastical court (to be commenced within a year) the marriages of persons having estates to a certain amount therein specified, who marry under twenty-one, without consent of parents or guardians." [a]

[a] Brown's Civil Law, Lect. 1, p. 13.

After taking notice of the great controversy concerning the expediency of the marriage act, the learned professor says, "The act is not supposed to extend to Scotland; but lord Mansfield expressed great doubts upon that point."

But § 18 expressly provides, "that nothing in this act contained shall extend to that part of Great Britain called Scotland." Lord Mansfield, therefore, could not have entertained or expressed any such doubt. Probably the learned professor alluded to an *obiter dictum* of lord Mansfield's, when delivering his opinion in a question with respect to money won at play in France. His lordship said, "I admit that there are many cases where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect as other laws are. It has been laid down at the bar, that a marriage in a foreign country must be governed by the law of that country where the marriage was had, which in general is true. But the marriages in Scotland, of persons going from hence for that purpose, were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 33, and other writers. No such case hath yet been litigated in England, except one of a marriage at Ostend, which came before lord Hardwicke, who ordered it to be tried in the ecclesiastical court. But the young man came of age, and the parties were married over again; and so the matter was never brought to trial."—Burrow's Reports, 1079.

Lord Mansfield doubted, therefore, not whether the English marriage act extended to Scotland; but whether a couple resident in England, and purposely going to some other country, (no matter which), to get married, were not to be considered as *facientes fraudem legi*, which is agreeable to the opinion of many continental writers on the law of nations.

This distinction obtained in France. "*Tout ce que nous avons dit jusqu'a présent sur la nullité du mariage célébré hors de la présence et sans le consentement du curé des parties, a lieu, quand même le mariage auroit été célébré en pays étranger par des François, lorsqu'il paroît* que c'est en fraude de la loi qu'ils y sont allés. —*Il en seroit autrement d'un mariage qu'un François qui se trouveroit avoir, sans fraude, sa résidence dans un pays étranger, où il n'y a pas d'exercice de la religion catholique, auroit contracté avec une femme catholique, et qui auroit été célébré dans la chapelle d'un ambassadeur catholique par l'aumônier.*"—Pothier, t. iii, p. 297.

§ 5. CONSTITUTION OF MARRIAGE.

IN those countries, positive enactments have altered the law which was there formerly the same as it still is with us.[p] "The intervention of a priest," judge Blackstone observes, to solemnize this contract, is merely *juris positivi* and not *juris naturalis aut divini.*"

The marriage law of those countries formerly the same with ourselves, but altered by special enactments.

IN Scotland, no such statutes have ever passed; nor do the acts against clandestine marriage interfere with its validity. And on the common law of this country, the Council of Trent could not have any virtual operation which it had not in popish countries. Neither can it be imagined that previously thereto the common, civil, or ecclesiastical, law of Scotland was in this particular different, or stricter and more scrupulous than in the rest of Christendom.

§ 3. REGULAR —BANNS.

III. A REGULAR marriage requires two solemnities. The one is, that its celebration be preceded with banns, or proclaimed.[a] Banns are a public intimation of the intended marriage, and notification to those who know any objections

Yet this principle, how just soever in theory, the English courts do not appear to have deemed it fit to apply to the construction of a statute so unpopular, and of such dubious policy, as their marriage act. Such marriages are not winked at merely; the court of king's bench have decided in favour of their validity. "The appellant "and respondent, both English subjects, and the appellant being under "age, ran away without the consent "of her guardian, and were married "in Scotland; and, on a suit brought "in the spiritual court to annul the "marriage, it was holden that the "marriage was good."—Compton & Bearcroft, 1st Dec. 1768. Butler's *Nisi prius*, p. 113.

[p] Blackstone says expressly, "that "any contract made, *per verba de pre-* "*senti*, or in words of the present "tense, and in case of cohabitation, "*per verba de futuri* also, between per- "sons able to contract, was, before "the late act, deemed a valid mar- "riage to many purposes."—Black. b. 1, c. 15. So chief-justice Holt, in speaking of a marriage *per verba de presenti*, says, "this is a marriage, and "they cannot punish for fornication; "but only for not solemnizing the "marriage according to the forms "prescribed by law, but not so as to "declare the marriage void.' Burn's Eccl. Law, vol. ii, p. 30.

[a] Banns, from *ban*, Teutonic, a proclamation or publication.

4

thereto, to divulge them. Banns were introduced by the Lateran Council in 1216, under the pontificate of Innocent III. This ordinance of the Lateran Council was renewed, and more particularly regulated by the Council of Trent. § 3. REGULAR —BANNS.

THE same ordinance was adopted by our provincial councils, held at Perth in 1242 and 1269. Though of popish original, it was retained by the presbyterian church.[b] The holidays being abolished, the proclamation was required to be made on three several Sundays. The presbyteries at first were in the practice of dispensing with banns; but have not exercised such a power since the Revolution.[c] Dispensing with them.

THE proclamation must be made in the parish churches of the parties. If the ceremony is to be performed by an episcopal clergyman, the proclamation must be made in the episcopal congregation also. Of course, if the parties belong to any other dissenting congregation, the proclamation should take place there as well as in the parish church. "A certificate of the clerk of the kirk-session, that the banns were "duly published, is received as legal evidence that they were "proclaimed on three different Sundays; not to be traversed by positive proof that all the three proclamations were "made on the same day."[d] As a part "of the laudable "order and constitution of this kirk," banns are mentioned Where is the proclamation, if the parties are dissenters. Legal evidence of the banns.

b "In a reformed kirk," says the first book of Discipline, "marriages "ought not to be secretly used, but "in open face and public audience of "the kirk; and, for avoiding of dan-"gers, expedient it is, that the banns "be publicly proclaimed three Sun-"days, unless the persons be so known "that no suspicion of danger can "arise, and then may the time be "shortened at the discretion of the "ministry. But no ways can we ad-"mit marriage to be used secretly, "how honourable soever the persons "be. The Sunday, before the noon, "we think most expedient for mar-"riage, and it be used no day else "without the consent of the whole "ministry."

c Ersk. b. 1, t. 6, § 10.

d Ibid.

§ 3. REGULAR —BANNS.

in the act 1661, c. 34; as they also are in the statute 10 Anne, c. 7. The General Assembly have made several acts for the proper observation of this solemnity. In particular, by a resolution in 1784, it was provided, "that until persons have resided for the space of six weeks complete "within a parish, they are not to be considered as residenters, nor entitled to proclamation in the church thereof, but must be proclaimed in the church of the parish "where their ordinary residence was previous to their "proposed marriage. And that no precentor or session "clerk shall grant a certificate of proclamation in behalf "of any parties, unless he can attest, upon proper evidence, for which he shall be answerable, that they have "resided for the space of six weeks within the parish, "that they are unmarried persons, and not within the forbidden degrees of consanguinity."[a]

Statutes taking notice of banns.

Acts of the General Assembly.

—CELEBRATOR.

THE other requisite is, that the marriage be celebrated by a person duly authorized by law; that is, either a clergyman of the established church, or an episcopal clergyman, qualified in the manner required by special act of parliament. This will appear from a short view of the statutes.

Who can legally perform the ceremony.

View of the statutes.

[a] The resolution of 1784 is in these words: "The general assembly do "resolve, that no session clerk in this "church proclaim any persons in order to marriage, until he give intimation to the minister of the parish "in a writing, dated and subscribed "by him, of the names, designations, "and places of residence, of the parties to be proclaimed, and obtain "the said minister's leave to make "the said proclamation; with certification, that, if any certificate of "proclamation of banns is given, "without observing the above order, "the said certificate shall be held as a "false certificate, and the session clerk "who subscribes it shall be censured "accordingly; and, in case of a vacancy, the above intimation is to be "made to two of the elders of the "parish. And that this resolution be "printed in the acts of the assembly; "and appointed the clerks to transmit "copies of this their resolution to the "several presbyteries, to be by them "transmitted to the sessions of the "parishes within their bounds, in order to its being observed."

§ 3. REGULAR MARRIAGE —CELEBRATOR.

THE act 1661, c. 34,[e] directs that those who *marry*, or procure themselves married, in a clandestine and inorderly way, or by jesuits priests, or any other *not authorized by this kirk*, shall be imprisoned, &c. 1661, c. 34.

Concerning church government.

BY 1661, c. 16,[f] the present administration of the church by sessions, presbyteries, and synods, was allowed in the meantime. Episcopacy was restored only by 1662, c. 1.[g] The act 1661, c. 34, by ministers *authorized by this kirk* meant *presbyterians*, and it struck against episcopals, though Roman catholics seem chiefly to have been in view. Episcopacy restored by 1662, c. 1.

1690, c. 27, rescissory act.

ACCORDINGLY, in the act 1690, c. 27,[h] rescinding the acts against nonconformity to the episcopal church, the act 1661, c. 34, is not mentioned, though the act 1670, c. 6,[i] (passed in the time of episcopacy) is.

1695, c. 12.

THE act 1695, c. 12,[k] upon the narrative that baptising and solemnizing of marriages, by the laws and custom of this kingdom, and by the constitution of this church, have always been done by ministers of the gospel, authorized by law and the *established church of this na ion;* therefore prohibits all *outed ministers* to baptise or solemnize marriage, &c.

BY *outed ministers* here are meant the episcopal clergy, who were turned out of their churches at the Revolution.

Right of celebration confined to the establishment.

THE exclusive right to marry, therefore, remained still with the presbyterian church, the establlshed church, both in 1661 and 1695; and it deserves notice, that in the close of this same act 1695, c. 12, the former acts against *private and clandestine marriages* are declared to stand in full force.

e Parl. i. Cha. II.
f Ibid.
g Ibid.
h Parl. i, Will. & Mary.
i Parl. ii, sess. 2, c. 2.
k Parl. i, Will.

§ 3. REGULAR MARRIAGE —CELEBRATOR.

THE act 10th of Anne, c. 7, § 5, upon the narrative that since the establishment of the presbyterian government in Scotland, some laws have been made by the parliament in Scotland against the episcopal clergy of that part of the united kingdom; and particularly an act passed in 1695, intitled against irregular baptisms and marriages, by which all episcopal ministers who were turned out of their churches are prohibited, &c.; repeals the said act, and declares it free for all the episcopal ministers, not only to pray and preach in the episcopal congregations, but to administer the sacraments, *and marry* without incurring any pain or penalty whatsoever.

Anne 10, c. 7, 25.

Narrative of Anne's act.

Episcopals lawful to pray and preach, &c.

IT appears, therefore, that the clergy of the established church, and the episcopal clergy, authorized as required by the above of queen Anne, are the only ones authorized to marry; exclusive of all species of presbyterian dissenters, seceders, independents, baptists, &c.

Only presbytery clergy and episcopal clergy qualified to marry.

THIS is strongly marked by the said act of queen Anne, which, while it declares it lawful to all the protestant subjects *to assemble for divine service*, gives the power of marrying only to the episcopal clergy.

Q. Anne's toleration act.

THIS statute of queen Anne, whatever may have been the views of her tory ministry in passing it, and some other contemporary enactments,[a] must be admitted to have been a just and proper measure, and indeed a natural consequence of the incorporating union of the two kingdoms; whereby presbytery and episcopacy were distinguished from dissenting sectaries, and put on a level with each other as the two established modes of worship in the united kingdom. Rea-

[a] The law of patronage, and the renewal of the Christmas vacation, see Smollett's History, where bad motives are positively imputed to them, and Dr. Sommerville's, where the matter is considered more at large, and with great candour. P. 469, &c.

sonable, therefore, it certainly was, to relieve episcopal clergymen from severe and infamous penalties for doing in one part of the same kingdom the very thing which they alone were competent to do in the other. § 3. CLANDESTINE — CELEBRATOR.

SUCH is the letter of the law. Not to mislead, however, it is necessary to mention that the same indulgence, which queen Anne's act gives to episcopal clergymen, is in practice extended to all those, who are, *bona fide*, clergymen or pastors of tolerated dissenting sects. Yet the statutes are not in desuetude. Under them, those vile impostors, who without just pretensions to the clerical character, assume its functions, and drive a gainful trade by celebrating marriages, are punished; but dissenting clergymen never. Not one instance of any such prosecution exists. So have the spirit of the constitution and the good sense of the nation, corrected the letter of the law.

THIS indulgence indeed is justly considered no more than what they are well entitled to, on the sound principles of toleration, and under the spirit of those principles of civil liberty which were recognized at the Revolution. Relief to the episcopal clergy.

MARRIAGE, considered merely as a civil contract, involving patrimonial rights and consequences, is under the regulation of the state; which may make banns, or any other civil form or preliminary, indispensible, and the omission thereof punishable. how far to be extended.

BUT the nuptial blessing is a religious act with which the state cannot intermeddle, without violating the rights of conscience and religious liberty. The nuptial blessing and interposition of the priest in marriages, grew into observance among the earlier christians, without the interposition of the state. Had the Roman law held it essential to the validity of their marriages, or required under pains and

§ 3. CLANDESTINE —CELEBRATION.

penalties, that they should be solemnized in a pagan temple, and by a pagan priest, it would have been tantamount to prohibiting the marriages of christians altogether. They would have rather braved death, in its most frightful forms, than so far countenanced the heathen worship.

PRESBYTERY and episcopacy, and other protestant denominations, are not, indeed, opposite to each other, like paganism and christianity; yet the distinctions between these several modes of worship were not on either side deemed utterly frivolous and immaterial. During the bloody and tyrannous times which preceded the Revolution, the one deemed it lawful to employ fire and sword to procure conformity, and the others again chose to suffer rather than conform.

AT any rate, *majus et minus non variant speciem.* If the scrupulous conscience of any one of the episcopalian persuasion prevented him from considering that worship which was performed by a presbyterian clergyman in a presbyterian kirk, lawful or acceptable, was it not wise and right in the state to indulge his religious scruples, and permit him to obtain the nuptial benediction, from a minister with whom he was in the habit of joining in devotional acts and religious observances?

BANNS, indeed, were not to be dispensed with; but proclamation (both in the established and dissenting congregations) secured every object the state could have in view. The interposition, therefore, in favour of episcopalians was just and proper.

WHY then did not that relief extend in like manner to all protestant dissenters? Without recurring to the alleged views of the tory administration, which framed the act, a satisfactory answer will be found from the history of those

sects. Excepting a few Cameronians,[a] of no note or consideration, scattered over the southern mountains, the only dissenters in the reign of queen Anne, were papists, on the one hand, who were exposed to many disabilities, and episcopals, on the other, in favour of whom the statute in question was passed. It is not the practice of the legislature ever to extend relief beyond the evil existing at the time, and which attracted their attention. § 3. CLANDESTINE—CELEBRATOR.

BUT queen Anne's act seems to have fixed the principle, and determined the public mind. For when, in process of time, seceders and other sects arose, they were not persecuted for receiving the nuptial benediction from their respective priests; banns taking place in the dissenting, as well as the established congregations. Even at the first, when the recency of the schism most embittered men's minds, the mother church did not attempt to hinder dissenting clergymen from performing such clerical functions any more than from baptizing and celebrating the sacrament.

AN irregular marriage is a punishable offence. The parties, as well as the celebrator and witnesses, are liable in pains and penalties; and equally, whether the defect lie in the omission of banns, or in the incompetency of the celebrator. Irregular marriages punishable.

THE parties, by the act 1661, c. 34, are punished with three months imprisonment, besides certain penalties.[b] And —PENALTY.

[a] A sect of presbyterians who first appeared in the reign of Charles II, so called from Cameron their leader. See Laing's Hist. Vol. ii, p. 699.

[b] Parl. i, Car. II.

The penalties are, for each nobleman, 1000l Scots; each baron and landed gentleman, 1000 merks; each gentleman and burgess, 500l. Scots; and to "remain in prison aye and "until they make payment of these "respective penalties." And, if any person residing in Scotland, marries with a person residing in England or Ireland, without previous proclamation of banns, the penalty is,

§ 3. CLANDESTINE —PENALTY.

by the statute 1698, c. 6,[b] the penalties are made still higher, in case of their not declaring, when requested, the names of the person who celebrated, and of such as were witnesses to the irregular and clandestine marriage.[c]

THE penalty by the last act, on the witnesses, is to be £100 Scots, each, to be applied in like manner with the other penalties.

THE person, again, who celebrates such clandestine or irregular marriage, is, by the first act,[d] "to be banished "the kingdom, never to return therein under the pain of "death;" and by the other statute,[e] he is liable to be summarily seized and imprisoned by any ordinary magistrate or justice of peace, and is further punishable by the privy council, not only by perpetual imprisonment, but by "such pecunial or corporal pains as the said lords of privy "council shall think fit to inflict."

THE charge, so far as it relates to the omission of the banns, involves the proof of a negative. It is therefore attended with this peculiarity, that the prosecutor has suffi-

is, for each nobleman, 1000l. Scots; for each landed gentleman, 1000 merks: for each burgess, 500l. Scots; for each other substantious person, 500 merks; for an yeoman, 100l. Scots; for each person of inferior quality, 100 merks: the one half of which "shall belong to the king's "majesty, the other to the paroch "or paroches where the married per-"sons did reside." And the king's advocate, and procurator for the kirk, are ordained to pursue for these penalties before the civil judge; and, in "case of the poor condition of any "man married in manner foresaid, "he is to be punished with stocks "and irons; which pains, corporal "and pecunial, shall no ways be pre-"judicial to, or derogate from, the "order or censures of the kirks, to be "inflicted against the delinquents."

b Parl. i, Will.

c The penalties are, in that case, for a nobleman, 2000l. Scots; each baron and landed gentleman, 2000 merks; each gentleman and burgess, 1000l. Scots; each other person, 200 merks: to be applied to pious uses within the parishes: and farther to be imprisoned till payment of the penalties, and till they declare the names.

d 1661, c. 34.

e 1698, c. 6.

ciently made out his case, if he prove the "celebration of "the marriage, and that no certificate of proclamation of "banns was on that occasion produced to the minister."[f] § 3. CLANDESTINE —PENALTY. Proof.

THE general statute gives the justices of peace no power to inflict the penalties incurred by the irregular celebration of marriage. The act 1661, c. 34, appoints the penalties to be pursued for by the lord advocate, and procurator for the church, before the civil judge; which cannot well be supposed to mean justices of peace, who, unless by special statute, have no civil jurisdiction. By whom punishable.

THE execution of the act 1695, punishing with banishment all outed ministers who marry or baptize, is intrusted to the privy council, and all other magistrates, judges and officers of justices, which, no doubt, includes justices of the peace; and the act 1698, c. 6, ordains the celebrator to be summarily seized and imprisoned, by any ordinary judge or justice of peace; so that the jurisdiction of justices of peace would seem to be limited to that special case. 1695, by whom to be executed.

IT is the religious act of pronouncing the nuptial benediction that is here punishable if performed by an unqualified person. For, "if a couple go into the presence of a "magistrate, and there exchange the matrimonial consent, "in this there does not seem to be any thing unlawful on "the part of the magistrate, who does not pretend to marry them, or at all to officiate in the matter, but merely "serves as a reputable witness of the act and civil contract "of the parties."[g] when incurred.

IV. TOUCHING the constitution of marriage, that nice and most interesting subject of human legislation, so stands the law of Scotland; in unison with sound policy and the genuine principles of natural jurisprudence. § 4. PARENTAL CONSENT.

[f] Hume, Vol. ii, p. 329.

[g] Hume, Vol. ii, p. 327.

§ 4. PARENTAL CONSENT.

MARRIAGE, without the consent, or against the inclination, of parents and guardians, is not merely not invalid: it is not even punishable by any penalty or disability whatever; such consent not being put on the same footing with any of those solemnities which are necessary to constitute a regular marriage.

YET the law of Scotland is not exceeded by that of any other nation, ancient or modern, in tender and jealous regard for parental authority, and anxious endeavours to discountenance all appearances of disobedience or disrespect by children to their parents.

BUT in regard to marriage, it wisely deems parental authority best intrusted to its natural sanctions; esteem, gratitude, affection, and the legal power of parents in the disposal of their property. *La douce persuasion doit t'imprimer dans les coeurs et non pas la force y contraindre.* If love prove too strong for these motives to withstand it, the law of Scotland deems the evil already too desperate to admit of any remedy but the speedy marriage of the lovers. "If the father, friend, or master, gainstand their request, "and have no other cause than the common sort of men "have, to-wit, *lack of goods*, and because they are *not so* "*high born* as they require,"[i] the law of Scotland disapproves of the opposition of parents, as an unlawful exertion of authority: for (to use the homely but significant words of the venerable authors of our ecclesiastical polity) "God's "work ought not to be hindered by the corrupt affections "of worldly men. The work of God we call, when two "hearts, without filthiness before committed, are so join-"ed, and both require and are content to live together in "the holy bond of matrimony."[k] This union of hearts, the

[i] First Book of Discipline, tit. Marriage.

[k] Ibid.

But while these liberal sentiments

writers on general law term marriage, *foro poli;* and from such marriage the law of Scotland deems it unjust, unwise, and impolitic, on account of the disinclination of parents, to withold the sanction of human authority. *Tædæ quoque jure coïssent; Sed vetuere patres, quod non potuere vetare . . . Quoque magis tegitur, tectus magis æstuat ignis.* § 4. PARENTAL CONSENT.

V. IF either of the parties die within year and day, the tocher returns to the wife, or those from whom it came; and all the interest, either legal or conventional, arising to the wife in the husband's estate, returns to the husband or his heirs,[a] unless the contract of marriage contain a special clause to the contrary. But "a provision of land or money "made by the husband's father, not to the wife or to the "issue of the marriage, but without restriction to his own "son, which, because it does not form a contract between § 5. DISSOLUTION.—DEATH. within a year and day, its effects.

were expressed for the encouragement of youthful attachments, it was far from the intention of these good men to encourage hasty and clandestine marriages, or to represent the approbation of parents as a thing of no moment—on the contrary, they considered the dissent of parents as a serious evil, to remove which no pains should be spared. The whole passage runs as follows:

"If the father, friend, or master, "gainstand their request, and have "no other cause than the common "sort of men have, viz. lack of goods, "and because they are not so high "born as they require, yet must not "the parties whose hearts are touched, make any covenant till farther "declaration be made unto the kirk "of God; and, therefore, after that "they have opened their minds to "their parents, or such others as "have charge over them, they must "declare it to the minister, or to the "civil magistrate, requiring them to "travel with their parents for their "consent, which to do they are "bound. And if they, to wit, the "minister or magistrate, find no "cause, that is just, why the marriage required may not be fulfilled, "then, after sufficient admonition, "to the father, friend, master, or superior, that none of them resist the "work of God, the minister or magistrate may enter in the place of "parents, and be consenting to their "just requests, may admit them to "marriage; for the work of God "ought not to be hindered by the "corrupt affections of worldly men."

[a] Ersk. b. i, c. 6, § 38.

§ 5. DISSOLUTION —DEATH.

" the married parties, but barely between one of the parties " and his father, without any stipulation in favour of the " wife or the issue of the marriage, continues in full force, " let the marriage be of ever so short a duration.[b] If a " living child be procreated of the marriage, who has been " heard to cry, the marriage has the same effect as if it " had subsisted beyond the year."[c]

If a living child cry.

THE husband must repay the tocher without any deduction, on account of any expence of the family during the marriage; but he is entitled to deduct his wife's funeral expences. " Where things cannot be restored on both " sides to their former state, it would be inconsistent with " equity and with the spirit of the law, to restore one " party and not the other."[d]

Repays the tocher or dowry.

Deducts funerals charges.

" PRESENTS, made on account of the marriage, to the " new married pair"..." or by the husband himself to the " wife at the marriage, whether of subjects properly paraphernal, or of common goods, ought not to be restored."[e] The indigent widow of an opulent husband was found entitled to aliment from the heir, though not to her legal provisions.[f]

Marriage gifts.

Indigent widow alimented.

WHEN marriage dissolves after year and day, the sur-

[b] Home, 132. Kilk. Husband and Wife, N°. 5. Ersk. b. v, t. 6, § 38. Lord Kilkerran seems not to be quite satisfied with the decision; but since his time the point has been decided more than once in the same way.

[c] Ersk. ib. 17th July 1765. It was not held sufficient that the child breathed and lifted its arm.

[d] Ersk. b. i, p. 116. Hence, an infeftment granted by the husband for the wife's jointure, was found to subsist, though the marriage dissolved within the year as a security for the repayment of her tocher.—20th July 1664, Petrie.

[e] Ersk. Ed. 1805, b. i. t. 6, § 40.

[f] Fac. Coll. 15th Dec. 1786, Mrs. Barbara Louther against Murdoch M'Laine.

viving husband becomes the irrevocable "proprietor of the "tocher: and the wife, where she survives, is entitled to "her jointure, or to her legal provisions of *terce et jus* "*relictæ*;" to mournings and aliment, from the day of his death till the term at which her life-rent provision commences; which are to be "regulated, not by the extent "of her jointure, but by the husband's quality and for- "tune, and the condition of the family left by him.[g] §. 5. DISSOLUTION —DEATH. After year and day. Mournings. Aliment to the term.

ALL voluntary contracts of separation were, by our more ancient practice, null from the beginning. But, by our later practice, they are effectual during the whole period of the separation; the alimentary provisions which they contain, being granted by the husband in consequence of his natural obligation to maintain the wife. Still, however, they are revocable. The husband is understood sufficiently to revoke any such contract, by offering to receive his wife again into the family; and the wife, notwithstanding the existence of such voluntary contract, may bring an action for a separation, "*a mensa et toro*."[h] —VOLUNTARY SEPARATION. If revocable If he offers to receive her back.

IF the husband should abandon his family, or turn his wife out of doors, or by barbarous treatment endanger her life, or even be guilty of such indignities to her person as to render her life uncomfortable, it is competent for the commissary court to authorise "a separation *a mensa et* "*toro*, and award a separate alimony to her, suitable to "her husband's fortune, to take place from the time of "the separation, and to continue till there shall be either "a reconciliation between the parties, or a sentence of "divorce."[i] But this does not loose the nuptial tie, or leavet hem at freedom to intermarry with others: that requires a sentence of divorce. —LEGAL SEPARATION. For what causes. Alimony in such cases.

g Ersk. b. i, t. 6, § 22.
h Nov. 28, 1797, Lawson, Fac. Coll.
i Ersk. b. i, t. 6, § 19.

§ 5. DISSOLUTION. —DIVORCE.

"DIVORCE is such a separation of married persons during their lives, as looses them from the nuptial tie, and leaves them at freedom to intermarry with others."[k]

On what good ground.

Divorce may proceed in an action brought before the commissary court, at the instance of either husband or wife, against the other who has been guilty of adultery.[l]

No collusive divorces.

No divorce can proceed which is carried on by collusion between the parties.[m] Lord Bankton says, "it is a good "defence against divorce for adultery, that the pursuer is "guilty of the like crime; for he or she cannot take the "benefit of that law against which they offend."[n] The court of session have found that recrimination cannot be pleaded by exception.[o] And when that point was last before the court, it seemed to be the general opinion that it was not a good defence, although the guilt was proved in a counter action of recrimination.[p]

Recrimination.

[k] Ersk. b. i, t. 6, § 43.

[l] "With us in England," says Sir W. Blackstone, "adultery is only a "cause of separation from bed and "board"..."however, divorces, *a vinculo matrimonii*, for adultery have of "late years been frequently granted "by act of parliament." B. i, c. 15.

The same formerly was the case in France, marriage being there considered as a sacrament agreeably to the canon law. But since the Revolution, divorces are allowed on the most trivial pretences. See vol. i, p. 98. In England, "to prevent divorces, *a* "*vinculo matrimonii*, from being obtained in parliament, by fraud and "collusion, the two houses not only "examine witnesses, to be convinced "of the adultery of the wife, but "they require also that the husband "shall have obtained a sentence of "divorce in the spiritual courts, and "a verdict with damages in a court "of law from one who has had criminal intercourse with the wife." Christian's Note, 13. ib.

[m] Accordingly, *lenocinium* was found to be a good defence to the wife in an action of divorce, at the instance of her husband on the ground of adultery. Falc. Feb. 28, 1745, M'Kenzie.

[n] B. i, t. 5, par. 128, quoting l. 39. ff. Sol. Mat. c. 6, Ex. de Adult.

[o] 9th March 1787. The court allowed the wife to repeat a counter action of divorce, but under a qualification, that by adopting that form of procedure, she should not be prevented from pleading the recrimination, when proved as a total bar to a decree of divorce, nor the pursuer from pleading his answers thereto.

[p] 7th Dec. 1799. One of the judges observed, "that the contrary opinion

§ 5. DISSOLUTION —DIVORCE

IT is by virtue of a special statute,[a] that the party, divorced for adultery, is disabled from marrying the person with whom the adultery is said, by the sentence of divorce, to have been committed.[b] If the parties cohabit afterwards in the knowledge of such adultery, this bars the action of divorce.[c]

Cohabiting after knowledge of the guilt.

Desertion.

DIVORCE is allowed on the ground of desertion. Where either party has deserted from the other for four years together, the latter may[d] sue for adherence before the commissaries, whose decree the court of session may enforce by letters of horning. If these have no effect, the church is to proceed, first by admonition, then by excommunication; all which previous steps are declared to be a sufficient ground

" had arisen from not distinguishing " betwixt separation, *a vinculo matri-* " *monii*, and the civil effects thereof; " that recrimination may alter the " latter though it cannot prevent the " former." The lord president observed, " that if recrimination was " competent at all against a divorce, " it would be competent as an excep- " tion; but the contrary was found " in the case of Sir William Jardine. " If both parties pursue, the civil " consequences must necessarily be " affected. Two adulteries form a " double ground for dissolving mar- " riage. This is a different thing " from dissolving marriage by collu- " sion or mutual consent. For such " an object, had it been in view, one " adultery would have been suffi- " cient."

[a] 1600, c. 20.

[b] The canon law permits the adulterer, after the marriage is dissolved by the wife's death, to intermarry with the very woman with whom he was guilty, except in the special case where the adulterers had contrived and had been accessary to the death of the wife. Decretal. Greg. l. iv, t. 7, c. 6.

[c] A wife had been very much maltreated by her husband, and obliged to leave him, but returned on promise of amendment. This happened more than once. Afterwards, finding him likely to continue his mal-treatment, she left his family, and brought an action for separation, *a mensa et toro*, and offered a proof of all the maltreatment from first to last, as a reason for obtaining decree. It was objected, that she should be allowed to prove only what was subsequent to the last reconciliation. But the court were clear that the analogy of what obtained in the case of adultery, did not apply to the case of mal-treatment; and that it was competent to prove the whole of his mal-treatment, from first to last, in order to satisfy the judge that there was good ground for separation.

[d] 1573, c. 55.

§ 5. DISSOLUTION —DIVORCE

for suing for a divorce. *De praxi*, the commissaries pronounce sentence in the adherence after one year's desertion; but four years must intervene between the first desertion and the decree of divorce.[a]

Effects of divorce. Adultery. If the husband, if the wife, be the guilty party.

IF the marriage be dissolved in consequence of the adultery of the husband, and there be no contract of marriage, the wife gets her legal share of the goods in communion, and her *terce*, just as if the husband were dead. In like manner, if the wife be the offending party, the husband divides the goods in communion with her, just as he would have done with her executors had she been dead. And if the legal rights be superseded by a marriage contract, it takes effect in favour of the innocent person, as it would have done by the death of the party guilty.

If on desertion.

BUT if the divorce proceed on the head of desertion, the guilty persons are ordained "to tyne and lose their "tocher;"[b] by which, says Mr. Erskine, "when applied "to our law, must be understood the provisions that the "wife is entitled to, either by law or by paction, in con- "sideration of the tocher; and the meaning of the act is, "that the offending husband shall restore the tocher, and "forfeit to the wife all her provisions legal and convention- "al; and, on the other hand, the offending wife shall forfeit "to the husband her tocher, and all the rights that would "have belonged to her in the case of her survivance."[c]

§ 6. RIGHTS AND INTERESTS —COMMUNITY.

VI. MODESTINUS calls marriage *divini et humani juris communicatio*.[d] Which definition, in regard to the civil or patrimonial consequences at least,[e] seems to describe the

[a] Ersk. B. i, t. 6, § 44.

[b] James VI, parl. 4, 1573, c. 55.

[c] Ersk. B. i, t. 6, § 25, octavo edit.

[d] Ff. L. i, De Ritu Nuptiarum.

[e] The Roman wife became entitled to the protection of her husband's household gods (*penates*), and entitled to

state of marriage with ourselves better than among the Romans; where, in several respects, husband and wife were considered as distinct persons with separate properties and interests.[a] § 6. RIGHTS AND INTERESTS —COMMUNITY.

THE wife enjoys the same rank and precedency with her husband, except such as is merely professional or official:[b] So much so, indeed, that the widow of a peer who marries a commoner loses her rank. But if the widow of a duke, for example, marry a nobleman of inferior title, she continues a duchess still, for all the nobility are peers; and therefore, it is no degradation.[c] Even the widow of a peer marrying a commoner, "is commonly called and addressed "by the stile and title which she bore before her second "marriage, but this is only by courtesy; as the daughters "of dukes, marquisses, and earls, are usually addressed by "the title of a lady, though in law they are commoners."[d] But a peeress in her own right gives no rank to her husband, nor loses her own rank by marriage.

If the rank be professional only.

Peer's widow marrying one of an inferior title,

or a commoner.

THE common interest of husband and wife, in their respective effects, is styled the *community of goods*. As marriage continues no longer than the joint lives of the two individuals, so the community resulting from it includes no rights, on the one hand, which, without perishing in the use, may be transmitted from one generation to another;[e] but all

Community of goods.

to join the family worship that was regularly offered to them. See Hein. Antiq. lib. i, tit. x, § 4.

[a] See the book of the Codex, which is entitled "*Ne uxor pro marito, vel "maritus pro uxore, vel mater pro filio "conveniatur.*"

[b] Black. B. i, c. 12, p. 406.

[c] Ibid. p. 401.

[d] Ibid.

"In a writ of partition, brought "by Ralph Haward and lady Anne "Powes his wife, the court held that "it was a misnomer, and that it ought "to have been by Ralph Haward and "Ann his wife, late wife of lord "Powes deceased." Dyer, 79.

[e] As a land estate, a tenement of houses, a right of tithes; nay, a bond of borrowed money if it carries interest, which is *feoda pecuniæ*. Ersk. B. i, t. 6, § 12.

§ 6. RIGHTS AND INTERESTS — COMMUNITY.

rights, on the other hand, of a temporary nature, and producing no yearly profits, (except *paraphernalia*, which are exclusively the wife's property, though they were given to her by the husband subsequent to the marriage;[a]) even the yearly rents of lands, &c. or interest of bonded money; and even the arrears of a wife's jointure by a former husband.[b]

Division of goods.

ON the death of either party the goods in communion fall to be divided.

If no children.

IF there be no children, one half goes to the surviving spouse, and the other half to the relations of the deceased.

If children.

IF there be children, the goods undergo a *tri-parte* division. If the father die, leaving widow and children, one third goes to the widow; another third goes to his children equally among them, whether of that or any former marriage, as legitime; and the other third is considered the dead's part, which, if the defunct has not otherwise disposed of it, will go to the children in right of succession. If the deceased left no widow, but children, they will take one half as legitime, and the other half as dead's part.

If the husband die.

If a widow and children.

Dead's part.

If no widow but children.

If a widower and children.

IN like manner, if the wife predecease, leaving children, the goods in communion are supposed to be divided in three shares; two thirds remain with the father, one is due to him in his own right, and the other as legitime, of which he continues to have the administration as before, for behoof of his children; and the remaining third divides among her child-

[a] See Vol. i, p. 124, note 6.

[b] With respect to this last case, lord Kilkerran says th court were not unanimous, as the first husband had provided by the marriage contract, that each term's annuity should bear interest if not paid.

ren, whether of that or any former marriage, *in capite*. If she has no children, it will go to her nearest of kin.[a] § 6. RIGHTS AND INTERESTS —COMMUNITY.

THE interest of the wife and children in the community, depends upon its value at the dissolution of the marriage. If it be diminished or exhausted, they must suffer; as, on the other hand, if its value be increased, they are gainers. Value, at the dissolution, is the rule.

IF the wife was infeft in heritage at her death, the husband by courtesy enjoys the liferent of it. And if the husband, predeceasing, was infeft in heritage, the wife has her terce, or the liferent of a third of it. Liferent; terce.

THE husband has the entire right of management. He can even gratuitously give away the goods in communion; but he cannot bequeath or dispose of them by any testament or *mortis causa* deed to take effect at his death. *Jus mariti*.

HE has even the right of managing such property as does not fall under the *jus mariti*. With respect even to her heritable property, the wife cannot do any thing without his consent and concurrence. Without his concurrence she cannot sue; nor be sued without he be made a party to the ac- The wife cannot sue without his consent.

[a] Personal bonds, bearing interest, it was observed, do not fall under the community; but, in respect of succession, they are moveable by act 1661, c. 32. The legitime and dead's part, therefore, they increase, though not the share of the widow: and as such bonds, when due to the husband, do not benefit her; so, when they are due by him, they do not lessen her share of the effects, but are a burden altogether upon his children or next of kin. These observations concerning the legitime and *jus relictæ*, 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. Ersk. B. iii, t. 9, § 22.

§ 6. RIGHTS AND INTERESTS —COMMUNITY.

tion: but deeds *mortis causa*, not having an effect till the dissolution of the marriage, she may execute without it.

Cannot personally bind herself.

EVEN with his consent a wife cannot come under any personal obligation. With respect to the wife herself, as well as her husband, a bill or bond granted by her, is entirely null. Even when she is *preposita negotiis*, or entrusted with the management of any business, she does not bind herself, but her husband only.

Preposita negotiis.

Natural *prepositura.*

The wife has naturally the management of the family: "in which character she hath power to purchase whatever "is proper for the family; and the husband is liable for "the price, even though what was purchased may have "been applied to other uses, or though he may have given "the wife a sum of money *aliunde* sufficient for the family expence." [l]

If they live apart?

THIS *præpositura* ceases if the wife live apart from her husband; or if he *inhibite* her, "the husband is not liable "for any debt contracted by his wife after inhibition, except for such furnishings, suitable to her quality, as he "cannot prove that he provided her in *aliunde*." [m] A husband having left Scotland in bankrupt circumstances, his wife entered into trade to maintain herself and her children, and having granted a bill, was, as an unmarried woman, found liable to *personal diligence*, or execution. [n]

Family residence.

THE husband has also the power of fixing the family residence. In France, this doctrine is said by M. Pothier, to be so far limited, that a wife cannot be compelled to accom-

[l] Dirl. 310; Harc. 871; Ersk. B. i, t. 6, § 26.

[m] Gosf. June 23, 1675; Auchinleek, July 25, 1676, Campbell, Ersk. B. i, t. 6, § 26.

[n] Fac. Coll. July 11, 1789, Churnside against Currie.

pany her husband to a foreign country.[a] The question, it is believed, has not yet occurred in our courts. Pothier's opinion seems in unison with that of Cicero, when he asks, "*an potest cognatio ulla propior esse, quam patriæ in qua parentes etiam continentur?*"[b] § 6. RIGHTS AND INTERESTS — COMMUNITY.

LEST this *maritalis potestas* should be employed to the prejudice of wives, deeds granted by them, in favour of third parties, with the consent of their husbands, are revocable, unless they be secured by ratification;[c] that is, the wife must appear before a judge, and swear that she was not induced to grant the deed *vi et metu*. This renders the deed irrevocable, even although consequentially it should benefit the husband. Ratification.

BUT pure donations in favour of the husband are not the subject of ratification, but are always revocable; as are also those of the husband to the wife, *ne conjuges mutuo amore sese spoliarent*. Donations.

THE husband having the sole management of the goods in communion, is liable for his wife's debts, even those contracted before marriage; as if she had granted a bill or Husband's liability.

[a] Tom. iii, p. 456.

[b] In the late case of sir James Colquhoun, the court of session sanctioned what to some appeared a still stronger exercise of this *maritalis potestas*. They found that the husband could dismiss his wife from the family, provided he furnished her with another house, and money to live apart suitably to her rank. This decision was far from being unanimous. The judges who were in the minority, observed, that the husband's powers were *as head of the family*. Uncontroulable they allowed him to be in every thing relating to the management of the family, as to the residence, &c.; but it was contended, that he could not, of his own authority, thrust her out of doors, because this was depriving her of her *status*, and must be presumed an unlawful act, till it was sanctioned by a judge, on advising all circumstances. 7th March 1804. Fac. Coll.

[c] 1481, c. 84.

§ 6. RIGHTS AND INTERESTS.

incurred a merchant's account for goods, clothes, &c. the husband is liable; and equally whether she brought any tocher with her or not.[a] Yet, in all such questions, the wife is considered the proper debtor; the husband being called only for his interest, and as managing the community. Of course, after the dissolution of the marriage, he ceases to be liable for her debts; unless either his estate had been attached by complete legal diligence during the marriage;[b] or unless he be *lucratus*, that is, enriched by her estate, which will be judged of according to the situation of the parties and their condition in life. A moderate tocher is not considered as making a husband *lucratus*.[c] The husband, even though *lucratus*, is liable only *subsidiarie*; that is, if the wife's own separate estate proves insufficient.[d] The husband is not liable for those debts due *by* the wife, which, had they been due *to* her, would have made no part of the community. Thus, if the wife was owing a bond, the husband is not liable for the principal, but for the interest only; viz. the arrears, and what may fall due during the marriage.

Wife's bills granted before marriage.

Wife the proper debtor therein.

Diligence used against the husband.

Lucratus.

What sort of debts?

Contracts. *post* or *ante*-nuptial.

MARRIAGE contracts are either post-nuptial or ante-nuptial. Post-nuptial contracts are equally irrevocable with the other, in so far as they are fair and moderate; for so far they are *onerous*, that is, not gratuitous. Their irrevoca-

[a] In France, M. Pothier says, that some lawyers thought that the husband having, as chief of the community, been liable *in solidum* for such debts, he still continued to be so after the dissolution of the community; but that he himself, on the contrary, thought that the husband then ceased to be liable *principally*, except for one half, while, however, he continued still liable for the other half *subsidiarie*. "*N'en ayant été débiteur, qu'en sa qualité de chef et seigneur de la communauté, cette qualité venant à se restreindre par la dissolution de la communauté (lorsqu'elle est acceptée par les heritiers de la femme) à celle de commun pour moitié.*"—Droit Civil, &c. tom. iii, p. 827.

[b] Diligence against his person will not do. Haddington, 26th Feb. 1723, Douglas, nor diligence against his estate if incomplete, 23d Jan. 1678, Wilkie.

[c] 23d Dec. 1665, Burn.

[d] Falconer, 54.

bility, therefore, will depend on their adequacy and suitableness under all the circumstances of the case.

§ 6. RIGHTS AND INTERESTS —CONTRACTS.

MARRIAGE contracts are as various as the views and intentions of parties.[a] "It is unnecessary for me," lord Gardenston observes, "to lay before country gentlemen the "nice distinctions of lawyers from which such questions "have arisen. It is sufficient to suggest a plain and proper "caution by which they may avoid such doubts and con- "troversies. In all contracts of marriage, wherein land or "money is provided, in the form of conjunct fee and life- "rent to the husband and wife, and to the heirs of the "marriage, &c. in fee, the addition of two or three words "will serve to explain the sense of parties, and prevent "questions of this nature only by adding the words, *for "the wife's, or for the husband's, liferent use allenarly,*" as parties are agreed;[b] if parties mean the right to carry no more than the liferent. Farther, "it is very material to "advert that the provisions for the wife, in case she sur- "vive her husband, be expressed as *in full satisfaction of "all her legal claims in that event*, and that they are *also "in full satisfaction* of any claim her executors can have "in the event that she predecease her husband." And also, that they are to take effect, though the marriage dissolve by death within year and day.[c]

Lord Gardenston's opinion.

[a] In general, however, they may be resolved into three distinct classes, Either, 1st, the property is vested in trustees for the purposes of the contract, and the father is denuded; or, 2dly, the contract may prohibit the father from contracting debt, which may be enforced by interposition of a cautioner or by warrandice, or there may be an obligation at a certain period to denude; or, 3dly, the contract simply settles the property on the father and the heirs of the marriage, which only bars gratuitous deeds. According as the deed is made out, in one or other of these ways, the children are more or less secured. But, with respect to their phraseology and construction, which daily give rise to important questions in *apicibus juris*, it would not be possible to state any thing useful in practice without going into too long a detail.

[b] MS. tit. Marriage,

[c] Ibid.

§ 6. RIGHTS AND INTERESTS —CRIMINAL MATTERS.

Have they a common interest?

IN criminal matters, husband and wife have no common interest, but must answer severally for their respective misdemeanours. The wife may be imprisoned, or otherwise corporally punished, as the case may require. But, with our neighbours in England, "if a woman commit theft, "burglary, or other civil offences, against the laws of so- "ciety, in her husband's company, which the law con- "strues a coercion; she is not guilty of any crime, being "considered as acting by compulsion, and not of her own "will: which doctrine is at least a thousand years old in "this kingdom, being to be found among the laws of king "Ina the West Saxon."[a] With us, on the contrary, in Scotland, the wife is not treated with so much indulgence. "If the husband and wife go out together and steal, or, "if the husband steal, and the wife receive the spoil into "her private repositories and particular keeping; or, if "the husband forge the notes, and the wife is employed "to put them in circulation, we will rather be disposed "to follow the precept of the old law of William for such "cases, which holds both for guilty, and punishes them "according to their demerits."[b] No criminal prosecution, however, can go on against her without calling her husband.[c] The wife cannot even wave the defence that her

[a] Blackst. B. iv, p. 28.

[b] Hume, Criminal Law, Vol. i, p. 43.

[c] The contrary seems to obtain in England. Helen Bent was delivered of a bastard child. Thereafter she married. The justices made an order of filiation, charging her with 8d. a week towards the relief of the parish, and till payment thereof committed her to the house of correction. She was brought up by *habeas corpus*. The opinion delivered by the court was, that "a *feme covert* is liable to "be prosecuted for crimes commit- "ted by her. This woman has dis- "obeyed the order of the justices, "and the statute prescribes the pu- "nishment here inflicted upon her. "There is no need to summon the "husband in a criminal prosecution "against the wife." Burrow, Mansf. 1681. E. 5, Geo. III. See Dr. Burn. tit. Bastard.

husband is not called.[c] For, even in such matters, the husband is understood to be *dominus litis*, and responsible to a certain extent for the right conducting of the litigation.[d]

§ 6. RIGHTS AND INTERESTS —CRIMINALS.

BUT, for those sums, whether in name of damages or fine, that may be awarded against the wife on account of any such delinquency, the husband is no more personally responsible than for any corporal punishment to which she may be sentenced. In the one case, he no more *luit in cære*, than, in the other, *in pelle*;[e] which, indeed, seems to be a principle, not of municipal merely, but of constitutional law. For, the memorable declaration of the Scottish estates, that king James the seventh "hath forfaulted his right to the "crown,"[f] particularly mentions, amid other griev-

Even in criminals the husband is *dominus litis*.

Husband not liable for fines.

[c] Isabel Freebairn, and Muir her husband, against Helen Grant; 8th Dec. 1749. In this case the court found, "that the process could not "proceed, the husband not being "called, which objection the wife "could not wave." The court therefore suspended "a decree of the com- "missary of Glasgow, obtained at "the instance of Isabel Freebairn "against Helen Grant decerning "her 'to stand at the court door for "half an hour, with a label above "her head acknowledging her crime, "in uttering certain injurious ex- "pressions against the said Isabel, "and to subscribe a recantation, all "under the penalty of 10l. sterling, "and afterwards decerning in the "penalty as incurred." Kilk. Tit. Husband and Wife, No. 15.

[d] 19th Feb. 1790, Chalmers against Douglas and husband. The wife, for defamation, was found liable in a fine and damages. The court of session found the husband liable in the expence of the action. But the house of peers "remitted back the cause to "the court of session, to inquire how "much of the said sum of expence "of process had been occasioned by "the conduct of the defender in the "cause, as he was responsible for the "conduct of the cause, in so far as "the same was malicious, vexatious, "and calumnious." Dict. Vol. iii, tit. Husband and Wife.

[e] This is the common law; if particular statutes make any exceptions, such statutory liability is law applicable to such particular cases only. (See under the article "Planting "and Enclosing," where there is an example of such liability, though rather in appearance than reality.

[f] See "Declaration of the Estates "of the kingdom of Scotland, con- "taining the Claim of Rights and "Offer of the Crown to their ma- "jesties king William and queen "Mary." Scots Acts, Vol. iii, small edit. p. 156.

§ 6. RIGHTS AND INTERESTS —CRIMINALS

ances, that the "fyning husbands for their wives with-"drawing from church was contrary to law:" Wherein the thing chiefly in view appears to be the illegality, not of punishing the offenders themselves for what was truly not blameable, but of subjecting husbands in the penal consequences of the real or imagined delinquency of their wives.

THOUGH, during the subsistence of the marriage, the wife may be corporally punished, as by imprisonment, scourging, banishment, pillory, yet, till the dissolution of the marriage, personal execution will not issue against her for compelling her to pay any sum of damages or of fine she may have incurred by her delinquency; because, till then, having no power over any part of the community, nor, of course, any funds wherewithal to pay, she cannot justly be obnoxious to that diligence or execution which is not penal, but merely a *compulsitor* for procuring payment. In England, we have seen[g] it was held lawful to imprison a married woman, for payment of the sum awarded against her, for the aliment of a bastard child, which she had born to another man before her marriage. Such a case, with us, would be decided differently. If the sum be considered, on the one hand, as a fine arising from delinquency, execution would be suspended till the dissolution of the marriage; if, on the other, it be considered as a civil debt, execution would go out against the husband, and not against her.

[g] Vide supra, p. 235.

CHAP. IX.

Of Parents and Children.

§ I. THEIR DUTIES IN GENERAL.

I. PARENTS and children are by nature under reciprocal obligations to each other. This law is written on our hearts (as lord Stair emphatically says) "with capi- "tal letters."[a] "Though evil custom hath put out the "eyes of natural light in other things, yet, in this, the "rays of the sun of righteousness are so direct, that their "illumination cannot be extinguished."[b]

THESE reciprocal duties must, in most cases, be left to the light of natural conscience, and cannot be enforced by human laws. Some grosser breaches of the duty, however, may be brought under the cognizance of the criminal magistracy.[c]

[a] Instit. B. i, t. 5. [b] Ibid.

[c] Thus the statute 1661, c. 20, ordains, "that whosoever, son or "daughter, above the age of sixteen "years, not being distracted, shall "beat or curse either their father or "mother, shall be put to death with- "out mercy; and such as are within "the age of 16 years, and past the "age of pupillarity, to be punished "at the arbitriment of the judge, "according to their deservings, that

§ 2. LEGITIMATE CHILDREN.

II. CHILDREN are either legitimate or spurious and bastards.

A LEGITIMATE child is born in lawful wedlock, or within a competent time after the dissolution of the marriage.

Presumption in favour of legitimacy.

THE presumption that the husband is the father of the child cannot be defeated but by direct evidence that it was impossible; as, for example, where he is impotent or has been absent till within six lunar months before the birth, or where the child is born after the tenth month from the husband's departure from the country, or death.[a]

IN England, "if a man dies, and his widow soon after "marries again, and a child is born within such a time as "that, by the course of nature, it might have been the child "of either husband; in this case, he is said to be more than "ordinarily legitimate; for he may, when he arrives to years "of discretion, choose which of the fathers he pleases."[b]

"others may hear and fear, and not "do the like." This act has been found not to extend to a parent by affinity. M'Kenzie and Mr. Hume seem inclined to think that it would not extend to the grandfather. Hume, V l. ii, p. 39.

[a] Mr. Erskine says, "that it is not "required by our usage, as it is said "to be by that of our neighbours in "England, that one of the spouses "must have been out of Britain; but "the distance between them ought "to be so great as to carry full evi-"dence with it, that they could not "have cohabited during the whole "time libelled" St B. iii, t. 3, § 42. Ersk. B. i, t. 6, § 50.

Mr. Christian observes, "It used "to be held that when the husband "was living within the kingdom, "access should be presumed, unless "strict proof was adduced that the "husband and wife were all the time "living at a distance from each "other; but the courts have relaxed "that rule, and have gone the length "of holding that the legitimacy or "illegitimacy of the child of a mar-"ried woman, living in a notorious "state of adultery, under all the cir-"cumstances, is a question for a jury "to determine." I. 4 T. R. 356. & 251. Blackst. B. i, c. 16, Note 8.

[b] Blackst. B. i, c. 16, p. 456.

§ 2. LEGITIMATE CHILDREN.

IF either father or mother have once acknowledged the child as lawful, it cannot afterwards be deprived of its legitimacy by the oath even of both of them.[a]

Bona fides of either parent.

A MARRIAGE, we have already seen, may be null, on account of the propinquity of the parties, or of the previous marriage of one of them. If either of the parents were ignorant of the nullity at the date of the marriage, the canon law holds that *bona fides* sufficient to legitimate the children;[b] which principle, Craig[c] and lord Bankton[d] incline to think is adopted by our own law.

IN England, if the marriage be not declared void on account of the propinquity during the lives of the parties, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void, to the effect of bastardizing the children. And, therefore, when a man had married his first wife's sister, and after her death, the bishop was proceeding to annul the marriage, and bastardize the issue, the court of king's bench granted a prohibition *quoad hoc*, but permitted them to proceed to punish the husband for incest.[e] So also the children of a marriage between an adulterer and adultress are legitimate, though such marriages are prohibited by the act 1600, c. 20.[f]

Adulterer and adultress.

THOSE also are in every respect legitimate children, whose parents afterwards intermarry, our law completely adopting the sentiment of Pope Alexander III, *Tanta est*

[a] Craig, de Feud. Lib. ii, d. 18, § 20. Ersk. b. i, t. 6, § 49.

[b] The canonists enter into various distinctions not necessary to be here mentioned; as, whether *bona fides* must subsist at the birth, or is required at the conception only. Decret. Gregor. ix, Lib. 4, tit. 17, c. 14. See Pothier, Droit Civil, &c. Tom. iii, p. 332.

[c] De Feud. Lib. ii, D. 18, § 18, 19.

[d] Instit. B. i, tit. 5, § 1.

[e] Blackst. B. i, c. 15.

[f] Ersk. B. i, t. 6, § 51.

§ 2 LEGITIMATE CHILDREN.

vis matrimonii ut qui antea sunt geniti post contractum matrimonium legitimi habeantur.[a]

FOR the same reason, even those of the children who die before their father's marriage with their mother, are yet considered as legitimate. For example, the eldest son so dying, and leaving a son, the latter will succeed to heritage in preference to his uncles.

THIS presumption supposes always that it was lawful for the parties to have been married together when the child was begotten.[b] A marriage entered into any time during

[a] Decret. Gregor. lib. iv, t. 17, c. 6.

Legitimation, by subsequent marriage was first introduced by Constantine, in the law 5 Cod. de Nat. Lib. Justinian, in the 10th and 11th law, extended it to two particulars; the father got this power of legitimation, though he had children by a lawful marriage, provided it was dissolved before his illicit connection; and likewise whatever was the quality of the woman. By the Roman law, those only could be legitimated by subsequent marriage who were born in concubinage, which was a species of natural marriage authorized by the law. The canon law, however, has extended it. And as this legitimation proceeds upon the fiction, that the parties were married at the date of the first conception, the children thus legitimated succeed in preference to the children born after the marriage. This the latter cannot complain of; since, as Justinian remarks, it is to the father's affection for the other children that they owe his marriage with their mother, and, of course, their own legitimacy. L. 10, Cod. de Nat. Lib.

In France, though the canon law of itself has there no force, yet, says M. Pothier, "*l'équité et la faveur que* "*ces principes renferment, nous les ont* "*fait embrasser.*" Ibid. V. iii, p. 320.

England has lost the benefit of this regulation, by the *nolumus mutare* of the barons, at the parliament of Merton. Yet, in England, if a man marry a woman *great with child*, the marriage legitimates the child though born an hour after. Since marriage has a retrospective operation so far, it is not easy to perceive the consistency of stopping short there. If the *subsequent* marriage have virtue sufficient to legitimate those previously *begotten*, it does not seem very consistent to deny its virtue to legitimate the children previously *born*; a humane and salutary provision, strongly inviting to reformation by removing the *stigma*, which necessarily attaches on every family some of whose members are illegitimate.

[b] Craig puts this question:—If, after

life, even *in agone mortis*,[a] has this effect. It was otherwise in France. If at the time of the marriage any of the parties were labouring under a deadly disease, the law of death-bed prevented such marriage from legitimating the children.[b] § 4. LEGITIMATE CHILDREN.

A FATHER has the absolute right of disposing of his children's persons, of directing their education, of moderate chastisement; which right, indeed, may be said, during childhood, to be almost unlimited: And even after they become *puberes*, he may compel them to live in family with him, and to contribute their labour and industry, while they continue there, towards his service; which power of compulsion lasts, in lord Stair's opinion,[c] after their majority.[d] PATERNAL AUTHORITY.

after a man has children by a concubine, he shall marry and beget lawful children, and this marriage dissolving by his wife's death; he shall marry the mother of his bastards —will the children legitimated by this second marriage be preferred, in the successson of his estate, to the children of his first marriage? And he resolves it thus: That the children of the first marriage will be preferred, having a *jus quæsitum*, or right, established, which the father's subsequent marriage could not defeat. Yet the children legitimated by the second marriage will take the inheritance in preference to collateral heirs. De Feud. p. 368—Lord Bankton delivers a different opinion upon this question. Instit. B. i, t. 5, § 44.—"But I think," says lord Gardenston, "Craig's opinion is the soundest authority." MS. *voce* Bastard —Mr. Erskine says, the contrary is a hard doctrine. B. i, t. 6, § 52.—Which, however, Voet learnedly and decidedly supports.—But with our lawyers M. Pothier coincides in opinion, upon this very rational ground: viz. "*Quoi'qu'ils soient venus au monde avant eux, ils ne sont néanmoins nés à la famille de leure pere qu'après eux, par le second mariage que leur pere a contracté avec leur mere. Ce second mariage qui les a légitimés, les fait reputer enfans de ce second mariage. Or il seroit absurd que des enfans du second mariage fussent les Aînés de ceux du premier.*" T. iii, p. 328.

[a] Voet, lib. xxv, tit. 7, § 11.
[b] Pothier, Droit. Civil, &c. t. iii.
[c] L. 5, 13.
[d] Ersk. B. i, t. 7, § 36.

§ 2. LEGITIMATE —MAINTENANCE.

Property of children.

Father's administration.

CHILDREN, though in family with their father, are capable of receiving sums in gift or legacy, either from strangers or from the father himself, which thereby become their property. But the father, as their tutor and curator, has the administration thereof, unless it has been expressly excluded, or unless such child be forisfamiliated; that is, has left the family, and is supported without his father's assistance. But, a child who gets a separate stock from the father, for carrying on any trade or employment, even though he should continue in the father's house, may be said to be emancipated or forisfamiliated, in so far as concerns that stock: for the profits arising from it are his own.

If the child after majority is in poverty.

Grandfather when liable.

Mother &c.

Has the grandfather any power of management?

PARENTS may be compelled by the magistrate to maintain their children.[a] If the child, even after majority, be unable to support himself, his parents are bound to maintain him. And failing the father, the same obligation extends to the paternal grandfather, and so upwards to the other ascendants by the father; and failing these, to the mother, and the ascendants by her;[b] though neither the paternal nor maternal grandfather, or remoter ancestors, have any part of those powers and right of administration which belong to the father. It has been found that a father is liable to maintain the wife,[c] but not the widow of his son.[d]

[a] Ersk. B. i, t. 6, § 53.

[b] Ersk. B. i, t. 6, § 56.

[c] Helen Adam against Andrew Lowther, 1st March 1765, Fac. Coll. "entitled, Proprietor of an entailed "estate bound to aliment his eldest "son's wife.

[d] Idem, ibid. 14th June 1765, and Sel. Dec. 220. The son, who had left the country before the aliment was applied for, having thereafter died, it was recalled. In the case of sir Stair Agnew, 8th June 1805, some of the judges expressed an opinion that there might be room for reconsidering the point, at least, wherever there was issue of the marriage, whereby the widow's connection was still maintained with the family of her father-in-law.

§ 2. LEGITIMATE —MAINTENANCE.

ACTION lies against the father for the price of goods given on credit to his child,[a] even although the child should not be living in family with its parents;[b] and though the tradesman had neither consulted the parent upon the particular occasion, nor received any general authority to furnish the child on credit what he might call for.[c]

[a] Ersk. B. i, t. 6, § 57.

[b] Fac. Coll. Vol. ii, 119. Robert Barclay against Archibald Douglas of Dornock.

"Robert Barclay, tailor in Edinburgh, furnished Archibald Douglas of Dornock, for an account of tailor furnishings made all at one time to his eldest son, amounting to 36l.

"The debt was contracted by Dornock's son, when 18 years of age, without aliment or profession, and not living with his father, on account of some differences betwixt them. The debt was high, considering the circumstances of father and son; but for this the pursuer assigned as the reason, that, at the time of contracting it, the son's friends were soliciting a commission in the army for him.

"The lords found the defender liable."

2d Dec. 1758, John Telfer against Hugh Maxwell of Dalswinton.

Entitled, "Father liable for furnishings to his son above majority, while the son was apprentice."—"James Maxwell, son to Hugh, from the age of 19 to that of 22, during the two first years of which he was an apprentice to a linen manufacturer, contracted some trifling debts to tradesmen; and, among others, one of 7l. to Telfer, a tailor. There were no complaints that his father had pinched him in his allowance. In a process at the tailor's instance against the father, the son being dead, the lords found the defender liable for the debt."

The expression, that "there were no complaints that his father had pinched him in his allowance," perhaps scarcely authorized the positive assertion of the learned author of the Dictionary, in his account of this case, that "the son had a sufficient allowance from his father." It certainly does not appear, that the father, in this case, had never been in the habit of paying any account for his son; but had either always previously impressed money into his hands for the particular occasion, or given him a general allowance, in order to provide himself in every thing, otherwise the decision would have been contrary to cases, both prior and subsequent, and to the authority of our writers.

[c] Ersk. B. i, t. 6, § 57.

§ 2. LEGITIMATE —MAINTENANCE.

BUT the parents is not liable, if the child had previously got a separate allowance to provide for himself, or was otherwise sufficiently provided.[d]

BUT concerning the parent's plea of having previously provided the child, the distinction which was laid down in the case of master and servant, may perhaps here too apply. If the merchant or tradesman had been previously in the habit of giving credit to the child, and always had

d Ersk. B. i, t. 6, § 57.—20th Jan. 1672. Wallace against Crawford. Stair, Vol. ii, p. 53.

" Hugh Wallace having furnished certain cloaths and furniture to umquhil Mr. William Crawford, Camber's eldest son, pursues Camber for payment, as he who was obliged to aliment and entertain his son, and so the furniture was to his advantage and behoof. The defender alleged, that albiet a father be obliged to entertain his son in his family, that will be no warrant for any merchant to furnish the son without the father's consent; especially seeing the father offers to declare upon oath, that he gave money to the son to furnish himself, according to the quality and condition of his estate.

" The lords found the defence relevant, to be instructed by the father's own oath."

14 Jan. 1698. Hopkirk against Wedderburn.

" Hopkirk, merchant in Edinburgh, against Mary Daes, and Mr. Alexander Wedderburn, her husband, and Mr. James Daes, of Coldingknows, advocate, her father, for payment of the sum of 241l. Scots, as an account of clothes and others furnished to her, and which she had subscribed. The defence for her husband was, I cannot be liable, because furnished to her before her marriage, when she was minor and a daughter in *familia*, had no separate estate of her own; and so her father must only be convened for that.

" The lords found, if she had been *sui juris et mater familias* the time of ontaking of this account, and that she wanted a father, that then it would have affected herself, and consequently her husband *jure mariti*; but living in *familia* with her father, she nor her husband could not be made liable for the same. Then the pursuer insisting against her father, *super hoc media*, that he was bound to furnish his daughter.

" The lords found it relevant to assoilzie the father from this pursuit, that he proved he furnished his daughter sufficiently *aliunde*, by paying accounts for her elsewhere to merchants for clothes, near the time of contracting this debt." Fountainhall.

his accounts paid by its parents, his claim will be well founded against the latter, even on any particular occasion, when the father may have given money to the child, which the merchant could not have any reason to suspect: whereas if the child had either never dealt with him, or had always before paid ready money, the parent will not be liable if he had given the child money; for it would be unjust to subject him in double payment of the same articles. § 2. LEGITIMATE —MAINTENANCE.

FARTHER, in order to make the parent liable, it is necessary that the goods furnished be "suitable to his for-"tune."[a]

[a] Ersk. b. i, t. 6, § 57.

That actions for payment of things not of necessary use, furnished to a son or minor does not lie against the father, was the opinion of the court in the following case, which has always been quoted as a leading one in support of that principle.

20th November 1782. Robert Johnston against the honourable William Mordaunt Maitland, and the earl of Lauderdale, his administrator-in-law, "Mr. Maitland, in the "15th year of his age, received a "commission in the army; and having, in the course of a few months "after, run in debt to Mr. Johnston, "toyman in Edinburgh, he granted "his acceptance for the amount, being 17l. 17s. A few days after, "he incurred a farther debt of 7l. "18s. Of the furnishings composing this debt, some might have "been deemed altogether useless and "frivolous; but the greater part "were articles, which, although not "absolutely necessary, are commonly possessed by young gentlemen "of fashion and fortune.

"Payment having been refused, "Mr. Johnston commenced an action before the sheriff of the county, and attached Mr. Maitland's "horses in security. The sheriff ordained the articles, which were "still in the defender's possession, to "be delivered up, and assoilzied "*quoad ultra;* and Mr. Johnston "having brought this judgment under review of the court of session "by a bill of advocation, one of "the judges, considering the practice of merchants taking bills from "minors, as highly improper and inexpedient, was for dismissing the "action; another was for making a "distinction between the furnishings "which were altogether extravagant, and the rest; and all agreed "that contractions of this sort were "incapable of producing action against a father, upon his natural "obligation to afford an aliment to "his children. The majority, however,

§ 2. LEGITIMATE —MAINTENANCE.

Father's obligation whence?

THE father's obligation arises also from the principle already mentioned, that one third of the goods in communion of which he has the management, belongs to the children. During his life he has the unlimited disposal of the whole goods in communion; but he cannot, by any testament or *mortis causa* deed, affect the legitime or third belonging to his children.

Legitime.

THIS third, or, when there is no widow, half, divides among the children equally, though of separate marriages.

IF the eldest son succeed to a landed estate, he gets no part of the legitime, or the dead's part. If a child renounce the legitime, it is the same thing as if he had died: his share divides among the rest; but he does not thereby lose his right to the dead's part, if he does not also renounce his share in his father's executry.

Collation,

only among children,

not with the widow.

A CHILD having a provision from the father, cannot draw any share of the legitime without *collating*; that is, he must throw such separate provision into one stock with the legitime, that the whole may be divided equally; unless, from the deed, it shall appear that the father intended it as a *precipuum*. This *collation* takes place only in questions among children who are entitled to the legitime. The widow is not bound to increase the legitime by col-

" ever, were of opinion, that in an " action against the minor himself, " and to the effect of attaching his " proper estate, the circumstance of " his enjoying a commission in the " army was sufficient to justify ad- " vances such as the present, which " were in general unexceptionable. " The lords, therefore, advocated the " cause, repelled the defences, and " decerned."

The defence was here repelled, so far as regarded the minor himself, and his pay as an officer in the army; but it was the clear opinion of the court, that no action could be sustained in such circumstances against the father of a child, or administrator of a minor. The decision has in general been quoted as a leading one in support of that principle.

lating donations given her by her husband; on the other part, the children are not obliged to collate their provisions in order to increase her share.[a] § 2. LEGITIMATE —MAINTENANCE.

CHILDREN are bound to maintain their parents, when they fall into decayed circumstances; which duty, Mr. Erskine says, is enforced also by the civil sanction.[b] After the father's death, the eldest son, succeeding to the heritage, and representing his father, is obliged to aliment his younger brothers and sisters, if left unprovided. The representatives of a grandfather are, agreeably to the latest decisions, not liable; because, were this obligation to go beyond the representatives of the immediate parents, there would be no knowing where to stop.[c] Such questions are competent before the judges ordinary; whether they are so before the sessions of the peace is not so clear; but this we had already occasion to take notice of.[d] Children bound to maintain their parents. Maintenance among brethren.

III. SPURIOUS children, or bastards, must be maintained by their parents. Bastards derive their name of spurious from their being said to be *sine patre*. And, in their case, it is necessary to bring evidence of the man's connection with their mother within the legal period.[e] § 3. BASTARDS.

[a] If a man leave a widow and one child, who succeeds to his heritage, still the society goods divide in three, because such only child is entitled to a legitime.

[b] B. i, t. 6, § 58.

[c] Seton, &c. against Paterson 25 June 1761. And, accordingly, a brother having succeeded to the family estate, which was considerable, but not as representing his father, an application was made to the court to authorize his tutors to allow a sum to his sister; the court refused to interfere, leaving to the tutors to take such responsibility upon themselves. Clerk of Pennycuick, 19 Feb. 1799.

[d] Vol. i, p. 103.

[e] In England, when a woman is delivered, or declares herself with child of a bastard, and will, by oath before a justice of peace, charge any person as having got her with child, the justice must cause such person to be apprehended, and commit him, till he gives security either to maintain the child, or appear at the next quarter sessions to dispute or try the fact; when he will either be subjected in an aliment or discharged, if the justices at the sessions, upon hearing all

§ 3. BASTARDS.

Woman's oath in supplement as to the father.

If he own guilt.

BUT, as the guilt in such a case does not admit of direct evidence, it has become customary to admit the woman's oath in supplement. This, however, ought to be done only where there are some grounds of suspicion against the man; as, for example, where there is a proof of indecent freedoms with the woman, and subsequent opportunity; for no anxiety to free the public from the burden of the maintenance, ought to induce justices, rashly, to admit an oath in supplement, without reasonable foundation in the circumstances of the case.[a] If the man acknowledge his guilt at a distance of time greater than the natural duration of a woman's pregnancy, that will not be sufficient to subject him, unless it be presumable from circumstances that he afterwards kept company with her, and had an opportunity to repeat his guilt.[b]

Both parents liable.

THE aliment of bastards is a burden on both parents, according to their respective ability. Mr. Erskine says, "*not only* the mother, who is always certain, *but likewise* "the father, if he have either acknowledged the child, or "may be presumed from other circumstances, to have "begotten him."[c] The sum, therefore, for which decree is to be given against the father, is only such, as together with the mother's contribution, may suffice for the maintenance of the child. The code of monarchical France more humanely laid the burden on the father alone; and, only failing him, on the mother. *Lorsque le pere ne'st pass connu, ou lorsqu' il n'a pas le moyen, c'est la mere qui doit etre chargée de de l'enfant.*[d]

all the circumstances of the case, shall be of opinion that he is not the father of the child. Christian's Black. B. 1, c. 16, p. 458; and Note 10.

[a] *Vide supra*, the chapter on Evidence. Vol. i, p. 234.

[b] The acknowledgment of guilt with the mother, at the distance of eleven calendar months from the birth, was not found sufficient to subject the defender. Dict. vol. iv, 135. But in a later case, Wightman against Tomlison, 4 July 1807, the court rejected the qualification, as believing it to be untrue.

[c] B. 1, t. 6, § 56.

[d] Pothier, Droit Civil, &c. Tom. iii, p. 314.

§ 3. BASTARDS —CUSTODY. —QUANTUM. Aliment discretionary, according to expence of living.

As to the *quantum* of the aliment, no particular directions can be given; it must be such, as with what the mother may be supposed able to earn with her labour, shall be sufficient for the support and clothing of the child; and this must depend on circumstances, according to the expence of living in the time and place. The rate of aliment varies also according to the father's rank and circumstances. Only it is material to remark, that be the rank and fortune of the father what it may, that is no foundation for the magistrate awarding such a sum as shall bring up the child in such stile as might be suitable to the father's station, were it legitimate. It takes no rank from the father, unless what he chooses to give it. The court of session has seldom in any case of labouring people, allowed above £5 or £6 sterling; in one case, where they allowed £10, the reporter expressly observes, that in fixing the *quantum*, the court was influenced by a particular obligation. This aliment must be continued from time to time[a] till the child is able to do for itself.

[a] Lord Kilkerran reports a case, where "4l. sterling of yearly aliment was decerned to be paid by "the father to the mother of his "bastard child, without limiting the "endurance. A bill of suspension "was on that ground presented; "and as the question occurred upon "the passing or refusing the bill, the "lords had some difficulty how to "qualify the endurance, and at last "fell upon this expedient, to refuse "the bill, without prejudice to the "suspender to apply again by suspension, how soon the child should "arrive to the age of fourteen years, "and become able to aliment itself; "which implied that the aliment "should continue no longer than the "age of fourteen; and such was the "opinion of the court." Graham "against Kay, 25 July, 1740.

In the subsequent case, Oliver ag. Scott, 3 March 1778, "the justices "of peace, of the county of Roxburgh, found Oliver, a day labourer, liable to Janet Scott, a "woman of the same rank, by whom "he had a bastard child, in 4l. sterling annually of aliment, for the "said child during her continuing to "keep and maintain said child."

In a suspension of this judgment, at the instance of Oliver, the lord ordinary found that he was liable in that sum annually, until the child should attain the age of 14 years.

But the court, in reviewing this judgment, were of opinion, that, for persons in his circumstances, the sum

§ 3. BASTARDS —CUSTODY.

THIS alimentary claim has been found to fall under the triennial prescription.[a]

THE opinions, however, and decisions are far from being at one upon this subject.[b]

sum was too large, and the time too long; and, therefore, they restricted the *quantum* of the aliment to 3l. in the year, to be paid quarterly, until the child should attain the age of seven years; and also, thereafter, until either that the father shall take the child into his own keeping, or that the child shall attain the age of ten years.

In the case of Glendinning against Flint, the court found the mother entitled to aliment for the child, ay and until she arrives at the age of ten years complete, reserving to the child to apply afterwards for aliment as accords. 19 Nov. 1782. Fac. Coll.

And in the case of Paterson against Spiers, 29 Nov. 1782, the lord ordinary found the defender only liable in payment to the pursuer of the aliment awarded, till such time as the child in question arrives at the age of seven years. The court adhered to this interlocutor.—Observed on the bench: There is no established general rule for determining cases of this nature, which are always to be regulated according to their peculiar circumstances; and, therefore, though in the case of Flint and Glendinning, the continuance of the payment for aliment sought by the mother, was protracted to ten years, the child being a female; yet, in the present, which respects the aliment of a boy, seven years appear a more proper period. The lords therefore adhered to the interlocutor of the lord ordinary.—Fac. Coll. The reporter observes, that the lord ordinary's interlocutor contained this *ratio decidendi*: "In respect from the nature "of the business carried on by the "father, the defender, being that of "bleaching, drying, and dressing of "cloth, the child in question will be "fit for being employed in certain "branches of it by the time he ar-"rives at the age of seven years." It is however, to be remarked, that the court disapproved of this observation as a ground of decision; and that, therefore, it had no influence whatever on their judgment.

[a] Dict. Vol. iv. p. 105.

[b] The following are the words of the statute 1579, c. 83. introducing the triennial prescription: "It is statute and ordained be our "soveraine lord, with advice of his "three estates in parliament, that "all actions of debt, for house "mailles, mennis ordinars, servants "fees, merchants comptes, and uther "the like debts, that are not found-"ed upon written obligations, be per-"sewed within three zeires, uther-"wise the creditour sall have na "action, except he outher preife be "writ, or be aith of his partie." This statute, according to sir George M'Kenzie, is founded upon the presumption "that men would not "suffer such debts to lie over, with-"out taking an obligation for them "in writ; *and the presumption lies for* "*their being* yearly paid; and that "which

" which was *præsumptio hominis*, is, " after the current of 3 years made " here *præsumptio juris et de jure*, *et* " *lex statuit super præsumpto*." (Observations on the statute.)

Both Lord Bankton and Mr. Erskine think, that alimentary debts fall under this prescription. The words of the former are. " house rents, servants fees, mens ordinars, i. e. *a* " *claim for aliment or maintenance*, and " debts of the like nature prescribe " in three years after they grow due."

The latter thinks, that in virtue of the general clause " *of such like* " *debts*, alimentary debts are subject- " ed to a triennial prescription."

In the Dictionary, vol. ii, title prescription, it is stated, " Aliments " prescribe *quoad modum probationis* in " three years, because of the men- " tion of mens ordinaries, &c. and " the other like debts. Bruce, 25 " July 1716. Hamilton. The like." And in vol. iv of the Dictionary, p. 104, the case of Davidson against Watson is mentioned, 16 Nov. 1739, where the court found, that the aliment of the minor fell under the triennial prescription, thinking it unreasonable, says Lord Kilkerran, that the privilege given to a major should not be competent to a minor in pleading this prescription.

Upon an appeal, this judgment was reversed, (Kilkerran, p. 415, and Journals of House of Lords, vol. xxv, p. 549, reported also by Clerk Hume.)

The case of Paterson against Cochran. 14 February 1758, is reported as follows in the Dictionary. " The mo- " ther of a bastard child pursued the " father for aliment, who pleaded, " that several years ago, he paid about " 100l. Scots to the mother, and " that as she had made no demand " for many years, the claim was pre- " scribed by act 1579, statuting the " triennial prescription of house " mails, mens ordinaries, and other " like debts. Answered, that a na- " tural obligation was not subject to " prescription. The lords repelled " the defence, and found the defend- " er liable in a yearly aliment of 40l. " Scots till the child was 14 years of " age." Dict. vol. iv, p. 105.

§ 3. BASTARDS —CUSTODY.

In the next case, Forsyth against Robertson, 15 February 1791, an opposite judgment appears to have been given. " The mother of a " bastard, when he was about 17 " years of age, sued the father for a " sum of money corresponding to a " yearly aliment while the child had " been maintained by her, with in- " terest; the father pleaded, that the " claim was cut off by the triennial " prescription. The Lords sustained " the defence." Dict. vol. iv, p. 105.

In the first of these cases, however, there was this specialty, that it appeared that the several sums paid by the defender did not amount to a full discharge of his obligation. Accordingly, it was observed from the bench, " The " act 1579 proceeds upon a presump- " tion, that debts of the kind there " mentioned, are paid either at the " time, or before the 3 years expired. " But here the defender does not say " that he paid a reasonable aliment. " All he gave, by his own account, " was about 100l. Scots; therefore, " he ought to pay the remainder," &c.

On

§ 3. BASTARDS —CUSTODY.

THE mother, in general, is the fittest person to have the charge of the child during the period of infancy.[p] The father has no title to insist for the custody of his natural child; in such cases, the court of session exercises a discretionary power according to the circumstances of the case. In general, unless good cause be shewn for the contrary, the court allows a daughter to remain with her mother till she arrive at the age of ten years, and a son till he arrive at seven years.

Mother entitled during infancy.

Daughter.

Son.

A MOTHER, even after her marriage, was preferred to the custody of a child, though the father offered to take him home.[q]

On the other hand, it has been remarked, that the case of Forsyth was also attended with some specialties.

The facts were, about a month after the birth of the child, the mother married, and, leaving the child with its maternal grandfather, followed her husband to a different part of the country; and the bastard child never lived in family with its mother and her husband. The child was born in the year 1773; and no claim was made upon the father till the action was raised in the year 1789; and no action was brought by the paternal grandfather, in whose house it had been maintained; and it appeared that the father had paid the mother more than her legal claims could have amounted to, during the short time she maintained the child.

The last case of the kind, M'Dowal against M'Larg, was decided 4th and 19th Feb. 1807: the court repelled the plea of triennial prescription, on account of special circumstances, such as, that he had gone abroad, and that his residence had been for a long time unknown to the claimant. It was observed from the bench, in the last case, that the decision in the case of Forsyth, above quoted, had been given on general grounds.

[p] Dr. Burn observes, "In practice, "it is seldom, if ever known, that a "reputed father, who applies to have "the child taken off from the parish "into his own management, even so "much as pretends any advantage to "the child thereby, but merely his "own interest to save charges." Vide Bastards.

[q] 4th March 1758, Burgess against Halliday. And, in a late case, where the father pretended anxiety for the morals of the child, and on that account craved to have the custody of the child, mentioning the place where he meant to board it, the court did not indulge him. 11th July 1804, Farquharson against Anderson.

§ 3. BASTARDS --FATHER'S POWER.

THE father has no power over his natural children; he is not their tutor, guardian, nor administrator in law.[r] He does not succeed to them, nor they to him. He is no otherwise their father, except in *pœnam*, that he may be burdened with their maintenance.

IN France, M. Pothier says, that bastards were *subsidiarie* liable in the maintaining their parents, failing lawful children.[s]

BASTARDS do not succeed as heirs at law, nor as nearest of kin to any person; not even to their mother either in moveables or heritage.[t] And if they die without lawful children, the king takes up the succession as *ultimus hæres*.

BASTARDS may succeed to property heritable or moveable, by destination. A bastard having children may make a testament, even in favour of strangers: and though he should have no lawful issue, is absolute proprietor of his whole estate; and may even settle his heritable property by a deed, not to take effect till his death.[u]

—SUCCESSION.

He may gift away.

May settle heritage by a deed *mortis causa*.

[r] Professor Christian observes, that in England, "though he is considered "*filius nullius* with respect to inheritances and successions, yet the law "takes notice of his connection with "his natural parents for some other "purposes, as it has been decided, "that if a bastard marries under "age, by licence, he must have the "consent of his putative father, "guardian, or mother, according to "the 26 Geo. II, c. 33." 1 T. R. 96. Blackst. B. i, p. 458, note 11. He afterwards adds,—"bastards are not "favoured in equity as legitimate "children. The court will not supply the defect of a surrender of a "copyhold in a conveyance, or devise by a father to a natural child, "as it will in favour of a legitimate "child." Gilb. For. Rom. 256, 2 Ves. 582. Blackst. V. i, 459, Note 12.

[s] Droit Civil, &c. Tom. iii, p. 314.

[t] By the civil law, *spurii* succeeded both to mother and grandmother. L. ii, 4 & 8 ff. *unde cognati*. Justinian makes an exception, which Craig says is wonderful (*mirum est*) that spurious children did not succeed to their mother if she was *illustris*. L. v, Ad SC. Orphitianum.

[u] Ersk. Inst. B. iii, t. 10, § 6.

§ 3. BASTARDS —SUCCESSION.

BUT our later customs, contrary to the opinion of Craig, have adopted the doctrine of some other states, that bastards, having no lawful children, are incapable of making a testament.[v]

§ 4. LEGITIMATED CHILDREN.

IV. THE sovereign, the fountain of honour, can remove the stain of bastardy by letters of legitimation; which enable the bastard to make a testament, and even to assume the name and arms of his putative father's family, (only marked with a cross barr):[w] letters of legitimation farther make his property as in right of blood, descendible to his agnates, that is, his relations by the father,[x] provided they contain an express clause to that effect. But they never entitle him, as in right of blood, to succeed to any person; because that would interfere with the rights of third parties.

[v] Ersk. ib.

[w] Children legitimated by subsequent marriage being, to all intents, lawful children, bear their father's arms without any such diminution.

"I cannot," says sir George Mackenzie, "be so partial here as not to "reprove an error of my own countrymen, who make the mark of "bastardy to be a ribbon sable, and "make it extend from the dexter "corner of the shield to the sinister; "for the mark of bastardy should "still be sinister: nor is it called a "ribbon in any nation.

"And though we have received "an opinion, that the bastard's distinction may be, after three generations, born dexter or omitted, "yet the opinion is most unwarrantable, for *jura* sanguinis numquam præscribuntur. And, in the "bastards of great families this were "very dangerous, for the bastards "might pretend to the succession by "this means; albeit that mark was "invented to exclude them." Works, fol. edit. V. 2.

[x] Ad. Hunter against Alex. Hunter, bastard; 10th Feb. 1784, Fac. Coll. Letters of legitimation do not entitle agnates to succeed to a bastard, without a special provision in their favour.

CHAP. X.

Of Persons under Age.

I. A CHILD is under pupillarity, if a male, till fourteen; and if a female, till twelve years of age. Minority begins where pupillarity ends, and continues till majority, that is, the age of twenty-one years complete. § 1. PUPILLARITY. Male. Female.

PUPILS cannot in any degree act for themselves. They are protected from imprisonment on civil debts.[a] But if pupils be guilty of thieving, or other crime or misdemeanour, they are liable to be punished as the circumstances of the case and their knowledge of the criminality of the act may seem to require. In cases of peculiar aggravation, their guilt may perhaps even be such as to be capitally punishable.[b] Pupils.

THE father has the right of naming tutors: if he name none, the nearest relation by the father's side is entitled to Tutors named by the father.

[a] Act 1696, c. 41. [b] Vol. i, c. 1.

§ 1. PUPILS.

act as tutor-in-law, the person of the child being entrusted to the mother till it attain the age of seven, if she remain unmarried, and failing her to the next cognate, i. e. relation by the mother.

Custody of his person.

Factor, *loco tutoris*.

IF no tutor at law demand the office of tutor, a stranger may apply to the barons of exchequer for a tutory dative; or the court of session may, upon the application of any kinsman, and under certain regulations, appoint a factor *loco tutoris* for the management of the pupil's estate.

Tutory dative.

Inventory.

TUTORS must make up an inventory. The office of a female tutory falls by her marriage. A tutor cannot act where he has a personal interest: he cannot be *auctor in rem suam*. A larger sum than the interest of the pupil's stock, or the rent of his estate, should not be employed for his education and maintenance.

§ 2. MINORS.

II. MINORITY begins where pupillarity ends, and continues till twenty-one years of age, when both boys and girls become major.

THE father cannot on death-bed name curators to his children. Even in *liege poustie*, he cannot name them to his grandchildren, nor to his forisfamiliated children.

Father, if curator.

THE father, if alive, is curator as well as tutor, that is, administrator in law, to his children. Otherwise, the minor chooses curators to himself.

May they encroach on the stock?

CURATORS may encroach upon the stock, for giving the young man necessary education, or putting him into a way of business.

Restitutio.

MINORS, not having curators, may be restored against all deeds that are hurtful to them, granted by them in their mi-

nority, if challenged within four years after majority. If a minor, having curators, act without their advice, the deed is null. § 2. MINORS.

MINOR non tenetur placitare super hereditate paterna; that is, to appear as defender in any process whereby his heritable property, derived from the father, may be evicted.

A MINOR's person may be laid hold of for civil debts due by him. If he has tutors or curators, he cannot sue or be sued without them. Minors committing delicts or other offences are punishable.

III. INTERDICTION is a legal restraint laid on facile and extravagant persons, from signing any deed to their own prejudice without the consent of their interdictors. Though interdictions be voluntary, they cannot be recalled by the party at his pleasure. § 3. INTERDICTED PERSONS.

CHAP. XI.

Of Watching and Warding.

§ 1. WATCHING AND WARDING.

I. A POLICE magistracy would be of little avail without the power and the means of coercion. The mode of exercising such power has already come under our view when considering preventive, remedial, and punishing, justice. Here it is meant to take notice, in general, of the legal provisions for having places of confinement, and of other general regulations respecting imprisonment.

§ 2. WHO ARE LIABLE.

II. "BOROUGHS having great freedoms and privileges "from the king, are therefore obliged to have sufficient "prisons for receiving such as are attached for crimes and "debts."[a] This burden naturally arose from the ancient service of watching and warding, the price of their privileges and immunities.[b] It is further enforced by positive sta-

[a] Sir George M'Kenzie's Observations, p. 302.

[b] *Servitia autem burgorum hæc sunt; vigiliæ, custodiæ intra burgum et ejus territorium (nos libertatem burgi dicimus.)* Craig, Lib. i. Dieg. 10, § 31. And the 86th chapter of the Leges Burgorum relates entirely to watching

tute.[a] The general statute imposed no new burden upon burghs, when it ordained that "all magistrates of burghs, "and keepers of any gaols or prisons, shall receive into "their prisons all such persons as either shall be brought "by constables, or sent unto them by warrants under the "hand of any one justice of peace, the said justices caus- "ing satisfie for their entertainment."[b] § 2. WHO ARE LIABLE.

BOROUGHS of barony are not bound to have prisons; "but the baillies of the head burghs of stewartries were "thought to be obliged by this act of parliament to receive "prisoners."[c] And a borough of barony, having a suffi- Boroughs of barony.

watching within burgh, as follows: "Forth of ilk house inhabit, ane "man sould come to watch for feare "of perrell, quha sall passe fra dure "to dure, with ane staff in his hand, "and sall be of ane man's age. And "quhen curfure (coverfew) is rung "in, he sall come forth with twa "wapons, and sall watch cairfullie "ane discrietlie untill the morning. "And gif he fails therein, he sall "pay ane unlaw of foure pennies."

[a] The statute James VI, parl. 15, c 277, 1597, narrates, "that for "want of sufficient and sure pri- "sones, jailles, and warde houses, "sundry rebelles and transgressoures "of the laws, alsweill criminal as "civil, escapis unpunished, and jus- "tice contemned;" and ordained, "that within the space of three "zeires, in all burghs within this "realm, there be sufficient and sure "jailles and warde houses bigged, "uphalden and mainteined by the "said provost, baillies, councell, and "communities of the said burghs, "upon their awin common gude, "or otherwayes upon the charges of "the burgh. And that, for sure "imprisoning, warding, keeping, and "deteining of all sik persons, trans- "gressoures of his heiness lawes, "upon their awin expences, alsweill "criminal as civil, as sall be presented "unto them by the schireffe of the "schire, or stewards or baillies of "regalities within the quhilk the "saids burghes are situate, and spe- "cially quhair their judicatory sits. "And alswa all uther persons pre- "sented aither to warde be vertew "of their awin authority within "burghs, or utherwayes upon let- "ters of caption directed to them.

[b] 1661, c. 38, App. I, p. 56.

[c] M'Kenzie, ibid. Sir George refers to the case, Cheap against Baillies of Falkland, June 18, 1670.

But lord Stair, who reports the case, observes, "The lords did not "determine that point".....They "found, that seeing the defenders "did receive the rebel upon the "caption, they could not now dis- "pute whether they were liable to "receive

§ 2. WHO ARE LIABLE.

cient gaol, is bound, at its own expence, to maintain prisoners in it for crimes committed within the borough; but it is entitled to relief from the rogue-money, for the maintenance of persons confined for crimes committed in the other parts of the county.[a]

§ 3. MAINTENANCE OF PRISONERS

III. THE statute expressly says, that the prisoners are to be kept upon "their awin expences." But in general they are unable to maintain themselves: wherefore, in the case of persons criminally convicted, the statute ordains "commissioners and justices, at their quarter sessions, to "rate every paroch for a weekly proportion, for the enter-"tainment of those poor prisoners, providing they do not "exceed the sum of five shillings Scots money at the most, "nor under one shilling at the least; which sum shall be "uplifted for that use by the minister or reader, who shall "serve at every paroch, from such deacons who shall be "appointed to collect the same, and the said sums to be "delivered by the constable of the paroch at the quarter "sessions, in presence of the whole bench then convened, "to such persons as the said justices shall trust therewith, "and who accordingly shall make due account in paying "the gaolers such rates as shall be allowed for the poor "prisoners, and making the rest forthcoming for such use "and intent of the like nature, as the said justices shall "appoint.[b]

THIS branch of police was afterwards regulated by a clause of the general statute of Geo. I, for securing the peace of the

"receive or not, as being the head "burgh of the stewartrie, and there-"fore, &c.

[a] 17th January 1793, Magistrates of Paisley against the Freeholders and Commissioners of Supply of the county of Renfrew. Fac. Coll The reporter adds, "the court, however, "were influenced a good deal by "the practice;" i. e. the practice of this burgh. For he adds in a note, from inquiries with respect to the usage in other burghs of barony, "it appears that the usage had not "been uniform, nor settled on any "general system."

[b] App. of Statutes, p. lvi.

country, empowering the freeholders to levy an assessment, which is commonly called the rogue-money fund.[a] These provisions do not extend to debtors, who must be maintained, either on their own funds, or at the expence of the person by whom they are imprisoned.[b]

§ 3. 11 Geo. I, c. 25, § 12. —ROGUE-MONEY.

IV. THE justices of peace are particularly enjoined to "take notice, in all sheriffdoms, where there are any goals "and prison houses within any burgh, that the same may "be kept up, and not suffered to decay or become ruin-"ous; and if there be any shire where there is not any "gaol or prison-house, they shall inform his majesty's "council thereof, that they may appoint and give order "for building of one within the head burgh of the shire; "and, according to the directions to be given thereanent, "the justices shall be holden to proceed."

§ 4. PRECAUTIONS FOR KEEPING THEM IN CONDITION.

THERE are also some British statutes, which contain very

[a] 11 Geo. I, c. 25, § 12. "And "whereas, for want of a sufficient "fund for defraying the charges of "apprehending criminals in North "Britain, and of subsisting them "when apprehended, until prosecu-"tion, and of carrying on the neces-"sary prosecutions against them, it "often happens that criminals there-"by escape the punishment due to "their offences; for preventing of "which inconvenience for the fu-"ture, be it enacted, by the author-"ity aforesaid, that it shall and may "be lawful to and for the free-"holders of every shire, county or "district in North Britain, to assess "the several shires or stewartries, "where their estates lie, at their "meetings, at any of the head courts, "yearly, in such sums as they shall "judge reasonable and sufficient for "the purposes aforesaid; and that "such monies so, from time to time, "to be assessed, shall be collected, "received, and accounted for, by "such person and persons and in "such manner as such freeholders "shall from time to time appoint, "and shall be applied for defraying "the charges of apprehending of "criminals, and of subsisting of them "in prison until prosecution, and of "prosecuting such criminals for their "several offences by due course of "law, and to and for no other use "or purpose whatsoever."

[b] It is not by this meant, that either debtor or creditor is chargeable with any dues for lodging or room-rent in prison; unless it shall be thought proper, at the prisoner's desire, to accommodate him with a better apartment than the common rooms for debtors.

§ 4. PRECAUTIONS FOR KEEPING THEM IN CONDITION.

useful regulations concerning prisons. 1st, With respect to the building and repairing of county gaols; 2dly, as to the selling of ale, wine, or other strong liquors, in gaols; 3dly, as to the setting of the prisoners at work; 4thly, great care is employed for attaining the important object of cleanliness; 5thly, in order to secure those objects, the justices are directed to visit the gaols; 6thly, as a farther check, gaolers are ordered to make returns; 7thly, provision is also made for the attendance of a clergyman; and lastly, for the mode of setting prisoners at liberty.

BUT as these statutes relate entirely to the county gaols in England, and to the powers and superintendence of the justices of peace of that country over them; it will be enough here to refer the reader to the acts themselves, and to the different clauses of them, which may be of great importance in point of example, but cannot well be executed in Scotland, without a new law to that effect.[a]

V. MAGISTRATES of boroughs are bound by a very severe sanction to take care that the prisons be kept in sufficient order, or, at least, that through their disorder the prisoners do not escape.

If criminals escape.

MAGISTRATES are punishable arbitrarily, if criminals escape through their negligence, or the insufficiency of the jail: in the case of debtors, they are liable in the payment of the debt. And, for putting them more on their guard, the court of session, by an act of sederunt,[b] declared, "they would find magistrates of burghs liable for the "debts of rebels who shall escape furth of prison in all "time hereafter, in case they have not sufficient catbands "upon the doors of their prisons, and lock the same ilk "night, least the rebels pyke or break up the locks."

Debtors.

Act of sederunt.

[a] 12 Geo. II, c. 29; 11 & 10 Will. c. 19, § 1, 2; 24 Geo. III, c. 24; 24 Geo. III, c. 54; 31 Geo. III, c. 46; 32 Geo. III, c. 28; 13 Geo. III, c. 58; 14 Geo. III, c. 20; 14 Geo. III, c. 59; 32 Geo. III, c. 45. See Appendix I. some of the principal clauses.

[b] 11 Feb. 1671.

§ 5. RESPONSIBILITY.

WHICH duty has always been very strictly enforced.[a]

Must the creditor discuss the debtor?

THE magistrates are liable to the creditor in the first instance. The creditor need not discuss the debtor, though afterwards discovered; but the magistrates will have recourse against the debtor himself, or any other person who may have been aiding to him in his escape.[b]

EVEN though there be no insufficiency in the prison, any delay in searching for the prisoner will subject the magistrates.[c]

[a] Thus, in a late case, the magistrates of Ayr were subjected, where the prisoner had, by means of a pocket-saw, made his escape by cutting through the iron bars of the prison window. The magistrates, it was observed, must either employ some men to watch the prison, or every other precaution to make it fencible. The device, it was observed, could not have been successful had the jailor done his duty. 27th Jan. 1803, Dean and Attorney against Magistrates and Jailors of Ayr.

This decision seems contrary to that of Brodie against the Magistrates of Elgin; where the lords found, "that "the magistrates of a royal burgh "were not liable for the escape of a "prisoner for debt, who had got out "by means of false keys without "any connivance or culpable neglect "of the jailor." July 1759. Fac Coll. and Dict. Vol. iv, *voce* Prisoner. Indeed, as the catbands were not locked that night, perhaps it may be thought they should have been found liable in terms of the act of sederunt. The answer, that that circumstance did not facilitate the escape, seems scarcely relevant. The favourable circumstance in this case was, that the doors were opened by an accomplice from without.

[b] Chalmer, &c. against the Magistrates of Tain, 14th Dec. 1757.

[c] Gall against the Magistrates of Forfar, 29th January 1747. In this case, to be sure, it was disputed whether the prison was not insufficient, in so far as there was no vault below the prison, which was floored with large oak boards upon oak joists and that the prisoner had escaped by forcing up, in the night time, three of those boards, and thereby getting down to a shop which is immediately below the prison room, (and which has been there past memory), and by getting out at the window of said shop, which, as usual in shops, was bolted on the inside. But lord Kilkerran observes, "there was no occasion to give judgment upon the "point, as all agreed that they were "liable upon the other, and so the "interlocutor was given, in general, "finding them liable as above." However, it will occur, that on the principles of the decision in the case of Ayr, there were grounds for subjecting the magistrates even on the footing of insufficiency.

§ 5. RESPONSIBILITY.

If the prisoner might have escaped.

FARTHER, even should the prisoner not escape, still the magistrates will be subjected if he had an opportunity of doing so, or was allowed to go out for air or exercise; and, in short, if he was not kept in that close confinement that gives the creditor a chance of getting payment of his debt *squalore carceris*,[a] or if there be any delay in committing him to prison.[b]

Imprisonment *meditatione fugæ*.

IN case of the escape of a debtor imprisoned on a warrant *meditatione fugæ*, the magistrates are not liable for the debt, but are considered only as cautioners *judicio sisti*; and, therefore, if the prisoner be recommitted before they are required to present him in court, no claim lies against them.[c]

Management of the prison.

BUT, farther, magistrates will be liable if they dismiss the prisoner without the proper and regular warrant. A prisoner, on a criminal warrant, cannot be set at liberty, unles in consequence of a warrant of liberation under the hand of a competent judge. And, in the case of prisoners for debt, strictly speaking, a regular warrant is necessary: as no debtor can be imprisoned unless by letters of caption under the signet, so regular letters of liberation should also be necessary to justify setting prisoners at liberty. But, to save expence to the debtors, a written discharge by the creditor in the

[a] 8th June 1790, Shortreed against Magistrates of Annan. The sheriff of the county was committed to prison for debt. The prison or town-hall and court-room were apartments of the same building. The magistrates had long been in the practice of allowing prisoners, on whom they could depend, access to the hall, which was no way secured. And, in this case, the sheriff held courts there. He did not escape; but the magistrates were subjected in payment of the debt for which he had been imprisoned. And the house of lords affirmed the judgment.

[b] Two debtors were presented to the magistrates of Lochmaben, on the 25th March, but were left at liberty till the 27th. The magistrates were found liable for the debt and for expences. 13th June 1781, Bell against the Magistrates of Lochmaben, Dict. Vol. iv, *v.* Prisoner.

[c] 16th Nov. 1792, Brown against the Magistrates of Lanark. Dict. ib.

caption is sufficient for debts under 200 merks.[a] And in practice, a written discharge is held sufficient, whatever be the amount of the debt. § 3. RESPONSIBILITY.

IN the case of a *cessio bonorum*, the decree must be extracted before it can have effect. "A debtor having been "imprisoned, obtained a decree of *cessio* on the last day "of the winter session, whereupon the jailor immediately "set him at liberty. The creditor prosecuted the magis- "trates of Edinburgh, on the ground, that this liberation "was illegal, as a decree of *cessio* before it is extracted, "and still more, when, by the forms of the court, it is "incapable of being extracted, is of no avail. The lords "found the magistrates liable in the full sums contained "in the diligence."[b]

No spiritous liquor ought to be allowed to be sold in the jail. By the 24 Geo. II, c. 40, it is enacted, that no licence shall be granted for retailing spiritous liquors within any jail or prison; and the penalty of transgressing this

[a] Act of sederunt, 5th Feb. 1675, "The lords . . . finding that where "the debt for which persons are "incarcerate is inconsiderable, the "expence of procuring a charge to "set at liberty, will sometimes near "equal the debt itself, the prisoners "being also poor, and not able to "satisfy the said expences: There- "fore the said lords do authorize "and allow the magistrates of burghs "to set at liberty out of their tol- "booths persons imprisoned for debt, "by virtue of letters of caption, upon "production of a sufficient discharge "of the debt granted by the creditor, "at whose instance they are incar- "cerate, bearing a consent to the "debtor's liberation, and duly regis- "trat, if the sum do not exceed 200 "merks Scots, and the prisoner be "not arrested at the instance of other "parties; the magistrates or keeper "of the tolbooth being always care- "ful to keep an extract of the said "discharge; and finds no necessity in "this case of a charge to set at liber- "ty; but, if the sum for which the "debtor is incarcerate, exceed 200 "merks Scots, the lords discharge "the magistrates of the burgh to "liberate him out of prison, without "a suspension and charge to set at "liberty under his majesty's signet."

[b] 8th July 1788, Wilson against Magistrates of Edinburgh. Fac. Coll.

§ 5. RESPONSIBILITY.

act is fixed at *one hundred pound*, wherof one moiety goes to the king, and another, with full costs of suit, to the prosecutor.[a]

Jailor's dues.

BOROUGHS are liable to keep a free jail, which includes the expence of a jailor as well as of the prison itself. They are not entitled, therefore, to exact dues from prisoners, whether confined for debt, or upon a criminal warrant; unless, perhaps, in particular circumstances for better accommodation, if required.[c]

[a] This evil had prevailed to a great height even in Edinburgh. but the magistrates, being called before the court, assured their lordships it should be corrected in time to come.

[b] M'Whinnie against Keepers of the prison of Ayr, 7th Dec. 1803. "It was the decided opinion of the "court, that the magistrates of "every burgh were obliged, at the "expence of the burgh to keep up "a free jail; and that neither they "nor their jailors were entitled to "exact any such dues from the "debtors, who might be incarcer-"ated as was here attempted." The contrary practice of exacting fees has become very frequent throughout the country, and was the source of great oppression. The evil has gone to that height, that the court have thought it necessary to appoint a committee to take the matter into consideration, with a view to regulate it in time to come, by an act of sederunt. The magistrates of Glasgow have lately published a set of very good regulations for the management of their prison.

CHAP. XII.

Of the legal Provisions for the Relief of Prisoners.

§ 1. BAD HEALTH. *Squalor carceris*, means confinement only.

I. *SQUALOR carceris*, by means of which creditors are entitled to attempt procuring payment of their debts, implies close confinement alone; but does not justify any aggravation thereof by bad air, or unwholesomeness of the prison.

ACCORDINGLY, the magistrates, on any medical practitioner's certificate, *on oath*, that the confinement threatens the prisoner's life, have a discretionary power to remove him to some other place within their jurisdiction. This practice, agreeable to the native humanity of our common law, had prevailed at an early period, and rather been carried to excess. It was regulated by act of sederunt.[a] The debtor must be

[a] 14th June 1671. "The lords "considering, that albeit by the law, "magistrates of burghs are obliged "to detain, in sure ward and firm- "ance, persons incarcerate in their "tolbooths for debt, yet hitherto "they have been in use to indulge "prisoners to go abroad upon several "occasions; and it being expedient, "that, in time coming, the foresaid "liberty

§ 1. BAD HEALTH. Certificate of bad health.

confined to some house within the jurisdiction, under the custody of some person authorized by the magistrate to look after him, under which custody he must still be, even should it be found necessary to indulge him with air and exercise.[b]

THE magistrates do this at their own expence, if the

" liberty, taken by magistrates of " burghs, should be restrained, and " the law duly observed, therefore " the said lords do declare, that here- " after it shall not be lawful to the " magistrates of burghs, upon any " occasion whatsoever, without a " warrant from his majesty's privy " council, or the lords of session, to " permit any person, incarcerate in " their tolbooth for debt, to go out " of prison, except only in the case " of the party's sickness and extreme " danger of life, the same being al- " ways attested upon oath, under " the hand of a physician, surgeon, " apothecary, or minister of the gos- " pel in the place; which certificate " shall be recorded in the town court " books: And, in that case, that the " magistrates allow the party only " liberty to reside in some house " within the town during the con- " tinuance of his sickness, they being " always answerable that the party " escape not, and, upon his recovery, " to return to prison. And the lords " declare, that any magistrates of " burghs, who shall contravene the " premises, shall be liable in payment " of the debt for which the rebel " was incarcerate. And appoints this " act to be intimate to the agent for " the royal boroughs, and to be insert " in the books of sederunt."

b Fullerton against Magistrates of Ayr, 7th March 1781. " The fol- " lowing circumstances were found " sufficient to subject the magistrates " of a burgh to the payment of a " debt due by a prisoner in terms of " the act of sederunt, 14th June " 1671.—

" Instead of complying with the " act, by requiring the attestation of " a physician, upon oath, bearing, " that the debtor actually laboured " under a disease, attended with " deadly symptoms, they had dis- " missed the debtor, upon the physi- " cian's declaring, *upon soul and con- " science*, that the debtor's continu- " ance in confinement might, by " reason of his valetudinary state of " health, prove fatal to his life; and, " instead of confining the debtor in " a house within the burgh and re- " manding him to prison upon his " recovery, they had allowed him to " go through the country, for the " space of five months, in the exer- " cise of his profession as a country " surgeon.

" It may likewise be remarked, " that the magistrates had accepted " a bond from the debtor's friends, " securing them against the conse- " quences of their procedure." Fac. Col.

debtor cannot afford it. During this indulgence, the debtor is still understood to be in confinement. § 1. BAD HEALTH.

II. IT is only criminals who must be maintained by the public. Debtors, if they have no funds, must be maintained by those who imprison them, whether with a view to their own personal advantage, or to gratify their resentment. § 2. ACT OF GRACE, WILL. P. I. 1696, c. 32.

THE act of grace, therefore,[a] as it is called, provides, that, on any prisoner for a civil debt making oath before the magistrates of the jurisdiction, that he has not where-with to maintain himself, the magistrate may require the creditors, upon whose diligence he is imprisoned, to provide and give security for an alimony to him, at a rate not under 3d. a day; which, if the creditor refuse or delay to do within the space of ten days thereafter, it shall be lawful for the magistrate to set the prisoner at liberty. If the debtor cannot maintain himself. Rate of statutory alimony. If the creditor gives no aliment.

THE debt and diligence, upon which the debtor was imprisoned, are not discharged by the magistrate's setting him free upon this statute, and therefore the creditor may again use personal execution against him upon the former caption.[b] 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.[c] Does liberation for no aliment discharge the debt?

THIS obligation upon creditors to support their indigent debtors, Mr. Erskine says, took its rise from the Romans. Accordingly, the code of monarchical France,[d] which drew more liberally still from the same source, had adopted the very same regulation, by two edicts; the one in 1670, and the other in 1680, not many years prior to our act of grace.[e]

[a] 1696, c. 32.

[b] Abercromby against Brodie, 19th June 1759, Fac. Col.

[c] Ersk. B. iv, t. 3, § 28.

[d] Nov. 135, c. 1.

[e] The former is in these words: "*Sur*

§ 2. ACT OF GRACE.

ALL debtors, imprisoned for payment of a sum of money, are entitled to the benefit of the act of grace, without respect to the nature and origin of the debt, as implying blame in them or not.[a] This privilege no person is entitled to who is imprisoned *ad factum præstandum.*

Who entitled to the act of grace?

If in the case of fines for delinquency?

§ 3. CESSIO BONORUM.

III. *Cessio bonorum* is the most important of the *remedia miserabilia*, devised by the Scottish law for the relief of debtors: By means of it a debtor is set at liberty, on making a full surrender of his effects to his creditors.

" *Sur deux sommations faites à differents jours aux créanciers qui seront en* " *demeure de fournir la nourriture au* " *prisonnier, et trois jours après la der-* " *niere, le juge pourra* ordonner l'élar- " gissement du prisonnier, partie " présente, ou duement appellé." The latter edict extended the former, with a view to the greater convenience of prisoners, on the narrative, " *que souvent le prisonnier n'avoit pas* " *le moyen de faire ces sommations . . . .* " *le roi, par ce même edit, art. 5, or-* " *donna qu'après l'expiration des pre-* " *miers quinze jours du mois, pour lequel* " *la somme nécessaire aux aliments* " *n'auroit point été payée, le juge, sur la* " *simple requisition du prisonnier, et le* " *certificat du geolier, que la somme n'a* " *point été payée, ordonneroit l'élargisse-* " *ment du prisonnier, pourvu que les* " *causes de l'emprisonnement, et des re-* " *commandations n'excedassent as la* " *somme de deux mille livres; et, si les* " *causes excédoient cette somme, que l'é-* " *largissement, en ce cas, ne pourroit* " *être prononce qu'au siege.*" Pothier Oeuvres Posthumes, t. 3, p. 294.

[a] Decem. 7, 1787, Clerk against Johnston and Procurator Fiscal. Clerk was imprisoned for payment of a fine of 60l. sterling, imposed by the justices of peace, on account of his being guilty of an assault and battery. He applied for the benefit of the act 1696. It was pleaded, he was not entitled to an aliment, as the imprisonment was in consequence of a delict. The court of session were of opinion, that a fine, or damages, arising *ex delicto*, were truly a civil debt; and found him entitled to be alimented by those to whom the fine was to accrue. And the same has ever since been held as fixed law. At one period, the court rather inclined to an opposite construction of the act.

The present idea is agreeable also to what obtained in the French law; this privilege there being mentioned as applicable to all prisoners in general, although the distinction betwixt fines and damages, and civil debts, was not only known, but more regarded in their law than in ours, as we will see in treating of another (in the language of the civilians) *miserabile remedium.*

§ 3. CESSIO BONORUM.

THE benefit of *cessio bonorum* arises from a twofold foundation, viz. "the compassion of human misery;" and from "the design of the incarceration not being penal, but "against defrauders or concealers of their estate." [a]

Cessio when first introduced by the Roman law.

IN the Roman law, creditors were first indulged with this privilege by the *lex julia*. The debtor, craving this privilege, must prove insolvency.[b] But, as in the case of the act of grace, so the benefit of the *cessio* is not denied to those debtors who are owing *ex delicto*.[c]

In debts of *delicto*.

BUT the benefit of *cessio bonorum* was refused to a bankrupt, where his insolvency had proceeded, not from unforeseen losses, but from extravagant living, unsuitable to his income.[d]

THE benefit of a *cessio* was refused to a person who acknowledged he kept no books; a circumstance that rendered it impossible for him to prove that his bankruptcy had been occasioned by innocent misfortunes.[e] For no

If the debtor keeps no books.

[a] Stair, B. 4, t. 52, § 31.

[b] Feb. 4, 1775, Sharp against Turner, Dict. Vol. iv, t. 1, Prisoner.

[c] March 5, 1791. "M'Dowal "was imprisoned, for payment of a "claim of damages against him for "seduction. Having pursued a *ces-* "*sio bonorum*, it was objected, that "this benefit was not competent to a "debtor *ex delicto*. Answered, The "pursuer's insolvency does not arise "from this claim, but from a variety "of other debts. The lords repelled "the objection." M'Dowal against Moliere, Dict. Vol. iv, ibid. So also, in the subsequent case, 15 January 1794, Douglas against her Creditors. In this case, the pursuer was imprisoned for payment of damages for defamation.

[d] 12 July 1785, M'Cubbin against Thomson and his Creditors. And though, in a subsequent case, the benefit was granted where the insolvency had arisen from too great indulgence in living, Tough against his Creditors; yet the court have since refused the benefit, in cases of extravagant living, and expressed an opinion, that the case of M'Cubbin was better decided.

[e] 10 March 1786, Fraser against his Creditors, Dict. Vol. iv, Prisoner.

§ 2. CESSIO BONORUM.

debtor is entitled to this privilege, who has been engaged in fraudulent transactions.[a]

What debtors?

EVERY debtor, imprisoned for a debt of the proper description, is entitled to the benefit of the *cessio*. Even a

Foreigners?

foreigner, the greatest part of whose debts had been contracted abroad, has been found entitled to it.[b]

Must be imprisoned for a month.

BUT no person can obtain the *cessio*, unless he has been imprisoned for a month before the application for it. If he be out on a bill of health, he may obtain it, that being held as being legally in prison.

One out on a bill of health.

[a] In the case James Scott against Crosbie, the pursuer of the *cessio* pleaded, that as imprisonment for debt was not *penal*, but merely a *compulsory* for compelling payment, it followed that the benefit was to be granted to every debtor whatever, provided only there was complete evidence that his funds were all spent, and that nothing remained in his power. One respectable judge, supporting the idea, observed, that, at the date of the acts of sederunt 1666, 17 May, 1669, 26 February, 23 January 1663, there must have been two classes of bankrupts in view, those who had become so from innocent misfortunes, with respect to whom the habit was dispensed with, and culpable bankrupts, who were ordained "in all time "thereafter to wear a bonnet partly," &c. His lordship, therefore, thought it agreeable to the ancient principles of our law, to grant the *cessio* in every case where there was no ground to suspect a concealment of effects in the case of blame, with the *stigma* of the habit; in the case of an innocence, without it. But the other judges did not go into that idea.

They thought it afforded too much encouragement to fraud, in mercantile transactions, to allow the benefit to any but the fair trader; and that the law had been so fixed, by the general practice of the court, for many years past. Scott, at last, obtained the *cessio*; but it was in consequence rather of Mr. Crosbie withdrawing his opposition, than of any change of opinion in the court.

[b] 29 May 1804, Mercer against Tasker, &c. Fac. Coll. In France, the benefit of *cessio* was confined to natives; but this limitation arose from a special ordinance of the king, 1673, t. 10, art. 2. In Scotland, again, no enactment provided for that matter, and the court extended it to strangers, on the sound and liberal principles of our common law. This, however, must depend a good

§ 3. CESSIO BONORUM.

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 prison; without which certificate the process is not to be sustained.[a]

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.[b]

Dispensing with the habit.

THE court of session, by the said act of sederunt, declared, that it would not dispense with the wearing of the habit, except in the case of mere misfortune; and the statute 1696, c. 5, prohibits the dispensing 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.[c]

deal on circumstances; for if it shall appear that a stranger has come to this country with an unfair view of withdrawing himself from his creditors and from the law of his own country, he will not easily obtain the benefit of a *cessio*.—Maidmont against his creditors, 29 January 1799.

[a] Act of sederunt, 18 July 1688.

[b] Act of sederunt, 18 July 1688. "The lords of council and session do "ordain .... the magistrates of the "burgh, before his liberation out of "prison, to cause him to take on and "wear upon his head a bonnet, part-"ly of a brown and partly of a yel-"low colour, with uppermost hose "or stockings on his legs, half brown "and half yellow coloured, conform "to a pattern delivered to the ma-"gistrates of Edinburgh, to be keep-"ed in their tolbooth; and that they "cause take the dyvour to the mer-"cat cross, betwixt 10 and 12 o'clock "in the forenoon, with the foresaid "habit, where he is to sit upon the "dyvour stone the space of ane hour, "and then to be dismissed, and or-"dains the dyvour to wear the said "habit in all time thereafter; and in "case he be found either wanting or "disguising the same, he shall lose "the benefit of the *bonorum*."

In France, in like manner, debtors were under the necessity of wearing the *bonnet verd*. "*J'ai*," says M. Pothier, "*toujours vu prononcer ici cette "condition de porter le bonnet verd; "mais je n'ai jamais vu que des créan-"ciers ayent fait usage de ces sentences, "et ayent fournis à leur debiteur un bon-"net verd pour le porter.*" Oeuv. Post. t. 3, p 300.

[c] Ersk. B. iv, t. 3, § 27.

§ 3. CESSIO BONORUM.

THE debtor must dispone over his whole heritable and moveable effects to his creditors. The Romans allowed him to retain the *beneficium competentiæ*, viz. what was necessary for his sustenance; which doctrine[a] is no farther gone into by our practice, than with respect to implements of husbandry, working tools, &c. necessary for his future industry. And farther, persons not in the way of supporting themselves by industry, such as ministers, half-pay officers, &c. have been allowed to retain a certain part of their income, which seemed necessary for their subsistance.[b]

Disposition *omnium bonorum.*

Beneficium competentiæ.

Effect of liberation.

If creditors are not all called.

Future debts.

Alimentary funds.

THE decree, ordaining the prisoner to be set free, has no effect as to creditors who are not called in the action, nor with respect to future debts contracted by him, or future acquisitions which may be attached by his creditors, "except," says lord Bankton, "what is conferred on him by "third parties, expressly for his aliment."[c]

§ 4. CRIMINALS.

IV. CONFINEMENT for unknown causes, and confinement for an unreasonable length of time, the two great dangers most likely to attend the imprisonment of persons accused of crimes, are both provided against by the act 1701, which we have already largely considered.

BUT, if persons unable to find bail, or imprisoned for crimes not bailable, or imprisoned *in pœnam*, are suffering in their health from the confinement, still there is no legal

[a] It is favoured by the Quon. attach. c. 7, § 3, "reservand to him-"self his necessare sustentation, "quhereby he may live."

[b] A very considerable portion of the stipend was allowed in Tough's case In the case of Baillie, the pursuer, a widow woman, was allowed to retain a part of her jointure.

A dentist having obtained the benefit of the *cessio*, insisted, that, under the spirit of the indulgence with respect to working tools, he should be allowed to retain the furniture of one apartment as being necessary for carrying on his business. The court unanimously refused the request.—Chevalier Ruspini, younger.

[c] B. iv, t. 40, § 5.

remedy applied to their case. If it can be afforded at all, it must come from the high court of justiciary, on a special statement of the circumstances of the case.[a] Hence justices of the peace must feel themselves under the stronger obligations to prevent the evil, by attention to the discharge of their statutory duty, in attending to the cleanness, the salubrity of the prisons, and the treatment of the prisoners.

§ 4. CRIMINALS.

[a] Hume, Vol. iv, p. 355.

CHAP. XIII.

Of Schools.

§ 1. IN GENERAL.

I. *Quid vanæ sine moribus leges?* Police regulations, and vindictive justice can avail little, unless due care be taken of the public morals.

On this account, the Scottish government expressed much anxiety, that "the subjects, especially the youth, be exer- "cised and trained up in civilitie, godliness, knowlege, "and learning;"[a] thinking that there "are no means "more powerful to further this .... than the establishing "of schools in the particular parishes of this kingdom, "where the youth may be taught at the least to write and "read, and be catechised and instructed in the grounds "of religion."[b] And, at an early period, when men of rank and political importance could frequently neither read nor write, statutes enacted, that "all baronis and substan- "tious frehalderis sould put thair airis to ye schulis."[c]

[a] Act of privy council, 1616.
[b] Ibid.
[c] Jas. IV, 1496, c. 87. President Balfour "anent schulis," p. 132.

§ 1. IN GENERAL.

OUR country, we must admit, is surpassed by its neighbours in many important advantages. This perhaps may apologise for the national partiality of our antiquaries clinging the closer to the imagined literary distinctions of the Scottish name; not only disputing with English and Irish antiquaries the honour of giving birth to many learned men,[a] but even taking credit for the origin of scholastic divinity,[b] and the foundation of the university of Paris;[c] the one the chief subject, and the other the chief seat, of European learning for ages.

[a] See, for example, Dr. M'Kenzie's lives of the Scottish writers, *passim*; and particularly the preface of vol. ii.

[b] John Duns Scotus, called the subtle doctor, one of the fathers of the school divinity, was born at the town of Dunse, in Berwickshire, Scotland.

[c] The legend alluded to appears in the chronicles of the times of Charlemagne, viz. "two Scottish "monks *(duo monachi Scoti)* arriving "in France, in company with some "merchants, demanded of the in- "habitants, whether any person "wished to buy wisdom? The king "hearing of it, ordered them into "his presence; and asking them "whether they had wisdom to dis- "pose of, they answered, that they "had. He then asked them, what "price they demanded for it? They "replied, We ask three things; a "convenient residence, docile dis- "ciples, and a competent mainte- "nance." This demand was complied with; and *Studium Parisiense inceptum et ac tunc delatatum est Bulæus*, who gives the story at length in his history of the university of Paris, (vol. i, p. 96, &c.) tells us, these two monks were *viri in sacris et secularibus scripturis ut tum erant tempora eruditissimi*. But he describes them by another particular also, which is not so much to the liking of our writers; he says, *duo Sceti monachi* ex Hybernia.

This story is adorned by the poetry of Buchanan. In his Epithalamium in honour of queen Mary, after enumerating, with no small poetical licence, various imagined national advantages,

"*Quæque beant alias, communia com-*
"*moda gentes,*"

as trifles, which the country does not reckon upon, he then proceeds to triumph in what he supposes the true ground of national exultation, its literary honours, which he expresses in these lines:

"*Neque putes duri studiis assueta gra-*
"*divi*
"*Pectora, mansuetas non emollescere ad*
"*artes:*
"*Hæc quoque cum Latium quateret*
"*Mars barbarus orbem*
"*Sola prope expulsis fuit hospita terra*
"*Camœnis.*
"*Hinc sophiæ Graiæ, sophiæ decreta*
"*Latinæ,*
"*Doctoresque rudis formatoresque ju-*
"*ventæ,*
"*Carolus ad Celtas traduxit:*"

But need we boast of learned names

§ I. IN GENERAL.

BUT the ardour of our countrymen unfortunately evaporated in such unprofitable contentions (the serious occupation of the last age, but which are long ago sunk in merited contempt and oblivion) without procuring for us any satisfactory information concerning the particular state of schools in Scotland before the reformation; while the pains bestowed in some other countries, to trace the rise and progress of seminaries of education, are among the most stupendous monuments of learned industry.

IT cannot, however, be doubted, that here, as in other countries where the popish hierarchy obtained, parochial schools were under the management of the clergy, and maintained by the revenues of the church; which seminaries may be traced back to the earliest periods of primitive christianity.

THE philosphers had divided mankind into two classes, *the few*, and *the many*. Their instructions they confined to the former, assembled in the academy or the porch; but to the latter their language was, *Procul ô, procul este, profani;* whereas, in Christian congregations, on the other hand, the great aim was to ameliorate the minds, and increase the knowledge and happiness of *all*. Schools were therefore early established for the instruction of the children, not only in the principles of the Christian religion, but likewise in

contemporary with Charlemagne, considering our long line of royal authors? whose history one doughty patriot, in his "*Oratio de illustribus* "*Scotiæ scriptoribus*," commences with the complete system of Political Economy, published, with other learned works, by king Fergus I, much about the time of Alexander the Great's victory over Darius: "*Fergusium pri-* "*mum Scotorum regem illustrissimum* "*...hic fælicem doctrinæ facem sequu-* "*turis Scotiæ regibus primus prætulit,* "*scripsit* inter alia legum politicarum "librum unum. *Post hunc, Dorna-* "*dilla ... composuit ad posteritatis usum,* "*ut alter Artaxerxes, legum venatori-* "*arum librum unum*, aliaque fælicis "ingenii monumenta." Apud M'Kenzie, vol. i, p. 21.

secular learning. With the increase of the hierarchy, and wealth of the church, these schools multiplied, and were divided into different classes.[a] § 1. IN GENERAL.

THE canon law contained many injunctions with respect to these schools; and many decrees of the general councils were passed, with the view of preventing their neglect. In particular, the Lateran council, held in 1102, expressed itself as follows: "Since the holy church, like an affectionate "mother, ought to provide means of instruction for the "children of the poor, therefore, in each cathedral church, "let a benefice *(aliquod beneficium)* be set apart for a mas- "ter to teach the clergy thereof, and poor scholars;"[b] which provision was ratified and farther extended by subsequent constitutions.

IN Scotland, we have every reason to imagine, that, prior to the reformation, such schools abounded through the country, maintained by the ecclesiastical revenues. Accordingly, in reclaiming the patrimony of the church our first reformers uniformly mentioned the maintenance of the schools among the other public and pious works to which it was sacred, and the expence of which had been supplied by the former incumbents.[c]

[a] Cathedral schools were taught in the cathedral church, under the bishop's immediate inspection; *episcopal schools*, in other parts of the diocese, under his superintendance. And those taught by the regulars in the monasteries, which soon shook off all dependence upon the secular metropolitan, were called *cænobiales*. See Church history, and Histoire Literaire de la France, 7, 9.

[b] Decretal, L. v, t. 5, § 1.

[c] In the form of church policy drawn up by John Knox, and inserted in Spottiswood's history, p. 160, it is said, two sorts of men, that is, the preachers of the word and the poor, besides the schools, must be sustained upon the rents of the church. So the book of policy presented to the parliament at Stirling in 1578, c. 9, and 10, "We adhere unto the schools "and schoolmasters, who ought and "may well be sustained of the same "goods, and are comprehended un- "der the clergy." Spottiswood, 297

§ 1. IN GENERAL.

PARLIAMENT did not deny the truth of the allegation; and though it did not, on that account, restore the church lands to the clergy, it passed several acts, providing for the establishment and maintenance of the schools throughout the country.

THE first regular enactment, respecting parochial schools, was the act of the privy council, which expressed, that "the "king's majestie, with advice of the lords of his secret "council, has thought it necessar and expedient, that in "every paroch of this kingdom, whair convenient means "may be had for entertaining, a schoole sall be established, "and a fit person appointit to teach the same, upon the "expence of the parochiners, according to the quantity and "quality of the paroch, at the sight, and be the advice of "the bishop of the diocese in his visitation."

THIS proclamation of James VI was ratified and extended by an act of parliament in the succeeding reign,[b] which, however, and the other enactments during the short and alternate reign of episcopacy and presbytery, need not be taken notice of; the law, after the final establishment of presbytery by king William's parliament, having been regulated by two statutes, the one the act 1693, the great charter of the presbyterian church, the other the act 1696, "anent the settling of schools," as they are corrected and enlarged by the 43 Geo. III, c. 54.

§ 2. ONE IN EVERY PARISH.

II. THE law is express, that a public school be established in every parish: Whether great or small, accessible easily from one part of it to another, or intersected by rivers and arms of the sea, populous and consisting of arable farms, or devoted to sheep walks and dispeopled of its ancient inhabitants, the resort of private teachers, or destitute of any other

[b] 1633, c. 5.

means of instruction, the parish is equally entitled to the benefit of this salutary institution, which the law does not make dependent upon any specialties. §. 2. ONE IN EVERY PARISH.

SUCH circumstances never justify the want of a school in any parish; but local situation the law sometimes considers as a good reason for two schools in one parish. The late statute enacts, "That, in case of those parishes which consist of districts detached from each other by the sea, or arms of the sea, or otherways, as where a parish consists of two or more islands, (of which there are several instances in the Highlands, North Isles, and Hebrides), or where it is otherways 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 600 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."[a]

THE late statute naturally takes for granted, that each parish is already provided in a schoolmaster.[b] The act 1696 indeed takes the wisest method for procuring such an establishment in every parish. It directs, in the first place, the heritors in every parish to meet and provide, &c. as the persons who have the permanent interest in the parish, and ought to be interested in the welfare of its inhabitants. In case of their neglect, the act directs "the presbytery of the bounds to apply to the convener of the commissioners of

[a] § 11.

[b] This, however, there is reason to believe, is far from being the case. This appears from the records of the general assembly. Representations having been made, from time to time, down to very late years, of the want of schools in many parts of the highlands and islands.

§ 2. ONE IN EVERY PARISH.

"supply of the county or stewartry, who, or any five of "them, at a meeting to be held by the convener upon "thirty day's notice, shall have power, *jure devoluto*, and "are hereby directed, to elect a person to supply the va- "cancy."[a] Or if such parish never had any school-master, then the said commissioners of supply "shall have "power to establish a school, and settle and modify a sal- "ary for a schoolmaster."[b] The law thus intrusts the redress with the presbytery, without imposing on them the disagreeable part of the business. They are not authorized to proceed themselves, either to elect a school-master, or provide a salary for him, but merely to lay the matter before the commissioners of supply.[c]

THE statute has not deemed it necessary to provide any farther remedy, in case of all of these respectable bodies failing in the discharge of this duty. But, were the commissioners of supply to refuse obeying the call of the presbytery, this wrong would be remedied by the supreme civil court.[d]

[a] Stat. 43 Geo. III, c. 54, § 15.

[b] 1696, c. 26.

[c] 22d July 1768, Mr. George Brown against the Heritors of Dunfermline. No salary having been settled by the heritors, Mr. Brown applied to the presbytery, who sustained themselves competent under the statute 1633, c. 5, as having come in place of the bishop, and found that the mortification is no part of the legal provision for the schoolmaster; and modified 200 merks, including the 40l. settled by the town, as the legal salary of the schoolmaster in all time coming; and appointed the heritors to stent themselves, conform to their valued rent, for the remainder of the 200 merks.

The lords found, that the presbytery has no jurisdiction in this matter; and therefore advocated the cause, and assoilzied.

[d] 31st July 1773, Minister of the parish of Reay. The clergyman seeing his parishioners without the means of instruction, made various attempts to prevail upon the heritors to put the act in execution. The presbytery then made application to the commissioners of supply, who were guilty of the same illegal disobedience to the law. The minister of the parish, with concurrence of the

WERE the minister of the parish, and the presbytery of the bounds, to concur with the heritors and commissioners of supply in disobedience to the statute, there cannot be a doubt that the court of session would compel the heritors to do their duty, upon the complaint of any one of the parishioners. No human being within the bounds wants either title or interest for enforcing the observance of so pious and necessary an enactment. § 2. ONE IN EVERY PARISH.

III. UPON the narrative of the great fall in the value of money, the late statute enacts, that after Martinmas 1803, the salary of each parochial schoolmaster, in every parish of Scotland, shall not be under 300 merks Scots (£16 : 13 : 4) per annum, nor above 400 merks Scots (£22 : 4 : $5\frac{4}{12}$) per annum.[a] And within three months after the passing of the said act, the heritors duly qualified, and minister of the parish, were ordained to hold a meeting, and determine what the salary should be, whether the *maximum*, *minimum*, or intermediate sum. But they had no power to lower the salary of any schoolmaster which he enjoyed before the late statute. And if any part of the salary is payable in grain or meal, such grain or meal shall continue payable as before, with such additions in money as the meeting shall judge § 3. MAINTENANCE—SALARY.

the presbytery, applied to the court of session by declarator, narrating the refusal of the heritors and commissioners to meet. The lord ordinary made a special order for the meeting of the heritors to be held, in order to execute the statute. At the day appointed, there appeared one heritor, and the minister, who transmitted a report that 200 merks Scots would be necessary. Their lordships pronounced the following interlocutor: "Find that 200 merks is a proper and necessary salary for a school-master of the said parish of Reay, and that 20l. sterling is necessary to build a proper schoolhouse in the said parish, to be built upon an acre of land, called the school-acre, given in donation by Mr. Innes of Sandside; and remit to the ordinary to proceed accordingly; and particularly to allocate and proportion the said yearly salary, and expence of building the schoolhouse, upon the several heritors liable in payment agreeable to law."

[a] 43 Geo. III, c. 54, § 1.

§ 3. MAINTENANCE —SALARY.

proper; and that, in fixing the amount of the salary to be paid pursuant to this act the grain or meal shall be estimated at 200 merks per chalder; which salary, when so fixed, shall continue to be paid to the schoolmaster for 25 years after the passing of the act.[a] Farther, the schoolmaster is provided in a house and garden.[b]

THE expence of providing the school-house, dwelling-house, and garden, is to be defrayed by an assessment on the

[a] § 2 and 3. "If the heritors and "minister shall neglect or refuse to "determine the amount of the salary "to be paid to the schoolmaster, ac- "cording to the provisions of the act, "or if any heritor or schoolmaster "shall be dissatisfied with the deter- "mination made, the person so dis- "satisfied may, within three months "after such meeting ought to have "been held, or such determination "shall have been made, apply or ap- "peal to the next quarter sessions "for the shire or stewarty, whose "judgment shall be final, and that "no appeal by advocation, suspen- "sion, or otherwise, shall be admit- "ted against the judgment given at "such quarter sessions; provided al "ways, that no heritor of the parish "from whence the appeal comes, "shall vote upon such appeal at the "quarter sessions."

[b] The act 1696 provides, that it shall be lawful to patrons to employ the vacant stipends, as they shall see cause; excepting from this act the bounds of the synod of Argyle, in respect that by a former act of parliament, in the year 1690, the vacant stipends within the said bounds are destined for the setting up and maintaining of schools in manner therein mentioned; and the said vacant stipends are hereby expressly appointed to be thereto applied at the sight of the sheriff of the bounds aforesaid.

And the late statute enacts, that in every parish where a commodious house for a school has not been provided pursuant to the act 1696, c. 26, and where there has not been already provided a dwelling house for the residence of the schoolmaster, with a proportion 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. § 8.

parish.[d] But, if a garden cannot be allotted to the schoolmaster, without great loss and inconvenience, it is optional to the heritors, with the authority of the quarter sessions, to assign to the schoolmaster, in lieu of such garden, an addition to his salary, at the rate of eight bolls per acre, the grain or meal being estimated at 200 merks per chalder.[e] If the heritors shall neglect to provide the schoolmaster in those accommodations, or he be dissatisfied with what they have done, he may bring the matter within the review of the quarter-sessions, whose judgments are final. The heritor, from whose estate the ground is taken, has relief against the other heritors, according to their valued rent. § 3. MAINTENANCE —GARDEN

IN those parishes where two schoolmasters may be found necessary, the heritors are not bound to provide the schoolmasters in houses or gardens, but may, on fixing a salary of 600 merks, or the value of three chalders of oat-meal, 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;[f] which provisions are exclusive of the casualties which formerly belonged to the readers and clerks of the kirk-session;[g] offices that are generally held by the parochial schoolmaster.

IV. ALL heritors possessing £100 Scots of valued rent within the parish,[h] are entitled to attend the meeting; and if absent, to vote by proxy, or by letter under his hand. The minister also is a member of the meeting, and the vote *per capita*: but where there is only one heritor duly qualified, he has two votes.[i] If no preses be chosen, the heritor having the highest valuation has the casting vote. § 4. ASSESSMENT.

d 43 Geo. III, c. 54, § 8.
e Ibid.
f Geo. III, c. 54, § 11.
g 1696, c. 23.
h § 22.
i § 7.

§ 4. ASSESSMENT. THE assessment is paid by the heritors according to the valued rent. Each heritor has relief from his tenants of the half of his proportion.[a] And because the proportion imposed on every heritor will be but small, therefore if two terms' proportion run into the third unpaid, then these that so fail in payment, shall be liable in the double of their proportions then resting, and in the double of every term's proportion that shall be resting thereafter, ay and while the schoolmaster be completely paid, and that without any defalcation; and that letters of horning, and all other executorials necessary, be directed at the instance of the schoolmaster, for payment of the said stipend, and double of the proportions foresaid. All suspensions are discharged to pass, except upon consignation or a valid discharge. Liferenters during their lifetime pay the proportion laid upon the liferented lands.

IF a parish consists of a royal burgh, or part of a royal burgh, the salary is to continue to be paid in the same proportions by them as before the late statute, provided the salary be not below the *minimum*; in which case, the same appeal lies, as in the others, to the quarter-session.[b]

§ 5. ELECTION. V. THE choice of the schoolmaster is vested in the minister and heritors, meeting after thirty days premonition by edictal citation and circular letters, to the non-residing heritors.[c] The person so elected must take the oath of allegiance. Farther, he must be found qualified by the presbytery as to his 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. He must also sign the confession of faith and *formula* of the church of Scotland.[d] Their de-

[a] 1696, c. 26. [b] § 14. [c] Ibid. [d] § 16.

termination, as to the qualifications of such presentee, shall not be reviewed or suspended by any court civil or ecclesiastical.[a] If the person is not found qualified, another person must be chosen by the minister and heritors within the remainder of the time; otherwise the *jus devolutum* will take place. § 5. ELECTION.

THE fees are to be fixed from time to time, at a meeting called in the manner required by the statute, the schoolmaster teaching poor children gratis.[b] But the presbytery have the power of correcting any thing that appears to them amiss, with respect to the hours of teaching, the length of the vacation usually given, &c. Their regulations must be complied with by the schoolmaster, under the pain of censure, suspension, or depravation, according to the discretion of the presbytery.[c] In case of complaint being made against the schoolmaster for misbehaviour, the

[a] § 16. This makes it almost unnecessary to take notice of the case of M'Cuiloch against Allan, 26 Nov. 1793; where it was decided, that the sentence of the presbytery was reviewable by the court of session, and not by the ecclesiastical judicatures. A decision not in unison with that of the general assembly and synods, who had been in the practice of exercising a power of review in these questions. This judgment of the court of session was reversed in the house of lords, 18 Feb. 1800.

17th January 1807.—After the last statute, the presbytery and heritors again elected the said Mr. Allan, and without any new examination. The court, by a great majority, found the election null and void. Two judges voted, dismiss the complaint, upon the footing that, under the late statute, the sentence of the presbytery was not reviewable.

The court, on the contrary, thought their common law powers were still reserved to take care that the presbytery acted regularly; and here there were two irregularities; *first*, there was no new examination; *secondly*, the person elected had been found disqualified by the ultimate authorities on the former occasion. To this last objection it was answered, that he might have since become qualified. To the other it was answered, that "or otherways" entitled them to elect by private knowledge. This was scouted by the bench. They referred to means of scrutinizing his talents, but did not dispense with a trial.

[b] § 18. [c] § 20.

§ 5. ELECTION. presbytery are entitled to take cognizance of the same; and their judgment is final, without any appeal to or review by any court civil or ecclesiastical. In case of deposition, the school shall immediately be declared vacant.

§ 6. SUPERINTENDANCE OF THE PRESBYTERY. VI. THE presbytery has no superintendance over private schools. By act 19 Geo. II, c. 39, no person can keep a private school for teaching English, Latin, Greek, or any part of literature, until their description be registered, and the master qualify by taking the oaths, under the penalty of transportation; and 21 Geo. II, c. 34, § 12.

CHAP. XIV.

Of Religion.

I. THE State is "a society of men, constituted only for "the procuring, preserving, and advancing their "own civil interests,"[a] *ne quis fur esset, neu latro, neu quis adulter.* The magistrate therefore, has no right to punish or persecute individuals on account of their religious opinions, and never attempted to do so without producing, more or less, mischief and injustice. § 1. IN GENERAL. State, what is it? Cannot intermeddle with religion.

BUT the belief of a future state of retribution ever appeared a powerful auxiliary to human laws, in order to the attainment, even of those temporal advantages, that secure enjoyment of property and public quiet and tranquillity, which are the great ends of civil society. Hence, religion was termed by the ancient philosophers and politicians, "the link of society, and foundation of legislation; the bul-"wark of authority, and bond of law."[b] Accordingly, the Beneficial operation of religion. How termed by the ancients.

[a] Locke's Works, Vol. ii, p. 244.

[b] *Neque immerito Plato religionem propugnaculum potestatis ac legum et honestæ disciplinæ vinculum.*—Grotius de Jure Belli, &c. Lib. ii, c. 20, § 44.

§ 1. IN GENERAL.

ancient legal institutes, whether real[a] or Utopian,[b] are interwoven with ordinances touching religion.

Affected a divine origin.

HENCE, too, the more to increase their authority, the ancient lawgivers endeavoured to trace the different codes to a divine original. Plato begins his dialogue on the laws with this question, "Do you think, O guests, that a god, or some "man, was the cause of the establishment of laws?" ... to which the answer made is, "A god, O guest, a god; as it is "most just to assert: with us, indeed, Jupiter; but with "the Lacedæmonians, I think, Apollo dictated the laws."[c]

Kings also did so.

In like manner the kings affected a sacred character,[d]

[a] For example: The preface to the laws of Zaleucus and Charondas, (who were contemporary with Lycurgus, or 950 years before Christ), written, the one for the Locrians, the other for the Chalcidic cities of Italy. Zaleucus begins his laws as follows: "Every inhabitant of town "or country, should first of all be "firmly persuaded of the being and "existence of the gods; which be- "lief he will be readily disposed to "entertain, when he contemplates "the heavens, regards the world, "and observes the disposition, order, "and harmony of the universe; "which can neither be the work of "blind chance, nor of man. These "gods are to be worshipped as the "cause of all the real good we enjoy, "every person, therefore, should so "purify and possess his mind, as to "have it clear of all kinds of evil, "being persuaded that God is not "acceptably honoured by wicked "persons, nor acceptably served with "sumptuous ceremonies, or taken "with costly sacrifices; but with "virtue only, and a consistent dispo- "sition to good and virtuous actions." See this beautiful fragment of antiquity largely quoted, and its authenticity defended, by Warburton in his Divine Legation.

[b] As the Dialogues of Plato, and Cicero de Legibus.

[c] Taylor's Plato, vol. ii, p. 6.

[d] Hence Homer commonly applies to them the epithet Διογενεις, born of the gods; and Διοτρεφεις, bred by the gods: just as the Holy scriptures call them the *Lord's anointed*—1 Samuel, ch. xxiv, v. 8. Or as, agreeably to the amplifying phraseology of the east, the laws of Menu (more ancient than those of Lycurgus) say, "a king "was composed of particles drawn "from those chief guardian deities, "Indra," &c. and "consequently sur- "passes all mortals in glory." And, "even though a child, must not be "treated lightly, from an idea that "he is a mere mortal ... no: he is "a powerful divinity that appears in "a human shape."—Sir W. Jones's Works, vol. iii, ch. 7, p. 242.

which, on the one hand, begot a veneration for their persons and authority; just as, on the other hand, the most despotical monarchs have been practically limited, by their being "under the controul of laws, believed to be divine, "with which they never claimed any power of dis-"pensing.[a] § 1 IN GENERAL. Reason and effects of it.

BUT the derivation of the laws from the interposition of some tutelar deity in particular, so necessarily linked the ecclesiastical with the civil polity, that it was impossible to reject the one without committing an offence against the other.[b]

IN our own country, as well as throughout all Christendom, the political state of religion was for many centuries still worse, when the church claimed even superiority over the state, and when its priests were not amenable to the civil magistrate, but assumed the power of trying individuals for the heterodoxy of their religious opinions, as an offence, not againt civil society, but against the

[a] Sir W. Jones's Preface to the Commentary on the Mahommedan Law of Inheritance. Works, vol. iii, p. 513.

[b] Yet, like Julian of old, Voltaire, in his Age of Louis XIV, and with ourselves, the noble author of the Characteristics, affect to contrast the sociable and tolerant spirit of paganism with the persecuting and intolerant spirit of Christianity. In truth, ancient paganism neither did nor could tolerate the disbelief of the national gods, or rejection of the public worship. Christianity no sooner made known its pretensions to be the only true religion, and recommended the renouncing the heathen superstitions, than it experienced the vengeance of the civil magistrate; of the moral and philosophical Antoninus, as well as of the bloody Nero. Even Plato, in his book of laws, lays it down, that "no one shall have a "temple in any private house"... And that "if it shall appear that any "one possesses temples, and performs "orgies in any other places than "such as are public, he who detects "him, shall announce the affair to "the guardians of the laws"... And "if any one act impiously, shall ap-"pear to have committed, not the "impious deed of boys, but of im-"pious men, whether by sacrificing "to the gods in private or in public "temples, let him be condemned to "death, as one who has sacrificed "impurely."—Taylor's Plato, vol. ii, p. 325.

§ 1. IN GENERAL.

supreme Being; consigning the execution of their sentences to the civil magistrate, who had no discretionary power, but was necessitated to commit the victims to the flames.[a]

§ 2. HISTORY OF IT IN SCOTLAND.

II. CHRISTIANITY, however, while in its primitive purity, is said to have been planted in this country by Christians flying from the Roman empire, during the persecutions;[b] and by means of the culdees, or Irish presbyters, maintained among

[a] James I, parl. 2, 1424, c. 28, "anent hereticques, that ilk bishoppe "sall garre inquire to the inquisition "of heresie, quhair onie sik beis "founden, and that they be punished "as law of halie kirk requires. And "gif it mistoris, that secular power "be called in support and helping of "halie kirk;" under which statute, says sir George M'Kenzie, "the cog- "nition belongs to the church, and "the punishment to the secular "judge; and this the canonists call "*tradere hæreticum brachio seculari.*" Crim Law, p 17.

[b] Lord Hailes observes, that "the "history of the church of Scotland, "during remote ages, is involved in "impenetrable obscurity." (Annals, App. ii, N° 3.) However, the barons, freeholders, and whole community of the kingdom of Scotland, in their amous letter to pope John XXI, say positively, "that the king "of kings and Lord Jesus Christ, "after his passion and resurrection, "called them living in the uttermost "parts of the earth, first to his most "holy faith; nor would he have them "confirmed by any in this faith but "by his first apostle, although second "or third in order; viz. the most "meek Andrew, the brother of St. "Peter, whom our Saviour would "have to be always their patron." Anderson's Independency, and Hailes, ib. N° 5.

That Christianity had, in the second century, penetrated into parts of Britain, beyond the limits of the Roman empire, appears from Tertullian's mentioning, among other remote regions early illuminated with the Christian faith, *Brittanorum Romanis inaccessa loca, Christo vero subdita.* (Lib adversus Judæos, c. 7) that is, to use sir George M'Kenzie's translation, that "those inhabitants of "Britain, which could not be sub- "dued by the Romans, yet willingly "yielded to the yoke of Christ." Works, Vol. ii, p. 376.

Bishop Stillingfleet traces the Christianity of South Britain to the apostle Paul himself. And he insists on the evidence arising from this passage of Tertullian, that "Christianity was "then received beyond the wall." But so strangely jealous were the English and Scottish antiquaries in his time, for the supposed honour of their respective nations, that that learned writer takes a great deal of pains to shew that no share of the merit of this

us, says Buchanan, *minore quidem cum fastu et externa pompa, sed majore simplicitate et sanctimonia,*[a] till latterly they gave place to the establishment of a more regular hierarchy. § 2. HISTORY OF IT IN SCOTLAND.

THE Scottish hierarchy did not escape the same vices which have ever accompanied the establishment of the Romish superstition; yet it ought not to be forgotten that it successfully resisted the metropolitan claims of York and Canterbury, though sometimes backed by the sovereign pontiff;[b] and it had the merit of dexterously preserving the rights of the Scottish church entire even under that "miserable treaty," as lord Hailes[c] has stiled it, whereby the Scottish nation redeemed its beloved monarch from captivity, at no less an expence than its independency.[d]

this early conversion can be claimed either by the Picts or Scots; and that this profession of Christianity beyond the wall, was, by "the old Britains "who were driven thither—the Me-"atæ and Caledonii.—These were "distinct both from the Picts and "Scots," &c. (Origines Britannicæ, c. ii, p. 52.) But the warlike Caledonians, who first checked the Roman arms, were the same with the Picts: and from that Gothic ancestry lineally sprung the present lowland Scots. See Mr. Pinkerton's Inquiry, Vol. iii, p. 3, c. 1.

According to Bede, the establishment of Christianity among the inhabitants on the south of the Grampian hills, *Picti australes*, took place in the 412, as it did among the northern inhabitants, *Picti septentrionales*, in the year 565, by the Irish monk St. Columba. Hist. Eccles. Lib. iii, c. 4. The old British Scots of Argyle are said to have been converted by St. Patrick, during their exile in Ireland in the year 460, and of course to have brought Christianity with them on their return to Scotland.

[a] Hist. Lib. v, Eugen. II.

[b] Lord Hailes' Annals, Alexander I and II. The struggles on this subject may be seen in the reigns of Alexander I and II, as well as that of William.

[c] Annals, Vol. i, p. 131.

[d] When William became the liegeman of Henry for Scotland, and all his other territories, the agreement with respect to the church was, "that "the Scottish church should yield to "the English church such subjection "in time to come, as it ought of "right, and was wont to pay in the "days of the kings of England, pre-"decessors of Henry. The bishop of "saint Andrews, &c. consenting *that* "*the English church should have the right* "*over the Scottish, which in justice it* "*ought to have; illud habeat in eccle-*"*sia Scotiæ, quod de jure habere debet.*"

§ 2. HISTORY OF IT IN SCOTLAND.

BUT the papal hierarchy in this country, with its early merits and subsequent depravity, was happily supplanted by a simpler ritual and purer worship.

THE Reformation in Scotland was opposed by the government. "Its history opens with a band of martyrs, "who died resisting popish tyranny over the reason and "consciences of men."[a] The persecution, by which it was attempted to stop the progress of truth and knowledge, offended the native freedom of the Scots, then beginning to be aided and enlightened by generous lessons from Greek and Roman learning.[b]

THE congregation, (the chief of the nobles, landed-gentry

"A memorable clause! (says lord "Hailes) drawn up with so much "skill as to leave entire the question "of the independence of the Scottish "church." Ibid.

[a] Dr. Charters' Sermons, vol. ii.

[b] Dr. Robertson remarks, how much the political speculations of Knox and Buchanan are tinctured with ancient learning. Their writings, indeed, and, in an after age, those of Andrew Fletcher of Salton, are among the first breathings of whiggism. Eventful affairs, and the spur of real business, made Knox discuss the reciprocal rights and duties of kings and their subjects, at a period when the learned men of Europe were students of words, mere scholars of the ancients, rather than scientific reasoners themselves. And, until the settlement of the British constitution, at the Revolution, modern Europe had seen no example of regular systematic liberty. Hence we find the earlier political speculations of modern times appearing very much in the garb and language of the ancients. This has misled some, ungratefully, to throw the foul reproach of practical republicanism upon their authors, as if they were of the same stamp with those harbingers of innovation who have appeared in our own times. But the transmarine jargon and anarchical principles that struck at the distinctions of rank and property, the sacred and venerable pillars of civil society, no more resembled "that sentiment of liberty, and fire "of heaven," which animated those virtuous and intrepid vindicators of our civil and religious rights, than the licentious reveries of the Munster fanatics of the sixteenth century resembled the benign and sober piety of the apostolical Christians. The British constitution is remoter from the monarchies which the ancients had in view, and really more democratical than that of Athens or of Sparta: that is, true liberty and equality

§ 2. History of it in Scotland.

and community of Scotland), loyal to their sovereign and the constitution, united in defence of the rights of conscience. "I will serve my prince," said the old earl of Argyle,[a] "with body, heart, goods, strength, and all that is in my "power, except that which is God's due, which I will re- "serve to him alone, that is, to worship him in truth and "verity, and as near as I can to conform to his written "word, to his own honour and obedience of my princess."

In this country, the Reformation was likewise a political era. Civil were blended with religious grievances. In order to prevent the nation from being enslaved by the illegal employment of French mercenaries, the protestant peers, barons, and representatives of boroughs, with Knox and Willox for the clergy, "a convention, which "exceeded in number, and equalled in dignity, the usual "meetings of parliament,"[b] deposed the queen dowager from the regency.[c] This bold step, authorized, indeed,

lity are more directly and successfully aimed at; by a happy policy, the same cause giving, at once, security, independence, and dignity to the subject, and stability, grandeur, and importance to the throne.

[a] In answer to the archbishop of St. Andrews, admonishing him not to stain the ancient blood of his house, by wavering from the faith, and giving the sanction of his name to those "setting forth schisms and divisions "in the holy church of God." Knox's History of the Reformation, 4to edit. B. i, p. 126.

[b] Robertson's History, B. ii, p. 123.

[c] This celebrated sentence, recommended by Dr. Robertson for its precision and vigour of expression, is engrossed at large by Knox in his History, B. ii, p. 183. It begins, "The "nobility, barons, and burgesses, con- "vened, to advise upon the affairs of "the commonwealth, and to aid, sup- "port, and succour the same, perceiv- "ing and lamenting the enterprised "destruction of their said common- "wealth, and overthrow of the liber- "ties of their native country, by the "means of the queen regent, and cer- "tain strangers her privy counsellors, "plain contrary to our sovereign lord "and lady's mind, and direct against "the counsel of the nobility, to pro- "ceed by little and little, even unto "the uttermost ruin, so that the ur- "gent necessity of the commonwealth "may no longer suffer delay," &c. "*sic scribitur*, by us the nobility and "commons of the protestants of the "church of Scotland." And it enumerates her various violations of their civil

§ 2. HISTORY OF IT IN SCOTLAND.

and justified by the genius of the Scottish constitution, "free from the times of the mighty Goths," led, after various vicissitudes, to the final triumph and exaltation of the righteous cause; by the celebrated deed of relief and concession, granted by the sovereign at the treaty of Edinburgh—by the "abolishing the pope and his usurped authority"—approving of the protestant confession of faith in the parliament 1560—and the establishing the presbyterian discipline and policy in the convention of estates, 1561. Which enactments were ratified by the first parliament of James VI.[a]

IN 1572, under Morton's regency, it was agreed by the privy council and general assembly, that the name and office of archbishop and bishop should be continued during the king's minority; but that, with regard to their spiritual jurisdictions, they should be subject to the general assembly.[b] In 1580, the assembly condemned episcopacy as unlawful. In 1592, James VI established the presbyterian government by law,[c] but soon revived the order of bishops,[d] and, after his ascending the English throne,[e] prosecuted still farther the establishment of prelacy. Charles I pressed the introduction of a liturgy[f] with such inconsiderate and violent zeal, as

civil rights, as well as her hostility to persons never called nor convinced of any crime, only because they professed the true worship of God. Dr. Robertson, B. ii, p. 124: and Dr. Gilbert Stuart, in his History of the Reformation, B. ii, p. 148, coincide in justifying the measure.

[a] Hence it is unnecessary to enter into the famous controversy respecting the validity of the parliament 1560. See the arguments on the one side by Dr. Stuart and Dr. Robertson; and the arguments on the other very acrimoniously stated by our learned and acute countryman Mr. Innes in his Critical Essay.

[b] Calderwood tells us, these bishops were named *tulchan* bishops, as having the name only, without either the jurisdiction or revenues.

[c] Jas. VI, parl. 12. c. 114.

[d] 1597, parl. 15, c. 231, ordaining, that all ministers provided to the title of a bishop, abbot, or other prelate, have vote in parliament sicklike as prelates had of old.

[e] 1606, parl. 18, c. 6; and 1609, c. 6; 1617, parl. 22, c. 1 and 2. The revival of prelacy was assented to by the Glasgow general assembly 1612, which was declared to have been *fundi-tus* void by the general assembly 1638.

[f] It was a liturgy prepared by the Scottish

kindled the flames of civil war, and occasioned the *solemn league and covenant*, to support the religion as established in 1580. In 1638, the general assembly declared against episcopacy. In 1660, Charles II not only restored episcopacy, but persecuted the presbyterians with all the barbarity of popish times, as well as made deep encroachments on civil liberty. The meeting for worship in the fields was construed treason. The principle of self-defence at last was roused. The people assembled for worship with arms in their hands, to defend themselves against the soldiers employed to search them out in the mountains, and hunt them down.[a] "Their standard on the moun- "tains of Scotland indicated to the vigilant eye of

§ 2. HISTORY OF IT IN SCOTLAND.

Scottish bishops under the direction of archbishop Laud.

[a] The conventiclers, or attendants on field preachers, called by Woodrow "society people," and sometimes Cameronians and Cargyllites, from two of their most eminent preachers, Cameron and Cargyll, were, by the tyranny of the government, driven, in some instances, to extremes. They would swear no oaths, subscribe no bonds, take no test, nor yield to any imposition on conscience. Yet the principle of their union was the solemn league and covenant, the renewal whereof they imposed on all.

"Their arguments upon this sub- "ject were so far stretched as to im "ply that swearing or taking the "covenant, was necessary to confer a "right to the crown." (See Dr. Somerville's Hist. Pol. Tran. c. 18, p. 468.)

"This obstinacy was much in- "sisted on as an apology for the "rigours of the administration: "But if duly considered, it will "rather afford reason for a con- "trary inference. Such unhappy "delusion is an object rather of com- "miseration than of anger: And it "is almost impossible that men could "have been carried to such a degree "of phrenzy, unless provoked by a "train of violence and oppression." Hume's Hist. Ed. 1791. v. 8. p. 172.

Mr. Hume has been often reproached as the apologist of the house of Stuart, and the abettor of arbitrary principles; but never was suspected of a bias in favour of whiggism, or of any inclination to appreciate too highly those religious interests and rights of conscience, for which our ancestors endured the rigours of persecution.

Very different is the strain and spirit of a remark on the same subject, contained in a recent publication, The official rank of the learned author as a judge of the supreme court, makes it necessary to take notice of the passage, which appears to contain doctrines inconsistent with the received principles of our constitutional law.

§ 2. HISTORY OF IT IN SCOTLAND.

"William that the nation was ripening for a change." "While lord Russel and Sidney, and other enlightened patriots in England, were plotting against Charles, from a

It is as follows: 'Sir George M'Kenzie, in the exercise of his duty of king's advocate, in the reign of Charles II, incurred, of necessity, the resentment of the party of the covenanters; and he has been accused by Burnet, and other writers of similar principles, of stretching the laws for constructive treasons, in the noted trials of Baillie of Jerviswood and the Earl of Argyle, and in the prosecutions against Mitchel and Learmonth; but his own defence will fully justify his conduct in the breast of every man, whose judgement is not perverted by the same prejudices, hostile to all good government, which led those infatuated offenders to the doom they merited." Memoirs of the Life and Writings of Lord Kames, Vol. 1, App. N°. 1, p. 12.

This passage is an attack upon the principles of the Revolution, and a libel on king William's first parliament, so deservedly dear to the nation, and the object of veneration to every constitutional lawyer.

The Earl of Argyle and Baillie of Jerviswood, the learned author calls "infatuated offenders," who merited the doom they received; and says, that M'Kenzie's conduct, in their trial and others above mentioned, is fully justified "in the breast of every man, "whose judgement is not perverted "by the same principles, hostile to "all good government," &c.

On the contrary, that those condemnations were most unjust and illegal, has ever been the prevailing sentiment of the Scottish bar, bench, and nation; and it was not imagined that even party zeal could deny, that they were at any rate accomplished by base, deceitful, and nefarious means.

The censure conveyed in this passage, does not fall only "on Burnet "and other writers of similar princi-"ples." It equally strikes against the DECLARATION AND CLAIM OF RIGHT itself, which, among other acts of oppression, "utterly and directly con-"trary to the known laws, statutes, and "freedom of this realm," whereby king James was said "to have forefaulted "the right to the crown," specially mentions "the causing pursue "and forefault several persons, upon "stretches of old and obsolete laws, "upon frivolous and weak pretences "upon lame and defective probations; as particularly, the late "Earl of Argyle, to the scandal and "reproach of the justice of the na-"tion." Scots acts, v. 3d p.

And king William's first parliament not only repeats the same opinion of the illegality of those condemnations, but among its very first acts, afforded all the reparation then possible, by rescinding the forfeitures of Argyle, Jerviswood, and others, who had been unjustly and illegally condemned.

The principles on which Argyle and Jerviswood acted, and bishop Burnet wrote; which led to the Revolution, and the settlement of the throne upon king William and the house of Hanover, may have some-

time-

" conviction that his right was forfeited; the Cameronians § 2.
" in Scotland, under the same conviction, had the courage HISTORY OF IT IN
" to declare war against him. Both the plotters and the war- SCOTLAND.

times been perverted by weak or wicked men, to promote seditious and anarchical designs. But in politics, we are no more, than in morals or religion, to reject truth from the possibility of abusing it. And any danger that may be thence dreaded, or from the influence of the democratic part of the constitution, may be greatly increased, but never can be warded off, by substituting abject and slavish opinions, in place of those good old whig principles which are sanctioned by so many illustrious names, as well as by the actual benefit they have rendered to the kingdom.

The statute rescinding the forfeiture of the earl of Argyle, is parl. 1, cap. 8, 4 William and Mary, 1689, Aug. 1. (Small edit. Scots Acts, v. iii, p. 147.) It proceeds on the narrative, " Our sovereign lord and lady, the " king and queen's majesties, and the " estates of parliament, considering " that the estates of this kingdom, in " their Claim of Right, of the 11th " of Aprile last, declared," (here it engrosses the clause above mentioned, and then goes on,) " therefore " their majesties, with the advice " and consent of the estates of par- " liament, do hereby rescind, retreat, " cass and annul the doom and sen- " tence of forfeiture pronounced by " the lord justice general and com- " missioners of justiciary, against the " said deceased Archibald," &c.

The act rescinding the forfeiture of Fletcher of Salton, (cap. 16 of the same parliament), is still more particular, as to the illegalities of which the public prosecutor had been guilty at the trial. " The king and queens majesties, " and the estates of parliament, tak- " ing into their consideration, that " by the Claim of Right, the causing," &c. here it repeats the same clause, and then goes on, and " having con- " sidered the process, and sentence of " forfeiture, &c. they find, that " the said Andrew Fletcher hav- " ing been condemned upon the " deposition of one single witness, " and he also under the terror of " death, and temptation of a remis- " sion as standing charged with, and " prisoner for the same alledged " crimes, and not pardoned till he " had deponed in court, and then be- " ing presently liberat: The other " pretended witness being wholly a " stranger in the same case with the " former, and deponing upon report " and *ex auditu*, and finds, that the " remissions granted to the saids wit- " nesses, were sealed that day on " which they deponed, and were of- " fered to them that day in court, " and so the said forfeiture is founded " on a lame and defective probation," &c. And on similar grounds, another act was passed by the same parliament, rescinding the other forefaulters and fines therein contained, passed since the year 1615. Ibid. p. 270.

§ 2. HISTORY OF IT IN SCOTLAND

"riors fell; but their blood watered the plant of renown, "and succeeding ages have eaten the pleasant fruit."[a]

THE reigns of Charles and James were, in regard to Scotland, a sanguinary period of progressive cruelty. The latter filled up the measure of guilt. The tyrannical violation of every valuable right, and invasion of every valuable comfort, at length produced and justified the Revolution, when king William accomplished our deliverance.

THE Scottish nobility and gentry in London addressed William, desiring him to take upon him the "administra- "tion civil and military; and to call a meeting of the estates "for securing the protestant religion, the ancient laws and "liberties of that kingdom."[b] William accordingly called a meeting of the estates, and added, "Now it lies on you, "to enter upon such consultations as are most probable, to "settle you on sure and lasting foundations, which we hope "you will set about with all convenient speed, with regard "to the public good and to the general interests and in- "clinations of the people, that after so much trouble and "great suffering, they may live happily and in peace."[c] The estates approved of the address by the Scottish noblemen and gentlemen in England, "and declared the same "to have been an act of duty, tending to the good of the "protestant religion in general, and of this nation in par- "ticular, in all its concerns.[d] In their answer to king William, they thank him for accepting "the administra- "tion of public affairs, and convening the estates;" and say, "we shall with all convenient speed take your gra- "cious letter into consideration, hoping shortly, by the

[a] Dr. Charters' Serm. p. 181, edit. 1807.

[b] Ibid. 373.

[c] Scots Acts, small edit. Vol. iii, p. 130.

[d] Letter from king William, king of England, for the Estates of Scotland; 16th March 1689. Scots Acts, ibid.

[e] 19th March 1689, ibid, p. 133.

§ 2. HISTORY OF IT IN SCOTLAND

" blessing of God, to fall upon such resolutions as may be " acceptable to your majesty, secure the protestant religion, " and establish the government, laws, and liberties of this " kingdom, on solid foundations, most agreeable to the ge- " neral good and inclinations of the people."[a] And this momentous duty they soon after discharged by their memorable declaration, that " king James the seventh being a " profest papist, did assume the regal power and acted as " king, without ever taking the oath required by law, and " hath, by the advice of evil and wicked counsellors, in- " vaded the fundamental constitution of the kingdom, and " altered it from a legal limited monarchy to an arbitrary " despotic power, and hath exercised the same to the sub- " version of the protestant religion, and the violation of " the laws and liberties of the kingdom, inverting all the " ends of government, whereby he hath forfaulted his " right to the crown, and the throne is become vacant;"[b] ---by the claim of rights and specification of the tyrannical acts which justified the sentence. And by the resolution, " that William and Mary, king and queen of England, " France, and Ireland, be and be declared king and queen " of Scotland, to hold the crown and royal dignity of the " said kingdom of Scotland, to them the said king and " queen during their lives, and the longest liver of them, " and that the sole and full exercise of the regal power " be only in and exercised by him the said king, in the " names of said king and queen, during their joint lives; " and after their decease, the said crown and royal dignity " of the said kingdom to be to the heirs of the body of the " said queen; which failing, to princess Anne of Denmark, " and the heirs of her body; which also failing, to the " heirs of the body of the said William king of England."[c] Which " chearful offer of the Crown," Declaration, Claim of Right, and Grievances to be redressed in the first par-

Promise.

[a] 23d March 1689, ibid, p. 136.
[b] 11th April 1689, ibid, p. 152.
[c] Ibid.

§ 2. HISTORY OF IT IN SCOTLAND

liament,[a] together with "the Oath to be administered "to the king and queen at their acceptance of the crown," were communicated to William[b] by a committee, being one out of every estate, whom they specially enjoined to see the same read in their presence, and to see the oath be sworn and signed by them.[c] This solemn and momentous communication between William and the nation was closed by two letters, the one from his "majesty to the "estates, declaring he had accepted the crown and taken "the oath;" and justly observing, "we shall never be-"lieve that the true interest of the people and the crown "can be opposite;"[d] and the other, "the answer of the "estates;"[e] which were thereafter adjourned and turned into a parliament.

THE parliament began its operations by abolishing prelacy;[f] rescinding the act 1669, which asserted the king's supremacy in causes ecclesiastical;[g] restoring the presbyterian ministers, who were thrust from their churches on account of nonconformity to prelacy;[h] ratifying the confession of faith, and settling the presbyterian church government,[i] that is, by kirk-sessions, presbyteries, provincial synods, and general assemblies. Here opens the first dawning of more tolerant principles; this establishment of the presbyterian government being accompanied with a

[a] Artic. of Grievances, 13th April 1689, ibid, p. 155.

[b] Letter directed from the Estates to the King's Majesty, 24 April 1689, ibid. p. 164.

[c] Instructions by the Estates of Scotland, to the Earl of Argyle, Sir James Montgomery, and Sir John Dairymple, nominated and appointed to attend the King and Queen with the offer of the Crown.

[d] 29 May 1689, Scots Acts, vol. iii, p. 187, small edit.

[e] Ibid.

[f] 1689, c. 3. App. of Statutes, No. 58.

[g] 1690, c. 1, App. of Statutes, No. 59. The second article in the above-mentioned list of grievances had declared, "that the first act of parlia-"ment 1669 is inconsistent with the "form of government now desired, "and it ought to be abrogated."

[h] 1690, c. 2, App. of Statutes, No. 60.

[i] Ibid. c. 5, ibid. No. 60.

liberality towards the episcopalian ministers,[a] that does the nation the greater honour, considering the recency as well as enormity of its sufferings under episcopacy.[2] §. 2. HISTORY OF IT IN SCOTLAND

[a] "Under the pain of being de-
"prived and losing their benefices,"
indeed, the estates required the minis-
ters to read the proclamation from
their pulpits "against the owning of
"the late king James;" but they pro-
hibited and disharged "any injury
"to be offered by any person what-
"soever, to any ministers of the gos-
"pel, either in churches or meeting
"houses, who are presently in pos-
"session and exercise of their minis-
"try therein, they behaving them-
"selves as becomes under the pre-
"sent government." Proclamation, App. xiii, 1689, Scots Acts, vol. iii, p. 154, small edit.

The act 1690, c. 5, (App. of Statutes, No. 61) followed out the same benevolent plan. Where the episcopalian ministers had "either desert-
"ed, or been removed from preach-
"ing in their churches, preceding
"the 13th of 1689," or had been
"deprived for not giving obedience
"to the act of the estates;" it declared such parishes to be vacant;
"and that the presbyterian ministers
"exercising their ministry within
"any of these parishes, (or where
"the last incumbent is dead) by the
"desire or consent of the parish,
"shall continue their possession, and
"have right to the benefices and
"stipends." Under those acts, such episcopalian clergymen as complied with the proclamation, were allowed, without molestation, to preach in the parish churches, and enjoy the stipend till their death.
"And there (says De Foe, in the Preface to his History of the Union, p. 27) they remain to this day; a
"kind of toleration much superior
"to that in England; for these en-
"joy the presbyterian stipends and
"manses; and in some of their pa-
"rishes the established church mini-
"sters preach by them in meeting-
"houses to this hour."

The conduct and principles of the presbyterians at the revolution, were thus far from meriting the reproaches that have been cast upon them, as narrow, intolerant, and illiberal. When the facts, indeed, are accurately known, the contrary appears to be the case.

Our ecclesiastical history of that period is rather involved in obscurity, our knowledge of it in general being derived from the incidental notices of the historians of civil affairs, some of whom have not been solicitous to do ample justice to our presbyterian forefathers. Some farther notices, therefore, upon this subject may perhaps here not be unacceptable.

By the above act 1690, c. 5, of the general assembly, the commissioners, by them authorized, are "empower-
"ed to try and purge out all insuf-
"ficient, negligent, scandalous and
"erroneous ministers, by due course
"of ecclesiastical process and an-
"swers."

Nothing is here said of their being episcopals;

§ 3. NATIONAL ESTABLISHMENT

III. THE church of Scotland was now established on juster and more liberal principles than formerly. The early reformers had unanswerably refuted, and courageously resisted, the right of the government to compel them to adhere to a corrupt and erroneous church; and in the course of that argument, had taught many noble lessons of civil and religious liberty. Yet they appear to have been ignorant of this political truth, that the magistrate is no more entitled to employ pains and penalties to compel individuals to embrace truth, than to embrace falsehood; and cannot do so, without being guilty, in the one case as much as in the other, of tyranny and oppression. They went no farther length than to say "that none ought to

episcopals; and though numbers of processes were raised against the episcopal clergymen upon the ground mentioned in the act, and many bishops and others were deposed upon those grounds, yet none were ever deposed upon the ground of their being episcopal merely. See Memoirs of the Church of Scotland, p. 318' (ascribed to Defoe.)

In the first general assembly after the revolution 1690, sess. 6, it was "declared, that this assembly will "depose no incumbents, simple for "their judgements anent the govern-"ment of the church, and urge re-"ordination upon them." Index of the unprinted acts of the assembly, 1690, sess. 6.

In the same assembly, instructions were given to their commission, "that they be very cautious of re-"ceiving information against the late "conformists; and that they pro-"ceed in the matter of censure very "deliberately, so as none may have "just cause to complain of their ri-"gidity; and that they shall not "proceed to censure, but on rele-"vant libels and sufficient proba-"tion." § 7, act 15, sess. 26, Assembly 1690.

The commission is also directed, "if they shall be informed of any "precipitant or unwarrantable pro-"cedure of presbyteries in processes, "to interpose their advice to such "presbyteries, to sist such procedure "till either the synod or next gene-"ral assembly take cognizance of "it." Ibid. § 3.

Many of the episcopal clergy were prosecuted for immorality, neglect of duty, and erroneous doctrine and deposed; but the author of the Memoirs says, that from the Revolution downward, no one was deposed on on account of his being episcopal; and at the time of the union, there were 165 episcopal ministers possessing churches and stipends in Scotland, the presbyterians preaching in some parishes in meeting-houses at the private expence of their hearers. Memoirs of the Church of Scotland, p. 320.

§ 3. NATIONAL ESTABLISHMENT.

"suffer for religion that is not found obstinate in his "damnable opinion."[a] They protested, indeed, "that "it be lawful to us to use ourselves in matters of religion "and conscience, as we must answer unto God."[b] But this they qualified, by adding, "until such time as our ad- "versaries be able to prove themselves the true ministers of "Christ's word."[c] They required, indeed, "that our "brethren be not condemned for heretics:"[d] But they "added, unless, by the manifest word of God, they be "convinced to have erred from that faith which the Holy "Spirit witnesseth to be necessary to salvation; and if so "they be," they expressly say, "*we refuse not but* "*that they be punished according to justice*, unless by "*wholesom admonition they can be reduced to a better mind.*"[e]

Intolerant principles of the reformers.

At the very time they were a persecuted sect

Cause of their error.

THIS radical error, so repugnant to the general spirit of their political creed, they seem to have fallen into, by not adverting to the peculiar nature of a theocracy. The Mosaical directions for punishing idolatrous Jews were applicable to that extraordinary dispensation alone under which they lived. These, however, the reformers mistook for rules of perpetual universal obligation. The sword, they imagined, was held by the magistrate for the punishment, not of "evil doers" only, but likewise of heretical opinions.

Jewish theocracy misunderstood.

Not guilty of inconsistency afterwards in framing penal statutes.

THESE intolerant tenets they thus openly professed, even at the very time they were themselves smarting under the rod of persecution. Consistent, at least, therefore, it certainly was, however unjustifiable afterwards to accompany the establishment of presbytery with those penal ordinances which tarnish the glory of the reformation.[f]

[a] Petition of the Protestants to the Queen Regent. Knox's Hist. B. ii, p. 140, 4to edit.

[b] Protestation made in the parliament 1558. See Knox's History, B. ii, p. 141.

[c] Ibid. 141.

[d] Letter given into parliament 1558. Knox's History, B. ii, p. 139.

[e] Ibid. 140.

[f] Thus the first book of discipline, (composed by Knox), containing an enumeration

§ 3. NATIONAL ESTABLISHMENT

Coronation oath.

NAY, by the oath prescribed by act of parliament to be taken at the coronation, the king promised, not only "to "maintain the true religion of Christ Jesus . . . now re- "ceived and preached within this realm," but also "to "abolish and gainstand all fals religion contrare to the "samen . . . and out of thair landes and empyre, they sall "be careful to rute out all heretikes, and enemies to the "trew worship of God, that sall be convicted by the trew "kirk of God of the foresaid crimes."[a] This persecuting clause, as forms remain long unaltered after the change of opinions, was contained in the oath transmitted by the estates to king William, but refused by that monarch, a lover of religious as well as civil liberty, till it was distinctly understood and explained "that he did not mean "to become a persecutor; and, on the assurance of the "commissioners that such was not its import," he "pro- "tested that in that sense only he received the oath."[b]

enumeration of various popish doctrines, which it condemns, and then proceeds as follows: "Which things, "because in God's scriptures they "neither have commandment nor "assurance, we judge utterly to be "abolished from this realm; affirm- "ing farther, that the obstinate "maintainers and teachers of such "abominations ought not to escape "the punishment of the civil magis- "trate." Explication of the first Head of Doctrine. See Knox's History, 4th ed. p. 484.

Thereafter, in like manner, passed the act 1600, c. 17, requiring, "that "all his highness subjects should "embrace the religion presently pro- "fessed, as well by hearing of the "word, as participation of the sa- "craments." "And that all his "highness subjects shall communi- "cate once every year . . . under the "penalties following," &c. See also the act 1587, c. 24, "Anent tryal "and punishment of the adversaries "of the true religion," whereby professed papists were capitally punishable, and hearers of mass, and withdrawers from the preaching of the word, were to incur the tinsel (forfeiture) of their moveable goods and liferent. The same spirit runs through the famous covenants. By the solemn league and covenant 1643, which bound subscribers "to the "extirpation of popery, prelacy, su- "perstition, heresy, schism, profane- "ness, and whatever else shall be "found contrary to sound doctrine, "that the Lord may be one, and his "name one, in the three kingdoms." Collection of the Laws in favour of the Reformation in Scotland, p. 91.

[a] 1567, c. 8. This oath was afterwards confirmed by subsequent statutes, as for example, 1581, c. 99.

[b] Laing's Hist. of Scotland, v. ii, b. 9, p. 194. Sir J. Dalrymple's Mem. of Great Britain, v. i, p. 226. See also Appendix II. to ch. 11th of Dr. Sommerville's Hist. of King William.

§ 3. NATIONAL ESTABLISHMENT.

AND the second book of discipline teaches, that "the "magistrate ought to assist, maintain, and fortify the ju- "risdiction of the kirk;" [a] "and punish them civilly that "will not obey the censure of the same, without confound- "ing always the one jurisdiction with the other." [b] And accordingly, persons excommunicated "for not conforming "themselves to the true religion presently professed, were "not suffered directly in their awne persons, or covertlie "and indirectlie by any others in their names, and to their "behove, to enjoy the possession of their lands, rents, and "revenues," which "were to be meddled with, intromit- "ted with, and uplifted to his majestie's use" [c]—were precluded from obtaining any heritable title in their persons, either from the king or subject superior [d]—were to be "denounced rebelles, and apprehended by letters of horn- "ing and caption, for the purpose of compelling them to "satisfy the sentence or decreet pronounced against them, "and to reconcile themselves to the kirk, and submit them- "selves to the discipline thereof." [e]

BUT these deformities of the presbyterian establishment were corrected at the revolution.

Excommunication not attended with pain.

FIRST, All acts, enjoining civil pains upon sentences of excommunication, were rescinded; [f] and judges were expressly prohibited to lend their aid, for obliging any one to appear before a church court, when summoned in a process for excommunication. [g]

SECONDLY, All acts, and provisions of acts, against non-

[a] Chap. 1, Of the Kirk, and Policy thereof in General.

[b] Chap. 10, Of the Office of a Christian Magistrate in the Kirk.

[c] 1604 c. 3.

[d] 1604, c. 4.

[e] James VI, parl. 3, 1572, c. 53. And afterwards in the time of episcopacy, by the 1661, c. 25, and 1663, c. 23.

[f] 1690, c. 28.

[g] 10th Anne, c, 7, commonly called the Toleration Act.

§ 3. NATIONAL ESTABLISHMENT.

conformity, and for conformity to the church, or against separation and disobedience to ecclesiastical authority,[a] were repealed. This was a complete toleration; for where there are no penal enactments, punishing individuals for worshipping the Deity according to their consciences, the principles of common law entitle them to do so. Nonconformity is not an offence or misdemeanour at common law. But farther, it has been declared, that it "shall be free and lawful for all the subjects in that part of Great Britain called Scotland, to assemble and meet together for divine service, without any disturbance; and to settle their congregations in what forms or places they shall think fit to chuse, except parish churches."[b] This is a charter, and legal recognition of dissenters, and charter in their favours.

Nonconformity, penalties against it, abolished.

Express enactment in favour of dissenters.

No test.

THIRDLY, The act of Charles II, parl. 3, act 6, intitled, Act anent Religion and the Test was rescinded;[c] and no other test was substituted in its place, excepting that all persons bearing office in any university, college, or school, shall subscribe the confession of faith, and adhere to the government and discipline of the presbyterian church.[d] In Scotland, a dissenter is not disqualified from holding any offices.[e]

[a] Act 1690, c. 27, App. I. This rescissory act does not expressly repeal the persecuting act of James VI. And the general rescissory clause is limited in these terms: "All other "acts, clauses, and provisions in acts "whatsoever made since the year "1661 inclusive, against nonconformity, or for conformity to the "church and government thereof, "as then established under archbishops and bishops." And the act 1690, c. 5, revives "all laws, "statutes, and acts of parliament "made against popery and papists, "and for the maintenance and "preservation of the true reformed "protestant religion, and for the true "church of Christ within this kingdom, in so far as they confirm the "same, or are made in favour thereof." These penal acts have been since repealed; of which in the next chapter.

[b] 10 Anne, c. 7.

[c] Act 1690, c. 5.

[d] 1707, c. 7.

[e] "For the greater security of the "foresaid protestant religion, and of "the worship, discipline, and government of this church, as above established, her majesty, with advice "and consent foresaid, statutes and "ordains, that the universities and "colleges

§ 3. NATIONAL ESTABLISHMENT.

OUR national establishment is thus happily rid of every oppressive distinction, enjoying only such advantages as are injurious to none. At the public expence it is provided in stipends and churches; and its general assemblies, synods, presbyteries, and kirk sessions, are *nomina juris* by which it can sue and be sued. Other bul-

" colleges of St. Andrews, Glasgow, " Aberdeen, and Edinburgh, as now " established by law, shall continue " within this kingdom for ever. And " that, in all time coming, no pro- " fessors, principals, regents, masters, " or others bearing office in any uni- " versity, college, or within this king- " dom, be capable, or be admitted or " allowed to continue in the exercise " of their said functions, but such as " shall own and acknowledge the " civil government, in manner pre- " scribed, or to be prescribed by the " acts of parliament. As also, That " before, or at their admissions, they " do and shall acknowledge and pro- " fess, and shall subscribe to the fore- " said confession of faith, as the con- " fession of their faith, and that they " will practise and conform them- " selves to the worship presently in " use in this church, and submit " themselves to the government and " discipline thereof, and never endea- " vour, directly or indirectly, the " prejudice or subversion of the " same." 1707 c. 7.

The abolition of the test act is here necessarily taken notice of, along with the abolition of penal statutes. But a religious test, touching civil offices, stands on a different footing from penal statutes. To inflict any punishment upon an individual, for nonconformity to the established church, is unjust and unlawful. But, the exclusion of dissenters from offices, is a measure to be weighed on the principle of expediency alone It affects not their *perfect rights*. *All* have no right to what can be enjoyed by a *few only*. Men did not enter into society that they might be generals, or judges, or members of parliament, but that their properties and lives might be protected. Under even democratical governments, such as that of Athens, certain qualifications have ever been required for holding offices. What this criterion shall be, whether wealth or age, or religious opinions, is a thing entirely discretionary: it is a question of expediency, not of justice. The Scottish establishment has not the support of a test act, and it has never found any prejudice from the want of it. The English, on the contrary, has that security, and is not, on that account, guilty of persecution or intolerance.

However, many wise and good men disapprove of a religious test, on the footing that the community have a right to the talents of all the citizens; and that it is injurious to the public and to individuals, to exclude any on account of religious opinions. And it must, at least, be allowed, that a *sacramental* test for a civil office is a prostitution and profanation of sacred things.

§ 3. NATIONAL ESTABLISHMENT.

wark or prerogative it has none; yet piety and good morals, and all the salutary purposes of a national establishment, it promotes more abundantly than heretofore.

SUCH, then, was our legal establishment when Scotland remained a separate and independent kingdom. But, by the Union, England and Scotland became one kingdom. Another question, therefore, arises, viz. had that event any effect upon the rights of the presbyterian church? or, on what footing does it stand with respect to Great Britain?

THE Scottish nation has been always noted for religious zeal. The string, therefore, most powerfully touched by the enemies of the Union, to disincline the people to it, was the supposed danger to the dignity and security of the national church, which had recently been settled with so much care at the Revolution. In order to quiet all such apprehensions, an act was passed for securing the protestant religion, and presbyterian church government; not only ratifying the act of king William and queen Mary, and all other acts relative to the confession of faith and presbyterian church government—expressly providing and declaring, "that the foresaid true protestant religion, contained "in the above-mentioned confession of faith, with the form "and purity of worship presently in use within this church, "and its presbyterian church government and discipline, "that is to say, the government of the church by kirk sessions, presbyteries, provincial synods, and general assemblies, all established by the foresaid acts of parliament, "pursuant to the claim of right, shall remain and continue "unalterable; and that the said presbyterian government "shall be the only government of the church within the "kingdom of Scotland; .... for the greater security of the "foresaid protestant religion, and of the worship, discipline, "and government of this church, as above established"—statuting and ordaining, that the professors of universities,

§ 3. NATIONAL ESTABLISHMENT.

and schoolmasters, should sign the confession of faith, and promise to conform to the presbyterian worship[a]---but also declaring and statuting, "that none of the subjects of this "kingdom shall be liable to, but all and every one of them "for ever free of any oath, test, or subscription, within "this kingdom, contrary to or inconsistent with the fore- "said true protestant religion and presbyterian church "government, worship, and discipline, as above estab- "lished; and that the same, within the bounds of this "church and kingdom, shall never be imposed upon or "required of them in any sort....and, lastly, that, after "the decease of her present majesty, the sovereign suc- "ceeding to her in the royal government of the kingdom "of Great Britain shall, in all time coming, at his or her "accession to the crown, swear and subscribe that they "shall inviolably maintain and preserve the foresaid settle- "ment of the true protestant religion, with the govern- "ment, discipline, worship, rights, and privileges of this "church, as above established by the laws of this king- "dom, in prosecution of the claim of right."

This statute, with the addition of the test in regard to schools and colleges, was a reiteration of king William's act of security; it was framed in reference to the Union; and, accordingly, it was "ordained, that this act of parlia- "ment, with the establishment therein contained, shall "be held and observed, in all time coming, as a funda- "mental and essential condition of any treaty or union to "be concluded betwixt the two kingdoms, without any "alteration therof, or derogation thereto, in any sort for "ever; as also, that this act of parliament, and settle- "ment therein contained, shall be insert and repeated in "any act of parliament that shall pass for agreeing and "concluding the foresaid treaty or union betwixt the two "kingdoms; and that the same shall be therein expressly

[a] Page 315. Note [c].

§ 3. NATIONAL ESTABLISHMENT.

"declared to be a fundamental and essential condition of "the said treaty or union in all time coming."

IT happened, however, that in England, on the establishment of episcopacy, there were two bulwarks erected for its defence, called the corporation and test acts; by the former of which[a] "no person can be legally elected to any "office relating to the government of any city or corpo- "ration, unless within a twelvemonth before he has re- "ceived the sacrament of the Lord's Supper, according to "the rites of the church of England; and he is also en- "joined to take the oaths of allegiance and supremacy at "the same time that he takes the oath of office, or, in "default of either of these requisites, such election shall "be void." The other, called the test act,[b] directs "all "officers, civil and military, to take the oaths, and make "the declaration against transubstantiation, in any of the "king's courts at Westminster, or at the quarter sessions, "within six calendar months after their admission; and "also within the same time to receive the sacrament of "the Lord's Supper, according to the usage of the church "of England, in some public church, immediately after "divine service and sermon; and to deliver into court a "certificate thereof, signed by the minister and church- "warden; and also to prove the same by two credible "witnesses, upon forfeiture of 500l. and disability to hold "the said office."[c]

AND as the king is bound, by his coronation oath, to preserve the privileges of the presbyterian church, so is he also bound, by his oath, to preserve those of the episcopalian. The question, therefore, occurs, how far these obligations are consistent with each other? In Scotland, as already mentioned, there is no test with regard to civil or military of-

[a] Stat. 13 Car. II, st. 2, c. 1.

[b] Stat. 25 Car. II, c. 2, explained by 9 Geo. II, c. 26.

[c] Black, vol. iv, p. 58.

fices; the sole question, therefore, is, how far Scottish presbyterians are affected by the episcopalian tests? § 3. NATIONAL ESTABLISHMENT.

WITH respect to the corporation act, it is clear that Scottish presbyterians are in no better a predicament than English dissenters. A Scottish presbyterian can no more complain of being excluded from an office relating to the government of an English city or corporation, on account of his not complying with the corporation act, than an episcopalian can for being excluded from the Scottish universities, unless he subscribe the confession of faith, and promise to conform to the presbyterian worship; these two acts respectively relating to things which did not fall under the imperial community, but remained still as before; the one, English; the other, Scottish.

BUT the test act deserves a different consideration, relating to offices civil and military, which are no more English exclusively than they are Scottish, but belong to the united kingdom of Great Britain.

WITH respect to these, an incorporating union necessarily supposed a complete communication of rights. This, indeed, was the least price that could be offered for the surrendering of that "which all the world hath been fighting "for since the days of Nimrod,"[d] national sovereignty and independency. But it was not left to double constructions. It was expressly stipulated, that the subjects of the united kingdom should have freedom of trade and navigation, &c. and a communication of all other advantages. But this must be connected with the other clause of the Union, for the preservation of the presbyterian church government, and securing it against all tests in this kingdom inconsistent therewith. In good faith, therefore, the communication must have been in favour of Scottish presbyterians: and it

[d] Lord Belhaven's speech.

§ 3. NATIONAL ESTABLISHMENT.

would seem to amount to little less than a contradiction and absurdity to suppose, that these Scottish presbyterians could not avail themselves of this communication, till they had solemnly professed themselves episcopalians: for the test act was devised by the English parliament, not to try the laxity of men's consciences, and to admit the unprincipled part of all sectaries to the enjoyment of offices, but as the most solemn method that could be devised for excluding every one that was not a true episcopalian.

ANOTHER view of the subject arises from the positive declaration, that the Scottish presbyterians were to be free from all tests in this kingdom, inconsistent with the presbyterian worship. This does not affect the argument touching the incorporation act; because an *English* corporation or city is not in the sense of this act in this kingdom. But it is not the case with offices in the army or navy. These are offices in the kingdom of Scotland as much as they are in the kingdom of England. Relating to the united kingdom, they are offices in both kingdoms equally; and a Scottish presbyterian who is excluded from them, unless he take the episcopalian test, is, against the sense of that stipulation, subjected in this kingdom to a test, contrary to the presbyterian worship.

BUT, in truth, the episcopalian test cannot strike against Scottish presbyterians, unless it be more extensively construed than would be allowable in regard to an act of that nature, even in a question with private individuals. The test act was not directed against persons in the same predicament with Scottish presbyterians. It was framed "in "order the better to secure the established church against "perils from nonconformists of all denominations, infidels, "Turks, Jews, heretics, and sectaries."[c] But a member

[c] Blackstone, B. iv, c. 4.

of the church of Scotland is no more a British nonconformist, or sectarist, than a member of the church of England is. Even, in this view, the test act does not seem at all to affect them. § 3. NATIONAL ESTABLISHMENT.

ACCORDINGLY, at the time of the Union, such seems to have been the idea of the English parliament. With a view to the Union, a bill was brought in for the security of the church of England; and a question was put, that "it be an instruction to the committee, to whom the bill "for *security of the church* was committed, that there "should be inserted in the said bill, as a fundamental con-"dition of the intended Union with Scotland, particular "and express words, declaring perpetual and unalterable "an act of parliament made in the 25 Car. II," &c. But this being resolved in the negative, occasioned a protest.[f] Thus the English parliament purposely avoided clogging the Union with any conditions about the episcopalian test.

So standing this important question on the general construction of these enactments and articles of Union, there seems reason for the remark, that the Scottish "parliament "did not slightly pass over that affair, as some people pre-"tended they would do, though they did not enter into the "debate of the insufficiency, which some offered, as things "which tended not to amendments of the act, as it was

f "We conceive that this act doth "deserve to be particularly mention-"ed, and not left to double construc-"tions; because as it was at first "made to secure our church, then in "danger, by the concurrence of pa-"pists and dissenters to destroy it; "so they have found by experience, "both in the reign of king Charles "II and of king James II, that it was "the most effectual means of our "preservation, by removing from "their employments the greatest "enemies of our church and parti-"cularly in the reign of the late king "James II, the assuming of a dispens-"ing power, and illegal practices, by "closetting and corrupting the mem-"bers of parliament, were chiefly "levelled against the test act."—Parliamen. History, Vol. v, p. 104.

§ 3. NATIONAL ESTABLISHMENT.

" offered, but to a rupture of the debate; for the people " who offered at the insufficiency of the act went upon " this footing, not that this overture or act was an insuffi- " cient security, but that really the Union with England, " as an episcopal nation, was inconsistent with the safety " of the church of Scotland; and that not this act only " was, but any other act that could be made, would be, " insufficient to secure the church of Scotland."[g]

[g] Defoe's History of the Union, p. 338. This affords the true explanation of the parliament of Scotland rejecting the proposal to insert a clause in these terms: " And that " they shall be capable of any office, " civil or military, and to receive " any grant, gift, or right, and to " have command or place of trust " from or under the sovereign with- " in any part of Great Britain." Accordingly, the protest drawn up by Lord Belhaven was not merely " that this act is no valid security to " the church of Scotland," but that the " church of Scotland can have " no real or solid security by any " manner of union, by which our " claim of right is unhinged, our " parliament incorporated, and our " distinct sovereignty and independ- " ency abolished." Ibid. For this affair of the sacramental test was generally mentioned alongwith other proposals, obviously impracticable, as the taking away the representation of the bishops, as to which the address of the commissioners of the general assembly says, " it is contra- " ry to our own principles and cove- " nants, that any churchman should " bear civil offices, or have power in " the commonwealth." Ibid. App. No. H. 2.

The same thing farther appears from the answer to that part of the address that related to the sacramental test. The address said, that " the " sacramental test being the condi- " tion of access to places of trust, and " to benefits from the crown, all of " our communion must be debarred " the same, if not in Scotland, yet " through the dominion of Britain, " which may prove of most danger- " ous consequence to this church."

The answer made to this address, by the protest of the ruling elders, some of whom were members of parliament, did not justify such exclusion of Scottish presbyterians; but, on the contrary, proceeded on this, that the address was unnecessary, and the fears imaginary. The first article of the address was that relative to the sacramental test; and the first article of the answer is as follows: " The commission of the general as- " sembly having already addrest to " the parliament, for securing the " doctrine, worship, discipline, and " government of this church, and " that address being read in the " house upon the 17th October last, " the parliament did thereupon de- " clare, that, before concluding, they " would take said address into their " consideration, and would do every " thing

§ 4. CONFORMITY, LAW OF.

IV. To worship God agreeably to the light of one's own conscience, though contrary to the forms prescribed by the established church, is not an offence at common law. "The "sin of schism, as such, is by no means the subject of tem- "poral coercion and punishment."[a] At common law, therefore, religious societies are, at least, on a footing with other associations for innocent and lawful purposes.

THE Revolution, which settled the constitution, had in view the redress of religious as well as civil grievances. Religious freedom was provided for with no less care than civil. The Revolution gave birth to the act 1690,[b] which established presbytery, and is considered as the charter of our national church. But the same parliament[c] rescinded expressly "all laws for conformity." The freedom of dissenters, therefore, was as early and necessary a fruit of the Revolution as the establishment of presbytery. And queen Anne's toleration act declares it "free and lawful for all

"thing necessary for securing the "true protestant religion and church "government presently by law esta- "blished in this kingdom; which "assurance we conceive the commis- "sion may very well rely upon, "seeing it is not to be doubted that "the parliament will, in due time, "when the address is taken into con "sideration, make all necessary pro- "visions for securing our religion "and church government, by law "established," &c.

In this manner the motions about the sacramental test were allowed to drop away. Entering into that in particular, would not have satisfied the Scottish opposers of the Union, and might have created irritation in England. And, as Defoe says, the wiser heads of both countries avoided, as much as possible, going into particulars touching religion; rather choosing, as the English peers who dissented complain, to leave *matters to double constructions*, that is, the argument entire, on the general grounds already stated; which, now that all the heats have subsided, dangers are over, and sinister views and interests long ago forgotten, may expect a just and candid construction from the courts of law of either country.

[a] Blackstone, B. iv, ch. 4, p. 53, where he says very plainly: "Cer- "tainly our ancestors were wrong "in their plans of compulsion and "intolerance."

[b] C. 5, App. I.

[c] C. 28, App. I.

§ 4. CONFORMITY, LAW OF.

" subjects in that part of Great Britain called Scotland, to " assemble and meet together for divine service without dis- " turbance, and to settle their congregations in what towns " or places they shall think fit to choose, except parish " churches."[d]

UNDER those enactments, the right of protestant dissenters, as much as that of the national church itself, is statutory. They are not connived at and endured, but recognized and protected in their rights, though not stipendiary.[e]

HENCE property may be validly vested in trustees, for behoof of any dissenting sect.[f]

[d] 10 Anne, c. 7, § 5.

[e] This language was used from the bench, in the late case Aikman against Davidson, to be afterwards taken notice of. In England, too, the same liberal view seems now to be taken of their situation.

Blackstone, indeed, exposed himself to severe animadversion, for the view he gave of the English toleration act, as rather suspending the penalties, than taking away the crime of nonconformity. But the court of king's-bench adopted the more liberal view, that the toleration act removed the crime, as well as the penalty, of mere nonconformity. Lord Mansfield is said to have used the expression that the toleration act had " established the dissenters worship, " rendering it not only innocent but " lawful." Furneaux's Letters to Blackstone.

It is material to take notice, that Blackstone founded his limited view of toleration, on the particular phraseology of the English act, which does not affect Scottish dissenters. He says, " In case the legislature had " intended to abolish both the crime " and the penalty, it would at once " have repealed all the laws enacted " against nonconformists. But it " keeps them expressly in force a- " gainst all papists and oppugners of " the Trinity, and persons of no re- " ligion at all; and only exempts " from their rigour such serious sober " minded dissenters as shall have tak- " en the oaths, and subscribed the " declaration at the sessions, and shall " regularly repair to some licensed " place of religious worship." (Answer to Dr. Priestley.) Now, this very thing is done by our toleration act. It rescinds, at once, all the laws against nonconformists, without any condition of taking oaths, or meeting in licensed houses.

[f] The seceders, denominated burgers and antiburgers, are a numerous body of dissenters in Scotland. They have presbyteries and synods, after the model of the church of Scotland. A house was feued and built for one of the original members of the associate

§ 4. CONFORMITY, LAW OF.

HENCE in England it has been likewise found, that dissenters were not liable in the fine imposed on those who decline a public office, which cannot be held without taking the sacramental test.[g] So also in England it has been found, that Quakers refusing to swear at a criminal trial are not punishable.[h] Episcopalians and papists were not included in the rescissory act 1690, c. 28: but the former have been since tolerated by 10 Anne, c. 7, and 32 Geo. III, c. 63; and the latter by 33 Geo. III, c. 44, if they comply with the conditions thereby required.[i]

ciate synod. Many years thereafter, the burger synod, or general assembly of that denomination, agreed to a variation of the formula contained in the 23d chapter of the confession of faith. But the clergyman, and part of this congregation, preferred the old formula, and declined the jurisdiction of the associate burgher synod, until the said resolution is completely rescinded; but at the same time he alleged—"I conceive I have "full title and authority still to exercise the duties of the holy ministry, in the place where I have been "in the use to exercise those duties; "for it is the reverend synod, and "those of my congregation who adhere to them, not me, who have "renounced and departed from the "faith." On the other hand, the associate presbytery, on account of this declinature, "dropped his name "from the roll, declaring that he is "no longer of our church, and that "the collegiate charge in the congregation of Perth is dissolved."

The parties therefore were at issue respecting the property of the house. The court of session, by their first interlocutor, found that the right of the church and premises was held in trust for a society of persons who had contributed their money for the same, and was to be managed by the majority in point of interest. And this was agreeable to some decisions of the court in former cases. But, on advising full papers, and a hearing in presence, the court, though much divided in opinion, ultimately found that the church was an erection for behoof of that society "or congrega-"tion continuing in communion with, "and subject to the ecclesiastical dis-"cipline of a body of dissenting pro-"testants, calling themselves the asso-"ciate presbytery and synod of bur-"ger seceders." This judgment interposed as effectually in support of the authority of the synod, as if it had been the general assembly of the church of Scotland. Aikman against Davidson, June 27th 1805.

g The chamberlain of London against Evans, Feb. 4th 1767. See Lord Mansfield's speech, App. to Furneaux's Letters to Blackstone, p. 265.

h See Vol. I, p. 244.

i See next chapter.

CHAP. XV.

Offences against Morality and Religion.

§ 1. IN GENERAL.

I. JUSTICES of peace are entrusted with the care of checking and punishing those immoralities which are rather considered as offences against the police and good order of the community, than as indictable crimes.

§ 2. OFFENCES AGAINST MORALITY —DRUNKENNESS.

II. THE justices are ordained, by the general statute,[a] to put in execution all enactments for the punishing of all persons found guilty of the sin of drunkenness, or excessive drinking, especially under the names of healths; or haunting taverns or alehouses after ten of the clock at night, or at any time of the day, except in time of travel or for ordinary refreshments; as also, against the keepers of the taverns or ale-houses that shall sell the drink unto them.[b]

THEY are also to put in execution the acts of parliament

[a] Appendix I, No. 9.

[b] Ibid. p. 61. The statutes regarding this crime are, 1617, c. 20, and 1661, c. 19; and the penalties are the same as in the case of cursing and swearing.

made for the punishing of all persons that shall be found guilty of the sin of fornication;[a] and the penalties are to be levied, not only from the man, but also from the woman, according to their quality and the degree of their offence, the one without prejudice of the other. § 2. OFFENCES AGAINST MORALITY —FORNICATION.

IN England, brothels and bawdy-houses are indictable at common law, as an offence against the police; and the same thing, no doubt, obtains by the law of Scotland. A wife may be indicted and condemned along with her husband, to the pillory, for keeping a bawdy-house; this being an offence against the government of the house, in which the wife has a principal share, and because the offence is of that kind which may generally be presumed to be managed by the intrigues of her sex. —BROTHELS.

IN England, it is laid down, in general, by Dr. Burn, that all open lewdness, grossly scandalous, is punishable upon indictment at the common law. And offenders of this kind are punishable, not only with fine and imprisonment, but also with such infamous punishment as the court shall think proper.[b] —LEWDNESS.

IN like manner, all other behaviour which is an outrage upon public decency and decorum, may be checked and punished; of which Dr. Burn gives an instance in the punishment of a person, who, for a wager, run naked through the streets of a populous town. —INDECENCY.

III. THE justices of peace, by the general statute, are ordained to put in execution all acts of parliament made for punishing all persons whatsoever who shall curse or profanely § 3. OFFENCES AGAINST RELIGION —PROFANITY.

[a] As to the particular fines, see Appendix I, p. 60.

[b] *Voce* Lewdness, i, Hawk. vii, 1, 6.

§ 3. OFFENCES AGAINST RELIGION.

swear, or shall be mockers or reproachers of piety, or the exercise thereof.[a]

—CURSING AND SWEARING.

THE offences of cursing and swearing are punishable by certain pecuniary penalties, according to the offender's rank and circumstances.[b] "And, in case of inability of the "parties delinquents, to pay the sum mentioned in this "instruction, the said justices shall put in execution such "laws, as for corporal punishments, as have any provisions "mentioned in them for such cases."[c]

—PROFANATION OF THE LORD'S DAY.

THE justices are ordained to put in execution, all acts of parliament made against such persons as shall profane the Lord's day, and require or levy the penalties therein contained.[d] These statutes are numerous,[e] our legislature being anxious to enforce the due observance of the Sabbath, without which, the principles of religion and morality would soon be obliterated from the minds of the people.[f] The holding of fairs or markets, all buying and selling, working, gaming, or playing, resort to ale-houses or taverns, salmon fishing, going of salt-pans, mills, or kilns, hiring of reapers, and, in general, all use of ordinary labour, employment, or sport, upon that day, are prohibited under pecuniary penalties, to be disposed of as in the case of the offences before mentioned.[g]

[a] Appendix, I, p. 59.

[b] Ibid. 59 and 60, and stat. 1661, c. 19.

[c] Ibid. I, p. 60. The corporal pains pointed out for that case, by the older statutes 1551, c. 16, and 1581, c. 103, are chiefly those of imprisonment, and setting in the jugs or stocks, or, in case of great obstinacy, banishment.—Hume, vol ii, p. 528.

[d] 1661, § 31, App. I, p. 60.

[e] 1503, c. 83; 1579 c. 70; 1592, c. 124; 1593, c. 163; 1594, c. 201; 1661, c. 18; 1663, c. 19.

[f] See Warburton's Works, vol. iv; and Dr. Paley's Moral and Political Philosophy, B. v, c. 7; where the observation of the Sabbath is proved to be a positive, not a natural duty; but, at the same time, of the last importance in a political as well as in a religious and moral point of view.

[g] The latest of these enactments, 1661, c. 18, king Charles II, parl. 1, mentions

§ 3. OFFENCES AGAINST RELIGION —BLASPHEMY.

BLASPHEMY is described by civilians to be *omne convitium contumelia vel maledictum in Dei nomen prolatum;* or, *qua de Deo pugnantia cum ejus natura et sanctitate, cum contemptu et velut in contumelium ejus proferuntur:* [a] or uttering impious things against God, his "Being, Attributes, or Nature, in a scoffing and railing manner, out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion." [b] This, too, is the manner in which it is described by our statute, 1661, c. 21,[c] by which it is ordained, "that whosoever hereafter, not being distracted in his wits, shall rail upon, or curse God, or any of the persons of the blessed Trinity, shall be processed before the chief jus-

What is it?

Reproachful disposition essential to the crime.

mentions the following penalties, viz. "The sum of 20l. Scots for the "going of ilk salt pan, miln or kiln, "on the said day, to be paid by the "heretors and possessors thereof; "and the sum of 10l. for ilk shearer "and fisher of salmond on the said "day, the one half thereof to be paid "by the hirers and conducers, and "the other half by the persons hired; and the said sum of 10l. for "every other profanation of the said "day. And which fines and penal"ties are to be uplifted and disposed of in manner contained in the "act, and instructions anent the jus"tices of peace; and if the party offender be not able to pay the pe"nalties foresaid, then to be exem"plarly punished in his body accord"ing to the merit of his fault."

[a] Voet. Comm. in tit. ad Leg. Jul. Maj. No. 1.

[b] Hume, Criminal Law, Vol. ii, p. 514.

This definition is agreeable to the true meaning of the term. Blasphemy is a Greek word, which has been adopted into the Latin and English languages, and properly denotes calumny, detraction, reproachful, or abusive language, against whomsoever it be vented; and in scripture is very often applied to reproaches retained against God. (Rom. iii, 8; xiv, 16; 1 Cor. iv, 13; x. 30; Tit. iii, 2; 1 Pet. iv, 4; Jude 9, 10; 2 Pet. ii, 10, 11.) "Now, "let it be observed, that when such "abuse is mentioned as uttered a"gainst God, there is properly no "change made on the signification "of the word; the change is only "in the application, that is, in the "reference to a different object. "The idea conveyed in the explana"tion now given, is always includ"ed, against whomsoever the crime "be committed."

[c] Cha. II, parl. 1.

§ 3. OFFENCES AGAINST RELIGION —BLASPHEMY.

"tice, and, being found guilty, shall be punished with "death."

THIS diabolical crime is triable before the chief justice, that is, the high court of justiciary. Justices of peace, and other judicatories, have no jurisdiction touching it, except in preliminary matters of arrest, precognition, &c. It may be remarked, however, that, in the statute, the exception of distraction is expressly mentioned; though such state of mind, on the common principles of law, would excuse in the case of any crime. This, therefore, is a humane hint to the judge, to pay particular attention to the person's state of mind who is accused of blasphemy; that being a crime which a man in his right senses can scarcely be supposed capable of committing.

UNDER the same general term of blasphemy, other offences, differing not only from blasphemy, properly so called, which we have already considered, but likewise from each other, are punishable by another clause of the same statute: by which it is ordained, that "whosoever here- "after shall deny God, or any of the persons of the bless- "ed Trinity, and obstinately continue therein, shall be "processed, and being found guilty, that they be punished "with death." These offences are not punishable capitally, unless they be obstinately persisted in; that is, on the third conviction, as it is explained by the subsequent statute 1695, c. 11, which punishes the first offence with imprisonment and public satisfaction, the second with a fine, and the third with death.[d] And it describes the offence as in-

Denying God,

or the Trinity.

Obstinately persisting therein.

[d] The act 1695 provides, "that "such persons shall, for the first of- "fence, be punished with imprison- "ment, ay and until they give pub- "lic satisfaction, in sackcloth, to the "congregation within which the "scandal was committed. And, for "the second fault, the delinquent "shall

§ 3. OFFENCES AGAINST RELIGION —BLASPHEMY.

cluding all "whoever hereafter shall in their writing or "discourse, deny, impugn, or quarrel, argue, or reason, "against the Being of God, or any of the persons of the "blessed Trinity, or the authority of the Holy Scriptures "of the Old and New Testaments, or the providence of "God in the government of the world." [a]

UNDER one common denomination and punishment, there are here blended together offences dissimilar in their nature and consequences; the denial of the existence and providence of God, which is atheism; the impugning the authority of the Holy Scriptures, which is infidelity; and the reasoning against any of the persons of the blessed Trinity, which is heresy.[b]

Atheism. Infidelity. Heresy.

"shall be fined in an year's valued "rent of his real estate, and the "twentieth part of his free personal "estate, (the equal half of which "fines are to be applied to the use of "the parish within which the crime "shall happen to be committed, and "the other half to the party in-"former), besides his being impri-"soned ay and while he again make "satisfaction *ut supra*. And for the "third fault, he shall be punished by "death, as an obstinat blasphemer."

[a] This statute is itself as heretical as the offences it prohibits. In the language of scripture, there can be no blasphemy, where there is not an impious purpose to derogate from the divine Majesty, and to alienate the minds of others from the love and reverence of God. The epithet *blasphemous* is never coupled in scripture with *doctrines* or *opinions*. It is never applied but to words and speeches. *A blasphemous opinion*, or *blasphemous doctrine*, are phrases which are as unsuitable to the scriptural idiom, as a *railing* opinion, or *slanderous* doctrine, is to ours. See Dr. Campbell's Translation of the Gospels, Prelim. Dissertation 9, part 2.

[b] These offences, though here classed together, must be admitted to be extremely dissimilar. Thus atheism strikes at the root of civil society. And that it, therefore, ought not to be tolerated, is admitted even by the great Locke himself, the champion of toleration. "Those are "not at all to be tolerated who de-"ny the being of a God. Promises, "covenants, and oaths, which are "the bonds of human society, can "have no hold upon an atheist. "The taking away of God, though "but even in thought, dissolves all." Works, vol. ii, p. 262, folio edit. Yet his reasoning would seem to go the length of not excluding even atheism from the benefit of toleration; for persecution seems just as bad

§ 3. OFFENCES AGAINST RELIGION —ATHEISM —INFIDELITY —HERESY.

BUT such offences are not justly punishable *foro humano;* because "it is not for the punishment of those "who are not in church communion with the magistrate,[a] that governors are sent,' but "for the punishment of evil doers;"[b] that is, those who injure "others, in their *civil interests,* "life, liberty, health, "and indolency of body;" or "in the possession of outward things, such as money, lands, houses, furniture, "and the like...for the procuring, preserving, and advancing," which alone the commonwealth was constituted.[c] "The sin of schism, as such, is by no means the "object of temporal coercion and punishment."[d] "All "persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom."[e]

THIS statute, however, is no diminution of the merited fame of king William, who understood and loved religious liberty better than his subjects did. But a previous statute, redounding more to the credit of the same parliament, had already given the fatal blow to religious persecution, by

had a way to make a man a theist, as to make him a Christian or an episcopalian. The truth is, the great object of Mr. Locke was practical; to put the different sects of Christians out of countenance with their persecuting and intolerant spirit towards each other, wherein he most illustriously succeeded. This was the first great point to be gained. And necessary, certainly, it was not, nor perhaps prudent, for Mr. Locke to render such success more difficult by at once including atheists also in his toleration. These were so far from being a numerous body, that it has often been doubted whether it be possible to banish the belief of a God from the human mind; so strongly founded is it in the principles of our nature, and the most obvious deductions of reason.

But how far the principles of toleration were from being generally understood in the time of Mr. Locke, appears strikingly from his celebrated letters on toleration; where he employs the utmost strength of reason in the formal demonstration of many propositions, appearing in these days almost self-evident.

[a] Locke's Works, vol. ii, p. 300.

[b] 1 Peter, ii, 13.

[c] Locke, vol. ii, p. 244.

[d] Blackstone, b. iv, c. 4, p. 41.

[e] Ibid. p. 52.

depriving the sentences of church courts of all civil or penal consequences.[a]

§ 3. OFFENCES AGAINST RELIGION —ATHEISM —INFIDELITY —HERESY.

THE statutory punishments, therefore, cannot follow any sentence of a church judicatory convicting a man of atheistical or heretical opinions; which are no longer punishable as offences against religion or the Supreme Being; but such of them as are particularly specified in the two statutes are thereby transplanted from the spiritual to the temporal code, and adopted as offences against civil society: wherefore the statute itself expressly confines the cognizance thereof to the temporal courts; of the capital crime to the court of justiciary, and of the arbitrary offences to judges ordinary. This affords a security against any pernicious consequences from the statute; those jurisdictions having never shewn any inclination to inflict any punishment for sceptical, heretical, or even atheistical opinions, upon men conducting themselves otherwise inoffensively as members of civil society. Accordingly, though, ever since the date of the statutes, heresy and infidelity have been stalking abroad as much as ever, yet these penal enactments are not resorted to. If their *dead letter* disfigure our statute-book, yet, in fact, toleration is completely enjoyed and felt to be reasonable; the protection of Christianity being wisely entrusted to its natural bulwarks, reason and erudition. True religion, at first, made its way in the world in spite of pains and penalties, and it will always be able to maintain its ground without their aid.

THESE chapters may be concluded with the regulations respecting certain offences, rather political than either religious or moral, as directly affecting the civil government rather than either religion or morality. The episcopalians, as already mentioned, are tolerated only under certain conditions, in case of not complying wherewith, they are

[a] 1690, c. 28.

§ 3. OFFENCES AGAINST RELIGION —A HEISM —INFIDELITY —HERESY.

liable in certain penalties. Thus: for officiating as a pastor or minister in any episcopal chapel or meeting-house,[a] without taking the oaths and articles required by the 32 Geo. III, c. 63, and producing certificates thereof;[b] or without praying for the king by name, his "majesty's heirs and succes-

[a] That is, where five persons, or, if in a dwelling-house, five besides the family are present, 19 Geo. II, c. 38.

[b] This statute is entitled, "An "act for granting relief to pastors, "ministers, and lay persons of the "episcopal communion in Scotland," on the narrative that they are now well attached to his majesty's person, family, and government; it therefore repeals so much of the statutes 10 Anne, c. 7; 5 Geo. I, c. 27; and 19 Geo. II, c. 38; and 21 Geo. II, c. 34; as "relate to the im- "posing any penalties or disabilities "on any person or persons, for or "on account of his or their officiat- "ing at any such chapel or meeting- "house.

"2, Provided always, That every "person who shall exercise the func- "tion of a pastor or minister in any "episcopal chapel, meeting house, "or congregation in Scotland, shall, "within six months, to be reckoned "from and after the first day of July "in this present year of our Lord "one thousand seven hundred and "ninety-two, or at some other time "previous to his exercising the said "function, take and subscribe the "oaths of *allegiance*, *abjuration*, and "*assurance*, in such manner as all "officers, civil and military, in Scot- "land, are now by law obliged to "take and subscribe the same, and "shall also subscribe at the same "time and place, a *declaration of his* "*assent* to the thirty-nine articles of "the church of England, as contain- "ed in the act passed in the thir- "teenth year of the reign of queen "Elizabeth, in the words following; "videlicet:

"I, A. B. pastor of a congregation "of persons in the episcopal commu- "nion in Scotland, meeting for di- "vine worship at "in the county of "do willingly and *ex animo* subscribe "to the book of articles of religion "agreed upon by the archbishops and "bishops of both provinces of the "realm of England, and the whole "clergy thereof, in the convocation "holden at London in the year of "our Lord one thousand five hun- "dred and sixty-two; and I do ac- "knowledge all and every the arti- "cles therein contained, being in "number thirty-nine, besides the ra- "tification, to be agreeable to the "word of God.

"3. Provided also, That every "person who now does or shall here- "after exercise the function of a pas- "tor or minister of any episcopal "chapel or meeting-house in Scot- "land, shall, and he is hereby requir- "ed, within six months, to be rec- "koned from and after the first day "of July in this present year one "thousand seven hundred and ninety- "two,

"sors, and the royal family, in the same form of words" they are or shall be directed by lawful authority to be prayed for, in the prayers contained in the liturgy of the church of England, the penalty is, for the first offence £20 sterling, one moiety to the informer, and the other to the poor of the parish where the offence is committed; and, for the second, the offender shall be "declared incapable of officiating as "pastor or minister of any such episcopal chapel during the "space of three years."[a] For being present twice in the

"two, or at some time before his "exercising the said function, to pro- "duce to the clerk of the shire, "stewartry, or borough, where his "meeting-house is situated, a certifi- "cate from the proper officer, of his "having qualified himself by taking "and subscribing the said oaths, and "a certificate from such officer of "his having subscribed to the said "articles above mentioned; of which "respective certificates the clerk shall "forthwith make an entry in the "book appointed for keeping a list "or register of the meeting houses "within that jurisdiction, which en- "try shall express the name of the "minister whom the said certificates "concern, and the situation and de- "scription of the meeting-house "where he officiates, or shall offi- "ciate, as minister or pastor; copies "of which entries shall likewise be "transmitted by the said clerk to the "clerk of each house of parliament, "to be laid before the said houses "respectively at their next meeting: "And the said clerk of such shire, "stewartry, or borough, shall like- "wise deliver two attested copies of "each of the said certificates to such "pastor or minister, one copy of each "of such certificates to be by him "fixed on the outside of the meeting- "house where he officiates, or shall "officiate, on or near the door there- "of, and the other in some conspi- "cuous place within such meeting- "house; for each and every of which "last-mentioned copies, the sum of "sixpence sterling shall be paid, and "no more."

[a] 32 Geo. III, c. 63. Farther, by said act, § 7, "If any pastor or mi- "nister of any episcopal chapel or "meeting-house in Scotland shall of- "fend in any of the premises herein- "before mentioned, such pastor or "minister so offending shall be in- "capable of voting in any election "of a member of parliament for any "shire or borough in that part of "Great Britain called Scotland, or "of voting in the election of a ma- "gistrate or counsellor for boroughs, "or of a deacon of crafts within "burgh, or of a collector or clerk of "the land tax or supply.

"8, Provided always, That every "assembly of persons for religious "worship in any such episcopal cha- "pel or meeting house as aforesaid, "shall be held with doors not lock- "ed, barred bolted, or otherwise "fastened during such assembly.

"9, Provided also, That no person

§ 3. OFFENCES AGAINST RELIGION —EPISCOPACY.

same year at divine service in any episcopal chapel or meeting-house in Scotland, where the royal family are not prayed for, the first offence is five pounds sterling, one moiety to the use of his majesty, and the other moiety to the informer; and the offender shall suffer "imprisonment for "the space of six months, or until the same be paid," and for the second offence, imprisonment for two years.[a]

EVERY peer so offending, by being twice present within one year at divine service, in any episcopal meeting or congregation in Scotland where the royal family is not prayed for, shall be incapable "of being elected one of the sixteen "peers to sit and vote in the house of peers in the parliament of Great Britain, or of voting in the election of any "of the said sixteen peers;"[b] "all persons so offending, "by being present at such meeting-houses twice in one "year, shall be disqualified from voting, or being elected "for a member of parliament for any shire or burgh in

"exercising the function, or assuming the office and character of a "pastor, or minister of any order, in "the episcopal communion in Scotland as aforesaid, shall be capable "of taking any benefice, curacy, or "other spiritual promotion, within "that part of Great Britain called "England, the dominion of Wales, "or town of Berwick upon Tweed, "or of officiating in any church or "chapel within the same, where the "liturgy of the church of England, "as now by law established, is used, "unless he shall have been lawfully "ordained by some bishop of the "church of England, or of Ireland."

[a] § 10.

[b] 32 Geo. III, c. 63, § 12. And it is farther "competent for any peer of Scotland, present at the election of the said sixteen peers, or of any of them, to make this objection, and to prove the same by a witness or witnesses, upon oath; or by referring it to the oath of the peer so objected to; which oath the lord clerk register, or either of the two clerks of session appointed by him to officiate in his name at such election of sixteen peers, or of any of them, is hereby empowered to administer; and in case the same shall be proved, or the peer so objected to shall admit the fact, or refuse to depose concerning it, he shall be and is hereby disqualified from, and rendered incapable of voting, or being chosen at any such election as aforesaid, but such admission or confession, upon oath or otherways, so made at such meeting assembled for any such election, shall not be made use of, or given in evidence against any such peer, upon any prosecution for any penalty inflicted by this or any former act of parliament.

"Scotland, or a deacon of crafts within burgh, or of a collector or clerk of the land-tax or supply."[a] Every prosecution must be commenced within the space of twelve months after such offence is committed.[b]

EPISCOPAL ministers, not qualified under the said statutes, are also liable under the Scottish act, if they marry or baptize, as has been already mentioned.

IF any person shall willingly and of purpose, maliciously, or contemptuously come into any congregation of religious worship permitted by this act, and "disturb the same, or give any disturbance to the congregation at the doors or windows, or misuse any minister of such congregation, such person upon proof thereof before two justices of peace, by two witnesses, shall find sureties to be bound by recognizance in £50 for his appearance at the next quarter sessions, or before the court of justiciary, or other judge competent, and in default of sureties, shall be committed to prison, and, upon conviction of the offence, shall forfeit £100, one moiety to the informer, the other to be disposed of for the use of the poor of the parish where such offence shall be committed."[c]

Disturbing a qualified chapel.

Two justices.

Recognizances.

Penalty.

BUT it is specially provided, "that the assembly for reli-

[a] 32 Geo. III, c. 63, § 13. And "it shall be competent for any candidate, or member of the meeting assembled for any such election, to make this objection, and to prove the same by a witness or witnesses upon oath, or by referring it to the oath of the person objected to, which oath the preses or clerk of such meeting is hereby empowered to administer; and in case the same shall be proved, or the person so objected to shall admit the fact, or refuse to depose concerning it, he shall be and is hereby disqualified from and rendered incapable of voting, or being chosen at any such election as aforesaid; but such admission or confession upon oath or otherwise so made at such meeting assembled for any such election shall not be made use of, or given in evidence against any such person, upon any prosecution for any penalty inflicted by this or any former act of parliament."

[b] 32 Geo. III, c. 63, § 11.

[c] § 9.

§ 3. OFFENCES AGAINST RELIGION.

gious worship in the episcopal meetings be held with doors not locked, barred, or bolted; and that nothing herein contained shall exempt any persons frequenting the episcopal congregations from paying tithes, or other parochial duties, to the church or minister of the parish in which they reside."[a]

Must meet with open doors.

—POPERY.

FROM the history of the Reformation, as well as of the Revolution, it is easy to see how a terror of popery came to be incorporated into our laws and constitution. Under an agreeable and fascinating exterior, it had been felt, by our forefathers, to be inconsistent with the well-being of society, subversive at once of the morals of the people, and of the established laws and government. Severe statutes were therefore enacted against papists, as a political party, hostile to the state, and were continued against them, as being rendered, by their religion, incapable to give the magistrate any reasonable security for their obedience. Hence, persons reconciled to the pope or see of Rome; defending the pope's jurisdiction "in this realm, if a person be twice convicted thereof; popish priests, born within the dominions of the crown, coming over hither from beyond seas; or tarrying here three days without conformity to the church;"[b] professed jesuits, or seminary priests, apprehended within this realm, and all wilful hearers of mass, and concealers of the same, were capitally punishable.[c] The "importing, vending or dispersing, of popish books; the endeavouring to persuade any person to decline from the true faith; the resetting of any jesuit, seminary priest, or trafficking papist, (which last also was treason at one time); are punishable with fine, banishment, or escheat of

Capitally punishable.

Lesser punishments.

[a] 10 Anne, c. 7, § 4.

[b] See Vol. I, p. 342.

[c] 1587, c. 24; 1592, c. 122; 1594, c. 196; 1600, c. 18; 1607, c. 1; 1609, c. 5. Hence, as late as the 11th March, 1755, the petition of Alexander M'Donald, for bail, was refused, on the ground that the saying of mass, which is confessed in the petition, is not within the privileges of that relief. (Hume Crim. Law, Vol. II, p. 536.

moveables; and rewards are offered to such as shall inform against delinquents.[a] These penal enactments were all ratified by the act 1703. c. 3; and it was farther provided. that any person who laboured under the repute of being a jesuit, priest, or trafficking priest, or who was proved to have changed his name or surname, might be called upon to purge himself of the suspicion of popery, by taking the formula prescribed by the statute; and his refusal so to do was a sufficient warrant to the privy council; and now, under the 12 Anne, c. 14, to the court of justiciary, for banishing him forth of the realm, never to return. § 3. OFFENCES AGAINST RELIGION —POPERY.

PROFESSED or known papists were debarred from granting gratuitous deeds to the prejudice of their heirs;[b] and also from purchasing by voluntary disposition any heritable right, either in their own name or that of third persons.[c]

BUT, by the statute 33 Geo. III, c. 44, the pains, penalties, disabilities, and restrictions, are removed from those Roman catholics who are willing to comply with that statute, by taking an oath agreeable to the formula therein prescribed, which goes not to the renunciation of the popish religion, but of such popish doctrines as appear less consistent with the well being of society and civil liberty. On taking this oath, they are relieved from all disabilities imposed or ratified by the act of the 8 and 9 of the first parliament of king William, as fully and effectually, to all intents and purposes whatsoever, as if such persons had actually made the renunciation of popery ordained by that statute, and according to its formula.[d] Removal of the pains and disabilities.

[a] 1587, c. 24; 1592, c. 122; 1600, c. 18 1700 c. 3.

[b] 1695, c. 26.

[c] 1700, c. 3.

[d] Formula required to be taken by the stat. 33 Geo. III, c. 44, by catholics, which relieves them from all disabilities imposed by the acts of William, &c.

"I A. B. do hereby declare, that I "do profess the Roman catholic religion: I A. B. do sincerely promise "and

§ 3. OFFENCES AGAINST RELIGION —POPERY.

THIS oath may be taken by every person "professing the Roman catholic religion, within that part of Great Britain

"and swear, that I will be faithful
"and bear true allegiance to his ma-
"jesty king George the third, and
"him will defend to the utmost of
"my power against all conspiracies
"an' attempts whatever, that shall
"be made against his person, crown,
"or dignity: and I will do my utmost
"endeavour to disclose and make
"known to his majesty, his heirs and
"successors, all treasons and traitorous
"conspiracies which may be formed
"against him or them: And I do
"faithfully promise to maintain, sup-
"port and defend, to the utmost of
"my power, the succession of the
"crown, which succession, by an act,
"(intitled 'an act for the further li-
"mitation of the crown, and better
"securing the rights and liberties of
"the subject,') is, and stands limited
"to the princess Sophia, electress and
"duchess dowager of Hanover, and
"the heirs of her body, being pro-
"testants; hereby utterly renouncing
"and abjuring any obedience or alle-
"giance unto any other person claim-
"ing or pretending a right to the
"crown of these realms: And I do
"swear, that I do reject and detest,
"as an unchristian and impious posi-
"tion, that it is lawful to murder, or
"destroy any person or persons what-
"ever for or under pretence of their
"being heretics or infidels; and also
"that unchristian and impious prin-
"ciple, that faith is not to be kept
"with heretics or infidels: And I
"further declare, that it is not an
"article of my faith, and that I do
"renounce, reject, and abjure the
"opinion, that princes excommuni-
"cated by the pope and council, or
"any authority whatsoever, may be
"deposed or murdered by their sub-
"jects, or any person whatsoever;
"and I do promise, that I will not
"hold, maintain or abet any such
"opinion, or any other opinion con-
"trary to what is expressed in this
"declaration: And I do declare, that
"I do not believe that the pope of
"Rome, or any other foreign prince,
"prelate, state, or potentate, hath, or
"ought to have, any temporal or
"civil jurisdiction, power, superior-
"ity, or pre-eminence, directly or in-
"directly, within this realm: And I
"do solemnly, in the presence of God,
"profess, testify, and declare, that I
"do make this declaration, and every
"part thereof, in the plain and ordi-
"nary sense of the words of this oath,
"without any evasion, equivocation,
"or mental reservation whatever,
"and without any dispensation al-
"ready granted by the pope, or any
"authority of the see of Rome, or
"any person whatever, and without
"thinking that I am, or can be, ac-
"quitted before God or man, or ab-
"solved of this declaration, or any
"part thereof, although the pope, or
"any other person, or authority what-
"soever, shall dispense with, or annul
"the same, and declare that it was
"null or void. So help me God."

called Scotland, being of the age of fifteen years and upwards, before the sheriff, or stewart-depute or substitute of the shire or stewartry, or before any two or more justices of the peace for the county, shire, or stewardry, where the party shall reside:" and the said officers are directed within thirty days after the last day of December every year, "to deliver into the office of the sheriff-clerk of the county or stewartry, in which the party shall have taken the said oath, a true and perfect list of the persons who shall in the preceding year have taken the said oath of *allegiance*, *abjuration*, and *declaration*, before them, in manner aforesaid; and that, in every such list, the quality, condition, title, and place of abode, of each person who shall have taken and subscribed the said oath of allegiance, abjuration, and declaration, within the preceding year, shall be fully and clearly expressed, and such officers shall respectively give to any person who shall take and subscribe the said *oath*, *abjuration*, and *declaration*, at the time of the taking and subscribing thereof, or at any other time or times, until the list or register shall have been delivered or transmitted to the sheriff-clerk's office, a full certificate of his or her having taken the said oath, and of the day on which the same shall have been taken; for which certificate there shall be paid no greater fee or reward than one shilling sterling, and every such certificate shall be signed by the officer giving the same, and shall be granted upon the same terms to any other person or persons who shall demand the same, and, every such certificate, being so signed, shall be evidence of the taking such oath in all courts of justice within that part of Great Britain called Scotland, to and for all intents and purposes whatsoever."[b] Sheriff-clerks are to make entries of lists delivered them, which may be inspected and copies required on payment of one shilling sterling for every entry, which shall be paid the clerks for

Who may take the oath.

[b] 33 Geo. III, c. 44, § 4.

§ 3. OFFENCES AGAINST RELIGION —POPERY.

their trouble in keeping the said books. Office-copies of such entries to be evidence.[e]

THE statute, however, provides, that "nothing in this act shall extend to enable any person professing the Roman catholic religion in Scotland, to be governor, chaplain, pedagogue, teacher, tutor or curator, chamberlain or factor, to any child or children of protestant parents, or to be otherwise employed in their education, or the trust or management of their affairs, or to be schoolmaster, professor, or public teacher of any science to any person or persons whomsoever, within that part of the kingdom of Great Britain called Scotland."[f] And Roman catholics cannot sit in either house of parliament, or vote at an election of a member of parliament;[g]

[e] Ibid. § 6.

[f] Ibid. § 7.

This act (in § 1) takes notice of the statute that had been passed for England, 31 Geo. III, c. 32 and then narrates that it is now found expedient that one common form of oath, abjuration, and declaration, shall be taken and subscribed by Roman catholics throughout the whole united kingdom of Great Britain: and "that "similar advantages shall be annexed "to the taking and subscribing the "same:" therefore it relieves them from the penalties contained in the act of William.... In the English act, it is expressly provided that no religious order shall be established: and every endowment of a school or college by a Roman catholic shall still be superstitious and unlawful. No such clause is in the Scottish act respecting religious orders.

[g] By the 22d article of the treaty of Union, it is *inter alia* provided, that the 16 peers and 45 members in the house of commons for Scotland, "be named and chosen in such manner as by a subsequent act in this present session of parliament in Scotland shall be settled; which act is hereby declared to be as valid as if it were a part of and ingrossed in the said treaty." And, in pursuance of this article in the treaty of Union, the act 1707, c. 8, was passed in the last session of the parliament of Scotland. It is intitled,—"act settling the manner of electing the 16 peers and 45 commoners, to represent Scotland in the parliament of Great Britain;' and *inter alia* contains the following clause: "It is always hereby expressly provided and declared, that none shall be capable to elect or be elected, for any of the said estates, but such as are 21 years of age complete, and protestant, excluding all papists, or who being suspected as such, being required, refuse to swear and subscribe the *formula* contained

an exclusion that appears, indeed, to be an unavoidable consequence of those leading principles which are interwoven with the whole system of our laws and civil government, as established at the Revolution. § 3. OFFENCES AGAINST RELIGION —POPERY.

THE plan of a new *formula*, containing positive professions of loyalty to the present government, has not been resorted to in favour of the Scottish episcopalians, whose ministers are required to take the oath of abjuration, as well as of allegiance and assurance. But this they cannot do without a dereliction of their principles. The conse-

contained in the 3d act made in the 8th and 9th sessions of king William's parliament intitled, 'Act for preventing growth of popery.'"

The *formula* is as follows:

"I do sincerely from my heart, profess and declare before God, who searcheth the heart, that I do deny, disown, and abhor these tenets and doctrines of the papal Romish church, viz. the supremacy of the pope, and bishop of Rome, over all pastors of the catholic church, his power and authority over kings, princes, and states, and the infallibility that he pretends to, either without, or with a general council, his power of dispensing and pardoning, the doctrine of transubstantiation, and the corporal presence, with the communion without the cup in the sacrament of the Lord's supper, the adoration and sacrifice professed and practised by the popish church in the mass, the invocation of angels and saints, the worshipping of images, crosses, and relicts, the doctrine of supererogation, indulgences, and purgatory, and the service and worship in an unknown tongue: All which tenets and doctrines of the said church, I believe to be contrary to, and inconsistent with the written word of God; and I do from my heart deny, disown, and disclaim the said doctrines and tenets of the church of Rome, as in the presence of God, without any equivocation, or mental reservation, but according to the known and plain meaning of the words as to me offered and proposed. So help me God."

Mr. Wight says, "it may be doubted, however, if the freeholders can strike a person off the roll on his refusing to take the formula. No such power is given by any statute; and it may be thought a sufficient security that this test of his religious profession can be put to him every time he attends and offers to vote." (Inquiry, B. iii, c. 3, p. 269.) "But, in the case of James Fergusson, esq. against W. Glendonwyne, esq. 1802, February, it seemed to be the opinion of the court that this was a mistake into which that eminent lawyer had fallen."

§ 3. OFFENCES AGAINST RELIGION —POPERY.

quence is, that in practice these oaths are not taken: the late enactment, so far as respects these oaths, adding one more to the list of those which lie a dead letter on the statute book. The great relief the statute afforded this sect was, by limiting the pains and disabilities touching lay-members and hearers to the single case of the minister omitting to pray for the royal family.

CHAP. XVI.

Gaming.

§ 1. AT COMMON LAW.

WAGERS and game debts are, in our law, arranged under the head of *pacta illicita*, unlawful covenants,[a]

[a] *Pacta illicita* are various. Thus: "A person granted an heritable bond "of annuity to another man's wife "for 40l. sterling, as also a like bond, "for an annuity of 30l. to a daughter "of the same woman, procreated, as "was supposed, between her and the "granter. Upon the granter's death, "his heir being pursued for payment "of these annuities, brought a reduction of the bond, as being granted "*causa adulterii*, and therefore avoidable. Answered for the mother, "The bond was not given as an inducement to her to leave her husband; for it was granted long after "she had left him, and probably with "a view of putting an end to their "criminal connection, which is a "meritorious cause. At any rate, "the rule of law is clear, *Turpiter facit quod sit meretrix, non turpiter accipit quum sit meretrix.* For the daughter it was pleaded, The supposed "*turpis causa* cannot apply to her. "Supposing her the daughter of the "granter, it was not only not unlawful in him to provide for her, but "he was under an obligation to do "it. Replied, That as the woman "lived in open adultery with the "granter, there could be no other "cause of the deed and there is no "difference between a previous corrupt bargain and a reward given "*ex post facto.* The lords found, That "no action lay upon the bond to the "mother, as granted *ob turpem causam*; but sustained action on that "granted to the daughter. June "26,

§ 1. AT COMMON LAW.

such as money stipulated for procuring an office;[e] or a wife or husband.[f]

English common law.

Wagers sustained.

Does not consider them *sponsiones ludicras.*

IN England, "wagers in general, by the common law, "were lawful contracts; and all wagers may still be recovered in a court of justice, which are not made upon "games, or which are not such as are likely to disturb the "public peace, or to encourage immorality, or such as will "probably affect the interests, characters, and feelings of "persons not parties to the wager; or such as are contrary "to sound policy, or the general interests of the community."[g]

"26, 1765, Sir William Hamilton "*contra* Mary De Gares and her "Daughter."

A man granted a bill for 500l. sterling to his servant maid, with whom he cohabited. The bill bore value received. After his decease, she brought an action for payment thereof against his representatives. They pleaded *turpis causa.* The court, under the circumstances of the case, repelled the defence; but it was observed, that it was not meant to do any thing to the prejudice of the doctrine of *turpis causa.* 21st May 1799, M'Nab against Spittal.

[e] "Mrs. Dalrymple pursued Shaw "in a declarator for having it found, "That as she had, through the interest of her friends, procured him the "office of keeper of the register of "seisins for the county of Ayr, on "the stipulation, that he was to pay "to her and her children five sixths "of the emoluments, he was bound "to fulfil that engagement. The "defender urged, it was a *pactum* "*contra bonos mores*, and amounted to "a sale of a public office. The evidence of the bargain was insufficient; but the defender agreeing "to a part of the pursuer's demand, "the lords, though they were of "opinion that such bargains are not "entitled to the aid of law to enforce them, decerned against the "defender to that amount. Feb. 1, "1786, Dalrymple *contra* Shaw."

[f] Lord Fountainhall reports a debate, concerning the validity of a premium promised for effectuating a marriage, but instead of telling the result, says only, "it moved laughter. 6th June 1678." Dirleton, indeed, reports a case where such a bond was sustained. 9th February 1676. But, in a subsequent case, the court was of opinion, that "the office undertaken by the pursuers," (viz. of procuring a wife for another person for a stipulated reward), "was "*contra bonos mores*, and assoilzied on "that ground, and found the pursuers liable in expences. 11th February 1770, Thomson and Dallas against Mackaile." Dict. Vol. iv, *Voce pactum illicitum.*

[g] Christian's Blackstone, B. iv, p. 173.

§ 1. AT COMMON LAW.

Roman and Scottish law different from the English

BUT the Scottish law, treading in the steps of Roman jurisprudence, avoids all such specialties, refusing to interpose its authority to enforce any obligation which does not arise from real business, but, at the very best, is mere pastime and amusement.[a]

ONE reason of this maxim in the Roman and Scottish jurisprudence is this, that, in wagers and game debts, there obtains not the same reciprocity of profit as in those onerous

173, note 11. See also Termly Reports, v. iii, p. 693, where the whole subject is fully discussed; and also Bacon's Abridgement, *v* Gaming, from which it appears, that lord Mansfield and judge Buller esteemed the policy of our law better, in disregarding such transactions altogether.

[a] Thus, "Bruce and Ross laid a "wager of 50l. respecting the issue "of a contested election of a mem- "ber of parliament. The lords re- "fused to sustain action for the debt. "26 January 1787, Bruce against "Ross, affirmed in the house of "lords, April 1788.

"Cochran granted bond, acknow- "ledging the receipt of a certain "sum of money, and binding himself "and his heirs to pay 100l. sterling "to Stewart and his heirs, to be paid "whenever he, the granter, or his "foresaids, should succeed to the dig- "nities and estate of earl of Dundon- "ald. The heir of the granter's "heir pursued the heir of the granter "for payment, The lords found the "bond null and void; reserving the "question whether the pursuer was "entitled to repetition of the money "paid, on proving its amount. Sel. "Decis. 7 Feb. 1753, Sir Michael "Stewart against Earl of Dundon- "ald."

Wordsworth against Pettygrew, 15 May 1799. Fac. Coll. The parties laid a wager, whether a particular horse would trot seventeen miles within an hour. The successful party for the amount, 50l. sterling, obtained a decree in absence against the other, who brought the question under review by suspension. The court was unanimously of opinion, that action does not lie for claims of this sort.

And, more lately, 16 Nov. 1804, Campbell against Cuming Gordon, the court thought the point quite fixed. The parties betted 100l. sterling with each other, the one affirming, that, in the course of 10 years, the 3 per cent. consolidated annuities would rise to 70l. and upwards; and the other, the contrary. A contract on stamped paper was executed and recorded. The successful party brought an action against the heir of the other. The court decided the cause in favour of the defender, and found him entitled to expences.

§ 1. AT COMMON LAW.

No reciprocity of profit.

The profit of the one is the loss of the other

In gaming the reverse holds.

Each can gain only by the other's loss.

contracts which are enforced in civil society. In these the advantage of the one party depends not necessarily on the loss of the other. This holds, not only in buying and selling, even sinking money or annuities, but likewise in marine or fire assurances. The one obtains that security, without which he could not have run the risk of the voyage; the other, by means of the premium, is aided in the carrying on his trade of insuring, which, though hazardous, yet affords, on the whole, a likelihood of gain, from the number of vessels that arrive safe exceeding those that are lost. But neither of them seeks the loss of the other. On the contrary, the assured is as well pleased as the underwriters, at the safe arrival of the ship. But, in wagers and gaming, the reverse holds. The *gain* of the one party must, necessarily, be the *loss* of the other. Each of the parties, therefore, thinks only of despoiling his antagonist, like two duellists, mutually aiming at each other's life.[a]

ON these accounts, our common law is jealous of gambling, even in its fairest and most concealed garb, refusing its countenance and protection to what it considers as a *species* of unlawful covenant.[b] Whether lotteries for sell-

[a] Pothier, tom. iii, p. 116. "*Dans ce contrat (de jeu) l'une des parties ne peut y trouver l'avantage qu'elle y recherche, qu'en dépouillant l'autre: chacun des joueurs ne cherche qu'à dépouiller celui contre qui il joue, comme deux duellistes cherchent réciproquement à s'ôter la vie. Le contrat du gross jeu a donc une fin contraire à la charité, et directement opposée aux principes de la société civile, qui n'a établi les commerces et les contrats que pour que les membres de cette société s'aidassent mutuellement et se rendissent mutuellement service. Le contrat du gross jeu, considéré du côté de sa fin, est donc contraire aux bonnes mœurs, et comme tel, doit être proscrit.*"

[b] Even in eastern countries, the laws do not appear more favourable to gaming, nor to class it in more honourable society than the Scottish law does. Thus, in the chapter on education, the institutes of Hindoo law ordain the first order to abstain from "gaming, from disputes, from detraction, and from falsehood," &c.

(Sir

ing hard-ware, or other goods, are removable as a nuisance at common law, has not yet been decided.[a] § 1. AT COMMON LAW.

II. CONSIDERING "the manifold evils and inconveniences which ensue upon carding and dicing, and horse races, which are now over much frequented in this country, to the great prejudice of the lieges: and because honest men ought not to expect that any winning, had at any of the games above written, can do them good, or prosper,"[b] the Scottish legislature have farther interposed to discountenance these practices by a positive enactment, the wisdom of which is commended by lord Gardenston, as clashing little with those delicate notions of honour and fidelity among gamesters, which are the great bar against the execution of such laws.[c] § 2. SCOTTISH STATUTE 1621, c. 14.

IN the first place, playing at cards and dice in any public house is prohibited. The penalty for this offence is inflicted on the master of the house, who incurs a fine of forty pounds Scots for the first fault, and loss of his liberties for the next. Gaming in public houses prevented.

(Sir W. Jones' Works, v. i, p. 108.) And, in a subsequent part of the Institutes on government, where there is an enumeration of the eighteen (or three sets of) vices to be avoided, gaming again appears in very discreditable company. (Ibid. p. 247.)

[a] The question occurred in the case, Fraser against Sprott, 7 July 1796. Fraser advertising a scheme of a lottery for disposing of his goods, the procurator fiscal of the city of Edinburgh applied to the magistrates for an interdict againt him, upon the ground of such lotteries being declared nuisances by law, particularly by 27 Geo. III, c. 1 and 2. The court were clear, that, for the reason already mentioned, the statute could not apply. But the late lord-justice-clerk M'Queen, and several other judges, delivered decided opinions, that it could be stopped as a nuisance by the common law of Scotland. The court passed the bill, to try the point, but continued the interdict.

The mistake here was, libelling upon this statute in place of the former ones respecting private lotteries, which are so far not repealed.

[b] James, VI, parl. 4, 1621, c. 14.

[c] Gardenston's MS. *voce* Gaming.

§ 2. JAMES VI, PARL. 4, 1621, c 14. Even in a private house, unless the master play.

IN the second place, playing, even in a private house, is prohibited, unless the master of the family play himself. No particular penalty is specified in this clause, and no question relative thereto has ever occurred.

Only below 100 merks.

IN the third place, if any man win "any sums of money, at carding or dicing, attour the sum of an hundred merks, within the space of twenty-four hours, or gain at wagers upon horse races any sum attour the said sum of an hundred merks,"[a] it is provided, that "the surplus shall be consigned within twenty-four hours thereafter in the hands of the thesaurer of the kirk, if it be in Edinburgh, or in the hands of such of the kirk-session in the country parochines as collects and distributes money for the poor of the same, to be employed always upon the poor of the paroche,[b] where such winning shall fall out."

IN the fourth place, full power and commission, to sue for the penalties, are given to the bailies and magistrates of boroughs, the sheriffs and justices of peace in the county;[c] who are bound, by their public duty, to attend to the execution of the statute, and cannot be supposed to be biassed by those ideal principles of honour which might mislead the parties themselves.

LASTLY. "In case the magistrate informed thereof refuse to pursue for the same, the party informer shall have

[a] Scottish money, equal to 5*l.* 11*s.* 1⅓*d.*

[b] June 1775, Maxwell against Blair of Dunrod. Fac. Coll. At Dumfries a bet was taken, which of the parties would ride soonest from that town to Kirkcudbright. The one was taken ill in the intermediate parish of Kelton; the other pushed on to Kirkcudbright. The poor of the town of Dumfries were found entitled to the money.

[c] The court sustained the kirk-treasurer's title to pursue under this statute. Grant, kirk-treasurer of the city of Edinburgh against sir Scipio Hill. Feb. 9, 1711. Fountainhall.

action against the said magistrate for double the like sum; the one half thereof to be given to the poor, and the other half to the party informer." § 2. JAMES VI, PARL. 4, 1621, c. 14

THIS act affords a defence in the case of a bond, or other document, taken for money won at play.[a] It must be proved, by writ or oath, that the document was granted for a game debt.[b] It was decided, "that the money lost being paid, and immediately lent back on bond though possibly the individual species lost was not lent, that this also fell under the act of parliament."[c]

III. IT does not seem necessary to enter into any long detail of the multiplicity of enactments which the British statute book presents upon this subject. Even in England, they scarcely appear to be *in viridi observantia;* and are so technically expressed in the phraseology of the English law, that, whether meant to be limited to England or not, very few of them admit of execution in this country. However, "they have been understood to extend to Scotland, though of this" (says lord Gardenston) "I cannot help entertaining a very great doubt... particularly because these statutes are framed as much in the language and terms of English laws, as the statute concerning justices of peace, which was found in the house of peers not to extend to *Scotland,* in the case of the *duke of Douglas;* and, indeed, some of the penalties in those statutes concerning gaming, can

§ 3. BRITISH STATUTES.

Do they extend to Scotland?

Lord Gardenston's opinion.

[a] "In a pursuit for payment of a 6000 merks bond—Alleged for the defender, that the money was won at dice, within the space of 24 hours, and so was not due by the 14th act parl. 1621. Answered, the said act affords only a defence against payment when the money is pursued for, but here there is a bond of borrowed money. The lords found it relevant to prove, *scripto or juramento*, that the bond was granted for money lost at play within 24 hours, to make the bond fall under the act of parliament. Harcarse, 19 July 1688 Straiton." Dict. vol. ii. *Voce pactum illicitum.*

[b] Ibid.

[c] Ibid.

§ 3. BRITISH STATUTES.

Lord Gardenston's opinion of their inefficacy.

only be recovered in the court of *king's bench*. If we judge of those laws by their efficacy, we have no reason to regret that they should not be extended. It is well known, that the transgressions against them are very prevailing, and yet we seldom hear of any execution upon them; and indeed, in my humble apprehension, the single and solitary Scots law, which is above recited, has a better tendency to restrain this practice, than all the severe prohibitions and penalties introduced by a multiplicity of English and British statutes. I shall not, however, presume to offer any positive opinion on this matter, especially as I find that lord Kaimes, in his abridgement of the statutes, has classed those laws as extending to Scotland. Lord Bankton is of the same opinion, in his Institutes."[a]

PERHAPS the truth really lies between the two opinions; that is, as general enactments, these statutes naturally should, and are intended to have authority over the whole empire; while, on the other hand, there is scarcely any one of them that does not contain clauses which do not admit of execution in this country. In many of them, some of the clauses have force in this country, while others have not.

[a] Lord Gardenston farther observes: "The great bar against the execution of such laws, is the notion which gamblers have propagated, like a tenet of faith, among gentlemen, that losses of this nature are to be regarded as *debts of honour*. Gentlemen, therefore, will rather be ruined, even by sharpers and pickpockets, so strange is the influence of *ideal honour*, than be persuaded to plead, that they are not bound in law to pay such debts, far less can they be induced to take the advantage of penal laws against the associates of their own extravagance, and the companions of their favourite pleasures. But the Scottish statute clashes less with those delicate notions of honour and fidelity among gamesters. It does not entitle the loser either to recover the sum he has lost, or to sue for penalties. If he take the benefit of this law, he can fall under no imputation of sordid motives, or ungenerous conduct. He must pay the debt; but all that exceeds a very moderate sum, must be applied to charitable purposes." MS. tit. Gaming.

IT would be improper, therefore, to pass them over altogether.

THE statute 9 Anne, c. 14, enacts, that all bonds, bills, and other securities, given for money won at play, shall be utterly void; [a] and that all conveyances and securities of

9 Anne, c. 14.

[a] "Arrestment being laid in the hands of a person, who was debtor in certain bills to the common debtor, the arrestee brought a reduction of the bills on the 9th act of queen Anne, and offered to prove by the oath of the creditor in the bills, that the sum was lost at play. Objected, That the oath of a cedent is not competent in prejudice of an onerous assignee. The lords found it competent to prove the reason of reduction by the oath of the winner, even against an onerous assignee. C. Home, Nov. 7, 1740, Pringle contra Biggar. The contrary was found where the onerous indorsee was not privy to the ground of debt. C. Home, Feb. 18, 1741, Stewart contra Hyslop. The same, Kilkerran, Jan. 29, 1740, Nielson contra Bruce. (See Bill of Exchange.) A shoemaker pursued a brother of the same trade for payment of a bill of 8l. sterling. The defence was, That it was money lost at play, and the security was null on the statute 9th of queen Anne. Answered, The winner kept a public house, and they had played at different times for liquor, which was actually drunk by the loser, so that he got value for his bill: and, 2do, The statute is levelled at *excessive and deceitful gaming*, which this is not. The lords found the bill void. March 5, 1767, Macconll contra Braidwood." Dict. Vol. iv, tit *Pact. illicitum.*

"T. 14 Geo. II Bowyer v. Bampton. Upon a case stated at *nisi prius* in an action by the plaintiff as indorsee of several promissory notes, it appeared that the notes were given by the defendant to one Church for money by him knowingly advanced to the defendant to game with at dice, and that Church indorsed them to the plaintiff for a full and valuable consideration, and that the plaintiff was not privy to, or had any notice, that any part of the money for which the notes were given had been lent for the purpose of gaming. Upon this a question arose on the above statute of 9 Anne, c. 14, whether the plaintiff could maintain this action, and the court were of opinion he could not; for it is making it of some use to the lender if he can pay his own debts with it, and will be a means to evade the act. And though it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side. And the plaintiff is not without remedy, for he may sue Church on his indorsement. Str. 1155.

H. 19 Geo. II, Barjeau and Walmsley. The plaintiff and defendant gamed together, at tossing up for five guineas at a time. And the plaintiff having won all the defendant's ready money, lent him ten guineas at a time, and won it, till the defendant had

§ 3. BRITISH STATUTES. —9 ANNE, c. 14.

lands made upon the same consideration, shall enure and be to the sole use and benefit of the heir of the granter.

had borrowed 120 guineas. In an action for money lent, it was insisted for the defendant, that by the 9 Anne, c. 14, the plaintiff could maintain no action; for by that act, all securities for money lent to game with shall be void; and the borrowing on an agreement to pay is a security. But chief justice Lee held that this was not a case within the act, for there is not the word contract, as in the statute of usury; and the word securities, as it stands in this act, must mean lasting liens upon the estate. The parliament might think there would be no great harm in a parole contract, where the credit was not like to run very high; and therefore confined the act to written securities. Wherefore the plaintiff obtained a verdict for 126l. Str. 1249.

In the case of Rawdon and Shadwell, April 23, 1755 A bill was brought by the plaintiff for an injunction, and that the defendant might deliver up the plaintiff's bond for 1150l. for money lost at play, and might refund a sum of 150l. paid by the plaintiff in part of the said bond. It appeared, that the plaintiff was a lieutenant, and the defendant a captain in Cotterel's regiment; and about 14 years ago, being quartered at Leeds in Yorkshire, the defendant won of the plaintiff in one evening the sum of 1150l. The plaintiff was under age; and being so, gave a bond for the money to the defendant; and afterwards, when of age, paid 150l. in part. It was insisted for the plaintiff, that the securities by the statute of the 16 Car. II, were totally void, and ought to be delivered up; that the property of an infant in money lost at play is not altered, and therefore trover would lie; and the statute of the 9 Anne was mentioned, and a case in 2 Mod. 91. For the defendant it was urged, that the plaintiff, on the same evening, won of another in the same company, to-wit, the surgeon of the regiment, a larger sum than the 1150l. which has been paid by him. That fair gaming is not *malum in se*. It is only prohibited *sub modo*. That the case cited was of money lost with false dice, which the court takes cognizance of as a cheat. That the statute of Anne gives the court jurisdiction only as to a discovery. That as to the 150l. it was paid after he came of age; and if the court should order the defendant to refund at the distance of 14 years, it would occasion an infinite number of applications. That the statute of 16 Car. II gives no remedy to recover money already paid. That there has been too long an acquiescence. That money paid, even in cases of bribery and corruption, cannot be recovered at law. That the statute of Anne has directed an action within three months, for money lost and paid at play. The lord chancellor said, the decree he should make was not founded on any imputation on the character of the defendant, who had put in a very candid answer. But this is a breach of the law, from a false principle of honour. And he was of opinion, that the plaintiff

THE statute further enacts, that if any person at any time or sitting,[a] loses £10 sterling at play,[b] he may sue § 3. BRITISH STATUTES —9 ANNE, c. 14.

plaintiff was entitled to the whole relief prayed; that a party may come into this court to have a void security delivered up; that refunding the money is of course, as the statute has made the security void to all intents and purposes." Burns, t. Gaming.

[a] M. 19 Geo. III. Bones against Booth. On a motion for a new trial, baron Perryn reported from the last Bristol assizes, that the action was brought to recover back 14 guineas won by gaming, upon the statute of 9 Anne. The play was at a coffee house in Bristol. They played at all-fours for two guineas a game, from Monday evening to Tuesday evening, without any interruption, except for an hour or two at dinner, but the plaintiff and defendant never parted company. It was insisted at the trial, that this was not won at any *one* sitting, so as to fall within the statute, because the dinner had intervened. But the judge thought otherwise: however, the jury found a verdict for the defendant, much to the dissatisfaction of the judge. On shewing cause, it was insisted, that a new trial in an action for a penalty was unprecedented; and that as both parties were gamblers, neither was intitled to any favour or indulgence from the court. Justice Gould (in the absence of chief-justice De Grey) was clearly for granting a new trial, the verdict being manifestly contrary to evidence. The statute (with respect to the party losing) is *remedial*, not *penal*. He is to recover back his money, and to that end the 3d section of the statute allows a bill in equity for a discovery; which plainly shews that it was not considered as a penal statute. Had this been a proceeding on that branch of the statute, which inflicts pillory or other corporal punishment, it had been otherwise. Judge Blackstone was of the same opinion. The statute makes the winning of 10l. at *one* time or sitting, a nullity; and therefore gives the loser an action to recover back what still properly continues to be his own money. To lose 10l. at one *time*, is to lose it by a single stake or bet; to lose at one *sitting*, is to lose it in a course of play where the company never parts, though the person may not be actually gaming the whole time. Judge Nares was of the same opinion. The statute is *remedial* where the action is brought by the party injured, but *penal* where brought by a common informer. And the rule was made absolute for a new trial. Black. Rep. 1226.

[b] The words are, "cards, dice-"tables, or other game whatsoever, "or by betting on the sides of such "as do play."

M. 15 Geo. II. Goodburn and Marley. It was determined, that horse races are within these general words. Str. 1159. So also in the case of Blaxstone and Pye, E. 6. G. 3. 2 Wilson, 309.

And in the case of Lynall and Longbothom, M. 30 Geo. II, it was admitted

§ 3. BRITISH STATUTES. —9 ANNE, c. 14.

the winner, and recover it back by action of debt at law; and, in case the loser does not recover back the money lost within three months, any other person may recover the same, and treble the amount besides, with costs, one half to himself, the other half for the poor.[a] And every person who shall be liable to be sued for the same, shall be obliged and compellable to answer, on oath, such bill as shall be preferred against him, for discovering the sum of money, or other thing so won.[b] So far this statute goes towards discouraging even gaming, when conducted in a manner perfectly fair.

May recover the winnings back.

Unfair play or winning more than 10l. sterling at a sitting.

BUT it farther exacts, that if any person, by cheating at play, shall win any money or valuable thing, or shall, at any one time or sitting, win more than £10 sterling, he shall forfeit five times the value, recoverable by the person who will sue for the same:[c] and (in case of cheating) shall be

admitted on all hands, that a foot race also is within the statute, and that a footman running against time, is a foot race; but in this case, for a flaw in the declaration in not laying the fact close enough to the words of the statute, the defendant had judgment. 2 Wils. 36.

In the case of Clayton and Jennings, E. 10, Geo. III. On an action for 5 guineas, won by betting at a horse race, it appeared that the bet was 10 guineas by the plaintiff, to 5 by the defendant. The plaintiff won, and obtained a verdict. It was moved in arrest of judgment, that there was no mutuality in the wager; for as by reason of the statute the defendant could not have recovered the 10 guineas, therefore the plaintiff shall not now recover the 5. And of that opinion was the court. And judge Aston mentioned the case of Connor and Quick in the king's bench about ten years before, when the court took a distinction between running a horse for 50l. which was lawful, and betting on the side of the horse, which was not so. And in the present case, by the opinion of the whole court, judgment was arrested. Black. Rep. 706.

[a] Christian's Blackstone, B. iv. p. 172.

But this statute does not repeal the Scottish statutes; under which therefore, without waiting three months, the magistrates therein mentioned may sue for the overplus beyond the 100 merks Scots.

[b] 9 Anne, c. 14, § 3; 18 Geo. II, c. 34, § 3.

[c] § 5.

Geo. II, c. 34, § 8, makes the

deemed infamous, and suffer such corporal punishment as in case of wilful perjury.[a]

§ 3. BRITISH STATUTES —LOTTERIES.

By several statutes, in the reign of king George II, all private lotteries, by tickets, cards or dice (and particularly the games of pharo, basset, ace of hearts, hazard, passage, roly-poly, and all other games with dice, except backgammon) are prohibited under a penalty of £200 for him that shall erect such lotteries, and £50 a time for the players.[b] Both the penalties of £200 and £500 are recoverable on conviction "before any one justice of the peace for any county . . . or before the mayor, or other justice of the peace, for any city or town corporate, upon the oath of one witness . . . or upon the view of such justice, or on the confession of the party accused; which forfeiture, after deducting the reasonable charges, shall go, one third to the informer, and the remaining two thirds to the use of the parish where such offence shall be committed." An appeal lies to the next general quarter sessions." But the appellant must "enter into a recognizance before some justices of the county . . . wherein the conviction or judgment was made . . . with two sufficient sureties . . . to try such appeal at the next quarter sessions." The matter is then to be finally determined. The appellant, if unsuccessful, pays treble costs. The action must be commenced within three calendar months. The pursuer, if he fails in his action, pays treble expences.[d]

Judges. Proof. Application of the penalty. Appeal.

the person liable to be indicted before the court of king's bench. That clause, of course, does not extend to this country.

[a] 9 Anne, c. 14, § 5.

[b] 12 Geo. II, c. 28. The purpose of this statute was to declare, that the games of ace of hearts, &c. were within the descriptions of the lotteries prohibited by 10 11 Will. III; 9 Anne, c. 6; 8 Geo. II.

[c] § 5.

[d] By *finally determine*, it is meant only that the cause shall be decided by the justices before it be brought before the supreme court.

§ 3. BRITISH STATUTES. —LOTTERIES.

THESE enactments of 12 Geo. II, c. 28, are laid down generally, and do not appear to be limited to England.[a]

[a] There seems reason to doubt whether the following clauses are applicable to Scotland. By clause 6, the matter is not to be brought by *certiorari* into the king's bench till the determination be given thereupon by the quarter-session. Whenever the question is brought to a final judgment by the sessions, it may be competent, notwithstanding this clause, to bring the cause immediately under the review of the court of session by advocation, without applying at all to the quarter sessions. For the legislature has not said the reverse expressly; and the court of session would not probably think itself at liberty to eke out the imagined meaning of the legislature, and extend the statute by analogical constructions.

In like manner, section 7 enacts, "that no *certiorari*, or other process, shall issue to remove the record of any such conviction from the said court of quarter sessions, touching such conviction, into any of his majesty's courts of record at Westminster, until the party find two sureties in 100l. sterling for his prosecuting the *certiorari*. For the same reason as just now stated, this security could not be exacted in Scotland from the party coming before the court of session by advocation. The supreme court at common law has a right of review, wherever it is not expressly excluded; and it must have it without such qualification as to the security, because the statute does not expressly so qualify it."

The other clauses seem to be general, and to extend to this country. Thus, clause 8, permits the justice, to inflict six months imprisonment on persons unable to pay the penalties; and, by clause 9, if any justice neglect or refuse to do what is required of him, he is liable in 10l. sterling for each offence, recoverable by any person who shall sue for the same by "plaint or information, in any of his majesty's courts of record, or at the assize for any county; in which action, bill, plaint, or information, no essoign, protection, or wager at law, nor more than one imparlance shall be allowed." This technical phraseology does not very well apply to our practice; but still, under the word, "his majesty's courts of record," the court of session may be reasonably thought to be included. The penalty goes one half to the informer, and one half to the poor of the parish where the offence was committed. The action against such justice or magistrate must be commenced within six months after his refusal to prosecute.

This act does not hinder games in palaces where the king resides; nor joint proprietors, or tenants settling their respective proportions of the property by lot. Actions must be brought within three calendar months. If the plaintiff or prosecutor is non-suited, or if he discontinues the action, or if judgment goes against him, the defendant recovers treble costs.

13 Geo. II, c. 19, § 9, extends the prohibition of the former statute to the

§ 3. BRITISH STATUTES. —LOTTERIES.

Public lotteries.

PUBLIC lotteries, that is, those that are regulated by the numbers of the state lottery, unless by authority of act of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, are prohibited by a great variety of statutes, under heavy pecuniary penalties.[1]

the game of *passage*, and all games invented or to be invented with one or more dice, but backgammon ... under the like penalties, and recoverable in the same manner with those under the former act. The observations, therefore, made with respect to the former, will apply to this act also.

18 Geo. II, c. 34, extended the prohibition and penalties of the above act of 12 Geo. II, c. 28, to roly-poly. Section 4th empowers all persons having jurisdiction in cases of gaming, upon any information exhibited before them, for any offence against this act, or that of 12 Geo. II, c. 28, or 13 Geo. II, c. 19, to summon any person to give evidence, upon penalty of 5ol. sterling, to be levied by distress and sale; and in default of such distress, the person thus refusing or neglecting to appear, or giving false evidence, may be imprisoned for six months. And, by § 5, no person other than the plaintiff and defendant in the cause, shall be incapable of being a witness, touching any offence against the laws for preventing gaming.

The 3d section, touching courts of equity, does not apply o our practice; and § 8, vesting a criminal jurisdiction in the court of king's bench, cannot extend to this country.

The number of statutes upon this subject need not surprise us. It is a necessary consequence of the plan that seems to be adopted of making a new enactment upon the appearance of every new game. For "the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another ... particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited." Blackstone, B. iv, p. 173. Indeed, to us in Scotland, the words of some of those statutes appear sufficiently broad to have that effect.

1 10 Anne, c. 26, § 109, it is enacted, that every person who shall keep any office or place for making insurances on marriages, births, christenings, or service, or any other office or place, under the denominations of sales of gloves, fans, cards, numbers, or the queen's picture, for the improvement of small sums of money, shall forfeit 500l.; one third to the king, one third to the poor, and one third, with full costs, to the party informer, to the person who shall sue for the same; and every printer, or other person, who shall publish the keeping any such office, shall forfeit 100l. to be distributed as the penalty last mentioned: and every person who, in any office before the 24th June 1712, set up for making insurances

§ 3. BRITISH STATUTES. LOTTERIES.

THOUGH the most material clauses of the statute of 27 Geo. III, c. 1, do not extend to this country, yet, under

ances on marriages, &c. or under any other the denominations aforesaid. or any like denominations for improvement of small sums, shall make, or suffer to be made, any new insurances on marriages, births, christenings, or service, or receive any payments for improvement of small sums, shall forfeit 100l. to be distributed in like manner.

These penalties are, by clause 109, said to be recoverable in any of his majesty's courts aforesaid, which, from clause 29, appears to mean for England the courts of Westminster, and for Scotland the court of session, justiciary, or exchequer.

Lord Swinton puts a query, whether this act, so far as respects lotteries, extends to this country? But as Scottish courts are thus expressly referred to, it does not appear what foundation there is for that doubt.

8 Geo. I, c. 2, § 36, prohibits the keeping of any office, under the denomination of sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, for the improvement of small sums of money, or shall sell or expose to sale any houses, &c. by way of lottery, or by lots, tickets, numbers, or figures, or shall make, print, advertise, or publish, proposals, or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided amongst them by the chances of the prizes in any public lottery, or shall deliver out tickets to persons advancing such sums, to entitle them to a share of the money, according to such proposals or schemes, or shall make, print, or publish, any proposal or scheme of the like kind; and shall be thereof convicted, on the oath of one witness, by two justices of the peace where such offence shall be committed, or the offender found, the person so convicted shall (over and above any former penalties) forfeit 500l.; one third to the crown, one other third to the informer, and the remaining third to the poor of the parish where the offence shall be committed, to be levied by distress and sale of goods, by warrant of the justices, and shall also be committed to the county gaol for one year, and till the 500l. be paid. Persons aggrieved may appeal to the next quarter sessions, where the judgment shall be final.

8 Geo. II, c. 2, § 29, for preventing the evasion of the statute 9 Geo. I, against selling tickets in any foreign lottery, under the penalty of 200l. and one year's imprisonment, farther enacts, that if any person shall sell or deliver any ticket in any foreign lottery, and shall be convicted upon action, or information in any of the courts of record at Westminster, or upon oath or affirmation of one witness, before two justices of peace, where such offence shall be committed, or the offender found, the person convicted shall forfeit 200l.; one third part to his majesty, one third part to him who shall make information of the offence, and the remaining third to the poor of the parish, to

other clauses of it, Scottish justices have jurisdiction as well as the English. For the statute enacts, that persons dealing in lottery tickets, without being licenced, or insured against to be levied by distress and sale of goods, and shall also be committed to the county gaol for one year, and till the sum of 200l. be paid. And, by § 30, any person aggrieved by the judgment of such justices shall have liberty to appeal to the next quarter sessions, whose judgment shall be final.

22 Geo. III, c 47, also regards selling tickets in the state lottery, but a subsequent statute, 27 Geo. III, c. 1, reciting the statute 8 Geo. I, c. 2, 12 Geo. II, c. 28, and 22 Geo. III, c. 47, enacts, "that from and after the day on which this act shall receive his majesty's royal assent, no pecuniary penalty or penalties which shall be incurred by any person or persons offending against such parts of the said acts, or any of them as touch and concern lotteries, shall be recovered or recoverable before any justice or justices of the peace, but shall and may be sued for by any person or persons whomsoever, at any time within six calendar months next after such offence shall be committed, and recovered by action of debt, bill, plaint, suit, or information, in any of his majesty's courts of records at Westminster." With respect to Scotland, therefore, those statutes are so far repealed, since it was omitted to give jurisdiction to some other Scottish court instead of the justices.

This statute, § 8, generally says, "that no person or persons shall be subject or liable to any prosecution before any justice or justices of the peace for any offence against the herein before-mentioned acts touching and concerning any lottery. However, in the case of K. v. Leston T. 33 Geo. III, it was determined by the court of King's bench, that the above statute only extends to state lotteries, and does not repeal the summary jurisdiction of magistrates over games of chance or lotteries prohibited by 12 Geo. II, c. 28. (Durnf. and East, 5 V. 338.) So the statute 12 Geo. II, and the others, remain in force still with respect to private lotteries.

This statute, 27 Geo. III, c. 1, when it takes the jurisdiction from the justices of peace, gives it, as we have seen, exclusively to the court of king's bench. Not adverting to that, in a case above mentioned, the procurator-fiscal for the town of Edinburgh laid a complaint on that statute, against a private lottery which had been advertised. The court were very clear that the limitation of the remedy to the court of king's bench prevented the execution of the statute in this country, while they were equally clear that the statute must have been intended to have force over both parts of the united kingdom; and as one of the judges expressed it, that it was owing to "a blunder" that the clause in question had been expressed in that limited manner. Fraser against Scot, 7th July 1796, Dict. Vol. iv. *Pactum illicitum.*

§ 3. BRITISH STATUTES. —LOTTERIES.

the drawing of any such ticket, or receiving money, &c. in consideration of any agreement to repay money or goods, upon any contingency relative to the drawing any such ticket, shall be deemed rogues and vagabonds within the meaning of 17 Geo. II, c. 5.

BUT no person shall be liable to be prosecuted by action, for the recovery of a pecuniary penalty, and by imprisonment as a rogue and vagabond.[m]

One justice.

BY 34 Geo. III, c. 40. On complaint upon oath before one justice, of any offence committed against the act of 27 Geo. III, c. 1, for suppressing unlawful lotteries in any house or place within the jurisdiction of such justice, whereby any offenders may be liable to be punished as rogues and vagabonds, such justice, by warrant, may empower any person employed by the commissioners of the stamp duties in the execution of the acts for the regulating of lotteries, by day or by night, (but if in the night in the presence of a constable, who is required to be aiding and assisting therein), to break open the doors of any part of such house or place where such offence shall have been committed, and to enter and seize all such offenders or other persons, who shall have knowingly assisted or been any ways concerned in committing such offence, and convey them before any justice of the county, city, or place, wherein such person shall be so apprehended, to be dealt with according to law; and all persons who shall have been discovered in such house or place, knowingly aiding assisting, or any ways concerned with such offenders in carrying on any such transactions, shall be deemed rogues and vagabonds, and punished accordingly: and the officer having the execution of such warrant, or person acting in his aid or assistance, may arrest any such

Breaking up doors.

In the night.

One justice

[m] § 7.

persons so discovered in such house or place, and convey them before a justice as aforesaid. And if any person shall forcibly obstruct or hinder any such officer, or others acting in his aid or assistance, in the execution of their duty herein, he shall be deemed an offender against law, and the court before whom he shall be tried and convicted may order him to be fined, imprisoned, and publicly whipped, as in their discretion shall be thought fit. And all persons, although not discovered in such house or place as aforesaid, who shall employ any person in carrying on any of the transactions aforesaid, or be aiding or assisting therein, shall be deemed rogues and vagabonds, and punished accordingly.[a] § 3. BRITISH STATUTES. —LOTTERIES.

AND if any person shall be brought before any two justices, and shall be convicted of any offence against the said act of 27 Geo. III, c. 1, or of this act, whereby he shall be adjudged a rogue and vagabond, such justices may order him to be sent to the house of correction, for any time not exceeding six, nor less than one calendar month, and until the final period of the drawing of the lottery in respect whereof such offence shall be committed; and such proceedings shall not be subject to appeal, nor removeable by *certiorari*.[b] Offenders adjudged rogues and vagabonds may be committed.

A STILL later statute, 42 Geo. III, c. 119, gives important powers to Scottish justices, although, like many other of the British statutes, it is so worded, as not, in many cases, to admit of execution in this country.

THIS statute declares all games, or lotteries, or wheels called little-goes, public nuisances. And persons keeping any office or place for any game or lottery not authorized by law, shall forfeit £500, and be deemed rogues and va- —LITTLE-GOES.

[a] § 37. [b] § 40.

§ 3. BRITISH STATUTES. —LOTTERIES.

gabonds within the meaning of 17 Geo. III, c. 5.[a] Offenders not proceeded against for the penalty, may be proceeded against as rogues under 17 Geo. II, c. 5; and 27 Geo. III, c. 1.

THE statute[b] prohibits any person to pay money, or deliver goods, &c. on any event relative to such game or lottery, or publish any proposal, under penalty of £100. Offenders may be apprehended on the spot by any one, and carried before a justice, who shall, on the penalty not being paid, commit them for 6 months, and till payment, without appeal; one third to his majesty, one third to the informer, and one third to the apprehender. The provisions of 27 Geo. III, c. 1, extended to this act.

One justice.

Imprisonment.

Penalty, application of.

WITH regard to public lotteries, then, in this country, there seems to be no other regulation, excepting what arises from the revenue statutes requiring a licence.

—GAMING HOUSES.

EVEN in England, all common gaming houses are nuisances in the eye of law, and it is *contra bonos mores* to live by gaming as a profession. So by queen Anne's act,[c] "any two justices may cause to come, or to be brought before them, every person whom they shall have just cause to suspect to have no visible estate, profession, or calling to maintain himself by, but do for the most part support themselves by gaming; and if such person shall not make it appear to the said justices that the principal part of his expences is not maintained by gaming, they shall require of him sufficient sureties for his good behaviour for 12 months,

Two justices.

Persons having no means of living.

[a] The 500l. is to be recovered in the court of exchequer, at the suit of his majesty's attorney general. In Scotland, we have no doubt a court of exchequer, but we have no attorney general; of course this penalty is not recoverable in Scotland at all.

[b] § 5.

[c] c. 14, § 6.

and in default of his finding such securities, shall commit him to the common gaol until he shall find such securities as aforesaid." § 3. BRITISH STATUTES.

"AND if he shall, during the time for which he shall be bound, at any one time or sitting, play or bet for any sums, or other thing exceeding in the whole the value of 20s. such playing shall be deemed a forfeiture of the recognizance."[a]

FOR preventing such quarrels as may happen on the account of gaming, queen Anne's statute farther enacts, that if any person shall assault and beat, or challenge to fight, any other person whatsoever, on account of any money won by gaming, playing, or betting, at any of the games aforesaid, he shall, on conviction thereof, by indictment or information, forfeit to the king all his goods and chattels and personal estate whatsoever, and shall also suffer imprisonment without bail or mainprize, in the common gaol of the county where the conviction shall be had, during the term of two years.[b] Quarrels. Beating, &c. on account of gaming. Punishment.

THE statute 13 Geo. II, c. 19, to prevent the multiplicity of horse races, another source of gaming, directs, that no plates or matches under £50 value shall be run, upon penalty of £200, to be paid by the owner of each horse running, and £100 by such as advertise the plate. Newmarket and Black Hambleton are excepted, where a race may be run for any sum or stake though less than £50.[c] HORSE RACES. Matches under 50l. Exception.

[a] § 7.

[b] 9 Anne, c. 14, § 8.

[c] In the case of Bidmead and Gale, E. 9 Geo. III, an action of covenant was brought upon articles to run a horse match. The agreement was, that each should start his mare; and that if either should refuse or neglect, he should forfeit and pay 25l. to the other. So that it was a match for 25l.

§ 3. BRITISH STATUTES.

BUT though such horse races are lawful, yet it has been determined that they are games within the statute of 9 Anne, c. 14, and that, of consequence, wagers above £10 upon a lawful horse race are illegal.[a] A foot race, and a race against time, have also been held to be games within the statute of gaming.[b] So a wager, to travel a certain distance within a certain time, with a postchaise and a pair of horses, has been considered of the same nature.[c] A wager for less than £10 upon an illegal horse race is also void and illegal.[d]

Wagers on horse races, foot race, against time.

BUT this statute cannot be executed in Scotland, as the penalty is only recoverable in the English courts of king's

25l. each side, play or pay: but the plaintiff was to pay the defendant 5l. before-hand, as a consideration to induce him to make the match. The defendant afterwards refused to run the match. Whereupon the plaintiff brought this action against him, for the 25l. and assigned the breach of covenant, in the defendant's not starting his mare. The cause was tried before Mr. Baron Perrot, who considered it as a match for 50l. and directed a verdict for the plaintiff, with liberty to move in arrest of judgment. A motion in arrest of judgment was accordingly made; and after some small altercation, whether this were within the statutes of gaming, the matter was reduced to this single question, whether this was a match for 50l. or for less than 50l.? If it was for less than 50l. it is prohibited by the statute of 13 Geo. II, c. 19, which enacts, that no match, unless at Newmarket or Black Hambleton, shall be run for any sum of money or other thing of less value than 50l. For the defendant it was urged, that this was only a match for 25l. as neither party could lose more than that sum; or, at the utmost, a match for 45l. as the total of both sums risked did amount to no more; for there was no risk remaining upon the 5l. which the defendant had received from the plaintiff, and had safe in his purse, without possibility of losing it upon this match. The plaintiff's counsel argued, that the sum run for was most manifestly 50l. and that the advancing 5l. certain made no sort of difference. The court, as it turned upon the construction of a general act of parliament, took a few days to consider. After which, lord Mansfield declared, that they were all of opinion, that this was a match for 50l. though the stakes were unequal, of which the plaintiff contributed 30l. and the defendant 20l. that is, they staked after the proportion of three to two. Burr. Mansf. 2432.

[a] 2 Bl. Rep. 706; Christian's Black. B. iv, p. 173.

[b] 2 Wils. 36.

[c] 6 T. N. 499.

[d] 4 T. R. 1; Christian's Black. ib.

bench and assizes. In Scotland, therefore, there is no distinction between stakes above and below £50 as to the legality of horse races.

§ 3. BRITISH STATUTES. In Scotland, law as to races.

IV. AUGUSTUS CÆSAR sometimes employed lotteries as a pastime at entertainments.[a] In England, the first lottery, to any amount, drawn under the sanction of public authority, was in the reign of James I.[b] It has long been considered as one of the ordinary sources of revenue. And a fair source of revenue it is admitted it would be, could the poorer classes be shielded from its mischiefs. For which purpose, Mr. Colquhoun suggests various plans.[c] It is clear, at least, that the more expeditiously the lottery is drawn, and the more the number of tickets drawn each day varies, the more effectually will those evils be prevented, which arise from the daily insurance on blanks and blank and prize.

§ 4. STATE LOTTERY.

As no country can reasonably expect to increase in wealth, without, more or less, experiencing those disorders which wealth usually engenders; so in Scotland we cannot pretend to deny that *ætas parentum, pejor avis, nos protulit nequiores.* Yet we may congratulate ourselves that we are still strangers to those enormous effects of this vice, which are said to create so much public alarm and uneasiness, as well as private misery, in the capital of the empire; where of late it has appeared in the formidable shape of *partnership concerns;* a floating capital little short of one million sterling, being employed in "the carrying on various illegal establishments; particularly gaming houses, shops for fraudulent insurances in the lottery; together with such objects of dissipation, as the races at Newmarket, and other

[a] Dr. Adam's Rom. Antiq. p. 458.

[b] Sir J. Sinclair's Hist. Pub. Rev. V. i, p. 245. "The profit was principally dedicated to defray the expences of our establishment in America."

[c] Colquhoun's Treatise on the Police of the Metropolis, ch. 6.

§ 4. STATE LOTTERY.

places of fashionable resort:"[a] "systems of ruin and depravity," the mischiefs whereof "have become great and alarming beyond calculation."[b] Mr. Colquhoun even mentions, that "another part of this capital was said to form the stock which composes the various faro-banks, which were to be found at the routes of ladies of fashion."[c]

IT is amusing to compare Mr. Colquhoun's chapter on gaming, with the description given by Tacitus of the effects of this bewitching passion among the ancient Germans. "It is wonderful," says the historian, "that, when sober, they addict themselves to dice as a serious employment, with such a mad desire of winning or losing, that, when stript of every thing else, they will stake at last their liberty, and even their very selves;"[d] Mr. Colquhoun, again, speaks of it as not uncommon for persons, after losing their money, to pawn watches and rings; and a deluded young man has been seen at last to "throw off his coat, and go away, losing it also."[e] So a desperate rage for the excitement which excessive gaming produces, and to which every valuable consideration is sacrificed, would seem to be equally the disease of very savage manners, and of times of extreme refinement.

[a] Colquhoun's Treatise on the Police of the Metropolis, ch. 6.

[b] Ibid. Mr. Colquhoun mentions an affidavit, made in one of the superior courts of justice, which states, that "the principle gaming houses at the west end of the town have stated days on which they have luxurious dinners, (Sunday being the chief day), to which they contrive to get invited merchants and bankers clerks, and other persons intrusted with money; and that it has been calculated, (and the calculation was believed not to be over-rated), that the expences attendant on such houses, amounted to 150,000l. yearly, and that the keepers of such houses, by means of their enormous wealth, bid defiance to all prosecutions, some of them having acquired from 50,000l. to 100,000l. each: considerable estates have been frequently won by them in the course of one sitting."

[c] Ibid.

[d] De Mor. Germ. cap. 24.

[e] Evidence of John Shepherd, in a trial in the court of kings bench for gaming, 29th Nov. 1796. See Colquhoun, p. 147.

BOOK IV.

RURAL POLITY.

CHAP. I.

Of Property.

§ 1. IN GENERAL. Original community. Things subject to appropriation. Origin of property.

I. LORD STAIR observes, that, "at first, dominion of the creatures being given to man, without distinct proportions or bounds, it necessarily followeth, that, by the law of nature, the birth and fruit of both sea and land were *common* to all mankind ... yet so as the use and fruit thereof *must*, in some cases, and *might*, in all cases, become *proper*; as what any had taken and possessed for his use ... and much more, what had received specification from his art and industry ... could not, without injury, be taken from him;"[a] or, in the words of Mr. Locke, "though the things of nature are given in *common*, yet man, by being master of himself, and proprietor of his own person, and the actions or the labour of it, had still in himself the great foundation of

[a] Lord Stair, B. ii, t. 1, p. 166. In illustration of the same idea of the origin of property from occupancy, Grotius quotes the expression of Seneca, "Equestria *omnium equitum Romanorum sunt, in illis tamen locus meus fit proprius, quem occupavi.*" (De Beneficiis vii, c. 12.)

§ 1. IN GENERAL. The produce of labour.

property.[a] The fruit or venison which nourishes the wild Indian, who knows no inclosure, and is still a tenant in common, must be *his;* and so *his*, that another can have no longer any right to it before it can do any good for the support of his life.[b] God gave the world to man in common, but, since he gave it for their benefit, he gave it to the use of the industrious and rational... The law man was under was rather for appropriating. God commanded, and his wants forced him to labour. That was his property, which could not be taken from him, wherever he had fixed it."[c]

THAT permanent and abstract relation, indeed, which constitutes our idea of property, would not, for some time, be well understood. On the contrary, "in these first ages, there was no property distinct from *lawful possession*, not only of moveables, but also of parts of the earth; for when possessors removed from these parts, they ceased to be theirs, and became the next possessors; and therefore *the scripture calleth them possessions, without mention of any other property.*"[d]

THUS, then, the exclusive appropriation of such things as are exhaustible—as are adapted for man's purposes—and are improveable or produced by his industry, becomes just and necessary.

§ 2. DIVISION OF THINGS SACRED.

II. SIR Thomas Craig,[e] as well as Heineccius,[f] follows Gaius' general arrangement of things, as either *divini juris*, that is, sacred; or *humani juris*, that is secular.[g]

[a] Locke's Works, Vol. ii, p. 179.
[b] Ibid, p. 174.
[c] Ibid, p. 176.
[d] Stair Inst. B. ii, t. 1, § 1, p. 166. This idea is enforced and illustrated by lord Kames, in his historical tract on property. (Law tracts, tr. 3.)
[e] *De Feudis*. Lib. i, dig. 15, § 1.
[f] Inst. Lib. ii, tit. 1.
[g] L. i, ff. *divisione rerum;* whereas Justinian, Pr. Inst. *de rerum divisione*, considers *res sacras* as a subdivision of *res nullius*.

§ 2. DIVISION OF THINGS.

PROPERLY speaking, "we have no consecration of things since the Reformation; yet some things have a relative sanctity, and so fall not under commerce;"[a] such as churches, bells of churches, communion cups, and other things destined to sacred purposes, and which cannot be applied to private or secular uses.[b] Sir George M'Kenzie, after the civilians, stiles church-yards religious. Any spot of ground where a human corpse was buried, was, by the civil law, for ever exempted from commerce. But, with us, a man may bury his dead within his property, and such burying ground continues *juris privati*, and so passes in a sale to the purchaser, as part of the lands within which it lies. "As for our common burying places, decency requires that these, when they are no longer to continue such, should be sequestered from the ordinary uses of property, till the remains of the bodies there interred shall have returned to their original dust."[c] Burying ground.

SOME are, from their nature, incapable of appropriation, as the air, "because all men everywhere must necessarily breathe it;"[d] running waters, "because they have no *Humani juris.*

[a] Sir George M'Kenzie, Inst. B. ii, tit. 1, § 4.

[b] "Yet our law allows, in certain cases, churches to be removed from one place to another; and the bells of churches, and communion cups, when they become unfit for service, to be melted down, or sold by the kirk session, with consent of the heritors of the parish, and the price applied towards purchasing others. Though churches fall not under commerce, because a church is the house of God himself, the heritors and other inhabitants of a parish may nevertheless acquire a *quasi* property in the seats of a church, or in part of its area, limited to the special purpose of attending divine service." (Ersk. B. ii, t. 1, § 8.)

[c] Ersk. B. ii, t. 2, § 8. Accordingly, it has been found, that the minister of the parish is not entitled to pasture his cattle in the church-yard. Dec. 2, 1798, Hay against Williamson. Fac. Coll.

[d] Stair, Inst. B. ii, t. 1, § 5.

§ 2. DIVISION OF THINGS

"bounds;"[a] and the "vast ocean, as to navigation and "fishings, which are the only uses thereof."[b]

—NEGATIVE COMMUNITY.

THINGS, whether animate or inanimate, which may become the exclusive property of any person by occupancy, are said to be in *negative communion*. Such are "pearls inclosed in shells, or pebbles cast on the shore, which belong to the person who finds them; such are (under some exceptions to be mentioned by and by) wild beasts, fowls, or fishes, which become the property of the person who first seizes them."[c]

Pearls.

Pebbles.

Wild animals.

BUT even such uses of things as are destined for perpetual community, may be rendered more easy or secure by labour or expence; for which, therefore, those who wish thence to derive any benefit, may justly be required to make compensation.

IN the torrid regions, where one discovered and secured a well, it was understood to be his property, even at a period of society when land continued still in its original community.[d] If a state be at the expence to build fortified harbours, or to clear certain seas from pirates, it may justly insist on a proportionable remuneration from all traders who share the benefit. Sometimes, too, things which are common, as the sea-shore, harbours, navigable rivers, cannot be used, without at the same time using the contiguous land, which is property. Hence, therefore, and indeed for their own defence, the governments of the respective countries necessarily have a controul over the use that is

[a] Stair, Inst. B. ii, t. i, § 5. So Ovid:

Quid prohibetis aquis, usus communis aquarum,
Nec solem proprium natura, nec aëra fecit,
Nec tenues undas. Ad publica munera veni. (Met. l. 6.)

[b] Ibid. [c] Ersk. B. ii, t. 1, § 10. [d] Gen. ch. v.

made of such things; which, therefore, are termed public.[a] § 3. DIVISION OF THINGS —PUBLIC.

AMONG *public* things are reckoned the seas, which wash the coasts of any state. Hence the king's sovereignty in the British seas.[b] So a shore, which, in the civil law, is explained to be so far as the greatest winter tides do run, ("which must be understood of ordinary tides, and not of extraordinary spring tides"[c]), to that extent is public, so far as it may be used, either for navigation, or the protection of trade, or the defence of the state; and, by our constant practice, proprietors who border on the sea, inclose, as

[a] Sir George M'Kenzie defines *public things* to be those which "are common only to a nation or people." This, indeed, is the most usual definition among the civilians. Yet the precise criterion seems to lie, not in *extent of the use*, but in the *property being vested in the state*; which, on the one hand, may controul, and limit, and restrain, the native inhabitants in the use thereof, and, as we shall see, does so in various instances; and, on the other, neither can justly nor reasonably exclude foreigners from the same use thereof, unless particular circumstances render it necessary to do so. Accordingly, Mr. Erskine, seeing the defect, adds, "and to those strangers to whom it allows the liberty of trade." (B. ii, t. 1, § 4.) But that the gist of the description lies in the property and power of reasonable controul in the government, and not in any distinction between natives and foreigners as to the actual enjoyment of the use, appears from the very examples which sir George Mackenzie gives of his own definition, "rivers, harbours, and the right of fishing." Now, on the one hand, it is notorious, that all the native inhabitants do not enjoy this right of fishing; and, on the other hand, a foreigner, from whom no reasonable ground of danger is apprehended, is entitled to the use of the harbour, to sail up the river, and to travel on the high roads. To prevent him would be an act of arbitrary power, not more reconcilable to justice than in the case of a native. Accordingly, while Mr. Erskine mentions highways among other examples of *public things*, lord Stair says expressly, "ways and passages in land are common to *all*, and may not justly be refused by one nation to another" (Inst. B. ii, t. i, 5.)

[b] Indeed, the famous controversy, *mare liberum an mare clausum*, resolves into a question of *majus aut minus*. Even the Dutch jurisconsults do not deny the legitimate appropriation of creeks, and small corners of the sea.

[c] Stair, B. ii, t. 1, § 5.

§ 3. DIVISION OF THINGS —PUBLIC.

their own property, grounds far within the sea mark.[a] So also public rivers, by which writers generally understand navigable rivers, or those on which floats may be carried to navigable rivers;[b] or, perhaps, any river which is beneficial to the public, by affording a conveyance by rafts for commodities to the sea,[c] wherein, therefore, no building or in-

[a] Ersk. B. ii, t. 6, § 17. And pres. Balfour, concerning the flood mark, observes, "It is leasum to ony mariner, master of ship, or uther persoun, to louse or laiden his ship, or boat, and lay or place the samin, or festin his anchor within ye flood mark, in all partis of this realm, but impediment or obstacle to be made to him yairanent be ony persoun; bot he may do nane of the premisses outwith ye flood mark in ony man's landis, possessions, or heretage, except he do ye samin with licence and good will. 4 July 1498, Al. Meldrum of Segie, *contra* Burgh of Cowper, i, t. c. 98. (Sea Lawis, c. 56, Practics, p. 626.)

"It is leasum to all our soverane lordis liegees to use and exerce ony industrie within the flood mark of ye sea; *quia usus littoris est communis omnium*. And thairfor gif ony man has ony landis lyand adjacent and contigue to the sea, he may not stop nor mak impediment to ony persoun to gather wilkis, cockles, limpettis, muscles, and uther small fish, or bait for taking of fish, upon the sandis or craigis within ye flood mark foiranent his landis. 24th May 1549, the Town of Crail against Gresill Meldrum, i t. c. 680." (Ibid.)

"Na man havand landis pertenand to him, lyand adjacent to the sea, may mak stop, troubill, or molest ye king, or his lieges, to win stanes, quarrel, or ony uther thing to his awin profit or commoditie within ye flude mark of the sea foiranent the saidis landis, except he quha stoppis ye *uther be speciallie infeft within the said flood mark*, als weill as without ye samin. 29th July 1500. The King against the Laird of Seafield." (Ib.)

[b] Ersk. B. ii, t. 6, § 17.

[c] Sir James Grant against the duke of Gordon, 9th March 1781. The river Spey is navigated by rafts, and the inhabitants of the adjacent country have for ages made us of it for conveying downwards to the sea their timber and other commodities. The duke having interrupted the navigation by some erections of cruives for his salmon fishing, some adjacent heritors brought a process of declarator, concluding to have it found, "that they had a right at all times to send floats of timber down the river, and to the navigation thereof, in every way of which it was capable, and to have every obstruction to this right removed; and that the duke of Gordon should be obliged to remove all dikes, braes, and other bulwarks impeding the navigation, and should be prohibited from erecting such for the future." The learned reporter says,—"The court, in giving their opinions, did not seem to regard the distinction betwixt public or navigable, and private rivers.

terruption is allowable;[a] and highways and bridges, which, for the same reason, the king cannot demolish, unless that measure shall become necessary for the public safety, in case of a hostile invasion, or other such exigency.[b] § 3. DIVISION OF THINGS —PUBLIC.

BUT the king may, by a special grant, transfer the right of a public ferry or a free port: the grantee, on the one hand, having right to levy anchorage, shore dues, and other such reasonable impositions; and, on the other hand, being bound to keep boats for the accommodation of the public, and the harbour in sufficient repair. In like manner, the crown can grant a right to the wreck or sea-ware and seaweeds within the sea-mark;[c] or a right to a mussel-scalp, either in the sea or public rivers;[d] the patrimonial advantages which arise from such rights being considered as *regalia minora*. Such also are forests, woods, and parks, (or large tracts of ground where deer have been in use to be kept);[e] —REGALIA MINORA.

rivers. They considered a river, by which the produce of the country could be transported to the sea, to be a public benefit intrusted *to the king as* pater patriæ, *for the behoof of his subjects in general, which could neither be given away, nor abridged by him*; and that this transportation, as the chief and primary use of the river, if incompatible with the cruive fishing, would prevail over it. They were, at the same time, of opinion, that these rights were not incompatible, if not emulously used, and therefore proceeded to fix certain regulations, according to which they were to be exercised."

[a] Sir James Colquhoun against the duke of Montrose and the magistrates of Dumbarton, 21st December 1793, entitled, "no length of possession can authorise any obstruction to the navigation of a public river." Observed on the bench, "every heritor through whose lands a public river runs, has a right to all the ordinary uses of it, but the channel is *juris publici*. The crown may give a right of salmon fishing, but it can give no right of placing any permanent obstruction in the channel. The crown may, indeed, under certain regulations, and which are intended partly for the benefit of the heritors, grant a right of cruives." This, however, is to be considered as an exception from the common law. (Fac. Coll.)

[b] Ersk. B. ii, t. 6, § 17.

[c] 15th June 1769, magistrates of Culross against the earl of Dundonald.

[d] 6th July 1764, Sir Ludovick Grant against Ross of Kilravock. (Lord Kaimes' Sel. Dec 218.)

[e] Ersk. B, ii, tit. 6, § 14.

§ 3. DIVISION OF THINGS —PUBLIC. —REGALIA MINORA.

and salmon fishings which are not carried by charter without an express clause; but the salmon themselves, like other game, belong to the catcher. Large whales, and such lesser ones as may not be drawn from the water to the nearest part of the land on a wain with six oxen, belong to the king as royal fishes.[a] So, in like manner, treasures hid under ground, strayed or waif cattle, if no owner appear within a year, belong to the king, or to the sheriff as his *donator:* wreck-goods, that is, where the wreck has been so total, that no living creature has escaped alive,[b] fall under the rights of admiralty.

Treasure.

Wreck.

—RES UNIVERSITATIS,

RES universitatis, which our writers take notice of after the civilians, are things proper only to a corporation or city, or trading company; as town-houses, market-places, &c. &c. This general classification may here suffice, without pursuing things (as possessed by individuals) through their various other descriptions, such as heritable and moveable, urban, and rural.

[a] Leg. Forrestarum, § 17. But no whales have, for at least a century past, been claimed either by the king, or by the admiral his donatory, but such as were of a size considerably larger than that there described. 17 Edw. II, c. 11.

[b] This right has seldom been strictly enforced; the property is restored to the owners, claiming within a reasonable period, and paying a salvage. In the case of stranded vessels, it is the duty of justices of peace, and all other magistrates and officers of the law, to give their assistance in saving and protecting the vessels and cargoes for those interested therein, under abundance of statutes, as acts 12 Anne, sess. 2, c. 18; 4 Geo. I, c. 12; 26 Geo. II, c. 19. They are directed to command the constables to summon as many men as shall be thought necessary for the assistance of the ship.

A vessel was lately stranded in Orkney. An agent for the owners was taking measures for selling the cargo. The vice-admiral depute interdicted him from doing so. The court of session found the whole proceedings of the said vice-admiral and procurator fiscal, tending to obstruct the sale, were illegal and unwarranted, and found the defender consequently liable in damages. 1st Feb. 1805, Courney against the vice-admiral of Orkney and Shetland, the vice-admiral-depute, and the procurator fiscal.

CHAP. II.

Common Property.

§ 1. IN GENERAL.

I. RIGHTS in common, as *matres discordiarum*, are no favourites of the Scottish law, which, indeed, interposes chiefly to dissolve them, and separate the interests of individuals. The wise and salutary expedient, so happily devised for attaining this object in the case of landed property possessed in commonty, will come under our view among other measures employed for the improvement of the country. Here, however, it may be proper to take notice of such rights and obligations as obtain in those instances, where the community does not admit of being separated and dissolved.

§ 2. TENEMENT WITH DIFFERENT FLOORS BELONGING TO DIFFERENT PROPRIETORS.

II. IF the different floors of the same tenement belong to different proprietors, "the house cannot be said to suffer a full or complete division. The proprietor of the ground-floor is bound, merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property,

§ 2. TENEMENT—COMMON. that it may be capable of bearing that weight; for, in that case, as the roof remains a common roof to the whole, and the area on which the house stands supports the whole, a communication of property necessarily arises, by which the proprietor of the ground-story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower."[a] Where the property of the highest story is divided into separate garrets, among the different proprietors, each proprietor must, by this rule, uphold that part of the roof which covers his own garret. But "proprietors of upper stories of a tenement have not an implied servitude on those below, to the effect of preventing the owners of the last from making such alterations on their respective parts of the walls as do not endanger the rest of the building."[b]

Alterations.

§ 3. WATER. III. THE most difficult and important questions, respecting common rights, occur in the case of rivulets and streams, in which the different proprietors, through whose grounds they pass in their course to the sea or to some public river, have a common property or interest.[c]

IF the river divide the properties of different persons, the one proprietor cannot divert any considerable portion of it, without the consent of the other.[d]

[a] Stat. B. ii, t. 7, § 6.

[b] Robertson against Ranken, 3d March 1784. Fac. Coll.

The alteration in this case was, striking out some doors and windows in the ground floor, which the dean of guild found could be done without any danger. But in a late case, Murray against Watt, summer-session 1805, where the alterations were attended with risk, and had occasioned rents in the walls, the owner of the ground storey, by whom they were made, was found liable in damages to the proprietor of the upper storey.

[c] As to the polluting of running water, see *supra*, p. 88.

[d] This has been often decided, and particularly in the case of Hamilton of Westburn, which has always been held as a leading decision.

"A few miles above Glasgow the Clyde separates Mr. Hamilton's lands of Westburn from Mr. Dunlop's lands of

BUT if the same person be proprietor of the grounds on both sides of the river, he can change its channel as he pleases, provided he restores it to its old channel before it leaves the ground.

THE superior proprietor cannot take away any part of the water so as to make the run less when it enters the ground of the inferior proprietor. However, as much water may be taken from a river by a pipe as can be used by the family and cattle;[e] but "not so much as to supply a distillery."[f]

Course of the water not to be interrupted.

IT is not lawful even to interrupt the natural course of a river, by collecting the water in a reservoir, and allowing it to run down at intervals; although, upon the whole, the quantity of water passing to the inferior proprietor be not diminished. The latter is entitled to complain of the injury he sustains by its being made to flow to him unequally.[g]

of Carmyle. Above Mr. Hamilton's boundary a dam-dike runs across the river, from which two opposite mills are supplied with water, one of them belonging to Mr. Dunlop; but the streams that supply both return into the river before it reaches Mr. Hamilton's property. Edington and Company purchased Mr. Dunlop's mill, and prepared to enlarge the canal from the river, so as to bring about a fourth, or at least a very considerable part of the river's water, to turn their coal-engines, which operation would carry the stream so diverted entirely past Mr. Hamilton's property. Of these operations Mr. Hamilton brought a suspension, and urged, that without his consent no part of the river could be diverted. Answered, the opposition is entirely emulous, as the river, after the proposed operations, will still be much more than sufficient for every purpose, both of utility and pleasure. The lords suspended the letters, 5th March 1793, Hamilton *contra* Edington and Company." (Dict. Vol, iv. tit. Property, p. 175.)

[e] 24th Nov. 1791, Ogilvy against Kincaid, Dict. Vol. iv, t. Property, p. 175.

[f] Ibid.

[g] Sir Wm. Millar against Gordon, March 10, 1804. "The river Ayr runs through the park and pleasure grounds of Barskimming, supplying with water two mills on the estate, the one by means of a loose parapet of stone thrown across the river a little below its junction with a stream called the Lugar; and the other a flax mill,

§ 3. COMMON PROPERTY —WATER.

THE inferior proprietor, again, cannot erect any building on mill, by a dam constructed farther up the river, and before the confluence of the two streams.

About two miles above Barskimming mill, upon the estate of a neighbouring heritor, there had been formerly a corn mill which many years ago was converted into a cotton manufactory, and the original dam was upon that occasion considerably enlarged, on account of the additional supply of water necessary for the machinery. And, in the year 1801, there was constructed a large reservoir, occupying an acre of ground, for the purpose of accumulating the water during the night, when the stream in its natural state was insufficient for supplying the machinery. The water was thus collected and let out as found necessary, so that even in a dry season there was a regular supply for the purposes of the manufacture. But while the water was accumulating, no part of it was allowed to pass down the channel of the river. With the view of obtaining a still farther command of water, the proprietors of the cotton work, in the year 1802, were proceeding to construct another reservoir of larger dimensions, which would have been attended with the same effect in a still greater degree, when the proprietor of Barskimming raised a summons of declarator against the company, concluding, "That the pursuer has, in virtue of his rights and infeftments, and possessions for time immemorial, good and undoubted right and title to the full, free, and uninterrupted benefit and enjoyment of the whole of the water of the foresaid rivers of Ayr and Lugar, for all uses to which an heritor may lawfully employ the water of a river which runs through his lands, and particularly for the use of the said mill of Barskimming, according to use and wont; and that the proprietors of the cotton-work had no right or title whatsoever to make any reservoir or reservoirs, or other *opus manufactum*, for the purposes of diverting or arresting and detaining the stream of the river, and keeping the same dammed up, and thereby stopping its course, and preventing the stream, for a time, from returning with its ordinary and accustomed current through the pursuer's property: And being so found and declared the said proprietors ought and should be decerned and ordained instantly to demolish all such reservoirs or works already made, and should be prohibited and discharged from hereafter making any reservoir, or other *opus manufactum*, whereby the stream of the river may be diverted from its bed for a time, or detained and arrested in its bed, and prevented from continually returning thereto, and running therein, through the pursuer's property, with its usual and accustomed current, according to the immemorial use and wont, for the benefit and use of the pursuer's lands in all lawful particulars whatsoever, and especially for the use of his said mill of Barskimming, in all time coming," &c.

the channel or alveus of the river, or carry on any other operation, so as to make the water regorge either upon the superior proprietor, or the proprietor of the opposite side.[a] § 3. WATER.

IT has been "found lawful, however, to build a fence by the side of a river, to prevent damage to the ground by the overflow of the river, though thereby a damage should happen to" the "neighbour, by throwing the whole overflow in time of flood upon the opposite side."[b]

IN complaining of such illegal uses of water, it is not

The court (25th Nov. 1803) being satisfied, from the statements on both sides, that the operations of the defenders must be attended with prejudice to the inferior heritor, pronounced the following interloculor.—

"Repels the defences, and finds decern, and declare, in terms of the libel; superseding extract till the 3d sederunt day in May next; and further, prohibit the defenders from hereafter using any reservoir or other *opus manufactum*, whereby the stream of the river may be diverted from the bed for a time, or detained or arrested in its bed, and prevented from continually running therein through the pursuer's property; and allow an interim decreet to go out and be extracted, for giving immediate effect to this prohibition." Fac. Coll.

[a] The earl of Eglinton erected a dam-dike, for the use of a mill upon the river of Irvine, in consequence of which the water sometimes regorged half a mile back, to the detriment of the mill belonging to a superior heritor, who, on that account, brought a process for having the dam-dike demolished. Urged for the defender, that as he had done a lawful act the pursuer was not entitled to complain of an accidental damage, especially as it could be remedied by raising the pursuer's mill-wheel somewhat higher, which the earl offered to be at the expence of doing for him. The lords found, that the defender could not, without consent of the pursuer, build a dam-dike across the river, so as to cause the water restagnate on the waygang of the pursuer's mill, or thereby hurt the going of the mill-wheel in the way it used to go formerly; and found, that the pursuer is not obliged to alter or suffer any alteration on the form of his mill; and they ordained the dam-dike to be taken down so far as it occasions a restagnation prejudicial to the superior mill. (MS. 5th June 1744, Rem. Dec and Kilkerran, 26th Jan. 1744, Fairly *contra* Earl of Eglinton.

[b] Kilkerran, 25th June 1741, Farquharson against Farquharson.

§ 3. WATER.

necessary to alledge any patrimonial loss, such as injury to a mill, fishery, or otherwise. A proprietor is entitled to enjoy his rivulet *amœnitatis causa*, which gives him a legal ground of action.

Amœnitatis causa.

NEITHER is this limited to the immediate inferior proprietor, but belongs to any other proprietor who sustains the injury.

So far the principles are abundantly clear.

If the river of itself leaves its channel.

IF the river, without any human operation, but owing to some natural cause, change its course, the proprietor who is deprived of the benefit of it, may, *de recenti*, at his own expence, bring it back to its old channel.[a]

[a] Magistrates of Aberdeen against Menzies of Pitfoddels, 22d Nov. 1748, *voce* Property. Kilkerran, No. III.

"The river of Dee having broke in upon the bank belonging to Menzies of Pitfoddles, he by a strong battery prevented its taking a new channel through his ground; and this battery, first begun about 70 years ago, was from time to time kept up and repaired till about the year 1731, that being neglected, the river broke in, so as to make two channels, one of which ran through Pitfoddles' ground, and, after forming an island, returned again below to the old course, in which another branch of the river always did continue to run.

"As by this Pitfoddles had lost a small salmon-fishing, he now began again to repair the battery his predecessors had made, and for many years kept up, in order to restore the river to its ancient channel.

"Being interrupted by a suspension at the instance of the proprietors of the opposite bank on the north side of the old channel, at discussing thereof, after proof led, the lords found, 'that, in this case, Pitfoddles had no right to alter the south *alveus* in prejudice of the suspenders.'

"The prejudice lay mostly in this, that the old *alveus* being now more filled up than it was before, a part of the river had diverted from its course, which, when sent back again, would occasion a greater overflow: but the point the judgment was chiefly put upon, was, that though he might have restored the river to its channel *de recenti*, he could not do it *post tantum tempus*. What length of time is for that sufficient, must in the nature of the thing be arbitrary."

§ 3. WATER.

YET a proprietor of the ground has not an actual property in the river as he has in his estate, or in his cattle, to recover them when they go astray. "*Et quidem naturali jure communia sunt hæc: aer, aqua profluens, et mare.*"[a] And so in England: "I cannot," (says Blackstone) "bring an action to recover possession of a pool, or other piece of water, by the name of water only, either by calculating its capacity, as for so many cubical yards, or by superficial measure, for twenty acres of water; or by general description, as for a pond, a water-course, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water: for water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein. Wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which the water covers is permanent, fixed, and immoveable: and, therefore, in this I may have a certain substantial property; of which the law will take notice, and not of the other."[b]

THE right, then, of bringing back *de recenti* the river to its old channel, seems to be founded less on legal than equitable considerations. The one proprietor has sustained a loss, the other gained an advantage, unexpectedly. We readily sympathize with the former, who may have paid a higher price for the estate, or have been in the habit of putting a higher value upon it on account of that advantage; to recover which his recent attempts appear excusable. But if he make no attempts *de recenti*, it is plain he does not feel

[a] § 1, Instit. de rerum Divisione. [b] Black. B. ii, c. 2, p. 18.

§ 3. WATER.

for himself. There is no room therefore for equity to interfere. It will not support his attempts, after a long interval, to recover it. But if the current has been changed by the other proprietor, and not by a natural cause, it may be brought back any time within forty years.

CHAP. III.

Of Servitudes.

I. SERVITUDE is a burden affecting land, or other heritable subject, whereby the owner is restrained from the full use of his property, or whereby another has right to do something upon it. The general doctrine, and indeed with few exceptions, the particular servitudes, we have derived from the Roman jurisprudence. Hence the similarity in this particular between the Scottish code and those of the greatest part of continental Europe; whereas our neighbours in England have not, in their law, any such title or *nomen juris* as *servitudes*. With them such rights, it is said, "would fall to be considered under the head of easements or nuisances." For (says the learned professor of civil law in the university of Dublin, taking notice of the defect) "so the services of the Romans would be classed by us."[a] And the rights of *pasture*, of *fishing*, of *turf*, of

§ 1. IN GENERAL.

What is it

[a] Lectures of Arthur Browne, esq. B. i, Lect. 11, p. 138.

§ 1. IN GENERAL.

way, are treated of by judge Blackstone,[a] along with things no less dissimilar than *offices* and *dignities*, under one common denomination of *incorporeal hereditaments*.[b]

Natural. SERVITUDES are either natural, legal, or conventional. Nature itself may be said to constitute a servitude upon inferior tenements, whereby they must receive the water Legal. that falls from those that stand on higher ground. Legal servitudes are established by statute or custom, from considerations of public policy. Conventional servitudes are Conventional. constituted either by grant, where the will of the party Grant, burdened is expressed in writing, or by prescription, where his consent is presumed from his acquiescence in the burden for forty years. In servitudes that may be acquired by pre- scription. by prescription, forty years exercise of the right is sufficient, without any title in writing, other than a charter and sasine of the lands, to which the servitude is claimed Negative. to be due. Negative servitudes do not admit of any visible use, but it has been found that they do affect singular successors. The law has provided no record for servitudes; but purchasers must inquire, or trust to the warrandice of their authors, if there be any undue concealment.[c]

SERVITUDES constituted by grant are not effectual in a question with the superior of the tenement burdened with the servitude, unless his consent be adhibited; for a superior cannot be hurt by his vassal's deed. But where the servitude is acquired by prescription, the consent of the superior, whose right afforded him a good title to interrupt, is implied.

[a] B. ii, c. 3.

[b] "Incorporeal hereditaments, in the English law, may be defined to be such rights and estates descending, or capable of descending, in fee-simple or fee-tail; of which the essence is merely ideal, and not the object of our outward senses." (Woodeson's Viner. Lectures, vol. ii, p. 57.)

[c] See p. 387.

A servitude by grant, though followed only by a partial possession, must be governed, as to its extent, by the tenor of the grant; but a servitude by prescription, is limited by the measure or degree of the use had by him, who prescribes agreeably to the maxim *tantum præscriptum quantum possessum*. The two general classes of servitudes are personal and real, or predial. In the one case *prædium servit personæ*, in the other *servit prædio*. § 1. IN GENERAL.

II. AMONG the Romans there were three personal servitudes, usufruct, use, and habitation. The first only is known in our practice. § 2. PERSONAL SERVITUDES.

A LIFERENT or usufruct "is a right to possess and enjoy the whole benefit of subjects belonging to another in fee, during one's life, without prejudicing the substance, fee, or stock." A liferent cannot, therefore, be constituted upon things which perish in the use; and though it may upon subjects which gradually wear out by time, as household furniture, &c. yet with us it is generally applied to heritable subjects. He, whose property is burdened, is usually called the Fiar. —LIFERENT. In what things may it be constituted? Fiar.

LIFERENTS are either conventional or legal. Conventional liferents are either by reservation, that is, reserved by the proprietor in the same writing by which he conveys the property to another, or by a separate constitution by the proprietor in favour of some other person. This latter is called a simple liferent, and is less favoured than the other. It requires sasine in order to affect singular successors: whereas the proprietor's former sasine supports his liferent by reservation: and a liferenter by reservation may enter heirs or singular successors of vassals, as if he were fiar, and is entitled to the casualties of superiority that fall during his life; his Conventional, By constitution. By reservation.

§ 2. PERSONAL—LIFERENTS.

right being more amply interpreted than that of a simple liferenter who had no prior interest in the lands.[d]

Legal, terce, courtesy.

LEGAL liferents are the terce and courtesy, which we have already taken some notice of.

Salva rei substantia.

LIFERENTERS must use their right *salva rei substantia*, and therefore cannot cut growing timber, nor work coals or minerals.[e] But where a coppice or *silva cædua* has been divided into hags, one of which was cut annually by the proprietor, the liferenter may continue the former yearly cuttings; because these are considered as the annual fruits the subject was intended to yield, and so the proper subjects of a liferent.

Burdens.

LIFERENTERS are directed to find security *(cautio usufructuaria)* that they should keep the subject in good condition during the liferent,[f] under the penalty of losing the profits thereof.[g] A special method is chalked out in the case of tenements within borough.[h] Liferenters are also burdened with the alimony of the heir, where he has not enough for maintaining himself, which is founded in an extension of the last clause of act 1491, c. 25; by the first part whereof, not only ward-superiors, but liferenters, were obliged to preserve, in good condition, the subject of the ward or liferent. Liferenters are also subjected to the payment of the yearly cesses, stipends, &c. falling due during their right, and to all other burdens that attend the subject liferented.

d Ersk. B. ii, tit. 9.

e If the grant generally express the right of working coals, the liferenter may work any colliery that had been opened before the commencement of his right, provided he does not employ a greater number of colliers, or bring up a greater quantity of coals than the proprietor did. (Ersk. B. ii, tit. 9.)

f 1491, c. 25.

g 1535, c. 15.

h 1594, c. 226.

THE liferent is extinguished by the liferenter's death. That part of the rent which the liferenter had a proper right to before his death falls to his executors; the rest, as never having been in *bonis* of the deceased, goes to the fiar. Martinmas and Whitsunday are, by our custom, the legal terms of the payment of rent: consequently, if a liferenter of land survives the term of Whitsunday, his executors are entitled to the half of that year's rent, because it was due the term before his death; if he survives Martinmas, they have a right to the whole. And this is the rule, though the conventional term should be after Martinmas; for still the rent, though not payable, was due while the liferenter was yet alive, and the postponing the term of payment cannot hurt the right of the executors.[i] A liferenter, who outlives any part of the term day, transmits to his executors the right to that term.[k] § 2. PERSONAL —LIFE-RENT. If he survive Whitsunday. If Martinmas. If the conventional term be different.

IF the liferenter, being in the natural or personal possession, and having first sowed the ground, should die, even before the Whitsunday, his executors are entitled to the whole crop, in respect that both seed and industry were his.[l]

IT has been adjudged that liferents of mills, though their fruits are continual, *de die in diem*, are governed by the same rule with liferents of land.[m] Mills.

IN a liferent of money, constituted by a personal bond, the executors have a right to the interest, down to the very day of the liferenter's death, where no terms are mentioned for the payment thereof; but in the case of an heritable bond, or of a money liferent secured on land, the interests of liferenter and fiar, (or of heir and executor, for the same Of money.

i Gosford, 24th July 1668, Carnegy. Fountainhall.
k 8th Dec. 1704, Paterson. Fountainhall.
l 25th July 1671, Guthrie. Stair.
m 8th Dec. 1671, Guthrie. Stair.

§ 2. PERSONAL —LIFE-RENT.

rules serve to fix the interests of both), are governed by the legal terms of land rent,[a] without regard to the conventional.[b]

§ 3. PREDIAL SERVITUDES.

III. PREDIAL or real servitudes are either urban or rural. This distinction depends not upon the situation, but the use of the servient tenement; urban servitudes meaning those which relate to houses, though situated in the country, as, for example, a dwelling-house and offices built for the use of a farm; and, on the other hand, rural servitudes regarding land wherever situated, as, for example, a field or garden within the liberties of a city.

THE chief urban servitudes among the Romans were *ligni immittendi*, or the right of fixing in our neighbour's wall a joist or beam from our house, and *oneris ferendi*, or the right of resting the weight of one's house upon his neighbour's wall; both which Mr. Erskine terms a servitude of support, the general nature of both being the same. And the essential difference between them lay in the precise form of words that the Romans used in constituting the servitude *oneris ferendi*, viz. *Paries oneri ferundo uti nunc est, ita sit;* by which words, against the general rule of servitudes, the owner of the servient tenement was bound to repair it, unless he chose to throw up the property altogether. But lord Stair and Mr. Erskine concur in opinion, that with us the owner of the servient tenement is not bound to repair it, unless he has come under such an obligation.[c]

[a] 11th Jan. 1738, Carruthers. Home.

[b] 12th Jan. 1681, Trotter. Stair.

[c] Ersk. B. ii, t. 9, § 8. Where different floors or storeys of the same house belong to different persons, the property of the house cannot be said to be entirely divided; the roof remains a common roof to the whole, and the area on which the house stands supports the whole; so that there is a communication of property, in consequence of which the proprietor of the ground floor must, without the constitution of any servitude, uphold it for the support of the upper, and the owner of the highest storey

§ 3. PREDIAL —URBAN.

STILLICIDE is that servitude by which a proprietor is entitled to throw the rain-water falling from his own house immediately upon his neighbour's ground. But if the water fall within his own property, though at the smallest distance from the march, the owner of the inferior tenement must receive it, that being a servitude constituted by nature itself. Stillicide.

THE servitudes *altius non tollendi, et non officiendi luminibus vel prospectui,* restrain proprietors from raising their houses beyond a certain height, or from making any building whatsoever that may hurt the light or prospect of the dominant tenement.[a] Negative servitudes cannot be constituted by prescription alone. A proprietor may have built his house ever so low, or not have built at all upon his grounds for forty years together; but this will not prevent him from afterwards building a house on his property, or raising it to what height he pleases. Such servitudes, however, affect singular successors.[b] *Altius non tollendi.* Light. By prescription.

ONE of the chief rural servitudes is the privilege of passage. As the Romans had their *iter, actus, via,* so we have a foot-path, a horse-road, a cart or coach-road, and ways or loanings by which cattle may be driven from one field to another, which terms correspond nearly to the other; only, —RURAL.

storey must uphold that as a cover to the lower. Where the highest floor is divided into garrets among the several proprietors, each proprietor is obliged, according to this rule, to uphold that part of the roof which covers his own garret. Stair, b. 2, t. 7, § 62.

[a] L. 4, 15, De serv. præd. urb.

[b] Clelland feued to Gray a piece of ground to build a house. In the feu-right it was stipulated that he was not to erect any building on the contiguous property on the north, so as to interrupt the light of Gray's house: That contiguous property Clelland thereafter, but without mentioning the said stipulation, feued out to Fergusson, who, many years after, began to build thereon. Gray applied for an interdict. The court found the servitude effectual. 31st Jan. 1792, Gray against Fergusson. Dict. v. iv, Servitude.

§ 3. PREDIAL —RURAL —PRIVATE WAYS.

in classing these roads, the Romans looked to the breadth thereof, we look to the manner of using them.[a]

THESE descriptions of private ways are considered as a servitude upon property, and must be constituted, either by special grant, or by immemorial usage, that is, for more than forty years back.[b] It is not every usage of traversing a person's property that is understood to constitute a servitude.[c] The small proprietors of town acres, after their corn is cut down, generally lead it, each through his neighbour's ground; this, though done for 100 years, will not infer a servitude.[d] In like manner, a *servitus spatiandi*, or walking in an open field, was not sustained from use and wont.[e]

[a] Ersk. Inst. B. ii, t. 9, § 12.

[b] Action for a servitude of a road to the parish kirk through grounds, whether laboured or lying fallow, was sustained "on immemorial use without writing;" but "the lords found, that that possession ought to be proven to be immemorial, and past memory of man, and would not sustain the offer to prove possession *for* 30 *or* 40 *years*." Durie's Decisions, Neilson against Sheriff of Galloway, 27th June 1623. By this must have been meant less than 40 years.

[c] For 40 years Thomas Purdie had been in the use of bringing home his corns, after harvest, through a ridge of Steil and his authors, after their corns on the said ridge were cut down. This, however, was found not to establish a servitude. Kilkerran, *voce* Servitude, No. 3.

[d] Kilkerran, *voce* Servitude, No. 3, 20 July 1749.

[e] Cochran against Fairholm, 8th February 1759. Fac. Coll. "The Bruntsfield links, an open piece of pasture ground belonging to the city of Edinburgh, had been used by the inhabitants of Edinburgh, for time immemorial, for playing at golf, and walking. A little bit of the most rugged and useless part of this field was feued out to Mr. Fairholm. He began to inclose it, but was stopped by a complaint exhibited to the sheriff by Mr. Cochran and others, proprietors of houses and yards conterminous to the links, setting forth, that they, their predecessors, and authors, had acquired a servitude *spatiandi* of amusing themselves in this field.

"Pleaded for Fairholm, personal servitudes are not received into the law of Scotland; there must always be a dominant tenement where there is a servient... And, in the case of the town of Dunse, 22d Nov. 1732, it was found that the town could not acquire a rural servitude, as it had neither property in lands nor houses.

"Mr. Cochran, finding that the sheriff was disposed to determine against him, advocated the cause to the

§ 3 PREDIAL —RURAL —PRIVATE WAYS.

SERVITUDES must be used in the manner least hurtful. Thus, for example, in a servitude of feal and divot, the proprietor of a servient tenement, has been found not precluded to cultivate part of the muir subjected to the servitude, provided sufficient were left for the purposes of the dominant tenement.[a] But he cannot hurt the servitude; as, for example, by putting up a gate on a road, where formerly there was none. A moveable stile, however, may be put on a foot-path, that being no injury, but rather beneficial to the foot passengers. Lord Kilkerran reports a decision of the court of session, finding that the proprietor, through whose grounds there had been immemorially a road to church, might shut it up, on his making another foot-path equally commodious, at the sight of the sheriff, or of any two justices

the court of session. "The lords refused the bill." (Fac. Coll. p. 293.) But in a late case, concerning the links of St. Andrews, decided in summer-session 1805, the title of individual inhabitants of that place, to prevent interruptions of the liberty of golfing on the links was sustained; and doubts were entertained of the decision in the case of Cochran.

The court of session found, that the inhabitants of Kelso, from immemorial use, had acquired a right of servitude of bleaching and drying linen on the island of Ana. This decision was reversed on appeal. July 18, 1755, Jaffray against duke of Roxburgh. However, a servitude of a similar nature has been since sustained, and the decree affirmed on appeal. Feb. 10, 1799, Dict. v. iv, Servitude.

[a] Watson of Dunnykier against his Vassals, 21st June 1667; Dirleton, D. 86. "The lords considering that it was intended that the said servitude should only be for the end foresaid, and it would be a prejudice both to the public interest which it concerned, that the country should be improved, and waste unprofitable grounds laboured, and to the pursuer also, without the least advantage to defenders: they therefore ordained as much ground to be set apart as might more than sufficiently serve for the use foresaid, and allowed the pursuer to labour and improve the rest, without prejudice to the defenders, to make use even of the rest during the time it continueth in the present condition, and not laboured; and, in case it should happen upon any occasion that what should be set apart for the feuars use aforesaid, should prove short, and not sufficient for that use, they reserved liberty to them to have recourse to the residue, and granted visitation to the effect foresaid."

§ 3. PREDIAL —RURAL —PRIVATE WAYS.

of peace of the district.[a] He remarks, however, that "this case had some specialties in it, which may have been thought to bring it nearer to the case of an indefinite servitude."[b]

THE road must be kept in repair by those who are expressly bound to do so. The public funds cannot be applied for that purpose.

THE proprietor of the dominant tenement having a kirk-road through a ford, was found at liberty to build a bridge over it, although he was not proprietor of the ground on both sides of the water on which the bridge was founded.[c]

—PASTURE

THE *jus pascendi pecoris*[d] is that servitude whereby the "owner of the dominant tenement is entitled to the use of the grass grounds of the servient, for pasturing a determinate number of cattle proper to the dominant."[e] Agreeably to the general rule of construing all servitudes, this right is not to be so stretched as to exclude the owner of the servient tenement from pasturing his own cattle on them, if there be grass enough for both, unless where the full and exclusive benefit of the grass is, by the express constitution of the servitude, granted to the dominant tenement.

how used.

Constitution.

Grant.

Prescription.

Personal obligation.

THIS right of common pasturage may be established either by grant or by prescription. In the first case, it is sometimes constituted by a personal obligation granted by the owner of the servient tenement; which, when it is followed by possession, is effectual against his singular successors; but most frequently by a clause of common pasturage, contained in the charter of the dominant tenement.[f]

[a] Bruce against Wardlaw, 25th June 1748, Kilk. tit. Servitude, No. 2.

[b] Ibid.

[c] Lord Stair, B. ii, tit. 7, § 10.

[d] Lib. iv, De Serv. Prad. Rust. ff.

[e] Ersk. B. ii, tit. 9, § 14.

[f] This clause, *cum communi pastura*, is often indefinite, without mentioning

§ 3. PREDIAL —RURAL —PASTURE.

COMMON pasturage may be constituted by prescription alone, *i. e.* by the uninterrupted exercise of that right for 40 years together, upon lands contiguous to his own, upon no other title than a general clause in his charter, *cum communi pastura*, even though no such right had been competent to his author in those lands. Nay, a right of pasturage may be effectually constituted by the common clause of part and pertinent, without the aid either of prescription or of a clause of pasturage.[a]

Common pasturage.

How constituted?

Part and pertinent.

WHERE a right of common pasturage, over the same ground, belongs to the contiguous proprietors, the number they are respectively entitled to feed upon it, if that has been left indefinite, is in proportion to the number and nature of the cattle each can fodder during winter on the dominant tenement; which proportions may be fixed by an action of *souming* and *rouming*.

Numbers each may feed on common pasture.

General rule.

WE have two predial servitudes to which the Romans were strangers. The one is the servitude of *feal and divot*; that is, a liberty of digging turf upon another's ground. This right results from necessity, being given for thatch to the tenant's house, and other such purposes of the dominant tenement.[b]

—FEAL & DIVOT.

MUCH like to this is the servitude of fuel, which is a

—TURBARY.

ing any servient tenement to be burdened with the pasturage; and is merely intended to convey all pasturage which had been appropriated to the lands disponed previously to the date of the charter, whether it was due out of the lands belonging to the granter, or out of other lands. If the clause be special, expressing the particular lands which are to be burdened, the servitude is effectually constituted on these lands, if the granter of the charter was proprietor of them, and so had a power to burden them; but if they were the property of a third party, the clause carries no farther interest in them to the grantee than the granter himself was entitled to. (Ersk. B. ii, tit. 9, § 14.)

[a] Ersk. B. ii, tit. 9, § 16.

[b] Ibid.

§ 3. PREDIAL —RURAL —TURBARY.

right of raising turf or peats from the servient moss or peat land, for fuel to the inhabitants of the dominant tenement. Which servitude seems to be known in England and Ireland under the term turbary.[a]

A SERVITUDE of feal and divot is not included in a servitude of pasture; though the latter is the greater and more valuable of the two: for they are not *ejusdem generis*.

THIRLAGE.

ANOTHER servitude unknown to the Romans is thirlage; by which lands are astricted or thirled to a particular mill, and the possessors bound to grind their grain there, for payment of certain multures and sequels, as the agreed price of grinding. In this servitude, the mill is the dominant tenement, and the lands astricted (which are called also the thirle or sucken) the servient. Multure is the quantity of grain or meal payable to the proprietor of the mill, or to the multurer his tacksman. The sequels are the small quantities given to the servants, under the name of knaveship, bannock, and lock or gowpen. The quantities paid to the mill by the lands, not astricted, are generally proportioned to the value of the labour, and are called out-town or out-sucken multures; but those paid by the thirle are ordinarily higher, and are called in-town or in-sucken multures.

What is it?

Multure.

Multure.

Sequels.

Different kinds,

grindable,

crescentia,

invecta et illata.

THIRLAGE is either, 1st, of grindable corns, that is, the corns which the tenants have occasion to grind, whether for the use of their family or for sale: 2dly, *grana crescentia*, that is, the whole grain growing upon the ground, with two exceptions, viz. seed and horse corn, and farm duties:[b] 3dly, *invecta et illata*, that is, all corns imported into the thirle that *thole fire and water*—that is, grain that is steeped or dried in

[a] Blackstone, B. ii, c. 3, p. 34.

[b] But if the rent be payable in meal, flour, or malt, the grain of which these are made must be manufactured in the dominant mill.

kilns; but it does not include grain used for brewing and baking; it does not extend to flour or meal if the corn be so manufactured before it was purchased.

THE possessors of the astricted lands are bound to uphold the mill, repair the dam-dikes and aqueducts, and bring home the stones; but, in a thirlage constituted by prescription, the suckeners are not bound to perform such services, unless there has been a usage to that effect.

THIS servitude having been found more vexatious to the one party than beneficial to the other, and indeed extremely prejudicial to the agriculture of the country, the statute 39 Geo. III, c. 55, allowed it to be redeemed by payment of a yearly sum, to be fixed in the manner therein prescribed; a wise and salutary provision;[c] on the same principles with Charles I's celebrated decreet-arbitral, making it lawful for proprietors to purchase their teinds from the titular. The procedure is so distinctly and particularly stated in the statute, as not to require any explanation. The statute itself is inserted in Appendix I.

[c] See Appendix, N°. 66.

CHAP. IV.

Of Ecclesiastical or Church Property, or the Patrimony of the Kirk.

§ 1. IN GENERAL.

I. THE clergy are principally maintained from the teinds or tithes; which, as being a fund appropriated for that purpose, are treated of by Sir Thomas Craig under the head of *res sacræ;* and which, as being truly a servitude or burden affecting lands, fall, according to Mr. Erskine,[a] naturally to be explained after servitudes.

BUT it may be proper, first, to consider those provisions which the law has made for the clergy's personal accommodation.

§ 2. MANSE.

II. ON the eve of the Reformation, the parsons, vicars, and other churchmen, having set in feu, or long tacks, their manses as well as glebes, there were no sufficient dwelling-places for those that served, "or suld serve and minister at the kirkes."[b]

1st case, kirkswhere there were parsons or vicars formerly.

[a] B. ii, tit. 10, § 1. [b] 1563, c 72.

§ 2. MANSE. —1st CASE.

IN order to remedy this evil, it was ordained by the act 1563, c. 72,[c] that "they that are appoynted or to be appoynted to serve and minister at ony kirk within this realm, have the principal manse of the parson or vicar, or sa meikle thereof as sall be fundin sufficient for staiking of them, to the effect that they may the better wait upon the charge appoynted and to be appoynted unto them, quhidder the saidis gleibes be set in feu or tack of before or not; or that ane reasonable and sufficient house be bigged to them beside the kirke, be the person or vicar or utheris havand the said manses in feu or lang tackes." This was confirmed by act 1572, c. 48,[d] declaring, that "the manses outher pertaining to the persone or vicar, maist ewest" (or nearest) "to the kirk, and maist commodious for dwelling, perteines and sall pertein to the minister or reader serving at the samin kirk.

Minister to have the principal manse.

Or a sufficient house be built.

1572, c. 48.

Manse nearest to the kirk.

"AND quhair ony persones, upon pretence of fewes or takkes obteined of manses or glebes, hes made sumptuous biggings thereon, fra the quhilks they think heavy to be dispossessed or removed, that then the archbishop, bishop, superintendent or commissioner . . . travel to agree the fewer or tacksmen and the minister or reader be delivering to the samin minister or reader of ane uther manse, quilk sall be als gude and ewest as the uther, be just estimation the time it was set in feu or takkes . . . Bot gif the fewer or takkesman refuses willingly to condescend on the samin, then the execution to proceed, for removing fra the principall manse . . . notwithstanding ony biggings made or to be made thereupon."

Or a house equally good.

THESE statutes, which also forbid all feuing and setting of manses on long tacks, provided for the accommodation of the ministers of those parishes only where there were manses belonging to the parson or vicar.

[c] Mary, parl. 9. [d] James VI, parl. 3.

§ 2. MANSE. —2d CASE.

BUT ministers were provided to churches also, where there were no parsons or vicars formerly; such as cathedral churches or abbacies.[e]

Parishes where there were no parson's manse.

IN order to provide for this second case, the above statutes were afterwards "extended to all abbayes and cathedral kirks ... quhair na uther manse ... perteining to parson or vicar was of before: swa that the ministers presently admitted, or quhilk hereafter sall happen to be admitted, to

Within the precincts of the abbey.

the office or cure of the ministry within the said kirk, sall have ane sufficient manse and dwelling place within the precinct of the abbey where he servis ... with special provision, that it sall be in the option of the abbots, priors, and utheris prelates, and persones quhatsumever, fewares of the saids cathedrall and abbaie-places, either to grant ane manse to the minister within the precinct of their place, or else ane sufficient manse lyand als ewest and commodious to the paroche kirk."[f]

—3d CASE, Where there was no house belonging to ecclesiastical persons, or where the same was mortified to schools, &c.

A THIRD case still remained unprovided for; that of the ministers of those parishes where there were no houses formerly belonging to ecclesiastical persons, or where the same were appropriated to the use of an university, school, or hospital.

IT was therefore provided,[g] that another house shall be designed as a manse to the minister, most commodious and nearest the parish kirk, with relief to the heritor, out of whose lands the same is designed; and, lastly, on the narrative that

—ST. 1663. Narrative.

"notwithstanding of diverse acts of parliament made of before, diverse ministers are not yet sufficiently provided with manses, and others do not get their manses free at their entry,"[h] the statute 1663, c. 21, in order to remedy the first

[e] Sir Geo. Mackenzie's Observations on James VI, parl. 3, c. 48.

[f] James VI, parl. 12, 1587, c. 118.

[g] 1644, c, 31.

[h] James VI, parl. 1, sess. 3.

of these evils, ordained, that "where competent manses are not already built, the heritors of the paroch, at the sight of the bishop of the diocess, or such ministers as he sall appoint, with two or three of the most knowing and discreet men of the paroch, build competent manses to their ministers, the expences thereof not exceeding £1000 Scots, and not being beneath 500 merks Scots."[a] § 2. NSE. 3d c 3E. —1663, c. 21. The heritors at sight of the bishop.

IN order to remedy the other inconvenience, viz. "that others do not get their manses free at their entry," the same statute, "where competent manses are already built," ordained the "heritors of the paroch to relieve the minister and his executors of all costs, charges, and expences, for repairing of the foresaid manses; declaring hereby, that the manses being once built and repaired, and the building or repairing satisfied, and payed by the heritors in manner foresaid, the saids manses shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors, in time of vacancy, out of the readiest of the vacant stipend." —REPAIR. To be put in sufficient repair by the heritors; but upholden by the incumbents in time of vacancy.

THIS obligation upon landholders to build a manse, is equitably held to include stable, barn, and byre or cow-house, with a garden; for all which it is usual to allow half an acre of ground. But the minister cannot demand a new designation on the footing that the ground formerly designed does not amount to half an acre.[b] —STABLE, BARN, AND BYRE. GARDEN.

WHETHER every minister of a royal burgh, having also a landward parish, is entitled or not to a manse from the heritors, has not yet perhaps been precisely decided.

THE point was, indeed, argued in a case which, however, was decided on specialties.[c]

[a] See p. 407.

[b] Ersk. B. ii, t. 10, § 57.

[c] Minister of Linlithgow against the heritors, 24th November 1801.

§ 2. MANSE.

IT has been decided, that the minister of a royal burgh, with a landward parish, having been once in possession of a manse, but having accepted a sum of money for manse rent, may insist upon a manse being provided for him.[a]

This case was not reported, as it was not understood to decide the general point, that in all cases the minister of a royal burgh, having a landward parish annexed to it, has a legal claim to a manse. The cause came at first before the court of session, by means of a bill of suspension at the instance of the heritors of the country part of the parish, against whom the presbytery had given decree for building a manse. "The letters "were found orderly proceeded." 20th May 1801. The magistrates were now called into the field, and the case fully stated on all sides, when the abstract general point was discussed without any specialty. And the court decided, 24th November 1801, "That "the charger is entitled to no more "than 100 merks yearly, in lieu of "manse or house from the magis-"trates of Linlithgow; and there-"fore suspend the letters simplici-"ter."

A reclaiming petition was presented on the part of the minister, who, besides arguing the general point, produced evidence from certain proceedings of the magistrates and heritors, that the minister of Linlithgow had formerly had a manse, and it appeared that, instead of following out the plan of providing a new manse, they had paid the minister 100 merks for house rent: But any incumbent may insist for the rights competent to the benefice, and no private arrangement by one can bind his successor. This specialty weighed with several of the judges who had formerly been against the minister's claim, and he was found entitled to a manse; some of the judges in the majority resting their opinion upon the general right, which they conceived every minister having a landward parish, has to a manse, while others decided in his favour on the specialty alone. See Fac. Coll. 1805, No. 222, note at bottom of page 504.

[a] Minister of Dunfermline against the heritors, 19th November 1805.

In delivering their opinions upon this case, many of the judges held, that by law every minister of a royal burgh, having also a landward parish, was entitled to claim a manse from their heritors, and that the interpretation given to the act 1663, in so many cases, was erroneous. Others of the judges, however, rested their view of the justice of the minister's claim to a manse in this case, upon the specialty of his having previously enjoyed one; instead of which, by a special agreement, he had accepted a sum of money; so that this case cannot be said to change the interpretation of the act 1663, which has been so repeatedly sanctioned by the court. (Dict. Vol. 3, p. 398.)

§ 2. MANSE. Presbytery in place of the bishop.

THE act 1663 ordained the manse to be built at the sight of the bishop. Since the abolition of prelacy, presbyteries, instead of the bishops, are in the practice of proportioning among the proprietors the sums falling to be paid by each, as well as judging of the plan, dimensions, and situation of the manse.

Court of session competent jurisdiction.

ANY dispute between the minister, presbytery, and heritors or landholders, as to any of these particulars, or as to the propriety of building a new one, or repairing or enlarging the old one,[a] must be determined by the supreme court.

THE expences, according to the present price of labour, necessary for the proper accommodation of the minister, are allowed, though far exceeding the statutory sums.

—ON WHOM. Heritor.

THE statute 1663 lays the burden on the heritors. This word sometimes means superiors;[b] but here it is understood to mean holders of land in property. No part of the

[a] The case Robertson against the earl of Roseberry, Fac. Coll. July 28, 1788, is reported under this title.—"Presbyteries, though they may authorize the repairing or rebuilding "of manses, have no power to enlarge them."

This, however, was a peculiar case. Accordingly, in the subsequent case, Gibson, minister of Muckhart, against Hill Rennie, May 1802, the court of session gave their sanction to an enlargement of a manse, by the authority of the presbytery.

The lord ordinary pronounced the following interlocutor.—"Being satisfied, from the circumstances of the "case, that the additions to the manse "are necessary to render it a proper "residence to the minister, and that "he ought not to be barred from insisting for it, from the manse having been built in its present form "and dimensions, under a warrant of "presbytery during his own incumbency; remits the cause to the "presbytery, to adhere to their judgments complained of, in such manner as shall be necessary to make "the same effectual to the pursuer."

This interlocutor was brought under review of the court by a petition, which was refused without answers. Gordon, clerk.

[b] As in 1661, c. 35.

§ 2. MANSE. Superior.

expence, therefore, of building or repairing a manse, falls on the superior.[a]

Liferenter.

THE term heritors does not include liferenters, who have been found to be free of any part of the burden of building manses:[b] but Mr. Erskine thinks "it is possible, that, in the reparation of the manse, which has less of the nature of perpetuity than building it, and is frequently reiterated during the subsistence of the same liferent, our judges might be moved, by considerations of equity, to burden a liferenter, who has a real right in the lands, though it be but temporary, with the interest corresponding to the sum imposed on the fiar for these repairs, while the liferent subsists."[c]

Are liferenters liable for repairs?

—HOW LIABLE.

Real rent?

Valued rent?

THE expence of building or repairing the manse, is generally proportioned by the presbytery among the proprietors, not according to their real rent, but according to the several valuations: and letters of horning issue of course against them for the payment of those proportions.[d]

—KEEPING IN REPAIR.

ALL ministers receiving sufficient manses are liable to

[a] 2d July 1778. Sir Laurence Dundas against Arthur Nicholson. In this case, "the court, before advising the cause, ordained an inquiry to be made by the parties, whether, in the general practice over Scotland, the superior was subjected in any parochial burdens. The court, upon advising certificates of the practice, with informations, were of opinion, that the expence of building the manse is to be laid on the property, and not on the superiority; and that by heritors, in the statute 1663, proprietors are to be understood: that there has been no usage, either in the general case over Scotland or in Zetland, sufficient to justify any contrary rule of assessment." (Fac. Coll.)

[b] 14th Nov. 1679. Lord and lady Binstoun. (Stair.) *Argued* for the liferenter, "whatever might be pretended in equity for making a statute to burden liferenters for some share for building manses, yet where the matter is fixed by a statute, the lords ought to acquiesce therein, and cannot extend it *de casu in casum*."

[c] Ersk. B. ii, tit. 10, § 57.

[d] Ibid.

keep them in tenantable repair; otherwise, they and their executors are liable in damages to their successors in office.[a] § 2. MANSE.

PRESBYTERIES may authorize the reparation or rebuilding, and even the enlarging of manses, when that appears to be necessary.[b] Lands united to a church *quoad sacra* (so far as respects religious ordinances) are not liable to repair the manse of that parish to which they are annexed.[c] The vacant stipend is not subject to be applied for rebuilding the manse.[d] —ENLARGING. Lands annexed *quoad sacra*. Vacant stipend.

A MINISTER of a royal borough, as was already observed (note, p. 405), was found not to be entitled to a manse by designation of the presbytery, on the act 1663. But the court reserved to him to apply for a dwelling-house in any other form he should be advised.[e] And in another

[a] Ersk. B. ii, tit. 10, § 58. It would seem that they are rather to be liable to the heritors, who must find a sufficient manse to the incoming minister.

The form of declaring a manse sufficient, or free, is this.—The incumbent applies to the presbytery, which appoints a visitation of the manse by tradesmen, who make up and report estimates to the presbytery, which, if it approves thereof, proportions the expence among the heritors. When the manse is repaired or built, the heritors apply for a second visitation. If the heritors report favourably, and the presbytery approve thereof, the manse is then declared to be *free*. In the same manner, a manse may be declared sufficient, though built not at the sight of the presbytery. (21st Feb. 1786, heritors of the parish of Cairney against the presbytery of Strathbogie. Fac. Coll.)

[b] See note [a], page 407.

[c] Dict. vol. iii, tit. Manse, p. 399.

[d] Ibid.

[e] 30th June 1750, Thomson against Heritors of Dunfermline, Kilk. Dict. vol. iii, p. 398.

§ 2. MANSE. case, the court "reserved to the minister to insist for a competent house rent."[a]

§ 2. GLEBE. What is it? III. "THE glebe is that portion of land that is assigned to the minister by statute, over and above his proper stipend."[b]

Allodial. Liferent escheat falls to the king. THE glebe, as well as the manse, is rather allodial than feudal, having no express holding or *reddendo*: yet "it is esteemed as holden of the king in *mortification*; and therefore the liferent of the incumbent, by being year and day at the horn, falls to the king."[c]

Benefices. OF old, ecclesiastical benefices were held to consist either of spiritualities or temporalities.

Spirituality. Temporality. THE spiritualities were the manse and glebe, as well as the stipend, or teinds. The temporalities, again, were all other subjects, which had been acquired by the church in property; as lands, superiorities, patronages of churches, and jurisdictions pertaining thereto.[d]

1st case, If there was a glebe. BY the act 1563, c. 62, there was "sa meikle land to be annexed to the dwelling-places of them that servis and ministers at the kirk, as sall be hereafter with gude advisement appointed." This uncertainty as to the *quantum* was removed by the next statute, by which the minister was to have "four acres of the glebe at least, lyand *con-*

[a] Robert Mutter, minister of Kirkcudbright, against the earl of Selkirk, 16th June 1784. Fac. Coll.

[b] Ersk. B iii, tit. 10, § 59.

[c] Stair, B. ii, tit. 3, § 40.

[d] Hope's Minor Practics, tit. 2, § 16, and note.

tigue or maist ewest to the said manse, gif there be sa meikle."[a] § 3. GLEBE. —DESIGNATION.

THE above acts were extended to abbeys and cathedral churches where there were no glebes, it being ordained that the minister should have "four acres of land of the best and maist commodious, lyand *contigue* and maist ewest to the manse, quhilk perteines, or in ony time of before, perteined to the said abbay, or ony member thereof; quhidder the samin land lye within the same precinct or without the same, gif there be sa meikle as may extend to the quantity of four acres.[b] 2d case, Where there was no glebe. Nearest the church. Whether within the precincts or not.

IN what order the different church lands should be designed for the glebe, was fixed by the statute 1593, c. 165,[c] ordaining, that "quhair there hes bene na glebe of auld, or quhair there has bene some of auld, zit it be far within the quantity of four aikers of land, that the designation be maid of the parson, viccar, abbot, or prioresses' lands; and failzying thereof, out of the bishopes' lands, friers' lands, or ony uther kirk lands lyand within the bounds of the said paroche, aye and quhile four acres of land be complete.[d] Order of designation.

THERE being many churches without any arable land

[a] James VI, parl. 3, 1572, c. 48, And this whether the glebe was set in feu-tack, or otherwise.

[b] James VI, parl. 11, 1587, 117.

[c] James VI, parl. 13.

[d] "Which order" (says sir George Mackenzie, in his observations on this statute) "is exactly to be observed in the way set down by this act, as Dury observes, 13th July 1636, Halyburton against Paterson. Yet I find that bishops' lands were designed before abbots' lands, because that bishops have the greater interest in the cure; and albeit, it may seem that the designing the most ewest and nearest lands to the manse for a glebe, be in favour of the minister, and for his ease, yet the lords found a designation null at the instance of the

§ 3. GLEBE.—DESIGNATION.

adjoining thereto, it was ordained, that there be designed to the minister "serving the cure of sik kirks where there is na arable land adjacent thereto, four sowmes,[a] for ilk aiker of the saids four aiker of gleib land, extending in hail to sexteen sowmes for the saids four aikers, and that of the maist commodious and best pasturage of ony kirk lands lying next adjacent and maist nearest to the saids kirks."[b]

Where there is no arable lands.

3d case, If there be no church lands.

WHERE church lands either were not within the parish, or were appropriated to the use of universities, schools, or hospitals, it was made lawful to design a glebe to the minister out of any other land (or out of grass, if there were no arable land) most commodious and nearest to the parish kirk.

THE other proprietors of the parish must, in the order above prescribed, contribute proportionally for a recompence to the one whose land is designed for the glebe, viz. the proprietors of church lands, when church lands are designed, and all the proprietors of the parish, where other lands are designed.[c]

ONE exception, however, is introduced by the act 1663, c. 21,[d] "that in all designations of gleibs, incorporate acres in village or town, where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk."

the heritor, whose lands were designed, because there were other lands nearer to the manse, for else any heritors' lands within the paroch might be designed out of prejudice."

[a] Pasture for a cow, or for ten sheep.

[b] James VI, parl. 18, 1606, c. 7.

[c] 1644, c. 31. This act fell under the rescissory act; but it seems to be revived, or regarded, as still in force, by the act 1663, c. 21, Ersk. B. ii, tit. 10, § 59.

[d] Car. II, parl. 1, sess. 3.

§ 3. GLEBE—DESIGNATION.

IT has been found, that temple lands (lands which had belonged to the knights templars) are not church lands in the sense of the act of parliament, so as to bear a proportional burden with bishops, parsons, and abbots lands.[a]

WHERE a glebe had been designed and possessed, the court of session refused to allow any new designation; but there being a question about the quantity, ordained to be measured anew.[b]

Parishes united.

WHERE two or more churches have been united by act of parliament, one of them having a glebe, and another never having had any, it had been decided that the minister could not be excluded from a glebe in the other also.[c] But if the glebes of the conjoined parishes amount together

[a] Fount. v. i, p. 94. The possessions of the knights were secular, being given to them for defending the temple of Jerusalem. So also it is said to have been decided by the parliament of Paris. The preceptor of the order sat in parliament *inter proceres regni*, and not among ecclesiastics.

[b] Dict. v. i, t. Glebe. "A minister charging upon his designation to infeft him therein, and the feuer suspending, on this reason, that there were kirk lands more ewest; and the minister answering, to fortify his designation, that his predecessor had possessed the lands for 20 years before, as glebe; the minister was preferred. Hadd. March 7, 1610, Henderson. A manse and glebe, long possessed by designation out of lands holden of the king, and most ewest, were found to debar all new designation." Nicolson, (Kirkmen), Dec. 14, 1621, Clark. A presbytery having designed a new glebe to a minister, on pretence that the old one was barren ground, and at great distance from the manse, the court of session decided, that there could be no designation of a new glebe by the presbytery, till it had first been cognosced before a judge competent, whether the first was sufficient; and that it was not empowered to change the glebe that had been possessed past memory of man, by giving a new one; but if there were inconveniencies, the minister might pursue declarator before it, to get them amended and repaired: And therefore reduced this new designation of a glebe, reserving his legal remedies as accords of the law. Forb. 24, Fount. 27th Dec. 1709, Linnen.

[c] Duric, Auch. (Glebe) Spott. (Kirk Patrimony) 22d January 1631, Rough, Dict. v. i, t. Glebe.

§ 3. GLEBE.

to four acres, it has been since decided the minister is not entitled to any further designation.[a]

If no church lands, Temporal lands?

WHERE there are no church lands near the church, whether temporal lands may be designed for the glebe, is a point not yet perfectly fixed.[b]

[a] 26th Nov. 1755, minister of the Gospel at Borgue against John Miller, factor upon the sequestrated estate of Carletoun. The present parish of Borgue consists of what was anciently three parishes, viz. Borgue, Senwick, and Kerkanders; the minister was in possession of the three glebes, which had anciently belonged to these parishes, each of which glebes were below the legal standard, but, when taken together, were above it. On the admission of a minister at Borgue in March 1752, the presbytery of Kirkcudbright, finding that the glebe at Borgue was below the legal standard, proceeded, according to the usual form, to make an addition of arable ground to the old glebe. "The lords found, that the charger, being in possession of three glebes, extending to more than a legal glebe for arable ground and grass, was not entitled to an additional designation to these glebes, and therefore suspended the letters simpliciter." (Fac. Coll.)

[b] In the case June 10, 1794, minister of Kingsbarns against Hon. Henry Erskine. "The parish of Kingsbarns was, in 1631, disjoined from the parish of Crail. A manse and offices were built for the minister of the newly-erected parish, but no glebe was designed for him.

"The present incumbent having applied to the presbytery for the designation of a glebe, they assigned, for this purpose, four acres of temporal lands lying contiguous to his manse. There are church lands in the parish, but the nearest of them are distant from the manse at least three quarters of a mile.

"The proprietors of the temporal lands brought a suspension of the proceedings of the presbytery. The lord ordinary reported the cause on informations.

"The court, by a narrow majority, found, that the lands allocated by the presbytery, being temporal lands, are not liable to be designed when there are church lands in the parish: and therefore sustained the reasons of suspension of that designation.

"On advising a reclaiming petition, with answers, the court adhered."

But these interlocutors being brought under review, at the instance of one of the heritors, who was a minor at their date, the court altered them, and decided, "that, in the circumstances of this case, the minister has right to have his glebe designed out of lands lying near to his manse, whether they be kirk lands or temporal lands; but found, that the heritor, whose lands shall be so designed, is entitled to a proportional relief from the other heritors in the parish, liable in payment of the

§ 3. GLEBE.

What are church lands.

Order of designation.

Bishops lands.

Priors.

LANDS are liable to be designed for the glebe as church lands, although the superiority only had belonged to the church for a long period before the Reformation.[a] If, at the time of designing a glebe, there be in a parish, lands held of the crown in right of a priory, others held of the crown in right of a bishop, and others by an university in right of the priory, the first are primarily liable, the bishops' lands in the second place, and the others only *ultimo loco*, whatever may have been the description of the lands at the Reformation, or at the date of the act 1593, c. 165.[b]

the 60l. Scots hitherto received in lieu of a glebe." June 1799. Fac. Coll. N°. 127.

[a] 11th June 1799, the minister of Kingsbarns against David Balfour and others. Fac. Coll.

[b] "Part of the parish of Crail was, in 1631, erected into the new parish of Kingsbarns, in virtue of a decree of disjunction by the high commission, which declared, "That the heritors of the kirk lands within the new established parish of Kingsbarns, and their successors, shall be subject to contribute *pro rata* with the heritors of the kirk lands within the parish of Crail, sicklike, and in the same manner, as if this division had not been made.

"In 1720, the minister of Kingsbarns applied to have a glebe and foggage designed to him; and the presbytery having met for that purpose, the heritors, in 1721, by a written agreement, obliged themselves and their successors to pay to the minister and his successors 60l. Scots yearly in lieu of glebe and foggage, according to their valued rents. Fallside, belonging to St Leonard's college, in the university of St. Andrews, was the only property not included in this agreement. A similar payment had, it was believed, been made to the minister, though without any written obligation, from the erection of the parish.

"This annual payment was continued till 1790. Thereafter the presbytery proceeded to design a glebe out of church lands Those understood to be such were Pitmillie, nearest to the manse; Fallside, at a greater distance; and Newton of Randerston, still farther removed from it.

"Pitmillie had, at least as early as the 13th century, been held of the priory of St. Andrews by laymen, for the yearly feu duty of 13s. 4d. Scots, and there was some reason to believe that it had originally belonged to the bishopric of St. Andrews. The revenue of the priory was annexed to the crown at the Reformation, and it was soon after erected into a temporal lordship in favour of the duke of Lennox. It was purchased from him in 1635 by Charles I, who immediately presented it to the archbishopric of St. Andrews, and,

§ 3. GLEBE.

THE statute 1594, c. 202, was specially passed "for relief of them quhais landis are or sall be designed for manses and, since the abolition of episcopacy, Pitmillie has been held of the crown in right of the archbishop.

"Fallside was disponed to St. Leonard's college by a prior of St. Andrews in 1512. James IV confirmed the gift, with an immunity from all future burdens. It was ratified by an unprinted act of parliament in 1612, and no public burdens of any sort have since been paid for these lands.

"Newton of Randerston was disponed by the bishop of St. Andrews to the prioress and convent of Haddington in 1359, and there is extant an instrument of seisin on a feu-right to the lands, granted to a layman by the prioress and convent in 1461. The superiority remained with the priory till the Reformation. Since that time, the lands have been held of the crown; and in some of the later titles, all mention of their having formerly held of the church has been omitted.

"The presbytery designed four acres as an arable glebe out of Newton.

"The proprietor of Newton raised a suspension, and the judgment of the presbytery was at first supported only by the minister of the parish and the proprietor of Pitmillie; and the lords, (17th May 1798), on advising informations, "repelled the reasons of suspension, and found the letters orderly proceeded, so far as concerns the four acres of glebe designed out of the suspender's lands of Newton.

"Mr. Hay presented a petition against this interlocutor, which the court directed to be answered by the heritors of temporal lands, and by St. Leonard's college, the proprietor of Fallside, as well as by the other heritors.

"The proprietor of Newton, besides, contended, that from the terms of the decree of disjunction, and subsequent conduct of parties, the burden of affording a glebe should be borne indiscriminately by the whole heritors of the parish according to their valued rents.

"Pleaded for the proprietor of Newton, 1mo, The legislature meant that the reformed clergy should be provided with manses and glebes from the patrimony of their popish predecessors. They cannot, therefore, affect the *dominium utile* of lands, which, like Newton, have been *bona fide* feued out to a layman above a century before the Reformation, and which, retaining no other connection with the church than the payment of a quit rent, it would have been hard to pitch on as exclusively liable for the burden. It was only certain feus that were ineffectual against the claim of the minister; for example, where his predecessor had feued out his glebe, which was declared illegal by 1563, c. 72; or where the feu had been granted in view of the Reformation, after 8th March 1558, and therefore, by 1564, c. 88, ineffectual, unless confirmed by the crown.

2do, Supposing Newton liable to be designed, in terms of the act 1593, c. 165, still Pitmillie, from being nearer to the manse would be primarily

and glebes to ministers." It provides, "that where desig- § 3.
nation of manses and glebes beis made and tane of kirkland, GLEBE.
(the hail parochin, or an great part thereof being kirkland; and the minister notwithstanding designed to the kirkland maist ewest and adjacent to the kirk:) That the fewars, possessours, and tacksmen, out of quhais landes the manses or glebes are designed, sall have their relief of the remanent

rily liable. Their only connection with a bishopric was the payment of 13s. 4d. Scots annually, to the archbishop of St. Andrews, from 1635 to the Revolution, while the right of the vassal remained the same as it had been for centuries before. But, from the period of the Reformation, there ceased to be, strictly speaking, any distinction among church lands, and it could not be in the view of the legislature that any future distinctions should arise.

3tio, Supposing Pitmillie to be considered as bishops lands, the glebe should be designed from Fallside. These being prior's lands, and, except the rescinded act 1644, c. 31, there is no authority for exempting lands mortified to a college from the ordinary rules.

Answered for the minister of the parish, and the proprietor of Pitmillie: The act 1593, c. 165, made the lands which had belonged to the popish parsons and vicars primarily liable, because the reformed parochial clergy came in their place, and had got right to a glebe out of their lands by prior statutes. The lands of abbots and priors were made liable in the next place, because most of them had been gratuitously disponed by the crown in favour of laymen; and those of bishops only *subsidiarie*, because no grants of their property had been made by the king, as he intended to restore them. It is a mistake, therefore, to suppose, that all church lands were in the same situation at the date of the statute 1593, c. 165, or that the legislature might not have in view the future changes which might take place in them.

Answered for St. Leonard's college, Fallside: Lands belonging to a college, are liable to be designed for a glebe only *ultimo loco*, (1644, c. 31, revived by 1663, c. 21; Stair, p. 225; Bank. Vol. ii, p. 47; Ersk. B. ii, t. 10, § 59.)

Two of the judges were much moved by the two first branches of the suspender's argument. But the court found, 27 Nov. 1798, "that in a question between the heritors of church lands, the glebe falls, in the first place, to be designed out of the lands belonging to the petitioner, being priors lands; in the second place, out of the bishops lands belonging to colonel Monypenny, (Pitmillie;) and, *ultimo loco*, out of the lands belonging to the college of St. Andrew's (Fallside;) and therefore adhered to their interlocutor reclaimed against, reserving to the petitioner still to be heard upon any claim he may have against the other heritors of the parish."

§ 3. GLEBE —RELIEF.

parochiners, quha are fewars, possessours, and tacksmen of kirklands, lyand within the said parochin *pro rata*;" it being, says the statute, "baith against reason and gude conscience, that there suld be an glebe designed only of the said kirklands that pertains to ane fewar and possessour, and not of the rest; and specially quhair the hail landes within the parochin, or ane great part of the saids lands, are alike halden of the kirk, and payis the like dewty." At the date of this statute, it was only church lands that were designable for the glebe. The statute, therefore, specified that a right of relief obtained among the proprietors of the different church lands. But, when the statute 1644 (passed during the usurpation) extended the designation of glebes out of temporal lands, it equitably gave the proprietor of the designated lands recourse against the other temporal lands of the parish. If this statute be now considered as in force, to the effect of designing temporal lands, it must also be presumed to be in force to the effect of giving proprietors of such lands this equitable title of relief. But this right of recourse is not real against the lands themselves, it is barely personal, against those who were proprietors at the time of the designation, and their heirs.[a] If a glebe were designated out of temporal lands adjacent to the church, while there are church lands in the parish, the relief lies wholly against the church lands.

What proprietors are liable.

If a temporal land be designed.

—PERTINENTS.

THE act 1593, c. 165, provides, "that the glebes be designed with freedom of foggage, pasturage, feual, faill, diffat, loning, free ish and entry, and all other privileges and rights, according to use and wont of auld." And the act 1663, c. 21, enacts, "that every minister have feuel, foggage, feal, and divots, according to the act of parliament made in anno 1593."

THE import of these statutes is, that, notwithstanding the special right thereby given to insist for designation of a glebe,

[a] Ersk. B. ii, t. 10, § 60.

clergymen might not be deprived of such servitudes as they were previously in possession of. This was necessary, to prevent all misapprehension of the meaning of the act. Accordingly, those privileges have been allowed to ministers no farther than they were sanctioned by the particular usage.[a] § 2. GLEBE —PERTINENTS.

A MINISTER has no right to the sea-weeds upon the shore of his glebe, for the purpose of making kelp,[b] but only for the purposes of manure, and feeding his cattle. Sea-weeds.

[a] Feb. 28, 1769, Duff against Chalmers. The ministers of the parish of Cairney had, from time immemorial, enjoyed a servitude of casting peats in certain mosses, the property of the duke of Gordon. In 1767, the presbytery, upon a petition from Mr. Chalmers, the incumbent, setting forth, that those mosses were exhausted, designed part of moss belonging to Mr. Duff of Drummuir, for the use of the petitioner and his successors in all time coming.

This decree being brought under challenge by Mr. Duff, it was decided in the court of session, that the presbytery were incompetent judges, and that their decree was of *funditus* null and void. Fac. Coll.

25th Feb. 1779, James Dymock against William duke of Montrose. Mr. Dymock, minister at Aberfoyle, brought an action before the court against the duke of Montrose, proprietor of the greater part of the parish, setting forth, that the mosses out of which the former ministers cast their peats were all exhausted, but that there still remained extensive mosses within the parish, and therefore, that it should be declared, that the pursuer, and his successors serving the cure in that parish, have right of casting, winning, and away-taking fuel, fail, and divot, from the mosses still unexhausted, for the use of their families.

The pursuer having likewise alleged that he and his predecessors had at different times taken their peats from different mosses in the parish, besides the mosses now exhausted, the court ordered the pursuer to give in a special condescendence of these alleged acts of possession; and a condescendence being accordingly given in, the court pronounced this judgment: "Having resumed the consideration of this cause, with the foregoing condescendence in behalf of the pursuer, and answers for the duke of Montrose, defender, they find the condescendence not relevant; sustain the defence for the duke of Montrose; and assoilzie him from this process." Fac. Coll.

[b] 14th Nov. 1781, Lord Reay against Rev. Alexander Falconer.—"Lord Reay insisted to have it found and declared, that Mr. Falconer, as minister of Edrachilles, had no right to the sea-ware upon the shore of his glebe, except for the purpose of manuring his land, and feeding his cattle. *Pleaded*, In the designation of the glebe, the boundaries are distinctly marked, there is no mention of shores, nor any clause upon

§ 3. GLEBE —PERTINENTS.

Trees.

A MINISTER has a right of property in the glebe. He will not be allowed to commit waste upon it, but he is entitled to every benefit that can be derived from it *salva substantia*.[a] Sir George M'Kenzie puts the question, to whom coals under the glebe, and trees growing thereon, belong?[b] But it has been decided, and indeed follows, from the nature of his right as above explained, that the minister has right to cut and appropriate trees on the glebe.

Marl.

In like manner, a minister is entitled to dig for marl on his glebe.[c]

which a right to sea-ware, as part and pertinent, can be founded. The original right, therefore, of the family of Reay still continues, and must be sufficient to exclude any right competent to the minister in virtue of the designation above mentioned.

Observed on the bench.—The designation of a glebe is like a bounding charter. Here the designation makes no mention of shores, and the minister is circumscribed by the terms of his own right. The court, therefore, adhered to the interlocutor of the lord ordinary, who had decerned in terms of the declarator." Fac. Coll.

[a] 16th May 1799, John Logan and others against William Reid. The reverend William Reid, minister of the parish of New Cumnock, having proposed to cut some grown trees, which had been planted by his predecessor on the glebe adjoining to the manse, John Logan and some other heritors of the parish, obtained an interdict from the sheriff against his doing so, till the question of right should be ascertained.

An advocation of this judgment was passed of consent, when, on the part of the heritors, it was averred, that the trees were in full vigour; that they afforded shelter to the manse, and were an ornament to the country. The minister, on the other hand, contended, that they were going fast to decay, and that they rendered the manse uncomfortable, from the damp and smoke occasioned by them. But the parties afterwards, waving all specialties, joined issue on the general point, how far the minister of a parish has right to dispose of trees on the glebe *qua* proprietor."

The court were at first a good deal divided in opinion; but they afterwards "remitted to the lord ordinary to remit to the sheriff, with instructions to assoilzie the minister, and recal the interdict; and farther found him entitled to expences." See also a late case, Hepburn of Humby against the minister of that parish.

[b] Observations on statute 1572, c. 233.

[c] 13th Nov. 1799, Minister of Madderty against the heritors, Dict. V. iii, p. 251. However, in this case the court was much divided in opinion. It was simply remitted to the lord-justice-clerk M'Queen, ordinary, and, on that account, is not reported in the Faculty collection. He pronounced the following interlocutor, which all parties acquiesced in:—"Finds, that the whole marl ought to be dug out, and the surface of the glebe then restored to the proper shap

IT has been also declared, that he may dig for coal,[a] the free residue being secured as a capital for the benefit of the benefice, the incumbent drawing only the interest. § 5. GLEBE AND PERTINENTS

BUT a minister is not entitled to dig peats in the glebe.[b]

THE statute 1563, c. 72, prohibited "ecclesiastical persons to set in few or lang tacks onie of their manses or glebes pertening to the said kirks, without special licence and consent of the queen's grace in writ."[c]

BY the statute 1572, it is said, "that it shall not be leison to the ministers, or readers present or to cum, to sell anallie, set in few or takkis, or to put ony in possession of kirks and glebes in prejudice of their successors, bot the samin to remain always free to the use and easement of sic as sall be admitted to serve and minister at the said kirk."[d] Leases.

AND the act 1585, c. 11, for making all ecclesiastical persons leave the benefice "als gude as they fand it," declares, that "in case ony of the said persons, provided to the said benefices sall happen to doe utherwayes; and be ony fewees, takkes, pensions, or changing of victual for money, or ony uther disposition, sall mak their benefice in worse estaite nor the same was at their entrie theirto, all setting and disposition sall be of nane avail, force, nor effect." *Salva substantia.*

shape: Finds, that the whole expences of digging, and of afterwards putting the surface of the glebe in proper shape, and also the expence of this process, ought to be deducted from the produce of the marl, and the free residue only secured for behoof of the incumbent: Finds, that the digging, putting the surface of the glebe in proper shape, ascertaining and securing the free residue, must be done at the sight of the heritors of the parish and the presbytery, the charger finding caution to the extent of £50 sterling for due implement of the above particulars, and lodging a bond of caution; therefore removes the interdict; suspends the letters *simpliciter*."

[a] 3d June 1807, Scott of Newton against Wauchope of Edmonstone. In this case, the principle of the decision as to marl, in that of Madderty, was considered to apply to coal also.

[b] 22d Jan. 1789, Mercer against minister of Lethendy. This case is not reported.

[c] Queen Mary, parl. 9.

[d] Jas. VI, parl. 3.

§ 3. GLEBE —PERTINENTS.

THESE acts have been explained into an absolute prohibition to feu, though the yearly feu-duty secured by the grant to the benefice should be quadruple to what could reasonably be expected in the way of tillage.[a]

THIS, however, Mr. Erskine observes, is certain, that in case of the removal of the church to another part of the parish, the old manse or glebe may be sold or exchanged for a more commodious one; and such sales or excambions have been authorized by the court. And such, it is believed, have been sustained, when fairly gone about, and not prejudicial to the benefice.

§ 4. —GRASS.

IV. IT is provided by the act 1633, c. 21,[b] "that every minister (except such ministers of royal boroughs who have not right to glebes) have grass for one horse and two kine, over and above their glebe, to be designed out of kirk lands, and with relief according to the former acts of parliament standing in force. And if there be no kirk lands lying near the minister's manse, out of which the grass for one horse and

[a] 14th May 1799, the Minister of the united parishes of Little Dunkeld and Lagganallachie against the heritors. The living of Little Dunkeld and Lagganallachie has two glebes annexed to it, one at Little Dunkeld, contiguous to the manse, and consisting of six acres of arable land, and two of pasture, and the other about two miles distant, at Lagganallachie, containing about four acres, one half arable, and the other half pasture.

The yearly produce of the grounds at Little Dunkeld, cultivated in the ordinary way, could not be rated at more than 20s. per acre. But being well adapted for the establishment of a manufacturing village, the minister, with the approbation of the presbytery, feued out several acres for a yearly payment of about £6 per acre.

Some of the heritors having considered this transaction as *ultra vires* of a parish minister, the question came to be tried in a process of suspension.

The question having been reported on informations, the court in general was of opinion, that a minister could not in any case grant feus of his glebe. The court, therefore, sustained the reasons of suspension, and suspended the letters simpliciter. A reclaiming petition was refused with answers. Fac. Coll.

[b] Cha. II, parl. 1, sess. 3.

two kine may be designed, or otherwise, if the said kirk lands be arable land, in either of these cases ordains the heritor to pay to the minister and his successors yearly the sum of £20 Scots, for the said grass for one horse and two kine, the heritors always being relieved according to the law standing, off other heritors of kirk lands in the said paroch." § 4. GRASS—STATUTE.

THIS provision of the £20 Scots is mere subsidiary, to take place, if there be no lands in the parish, such as are described by the statute; otherwise, neither the minister, nor heritors, nor presbytery, nor all of them together, have any discretionary power to substitute the £20 Scots in place of the grass lands.[a] Lord Bankton[b] says, that this grass being additional, takes place, though the old glebe (possessed before 1663) should include not only the four acres of arable land, but as much as might serve to maintain two cows and a horse. Mr. Erskine does not speak so positively; and an opposite principle seems to have governed two cases.[c] But the point is still *sub judice*.[d] Subsidiary.

[a] 10th Feb. 1804, Lawrie against Halket.

"In the year 1718, the minister of Newburn applied to the presbytery for a designation of a grass glebe, and a portion of ground was set apart for that purpose. The incumbent did not however carry the decree of the presbytery into execution, but accepted the sum of 20l. Scots in lieu of grass glebe, which from that time was paid by the heritors according to their respective valuations. In 1801, the minister of the parish made an application to the presbytery for a new designation of grass, and ground was designed. The proprietor thereof presented a bill of suspension of the decree of the presbytery.

"The lord ordinary found the letters orderly proceeded. The court adhered."

A contrary judgment had been given in the case of the minister of Mertoun, 19th Jan. 1780. But it was observed from the bench, that that case had not been sufficiently attended to when it was decided; that the decision was pronounced by refusing a petition against the lord ordinary's interlocutor; and that the minister prematurely acquiesced, (Fac. Col.)

[b] B. ii, tit. 8, § 124.

[c] 26th Nov. 1755, minister of the united parishes of Borgue, &c. Fac. Coll. And 11th July 1801, parish of Kilmadock.

[d] In the latest case, a decision has been pronounced against the minister, who

§ v. GRASS.

Arable, meaning of.

THE act allows the grass only to be taken out of such church lands as are not arable. By arable lands is to be understood ground in a continued state of cultivation, though bearing crops of grass, and not constantly under the plough.[e] "Grounds may be designed to a minister for grass, although they have been in use to be ploughed up for three years, and to lie three years in grass alternately."[f]

WHETHER ground falls within the exception of arable in the statute, is to be determined by its condition at the time when the designation is applied for, how recently soever it may have been brought into tillage.[g] Yet "heritors must

who has brought it under review by a reclaiming petition. Minister of Jedburgh against John Davidson's trustees, Feb. 19, 1805.

[e] Charles Grierson against John Ewart, 26th June 1778. The presbytery of Dumfries, upon the application of the minister of Troqueer, designed to him nine acres of kirk lands, for minister's grass, on the statute 1663, c. 21.

Grierson brought a reduction of the presbytery's decree, on this ground: That the lands designed fell within the exception of the act 1663, "that if there be no kirk lands lying near the minister's manse out of which the grass may be designed; or otherwise, if the said kirk lands be arable lands, in either of these cases, ordain the heritors to pay the minister and his successors, yearly, 20l. Scots for the said grass," pleading that the lands in question being arable lands, inclosed with dike and ditch 20 years before the designation; and regularly producing either crops of grain, or rye grass and clover; could not be designed. "The court sustained the reasons of reduction of the grass grounds." (Fac. Col.)

[f] 27 Feb. 1756, Hodges *contra* Bryce.——23 June 1784. The heritors of the kirk lands in the parish of Peebles against William Dalgleish. The presbytery allocated to the ministry of Peebles a piece of land, formerly part of the vicar's glebe, which, on the eve of the Reformation, had been feued out in small divisions to the inhabitants of the borough. The spot was marshy, and often covered with water for a great part of the winter season; it had never been in tillage, nor was it frequently used in pasture, the grass which grew upon it having been either cut green or made into hay. The heritors brought a reduction of the decree of the presbytery. The court of session assoilzied the defenders from the reduction. (Fac. Col.)

[g] 26 June 1778. Grierson against Ewart. (Fac. Col.)

not, *in æmulationem*, till up that which was in use to be let, since so they might leave nothing for the minister but moss, muir, hills, or rocky ground, to the defrauding the good design of the law, and the minister's manifest prejudice."[h] Besides, the minister is generally allowed to cut the grass upon the churchyard.[i] § 4. GRASS.

V. THE principal spirituality of benefices was the teinds or tithes, which, according to Mr. Erskine, are that "liquid proportion of our rents or goods which is due to churchmen for performing divine service, or exercising the other spiritual functions proper to their several offices;"[a] or, perhaps may be more correctly defined to be that proportion of our rents and goods, which by the law is subjected to a perpetual indefinite burden in favour of the ministers of the established church, for affording such stipends as it shall appear proper to the competent court to assign. § 5. TEINDS.

SUCH, in truth, was the proper description thereof even in popish times. The canon law, indeed, speaks of teinds as due to parochial churches of common right.[b] But this rule never

h 31 Jan. 1712, Minister of Lochmaben, Fountainhall.

i 2 Dec. 1778, Hay against Williamson. Two heritors in the parish of Arngask brought an action before the sheriff of Fife, against the minister of the parish, concluding *inter alia*, that he should be ordained to desist from pasturing his cattle in the church-yard in all time coming. The sheriff found that he was only entitled to cut the grass in the church-yard, but not to pasture his bestial thereon, and discharged him from doing so thereafter. The defender, in a bill of advocation, alleged, that it was the general practice over Scotland for ministers to feed their cattle in the church-yard. The court affirmed the judgment of the sheriff.

a Ersk. B. ii, tit. 10, § 10.

b Dec. Greg. ix, L. iii, tit. 30, c. 30, "*parochialibus ecclesiis exsolvantur, ad quas de jure communi spectat perceptio decimarum.*" Agreeably to this, the old statute 1489, c. 7, (James IV, parl. 7,) makes it to be a point of dittay, "to intromit with the lands, teinds, obligations, profits or duties of halie kirk, without tacke or assedation of the person, vicar, or their fermorares."

§ 5. TEINDS.—HISTORY.

obtained universally. Here, prior to the Reformation, as well as in other popish countries, it was only in some parishes that the teinds were enjoyed by parochial clergy. The great proportion belonged not merely to other churchmen, regular and secular,[c] or to charitable purposes, as hospitals and schools, or to chaplanies for private devotion, or to altarages in cathedral or collegiate charges for masses to be sung for

In popish times.

[c] "The regulars followed the rule of St. Augustine, bishop of Hippo in Africa, St. Bennet, or some private statutes approved by the pope, and lived, slept, and took their diet together, under the same roof. They were either canons, monks, or friars, and their houses were called abbacies, priories, or convents. The seculars, again, had their private rules composed by their chapters, or borrowed from other colleges abroad, which statutes were not commonly approved of by Rome. They lived separately in their cloisters, or in private houses near to their churches, and were governed by a dean or provost." (Spottiswood's App. to Hope's Minor Practics, p. 412.) So every churchman, who was not a monk, was secular.

The secular clergy consisted of the same three great classes, as in the episcopal church, viz. 1st, the archbishops and bishops; 2dly, there were their chapters, consisting of the inferior orders, of the dignified clergy, as deans, arch deans, &c.; and 3dly, there were parsons or ministers having right to the parsonage teinds of their respective parishes, but who were not members of the bishops chapter, and a few perpetual vicars or incumbents who were also settled for life, and were entitled to the vicarage teinds in their own right, in the same manner as the parsons were to the parsonage teinds.

The churches or parishes whereof the teinds were destined for the proper maintenance of the bishop, were called his *mensal*, *patrimonial*, or *proper* churches. The churches or parishes whereof the teinds were destined for the members of the chapter, or the inferior dignitaries of the church, were called *common* churches, because, as is said, the chapters lived anciently in common, and the funds for their support were levied and applied in common, and the same name was retained when the members of the chapter coming to live separately, a separation of the funds likewise took place.

When a church or benefice thus belonged to a bishop, or chapter, or monastery, none of whom could do the duty themselves, the cure was necessarily served by vicars or curates, who received some inconsiderable allowance out of the teinds. Sometimes, however, the patron, when he made the donation of his benefice to a bishop or chapter, reserved to himself the right of naming a vicar, with such proportion thereof as might be necessary for his support; generally the lesser teinds thence called vicarage.

the souls of the founders; but also to laymen in virtue of infeudations by which such teinds were secularised and became temporal rights.[a]

At the Reformation.

ON the Reformation, the possessions of the popish hierarchy devolved on the crown and the *lords of erection*; i. e. those great men in whose favour certain parts of the church patrimony were occasionally erected into temporal baronies.[b]

Third provided to ministers, Plat.

SOON after the Reformation, the protestant clergy were allowed a third of the church livings; for the distribution whereof, there were certain noblemen and ministers of *planted* churches, appointed commissioners, who were called the *plat*. This third was first set apart for them by an act of privy council; but the object thereof having been in a great measure disappointed, first by the imperfect rentals produced by the popish clergy, and afterwards by discharges granted to

[a] These infeudations were at length prohibited by councils of Lateran in 1180 and 1215.

[b] The erections, or impropriations, being considered prejudicial to the interest of the crown, the act 1587, c. 29, was passed, whereby church lands were annexed unalienably to the crown: under the exception, however, of such as had previously been erected into temporal lordships, of such as had been made over to hospitals, schools, or universities, and of those patronages which had been vested in laymen before the Reformation.

This act is entitled "the annexation of the temporality of benefices of the crown." Mackenzie, therefore, supposes it not to have included the teinds, "these being acknowledged by our law to be the patrimony of the church." (B. ii, tit. 10.) But Mr. Erskine seems to think that it included the teinds also, because it contains an express exception of the teind sheaves and the smaller teinds. And the act 1593, c. 190, seems to suppose it; so (he might have added) does also the act 1592, c. 121.

[c] "The thirds were distributed among the ministers in this sort; 1st, the several kirks were planted by the superintendants appointed in every province by the general assembly; and at the desire of the superintendants, or of the commissioners from the general assembly, the king and queen's majesty passed a commission under their seals to a number of the nobility and ministers of these kirks whilk were planted, which meeting was called the plat." (Sir Thomas Hope's Min. Practics, tit. 2, p. 102.)

§ 5. TEINDS. —HISTORY

them by queen Mary, the act 1567, c. 10, was passed, whereby it was ordained, "that the hail third of the hail benefices within this realm shall now instantly, and in all times to come, first be paid to the ministers of the evangile and their successors." This applied to church livings of every description, mensal kirks, common kirks, patronages, and vicarages.

A third provided to the clergy.

Assumption of thirds.

"FOR better payment of the thirds of benefices, there were particular places designed for payment of the third, which was called the *assumption of the thirds;* and after this assumption, the prelates and other beneficed persons had no power to set tacks, nor give pensions of that which was assigned for payment of the thirds."[a]

No tacks thereafter.

Common kirks made parsonages.

NOT many years after, a very material alteration took place with regard to common kirks, or those belonging to the chapters or inferior dignitaries. The act 1594, c. 199, entitled, for provision of common kirks, "declares all common kirks to be of the same nature of other parsonages and vicarages, and ordains the same common kirks to be conferred by presentation of the lawful patron, and sufficient collation to ministers serving thereat, seeing they are benefices of cure." While prelacy obtained, many of these common kirks belonged to one person, as the dean, archdean, &c. who served the cure by his vicar or curate, in such as he himself could not attend, he however remaining the *titular*, or entitled to draw the teinds. By this act, every one of the incumbents had a right to the teinds of their respective parishes, and at the same time, all of those parishes were declared to be patronate.[b]

Their state during prelacy.

Incumbent gets right to draw the teinds.

[a] Sir T. Hope's Min. Pr. t. 2, p. 102.

[b] The bishops *mensal*, *patrimonial*, or *proper* churches, were not *patronate*. As the bishop himself was the parson or proper pastor, so a presentation in favour of himself would have been unnecessary and improper. When the bishop appointed another in

§ 5. TEINDS.

IN 1606, the estate of bishops was restored. Although it was meant to "repone, restore, and reintegrate the said estate of bishops to their ancient and accustomed honour, dignities, prerogatives, privileges, livings, lands, kirks, teinds, rents, thirds, and estate, as the same was in the reformed kirk, maist ample and free at any time before the act of annexation aforesaid;" yet, notwithstanding those terms so very comprehensive, the act[a] was not understood to restore chapters, or the inferior dignitaries of the church, or to restore their benefices to the same footing in which they had originally stood.[b]

Bishops restored.

Chapters not restored.

in his stead to serve the cure, this was not done by *presentation* but *collation*, the bishop conferring or bestowing the living upon the incumbent, with such appointment out of the teinds as he chose to give him. Neither were the bishoprics themselves properly *patronate*; the bishop not having been presented, but elected, by the chapter, though the chapter were no doubt bound to chuse the person named by the king. Neither were *common* kirks *patronate*; to which the "chapter did not present as patron, but did nominate and collate." (Mackenzie's Observations, p. 284.)

It is certain, however, that many of the *common* churches were *patronate*, the patronage or right of presentation belonging to the king, to the pope (in times of popery), to the bishops or to laics. Those livings, whether of this description, or proper parsonages, whereof the patronage belonged to the bishops, were called the bishops *patronate* churches, (he having as to them merely the *jus presentandi*), in opposition to his *mensal* and *patrimonial* churches, whereof the benefice belonged to him *pleno jure*.

[a] 1606, c. 2.

[b] The act, indeed, rescinds all acts that had the effect to dismember particular kirks, or common kirks of the said bishoprics, from the samen; but the meaning of this was no other than again to annex to the bishopric what had been originally within the diocese, i. e. to subject those parishes to the ecclesiastical discipline of the bishop. And, accordingly, from that time forward, the bishops had their chapters, but this was only nominally, i. e. the parsons or ministers of certain parishes were called the dean, archdean, &c. assisted the bishop in all matters of discipline, and concurred with him in such acts respecting his own benefice, as could not be done effectually without the consent of a chapter. But this had no effect upon the benefices of the chapter or inferior dignitaries. It did not, for example, restore the dean to all the churches which formerly belonged to the deanery. It did not entitle

§ 5. TEINDS —HISTORY.

IT was at the distance of eleven years after, viz. by the act 1617, c. 2, that chapters or inferior dignitaries of the church were restored to their former rights and privileges. It was, however, with the exception of such teinds and patronages as had been lawfully granted by the king. Such, therefore, as had been thus granted, remained parsonages in virtue of the act 1594, and of laic patronage, in virtue of the king's grant, and of this exception.

Chapters restored.

Important alteration in the condition of tithes.

UPON this footing stood matters till the reign of Charles I, to whom we are indebted for a very important alteration in the condition of this species of property, which indeed principally distinguishes the Scottish teind from the English and Irish tithe, freeing it from those inconveniencies which rendered it formerly a fruitful source of disquietude and oppression.

Old mode of drawing, *ipsa corpora*.

HITHERTO the church beneficiaries, and other titulars, had been in the practice of making their right to the teinds effectual, by drawing the teind, or, in other words, by separating the tenth of the produce, after the corn was reaped, and by carrying it off the ground. This drawing of the teinds was attended with grievous hardships to the proprietor of the ground and his tenants; for every possessor of land who carried off any part of his corn from the field, till the titular had drawn his teind, was, from the first establishment of the church's right, subjected to severe penalties; and the titular, sometimes from indolence, but most frequently with a view of compelling the proprietor, at a high price, to purchase the leading of his teinds, delayed the drawing thereof till great part of the crop was rotten.[a]

Grievous.

entitle him to draw the teinds of those parishes; serving the cure by a stipendiary, under the name either of vicar or of curate. The parishes remained as under the act 1594. They still remained parsonages and vicarages, each incumbent having right to the teinds of the parish where he served the cure.

[a] Ersk. B. ii, t. 10, § 24.

And divers statutes had been passed,[b] without affording an adequate remedy to the evil. § 5. TEINDS --HISTORY.

CHARLES I executed a general revocation, and thereafter reductions, of all impropriations that had been granted by his father. To avoid the issue of a trial, the defenders agreed to submit the matter to the king himself, who pronounced four several decrees arbitral, respectively applicable to the several cases of the submitting parties. The first submission was "be the lords of erections, titulars, tacksmen, &c. gentrie, heritors of lands, to his majesty, anent their superiorities and teinds," &c. The second was "be the bishops and clergie of Scotland, to his majesty, anent the rights of teinds." The third was "be the burrowes, to his majesty, anent their teinds." The fourth was "be certain tacksmen, and others having right to teinds," &c. Upon each of which submissions, his majesty pronounced a separate decree arbitral.[c] Charles I revocation. Submission.

THE first and fourth submissions were signed, on the one part by the lords of erection, and the tacksmen claiming under them; and, on the other, by the landholders, who wanted either to purchase their own teinds, or to have them valued;[d] submitting "all and sundry teinds that they First submission.

[b] 1606, c. 8; 1612, c. 5; 1617, c. 9.

[c] See the small acts, V. ii, p. 87.

In a conference between the king and the titulars upon the subject of this suit, his majesty insisted, 1st That all proprietors should be relieved from the hardship of having their teinds drawn by the titulars. 2d, That all the superiorities of erection, (i. e. of lands holden of the titulars, as coming in place of the monasteries,) should be declared to be in the crown, on a reasonable composition to be paid to the titulars for passing from their right. 3d, That a small interest should be reserved to the crown out of all erected teinds. The submission took place on the basis of these demands.

[d] These submissions contained procuratories of resignation by the titulars, for surrendering their right of superiority to the king *ad remanentiam*, (on which account they were called also the surrenders of teinds); referring

§ 3. TEINDS —HISTORY.

or any of them have of other men's lands, by whatsoever right or title they possess or occupy the same; submitting likewise to his majesty, how they may be denuded thereof in his majesty's favour, *omni habili modo quo de jure;* and do, in like manner, submit to his majesty to appoint the quantity thereof, and what price shall be given thereof for the same, and what securities shall be made thereanent, they being always freed and relieved of the burden of ministers *pro rata*."

Terms of first submission.

Second submission. By whom. Its terms.

THE second submission, viz. that signed by the bishops and clergy, did not include the teinds which they drew themselves, but those only which they had let in tack to the proprietors.

Third submission.

THE third, viz. that by the royal boroughs, was for all the right they could claim to the teinds which had been granted for the sustentation of ministers, colleges, schools, or hospitals, within their respective boroughs.[e]

Valuation.

THE most important article in these decrees arbitral is that which directs the valuation of the teinds at a certain

referring to his majesty what consideration should be given to them for the feu-duties, or other constant rent of these superiorities.

[e] "The king, by the decrees arbitral, declared his own right to the superiorities of erection, which had been resigned to him by the submission, reserving to the titulars the feu-duties thereof, until payment by himself to them of one thousand merks Scots for every chalder of feu-victual, ratified 1633, c. 14; which right of redeeming the feu-duties was renounced by the crown, 1707, c. 11. If the church vassal should consent to hold his lands of the titular, he cannot thereafter recur to the crown, as his immediate superior.

"His majesty referred what interest the crown ought to have, in the teinds of erected benefices, to the commissioners, who determined an annuity to be paid out of them to the crown, of about six per cent. ratified 1633, c. 15. This right not having been annexed, was conveyed to one Livingston in security of a debt; but, in 1674, the exercise of it was suspended by the crown; since which time it has lain dormant. St. 2, 8, 13."

yearly rate, after which the landholder is entitled to the whole crop, upon payment of that yearly duty to the titular. § 5. TEINDS —HISTORY.

THE rules which the commissioners appointed for that purpose are directed to observe in the valuation, are different according to the different condition of the teinds. His majesty "finds and declares, that the rate and quantity of all teinds of the kingdom is and shall be the fifth part of the constant rent which each land payeth in stock and teind, where the same are valued jointly. And where the teinds are valued apart and severally, findeth that the rate and quantity thereof is and shall be such as the same shall be valued and esteemed to by the said commissioners, or sub-commissioners, deducing always the fifth part thereof, which we, out of our fatherly and royal care for the well of our said kingdom, ordain to be deduced off the said teinds, severally valued as said is, for the ease and comfort of our subjects." Rules various in the different cases.

THIS regulated the valuation and sale of teinds in every different predicament in which they could stand, 1mo, If they are let to the landholder for a certain duty, whether in money or in kind, such teinds are possessed by the same person who possesses the stock. The teinds, in this case, not being separated from the stock, cannot be separately valued. In the decree-arbitral, such teinds are said to be valued with the stock. And the rule laid down is, instead of the tenth of the increase, to take one-fifth of the rent, payable for both stock and teind. 1st CASE.

2dly, IF the teinds be yearly drawn by the titular himself, and thus actually separated from the stock, it is easy to value them separately. In the decrees-arbitral such teinds are said to be separately valued. From the average value, however, of the teinds, which appear to have been annually drawn, there falls in this case to be deducted one-fifth, which is called the king's ease; so that under the decree-arbitral in valuing such teinds, it is taken at four-fifths of its annual 2d CASE. King's case.

§ 5. TEINDS —HISTORY. amount.[a] The teind thus struck seems to have been considered as equal to a fifth of the rent for stock and teind, as in the first case.[b]

3d case. 3dly, IF the teinds of certain lands have been drawn *ipsa corpora* by the titular, and mixed so with the teinds of other lands as not to admit a proof of the real quantity or annual value, the rule for ascertaining the value of these lands, in a process of valuation at the instance of the proprietors of the land is, that the lands be valued at the same rate as where a joint duty is paid for stock and teind, that is, that they be valued at the fourth part of the rent paid to the pursuer for the stock; this amounting to the same with the fifth part of the rent, where that rent is paid both for stock and teinds.[c]

—SALE OF TEINDS. THE first decree arbitral, viz. that applicable to the submission of the titulars, contains also the following provision, touching the sale of teinds: "And as to the price of teinds, we find the price of each hundred merk of teinds, consisting in money, to be valued and estimate to nine years purchase. And where the said teinds consist in victual or other bodies of goods, because there is great difference of the quality of victual, and of other bodies of teinds, both in species and kinds, and in worth and goodness, according to the diverse places in the country where the same grows and are bred, therefore we decern and ordain trial to be taken by our commissioners appointed, or to be appointed by us, of the price, worth, and estimation of each chalder of victual, and of all other bodies of goods, wherein the teind consisteth in kinds and goodness, as the same commonly ruleth in each part of the country.

[a] Ersk. B. ii, t. 10. Jan. 28, 1708, Poul. Feb. 7, 1711, Hume.

[b] The teind and a third, as it was called, was considered as a fair rent; that is, suppose the produce 100 bolls, after deducting 10 as the teind, the remaining 90, divided into three parts, 30 for seed, 30 for the tenant, and to the landlord 30, which, with the teind, makes 40, being the rent the tenant actually pays. From the teind, viz. 10 bolls, deduct the king's ease, a fifth, viz. two bolls, there will remain eight, being just a fifth of the rent.

[c] 22d Feb. 1744, Sir Robert Gordon against Dunbar of Newton. Lord Kaimes, No. 54. Dict. V. iv, p. 355.

§ 5. TEINDS. —HISTORY —SALE.

BUT teinds may stand in two different predicaments. Either the seller possesses them under an heritable right or not. And as that is or is not the case, the price paid for them naturally falls to be different.

If the seller had an heritable right.

TOUCHING the first case, the decree-arbitral was as follows: "We find the just and reasonable price thereof to be estimate to nine years purchase; and we declare this nine years purchase to be the just price of the heritable right of teinds, where the seller hath the heritable right thereof." Touching the other case, where the right was not heritable, but consisted in tacks, or such other temporary rights, his majesty declared "the price in this case to be ruled proportionably, according to the number of years in the tacks to run, and quality of the rights." And it referred "to the commissioners appointed, or to be appointed, to determine and set down the proportion of the price of teinds, according to the years of the tack to run, and quality of the rights standing in the persons of the said heritors, and according to the quality of the rights standing in the persons of those who had title to the said teinds, after the outrunning of the heritors tacks and rights of the same."[a]

If he had not.

[a] Agreeably to the condition of the submission, it was "declared, that the said heritors who shall buy their own teinds, shall be obliged to pay for no more of the same, but such as shall rest by and attour the minister's stipend, and other pious uses which, by the tenor of the general commission, are ordained to be first provided. And also that those who shall not buy their own teinds, and are to be subject in payment of the rate of their teinds above specified, shall be no further obliged in payment thereof to the said titulars, but what with deduction of such part and portion thereof as is resting by and attour the said ministers stipends and pious uses foresaid."

The stat. 1633, c. 17 and 19, deprived landholders of the power of compelling a sale, unless it was prosecuted within two years after obtaining a valuation. But this condition is not understood to be in force, not being repeated in subsequent statutes. Irving, May 14, 1794. (Fac. Coll.)

§ 5. TEINDS —HISTORY —SALE.

SIMILAR clauses were inserted in the decreé-arbitral, relative to the fourth submission; but not in the second or third submissions; for the teinds belonging to churchmen, and those granted to certain boroughs for public and pious uses, were destined to continue as a perpetual fund for the maintenance of the clergy, or for those uses to which they were appropriated, which are inconsistent with their being sold. It only directed how these teinds should be valued, and secured the proprietors of the land in the full enjoyment thereof, on payment of the yearly duty.[a] With suitable powers for carrying these decrees-arbitral into effect, a parliamentary commission was appointed,[b] and particularly authorized "to prosecute and follow furth the valuation of whatsoever teinds, parsonage or vicarage, within the kingdom, which are as yet unvalued. And also to receive the reports from the sub-commissioners, appointed within ilk presbytery, of the valuation of whatsoever teinds, led and deduced before them, according to the tenor of the sub-commissions direct to that effect. And to allow or disallow the same, according as the same shall be found agreeable or disagreeable from the tenor of their sub-commission. And

Fourth submission, as to sale of teinds.

Commissioners appointed.

[a] The only teinds, therefore, belonging to churchmen, which fell under the submission, and which the king had power of valuing, were those which were in tack, or other use of payment, and of which the beneficed persons were not then in possession, by rental bolls or drawn tithe. Accordingly his majesty confined the award, proceeding on the submission by the clergy, to the special teinds falling within the compass of it, the rate of which he declared to be the same as of those belonging to titulars. But by 1690, c. 30, and 1693, c. 23, the tithes belonging to ministers, and what formerly belonged to bishops, may be valued, though they are not saleable. Ersk. B. ii, Tit. 10, § 37.

[b] 1633, c. 19. It was granted to nine of the clergy, nine of the nobility, nine of the small barons, and nine of the burgesses; together with my lord chancellor, and eight officers of state . . . or any 15 of them, there being three of every estate, with three of his majesty's officers of state; of which number of 15 the lords chancellor, thesaurer, and privie seal, archbishop of St. Andrews or Glasgow, earl marshall, and earl of Wintown, or any of them, shall be one, to meet and convene at Holyrudehouse or Edinburgh, at such times and places as they shall think fit.

§ 5. TEINDS —HISTORY —SALE.

also with power to rectify whatsoever valuations, led or to be led, to the enorme prejudice of the titulars, and to the hurt and detriment of the kirk, and prejudice of the ministers maintenance and provisions, or of his majesty's annuity. And for the better expeding and advancing of the saids valuations, with power to appoint committees, or sub-committees of their own number, to receive the reports of the saids valuations made or to be made; and to receive, admit, and examine witnesses, and to take parties oaths, with their depositions, where the same is referred to oath; and to give such farther power to the saids committees or sub-committees of their own number, as they shall think fit for the good of the work, and speedy finishing of the same. And sicklike, with power to them, if need be, to appoint sub-commissioners, not being of their own number, within any parochin or presbytery of the country, for leading and deducing of the saids valuations, and to receive the reports thereof, allow or disallow of the same: And generally with power to them to set down whatsoever other order or course which shall be thought fit and expedient for dispatch of the saids valuations, rectifying thereof, or final closing of the same. And sicklike, with power to the saids commissioners, or any fifteen of them, as said is, there being three of ilk estate, with any one of the persons of the quorum above specified, after the closing and allowance of the valuations of ilk kirk, to appoint, modify, and set down a constant and local stipend and maintenance to ilk minister, to be paid out of the teinds of ilk parochin, according to the tenor of the acts above specified. Referring, like as his majesty refers, with consent of the saids estates, to the saids commissioners, the trial of the reasons and causes which may move the said commissioners to go beneath the quantity of eight chalder of victual, or of eight hundred merks of money proportionally, in manner contained in the said act. And sicklike, with power to the saids commissioners to divide ample and spa-

§ 5. TEINDS —SALE.

cious parochins, where the same shall be found necessary and expedient, or to unite divers kirks in whole or in part to others. And to ratify and allow, after trial and consideration, such union or dismembering of parochins, as hath been formerly made by virtue of the former commissions. And sicklike, with power to them to appoint and provide for such other pious uses in each parochin, as the estate thereof may bear."

Teind court.

THE court of session succeeded to the power of these commissioners. Queen Anne's act "anent plantation of kirks and valuation of teinds" having appointed the lords of council and session "to judge, cognosce, and determine in all affairs and causes whatsoever, which by the laws and acts of parliament of this kingdom were formerly referred to, and did pertain and belong to the jurisdiction and cognizance of the commissioners formerly appointed for that effect, as fully and freely in all respects as the said lords do or may do in other civil causes; and particularly, but prejudice to the generality foresaid, to determine in all valuations and sales of teinds, to grant augmentations of ministers stipends, prorogations of tacks of teinds, to disjoin too large parishes, to erect and build new churches, to annex and dismember churches as they shall think fit, conform to the rules laid down, and powers granted, by the 19th act of the parliament 1633, the 23d and 30th acts of the parliament 1690, and the 24th act of the parliament 1693, in so far as the same stand unrepealed."

SINCE this period, no further alteration has been made by statute on this branch of the law.

—DIVISION.

IN Scotland, profits made by personal industry, "as by trading, negociation, artifice, science," &c.,[a] were never

[a] Stair, B. ii, t. 8, § 5.

titheable. Our law always rejects personal teinds; with us they are only predial, that is, arise from the "fruits of ground or water."[a] Teinds are either parsonage (rectorial), which, as the greater, were drawn by the parson; or vicarage, (vicarial), which, as the smaller, were drawn by the vicar.[b] § 5. TEINDS —DIVISION Personal teinds rejected by the Scottish law.

PARSONAGE means the teind of corn, as of wheat, barley, oats, pease, called *decimæ rectoriæ gabales*.[c] Vicarages that of every thing else. —PARSONAGE.

CORN is titheable by the public law, independently of custom or prescription; and cannot therefore be discharged from this burden by disuse of payment for what period soever. The arrears, however, are *debita fructuum*, not *fundi*; creating no real burden or charge on the lands, nor affording any claim against singular successors, but against the guilty persons merely who have intromitted therewith, or against those who represent them.[d] Neither the arable Not dependent on custom. No immunity from disuse of payment.

[a] Lord Stair calls predial the *natural* fruits of ground or water; and to the *industrial* fruits of the ground only he gives the name of mixed. Mr. Erskine, however, observes, that the "tithe of animals, which answers to the description of *mixed* tithes given by these authors, (Stair and Mackenzie), is truly predial, as it is paid without deduction of any charges laid out in rearing it, and as it belongs to the church of the parish where the pasture lands lie, and not of that in which the proprietor resides," (B. ii, t. 10, § 10). Mr. Erskine, therefore, defines predial as "arising from the produce of lands, whether merely natural, or in part industrial." (Ibid).

[b] If the person serving the cure of a parish of which he was not parson, was appointed by the lay patron, thus holding his place for life, and drawing the small tithes by the same right that the parson drew the greater, he was called vicar. If, on the other hand, the bishop or other clergyman, in right of the benefice, appointed him to serve, during his pleasure, for some stipulated stipend, he was called a curate. (Lord Bankton, B. ii, t. 8, § 140.)

[c] Ersk. B. ii, t. 10, § 13.

[d] Ersk. B. ii, t. 10, § 42. The lords found, that bygone teinds must be accounted for at the highest fiars, and not at the commissary or second fiars. Edgar, 28th February 1724, Kirk Session of North Leith against Law. "In a process, at the titular's instance, for the teinds of bygone years, who claimed a fifth part of the

§ 5. TEINDS —PARSONAGE —EXEMPTIONS.

glebe, nor the *scums* or proportion of grass, (substituted instead thereof where there is no arable ground),[a] nor lands held *cum decimis inclusis*, are titheable.

Lands *cum decimis inclusis.*

LANDS held *cum decimis inclusis*, or (as the English lawyers express the same thing) *with unity of possession*,[b] are such as never were tithed; belonging originally to churchmen who, when they possessed the lands themselves, gathered the whole fruits indiscriminately; and, when they conveyed the property to others, included, in one charter, stock as well as teind, which thus never were separated.[c] But if the charter specified a separate *reddendo* for the teinds, the lands have not the same exemption. Such teinds are not considered as *decimæ inclusæ*, although they should be so described in the charter.[d]

the rent which the lands were worth for the respective years, and insisted, that, without regard to the rent payable by the tenant to the heritor, who, on account of grassums or extraordinary services, might accept of less than the lands were worth, he might be allowed a proof of the true value of the lands by their sowing and holding, the lords found, that the fifth part of the rental must be the rule. Kilkerran, 22d June 1738, Sinclair against Groat." *V.* Teinds, No. 2.

A titular having brought an action in order to have his right to his teinds ascertained, and having claimed arrears for forty years back, it was decided in the court of session, that a colourable title of possession, such as a series of discharges from the minister, in full of the stipend or teind, was a sufficient defence against payment of the arrears, though, in terms of the declarator, decree was pronounced for the payment of the teinds claimed in future. 25th Feb. 1795, Sir John Scott against heritors of Ancrum. Fac. Coll.

[a] 1578, c. 62; and 1621, c. 10.

[b] Woodeson's Viner. Lectures, V. ii, p. 103; Black. V. ii, p. 31.

[c] Ersk. B. ii, t. 10, § 16.

[d] "In a process of augmentation, it was urged, that Menzies of Pitfoddles ought to bear his proportion, because his teinds, though designed in his charter *decimæ inclusæ*, yet were separate from the stock, as the charter bore a separate *reddendo*, payable for these teinds, viz. eight bolls of victual, and *de facto* they bore a part of the minister's old stipend. The lords found they were not the true kind of *decimæ inclusæ*, and therefore found the heritor liable." Fountainhall. 14th July 1678.

Miss Scott was proprietrix of certain lands which had belonged to the abbey

LANDS may be held *cum decimis inclusis*, as to the parsonage teinds, and yet be liable in payment of the vicarage teinds. The latter may not have belonged to the churchman who feued out the lands, but may have been drawn by the vicar. § 5 TEINDS —PARSONAGE. *Decimæ inclusæ.*

LANDS which formerly belonged to the privileged orders, as the knights templars, cistertians, hospitallers, are titheable.[a] Temple lands.

ALL other teinds, besides those of corn, are called with us vicarage.[b] Vicarage usually consists of the teinds of —VICARAGE.

abbey of Lindores. In all the charters of these lands the teinds were comprehended, and uniformly termed *decimæ garbales inclusæ*. Different duties, however, for stock and teind, were contained in those charters, and paid by the vassals. In a process of augmentation, Miss Scott claimed an immunity from payment of stipend for these lands, as being held by her *cum decimis inclusis*. "But the lords, considering that lands granted *cum decimis inclusis* are such as had never been subject to the exaction of teind, or in which there had never existed a separation of stock and teind, whereas here there was an actual separation, and a distinct payment of duties, repelled the claim of immunity." 17th July 1782, Heritors of Collessie against Miss Scott; and Nov. 21, 1798, Colville.

[a] June 15, 1737, Minister of Barry, Dict. V. ii, p. 438.

"In a process of augmentation, a defence was made by one of the heritors, that his lands were teind free, in respect they did antiently belong to the abbay of Balmerino, a convent of the Cistertian order; and, in the year 1539, were feued out to the defender's authors by the abbot and convent, *cum decimis garbalibus earundem*; that the Cisterians were one of the four privileged orders by the law of Scotland, whose lands were teindfree, and that the defender, as deriving right from them, while this privilege subsisted, was intitled to the same privilege; and for this Lord Stair was appealed to, lib. 4, tit. 24, § 9, and sir George Mackenzie, B. 2, tit. 10, § 7. Answered, 1mo, The Cistertians had no privilege as to their teinds, except as to lands acquired before 1120, the date of pope Innocent the third's canon, which excludes the privilege of the four orders as to *acquirendo*, and, though this will exclude the privilege entirely with regard to Scotland, where the Cistertian order had no property for a century thereafter, it only shows the inaccuracy of our writers, who, in laying down the doctrine in general, have not adverted, that it would not apply to Scotland. The lords repelled the defence founded on the charter produced for the defender."

[b] Bank B. ii, t. 3, § 140.

§ 5. TEINDS —VICARAGE.

animals, as calves, lambs, or their produce, as wool, milk, cheese, eggs; which, however, without customary payment, are no more titheable than flax, plants, roots, or other product of gardens; all vicarage depending wholly upon usage.[a]

[a] March 9, 1796, Rev. John Hunter against duke of Roxburgh.

"Part of the stipend of the parish of Oxnam arose from certain vicarage tithes due out of the lands of Plenderleath and Hyndhopes, belonging to the duke of Roxburgh. These tithes, since 1686, had been uniformly let, by the incumbent for the time, to his grace's predecessors, for 106l. 13s. 4d. Scots of yearly rent, and a grassum of 1000l. Scots at the commencement of each lease.

The leases were always made to endure for the lifetime of the granter, and three years longer; and the subject let was described to be, 'All and sundry the vicarage tithes, fruits, emoluments, and duties, of all and haill the said duke of Roxburgh his lands and barony of Plenderleath,' &c.

The minister, on the expiration of the lease current at his admission, brought an action of declarator against the duke of Roxburgh, in which he contended, that he was entitled to the *ipsa corpora* of the vicarage teinds of all the articles raised upon the lands from which vicarage is payable. At all events, he must be entitled to the tithe of lambs, stirks, and wool, which are included under the most limited species of them. Ersk. B. ii, t. 10, § 13; Dict. V. ii, p. 438; 24th July 1678, Grant against Mackintosh. But the late lord-justice-clerk MacQueen denied that there was any foundation in the law of Scotland for the supposed distinction between these latter and other vicarage teinds. He knew of no rule but usage to fix what subjects were liable to vicarage teind. Where money was paid for any length of time, the legal presumption was, that such money rent was the value of the teind.

The court of session, 20th Nov. 1795, found 'That the pursuer, as minister of the parish of Oxnam, is titular of the vicarage teinds in question; but in respect he has not condescended upon, or offered to prove, what vicarage teinds were in use to be drawn by his predecessors, found, That, in *hoc statu*, his demand falls to be restricted to the sum of 106l. 13s. 4d. Scots of tack-duty yearly, and 1000l. Scots of grassum, in use to be paid at the admission of each incumbent.'

The duke of Roxburgh, in a reclaiming petition, stated, That, by inveterate practice, he and his predecessors, on paying the 1000l. Scots of grassum, were entitled to a lease of the teinds *during the life of the incumbent, and three years longer;* but that, by the present judgment, he was made liable for the grassum at the *admission* of each incumbent. He therefore prayed, that the interlocutor might be so far altered, or explained, as to find that he was entitled to a lease on the usual terms.

The court pronounced the following interlocutor: 'Find, That, upon payment

So much so, indeed, that though it is not very easy to draw the line between one sort of hay and another, yet it has been decided, that the right of the minister to tithe bog or natural hay, will not entitle him to tithe hay from sown grass, although bog-hay should no longer grow in the parish.[a] § 5. TEINDS—VICARAGE. Natural hay.

If there happen to be no fruits to tithe, the titular has no claim against the proprietor, who is entitled to turn arable ground into grass, substitute sown grass for natural hay, and generally to manage his ground in the manner most agreeable or beneficial to himself.[b] But the titular may bring a process of valuation of the teinds, and thus ascertain his right to the fifth part of the rent which the lands might pay in name of teind. If no fruits. Proprietors power of management.

In security of the teinds, the titular has a right of hypothec over the fruits, but not on the horses, oxen, ploughs, and implements of husbandry bought on the ground, or on the other *invecta et illata*. If one buy, though at a public sale, the crop on the ground, either before it be reaped, or while it lies in the fields, he is liable in payment of the teind. Accordingly, the buyer of titheable fish, new caught, was condemned to pay the teind.[c] But where corns are bought at a public market, it has been sustained as a good plea in favour of the buyer, that he did not know that the teind had not been already drawn.[d] Hypothec. Over what?

Teinds, properly speaking, are not a burden upon landholders. For as the lands belonged to the proprietors, so the teinds belonged to the church. The rights of the two Right of teinds how constituted.

payment of the fine or grassum of 1000l. Scots, the petitioner and his successors are entitled to a lease of the vicarage tithes in question during the life of the incumbent at the time, and for three years thereafter: and, with this explanation, adhere to the interlocutor reclaimed against.'

[a] June 15, 1796, Brown against Hunter. (Fac. Coll.; and Sup. to Dict. t. 1, Teind.)

[b] Ersk. B. ii, tit. 10, § 43.

[c] Ersk. B. ii, t. 10, § 44; Stair June 24, 1662, Vernor; and Dec. 13, 1664, Bish. of Isles.

[d] Ersk. ibid. 20th Dec. 1664, Reid. Stair.

§ 5. TEINDS. If by seisin. Seisin when necessary.

were constituted differently. The lands passed by seisin; but the right of teinds vested in churchmen as a necessary consequence of their several ecclesiastical offices, without the intervention of any form of law. Such is the case with ministers since the Reformation: and a right to teinds at this day, even in favour of laymen, when it is conferred by statute, as on patrons by act 1690, c. 23, is complete without seisin.[a]

AFTER the Reformation, indeed, when entire church benefices were erected into temporal lordships, such impropriations, teind as well as stock, became proper feudal subjects, and the charters of erection feudal grants. The titles of the grantees were completed by sasine, and such teinds thenceforward were conveyable only in a regular feudal manner by infeftment.[b]

Astriction of.

THE astriction of lands which are held *cum decimis inclusis*, implies a thirlage of the teind as well as the stock, the landholder being proprietor of both. But the astriction by a proprietor, while as yet he has no right to the teinds, cannot extend to the teinds, though he should afterwards acquire right thereto; because he cannot be presumed in making the acquisition to mean to render the burden heavier against himself.

—VALUATION.

HAVING considered the history and general nature of teinds, it may be now proper to attend to the practical rules which have been established for the following out those provisions, as to their valuation and sale.

Pursuer who? Landholder? Minister?

THE landholder is the ordinary pursuer of the valuation; but it may be competently sued for by the parochial minister, in order to the fixing of his stipend; and the decree of valuation obtained by him is the rule for establishing the valuation of the teinds therein mentioned between the titu-

[a] Ersk. B. ii, t. 10, § 40. [b] Ibid.

lar and the heritors.[a] For it was the design of the legislature to force valuations by all reasonable means; and to this end, this burden was laid upon ministers, under the certification that they should not have otherwise access to a modification; and the act 30 parl. 1641, shews this to have been the case, in which act the commissioners are empowered to modify after closing the valuation, "or at least exact diligence of the minister to that effect."[b] For the same reason, the landholder, when he brings the process of valuation, is allowed the privilege of drawing his own teinds, unless he suffer protestation to be extracted by the titular against him for not insisting in the action.[c] It may also be sued out by the titular, or by his majesty's advocate on account of his majesty's interest; that is, in short, by any person interested in its objects, which were, 1st, that the proprietors of lands should have the leading of their own teinds, and should not be farther liable to the titular, or those having interest beyond the just value thereof as the same should be ascertained by the decree of valuation; 2dly, that a fixed and constant stipend should be modified and localled to the minister out of these teinds, after the valuations were completed, to fix the extent of the teinds; and 3dly, in order to ascertain the extent of the king's annuity.

§ 5. TEINDS —VALUATION.

Objects of a valuation.

IN actions of valuations, it is necessary to call the titular or his tacksman; the patron; and the minister of the parish; or, in case of a vacancy, the moderator of the presbytery, they having an interest that the teinds be not valued too low; the titular as the person to whom the valued teind is payable; the officers of state as representing his majesty;[d] and

Who called.

[a] C. Home and Remark. Decis. 12th Dec. 1744, duke of Roxburgh against Scott, Supp. to the Dict. *voce* Teinds.

[b] Lord Elchies *apud* Kames, ibid.

[c] 1693, c. 23.

[d] It was decided that it was no sufficient objection to the approbation of a valuation of the sub-commissioners, that the crown being titular, the crown officers had not been called as defenders in the process before the sub-commissioners. 20th July 1763. Thomson of Ingliston against Officers of state and earl of Galloway.

§ 5. TEINDS VALUATION.

the minister as having no other fund for future augmentations.[a]

BUT, in actions for approving of the reports of sub-commissioners, it is presumed that all parties having interest were in the field, those reports in general proceeding on a proof, and seldom stating the procedure particularly, but merely the result.[b]

[a] A process was brought for approbation of a report of the sub-commissioners, valuing the teinds of Nether Arrochar. It bore, that the heritor, patron, and minister, had, in presence of the sub-commissioners, consented that the old rental of the teinds should be held as their value in all time coming. The minister, pursuing an augmentation, objected, that the consent of the incumbent at the time could not bind his successors. The court approved of the report. 4 Feb 1795, Fergusson against Gillespie, Dict. *voce* Teinds.

Concerning the teinds of Upper Arrochar, the report bore, that the heritor and patron had given a similar consent, but did not mention that the minister had concurred. The court refused to approve of the latter report. Ibid.

Both decisions were affirmed on appeal.

Arrochar appears to have been a parsonage, that is, the minister had right to the teinds. But where the minister is stipendiary merely, it has been decided by the Court of Session, that it is no objection to a report of the sub-commissioners that the minister was not present at the valuation. See Major Macneil of Ardnacross against the ministers of Campbelton. Appendix III.

[b] 7th March 1798, Sir William Erskine against the reverend David Balfour. An action was brought by some proprietors of the parishes of Torryburn and Crombie, for approving of the report of the sub-commissioners, valuing their teinds in 1629. The valuation appeared to have taken place at the instance of the procurator fiscal, who was present. The report proceeded on a regular proof. In several passages it was mentioned, that the titular was present, and that the heritors were either present or cited. But this did not appear with regard to the minister; and the omission being objected to, the court repelled the objection.

It did not enter into view, in deciding this case, that the action was at the instance of the procurator fiscal. It was not his duty and business to attend to the interest of the several ministers in the presbytery. The procurator fiscal was, in the same way as the procurator fiscals in the other inferior courts in the kingdom, as the sheriff court, &c. to attend to the interests of the public or of the crown. Besides the interest of the crown, in many parishes, as patron and titular, the crown had an interest in every one valuation, on account of the king's annuity; so that it was impossible the proceedings could go on with effect, without having a proper officer appointed to attend to the crown's interest. This officer was the procurator fiscal, who appears as the pursuer of many

§ 5. TEINDS —VALUATION.

IT is sufficient, in suing for a valuation, to call the titular or patron, or those having a patrimonial interest in the teinds, and the minister of the parish. The contingent interest of the other proprietors, that the valuation should be fairly conducted, neither makes it necessary to call them, nor entitles them to sist themselves as parties; nor are they entitled to object to the valuation, on the footing of the minister or of the titular not having been called, nor to bring a reduction thereof on such grounds.[a]

Who may object to a valuation.

BUT objections to a report may be competently stated by the common agent in a locality, as acting for the titular and patron, as well as for the heritors.[b]

What is valued?

IN fixing the constant yearly rent in a valuation of teinds, first, no rent is taken into account which is not paid for the *titheable* fruits of the land. Such part of the rent, therefore, or yearly revenue, as arises from an orchard, the fruits whereof make no part either of parsonage or vicarage;[c] or from stone quarries, clay for making brick or earthen ware,[d] or

many valuations, and is in some of the reports designed procurator of the presbytery.

So also the case, 3d June 1801, Smith against Macqueen.

[a] June 1799, John Francis Erskine of Marr against Sir Ralph Abercrombie.

[b] 30th Nov. 1803, Hamilton against Colebrooke. In this case, a report of sub-commissioners in 1631, and approved of in 1770, was opposed by the common agent in the locality of Drummelzier on the head of dereliction. The title of the common agent to maintain this objection was questioned, on the authority of the case of Erskine of Marr, that as none of the heritors individually had either title or interest to object to a decree of approbation, so the common agent could not state, in his own name, a plea which would not be competent to any of his constituents. The court held the answer to be sufficient, that the titular was interested and entitled to object, and that the common agent who acted for all concerned, the titular and patron as well as heritors, was entitled to plead in their right, and therefore to object.

[c] 2d March 1757, Hay of Lawfield against the duke of Roxburgh. Fac. Coll.

[d] Ersk. B. ii, tit. 10, § 32.

§ 5. TEINDS —VALUATION.

from a moss, all which are *partes fundi*, rather than fruits;[a] or from supernumerary houses built for the purpose of any manufacture unconnected with the farm; or "from houses over and above what are necessary for the farm;"[b] or from mills;[c]

[a] 11th Dec. 1734, heritors of Calder, Dict. Vol. ii, *voce* Teinds.—— 22d July 1772, Fullerton against the New College of Aberdeen. In this case, the court sustained the following deductions: "viz. of the rent of the miln-eye of the over miln of Kinnaber; the waulk miln, snuff mill, and ferry boats, on the north water of Esk, and houses, yard, and smiddy, possessed by David Scott, smith; and also of services and kains paid in kind; and likewise the butter, in respect the quantity is so small, being half a stone."

[b] Ersk. B. ii, tit. 10, § 32. In like manner, in England, "houses for habitation, and the rents reserved on them, or on land, are not titheable. But houses in London are titheable by virtue of an arbitration or decree confirmed by parliament. In other places also, an annual payment may be due to the incumbent in respect of houses, if it hath the support of custom." (Woodeson Vin. Lect. V. ii, p. 92.)

However, it has been decided in the court of session, that no deduction is to be given for *extra* houses possessed by the farmer. Earl of Selkirk against the Officers of State, 8 Dec. 1802. *Pleaded*, "if the tenant, desirous of better accommodation than usual, agrees with the landlord to give a house beyond the style of what the farm usually has, not to allow a proportional deduction for the additional rent, would be making a dwelling house a teindable subject." *Answered*, "if the houses are necessary for the accommodation of the tenant, no allowance can be given for them: on the other hand, if they be erected not for the purposes of agriculture, but to indulge the whim or vanity of the tenant, no deduction can be claimed; the titular's interest cannot be hurt by such unnecessary accommodations." The court refused to admit the deduction claimed on account of the *extra* houses. It may be doubted, however, whether the argument used for the titular be not fallacious. The titular's interest, it was said, ought not to be hurt by such unnecessary accommodations. But this is begging the question. If the tenant pays additional rent for the gratification of his vanity, the titular does not suffer by allowing a deduction of such additional rent. If no such deduction be allowed, the titular is tithing a subject not titheable.

[c] In a valuation, deduction is not allowed of additional rent paid on account of exemption from multures, 8 Feb. 1786, Earl of Kintore against the united college of St. Andrews. In a process of valuation of teinds, brought by the earl of Kintore against the college of St. Andrews, he claimed a deduction from his rental of a part of the rent, as being paid by the tanants in consideration of his relieving them from a multure of the sixteenth peck, the knaveship only, which was the thirty-third peck, being exacted for the labour of grinding,

or from the proprietor undertaking any burden which the law imposes on the tenant, as for example, of keeping the farm houses in repair ;[a] or from that increase of the rental occasioned by the tenants relieving the landlord of the payment of the cess, that being a valuable and uncertain burden,[b] enters not into the computation.

UNDER the name of kains, or flying customs, a reasonable deduction is allowed. But if what truly ought to make part of the titheable fund be disguised under any other name than that of rent, the fraud will be corrected.[c]

Uncommon expenditure.

SECONDLY, If the landlord has raised the rent by any uncommon expenditure, as by draining a lake, he is allowed a reasonable abatement,[d] though the drained grounds should appear to be truly worth the rent that the proprietor had put on them in his lease to the tenant.[e] It has been found that lands gained from the sea are not titheable.[f] And generally, where the proprietor had improved or raised his rent, such additional rent, if it had commenced within seven years before bringing the action of valuation, was not rec-

Drained lands.

Recovered from the sea.

Rent raised within 7 years.

ing, so that the additional land rent was merely a substitute for the mill rent. The court, after advising memorials, allowed the deduction. The judgment was brought under review by petition and answers. The court ordered a hearing in presence, and afterwards altered their former interlocutor, and repelled the claim of deduction. (Fac. Coll.)

[a] Ersk. B. ii, tit. 10, § 32.

[b] Ibid.

[c] Nay, the controverted prices of fowls, butter, tallow wedders, lambs, &c. where the landlord has reserved an option either to demand the substance or the conversion, are considered not as kain, but rent, and therefore titheable. (Ersk. B. ii, tit. 10, § 32.)

[d] Kilkerran, No. 2, *voce* Teinds, 18th July 1739, heritors of Calder.

[e] Ersk. B. ii. tit. 9, § 32.

[f] 21st Feb. 1759, magistrates of Inverness against the heritors. Pleaded for the town, This improvement not only had been made and was kept up at great expence, but was in daily hazard of being totally undone by the sea breaking through the bank; and therefore the 183l. 12s. now paid to the town, could not be said to be a *constant* and *certain* rent which is requisite. (Fac. Col.)

§ 5. TEINDS VALUATION.

koned in the computation of rent by the older practice, probably from the uncertainty, whether the lands would continue able to bear that addition; but by the later decisions, such part of it is accounted rent, as the commissioners of tithes, from the circumstances of the case, judge equitable.[a].

Culture.

BUT the expence of culture, though heavier than ordinary, if it be annual, ought not to be deducted from the rent. No deduction is therefore to be allowed on the account of manure, though the tenant should purchase it at a high price from the inhabitants of a neighbouring village; and far less on account of sea-weeds,[b] which generally are procured without much trouble or expence.

Peats.

HOWEVER, where the proprietor proved that he was obliged, without any price, to furnish his tenants with marle for the use of their lands, and that the increase of rent, on account of that stipulation, would be moderately estimated at 20 per cent, the court allowed the deduction to that extent.[c] But it has been decided that a proprietor is not entitled to a deduction from his rental on account of peats or turf for fuel allowed by him to his tenants;[d] nor on account of expence incurred in laying on lime.[e]

WHERE the lands are in the natural possession of the pro-

[a] 1st Feb. 1738, Ersk. B. ii. tit. 10, § 32.

[b] Ersk. Ibid.

[c] 23d Feb. 1785, Gordon *contra* Officers of State, Dict. Vol. iv, p. 355.

[d] 14th Dec. 1796.

[e] Earl of Selkirk against Officers of State, 8th Dec. 1802. Fac. Coll.

A deduction was claimed on account not only of building houses, but of improvements, by making fences and drains and laying on lime. The deduction was allowed for the improvements of fencing and draining, but rejected as to the buildings and liming. On advising a reclaiming petition, the court allowed 5 per cent. on the expences laid out on lime, shells, and marle, to be deducted from the rental in valuing the teinds. But this interlocutor being brought under review by the officers of state, was altered. The court returned to their original interlocutor, allowing no deduction but for fencing and draining.

prietor, the teind is "a fifth part of the rent which they are truly worth, and might have paid had they been rented to a tenant; and when they are actually let, it is a fifth of the rent which they now pay, and may pay in all time coming in consideration of the fruits."[a] § 5. TEINDS —VALUATION.

IF teinds be let to the landlord for a fixed number of years, and if at the expiration thereof the titular declare not his intention to resume possession of the lease, it is presumed to be renewed, or the possession continues by *tacit relocation*. The method by which the titular must express his intention of removing the lessee, is by an *inhibition of teinds*, a writ issuing either from the signet or the commissary court, at the suit of the person entitled to take possession of the teinds, and discharging all others from intermeddling therewith. The writ is executed edictally, and entitles the titular to an action either for declaring his right to a fifth of the rent, or for a warrant to draw the teinds themselves. —TACIT RELOCATION. Inhibition of teinds.

IF the lessee continue to possess after the inhibition, he is liable to account for the whole of the teinds drawn by him; whereas, if, without inhibition, the titular brings an action against him for payment of a sum as the yearly value of the teinds, it has been found that the citation does not interrupt the tacit relocation, and that the defender is liable for the full teinds only from the date of the final interlocutor.[b] Citation, its effects.

VI. WE have already seen the successive provisions made for the reformed clergy down to the appointment of the court of session as commissioners for plantation of kirks and valuation of teinds. This court has the power of *modifying* § 6. STIPEND.

[a] Ersk. B. ii, tit. 10, § 23.

[b] 14th Nov. 1765, earl of March against Leishmans. Fac. Coll, Sir John Scott against Mrs. Stewart, 25th Feb. 1795. Ibid.

§ 6. STIPEND—MODIFICATION.

and *localling* ministers stipends, that is, fixing the *quantum* of each stipend, and the proprietors by whom it is payable.

In ancient times.

By chapter 10th of the Scottish provincial councils,[a] the pension payable to the vicar or parish priest was to be no lower than ten merks.[b] In the arrangement of the stipends in the year 1582, 400 Scots[c] each was fixed as the yearly stipend in one hundred parishes; £200 ditto in another class of one thousand parishes; and £66 : 13 : 4 in the remaining one hundred parishes. In the year 1588, the first minister of Edinburgh's yearly salary was only £400 Scots; the second minister's, £333 : 6 : 8 Scots; the third minister's, £200 Scots; and the fourth minister's, only £40 Scots. By the commission 1616, it was declared that the stipend provided to any minister should not be under five chalders of victual, (that is, eighty bolls of grain), or 500 merks of money[d] or proportionally, part victual and part thereof in money, ac-

[a] Hailes' Annals, Vol. iii, Append. No. 2; and Wilkin's Concilia Britannica.

[b] This regulation, lord Hailes observes, seems to have been carried into effect. Ibid.

[c] £33 : 6 : 8 sterling.

[d] £27 : 15 : 6⅔ sterling. The rate at which victual is here valued is 100 merks Scots, or £5 : 11 : 1⅓ sterling per chalder, or £4 : 3 : 4 Scots, (6*s.* 11⅓*d.* sterling), per boll. Afterwards it came to be valued at £100 Scots, (£8 : 6 : 8 sterling), the chalder, or £6 : 5 Scots, = 10*s.* 5*d.* sterling, the boll of victual, *i. e.* part meal and part bear. The statutory conversion applied to all grain indiscriminately. But, in the teind court, wheat is valued a third higher, viz. £128 Scots = £10 : 13 : 4 sterling, the chalder, or £8 Scots, = 13*s.* 4*d.* sterling the boll. At the date of the statutes, the 100 merks, and afterwards £100 Scots, were probably the real price of the grain. Hence it is, that even yet in the teind court, victual of every kind is always reckoned worth its real price: and, of course, the stipend is to be modified in money or victual, not with any view of making it higher or lower, but from a view of the circumstances of the parish, as affording more or less plentiful produce in kind; and a victual stipend has this advantage, that it is less fluctuating in its value. The court conversion does neither good nor ill to ministers, being quite nominal; but to those proprietors whose teinds have been valued in money, at that low rate, it has given an advantage which cannot be undone.

§ 6. STIPEND —MODIFICATION.

cording as the fruits and rents of the kirk should afford, or as the commissioners should think expedient. The parliamentary commission[a] thought it meet, that eight chalders of victual,[b] where victual is paid, or, proportionally in silver and victual, as the commissioners should appoint, should be the lowest maintenance, "except such particular kirks occur, wherein there shall be a just, reasonable, and expedient cause to go beneath it." And no subsequent commission having taken any notice of the *maximum* specified by the commission 1617, the teind court, wherever there is a sufficiency of free teinds, exercises a discretionary power of augmenting the stipend to such sum as the weight, or burdensome nature, or expensive situation of the charge, may seem to require.

Minimum.

Teind court, its discretionary powers.

THE former commissions being to individuals, were, of course, temporary. Their powers, however, were at length more properly devolved into the hands of a court of permanent jurisdiction. Yet, as the instruction was, "to appoint constant and local stipends," this court, for some time, held, that in regard to any parish, its commission was exhausted by a single augmentation; and therefore, in two cases, refused to grant second ones:[c] But these judgments were reversed by the house of lords.[d] By the late statute,[e] it is not competent to augment any stipend which has been modified prior to the passing of the statute, until the expiration of 15 years from the last final decree of modification, nor any stipend augmented after the passing of the act, until the expira-

Can the teind court modify more than once?

[a] 1627, ratified by 1633, c. 8.

[b] Then reckoned at 800 merks.

[c] Milligan against the heritors of Kirkden, 4th Aug. 1779, Fac. Coll. reversed 8th July 1784.——Mitchell against heritors of Tingwall, 23d Dec. 1786; reversed 22d May 1789.

[d] The general point was again so decided both by the teind court and house of lords. See App. III, N°.

[e] 48 Geo. III, c. 138. See App. I, N°.

§ 6. STIPEND —MODIFICATION.

tion of 20 years from the last decree of augmentation; and processes depending prior to 10th March 1808, may be suspended for 15 years, or prosecuted, at the pleasure of the minister.[a]

Discretionary power to refer augmentations.

THE teind court has a discretionary power to refuse or grant augmentations.[b] It formerly modified stipends, sometimes in money, sometimes in victual, or partly in both. But now,[c] every stipend which shall be augmented, must be wholly modified in grain or victual, even although part, or the whole thereof, shall have been previously modified in money, or although part, or the whole of the teind, shall be money teind, unless the state of the teinds, interest of the benefice, or nature of the articles, other than grain or victual, which have been in use to be paid as stipend, make it necessary that part of the stipend be paid in such articles, or in money.

Always in grain.

Conversion of money teind.

THE money teind, or money stipend, must be converted into grain, according to the average of the fiar prices of the county for seven years preceding, and exclusive of, the year in which the decree of modification bears date.[d] If no fiars are struck in the county, or if the parish lie not in one county, the conversion must be by the fiars of two or more adjoining counties. The conversion is always to be at the highest annual fiar prices. The stock cannot, in any case, be encroached upon. Therefore, instead of the stipend laid upon any proprietor, it is optional to him to give up, and pay to the minister, the whole of his valued teind.[e] But the minister's right to the modified stipend cannot be impaired or altered by this option. His

Stock not to be encroached on.

[a] 48 Geo. III, c. 138, § 4.

[b] Ibid, § 8.

[c] Ibid, § 8. See App. III.

[d] Ibid. Skene and the minister of Skene, 31st Jan. 1798.——Earl of Mansfield against minister of Cummertrees, 31st Jan. 1798.

[e] Skene against minister of Skene, 31st Jan. 1798, § 12.

proportion of victual-stipend must be laid upon the other proprietors.[a]

§ 6. STIPEND —MODIFICATION.

Victual meaning of.

THE word *victual*, is a sort of technical expression in the teind court, importing oat-meal and bear; but not understood to include wheat. A *victual* stipend, however, or valuation in *victual*, naturally signifies one in grain or corn, in opposition to money; besides wheat, thus including, of one *genus*, barley, bear, or bigg; of another, white oats, black oats, grey oats, and grey horse corn.

THE court, as already observed, may give victual or grain when the stipend is valued in money. But it has not yet assumed the power of obliging any one, whose teinds are valued in victual, to pay the minister another sort of grain than that mentioned in the decree of valuation, or at least without making such a diminution in the quantity as might correspond to the superiority of the quality.[b] A doubt has been started touching the meaning of the term *bear*, Bear.

[a] Nov. 16, 1803, Dalgliesh against the heritors of Peebles. Fac. Coll.

[b] In 1634, the teinds of Kinneder were valued at one chalder or sixteen bolls of grey horse corn, which is the worst species of oats. In December 1794, the court modified the minister's stipend to be "sixteen bolls grey horse corn *inter alia*, being the whole teind of the parish.' These sixteen bolls were localled on the lands of Kinneder. The ordinary growth of the parish at the date of the valuation was grey horse corn; but at the date of the augmentation was white oats. The proprietor of Kinneder, however, sowed some grey horse corn, and offered sixteen bolls thereof to the minister, who refused it as unmarketable, and insisted for sixteen bolls of white oats, as the ordinary growth of the parish. A sample of the grey horse corn was produced in court. It was thought that the minister, on the one hand, was not obliged to take it; and that the proprietor, on the other, was not obliged to deliver the full quantity in white oats. On the motion of the late lord-justice-clerk Macqueen, it was decided that the minister should have so many bolls of white oats as should correspond to sixteen bolls of grey horse corn, agreeably to a pecuniary valuation that had been put on the different kinds of grain in the parish recently after the teinds were valued. Forfar, minister of Saline, against Oliphant, June 1796.

§ 6. STIPEND —MODIFICATION.

which occurs in so many old decrees of valuation; and whether under that denomination, as the general term *hordeum*, the minister be entitled to the long-eared barley, (now generally called *barley*), where that is the usual crop of the parish, or only to the square or rough barley, in England called bigg, has, it is believed, not yet been finally decided; unless in so far as it has been determined by the court of session, that an heritor is not entitled to sow an inferior sort of grain, merely for the purpose of furnishing it to the minister.[a]

Barley.

As already observed, it could never be said, without many exceptions, that *decimæ debentur parochæ*. However, the parochial minister is always entitled to a competent provision from the teinds of the parish, into whose hands soever they may have come; even should they, past all memory, have been appropriated as part of the stipend of the minister of some other parish.[b]

[a] 7th March 1805, Brig.-general Al. Graham against Rev. Mr. Bell, minister of Crail.

[b] Dr. Johnston, minister of North Leith, against the heritors of S^t^ Cuthberts, 3^d^ Mar. 1802. About the beginning of the seventeenth century, the parish of North Leith was disjoined, by act of parliament, from the parish of Holyroodhouse; and in the year 1630, the lands of Hillhouseside and Newhaven were united and annexed, by the commissioners of teinds, to the new parish of North Leith. The teinds of these lands, however, still continued as before to be paid to the minister of S^t^. Cuthberts. In 1797, the minister of North Leith raised a process of augmentation, calling the heritors of S^t^. Cuthberts, and contending he was entitled to have a modification out of those teinds, without which there could not be a suitable provision. *Pleaded for the heritors*, he use of payment, proceeding upon regular decrees of court, affords a sufficient title to acquire by the positive prescription. *Answered*, prescription applies not. A minister, till he need such teinds for an augmentation of his own stipend, has no interest to oppose the misapplication, and is *non valens agere*. The court found, that "in allocating the pursuer's stipend, as modified, after continuing the old stipend drawn by him conform to use and wont, and after exhausting any other free teind in his parish, the pursuer is entitled to all, or as much of the victual presently paid out of the teinds of Newhaven to the minister of S^t^. Cuthberts, as may be necessary for completing his said modified stipend." The ministers of S^t^. Cuthberts made no opposition, there being plenty of teinds in their own parish for their provision.

Sometimes the teinds of one parish may

§ 6. STIPEND—LOCALITY.

AFTER *modifying*, the next thing is to *local* the stipend; that is, settle the different proportions thereof payable by the several landholders. Till a decree of locality be obtained, the minister may require payment of his whole stipend from any one of them, if it exceed not the amount of his teinds, leaving him to recur for his indemnification against the others.

Rules of allocation, 1st, Free teinds. What are they?

IN the first place, free teinds are allocated; that is, those which have neither been let nor sold to the landholder: but either remain still with the crown, or have been vested in the patron by virtue of the acts 1690, c. 23, and 1693, c. 25;[a] or have been conveyed by the crown to a lay titular.

may come to be paid as part of the stipend of another parish, not from any disjunction as above, but from the teinds of both having originally belonged to the same titular, who may have made the allocation for his own conveniency. Such an allocation had occurred in the case of the parish of Stobo, 1793. There, however, the court found it unnecessary to determine the general point, the remaining teinds being sufficient for the competent provision of the ministers; as they are also said to have been in the previous case, minister and heritors of Eyemouth against heritors of Swinton, 4th Feb. 1756, Fac. Col.

b The act 1690 took away the right of presentation; but it contained a condition that the parishes should pay 600 merks to the patrons. And, as a farther compensation to them, "it was declared that the right of the teinds of the said parishes, which are not heritably disponed, shall, by virtue of this present act, belong to the said patrons, with the burden always of the ministers stipends, tacks, and prorogations already granted of said teinds, and of such augmentations of stipends, future prorogations and erections of new kirks, as shall be found just and expedient, providing the saids patrons getting right to the teinds by virtue of this present act, and who had no right thereto before, shall be, like as they are hereby obliged to sell to each heritor the teinds of his own lands, at the rate of six years purchase, as the same shall be valued by a commission of valuation of teinds."

This statute was passed immediately on the abolition of prelacy. On this account, possibly, it would seem that some doubt had been entertained, whether it extended to *parsonages* and perpetual *vicarages*, which, except as to discipline under the bishops, within whose dioceses they were situated, had no proper connection with prelacy. Therefore, by the act 1693, c. 25, it was expressly declared, "that the foresaid right of teinds, granted to

§ 6. STIPEND —LOCALITY.

It is only in case of their not being a sufficiency of free teinds in either of the two first predicaments, that those in possession of the lay titular are allocated.

If the teinds be let.

IF the titular draw not the teinds himself, but have let them to the landholder, it is only the yearly rent or tack-duty paid to the titular that is considered as free teinds. Sometimes land is feued out for payment of an annual feu-duty, both for stock and teind. In that case, such proportion thereof as may appear to be payable for the teinds is allocated.[a] If any teinds have, in the manner above mentioned been payable as part of the stipend of any other minister, such teinds are to be allocated next after the other free teinds.[b]

Duty for stock and teind.

AFTER the free teinds there fall also to be allocated such teinds as the titular feuing the land chose to reserve.[c]

to patrons, as said is, shall be extended to the teinds of all parsonages and other benefices, and that the same shall belong to the patrons with the burdens specified in the said act."

[a] 13th Feb. 1797, Sir Thomas Dundas against Robert Baickie, The lord ordinary found, "in respect it is admitted that part of the duties paid by the heritors of St. Andrews and Deerness to Sir Thomas Dundas, are teind duties, finds that these teind duties are first to be allocated on with the other free teinds of the parish." The court adhered by two consecutive judgments. A similar judgment was pronounced in a case between Mr. Graham of Kinross and his vassals, and in subsequent cases.

[b] This order was observed in the case of North Leith, mentioned above. The interlocutor was, "Find that after exhausting any other free teind in his parish, the pursuer is entitled to all or as much of the victual presently paid out of the teinds of Newhaven to the minister of St. Cuthberts, as may be necessary for completing his modified stipend."

[c] 2d July 1746, Muir of Caldwall against Heritors of the Parish of Dunlop. Rem. Dec. V. ii. The interlocutor was: Find "that the teinds of the lands feued out are to be considered as if no such feus had been granted; and therefore, that they cannot be allocated to the minister while there are any free teinds in the parish." Lord Kames says, this point was much struggled, and that Lord Elchies in particular was of opinion that these teinds were to be considered as the teinds of other men's lands in the hands of the granter of the feu

§ 6. STIPEND—LOCALITY.

THE reason of the rule of allocating to the minister, *primo loco*, free teinds, or those in the possession of another than the proprietor of the land, is the inclination of our law to give every landholder, as far as possible, the possession of his own teinds. And the same principle runs through the whole rules, as to the order of allocating other teinds: Thus, Reason of the rule.

TEINDS let in lease to the landholder are allocated in the second place.[a] 2d, Teinds in lease.

IN the third place, if the minister cannot be competently provided otherwise, even those teinds to which, by purchase under the act 1693, or otherwise, the landholder has acquired any heritable or feudal right, may be allocated,[b] but not unless proportionably with the teinds of the lands belonging to the titular himself. The allocation of his purchased teinds affords the landholder no recourse against the titular, to whom he paid the statutory price, but who is not understood to warrant them against future augmentations, which are a known burden by law on all teinds, and which were in view in selling them so cheap. However, if the titular either has expressly warranted them against future augmentations, or got a price large enough for presuming such warranty, his own teinds will be allocated first.[c] 3d, Do. sold.

TEINDS, though purchased during the dependence of a process of locality, have been found entitled to the same privilege as those purchased previously.[d]

feu; and he put the case, what if a man should feu both stock and teind, and afterward purchase back the teind? It is clear, at least, that the circumstance of the titular not being compellable, by act 1690, to sell such teinds, decides not the point; because, as to the titular not being compellable to sell the teinds, that statute supposes an implied paction between him and the feuars, which, it is evident, can have no influence in the question of allocation. With lord Elchies, some eminent judges concur in thinking that decision bad.

[a] As a compensation to the tacksman for this supervening burden, the commissioners are empowered, by the act 1690, c. 30, to prorogate the lease for such term of years as appears just. The tacksman is not entitled to such prorogation, unless the augmentation be granted by judicial authority. (Ersk. B. ii, t. 10, § 52.)

[b] Dec. 21, 1757, Edmonstone of Duntreath against duke of Montrose.

[c] Ersk. B, ii, t. 10, § 52.

[d] 7th June 1797, Dr. Lamont against heritors of Urr. In 1794, the minister obtained an augmentation, to commence with crop 1792. In May 1795, Dr. Lamont obtained a

§ 6. STIPEND —LOCALITY.

In the fourth place, if the other teinds prove insufficient for the competent provision of the parochial minister, even bishops teinds themselves have no exemption.[a]

4th, Bishops teinds.

Teinds purchased during the dependence of the locality.

THE teinds belonging to colleges are allocated in the last place.[b] But such teinds partaking of the nature of

proof, in a process of valuation of his teinds. In July 1795, the lord ordinary approved of a locality, whereby Dr. Lamont's teinds, as free, were first allocated. In November, the titular, having no property in the parish himself, nor, of course, any interest to counteract Dr Lamont's object, granted him a voluntary conveyance of his teinds, which was produced on the locality. The lord ordinary, not thinking this late purchase entitled those teinds to any privilege, adhered to his interlocutor. But the court altered it, and found Dr. Lamont had "produced a sufficient heritable right "to the teinds of his lands within the "parish, to entitle him to be localled "upon only *pari passu* with other "heritors having heritable rights." *Observed by the court*, The object of Dr. Lamont's action was merely to bring him in *pari passu* with the heritors having right to their teinds. The titular has no interest in this case, and the heritors have no proper title to complain. But in the case where the heritor had obtained a decree of valuation, and was in course of obtaining decree of sale, the court refused to stop procedure till he had obtained a decree of sale. May 21, 1800, duke of Queensberry against earl of Mansfield. In this case the *ratio decidendi* was, that the minister's process of modification was in court *before* the Earl of Mansfield's action of valuation, and that the titular, who was an heritor, had given in a locality before Lord Mansfield's summons was called. Several decrees of sale have been obtained pending localities. In all of which that were brought after the ministers process was in court, a reservation was made of the titulars right to allocation in that process of locality, as if no such decree of sale had been obtained; Heritors of Lauder against Lord Lauderdale, *cum multis aliis*, quoted by the duke of Queensberry. All those decrees were obtained before a final decree of locality was pronounced.

[a] June 3, 1795, Skene against Officers of State. Dict. V. iv. t. Stipend.

But teinds formerly belonging to the arch-dean, or other member of the bishops chapter, or to the chapter in common, are not considered as bishops teinds. May 23, 1797, Solicitor of tithes against earl of Moray. Fac. Coll. Of course they have not this privilege, but belong to patrons, under the acts 1690 and 1693, and, as free teinds, are allocated *primo loco*.

[b] 12th Dec. 1716, Minister of Old Machar against the college of Aberdeen; 1753, Minister of Marytown against the new college of St. Andrews; 16th May 1792, Minister of Marykirk against the college of Aberdeen, not collected; and Dec. 9, 1795, heritors of Portmoak against Mrs. Douglas. Fac. Coll. The interlocutor found, that she "could not, in right of the college, plead an exemption, if there were not other teinds in the parish upon which the stipend could be localled; but found, 2do, as there are, in this case, lay titulars of

a grant for a pious use, cannot be allocated till those derived from a lay titular are exhausted.

§ 6. STIPEND —LOCALITY.

In two parishes united *quoad omnia*,

Are there separate localities?

IN localling an augmented stipend, two parishes, though they have been long united *quoad omnia*, are yet not considered as one parish. The modified stipend is divided between them, in proportion to their proven rentals; but there are separate localities, each patron having right to allocate his proportion thereof only within his own parish.[a] But part of a parish annexed to another *quoad sacra* only, and continuing to pay stipend to the minister of the parish from which it was disjoined, is not liable in payment of any stipend to the minister of the parish to which it is annexed.[b]

IF a second minister be not established by the authority of the teind court, but by private agreement with the heritors and magistrates of boroughs, he is not entitled to an augmentation out of the teinds.[c] But, in one case, where the court had so far interposed as to convert part of the money of a second minister's contributed stipend into victual, and to determine by whom the same should be paid for the future, it afterwarns gave the second minister an augmentation out of the teinds.[d]

STIPENDS being declared free from all burdens what-

teinds upon whom the stipend can be localled, the teinds belonging to the college of St. Andrews are, by law, entitled to an exemption."

[a] 13th July 1774, Ogilvy of Powrie against heritors of Methie. The parishes of Methie and Inverarity had been united *quoad omnia* above a century. The court having had an extract laid before them from the teind record of the case Maxwell of Tinwald against Officers of State, 1718, resolved to follow the precedent, and adopted the precise words of the judgment there given, which was as follows: Found that the two parishes "being under different patronages, the stipend modified is to be divided equally betwixt the paishes, effeiring to their rentals proven; and that each patron has only right to allocate his proportion thereof within his own right." Fac. Coll.; and Dict. Vol. iv, p. 301.

[b] Dict. V. iv, p. 299.

[c] 7th July 1738, Marshall against town of Kirkcaldy, Kilk, *v.* Stipend, No. 1, and Dict. Vol. iv. p. 299.

[d] June 14, 1749, Fairney against the heritors of Dunfermline. Dict. V. iv, p. 300.

§ 6. STIPEND —COMMUNION ELEMENTS.

ever,[a] it is usual for the court, when it pronounces decree of locality, at the same time to modify a sum to defray the expence of communion elements. This sum making no part of the stipend, is not due to the minister for the years in which he has not administered the sacrament, but ought to be paid to the poor.[b]

Bygone.

HOWEVER, a minister who had early received the allowance, but neglected, for twelve years, to celebrate the sacrament, was not made to repeat the money.[c]

If the teinds are exhausted.

IF the teinds be exhausted, the court cannot award an allowance for communion elements out of the stock.[d]

IN actions of modification and locality, it is necessary to call the titular; and "when ministers of mensal churches pursue for a modification, they must call the officers of state; because the bishop's teinds are in the hands of the crown."[e] And to prevent collusion, the late statute ordains that every minister insisting in a process of augmentation, shall, besides citing the heritors, cite also the moderator and clerk of the presbytery of the bounds. He must also furnish them with a statement of the amount of the present stipend, and the addition he means to crave. If they do not enter any appearance, the minister must transmit to the moderator or clerk a copy of the interlocutor, and within five months it is competent to the presbytery to enter an appearance, and shew that the modification is collusive. It is competent to the court to subject the minister in the expences incurred by the presbytery.[f]

[a] 1593, c. 162.

[b] Ersk. B. ii, tit. 10, § 50.

[c] Hay against Williamson. July 14. 1780. Fac. Coll. Dict. V. iv, p. 301. The learned reporter observes: "The court seemed to view this matter in a different light from that of a refusal to pay communion element money to a minister who had failed to employ it for that sacred purpose; in which case it appeared that the minister would not have been entitled to demand it."

[d] Dict. V. iv. p. 301.

[e] Forbes Treatise of church lands and tithes, p. 386.

[f] 48 Geo. III, c. 138 § 17.

§ 6. STIPEND—TERMS.

The legal terms at which stipends fall due to the incumbents, are Whitsunday, when the corn is presumed to be all sown, and Michaelmas, when it is presumed to be reaped. If the incumbent be admitted before the Whitsunday, he is entitled to the whole year's stipend, the sowing not having taken place at his entry. If he be admitted after Whitsunday, but before Michaelmas, he is entitled to the half of the stipend: Again, if he die before the Whitsunday, he is entitled to no part of the ensuing year's stipend: If he survive the Whitsunday, but die before the Michaelmas, he is entitled to no more than the half year's stipend: If he survive Michaelmas, he is entitled to the whole year's stipend. Such, too, is the case even where the stipend is payable by special agreement at the ordinary terms of Whitsunday and Martinmas.

During a vacancy, the patron is entitled to receive the stipend, which, yearly, as it falls due, he must apply to pious purposes within the parish.[a] The king, if he be patron, may dispose of the vacant stipend in pious uses anywhere.[b]

—ANN.

In some parts of Germany, after the Reformation, the incumbent's widow and children were allowed a year's stipend, which was called *annus gratiæ*. Hence we have borrowed our term *ann*, or half a year's stipend, which, after the minister's death, is allowed to his executors over and above what, as such, they may be entitled to. For example, if he survive Whitsunday, they are entitled to half a year's stipend as his executry, and to the other half as ann: if he survive Michaelmas, they are entitled to the whole

[a] By the act 1685, c. 18, the penalty is the losing the right of presenting on the next turn. By act 1690, it was the forfeiture of the right of applying the vacant stipend during that and the next vacancy. But patronage being now restored, Mr. Erskine concurs with lord Bankton in thinking, that the penalty contained in the act 1685, is revived.

[b] B. i, tit. 5, § 14.

§ 6. STIPEND —ANN.

year's stipend as executry, and to another half year's as ann. The ann is not affectable by his debts. It vests without confirmation. If there be a widow and no children, she gets one half, and his executors the other. If there be a widow and children, Mr. Erskine thinks it should, like executry, go one-third to the widow, and two thirds to the children.[a] If there be only children, they get the whole.

THE presentee, or person presented by the patron, acquires right to the stipend by being *collated*, or admitted by the presbytery; and forfeits his right thereto by deposition, though not by mere deprivation of his charge.[b]

§ 7. CHURCH.

Every parish must have a sufficient church.

VII. IN every parish there ought to be a sufficient church for the accommodation of parishioners. The rule is, that it must be capable of containing two-thirds of the parishioners above twelve years of age.[c] If its size and dimensions be unexceptionable, which it is the province of the presbytery to take care of, "the *plan* of the building may be concerted among the heritors themselves, without the intervention of the presbytery."[d]

Dimensions.

Plan.

In England who repairs the church?

IN England, it is said that, by general custom, the body

[a] B. ii, tit. 10, § 67.

[b] Campbell against Macdonald, Feb. 26, 1741. Kilk. *v.* Stipend, N°. 2. Dict. V. iv, p. 299.

After the Reformation, patrons retained their right of presentation. But by 1649, c. 39, it was abolished: their right was restored by the rescissory act 1661, c. 9; but by act 1690, c. 23, was again taken away; and an option given to the heritors and elders, and in boroughs to the magistrates, to acquire the right, on paying a sum to the patrons. Some parishes did so. Those patronages which had not been redeemed were restored by 10th Anne, c. 12. But Mr. Erskine observes, that all churches are now patronate, even those the presentations to which were sold in virtue of act 1690; the heritors and session having come precisely in the patron's place as to the right of presenting to the presbytery. B. i, tit. 10, § 19.

[c] June 22, 1787, Minister of Tingwall against the Heritors. Fac. Coll.

[d] Ibid. Fac. Coll.

of the Church is to be repaired by the parishioners, and the chancel only by the parson, vicar, or lay impropriator.[a] § 7. CHURCH.

By the canon law, the charge of keeping the whole church in repair was, at least in the first instance, imposed on the parson, who was supposed to draw the whole spiritualities, and who, by the present law of England, is understood to have the freehold of the church and churchyard, as well as a special property in the goods of the church, for the more convenient recovery and preservation of things devoted to holy uses.[b]

After the Reformation, an act was passed for "the repareling and uphalding of paroche kirkes, and of kirk zairdes of the samin for burial of the dead;"[c] and the charge thereof remitted to the privy council, which[d] laid one part of the expence upon the parson, and the other two parts upon the parishioners, who were directed to choose certain of the most honest qualified men within their parishes to tax every one of them effeiring (corresponding) to their In Scotland after the Reformation.

[a] Woodeson, Vin. Lect. V. i. p. 268; Burn's Eccl. Law, 321. 8vo, 1767. For this purpose the churchwardens may, by a general summons at the church, require the parishioners to meet and make a rate; and the majority present will bind the parish, though these officers themselves voted against the measure. If the parishioners will not meet, they may make a rate without their concurrence. "It seems also that a tax may be laid for enlarging as well as repairing the church." Woodeson. Ibid. "If a person refuses to pay the rate, he can only be sued in the ecclesiastical court, and, on the other hand, he must appeal to that tribunal who thinks himself aggrieved by the tax." Wood. Ibid. Hence it is said, that if the summons to meet be disobeyed, all the parishioners may be excommunicated, and those willing to contribute must be absolved. Watson, c. 39. Woodeson. Ibid.

[b] Woodeson, V. i, p. 271. Ker. Par. Antiq. p 649.

[c] Queen Mary, parl. 9, 1563, c. 76.

[d] 13th Sept. 1563, Lord Kames' Stat. Law App. No. 2; ratifie by act Jas. VI, parl. 3, 1572, c. 54

§ 7. CHURCH. substance; a burden, indeed, which, if *fructus residui ex beneficio* were not sufficient, even the canon law imposed on them, in the last place, "as getting the advantage in it of the word and sacraments."[i]

Proprietors BUT, by long custom, the expence of repairing, and even of rebuilding the church, rests on the landholders,[k] who must contribute thereto in such manner as, in the circumstances of the parish, may appear most just and equitable.

In parishes partly landward. In landward parishes the usual rule is according to their several valuations. But where a parish was only partly landward, about two thirds of the parishioners residing in a town, it was decided in the court of session, that the expence of building as much of the church as was necessary for accommodating the landwart part of the parish, should be defrayed by the proprietors of lands according to their valued rents, and divided among them in the same proportion; and that the expence of the remaining part should be defrayed by the feuars and proprietors of houses, in proportion to their real rents, and divided among them in the same proportion.[l]

PROPRIETORS are liable in their proportion of the expence necessary for the upholding of the church,[m] to which

i Sir George Mackenzie's Observations, p. 185.

k Ersk. B. ii, t. 10, § 63. Sir G. Mackenzie, in his observations on the act 1572, c. 54, mentions, "the heritors are only liable."

l 20th Nov. 1781, feuars of Crieff against the heritors, Fac. Coll.; case of Campbletoun 1774, and St. Andrews, 25th May 1791, and Ure and other heritors within the royalty of the borough of Forfar, against the heritors of the landward district. But, in a latter case, that of the town of Peterhead, a similar judgment of the court of session was reversed by the house of peers; and the expence ordered to be laid on the whole proprietors, whether of land or houses, according to the real rent of each.

m Feb. 2, 1775, Drummond against heritors of Monzie, Dict. V. iii, p. 370; and, of course, so too in the case of rebuilding the church.

they have been annexed, *quoad sacra*, and, of course, not for upholding the church from which they have been disjoined; but, for payment of stipend as well as other parochial charges, they remain liable in the latter parish only. § 7. CHURCH.

IT was decided in the court of Session, that the heritors have choice of place according to the valuation of their several estates, and that each heritor must have a seat in the church for his family, distinct from the share of area allotted to his tenants; but that, in dividing the whole area of the church, that of each heritor's seat must be taken *in computo*, in making up his share, corresponding to his valued rent.[a] Seats in the church.

VIII. EACH parish must also have a sufficient quantity of ground allotted to it for burying its dead. § 8. CHURCH-YARD.

IT has been decided, that where an enlargement of the church-yard is necessary, it must be furnished by the proprietor of ground proper for the purpose, who must be indemnified by the other heritors in proportion to the number of examinable persons residing upon their estates; and (if the parish be only partly landward) by the community, in proportion to the number of its inhabitants, respectively.[b] What benefit the parochial minister has from the grass growing upon the churchyard has been already mentioned.

BY act 1597, c. 232, the parishioners are ordained "to build and repaire the kirk zaird dykes of their awin paroch kirk with stane and mortare, to the hight of twa elnes, and

[a] Dec. 17, 1776, earl of Marchmont against earl of Home. Dict. V. iii, p. 370.

[b] July 5, 1777, Town of Greenock against Shaw Stewart. Dict. V. iii, p. 370.

§ 8. CHURCH-YARD.

to make sufficient stiles and entrance in the said dykes." But, by long custom, this, like the expence of repairing the church, now rests on the heritors. The minister has not such a property in the churchyard, as in England is understood to be vested in the parson.

CHAP. V.

Public or Highways.

§ 1. IN GENERAL. What are they?

I. PUBLIC or highways are not considered as a species of servitude, but a "reservation from property, and a necessary vestige of the ancient community of the earth."[a]

Publici juris. Patent to all.

HIGHWAYS are *publici juris*, patent to all without respect to any property in land; patent, indeed, even to strangers, who have the freedom of trade, or of travelling through the country.

Why called the king's.

A PUBLIC or highway must be constituted for public use, leading from town to town, or to a sea port.[b] It is called the king's highway, being *inter regalia*.[c]

IN England, the freehold of the highway is said to belong

[a] Stair, B. ii, tit. 7, § 10.
[b] Stair, ibid.
[c] Craig de Feudis. Lib. i, dig. 16, § 16.

§ 1. IN GENERAL.

to the proprietor of the freehold of the adjoining soil, and only the free passage to the public.[a]

Trees. Mines. Grass.

As owner, therefore, he is entitled to all profits from it; as, for example, to the trees upon it, and mines under it,[b] which, with us, belong to the king: as the grass on the side of the road, "and an arm's length beyond it"[c] does to the public.

§ 2. ANCIENT REGULATIONS. Old statutes.

II. OUR ancient law provided for the breadth, freedom, and conveniency of highways, by various enactments. The "king's way, or get, sould conteine in brede fourtene (*alias* (forty) foote, in the quhilk na damage nor violence sould be done to any man."[d]

IN like manner, by act 1555, c. 53, those who stop up the highways leading to and from royal boroughs, are ordained to be punished as oppressors. And by act 1592,

[a] Cok. Inst. 705.

[b] 1. Burr, 143. Burns, *ad vocem*, V. ii, p. 554.

[c] *In ea tamen certum est viatoribus equos . . . pascere licere; immo et gramina ex ripis carpere et* ultra ripas, *id est, ex altera parte ripæ* quatenus brachio *attingere possunt.* (Craig de Feud. L. i, dig. 16, § 10.)

[d] Stat. David II, c. 26, § 4. And the 12th chapter of the statutes of William states and resolves the following case: "Gif ane man haveand na other thing but ledeand ane horse or ane other beast in his hand, vpon ane brig; or in anie other strate way, or in anie other dangerous place, occurs or meetes ane other man, ane or mae, drivand before them, and nocht ledeand in their hands, sindrie horse, or other beastes; or ledeand in their hands horse charged (bereand laids) over the brig, or in ane other place, or way, quhere ane ma can nocht passe by ane other without skeath, bot of necessitie the ane man meete the other, and leave that way be returning back agane; he quha hes bot ane horse or other beast lede in his hand, be the law, suld turne back agane, and suffer him or them quha hes moe horse pass fordwart in the hie way.

"And gif he quha leides bot ane beast will nocht returne back, bot be thrawertnes passes throw them quha drives the many horse, and be his passing forwart throw them anie harme or skeath is done; be the law he suld restore and satisfie the samine to him quha receaved and suffered it; and nocht contrarie ways. Because na man who is fast and bund may save himselfe fra him quha is louse."

c. 159, persons who stop or impede such highways may be put under caution by the lords of session, not to commit the like in time coming, under a penalty. These, however, have been superseded in a great measure, by subsequent enactments; by the two general statutes [a] which intrusted this matter to the justices of peace; and by the act 1669, c. 16, "which [b] is penned with such propriety, perspicuity, and precision, "that" (says Lord Gardenstone), "I strongly suspect the modern laws, which have been intended to contrive more effectual measures for making and repairing our high-roads, have rather tended to perplex the country, and to mar than to improve the measures which might have been taken, under the authority of this plain and good law; happily, however, a great part of it is still in force, and a pretty regular system, in conformity to its wise directions, has been established in the practice of this country; which system, I am persuaded, will in a short time be fully effectual, if gentlemen, who have greater passion for innovation than they have knowledge for reformation, would only be quiet, and forbear to confound us with new laws, when it is evident that the old one was contrived with great wisdom and efficacy." However, in regard to the time for calling for the services of the tenants, this statute committed an error, which was corrected by the 9th act of the second session of the same parliament, [c] and the statute 1686, c. 8, [d] ratifying and confirming the above two enactments, communicates the same powers, jointly with the justices, to the commissioners of supply. The British statutes 5 Geo. I, c. 30, and 7 Geo. II, c. 9, confirm the Scottish acts, unless in so far as they are particularly altered.

§ 5 ANCIENT REGULATIONS.

Lord Gardenstone's advice against multiplying turnpike acts.

III. Two general meetings, of the justices of peace and

[a] 1617, c. 8, § 8; App. I, xvii; and 1661, c. 38, § 10; App. I, liii.

[b] MS. tit. Highways.

[c] 1670, c. 9.

[d] Parl. 1, Jas. VII.

§ 3. MEETING —ITS POWERS

commissioners of supply, must be held yearly, to order matters concerning the highways. The first meeting is appointed to be held upon the same day, and at the same place, that the commissioners of supply shall be directed by the land-tax act of the year then current, to assemble for the purpose of assessing the land-tax, &c.. The second upon the same day and place that the freeholders are assembled at their Michaelmass head court, annually; and the conveners of the shires are to give the same previous notice for these two general meetings, as are given for ordinary general meetings of commissioners of supply. [b]

When.

Quorum.

ANY five, and, in the small shires of Kinross, Clackmannan, and Cromarty, any three, whether commissioners, or justices, or consisting of both, are a *quorum*. This meeting may adjourn from time to time. It may choose clerks, surveyors, and other officers for putting the laws in execution, relating to the highways, bridges, and ferries, and may inflict a penalty of £5 sterling on any person who shall refuse to accept of the said offices.

List of highways, &c.

THIS meeting is empowered "to set down a particular list of the highwayes, bridges, and ferries, within their bounds, and to divide the paroches of the saids bounds, as they lie most to the several highwayes to be repaired, and as they may have the most equal burden, and to appoint such of their number, or others, overseers of such parts and portions of the said highwayes as are most convenient, and nearest to their ordinary residence; and to nominate such of their number as they see fit, to survey and give an account of the highwayes, bridges, and ferries, unto the rest; with powers to them to appoint meetings from time to time, till the said survey, list, and division, of the said highwayes be

[b] 1 Geo. III. c. 53, which so far altered 5 Geo. I.

§ 3. MEETING —ITS POWERS.

closed."[a] It is "likewise appointed to draw up annually a report of the condition of the highways, bridges, and ferries, within their bounds, and of the number of men and horses that have been employed in repairing the same during the preceding year; and this report they are to transmit to the lords of justiciary at their circuits, and to be recorded in their journals by the clerks of the peace, or by the clerk of the supply."[b]

Roads, their width, &c.

IT is the duty of this meeting to take care that the roads are in good condition; in particular, not less than the legal width, that is, twenty feet, exclusive of the banks and ditches on each side, or broader either if the same have been so before,[c] or if it shall appear beneficial to the public that they should be broader;[d] nor deep, or foundrous, or deprived of the benefit of sun and wind.[e]

[a] 1669, c. 10.

[b] 5 Geo. I, c. 33.

[c] 1669, c.

[d] The statute 11 Geo. III, c. 53, § 1, directs, that "highways and roads shall everywhere be made, 20 feet wide of clear passable road, exclusive of the banks and ditches on each side; and where it shall appear to be for the public benefit that any part should be farther widened and extended, or that fences of any kind should be removed for the purpose of widening said roads, they shall state their reasons in writing, and report the same to the next, or any following general meeting: And if the general meeting, after hearing all parties having interest, shall be of opinion, that it shall be for the public interest so to widen and extend the said highways and roads, or to remove fences, the same shall be accordingly done, satisfaction being always previously made to the owners and lessees for so much as shall be taken to widen and enlarge the said highway, over and above 20 feet in width, or the present width of the road, if more than 20 feet, and for the loss or damage the owner may sustain by removing fences." Appeal lies to the first general meeting, whose award is final.

[e] 7th Geo. II, c. 9, enacts, "that, if the surveyors of the highways find any highway deep and foundrous, and the hedges adjoining to be so high as to prevent the benefit of the sun and winds, the surveyors may, in this case, make presentment of such hedges, to the justices of peace who live in or near the division where the highway is, at their special sessions; and the justices, or any two of them, upon such presentment, are empowered

§ 3. MEETING —ITS POWERS.

If a road cannot be repaired or made of the breadth the law requires, the justices of the peace may throw it upon the next adjacent ground.[1] Perhaps, also, they may change the direction of a highway to avoid steep ascents, or other inconveniencies. It is better, however, that this should be done under authority of special acts.

Changing of them.

THE act 1696, c. 19, provides, "If any part of the saids highwayes cannot well be continued as now they are, but require to be changed, the saids justices shall appoint three of their number to visit the places where the highwayes need to be changed, and to set down meiths or the new way in place thereof, and upon oath to estimate the damage of the parties prejudged thereby, and to deliver the same to them in writing under their hands, to the effect the same may be

empowered to summon the occupiers of the lands to which these hedges belong, to appear at the next public meeting of the justices, to shew cause why such hedges should not be new made, or cut low. If the highway appear to be deep and foundrous, upon examination, and damaged by the height of the adjoining hedges, the justices, or any two of them, are then to issue out a precept to the surveyors of the parish where such hedges are, directing them to leave notice in writing at the place of abode of the proprietor or possessors of the lands to which the hedges belong, that they are required to new-make the hedges, or cut them low, within 30 days after such notice, (provided the notice be given betwixt the last of September and the first of February), and if they neglect to do the same, the surveyors are required to cause the hedges to be new made, or cut low, so as such hedges shall be left three feet high above the bank. The surveyors are declared entitled to repayment of such reasonable expences as they shall have been put to in this matter, from the persons thus neglecting to new make, or cut low, the hedges; and if these expences be not repayed within 14 days after demand, the justices, at their monthly meeting in or near the division where the hedges are situated, are to issue out a precept to the constable, or other officers of the place, requiring them to levy, for the repayment of such surveyors, such sums of money as the said expences shall amount to, upon the goods of those who neglect to pay." The act, in concluding, provides, that nothing therein contained shall alter the laws in relation to timber trees in hedges adjoining to highways, and that all laws in being for amending highways shall remain in force.

[2] Kilk. v. Highways.

satisfied by the whole, in manner therein specified." "These alterations," says Lord Gardenstone, "when fairly done for the advancement of private improvements, or for public conveniency, are highly favourable; and though the justices have exceeded the exact limits of their powers in the execution of such new roads, if parties interested do not recently complain, but acquiesce and use the new road for sometime, they will be barred from any challenge, as was found in several late cases, particularly the case of Spottiswood and the case of Haldane." [a] § 3. MEETING—ITS POWERS.

BUT, before giving any order for altering the road, the justices must *previously ascertain* the damages to the proprietors through whose grounds the road is intended to pass.[b] Must previously ascertain the damage.

AS an encouragement to planting and inclosing, proprietors are permitted, at the sight of the justices of the peace or judge ordinary, "to cast about the highways, providing they do not remove them above 200 ells upon their whole ground." [c] --CASTING ABOUT.

[a] MS. Highways.

[b] 1760, Dec. 17, Justices of peace for the shire of Clackmannan against the magistrates of Stirling.

[c] 1661, c. 41, ratified by 1685, c. 39. "May it not be doubted, what is meant by the provision in this act of parliament, that the highways be not removed above 200 ells upon their whole ground; whether is it that the new road be not above 200 ells longer from the point where the alteration begins, to the point where the new and old road again join, as the heritor who proposes to turn the road upon his neighbour's ground is sometimes inclined to explain it? Or is it that the new road is no where, even upon his own ground, to be above 200 ells distant from the old road? And it is thought that this last is the meaning, for the words are general that it be not be removed, that is, from the old road, above 200 ells. But it is easy to figure how the new road may be even shorter than the old, and yet be removed from it more than 200 ells. Suppose the old road to form two sides of a triangle, each 300 ells in length, and the new road to be so cast about as to form the base, the new road would be much shorter than the old, and yet removed at one point 300 ells from it, which the act does not permit." Kilk. v. Servitude, No. i, 515.

§ 3. MEETING —ITS POWERS.

THE alteration must be wholly at the expence of the proprietor, for whose accommodation it is done; in particular he is not to be aided by any part of the statute labour.[a]

Cannot take away one of two roads.

THE justices have no authority to stop up one of two public highways[b] which are useful to the country.

Shutting up byeways.

THE justices, however, have power to shut up bye-roads, which are unnecessary; but not any foot or horse road to church or mill.[c]

Encroachments.

THEY must also take care that no damage be done to the high-road, or encroachments made upon it.[d]

a 21st July 1724, tenants of Libberton, Laswade, &c. against the justices of peace of Mid Lothian. Edgar, Dict. Vol. iv, p. 200.

b Turner against the duke of Roxburgh. About a mile from the river Tweed, the highway divided into two branches, the one leading to the passage boat, the other to the ford; and from thence, along the river (Tweed) side, there is, when the Wooden burn is passable, access to the boat also. In this latter way, the distance to the boat was not 200 yards longer. On the application of the one, and consent of the other proprietor, "the justices granted warrant to stop the road leading to the boat, the proprietor being always obliged to make a bridge over Wooden burn at sight of the justices of the peace." But the court of Session "found the justices of the peace had no power to suppress it; and that the confining the highway to that which passes to the ford, does not fall under the powers given to the judge ordinary by the act 1661, and therefore suspended the act of the justices of the peace." (Kilkerran, *voce* Highways, No. 1; Falconer, No. 67.) A similar decision was given in a later case, 7th Aug. 1782, Napier against Robertson.

c Kilkerran, *voce* Servitude, No. 1.

d The act 1690 "prohibits and discharges all persons whatsoever to break or abuse the said highways, by plowing up any part thereof, laying stones, rubbish, or dung, thereon, or any way breaking or pooling the same, or turning in, or damming water thereupon; and ordains the conveener of the said justices, at their meeting, to take an oath of the remanent justices and of the constables, of what damage they know done to the highways, bridges, or ferrys, since the year preceding, in any of the foresaid particulars prohibited, or any other, and by whom. Upon which the said justices shall convene the transgressors, and, in case of conviction by oath or witness, shall fine them

A GATE on a highway, as being an interruption or common nuisance, is removable, unless it has continued from time immemorial.[e] § 3. MEETING—ITS POWERS.

IV. The statute 13 Geo. III, c. 78, containing many regulations respecting encroachments on highways, under the particulars "of trees and hedges, ditches, drains...straw, &c. laid upon it, divers acts of misbehaviour to be corrected... regulations respecting names on carts and other carriages... direction-posts, horse and foot paths, breadth of wheels, and number of horses,"[f] is expressly limited to England. But there are other British statutes which make similar provisions with respect to Scotland.[g] Thus the statute 27th Geo. II, c. 16, § 7, directs, that "if the driver of any carriage, on any street or highway, shall by negligence or wilful misbehaviour, cause any hurt or damage to any person passing, every such driver being convicted, either by his own § 4. GENERAL REGULATIONS. Driver's negligence occasioning hurt. Proof.

them as they shall see just, and shall poind therefore in manner foresaid, and apply the same for the use of the said highways."... And it is further declared, "that where laboured land lyes upon the sides of highways, the said laboured land shall be fenced with dike and ditch or hedge; yet so as neither dike, nor ditch, nor hedge, nor any part thereof, be within the fore-mentioned breadth appointed for the highway; and in case any laboured land so lying shall not be fenced betwixt and the first day of August 1671, then, and in that case, the saids justices are hereby authorised and required to cause poind in manner foresaid, the labourers of the said land, for 4s. Scots for each ell which shall not be so fenced after the said time, and to apply the saids fines for the fencing thereof in manner foresaid. Likeas, it is hereby declared, that whatsoever stones, rubbish, or dung, or other impediments, be thrown or found lying upon the saids highways, or water turned in or dammed thereupon, shall be esteemed and held as done by the labourers of the land next adjacent to the highways where the damage is done, who shall be fined therefore be the saids justices and overseers; reserving right to the saids labourers to call before the saids justices any other for their relief, who have been the real actors of the skaith."

[e] Gardenstone's MS. tit. Highways.

[f] See Burns, v. Highways, p. 578.

[g] 26 Geo. II, c. 28; 27 Geo. II, c. 16; 12 Geo. III, c. 45.

§ 4. GENERAL REGULATIONS.

confession or by the oath of one witness, before any justice of peace of the county, &c. where the offence is committed, shall for every offence forfeit any sum not exceeding 10*s.* or shall be committed to the house of correction for any time not exceeding a month; and every such driver offending in either of the said cases, may, without any warrant, be apprehended by any person who shall see such offence committed, and shall be immediately delivered to a peace officer, in order to be conveyed before a justice of the peace, to be dealt with according to law."

Penalty.

One justice.

One witness.

For preventing danger.

BUT, as it is better to prevent than to punish such accidents, there are many precautionary regulations made with a view to the public saftey. Thus it is provided, that "if the driver of any cart, car, dray, or waggon, shall ride upon any such carriage, not having some other person on foot, or on horseback to guide the same, (carts drawn by one horse only, or by two horses a-breast, and conducted by some person holding the reins, excepted), shall forfeit 10*s.* or shall be committed to the house of correction for any time not exceeding a month, being convicted by his own confession or the oath of *one witness*, before *any* justice of the peace of the county where the offence has been committed; and every such driver may, without any warrant, be apprehended by any person who shall see such offence committed, and shall be immediately delivered to a peace officer, in order to be conveyed to a justice of the peace, to be dealt with according to law." [h]

Driver not to ride in his cart.

Penalty.

IN like manner, "if any chaise-driver in Scotland shall be found sitting in his chaise, without another person on one of the horses driving the same, or if any carter, &c. or the driver of any other carriage, (coaches, chaises, phaetons, curricles, chairs, and such other carriages, which are

[h] 27 Geo. II, c. 16, § 4.

usually driven by a person sitting within or upon the carriage, and such as are drawn by one horse only, or by two horses a-breast, and are conducted by some person holding the reins of such horses excepted), shall ride upon any such carriage (not having some person on foot or on horseback to guide the same) on any street of any city or town, or on any highway within six miles of Edinburgh, or four miles of Glasgow, or two miles of any other city, royal borough, &c.; or if the driver of any carriage whatsoever, on any street or highway, shall by negligence or misbehaviour cause any hurt or damage to any person or carriage, or shall prevent or interrupt the free passage of any other carriage, or of persons on the said highways; or if any driver of any cart, &c. on any highway, when riding on his carriage, shall not dismount (so as the better to guide his horse or carriage) when required by any person apprehending danger, every such driver, for every such offence, shall forfeit a sum not exceeding 10*s.* if he is not the owner, and if he is the owner, not exceeding 20*s.* sterling."[a]

If hurt be done throughnegligence.

Carts not to go a-breast.

It is farther provided, "that no driver of carts or other carriages shall drive a-breast, so as to obstruct the free passage of streets and highways, but shall follow one after another, and shall have bridles or halters upon every horse, which bridles upon the foremost horse shall (in all carriages drawn by two horses) be tied with a rope to the halter or bridle of the horse behind, and which rope or bridle the driver shall have in his hand; and the offender in the premises shall forfeit not exceeding 20*s.* and not less than 5*s.* sterling."[b] "No drivers of horses or other beasts shall drive them so as wilfully to obstruct the free passage of his majesty's subjects, or to put their persons in danger, but shall drive them in a line, having a bridle or halter affixed to the

Free passage not to be obstructed.

[a] 12 Geo. III, c. 45, § 5. [b] Ibid, § 6.

§ 4. GENERAL REGULATIONS. —12 GEO. III. c. 45.

head of each horse or beast; and the driver or owner of any cart or other carriage shall not be permitted to leave the same on any street or highway after the horses have been unyoked, except during the time the same shall be loading or unloading; nor shall it be allowable to any person to leave stones, lime, timber, rubbish, dead horses, or other animals, or other nuisances, upon the streets and highways, so as to obstruct a free passage; and every person offending in the premises shall forfeit not exceeding 20*s.* and not less than 5*s.* sterling for each offence."[a] "The driver of every such loaded horse or other beasts of burden, and the driver of every cart, &c. or the like carriage, and every coach, &c. and such like carriage, shall be obliged on meeting another loaded horse or carriage, to make way by holding to his own left hand, or to the *near side;* and every person offending in the premises shall forfeit not exceeding 20*s.* and not less than 5*s.* sterling."[b]

Carts, &c. not to be left in the streets.

Carriages meeting on one another.

AND farther, it is provided by the same statute "no person shall drive any cart, car, with or without ledges, or any waggon, sledge, or dray, upon the high-roads or streets in Scotland, unless the master or owner of such cart, &c. shall place upon some conspicuous part thereof, the name of the owner and his place of residence, or of the house or farm where the owners generally employ such carriage, in different colours from the body of such carriage; and also the numbers, where more carts, &c. than one belong to the same person, in order that the driver may the more easily be convicted of any misbehaviour committed by him."[c] "If any person shall drive such carriages upon any such roads or streets, not having the name, place, and number, as aforesaid, placed in some conspicuous part of the same, he shall forfeit a sum not exceeding 20*s.* and not less than 5*s.* ster-

Master's name.

Penalty.

[a] Ibid. § 7. [b] Ibid. § 8. [c] Ibid. § 1.

ling for each offence."[a] "If the property of such carriages shall be altered, the succeeding owners shall, within fourteen days after they shall become owners and shall have used the same, cause the names and residence of the former owners, and number to be taken off, and their own name and place of residence, and a new number to be placed, in manner foresaid, upon such carriage; and every person omitting to do the same shall forfeit 20*s.* and not less than 5*s.* sterling."[b] Jurisdiction. "If any person shall place a false name or place of residence upon his carriage, he shall forfeit a sum not exceeding 40*s.* sterling."[c]

[a] Ibid. § 2.

[b] Ibid. § 3.

[c] Ibid. § 4. Prosecutions against offenders punishable by this 12 Geo. III, c. 45, may be brought summarily before the sheriff, or any justice of peace where the offence shall be committed, or before any of the magistrates of cities or boroughs where offences have been committed within their jurisdiction, or before any other judge competent; and judgment shall be given against the offender upon confession, or upon oath of one witness. § 9.

In all the neglects and offences punishable by this act, any person aggrieved, and intending to sue for the penalties upon the authority of the act without any other warrant, may apprehend the offender, and either convey him by the assistance of any peace-officer, or other person, before any justice or other judge competent, who is required, upon conviction of the offender, by confession or oath of one witness, to deal with him as before directed; and any person who shall see any of the offences committed, may, by this act, without any other warrant, seize and detain the horses, carts, &c. till sentence shall be pronounced by the judge; and in case the penalties shall not be paid, or security found for the same, within 24 hours after conviction and sentence, then the judge shall issue his warrant to a constable to cause sale to be made of the subjects retained, in case the same be the property of the offender, for raising the money forfeited, rendering the overplus, after deducting charges of sale, and the expence of keeping the subject, both which shall be determined by the judge before whom the offenders are convicted; and if the subject is not the property of such offender, the same shall be returned to the owner; and the judge in case the fine shall not be instantly paid, or security given, may commit the offender to gaol until paid, or security found for the same, or until the expiration of two months after commitment. § 11.

If any [illegible] charged with offences against this [illegible] shall, upon the seizure

§ 4. GENERAL REGULATIONS.

AND, on the narrative that it had become "a common practice to get materials out of commons, heaths, and waste grounds, for the repairs of the highways of this kingdom, and for other purposes, and to leave the pits and holes thereby occasioned open and dangerous," the statute 26 Geo. II, c. 28, enacts, "if any person, by reason of getting any materials for repairing any highway, or other purpose, shall make any pit or hole in any common, heath, or waste ground, he shall forthwith cause the same to be fenced off during the time it shall be open; and shall within 14 days after digging for such materials, cause the pit to be filled up, sloped down, or fenced off, and so continued; and on neglect so to fill up, &c. any justice may order such person to fill up, &c. or to repair such fence from time to time: and in case such person shall refuse, or neglect to comply with such order in ten days after the receipt thereof, or the same being left at his abode; on due proof by oath before any justice, of the offence, of the service of the order, and of the neglect, such person shall forfeit a sum not exceeding £10, nor less than 40s. to be applied in filling up, sloping down, or fencing the said hole, and towards the repair of the roads in the place,

Pits made in the highway.

One justice.

ure of their persons or property, or the property of others under their care, resist, abuse, or maltreat, any person whatsoever or if any person shall aid them in so doing, he shall forfeit 20s. for every offence; the offences to be proved, and judgment to proceed thereupon, in the same way as before provided for in the case of the other offences against this act. § 11.

Persons apprehended for offences, and refusing to discover their names and places of abode to any judge, shall be committed until they do so. § 12.

The fines and forfeitures arising by this act shall be, one half to the informer, and the other to the collector of the land-tax, to be accounted for as part of the funds for the detection and punishment of vagrants in Scotland. § 13.

No prosecution shall lie against any person unless brought within three months: and in all cases an appeal shall lie to the next quarter-sessions of the peace for the county, whose determination shall be final. § 14.

Nothing herein shall limit or take away the jurisdictions, privileges, and immunities, of any of the cities and royal boroughs in Scotland. § 15.

as the justice shall direct; the said forfeiture to be levied by distress and sale of the offender's goods, rendering the overplus to the owner, after deducing the charges of the distress." § 4. GENERAL REGULATIONS.

V. FOR repairing the roads the justices and commissioners of supply are entrusted with the charge of the statute labour; that is, the calling out the tenants, cottars, and householders, being authorized to give order as "they shall see most convenient, and with least grief to the subject for mending all highways and passages to or from any market town, or sea-port within the shire."[a] § 5. STATUTE LABOUR—WHO LIABLE?

BY the act 1669, c. 16, the justices were required "to convene all tenants and cottars, and their servants, who are to have in readiness horses, carts, sledges, spades, shovels, picks, mattocks, and such other instruments as shall be required."

THE act 1670, c. 9, allowed the justices to compound, in certain circumstances, with the persons liable in the statute work.

BY the stat. 5 Geo. I, c. 30, § 3, the justices and the commissioners of supply were ordained "to convene the tenants, cottars, and other labouring men, within their bounds for the repairing of the highways. This includes the whole inhabitants within the county;[b] even inhabitants of royal boroughs, fishermen, boatmen on the ferry,[c] tradesmen and artificers,[d] Inhabitants of royal borough

[a] 1617, c. 8.

[b] By the ancient common law of England, no person was exempted from this burden, which made part of the *trinoda necessitas*. (1st Blackst. Comment. 357. So also the Roman law, *domus etiam divinas tam laudabili titulo libenter adscribimus*. (Lib. iv, Code de Privilegiis Domus Augustæ, &c.)

[c] 24th July 1750, Hamilton against town of Kirkcaldy, Falconer.

[d] 11th June 1758, trustees of Glasgow turnpike against inhabitants of Paisley. Dict. Vol. iv, p. 201.

§ 5. STATUTE LABOUR —WHO LIABLE?

and other inhabitants in general;[e] but sailors who make coasting voyages, or to foreign parts, were found not to be liable,[f] nor colliers, gatesmen, winlessmen, and watermen employed in coalworks.[g]

Heritors.

HERITORS are not subjected by the act 1669, c. 16, in any part of the burden, unless so far as may be necessary for supplying the deficiency in the statute labour.[h]

[e] In the case of Paisley the decision was,—"That the whole inhabitants of the town of Paisley may be called out to repair the high-roads in time coming." In a reclaiming petition, a general exemption of all the inhabitants within the borough was not insisted for, but only in favour of merchants, artificers, tradesmen, as also peers, judges, clergymen, women, &c. none of whom could come under the description of labouring men, tenants, cottars, or their servants: "The lords adhered, and refused the petition, reserving to the inhabitants, or any class of them who shall think themselves aggrieved, to apply for redress as accords," 11th Jan. 1758. Dict. V. iv, p. 201.

[f] 24th July 1750, Hamilton against the inhabitants of Kirkcaldy. Falconer.

[g] 7th March 1755, Earl of Eglinton against the justices of peace for the county of Ayr. Dict. V. iv, 201.

The argument used was not only that those people were *adscripti glebæ*, and by 1 parl. Cha. II, sess. 1, act 56, obliged to work all the six days of the week, except at Christmas; but also, that were colliers diverted from their proper work for six days yearly, irreparable damage might ensue to their masters. This latter reason may seem to justify the exemption even yet, if not in whole, at least partially, notwithstanding the alteration that has since taken place in their condition.

[h] "And because the work of the inhabitants within the several bounds will not be able sufficiently to repair the highways and others foresaid, therefore his majesty with advice and consent of the said estates, doth hereby authorize and require the whole freeholders and heritors of the several shires, to convene at the respective head boroughs, the said first Tuesday of June yearly, and to call for an account from the justices of peace of what is needful for the reparation of the highways and others foresaid, and what charges and expences are requisite for promoving thereof, and for making or repairing bridges and ferries where they shall be found needful, and accordingly to stent the heritors of the said shire, comprehending the heritors of the borough lands therein, in what shall be found necessary for the effect foresaid, not exceeding 10*s.* Scots upon each £100 of valued rent in one year, which is to be uplifted by the said justices, or whom they shall appoint, by poind-

ing

§ 5. STATUTE LABOUR —WHO LIABLE?

THE act 1669, c. 16, appoints the sheriff, one of his deputes, justices of peace, or such of them to whom particular parts of the highways shall be committed, to call tenants, cottars and their servants, "by public intimation at the parish kirks on the Sabbath-day, immediately after the first sermon, or any other way that they shall think fit, to have in readiness, horses, carts, sleds, spades, shovels, picks, mattocks, and such other instruments as shall be required, for repairing of the saids highwayes, and to conveen at such places thereof as they shall be required, and in such proportion, and with such furniture, as the saids justices or overseers shall appoint, and that in the most equal and proportionable way, as the saids justices and overseers will be answerable: with power to them to design such of the saids persons as they find to be most skilful, to attend and direct the rest, and to appoint them fit wages for their attendance."

Nature and extent of the statute labour.

Intimation.

THOSE who have carts and horses are bound to bring them, others to give their personal labour only, with such instruments as the act requires, or otherwise as the trustees may think proper. Neither have the statutes ascertained the number of carriages to be performed by each tenant according to the extent of his farm or otherwise; all this is intrusted to the discretion of the justices.

Carts and horses.

Instruments.

THE persons liable must be convened, three days before the last of June, not being in seed time; and three days after harvest yearly, until the highways, bridges, &c. be sufficiently repaired.[a] This regulation, though chiefly calculated for the conveniency of the country labourers, yet applies to all equally who are liable to be called out. This act of 5 Geo. I, so far repeals former acts, as to limit the

Season of the year.

ing as said is, and employed for the use aforesaid, and of which they shall be obliged to give an account to the said heritors at the next Michaelmas head court yearly."

[a] 5 Geo. I, c. 30, § 3.

§ 5. STATUTE LABOUR —WHERE.

time for calling out people liable to work before harvest, that it should be before the end of June.[a]

Places.

THE act 1669, c. 16, ordains the persons liable in statute labour "to convene at such places as shall be required, and in such proportion and with such furniture as the said justices or overseers shall appoint, and that in the most equal and proportionable way, as the said justices and overseers will be answerable." The statute 5 Geo. I, c. 30, says "on such days, and at such places, as the Commissioners or their officers shall appoint."[b]

[a] Dec. 17, 1760, Walker and Herd *ag.* Thomson. The justices of peace of Kincardine having warned the tenants and labourers to come out to perform the statute work upon the 15th, 16th, and 17th days of August, and granted warrant for poinding the effects of the deficient, to the extent of the composition-money, which was accordingly executed; the tenants whose goods were poinded, brought an action for restitution, and for damages and expences, against the justices, on the ground of their being called out in time of harvest, contrary to the act 5 Geo. I, which limits the term for calling them out, to be before the last day of June. The justices insisted chiefly, that the statute was in non-observance, and that harvest was not actually begun, although the pursuers had cut some green corn to give a pretence for their plea. The court of session decided, that the warrant granted for poinding was illegal, as the tenants were not summoned within the time limited by the statute; and that the justices were liable in restitution of the goods, and in expences of process. Of course, it is a perpetual law with regard to the other clause also, the time of exacting the work after harvest. The act 1669, c. 16, had provided "that the number of days do not exceed six days for man and horse yearly for the first three years, and four days yearly thereafter, and that they be only betwixt the bear-seed yearly, and hay time or harvest thereafter." And the statute 1670, c. 9, upon the consideration that the time appointed by it for working at highways is limited betwixt seed time and harvest, and that it will be more convenient to work at, and repair several highways at other seasons of the year, empowers, upon that account, the sheriffs and justices to require all persons liable to work at and repair highways, bridges and ferries, to convene for the number of days they are liable, at any time or season which shall appear most convenient, seed time and harvest excepted.

[b] Justices of peace and commissioners of supply for the county of Berwick

§ 5. STATUTE LABOUR —WHERE.

PERSONS who live at such a distance, that they cannot go and return in the same day and do a day's work, cannot be called out under any higher penalty than that specified by act 1670, c. 9.[a] The act directs, "where the ways lie at great distance from those who are liable to repair the same, that it shall be leisome to the said justices and overseers to dispence with those persons who live at such a distance, they paying 6*s.* yearly for ilk man, and 12*s.* for ilk horse, which ought to have been employed in the said work." This is the only exception. Every other person must perform his statute labour, or pay 1*s.* 6*d.* for every day's failure, unless he send a man to work for him.[b]

Persons living at a distance.

—PENALTIES.

PAYMENT of the penalties may be enforced by distress and poinding[c].

wick against the tenants of Coldingham, 4th Jan. 1757. In this case, the tenants complained that the road they were called out to repair lay at a great distance, while nearer roads lay unrepaired. The court of session decided, "that the justices of peace and commissioners of supply have a discretionary power to determine what roads shall be first repaired, and to divide the shire into districts.

[a] 4th Jan. 1757, justices, &c. of the county of Berwick against tenants of Coldingham. Fac. Col.

[b] 5 Geo I, c. 30, § 3. In one case, the justices of peace were sanctioned in taking less than the statutory penalty. The justices of peace had made an order that the six days labour should, in the first place, be applied in the repairing of one highway, and allowed a composition for those who lived at a distance, below the rate of the legal composition. Some having refused to pay, as not being bound to perform six days labour on distant roads, nor to pay any composition for it, the court of session refused their bill of suspension. 15th Feb. 1754, viscount Arbuthnot against the justices of peace of Kincardineshire. Fac. Col.

[c] 5 Geo. I, c. 30, § 4.

The direction of the act 1669 was, "providing that the days they are required to work do not exceed the number of six days for man and horse yearly for the first three years, and four days yearly thereafter, and that they be only betwixt the bear-seed yearly, and haytime or harvest thereafter: with power to the saids justices or overseers to poind the readiest goods of the absents, for 20*s.* Scots money for the absence of ilk man daily, and 30*s.* for the man and horse, without farther solemnity but apprising the same upon the ground of the land, and

§ 5. STATUTE LABOUR.—PENALTIES.

THE act 1670, c. 9, ordains the 6*s.* yearly for every man, and 12*s.* for every horse, which ought to have been employed in the said work, to be expended at the sight of the said sheriff and justices, on workmen to work in place of those who live at such distances, in manner foresaid. And 5 Geo. I, c. 30, § 7, enacts, that "the penalties in this act, (other than such as shall be incurred by the tenants, &c.) shall be levied by sentence of the justices, and commissioners of supply, or any five of them; and the expence of the prosecution shall be defrayed by the shires and stewardries, at the suit of such surveyors; and such penalties shall be applied for repairing such highways, &c. as the justices or commissioners of supply shall appoint; and in default of such appointment for repairing such highways, &c. as the lords of justiciary in their circuits shall appoint."[a]

Application of the penalties.

therewith to hire others in place of the absents; and in case the saids absents shall have no poindable goods, to punish them in their persons as they shall see cause."

[a] The justices of Berwickshire and commissioners of supply, at two general meetings, as justices of peace and commissioners of supply had ordered, that two highways in the county should be repaired in preference to the rest, and had fixed a compofition to be paid in money, in case the labouring men should fail to attend at the reparation of these highways, and because they suspected that some opposition would be made to the proceedings, had come to the following resolution: "To empower a committee to name one or more proper agents at Edinburgh for defending and discussing any bills of advocation or suspension that might happen to be offered against the proceedings of the meeting, or those acting under their authority, and to empower the committee to draw upon the collector of supply for the necessary sums to be paid out of the highway and bridge money in his hands." In consequence of this resolution, the expences of a law-suit against some of the inhabitants of the county, who had refused to comply with the orders of the commissioners of supply, was paid by the collector, and this payment was approved of unanimously in an after-meeting of the commissioners. The pursuers who had been averse to their whole proceedings, executed a summons of declarator and repetition against the commissioners, of the following purport: "That the expending the highway and bridge money in a law-suit was illegal; and that the defenders conjunctly and severally ought to be decerned to refund to the collector the foresaid 10*d.* on

§ 5. TURNPIKE STATUTES.

The turnpike statutes being each an entire code, respecting the particular county for which it is made, and differing from one another according to the inclinations, knowledge, attention, or accuracy of the persons under whose direction they are respectively applied for, do not fall to be here explained. Their clauses are to be interpreted according to general principles of law; and the construction of such of them as have occasioned any general questions, touching, for example, the review of the supreme courts, has been already taken notice of. Here, therefore, it is only necessary to mention such general regulations as are contained in public statutes, obligatory throughout the whole country; and which, therefore, must regulate the conduct of all trustees under such turnpike acts, as contain no special exception to the contrary. In most of the turnpike acts, it is specially mentioned what qualification is necessary to act as trustee; but the general statute, 25 Geo. III, c. 82, provides, "that all proceedings of the trustees, for the care of turnpike-roads, at meetings where any person has acted as a trustee, without being regularly appointed, shall be valid; and he shall not be liable to any prosecution on that account, if, at the time of acting, he had an estate sufficient to qualify him, and had taken the oath required." Qualification.

FARTHER, the general statute 18 Geo. III, c. 63, § 1, provides, "that where the trustees appointed by any acts made for repairing turnpike-roads, shall not have met on the days appointed for the first meeting, &c. it shall be lawful for any five of the said trustees to cause notice to be affixed on all the turnpike gates erected on such roads; or if there shall be no turnpike gates, to cause the like notice to be affixed on some conspicuous place, in one of the neighbouring Notice of the place of acting.

the £100, and to employ the same as the law directs." The court decided that the money was properly applied. 27th Feb. 1757, Charteris against sir Robert Pringle of Stichell and other justices of peace and commissioners of supply in Berwickshire. Fac. Coll.

§ 5. TURNPIKE STATUTES.

market towns, and also to be published in some newspaper circulated in that part of the country, at least 20 days before the intended meeting; and the said trustees, when met, are hereby empowered to carry such acts into execution."

In like manner, the statute 32 Geo. II, c. 15, contains a great number of general regulations. Thus it is provided,[a] that all carriages drawn by more than four horses, or other beasts of draught, shall pay 5*s*. of additional toll for each horse or other beast. And farther, it is provided, that "no waggon or other carriage shall be drawn by more than eight horses, or other beasts of draught, upon any turnpike road in Scotland, on pain of forfeiting £5 sterling for every such offence; one half to the informer, and the other half to be applied to repairing the road where the offence is committed, as the trustees shall appoint;" but with this exception, "that nothing in this act shall extend to restrain the owner of any carriage, or his servants, drawing with as many horses or beasts of draught, as shall be necessary for drawing up any steep hill, as the trustees within their respective districts where such steep hills lie shall direct; a copy of which direction, under the hand of the clerk of the trustees, shall be kept by the person empowered to levy the tolls at the toll-gate next to such hills; and shall, without fee, be made patent to the owners of such carriages passing the road, or their servants;"[b] and excepting those carriages whereof the fellies of the wheels are nine inches broad;[c] carriages employed in carrying one tree or piece of timber, one stock or block of marble, or any machine in one piece, which cannot be drawn by fewer than four horses; waggons, &c. drawn by oxen or neat cattle only, or along with two horses, and no more;[d] excepting also coaches, chaises[e] marine, coach, chariot, landau, berlin, chaise, chair, or calash.

More than four horses.

More than eight.

Exceptions.

[a] § 1. [b] § 4. [c] Ibid. [d] Ibid. [e] Ibid.

§ 5. TURNPIKE STATUTES.

FARTHER, the trustees, or any five of them, under the several turnpike acts, are authorized, by a writing under their hands, to order the fellies of the wheels of all waggons and other carriages, which ought to be of the breadth before directed, to be measured at any turnpike upon any part of the highway upon which such carriage travels.[a]

Measuring the wheels.

"If any person shall attempt to prevent the measuring the fellies of such wheels, or use any violence to any person employed in such measuring, every person so offending, and convicted before the trustees, or five of them, upon the oath of one witness, shall forfeit £5 sterling; one half to the informer, and the other half to be applied to repairing such part of the road as the trustees shall appoint."[b]

Evading tolls.

AND farther for preventing evasions, it is provided, that "if any person shall take off any horse or other beast of draught from any carriage, at or before the same shall come to any turnpike, with intent to avoid paying the additional toll, every person so offending, and convicted before the said trustees, or five of them, upon the oath of one witness, shall forfeit 20*s*. sterling; one half to the informer, and the other half to be applied to repairing such part of the road as the trustees shall appoint."[c]

LASTLY, it is directed, that "all tolls and forfeitures by

[a] "In case it shall appear to the person appointed to measure the said wheels, that the fellies of the wheels were originally of the breadth of nine or six inches respectively, and by wearing have been reduced to less breadth, it shall be lawful for such carriage to travel upon any turnpike road, so as the fellies of all the wheels respectively be not diminished more than one inch of the full breadth required by this act."

[b] § 11.

[c] § 21. And by § 3, "Every person who shall drive any waggon, &c. upon any part of any turnpike road, with more horses than such carriage shall on the same day pass through any turnpike bar with, shall be deemed to have taken off the said horses with intent to avoid paying the additional toll."

§ 5. TURNPIKE STATUTES.

this act imposed, if not otherwise directed, shall be levied by distress of the offender's goods, by warrant of any two justices of peace for the county or place where the offence is committed; and the persons distraining are to sell the goods distrained, and return the overplus money, if any, upon demand, to the owners, after such tolls or forfeitures, with the charges of distress, are deducted and paid. If any person think himself aggrieved by any order of the trustees or justices, it shall be lawful for him to appeal to the justices of peace for the county or place where the cause of appeal arises, in their general quarter-sessions, who are to determine the matter in dispute, and whose order therein shall be final. If any action be brought against any person for any thing done in pursuance of this act, every such action shall be brought within one month after the fact done."

Appeal.

§ 6. BRIDGES AND FERRIES.

VI. THE same statutes which give the justices of peace charge of the highways, mention also bridges and ferries: and here they require again to be noticed only so far as they relate to the latter. Justices of the peace are empowered by the said statute 1669, c. 16, "to visit the ferries in their shire, and where ferries lie betwixt two shires, that they correspond with the justices of the other shire, to the end they may appoint fit and sufficient boats, and convenient landing places, and so to regulate ferries as that the lieges may be readily and conveniently served, and at reasonable rates; and to punish such as shall neglect or transgress the rules established by them." And by the statute 1686, c. 8, "where bridges and ferries are upon the confines of two shires, it being just that both shires be burdened with the expence of reparation, the justices of peace and commissioners of supply in both shires are ordained to meet and adjust the expence of reparation proportionably, according to their respective valuations of the shires; the sheriffs of these shires, or their deputies, to convene them; and in case they

do not meet, general letters to be directed for charging them to that effect."

§ 6. BRIDGES AND FERRIES.

By the act of the privy council 1669, c. 16, it was ordained that moderate customs should be levied at bridges, causeways, and ferries, for the building, repairing, and upholding thereof. And the Act 1686, c. 8, ordains, "that the several shires and burghs be holden to repair the present standing bridges within their respective bounds, and to uphold the same; and if they suffer them to fall, the privy council be empowered to fine them in as much as will repair or rebuild these bridges." Under which statutes, it has been frequently decided, that the inspection and regulation of ferries belong to the justices of peace.[a] In like manner, it has been

[a] 1st Aug. 1775, justices of Mid-Lothian against Galloway and others, Dict. Vol. iii, tit. Jurisdiction; and June 14, 1762, justices of peace for the county of Fife against the magistrates of Kinghorn, ibid.

"The magistrates of Kinghorn made the following regulations: 1mo, That each person passing the ferry upon a Sunday should pay half a crown above the ordinary freight. 2do, That no persons within the burgh should let horses to hire, without being entered burgesses, and paying £50. Scots; and that no burgess should let horses or chaises within the town, without allowance of the postmaster. 3tio, That all who let horses or chaises within the town, or those who being casually there took a retour hire, should pay 5 per cent. to the town, in name of portship. 4to, That each ton of wine landed at Kinghorn from the passage boats should pay five shillings of shore-dues to the town. And 5to, That no person should act as boatman till he was admitted a burgess. The justices of peace of the county brought an action, concluding for reduction of the above regulations, as the magistrates had no power to regulate the ferry or boatmen. The magistrates founded on a charter, containing a grant of the harbour and port, with customs, anchorages, and all other duties and casualties; and as to the other regulations, they urged, that they were consistent with their powers as governors of the burgh. The court of session decided, that the regulation of the ferry belonged to the justices of the peace; reduced the whole duties and taxations complained of, except the duty on the ton of wine imported; and reduced likewise the regulation with respect to burgess inhabitants only plying at the ferry, and letting chaises and horses. June 14. 1762, earl of Moray and justices of Fife *contra* magistrates of Kinghorn." Dict. Vol. iii, p. 102.

§ 6. BRIDGES AND FERRIES.

decided that they have the charge of repairing bridges even lying within the jurisdiction of a royal borough.[b]

7. INNKEEPERS.

VII. As roads and ferries are of small consequence without inns and other conveniencies for posting, a few observations may here be made upon these subjects, which are properly, indeed, a branch of police.

ANY combination to raise the rates of posting is equally illegal with other combinations to raise wages or the price of labour, and may be checked and punished by justices of peace.

BESIDES this, however, the Scottish justices have been in the practice of interfering to regulate the rates of posting; though such jurisdiction is not expressly conferred on them by any statute. In England, the justices of peace exercise no such power. In 1760, the justices of peace for Mid-Lothian fixed the hire for a chaise and two horses, travelling post, at 9*d.* per mile. In 1795, certain post-masters in Edinburgh, notified by advertisement in the newspapers, that they meant in future to charge 1*s.* per mile, exclusive of the king's duty. Upon this the procurator-fiscal for the county presented a complaint to the justices, praying that

[b] Dict. V. iii, t. Jurisdiction, p, 358. The magistrates of Paisley having refused their concurrence to a scheme of erecting a bridge over the river for the convenience of the inhabitants of a suburb of the town, which was proposed to be executed at the expence of the inhabitants themselves, they applied to the justices of peace, who authorized the bridge to be built. The magistrates suspended the decree of the justices, and argued, that the latter had no jurisdiction over bridges, highways, &c. lying within the magistrates territory, as the town had, by their charters, every privilege of a royal burgh, except sending a member to parliament. Answered, The statutes on which the jurisdiction of the justices is founded, make no distinction whether the bridges or highway lie within the territory of a burgh or not. The court of session sustained decree of the justices, Feb. 27, 1759, inhabitants of Smedden *contra* magistrates of Paisley.

the postmasters should be prohibited from making any addition to their fares without their authority. The defenders denied the jurisdiction of the court. The justices, 28th October 1795, found "it proven, by the admission of the defenders, that the combination complained of, and the increasing of the fares for posting, by their own authority, and publishing the same in the Edinburgh newspapers, was illegal and unwarrantable, and in contempt of the authority of the court; therefore prohibited and discharged the said defenders, and all others concerned within this county, from exacting a higher rate of fares than those which were in use to be exacted previous to the attempt made by them in spring 1793, until otherwise ordered by the justices; and that under the penalty of 20*s.* sterling for each transgression. And the meeting further appointed the justices present a committee, and three a quorum, to meet at such times and places as they shall think fit, to take into consideration the regulations of the justices of the peace now existing, relative to the fares exigible by the postmasters, with power to receive such propositions as the postmasters shall think proper to lay before them, and to report the whole to the next or any subsequent meeting of the quarter sessions;" and, after hearing parties, "refused the postmasters application for a rise in their fares for posting, adhered to the judgment pronounced on the 28th October last, and continued the interdict thereby granted." § 7. INNS.

THE defenders complained of these judgments by a bill of advocation, stating both the grounds on which they thought an increase of their fare reasonable, and also the argument in law from which they inferred that the justices had no controul over them.

THE court of session, though divided in opinion, instructed the lord ordinary to refuse the bill as to the competency of

§ 7. INNS.

the justices of peace; but to pass the bill, to the effect of trying the question as to the amount of the fares for posting, the complainers being in the meantime, at liberty to charge 1*s.* 2*d.* per mile, duty included.

THIS decision was affirmed on appeal. But the learned reporter adds: "It is believed that the appeal was dismissed entirely on the ground of the appellants having been guilty of an illegal combination to raise the price of posting; and that it was thought by the house of peers, that, had it not been for this circumstance, the justices of peace would have had no jurisdiction in the matter." [a]

—HORSES AND ACCOMMODATION NOT TO BE REFUSED

PERSONS having horses and carriages for hire, are not at liberty to refuse them to any person willing to pay the usual fare. In like manner, an innkeeper cannot refuse any person admission into his house. [b] "And it is noway material whether he hath a sign before his door or not, if he make it his common business to entertain passengers. [c] He may likewise be compelled to receive a horse, although the owner does not lodge in his house, because, by keeping of the horse, he has gain; but it would be otherwise of a parcel, or other dead thing." [d]

—EDICT *nautæ, capones, stabularii.*

FOR the greater security of travellers, the Romans devised their edict *nautæ, capones, stabularii*, which, with some variations, makes part of our law. By this edict, innkeepers, and, as it has been extended by our decisions, vintners in

[a] July 6, 1796, William Scott against William Smith and others. Affirmed Jan. 8, 1798. Fac. Col.

[b] Burn, tit. Alehouses, § 6, V. i, p. 41.

[c] "But how the officer may compel him may be a question. It seemeth that all the officers can do is either to cause such alehouse to be suppressed, or else to present such offence at the assizes or sessions, that so such offender may be thereupon indicted." Dalt. 7. Burn, ibid.

[d] Burn, ibid.

boroughs;[a] householders who take in lodgers;[b] carriers and owners of stage coaches,[c] are responsible not only for their own acts and those of their servants, but for the acts of the other guests and passengers.[d] They are liable for all losses not arising *damno fatali*. Another peculiarity is, that the extent of the damage may be ascertained by the suffering party's oath *in litem*. 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.[e] But a carrier is not liable for money, jewels, or other articles of great value in small bulk, inclosed in any parcel, unless its contents be mentioned to him.[f]

§ 7. INNS. EDICT *nautæ*, &c.

Damage, how ascertained? Oath *in litem*.

[a] Fount. Feb. 17, 1687, Master of Forbes.

[b] Fount. July 5, 1694. Hay.

[c] Feb. 6, 1787, Macausland. Fac. Coll.

[d] Ersk. B. iii, tit. 1, § 28.

[e] Ersk. B. iii, tit. 1, § 29.

[f] Jan. 15, 1791, Denniston. Fac. Coll.

CHAP. VI.

Regulations for encouraging of the Planting and Preservation of Wood.

§ 1. REGULATIONS.

I. THE Scottish legislature, subsequent at least to the reign of James I, appears to have been very solicitous for the improvement of the country; employing both reward and punishment to induce landholders to inclose their estates, and adorn them with trees and forests. In the reign of James II, the parliament thought it [a] "speedeful that the king charge all his freehalders, baith spiritual and temporal, that in the making of their Whitsundayis set, they statute and ordaine, that all their tennentes plant wooddes and trees, and make hedges, and saw broome, after the faculties of their mallinges, in place convenient therefore, under sik paine as law and unlaw of the barronne or lord sall modifie." And, in like manner, the tenth parliament of James V, ordained "that everie man, spiritual and temporal, within this realme, havand ane hundreth pounde land of

[a] 1457, c. 80.

new extent be zeir, and may expend sameikle, quhair there is na wooddes nor forrestes, plant woodde and forrest, and make hedges, and haning for himselfe, extending to three aickers of land, and abone or under, as his heritage is mair or less, in places maist convenient: and that they cause everie tennent of their landes, that hes the same in tack or assedation, to plant upon their onset zeirly, for everi marke land, ane tree. Ilk laird of ane hundreth pounde land, under the paine of ten pound, and lesse or mair, after the rate and quantitie of their lands." § 1. REGULATIONS.

THESE enactments were ratified by the act 1661, c. 41, which farther enjoined every heritor, liferenter, wadsetter, worth £1000 Scots a year of valued rent, to inclose four acres of land yearly for the then ensuing ten years, and to plant the same with trees: and other proprietors in like manner, more or less in proportion to their respective rents, the inclosed ground, for nineteen years, being free from all burdens and quarterings of horse.[a]

II. The destroying of planting was punishable by a great variety of enactments, the execution of which is entrusted, by the general statutes to the justices of the peace: and it is expressly declared that they are to proceed by witnesses and oath of party; and farther, that the punishment to be inflicted shall be a *pecunial* sum, answerable to the circumstances of the offence and quality of the offenders. This was a very wise limitation: for, the statutes referred to not only inflict the lesser corporal punishments of the stocks, but in some cases go the length of a capital punishment. Neither, indeed, is it very easy to reconcile those old statutes with each other. By one statute, the penalty for the first offence was £10 Scots to the proprietor, £20 Scots for the second, and £40 Scots for the third, besides damages.[c] And, in case the "committar of the wrang be unresponsal, he sall for the first § 2. PUNISHMENTS. Statutes to be executed by the justices. Ancient statutes. Penalties by 1579. c. 84.

[a] Parl. 1. Cha. II. [b] App. I, p. liv. [c] James II, 1579, c. 84.

§ 2. PUNISHMENTS.

fault be put in the stocks, prison, or irons, eight days, on bread and water; and for the second fault, fifteen days; and for the third fault, one month to lie in the stocks, and to be scourged at the end of the month." But with these severities and inconsistencies justices of peace have no concern, their jurisdiction, as already mentioned, being wisely restricted to a pecuniary fine; and, as must always be implied, imprisonment in case of the offender's inability to pay the same.[a]

In case of Insolvency.

FARTHER, those who wilfully cut and destroyed young trees, were to be "punished to the death,[b] as thieves." The act 1607, c. 3,[c] ratifies former acts, and farther enacts, "that whasoever shall be found hereafter to break down his neighbours woods and park dakes, fenses, stanks or closoures, to pastour within the said fenses, cut trees, broome, or sheare grasse within the samine, shall be conveined and called therefore, as an breaker of the law, either before the privy councill, or any other ordinare magistrat within this realme, at the option of the party compleiner: and the penalty to be imposed and taken of the contraveiners, before the saids ordinare inferiour judges, not to exceed the summe of forty pounds money of this realme. And the secret councell to impose sik penalties against the contraveiners of this present act, as after tryell taken in the cause, they shall finde the offence to merite and deserve. But" (i. e. without) "prejudice alwyse of putting of all former acts of parliament made thereanent to execution, after the tenour thereof in all poynts; to the whilk this present act shall make na derogation."

Death.

THE act 1641, c. 45, prohibits the demolishing, downcasting, climbing over, or any ways wronging the dikes or inclosure and planting within the same, under the penalty of £5. The statute 1661, c. 41, after ordaining each heritor to plant so many acres according to his valued rent, "for the better encouragement of heritors, and for preserving of the

[a] See Vol. I, p. 209. [b] Parl. 11, Jas. VI, 1587, c. 83. [c] Parl. 9, Jas. 6.

said planting and inclosures, ordained, that whosoever shall cut or break any of the said trees, (not being the heritors themselves), shall pay unto the heritors or persons wronged £20 Scots for every tree; or if he be not able to pay the said £20 it shall be in the power of the party thereby wronged, to make him work six weeks, giving him meat and drink allenarly. And farther, it is ordained, that whosoever shall break down the hedges or dikes of the said parks or inclosures, or be found within the same, being a stranger, shall be holden and repute a breaker down thereof, and pay £5 Scots, for every fault; or if he be not able to pay the said £5 Scots, to work ten days to the owner of the said grounds, for meat and drink as said is." And the act 1685, c. 39,[a] ordains "that no person shall cut, break, or pull up any tree, or peel the bark off any tree, under the penalty of £10 Scots for each tree within ten years old, and £20 Scots for every tree above that age. The havers or users of the timber of any tree so cut, broken, or pulled up, are declared liable to the same penalty, unless they can produce the guilty person who committed the misdemeanour." 1685 c. 39

§ 2. PUNISHMENTS. Encouragement to plant. Cutting trees. Penalty. In case of insolvency. Breaking hedges, &c. Penalty. Those unable to pay must work.

THE act 1661 directs process to be granted at the instance of the *party damnified;* and the other statutes are not explicit as to the form of the action. Hence a question arises, whether it may be at the instance of the private party alone, without concourse of the procurator fiscal. Perhaps this may be allowed, where the conclusion is merely *pecuniary;* but the aid of the public prosecutor ought always to be taken, where punishment of any kind is insisted for.

FRUIT trees in orchards fall under the statutes for the preservation of planting.[b] As all natural woods, Fruit trees. Natural woods.

[a] James VII, parl. 1.

[b] Kilkerran, tit. Planting, No. 2. So much says Lord Kilkerran, was thought to be imported in the letter of the 41st act, parl. 1, ses. 1, Cha. II, and therefore no regard was had to the suggestion, that fruit trees did not seem to fall under the purview of the statute; and that penal statutes were not to be extended.

§ 2. PUNISHMENTS.

where the trees are of that value to be cut down and sold. [c]

THESE offences are punished by British statutes also.

— BRITISH STATUTES — 1 GEO. I, c. 48.

STATUTE 1, Geo I, c. 48, § 1, enacts, "that if any person shall maliciously break down, cut up, pluck up, throw down bark, destroy or spoil any timber tree ... fruit tree ... or other tree ... it shall be lawful for any two ... justices of the county ... upon complaint ... by any inhabitant of such parish, or of any other, to cause such offender ... to be apprehended; and to hear and finally determine[d] and adjudge all and every the offence ... aforesaid. And if such justices shall convict any person ... then such justices ... shall commit such offender ... to the house of correction, there to continue and be kept to hard labour for three months; and where there are no houses of correction in the county, the justices shall commit him to prison for four months: and shall also order that such offender be publicly whipped by the master of such house of correction once every month during such three months, in such borough or corporation if the offence be committed therein, or in the market town where such house of correction stands, or in the next market town in the county, on the market day, between the hours of eleven and twelve; and where there is no house of correction, the justices shall order such offender

Two justices.

Punishment.

Correction house.

Imprisonment.

Scourging.

[c] Some oak trees, which formed part of a clump of natural wood, having been cut down, the proprietor sued for the penalties, under the act 1685, c. 39. The judgment of the sheriff was this: "In respect it appears that the trees libelled were not planted trees, but grew in a natural wood from stools or roots of trees that had been formerly cut, ordains the pursuer to instruct the value of the trees libelled, at the time of their being cut by the defender, and what value they might have risen to had they been allowed to grow to maturity." The lord ordinary refused a bill of advocation: but the court rather considering the statute as protecting likewise natural woods, passed it. 3d March 1784, Buchanan against Malcolm. Fac. Coll.

[d] See the import of such an expression as to the finality of the jurisdiction, B. I. ch. 7. § 3.

to be whipped by the hangman, once every month during such four months, on the market day, where such offender shall be committed, or on the market day of some town between the hours aforesaid." § 2. PUNISHMENTS —1 GEO. I, c. 48.

BEFORE such offender be discharged, he shall find sureties for his good behaviour for two years.

AND if any person shall maliciously set on fire, burn, or cause to be burnt, any wood, underwood or coppice, he shall be punished as a wilful fire raiser.[a] Burning.

THOSE who shall in the night time spoil, destroy, or carry away any timber tree, or pluck up, spoil, destroy, or carry away any root, shrub, or plant, of the value of 5*s*. sterling, growing in a nursery or other inclosed ground, shall be deemed guilty of felony so as to suffer transportation for the space of seven years. And those who are wilfully aiding, abetting, or assisting, shall be liable to the same punishment.[b] Spoil in the night time.

AND by the 6 Geo. III, c. 48, every person who shall wilfully cut or break down bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil, or destroy, or carry away any timber tree or trees, or trees likely to become timber, or any part thereof, or the lops, or tops thereof, without the consent of the owner, (or in any of his majesty's forests or chases, without the consent of the surveyor . . . or his deputy, or persons entrusted with the care thereof), and shall be thereof convicted on the oath of one or more credible witness or witnesses, before one or more justices, shall, for the first offence, forfeit a sum not exceeding £20 sterling . . . together with the charges previous to and attending such conviction, to be ascertained by such justice on non-payment thereof, to be committed by such justice to the common gaol, for any time not exceeding twelve months, nor less than —6 GEO. III, c. 48. Kinds of timber. Offence. One witness. One justice. Penalty. Imprisonment.

[a] § 4, 7 Anne, c. 21. [b] 6 Geo. III, c. 36.

§ 2. PUNISHMENTS —6 GEO. III, c. 48.

six, or until the penalty or charges shall be paid: for the second offence, to forfeit not exceeding £30 sterling, together with the charges as aforesaid; on non-payment, to be committed as aforesaid, for any time not exceeding eighteen months, nor less than twelve, or until the penalty and charges shall be paid. And if any person so convicted shall be guilty of a like offence a third time, and shall be thereof convicted in like manner, he shall be deemed guilty of felony, and the court before whom he shall be tried, shall have authority to transport him for seven years. And all oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees,[a] shall be deemed timber trees, within the meaning of this act.

Transportation.

Kind of trees.

ACCORDING to the words of this act, any one justice may order a man to be transported. "This," says Dr. Burn, "must be a mistake; it cannot be intended that a justice shall have power to transport a man. But the word *court* afterwards, before which he shall be convicted, (that is, of assize or sessions, as it seemeth by the following words of the act), implies a legal trial by jury. And, therefore, these words" in like manner "ought to be omitted."[b]

Dr. Burn's observation, as to one justice having power to transport,

IN Scotland, for the same reason, that clause cannot make transportation a punishment competent to be inflicted even by the sessions; which here, as we have seen,[c] do not try offences by a jury. And that the legislature could intend, against the spirit of our common law, and the tenor of our ancient enactments, as well as the principles of the British constitution, to deprive the subject, by implication, of the privilege of a jury trial, in the case of transportation, is not to be supposed. There is a price, at which, even the external

Contrary to the common law of Scotland.

[a] And also poplar, alder, larch, maple, and hornbeam; 13 Geo. III, c. 23.

[b] Tit. Wood, Vol. iv, p. 473.

[c] Vol. I, p. 147.

beauty and cultivation of the country, may be purchased too dear. § 2. PUNISHMENTS —6 GEO. III, c. 48.

THE third section relates to the punishment of those plucking up, or destroying roots, shrubs, or plants, out of fields, nurseries, or gardens. Plucking roots.

IN this case also, the trial is competent before one justice of the county where the offence has been committed, who may fine him in any sum not exceeding 40*s.* sterling with expences; and for the second offence, in any sum not exceeding £5; and "if any person, so before convicted, shall a third time commit the like offence, and shall be thereof convicted, such person so convicted shall, for such third offence, be deemed guilty of felony; and the court before whom such person shall be tried, shall, and hereby hath authority to transport such person for the space of seven years, to any of his majesty's plantations in America, in like manner as other felons are directed to be transported by the laws and statutes of this realm." So far as this clause is understood to give either one or more justices the power of inflicting summarily the punishment of transportation, Dr. Burn's observation will here too apply.[a] One justice. Fine. Second conviction. Third do. Transportation. Dr. Burn's observation applies.

[a] Farther, the statute says it shall be held *as felony*, which therefore must have a technical meaning in the English criminal law. In Scotland, we have no such *nomen juris*. With us it is merely a common word, and means, in general, acting with a criminal intention. Accordingly, in the stat. 1 Geo 1, c. 48, the legislature aware of this, made a distinction between England and Scotland. The burning of woods in England it declares to be felony; but as to Scotland, it drops the word felony, and describes the punishment to be inflicted.

The British legislature has no doubt power to add both to the vocables and punishments of our criminal code; and when it does so professedly, we must obey. But, in general, when we find the legislature using foreign and unknown terms, as having a fixed and established meaning, which in our law they have not, the safer rule is to hold that it is speaking not to us at all, but exclusively to that part of the empire in which its

§ 2. PUNISHMENTS. —6 GEO. III, c. 48.

AND lastly, section fourth declares, that all persons cutting or destroying "any kind of wood or underwood, poles, sticks of woods, green stubs, or young trees, or carry or conveyaway the same, or shall have in his, her, or their custody, any kind of wood, underwood, poles, sticks of wood, green stubs, or young trees, and shall not give a satisfactory account how he, she, or they came by the same. and shall be thereof convicted before any one or more of his said majesty's justices of the peace, on the oath of one or more credible witness or witnesses, shall, for the first offence, forfeit and pay immediately on conviction any sum not exceeding the sum of 40*s*. together with the charges previous to and attending such conviction, to be ascertained by the said justice or justices who shall convict the offender or offenders. And if any person or persons shall commit any of the offences aforesaid a second time, and shall be thereof again convicted in manner foresaid, he, she, or they, shall forfeit and pay any sum not exceeding the sum of £5 sterling, together with the charges previous to and attending such conviction, to be ascertained as aforesaid. And if any person or persons shall commit any of the offences aforesaid a third time, that then such person and persons being duly convicted thereof according to law, shall be deemed and adjudged an incorrigible rogue or rogues, and shall be punished as such."

Destroying underwood, &c.

One justice.

One witness.

Penalty.

Second offence.

Third do.

Rogue.

One justice.

AND it shall be lawful for such justice or justices, unless the respective forfeitures shall be paid down upon conviction forthwith, where not otherwise directed by this act, by warrant under his or their hands and seals, to commit such offender or offenders, for the first offence, to the house of correction for one month, to hard labour, and to be once whip-

Correction house.

language is intelligible. Lord Swinton, accordingly, puts the query—does this statute extend to Scotland? I see no other reason for the doubt, but this use of the word felony, and that in a subsequent clause, as we shall see the English court of king's bench alone is taken notice of: for in its enactments it speaks quite generally.

ped there; and for the second offence, where not otherwise directed by this act, to the house of correction for three months to hard labour, and to be whipped there once in every one of the said three months. § 2. PUNISHMENTS. —6 GEO. III, c. 48.

AND if any person or persons shall at any time hinder or attempt to prevent the seizing or securing any person employed in carrying away any such timber or other trees, every such person so hindering or attempting to prevent such seizing or securing, shall, for every such offence, forfeit and pay £10 sterling to the person or persons who shall convict such offender; and if the said sum be not immediately paid on conviction, the person or persons so convicted shall be, by the justice or justices before whom he, she, or they shall be convicted, committed to the house of correction to hard labour, for any time not exceeding six calendar months." Preventing the securing any offender. One justice Penalty. Correction house.

IT is directed, "that one moiety of all and every the forfeitures herein before directed to be paid in pursuance of this act and not otherwise directed, shall go to the informer, and the other moiety to the person or persons aggrieved." Application of the penalties.

IT is directed also, "that the conviction and convictions of all and every offender and offenders against this act shall be certified by the justice or justices of the peace before whom the same shall be made to the next general quarter sessions of the peace, to be filed amongst the records of the said sessions." The statute farther directs the conviction "to be fairly written on parchment or paper in the form which it prescribes, or in any other form of words to the like effect:[a] which said conviction shall be good and effectu- Certification to the quarter sessions. Finality of the jurisdiction.

[a] That is to say:

"Be it remembered, that on the day of in the year A. B. was, on the complaint of C. D. convicted before of the justices of peace for in pursuance of an act passed in the 6th year of the reign of his majesty.

§ 2. PUNISHMENTS—6 GEO. III, c. 48.

al in law to all intents and purposes; and shall not be quashed, set aside, or adjudged void and insufficient for want of any form or words whatsoever, nor be liable to be removed by *certiorari* into his majesty's court of king's bench, but shall be deemed and taken to be final to all intents and purposes whatsoever."

Finality.

IF such decisions of the justices be final in Scotland, it arises from the general words at the close of this section. The exclusion of the court of king's bench, could not, in sound construction, exclude the review of our supreme courts.

§ 3. STATUTORY PRESUMPTION.

III. A VIOLENT precaution has been taken for checking such depredations. A presumption, *juris et de jure*, of guilt has been introduced by two statutes, the one Scottish,[a] the other British.[b]

—SCOTTISH STATUTES.

BY the Scottish statute, it is enacted, that "all tenants and cottars shall preserve and secure all growing wood and planting that is upon the ground they possess, that none of it shall be cut, broke, or pulled up by the roots, or the bark pulled off any tree, and that under the pain to be exacted by their masters allenarly, of £10 Scots for each tree within ten years old, and £20 Scots for each tree that is above the said age of ten years, unless tha samen be done by warrand and order of the said master and heritor of the ground; and ordains the tenant to be liable for his wife,

king George III, for as the case may be.—Given under our hand and seal the day and year above written."

[a] William, parl. 1, 1698, c. 16. In a suit against a tenant for cutting wood within his possession, upon the said act, it was found to infer a presumption, that growing timber, cut or destroyed in a tenant's possession, was cut or destroyed by him, unless he instructed that it was done by a third party. (24th July 1734. Fergusson.)

[b] 1 Geo. I, c. 48, § 1.

children, and servants, or any others within his family that shall contraveen this present act." § 3. STATUTORY PRESUMPTION.

THE Scottish statute subjects the tenant in the damage unless he discover the real delinquent.[c] Nay, it holds him liable if the damage was done by wife, bairns, or servants, though without his knowledge and against his will and orders,[d] and when the real delinquent is discovered.

UNDER the term "growing wood," such trees as are not worth preserving for sale are not comprehended. Thus it was decided, that these statutes concerning planting did not apply to the case of a great number of natural growing trees in a glen, which had usually been pastured by cattle, the trees not having been preserved in time bygone to be cut for sale.[e]

THE British statute subjects the whole inhabitants of the ville or village, in the neighbourhood whereof the delinquency has been committed, in pecuniary damages, unless the guilty person be discovered within six months.[f] And, for the better discovery of such offenders, jurisdiction is —BRITISH STATUTES.

[c] Dict. Vol. ii, tit. Planting.

[d] Kilkerran *v.* Planting, N° 2. "And whereas a doubt was stirred upon the import of the act of parliament 1698, whether the tenant was liable, though it be not proved that he or any of his family did the damage; upon this ground, that although the first part of the act of parliament be general, subjecting the tenant, whoever may have done the damage, yet in the latter part of the act the tenant is declared liable for his wife, bairns and servants; but, *cui bono*, if he was liable, whoever did the damage? The answer was, That without doubt the tenant is, by the act, liable whoever do the damage; and the reason of the clause subjecting him for his servants, &c. was to obviate a pretence that might have been made by the tenant, that he was free, where the real delinquent was discovered."

[e] Dict. Vol. ii, tit. Planting.

[f] If any person or persons whatsoever, from and after the 24th day of June, in the year of our Lord 1716, shall

§ 3. STATUTORY PRESUMPTION.

vested in any two justices, to whom any of the inhabitants of the village shall complain; which two justices shall finally determine such offence, and shall have power to

shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil any timber tree or trees, fruit tree or trees, or any other tree or trees, the person or persons, body politic or corporate, that is, are, shall, or may be damaged by the same, shall receive satisfaction and recompence of and from the inhabitants of the parish, town, hamlet, vill, or place, where such tree or trees shall be so maliciously broken down ... where such offence or offences shall be committed in that part of Great Britain called Scotland, to be recoverable and recovered by way of summar action, and in the same manner and form as damages in other cases of riot are to be recovered by the laws there, unless the party or parties so offending, shall, by such parish, town, hamlet, vill, or place, be convicted of such offence, within the space of six months, from the committing such offence or offences; any law, or construction to the contrary in anywise notwithstanding.

And be it further enacted and declared, by the authority aforesaid, that it shall and may be lawful to and for any two or more justices of the peace of the county, riding, division, stewardry, regality, city, town, borough or corporation, wherein any such offence or offences shall be committed, or the justices in open sessions, upon complaint to them made by any inhabitant of the aforesaid parish, hamlet, vill, or place, or of the owner of such tree or trees, or of any other, to cause such offender or offenders to be apprehended for the trespasses and offences aforesaid, or any of them, and to hear and finally determine and adjudge all and every the offence and offences aforesaid; and if such justices shall convict any person or persons of all or any the trespasses or offences aforesaid, then such justices immediately after such conviction, shall commit such offender and offenders to the house of correction, there to continue and be kept to hard labour for the space of three months, without bail or mainprize; and where there are no houses of correction, in any county, riding, division, stewardry, regality, city, town, or borough, where such offender or offenders shall be convicted, the said justices shall commit such offender or offenders to such prison as is appointed for other criminals, there to continue for the space of four months; and shall also order and adjudge that such offender and offenders shall be publicly whipt by the master of such house of correction once every month, during such three months, in such borough or corporation, if the offence be committed therein, and not otherwise, or in the market town where such house of correction stands, or in the next market town

next

commit such offender to the correction house, to be there dealt with as specified in the said act.

§ 3. STATUTORY PRESUMPTION.

IV. A QUESTION occurred, whether soughs or willows were to be considered as a crop, which the tenant was at liberty to cut down, or as *pars soli*, and the property of the landlord. The interlocutor of the ordinary made a distinction between measurable timber and the younger willows, allowing the latter to be cropt. This distinction was approved of by the court.[a]

IT was observed from the bench, that if a tenant plant willows, he may cut them down every two or three years as a crop. But if he allow them to stand till they grow to the size of large trees, they become *pars soli*. The tenant may cut them for the purposes of the farm, but not for sale.—(1807.)

next adjacent to such house of correction and in the county where such offence shall be committed, on the market day of such town, between the hours of eleven and two of the clock; and in such places where there is no house of correction, the said justices shall order and adjudge that such offender or offenders shall be publicly whipt by the hand of the common hangman or executioner once every month, during such four months, on the market day of any borough or corporation where such offender shall be committed, or on the market day of some town, between the hours of eleven and two of the clock.

And it is hereby further enacted, that before any such offender or offenders shall be discharged, he, she, and they shall find sufficient sureties for his, her, or their good behaviour for the space of two years thence next ensuing; any law, custom, or construction to the contrary notwithstanding.

[a] 9th June 1807. Bossue against Wight.

CHAP. VII.

Of Winter-herding.

§ 1. IN GENERAL.

I. IN ancient times, it was customary for the cattle of the neighbouring proprietors to pasture promiscuously, after the crop was off the ground. And no man was obliged to herd his cattle off other men's grounds or corn, or to be answerable for any damage they might do, unless during the *haining-time*, that is, during the time the corn was upon the ground. If one, therefore, wished to keep his neighbour's cattle off his ground, it was necessary for him to "herd his ground, and turn off his neighbour's cattle, but without wronging them."[a] Nor could he "put them in poyndfold," before the act of parliament 1686, c. 11,[b] which was passed with the view of putting an end to this old and prejudicial practice of promiscuous pasturing.

II. THIS act proceeds on the narrative, of "the prejudice

[a] Stair, B. ii, tit. 3, § 67. [b] Jas. VII, parl. 1.

and damnage which the liegis do sustain in their planting and inclosures, through the not herding of nolt, sheep, and other bestial, in the winter-time, whereby the young trees and hedges are eaten and destroyed." § 2. ACT 1686, c. 11. Narrative of it.

IT therefore "statutes and ordains, that all heritors, life-renters, tenants, cottars, and other possessors of land or houses, shall cause herd their horses, nolt, sheep, swine, and goats, the whole year, as well in winter as summer; and in the night-time shall cause keep the same in houses, folds, or inclosures, so as they may not eat or destroy their neighbours ground, woods, hedges, or planting." Direction of the statute.

THE statute farther certifies, "such as shall contravene, they shall be liable to pay half a mark, (or about 13½*d.*) *toties quoties*, for ilk beast they shall have going upon their neighbour's ground. *by* and *attour*" (besides) "the damage done to the grass or planting." Punishment.

THE proprietor of the ground, as already mentioned, having, previously to the statute, no power to detain the trespassing animals, it farther "declares, that it shall be lawful to the heritor, or possessor of the ground, to detain the said beasts until he be payed of the said half mark for each beast found upon his ground, and of his expences in keeping the same; and this but" (without) "prejudice of any former acts of parliament made against destroyers of planting and inclosures." Gives power to detain the cattle, till the penalty, and expence of keeping them be paid.

IT was decided, that this act applies, if the cattle trespass by breaking through or getting over a fence. If the ground be not sufficiently inclosed, the cattle ought to be herded.[a]

[a] 19th Nov. 1799, Loch against Tweedie. Tweedie being subjected upon this statute, in a reclaiming petition pleaded the abstract point, that the

§ 2. JAS. VII, PARL. 1, 1686, c. 11.

WHETHER the statute applies where the owner of the trespassing cattle keeps a herd, thus obeying the injunction of the statute, although the herd's negligence suffer the cattle to go astray, can scarcely be said to be yet decided. This defence, among others, occurred in one case, where, upon the whole circumstances, it was decided that the act did not apply.[a]

the act being purposely passed to induce proprietors to inclose their grounds, did not apply to any case where there were mutual fences and inclosures. The petition was refused, but the point was thought attended with difficulty

[a] Feb. 18, 1794, Govan against Lang. Fac. Coll.

Alexander Govan and Thomas Lang were tenants, each for one year, of two adjoining inclosures, which belonged to different proprietors, and which were separated from each other by a hedge and ditch, forming a fence sufficient, at least, to keep in horses or black cattle. Govan's inclosure was under tillage; in Lang's sheep were pastured.

The former sued the latter for the statutory penalties, as well as damages, on account of certain trespasses said to have been committed by the defender's sheep upon the pursuer's corn. The sum demanded in name of penalties exceeded £13 sterling; and that for actual damages, amounted to about four guineas.

It appeared, that during the time libelled, the defender kept two herds, who relieved each other in succession, the one herding during the day, and the other during the night; and that in general, though it was sometimes otherwise, the one did not leave the field till the other arrived.

The sheriff subjected the defender in payment of the actual damage done to the corn; but not in the penalties, "in respect he appeared to have kept a herd."

The defender acquiesced in this decision; but the pursuer brought it under the review of the court of session by advocation, in so far as it refused him the penalties.

The lord ordinary having reported the cause on informations, the court was divided in opinion with regard to it.

Several judges, upon the grounds stated for the pursuer, thought all the defences ill founded. And of those who thought the penalties could not be exacted, some gave as the sole ground of their opinion, that in this case the defender had, *bona fide*, kept herds, and had done every thing in his power to prevent the trespasses from being committed; others, that the act applied only where the cattle were detained.

The court, by a narrow majority, 20th Nov. 1793, repelled the reasons of advocation; and, upon advising a reclaiming petition and answers, "adhered."

In that same case, the proprietor of the ground had omitted to detain the cattle when trespassing. The court, in general, seemed to think that this was necessary, in order to entitle him to the statutory penalty. § 2. JAS. VII, PARL. I, 1685, c. 11.

CHAP. VIII.

Of the Regulation respecting mutual Inclosures.

§ 1. cu. 11, p. 1, 1661, c. 4.

I. "FOR the greater encouragement of all persons who shall be vertuously inclined to ditch, inclose, or plant their ground, 'it was statuted and ordained, by a clause of the act 1661, c. 41,[a] that "where inclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dike which parteth their inheritance. And recommends to all lords, sheriffs, and bailies of regalities, stewarts of stewartries, and justices of peace, bailies of burghs, and other judges whatsoever, to see this act put in execution; and to grant process at the instance

[a] Cha. II. parl. 1. This act for the encouragement of planting contained other regulations, for example, exempting inclosed ground from payment of cess, &c. for 19 years, ordering heritors of £1000 rent to plant so much yearly, &c. These clauses were temporary. But the clause respecting mutual inclosures and some others were perpetual. The temporary clauses were continued for 19 years, and the perpetual clauses ratified generally by act James VII, parl. 1, 1685, c. 39.

of the parties damnified and prejudged, and to see them repaired." § 1. ch. 11, p. 1. 1661, c. 4.

THIS regulation is still in force.[a]

II. Under this statute, conterminous proprietors are bound, at their mutual expence, to repair and uphold such fences as have been formerly built.[b] § 2. WHERE THE REGULATION APPLIES.

IN order to have the benefit of this statute, it is necessary to make previous requisition to the conterminous proprietor, to concur in erecting the fence; otherwise he will not be liable in any part of the expence;[c] at least no farther than he is clearly benefited.[d] Requisition necessary. Requisition.

[a] July 28, 1713, Dunbar against sir Robert Gordon. (Forbes.) And 5th Dec. 1769, Riddell against the marquiss of Tweedale. (Fac. Coll.)

[b] 20th Jan, 1758, Alexander Lockhart against John Sievewright.

In March 1745, Alexander Lockhart purchased the lands of Craighouse from John Scivewright's father. The boundary on the east, between the lands of Craighouse and the lands of Plewlands, the property of Scivewright is described in the disposition to be a stone dike, "which stone dike, upon the east side, is hereby declared, to be, now and in all time coming, the boundary between the said lands of Plewlands and the lands of Craighouse."

In the year 1757, this stone dike had become decayed; and Mr. Lockhart with a view to inclose that part of his estate, brought an action against Scivewright, to oblige him to contribute half the expence of repairing or rebuilding it, or of making such other sufficient fence as should be found to be proper.

Pleaded in defence.—At common law, those who have concurred in building, may be obliged to uphold; yet this will not apply to the case, where one heritor has been at the sole expence of building, without following the rules of the act 1661; the intention of which statute was only to encourage the inclosing lands, but not to provide for preserving inclosures already made.

"The lords found the defender liable to contribute one half of the expence of upholding the march dike between the pursuer's property and his." Fac. Coll.

[c] 23d Feb. 1738, Ord against Wright. In this case, on account of that omission, no part of the expence was laid on the conterminous heritor.

[d] 9th Jan 1679. Seaton.

Seaton of Gairlton pursues Seaton of Barns on this ground, that he having inclosed a park, a part of the dike

§ 2. WHERE THE REGULATION APPLIES.

A PROPRIETOR is compellable to contribute equally to the erecting of the mutual fence, though the benefit he derives from it should not be precisely equal.[a] But the benefit must be in some measure mutual, otherwise the same equity, that gave birth to the regulation, will prevent its application.[b]

IN like manner, it was determined that it does not apply

dike whereof is upon his ground, adjacent to the march of Barns' ground, that part of the dike which is upon the march, should have been made up by equal expence of both parties: The defender alleged, No process, because the defender was never required to concur in building of the dike, which he might have done by his own servants, and by the land stones of his own ground, which the pursuer made use of; and the act of parliament doth not ordain the half of the expences by either party, but that both parties should concur, which necessarily imports a requisition, though it be not expressed.

"The lords found, that seeing requisition was not made, that they would only sustain the process against the defender *in quantum lucratus*, by not being put to the expence in the concurring to the building, which he might have done by his own servants and therefore would modify the expences so much the lower." (Stair.)

[a] Dict. Vol. iv, p. 80.

An heriror sold a part of his estate, separated from the part he reserved by a stone dike, which dike is declared in the purchaser's disposition "to be now and in all time coming the boundary between the lands." This dike falling some years after, into disrepair, the purchaser brought an action against his author, the conterminous heritor, to oblige him to contribute half the expence of repairing it. Urged in defence against this plea, That the dike was beneficial only to the pursuer, for the behoof of whose lands alone the defender had formerly erected it and that it was of no service to the defender's lands as they were all uninclosed, and set in long tacks. The court found the defender liable to contribute one half of the expence of upholding the dike.

[b] 15th June 1784, earl of Peterborough against Mrs. Garioch Dict. V. iv, p. 81.

The earl of Peterborough, proprietor of an estate in Kincardineshire, intending to inclose his grounds petitioned the sheriff that Mrs. Garioch, a conterminous heritor, might, in terms of 1661, c. 41, and 1685, c. 39, be found liable in half the expence of the march dike. The defender set forth, that her property was mountainous, barren, and of little value, and which would not be meliorated at all in proportion to the expence. The court, in an advocation, sustained the defence.

§ 2. WHERE THE REGULATION APPLIES.

to small properties consisting of no more than five or six acres each. The lands of two proprietors were divided by an inconsiderable stripe of water, oftimes dry. The one proprietor made requisition upon this statute to the other, to concur with him in building a mutual fence. He declined doing so. It was decided that the statute applied. But it was ordained, that the stripe of water should either "be wholly without the dike, or, if the defender pleased, that it run a space within the dike, and a space without the dike, that either party might have the benefit of watering thereat."[a]

If only to dry marches?

§ 3. NATURE OF THE FENCE.

III. The statute does not specify the kind of inclosure, whether ditch, or hedge, or of dry stones, or built with mortar, which it leaves to be regulated by the parties themselves: or, if they disagree, by the judge ordinary.[b]

[a] 21st July 1669, earl of Crawford against Rigg. Stair, V. i, p. 642.

[b] July 1739, Douglas against Penman. Kilkerran, *voce* Planting and Inclosing of Ground, No. 1.

CHAP. IX.

Of the Regulation for straightening of Marches.

§ 1. IN GENERAL.

I. IT often happens that the marches of conterminous proprietors are so crooked, and unevenly intersected with each other, as not to admit of making a mutual fence without an exchange of ground, which the act 1661, c. 41, did not give the proprietor, "vertuously inclined to inclose his ground," any power of compelling. In order to provide for such cases, the statute 1669, c. 17, was passed.

§ 2. 1669, c. 17. Jurisdiction created.

II. BY this statute it is enacted, that "it shall be leisome to him to require the next sheriffs, or bailiffs of regalities, stewarts of stewartries, justices of peace, or other judges ordinar, to visit the marches along which the said dike or ditch is to be drawn, who are hereby authorized when the said marches are uneven, or otherways incapable of ditch or dike, to adjudge such parts of the one or the other heritor's ground, as occasion the inconveniency, betwixt them,

Marches visited.

[a] Chas. II, parl. 2.

from the one heritor in favour of the other, so as may be least to the prejudice of either party; and the dike or ditch to be made, to be in all time thereafter the common march betwixt them, and the parts so adjudged respective from the one to the other, being estimate to the just avail, and compensed *pro tanto*, to decern what remains uncompensed of the price, to the party to whom the same is wanting. And it is hereby declared, that the parts thus adjudged *hinc inde*, shall remain and abide with the lands or tenandries to which they are respective adjudged, as parts and pendicles thereof, in all time coming."

§ 1. Ch. II, P. 2. 1669, c. 17. Adjudging the ground. Compensation, if the land adjudged is not of equal extent.

III. It may happen that the grounds of the parties are entailed. But that does not prevent the operation of this statute, the land got in exchange being considered as part of the entailed estate, and liable to the same restrictions with the land given up.[a] If part of the exchange be a pecuniary consideration, such sum must be considered as a capital to be laid out in purchasing land, or otherwise, in terms of the entail.

§ 2. If entailed or unequal.

IV. Transactions of this sort are not understood to make any alteration on the comparative value of either estate. Each proprietor is presumed to get as much as he gives. And it is not usual for any formal conveyances, from the one proprietor to the other, to take place. An exchange therefore, of small parcels of land, for the purpose of straightening marches, is not considered such an alteration of circumstances, as to afford ground for striking any one off the roll of freeholders,[b] even although his valuation be

§ 4. Effect of excambion.

[a] 10th Jan. 1702, sir John Ramsay against sir James Rivers. Fount.

[b] Wight's system of election law, B. iii, c. 4, p. 286. "In a case from the county of Forfar, no less than 40 acres had been given off by one proprietor to his neighbour, but as he received another piece of land in exchange, it was understood the transaction made no variation upon the extent

§ 4. EFFECT OF EXCHANGE

no greater than the law requires; not even although the freehold depend on the old extent.[a]

extent of his valued rent." 1768, Skene against Graham. Ibid. But if considerable tracts of ground are exchanged, and mutual dispositions become necessary, there may be a substantial alteration in their respective estates; and it should seem that an alteration of that nature might form an objection. Ibid.

[a] Feb. 1781, Hamilton of Sundrum against Bogle of Shettlestone. Wight. Ibid, p. 287.

CHAP. X.

Of the Division of Lands lying Run-ridge.

I. "LANDS are said to lie run-ridge, where the alternate ridges of a field belonging to different proprietors." [g] For remedying so inconvenient an arrangement, the act 1695, c. 23, [h] was passed. § 1. IN GENERAL.

II. THIS statute proceeds on the narrative, of the "great disadvantage arising to the whole subjects from lands lying run-rig, and that the same is highly prejudicial to the policy and improvement of the nation, by planting and inclosing." § 2. WILL. P. I. 1675, c. 23. Preamble.

It was therefore ordained, "that whatever lands of different heritors lie run-rig, it shall be leisum to either party to apply to the sheriffs, stewarts and lords of regality, or justices of peace of the several shires where the lands lie, to the effect that these lands may be divided according to their respective interests, who are hereby appointed and authorized for that effect, and that after due and lawful citation of Jurisdiction given

[g] Erskine, B. iii, tit. 3, § 59. [h] William, parl. 1.

§ 2. WILL. P. I, 1605, c. 23. parties concerned at an certain day, to be prefixed by the said judge or judges.

"IT is always hereby declared, that the said judges, in making the foresaid division, shall be and are hereby restricted, so as special regard may be had to the mansion-houses of the respective heritors, and that there may be allowed and adjudged to them the respective parts of the division, as shall be most commodious to their respective mansion-houses and policy, and which shall not be applicable to the other adjacent heritors."

Mode of proceeding.

Incorporate acres.

IT is also provided and declared, "that thir presents shall not be extended to the burrow and incorporat acres, but that, notwithstanding hereof, the same shall remain with the heritors to whom they do belong, as if no such act had been made."

§ 3. HOW INTERPRETED IN PRACTICE.

III. THE division competent to landholders, by the statute, "is not in practice confined to run-rig lands, in a strict sense of the words, but is, by a liberal interpretation, extended to cases where the properties of the several heritors are broke off, not by single ridges, but perhaps by roods or acres." [c]

A DIVISION under this statute has been ordered to proceed in the case of six acres; [d] and even of no less than nine contiguous acres. [e] But more lately it has been held, that this was rather carrying the remedy beyond the statutory intendment; and it is now understood that the largest quantity of ground to which the act applies is four contiguous acres. [f]

[c] Ersk. B. iii, tit. 3, § 59.

[d] 13th Nov. 1755, heritors of Inveresk against James Milne. Fac. Coll.

[e] Marquis of Annandale, 1774.

[f] Jan. 17, 1782, Lady Gray. Fac. Coll.

§ 3. HOW INTERPRETED.

"SMALL parcels of land surrounded by a greater estate, and lying at a distance off from each other, but each parcel lying contiguous, and not run-ridge, do not fall under" this act.[a]

It is competent to feuars to sue for a division upon this statute, against their superiors.[b]

[a] Interlocutor in the case Dec. 7, 1744, Sir John Hall against Alison Falconer. Followed as a precedent in the case July 14, 1780, Murison against Drysdale. Fac. Coll.

[b] 28th Jan. 1774, Feuars of Tranent against York Building company. Fac. Coll. In this case some other points were discussed.

In the neighbourhood of Tranent, there is a tract of ground of about 500 acres, partly belonging to feuars from the family of Winton, and partly to the York-Building company, as purchasers of the forfeited estate of Winton, comprehending, *inter alia*, the barony and borough of barony of Tranent.

As matters stood, there were in all 26 feuars of Tranent, vassals to the York-Building company, the original number being reduced from the rights of different feus or plots having come into one person. Of these, fourteen concurred in instituting an action against the said company, and the twelve residuary feuars, founding upon the act 1695: and, in respect that the pursuers lands lay runrig, or rundale, interjected with other conterminous lands belonging to the defenders, concluding that the whole should be measured, valued, and divided, and lands allocated to each of them, contiguous and together.

The feuars, called as defenders, made no opposition, considering the measure to be for the general benefit; but a keen opposition was maintained upon the part of the York-Building company, on the following grounds.

1mo, There was an objection to the title. 2do, It was pleaded, that the statute of run-ridge regards only *prædia rustica* so considerable, as to be the subject of inclosing and planting not *kailyards* and small pendicles of ground in the neighbourhood of boroughs. And, 3tio, That of eight of the feuars now pursuing a division, the properties lay in detached plots, not at all interjected, and which certainly, therefore, the statute was not applicable. The court repelled "the objection to the title of the pursuers, and to the competency of the action; and allow the division to proceed. Repel the objection, that eight of the feuars have their several properties, as now possessed by them, in one plot, each by themselves; and, therefore, cannot be transposed from one situation to another: And find it competent for the commissioner, in making the division, to set off the shares of the parties on either side of the town of Tranent, as shall be most conducive for the general interest, and without regard to the place where their respective

§ 3. HOW INTERPRETED.

IN a division of run-ridge lands, it is not necessary that the tenants should be made parties to the action. It is presumed that the landlord will take care of the interest of his tenants, who, if they suffer, have recourse against him on the warrandice in their leases.[a]

spective possessions were before the division."

This judgment was "adhered to," upon a reclaiming bill and answers.

[a] May 15, 1792, Bruce against Bruce, Dict. V. iv, p. 247.

CHAP. XI.

Of the Division of Commons.

I. A REGULATION, which has been still more extensively salutary to the landed interest and agriculture of Scotland, is that of king William's first parliament, "concerning the dividing of commonties." The exercise of this important jurisdiction is appropriated exclusively to the supreme court. But justices of peace, along with sheriffs, stewards, and bailies of regality, are expressly authorized to perambulate and take all necessary evidence; so that the court of session may, on their report, determine the processes." § 1. IN GENERAL.

II. THE preamble of the statute mentions its object to be, "for preventing the disputes that arise about commonties, and for the more easy and expedite deciding thereof in time coming." § 2. WILL. P. 1, 1695, c. 38. Preamble.

IT was therefore statuted and ordained, that all commonties, "excepting the commonties belonging to the king and Enactment.

§ 2. WILLIAM, PARL. I, 1695. c. 38. —EXCEPTION.

royal boroughs, i. e. all that belong to his majesty in property, or royal boroughs in burgage), may be divided at the instance of any having interest, by summons raised against all persons concerned, before the lords of session, who are hereby empowered to discuss the relevancy, and to determine upon the rights and interests of all parties concerned, and to value and divide the same, according to the value of the rights and interests of the several parties concerned, and to grant commissions to sheriffs, stewards, baillies of regalitie, and their deputes, or justices of peace, or others, for perambulating, and taking all other necessary probation, which commission shall be reported to the said lords, and the said processes ultimately determined by them.

Royal commonty.

Burgage tenure.

Mode of procedure.

Who may sue?

Jurisdiction vested.

If there be mosses.

" AND where mosses shall happen to be in the said commonties, with power to the said lords to divide the said mosses amongst the several parties having interest therein, in manner foresaid.

If they cannot be divided.

" OR, in case it be instructed to the said lords that the said mosses cannot be conveniently divided, his majesty, with consent foresaid, statutes and declares, that the said mosses shall remain common, with free ish and entry thereto whether divided or not.

Rule of estimating the different interests.

" DECLARING also, that the interest of the heritors having right in the said commonties, shall be estimate according to the valuation of their respective lands and properties; and which divisions are appointed to be made of that part of the commonty that is next adjacent to each heritor's property."

§ 3. CONSTRUCTION OF THE ACT.

III. A COMMON may be divided at the suit of any having interest; not only of a joint proprietor, but even of one person having merely a right of servitude thereon.[r] But whe-

[r] Ersk. B. iii. tit. 3, § 57. See, however, lord Kilkerran's doubt, (Dec. 129.)

§ 3. CONSTRUCTION OF THE ACT—WHO ENTITLED?

ther the statute extends to lands which belong in property to one proprietor, and are only burdened with servitudes in favour of neighbouring tenements, has been much disputed.[b] It is clear that it is no sufficient ground to entitle one to sue for a division on this act of parliament, that a few definite limited servitudes of so many *roums* of grass, for example, are given off. Such, neither in legal, nor in vulgar language, will make a common; for very frequent instances occur of a servitude of two cows' grass, for example, on the richest corn-lands, which was never even vulgarly called a *common*. But the case is different where the servitudes are of such extent as to exhaust the whole or great part of the use of the subject; as is often the case of large hills and great tracts of moor ground. Such are often even in the language of our writers called common.[c] They have occasioned much difference of opinion, and have been variously decided in the court of session. In one instance, it was decided that action lay for a division of a common to those having only servitudes against the proprietor, (and, of course, *vice versa*), although there was no common property.[d] But, in a subsequent suit, at the instance of the proprietor of a common moor against his feuars, who had only rights of servitude therein, where "the matter was argued among the lords themselves, with more accuracy than it had been in any of the former cases," it was decided that "the pursuer was not entitled to insist in a division upon the act of parliament."[e]

A joint proprietor.

One having a right of servitude.

But this general point again occurring, and still very much dividing the bench, lord Kilkerran reports, that "the

[b] Kilk. *v.* Commonty, N° 5.

[c] Dirleton, *v.* Commonty; and sir James Stewart's answers.

[d] 7th Jan. 1724, lord Kames, Vol. i, N° 42; Kilkerran, p. 126.

[e] 31st Dec. 1739, and 1st Feb. 1740, sir Robert Stewart of Tillicoultry *ag.* the feuars of Tillicoultry. Kilk. *v.* Commonty, N° 5.

§ 3 CONSTRUCTION OF THE ACT —WHO ENTITLED?

lords avoided a special determination of the point, but fell on somewhat of a middle way. They found that, without prejudice to the defender's right of property, the surface of the muir in question might be divided between the parties, according to their several interests on that surface:" which, says lord Kilkerran, seems rather a judgment on the common law than upon the statute. In a later case, however, it was again decided that a right of servitude over a commonty is not such an interest as can authorize a division upon the statute.[f]

—RULES OF DIVISION.

IF the several proprietors be the only parties, the rule of division, as fixed by the last clause of the statute, is according to the valuations of the several lands and properties. But the division of valuation must be made by the commissioners of supply.[g]

[f] 21st Feb. 1771, Gilbert Lawrie of Polmont, and others, *ag.* the duke of Hamilton. Hamilton's Decisions, N° 81.

In the process of division of the commonty of Reddinrig and Whitesiderig, it was decided that there were three different classes of heritors who had an interest. The first and second of these were found to have a right of common property corresponding to their respective lands, and were entitled to a share in the division according to their valued rent. The third class, consisting of the feuars of the family of Hamilton, were found not to have a joint right of property, but a right of *servitude* merely in terms of their title deeds; it being, however, declared, that the share to be set off to the duke of Hamilton was to be burdened with these servitudes, and that the feuars were to be continued in possession, till such time as shares should be set off to them sufficient to answer such servitudes.

When the case returned to the lord ordinary, the pursuers, who composed this third class, insisted that, according to the interlocutor, they were entitled to have a division of the commonty allotted to the duke, and shares set off to them respectively. In order to determine the point, his lordship made a vizandum to the court, with these questions: 1mo, whether these feuars could oblige the duke of Hamilton to divide that share of the common allocated to him, so as each person might have a share appropriated corresponding to his servitude? and 2do, in case the feuars could force such division, by what rule it ought to be made?

[g] 22d Jan. 1771, duke of Queensberry

§ 3. CONSTRUCTION OF THE ACT.—RULE; OF DIVISION.

WHERE the question lies between the proprietors on the one part, and those who claim servitudes on the other, Mr. Erskine[h] observes, it is more equitable to observe the rule laid down in the preceding clause, to divide the commonty according to the value of the interests of the several persons concerned. Thus, in one instance, where the defenders had rights of servitude of pasturage followed by possession, it was decided, that the rule of division was "not the valued rent; but that the commonty must be divided conform to the number of sheep and bestial in use to be pastured thereon, except where any of the feuars are limited by their rights to a lesser number of sheep."[i] "The proprietors were formerly entitled to a separate allowance, or a *præcipuum*, over and above their right of property, over and above the share due to them, on account of their own or their tenants' possession."[k] *Præcipuum.*

IT has, however, been decided, that a proprietor is not entitled, by virtue of his right of property, to any *præcipuum* in the division of the common; but that he had thereby a right to coals, mines, minerals, and other fossils, that might be under the same.[l]

ag. Johnson. In this case the court of session sisted procedure till the parties obtained a division of their valuation by the commissioners of supply. Sup. to Dictionary.

[h] B. iii, tit. 3, § 58.

[i] Aug. 11, 1772, Maitland against Tait. Fac. Coll.

[k] Erek. B. iii, tit. 3, § 58.

[l] Feb. 21, 1782, Sir Robert Henderson *ag.* captain George Macgill. The above was the interlocutor of the lord ordinary, and it was adhered to, reserving to the proprietor to claim that part of the commonty which should remain, after the respective shares had been allotted to all the parties having interest. Fac. Coll.

CHAP. XII.

Of the Laws concerning the Game.

§ 1. QUALIFICATION.

I. THE pastimes of hunting and hawking have been at all times highly esteemed in this country, as "the only means and instruments to keep the haill lieges' bodies fra not becoming altogether effeminate."[a] Yet, anciently, no qualification seems to have been necessary to entitle every person, whether proprietor of land or not, to hunt. "It is," says president Balfour, "leasum and permittit to *all men* to chayes hairis, foxis, and all other wild beasts, beand without forrestis, warrenis, parkis, or wardis."[b] It is

All qualified of old.

President Balfour.

[a] Parl. 16, James VI, 1600, c. 23.

[b] Practice, p. 542. And he quotes, "Quon. Attach. c. 29, Mod. ten. cur. c. 27."

No such passage appears in the printed edition of the first authority referred to, viz. Quon. Attach.; but in Moynet's MS. copy of the Regiam Majestatem, c. 29, folios 173, 174, in the library of the faculty of advocates, the passage stands as follows: "*Tempore regis Alexandri, nullæ aquæ erant prohibitæ de piscatione salmonum, nisi aquæ currentes ad mare. Item non prohibebatur aliquibus venare ubique ad lepores, et ad alia animalia silvestria vel capipestria, extra forestas et warrenas;*" of which there is a pretty exact translation in ch. 52 of the Form and Manner of holding Baron Courts. It is as follows: "In the time of king Alexander, na manner of waters were defended from fishing of salmon, but rivers runnand into the sea, nor zit was not defended to *any man* to hunt, nor to chase the hare, and the foxe, and uther wild beasts, without forrests and warrenis, wheresoever they are found-and."

certain that, by the common law of Scotland, all men have the privilege of hunting on their own estates at least.[a] § 1. QUALIFICATION.

IT was, therefore, an exception from this general rule, that deer, as we have seen, were considered as *regalia*, and the privilege of hunting them required a special grant from the crown.[b] In like manner, various regulations were made as to hunting in the king's forests;[c] our jurisprudence having never acknowledged the game, in general, to belong to the sovereign; a maxim that, amid other corruptions, crept latterly into the feudal system, as adopted by many neighbouring nations, though repugnant to the laws and native freedom of those warriors, who introduced it, originally a law of liberty, into Europe.[d] Exceptions. Deer. Regalia. King's forests. King never proprietor of the game.

[a] *Aucupationes, venationes et piscationes cum fundo transire nemo unquam dubitavit, ita ut qui feudum accepit, aucupari, venari, piscari, in eo possit; et etiam alium externum prohibere ne aucupandi, venandi aut piscandi causa ingrediatur.* Craig de Feud. Lib. ii, dig. 8, § 13. With Craig agrees lord Stair, B. ii, tit. 3, § 60.

[b] But deer in inclosures are private property.

[c] Thus, in chapter 17th of the Forest Laws of king William, which is intitled, "of hunting within the king's forest," it is enacted, "1, gif anie hunts within the king's forest, without licence, he sall pay £10. 2, Gif anie free tenant, having, be vertew of his infeftment, free power to hunt within his aune land, march-and near to the king's forest, lets and suffers his dogs to runne within his awne land, and they follow the beast within the king's forest, he may follow his hounds within the king's forest, as far as he may cast his horne or his dogliesch. 3, And gif it happens that the haunds or dogs take the beast, quhilk they followed, within the foresaid space, that man sall incontinent take with him that beast, and his haunds, without challenge of anie man. 4, And gif it sall happen him, in following his haunds or dogs within the forest, to overpas or to exceide the foresaid space, he sall pay aught kye, and sall tine his haunds with the beast. 4, And quhasoever sall fallow his haunds or dogs runnand at ane beast, fra his proper land, within the king's forest, he sall remove and lay aside his bow and his arrows, gif he anie has, or he may bind the bow and the arrows with the bow-string: and gif the haund slays the beast, he with his haund and the beast sall pass away quite and free, but (without) any challenge of the king, or lord of that forest."

[d] Sir William Blackstone remarks,

§ 1. QUALIFICATION.

THE earliest notice that appears in our statute-book, of any distinction of persons as entitled, or not entitled, to indulge in this favourite amusement, is the narrative of the act 1600, c. 23;[a] which observes, that, by the "common consuetude of all countries, special prohibition is made to all sorts of persons to slay wyld foule, hair or venison, except such as by their revenues may beare the charges and burdings of the halkes, hounds and dogs requisit in sik pastymes."

1600, c. 23.

First mention of privileged persons.

YET no alteration in the common law of Scotland was made by this statute; which contained only some general regulations with regard to the manner and the times wherein it should be lawful to kill game. But not many years thereafter, it was ordained by the statute 1621, c. 31,[b] "that no man hunt or haulk at any time hereafter, who hath not a ploughgate of land in heritage, under the pain of £100." It is not the superiority, but the property, (whether held of the crown or of a subject superior), that gives this privilege.

Heritage means land.

that in England, "upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or venery, and such other animals as were accounted game, was then held to belong to the king, or to such only as were authorised under him." This doctrine, however, his learned annotator controverts with great ability, observing, that "it is true that our kings, prior to the *carta de foresta*, claimed and exercised the prerogative of making forests, wherever they pleased, over the grounds of their subjects ... But, beyond the bounds of these privileged places, neither the king nor any of his grantees claimed a property in the game." (Christian's Blackstone, B. ii, p. 419, note 10.

In France, prior to an ordinance of Charles VI, in the year 1366, nearly 300 years after the invasion of England by the Normans, the privilege of hunting was common to all, excepting "*dans certain lieux et avec cette difference qu'ils ne peuvoient se servir d'engins ni chasser a la gross Bête, ce qui n'étoit pas permis qu'aux gentils-hommes.*" (Pothier, Droit Civil, &c. Tom. iv. p. 356.)

[a] James VI, parl.

[b] James VI, parl. 23.

§ 1. QUALIFICATION.

THIS very moderate qualification was so far a limitation of the right of hunting, previously common to all. In France, the right of hunting was understood to belong to the sovereign, other persons having that right only in consequence of his permission. Hence it is, says Pothier, "that in the different ordinances concerning hunting, the king always uses the term *we permit*."[a] In Scotland, no such right was ever supposed to belong to the crown: our enactment, therefore, speaks *prohibitively*.

THIS statute was ratified by the act 1685, c. 20;[b] and,

[a] Droit Civil, &c. Ibid, p. 357.

[b] James VI, parl. 4. Amid some severe regulations, this act of James "prohibited and discharged all persons to have or use setting dogs, unless he be an heritor of £1000 of valued rent, and have express licence of the masters of our game within their several bounds, under the pain of 500 merks, *toties quoties*, in case of failzie; and we do hereby discharge all common fowlers and shooters of fowl, or any persons, except they be domestic servants to noblemen or gentlemen who are heritors of £1000 Scots of valued rent, to have or make use of setting dogs or fowling pieces, under the pain of escheat of such dogs or guns, and imprisonment of their persons for the space of six weeks, *toties quoties*." Under this statute, the justices of peace having given judgment against a proprietor of more than a plowgate of land, but who had not £1000 of valued rent, he appealed to the circuit court of justiciary, at Edinburgh, which decided, "That, by the common law of Scotland, all men have right and privilege of the game on their own estates or property, that by the act 1621, this right and privilege, or qualification, was confined to persons who had a ploughgate of land or more of property; that the act 1685 ratified and confirmed the general rule laid down in the said act 1621, but introduced a new regulation respecting the particular mode of hunting with fowling pieces and setting dogs, under an exception to those possessed of £1000 Scots of valuation, and having licence from the master of the game: that no evidence had been laid before the court of the said regulation and exemption ever having been in observance since the Union, and that they are now in desuetude: that the appellant having more than a ploughgate of land in property, had a right, and was qualified by the law of Scotland to hunt, subject to all the regulation of the game: that he was not liable to the fines imposed by the 13th of his present majesty; therefore they reverse the decreet of the justices of peace appealed from; but, in respect of the circumstances of the case, find no expences due."

§ 1 QUALIFICATION.

to this day, constitutes the sole qualification in this country:[a] The Scottish game-laws thus not only happily escape judge Blackstone's severe remark, that, in England, there is "fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire;" [b] but, moreover, in the general spirit of their regulations on this subject, deviate less, indeed, from Roman jurisprudence and the law of nature, than almost any other code of feudal Europe.

THE *criterion* selected divides not the nation invidiously into two classes; the rich and the poor, the noble and the ignoble. Neither the amplest proffessional income, nor the largest fortune in money, in urban tenements, or even in heritable securities, nor the most valuable lease of the longest endurance on the one hand, nor rank, title, or pedigree, on the other, affords a qualification for killing game. In this particular the first peer of the realm and his children stand on the same footing with the meanest plebeian; so abhorrent has ever been the tenor of Scottish legislation from that aristocratical spirit by which the game-laws (as frequently it is said) have been almost everywhere dictated, and particularly in monarchial France; where nobility was almost exclusively the title for enjoying the pleasures of the chase. A person not noble,[c] *(un roturier)*, was not, indeed, prohibit

In France.

[a] A question presently depends in court whether this qualification of a plowgate is still in force

[b] B. iv, p. 174. The qualification in England is, 1*st*, an estate, whether freehold or copyhold, of £100 per annum: 2*d*, a leasehold for 99 years of £150 per annum; 3*d*, being the son and heir apparent of an esquire, or other person of superior degree: 4*th*, being the owner or keeper of a forest, park, chase, or warren.

[c] Speaking of the *ordonnance* 1669, art. 228, M. Pothier says, "*elle la defend indistinctement à tous les roturiers et non nobles, de quelque état et qualité, qu'ils soient, sauf à ceux, qui sont proprietaires de fiefs lesquels en cette qualité, ont droit de chasse dant tout l'etendue de leurs fiefs.*" Tom. iv, p. 377. The words of the *ordonnance* are, "*marchands, artisans, bourgeois et habitans des villes, bourgs, paroisses, villages et hameaux, paysans et roturiers de quelque, &c.*" *Roturier* properly sig-

ed from hunting on such property of his own as he held feudally *(en fief)*; but he could neither hunt on any other person's estate, though he had the permission of the proprietor, [a] nor even on his own allodial property: [b] whereas a nobleman, *(un gentilhomme)*, could hunt not only on his own ground, but on that of any other person who gave him liberty.[c] § 1. QUALIFICATION.

BETWEEN these two systems, our English neighbours appear to have steered their course pretty equally: with both they agree in part, but entirely with neither: like us, they confine the privilege to landed property;[d] and deny it, in general, to rank or title. Yet, like the French, they so far regard gentility, as to allow the privilege to eldest sons and heirs apparent of esquires, or of persons of superior degree. In England, fathers, thus, by virtue of their blood, communicate to their offspring rights not belonging to themselves. For this peculiarity an English judge apologizes, by observing, that "the game laws are to be considered as po- English law.

nifies one who holds by an ignoble or soccage tenure.

[a] *Les roturiers etant par leur qualité de roturiers, d'une condition à laquelle la chasse est defendue, peuvent être empêchés de chasser, même sur les terres du seigneur de fief qui leur en auroit accordé la permission* (Pothier, Tom. iv, p. 357.)

[b] *En franc aleu*, that is held by no feudal tenure.

[c] Pothier, ibid. 359.

[d] The statute 1 James, c. 27, § 3, required either an etate of £10 a-year, or £200 in money. The statute 23 Cha II, c. 25, repealed the personal qualification leaving no other but land: So, too, the earliest of the French ordinances touching the game, that of Charles VI, in the year 1366, while it absolutely forbids all persons not noble either to hunt or to have for that purpose dogs, *furets*, *cordes*, &c. specially excepts *bourgeois vivans de leur possessions et rentes*, c'est a dire, says Pothier, *ceux qui n'exercent aucun art mechanique ni profession illiberale.* (Tom. iv, p. 356); which privilege was reserved entire by Francis I and Henry IV, but afterwards abolished, and the right, as already mentioned, limited to noblemen; a progress very natural in France; but very much the reverse in England, where commerce and the monied interest were daily growing in importance.

§ 1. QUALIFICATION.

sitive rules, rather than as founded on reason; therefore, it is safer to adopt what they have actually said, than to suppose what they meant to say." [a]

The same qualification for all game,

and all modes of hunting.

THERE is required one general qualification merely, without any minute distinctions as to the kinds of game or the manner of killing it, or whether the qualified person kills it himself or by a gamekeeper, or whether the latter hunt in his master's presence or absence; while none of the lieges are forbid the keeping either of dogs or guns, but the illegal use only: to this moderation in our system of game laws, we owe our escape from many teasing and troublesome questions with which the reports of our neighbours abound.[b]

IN Scotland, then, it is only such proprietors as have a

[a] Judge Ashhurst, in the case Jones v. Smart, M 26, Geo. III, 1 v. 44.

[b] In England, any person not qualified is punishable "who shall keep or use any grey hounds, setting dogs, hays, lurchers, tunnels, or any other engine to kill and destroy the game, and shall be thereof convicted."

The expression of the previous statute 23 Cha. II, c. 25, is still more general. By it an unqualified person "is not allowed to have or keep for himself, or any other person, any guns, bows grey hounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, lowbels, harepipes, gins, snares, or other engines for the taking and killing of game." Lord Macclesfield, who was a member of the parliament which passed this, is reported to have said, that he objected to the insertion of the word gun in the latter act, because it might be attended with great inconvenience. (Andr. 255, 2 sess. c. 204, str. 1098. Burn, tit. Game. (§ 4, p. 397.) Accordingly it uses the general expression engines. Hence this distinction obtains in practice; in the case of a gun, or other equivocal engine that may be used for other purposes than the killing of game, the evidence must be at least generally, that it was kept for the illegal purpose; whereas, in the case of lurchers, harepipes, and such like, which are peculiarly fitted or disposed for killing game, it is incumbent on the defendant himself to prove that he kept them for other purposes, as that it was a favourite dog, house dog, &c. &c. Burn, ibid.

plowgate of land, and those who have regular deputations from them as their game-keepers, that are qualified to kill game.[a] § 1. QUALIFICATION.

THE penalty is £100 Scots by the statute 1621, c, 30, which "ordainis his majesty to have the one half of the penalty of the contraveners of this present act, and the dilator to have the other half of the said penalty." —PENALTY.

THE jurisdiction of the justices, in prosecutions upon this act, has been always acknowledged and admitted in practice, and seems to fall under the express words of the general statutes, empowering them to punish "the users of unlawful games with lying or setting dogs." [b] This penalty the justices have no legal power to mitigate. The act contains no limitation as to the time within which the action is to be brought. —JURISDICTION OF JUSTICES.

But British statutes have gone still farther; making it punishable for unqualified persons even to have game in their possession, without first obtaining the leave of a qualified person. By the 13th of the king, c. 54, § 3, it is provided that every person whatsoever, not qualified to kill game in Scotland, who shall have *in his or her custody, or carry at any time of the year, upon any pretence whatsoever,* any hares, partridges, pheasants, muirfowl, tarmargans, heathfowl, snipes, or quails, without the leave or order of a person qualified to kill game in Scotland, for carrying such hares or other game, or for having the same in his or her custody, shall, for the first offence, forfeit and pay the sum of 20*s.* sterling; and for the second, and every other subse- British statutes. Must not have game in their possession. Offence described. Penalty. Second offence.

[a] A question presently depends in court, whether a qualified person may authorise (though not by a regular deputation as a gamekeeper), any of his friends or acquaintances to shoot upon his lands, who has not obtained a printed certificate.

[b] App. I.

§ 1. QUALIFICATION.

quent offence, the sum of 40*s.* sterling; and, in case of not paying the sum decreed within the space of ten days, after conviction by a final judgment, shall suffer imprisonment for six weeks for the first offence, and for three months for the second, and every other subsequent offence."[a]

13 G III, c. 54.

Proof.

One witness.

Two justices.

Sheriff or Stewart.

Prosecutor.

IT is farther enacted,[b] "that all offences against this act shall and may be inquired into and determined, either by the oath or oaths of one or two credible witness or witnesses, or by the confession or oaths of the parties accused, before any two or more of his majesty's justices of the peace, or before the sheriff or steward depute or substitute of the county where the offence shall be committed, or where the offender shall be found; and that all prosecutions for offences against this act shall be carried on, either at the instance of the fiscal of the court in which the prosecution is brought, or of any other person who will inform or complain."

Punishment.

IF any person convicted of any of the offences against this act, shall not pay the penalty decreed against him within ten days, the justices, &c. may grant warrant for levying the same by distress and sale, returning the overplus to the owner; or may grant warrant for committing the offender to gaol for the time specified in this act, as satisfaction for the penalty incurred, or until payment; and in case a warrant for levying by distress and sale shall be first applied for and obtained, and the penalty shall not be recovered, the justices, &c. who granted the warrant, upon its being certified to them by the officer executing the warrant, either that he has been able to recover no part of the penalty, or that a certain part still remains unrecovered, to grant warrant for committing the offender to gaol as aforesaid.[c] One moiety of the

Application of the penalty.

penalties shall be paid to the prosecutor, and the other to the poor of the parish, or to the repairing the high-roads

[a] § 13. [b] § 8. [c] § 9.

within the parish where the offence shall be committed, as the justices, &c. shall direct.[a] § 7. QUALIFICATION. —13 GEO. III, c. 54.

ANY person aggrieved by any decree of the justices, &c. may complain to the next circuit court of justiciary, or where there are no circuit courts to the court of justiciary at Edinburgh, by entering an appeal in open court, at the time of pronouncing such decree, or at any time thereafter within ten days, by lodging the same in the hands of the clerk, and serving the adverse party with a duplicate thereof personally, or at his dwelling house, or his procurator or agent in the cause; and such service shall be sufficient summons to oblige the first court of justiciary held at Edinburgh, at least fifteen days after service; and the decree of either of said judges shall be final, and conclusive to the parties.[b] Review. Appeal

WHEN an appeal is taken, the appellant, at the time of entering it, shall lodge with the clerk of court from which the appeal is taken, a bond, with a sufficient cautioner for paying the sums contained in the decree appealed against, and for paying costs; and the clerk shall be answerable for the sufficiency of the cautioner.[c] If any circuit-court shall, on hearing such appeal, find difficulty to arise, the court may certify the appeal, together with the reasons of difficulty, and the proceedings thereupon, to the court of justiciary, which is to proceed in and determine the same.[d] Appellant must find caution. Certifying the appeal.

NO penalty shall be recovered, unless the prosecution be commenced within six months after the offence committed.[e] Within six months.

IT is unnecessary to remark, that an enactment going so much to an extreme as this, carries its own antidote along with it. Each season it is notoriously transgressed, without challenge or complaint. The first magistrates, the most Violated with impunity.

[a] § 10. [b] § 11. [c] § 12. [d] § 13. [e] § 14.

§ 1. QUALIFICATION. —13 G. III, c. 54.

opulent merchants, and the highest born gentlemen of the realm, who have no landed property, seem unconscious that they daily incur the guilt of transgressing the public law, and are liable to the same pains and penalties with common poachers, when they use game without first obtaining any other consent than that of the poultryman, to whom they pay an adequate price. To be consistent, this statute, like our act 1601, c. 23, ought to have prohibited the buying of game altogether; whereas, on the contrary, it (as well as several other enactments) sanctions this traffic,[a] prohibiting the selling and buying game at certain periods of the year, and of course tacitly permitting such buying and selling, at other seasons, not prohibited. Either then, such *bona fide* purchase is to be considered as presumption of that consent which the statute requires to be first obtained, or it is not. On the one supposition, the consent required dwindles into nothing at all; and it must, in that case, be admitted, that the statute adopted the very reverse of the rule *fortiter re, suaviter modo*, using very strong and terrific language to express a very harmless and insignificant regulation: on the other supposition, it is more exceptionable still. it neither is, nor can be enforced: It is openly and hourly violated, without scruple or compunction on the one hand, or challenge on the other. And can the worthless part of the community be taught a worse lesson, or one that tends more to harden them in their vicious courses, than by framing laws, which the better part of the community do not scruple to transgress, and are winked at in so doing?[b]

Game openly purchased by the most respectable part of the community

Sanctions buying game.

[a] See also 1707, c. 13.

[b] One prosecution took place under the stat. 24 Geo. II, (repealed by the 13th Geo. III,) which contained the same prohibition.

The procurator fiscal brought an action before the sheriff against certain vintners. The sheriff having imposed fines on them, they appealed to the court of justiciary, which dismissed the appeal. Thereafter another prosecution was brought against the same parties, and a similar decision being again pronounced by the sheriff, was in like manner appealed from, and a very elaborate argument

§ 1. QUALIFICATION.

Two questions here occur, 1*st*, Is one who is qualified to shoot in England thereby qualified to shoot here also; and *ice versa*? 2*dly*, Does a plowgate of land, (our Scottish qualification), if situated in England, qualify its proprietor to hunt in this country? and *vice versa*, viz. Is a Scottish gentleman, possessing an estate in Scotland of such an extent, as, had it been situated in England, constitutes a game qualification, qualified to hunt in England? These questions have not yet been decided in either kingdom.[a] A clause of the articles of union enacted, that there shall be a communication of all privileges, except where it is expressly provided to the contrary. It would seem to follow from this, that one, who is qualified to kill game in one part of the kingdom, cannot be punishable in the other, as a poacher.

English. Qualification, its effect here. And *vice versa*.

in writing given in to the court of justiciary, to which the procurator fiscal not giving in answers, the process was dropt. See Maclaurin's criminal cases, No. 85.

[a] But a point, something similar to the latter of these questions, occurred in a case which occasioned a great deal of discussion in the court of king's bench. Under the acts 5 and 9 Anne, an action to recover a penalty for killing game without being qualified was brought against a person, who pleaded, that, having a *diploma* as *doctor* of physic from the university of St Andrews, he was of equal rank, and equally qualified to hunt, with those who had obtained degrees from either of the English universities. Lord Mansfield said, "he had no doubt that all privileges granted by the statutes to the two universities were confined to our own, and did not extend to Scotland, or other foreign universities, which were governed by their own particular laws and customs. . . .There is not a colour for saying that the defendant is qualified by the act of union; it is true, that by the 4th article of that act, the Scotch have the same general privileges as the English, but then they must have the same qualifications, otherwise they come not within the same description; for the general article which declares, there shall be a communication of all privileges, can only mean such as are of a general nature; a burgess of London is endued with certain privileges, to which a burgess of Edinburgh has no claim; so in every case where a privilege is of a qualified nature, it must be understood with that qualification; a doctor of the English universities may become a member of the college of physicians, may plead in doctors commons, and has various

§ 2. GAME CERTIFICATE

II. EVEN qualified persons cannot kill game without obtaining a certificate, for which a duty is payable.

Repeal of stamp duty.

THE 44 Geo III, c. 90, the last of the enactments concerning stamp duties on game certificates, was repealed by 48 Geo. III. c 55, § , except as to recovering arrears of duties then remaining unpaid; and *new* duties were granted in lieu thereof, to be placed under the management of the commissioners for the affairs of taxes; the game certificate being issued by the clerk to the commissioners of supply acting in execution of the act, or if there be no clerk, by the surveyor for the district.

What is game.

By the schedule (L.) annexed to the act, another alteration is introduced, as it includes some animals not formerly considered as game.

Woodcocks, &c.

Rabbits.

Exceptions.

IT makes the duty payable by every person who shall use any dog, gun, net, or other engine, for taking or killing any game whatever; or any woodcock, snipe, quail, or mandrail; or any conies, in any part of Great Britain. But it contains two exceptions, 1*st*, "The taking of "woodcocks and snipes with nets or springs," and, 2*dly*,

other privileges from which a Scotch doctor, as such, is excluded; the qualification, therefore, must be from Oxford or Cambridge. In like manner the statutes allowing men of certain degrees to have certain dispensations for holding two livings, necessarily refer to such degrees only as are obtained in an English university, for the church of Scotland is distinct from ours, and admits not of the same rules; therefore, whatever rank the defendant may hold by courtesy, he is not in point of law to be considered as a doctor to this purpose." Justice Willes delivered an opposite opinion: "It is objected, that a person who has not taken his degree in England is not to be considered in the light of a person qualified by the same means as those are; but this objection is in my mind done away by the 4th article of the union, which enacts, 'that there shall be a communication of all privileges, except where it is expressly provided to the contrary.' As to their being excluded by the college of physicians, that is merely the result of a local institution." But the point could not be decided, the court being of opinion, that even English doctors themselves were not qualified, though their eldest sons were. Burn, t. Game.

"The taking or destroying of conies in warrens, or in any "inclosed ground whatever; or by any person in lands "in his or her occupation, either by himself or herself, "or by his or her direction or command." § 2. GAME CERTIFICATES. Warrens.

THE duty payable under this act is the same as formerly, viz. *three guineas*. Duty.

FOR this sum the collector of the cess for the district, or his deputy, grants a receipt, and may exact from the person a gratuity for his trouble of one shilling. The *three guineas*, without deduction, are to be paid over to the receiver general Collector's fee.

THE clerk for the commissioners, or (if there be no clerk) the surveyor of the district, is required on demand to deliver *gratis* a certificate in exchange for this receipt. Certificate, by whom issued.

A PERSON may grant a deputation to his own servant, or the servant of any other person, as gamekeeper on any lands or estate. If the master, in respect of such servant, be charged the duty granted by this act, 48 Geo. III, c. 55, on servants, *one guinea* is all that is payable for the servant's certificate. But if the master is not charged the servant's duty, on account of such servant, then the sum payable for the servant's game certificate is £ : . Deputation to a servant.

BUT the servant's certificate, whenever it is recalled, is void; and a new certificate for the remainder of the year must be issued, free of duty, in behalf of any other servant to whom a new deputation is granted. Renewal.

THE certificate is not available to any person acting under a deputation, if he kills game out of the precincts of the lands for which his deputation is granted. Not out of the precincts.

THE certificate neither entitles *unqualified* persons to Certificate qualifies not

§ 2. GAME CERTIFICATE.

kill game, nor qualified persons to do so, in *any place* or in *any manner* prohibited by any of the existing game laws.

Certificate must be produced.

EVERY person found using a dog, gun, or other engine, for the purpose of killing game, must produce his certificate, if he is required to do so by any assessor or collector of the parish where he shall then be; by any commissioner, or inspector, or surveyor of taxes, acting for the county or district; by any person duly assessed to the game duty; by the owner or occupier of the ground.

May take a copy of it.

THESE persons are entitled to take a copy of, as well as read the certificate.

Name, &c.

IF no certificate is produced, they may require the person to mention his christian and surname, and place of residence.

Penalty for refusing, &c.

IF he refuses to shew his certificate, or tell his name, or gives a false name, or produces a fictitious certificate, he is liable to a penalty of £20 sterling.

Penalty for hunting without a certificate.

IF any person, after the 30th June 1808, without a certificate, uses any dog, gun, or other engine for taking or killing game, or other animals above enumerated, he is liable in a fine of *twenty pounds*, besides the duty of *three guineas*.

THE duty is to be assessed by way of surcharge: but the direction of the statute is to recover the penalty in the manner mentioned by the acts relating to the duties under the management of the commissioners for the affairs of taxes, viz. 43 Geo. III, c. 150; 43 Geo. III, c. 161; 45 Geo. III, c. 5; 45 Geo. III, c. 71; 46 Geo. III, c. 84.

Procedure.

THOSE acts, however, as to the mode of recovering penalties, refer to 43 Geo. III, c. 15, the general consoli-

dating assess act for Scotland; so that the game penalty is to be recovered in the manner prescribed by this last statute. § 2. GAME CERTIFICATE.

BY this act,[a] the general rule is, that one moiety of all penalties goes to the king, and the other half to the person who informs, or sues for the same *within twelve calendar months* from the time when the penalty is incurred. Penalties, application of.

THE penalty may be sued for in the court of exchequer in Scotland. Forum.

BUT, to prevent oppressive prosecutions, where the penalty is incurred without fraud, it is made lawful to the king's advocate to stay further proceedings in any such action, with respect as well to the informer's moiety as to the king's.[b] King's advocate.

AFTER the expiry of *twelve months*, the prosecution can be brought only in name of the king's advocate. After 12 months.

WHEN the penalty is recovered by action in the name of the king's advocate, whether brought *within* or *without* the twelve months, the whole of the penalty belongs to his majesty.[c] But the barons may give any part thereof, to the extent of one half, deducting all expences, as a reward to the informer.[d] When wholly to the king.

BUT in the case of penalties less than £20, the general rule is, that they are recoverable before "the commissioners for the affairs of taxes, or the sheriff-depute or substitute of the county, or any two or more of them, in the shire, stewartry, or city, or borough, where the offence shall be committed."[e] Under £20.

THE information or complaint must be in writing. Procedure.

[a] § 53. [b] Ibid [c] § 54. [d] Ibid. [e] § 55.

§ 2. SAME CERTIFICATE. There must be a summons to the party, unless such party has been surcharged, and shall appeal, and appear upon said appeal.[d]

THE fact is to be heard and determined in a summary way.[e]

Proof. The proof is either by the voluntary confession of the party, or by the oath or solemn affirmation of one or more credible witnesses.[f]

Mitigation. TO the extent of one half, the commissioners, sheriff-depute or substitute, may mitigate the penalty.[g]

THE penalty is levied in the same manner with the duty.[h]

THE informer or informers are entitled to receive from the receiver general one half of such penalties, in shares, as the barons, on report of the commissioners, shall certify that they are respectively entitled to.[i]

Finality. THE decree of the commissioners, sheriff-depute or substitute, is final and conclusive: it is not subject to appeal nor reduction, nor is it removable by suspension, advocation, or any process whatever, in any court of law or equity.[k]

THERE is only one exception, viz. where a surcharge has been made, and a case is demanded for the opinion of one of the lords of session or barons of exchequer, or

[d] § 55. [e] Ibid. [f] Ibid.
[g] Ibid. [h] Ibid. [i] Ibid.
[k] Ibid.

may be directed by any particular act concerning the surcharge.[l] § 2. GAME CERTIFICATE.

THE only alteration introduced by 48 Geo. III, c. 55, is that in the case of the penalty of *twenty* pounds incurred by refusing to shew a certificate, &c.; the commissioners before whom the information is made must be justices of the peace of the county.[m] Justices:

III. BESIDES, there were farther regulations for security of particular sorts of game, or for preventing the killing them in an improper manner, or at improper times. Thus, there were acts against the killing hares or rabits in time of snow.[a] Lastly, the statute 1707, c 17, ordained, that no person whatever shoot hares, under the penalty of £20 Scots, *toties quoties*. This prohibition neither was nor could be enforced. It was notoriously violated without compunction, by persons of character and respectability. A penal statute in this predicament is a serious public evil. It tends to weaken the moral sense of the community, as to the guilt of breaking the law. Penal transgressions, in such instances as this, which are daily committed by men of character without discredit, embolden the worthless to commit more serious transgressions; for disregard to the law and defiance to its sanctions, are qualities common to all of them alike. The evil, in this instance, has at length § 3. REGULATIONS. —HARES. Killing in time of snow. Shooting.

[l] § 55. [m] Schedule (L), Rule . .

[a] Stat. Rob. III, c. 10, forbade it under the pain of 6*s*. 8*d*. Scots; 1457, c. 88, made this offence, or that of killing rabits in snow, a point of criminal dittay; 1621, c. 32, made the fine for killing hares in time of snow, £100 Scots, *toties quoties*, one-half to the informer.

§ 3. REGULATIONS. —DEER.

been corrected by the repeal of this exceptionable enactment.[a]

Killing in time of snow.

STALKERS that slay deer,[b] and halders and maintainers of them,[c] and those who kill deer in time of storm or snow, or any of their kids under a year old,[d] are punishable by pecuniary penalties. By act 1567, c. 16, shooting at doe, roe, hart, hare, hind, rabbit, pigeon,[e] heron, or water fowl, with culverin, cross-bow, or hand-bow, is prohibited under the penalty of forfeiture of moveables. This act was confirmed, with a variation of the punishment, by 1581,[f] c. 123, and 1587 c. 59, by which last act the slayers and shooters of hart, hind, roe, deer, hares, cunnings, and other beasts, are to incur the punishment of theft. The act 1594, c. 211,

Water fowl.

Hares. Rabbits.

[a] The bill was brought into parliament by Sir James Montgomery, baronet, member for Peebles-shire, and passed at the end of last session. See app. of statutes, 48 Geo. III.

[b] 1424, c. 36.

[c] 1474, c. 80.

[d] Act 1621, c. 32, and 1685, c. 20, augment the penalty for killing deer in time of snow to £100 Scots, *toties quoties*, the one half to the informer.

[e] Lord Bankton seems to have overlooked these three acts, when he says he finds no law against shooting pigeons going at large. In practice, it is considered as a punishable offence. See in vol. I, p. 107, a case relative to this subject, in 1797; and several years previous thereto, a judgment of the sheriff of Ayrshire, finding a person liable in damages for shooting pigeons, was affirmed by the lord ordinary, whose judgment was acquiesced in. Laird of Farley against Campbell of Newfield.

With regard to the shooting of pigeons; by the law of England, if the pigeons come upon my land, and I kill them, the owner has no action against me, though I may be liable to the statutes which make it penal to destroy them; Cro. Ja. 492. It may also be observed here, that doves in a dove-house, young and old, go to the heir, and not to the executor. Coke 1, Inst. 8.

[f] James VI.

§ 3. REGULATIONS—DEER, &c.

ordains, that none kill deer, or any kind of wild fowl, in snow, nor at any other time, with guns and girns, under the penalty of £100 Scots. By act 1597, c. 270, the acts against the killing of deer, roe, hares, wild fowl, and pigeons, with hagbuts, hand-guns, cross-bows, and pistols, or the taking them with girns and nets, are ratified; and, in addition to them, it is enacted, that it shall be lawful for every sheriff, stewart, bailie, and baron, each within his own bounds, to destroy dogs which fowlers make use of for killing wild fowl, and to take and apprehend the fowlers themselves, and put them in the stocks for the space of 48 hours, as oft as they are apprehended. In order that the game may be the better preserved, the act 1600, c. 23, prohibits the buying or selling of red, or fallow-deer, roe, hare, partridge, moor-fowl, or other wild fowl, that is in use to be taken by hawks, under the penalty of £100 Scots. The same penalty is, by this act, to be inflicted on those who kill the said wild fowl, or wild beasts, by girn, net, or hagbut. By act 1621, c. 30, all persons are prohibited from buying or selling pouts, partridges, moor-fowl, black cocks, gray hens, tarmagans, quails, or caperkailies, under the penalty of £100 Scots. And by 1685, c. 20, all buying or selling of deer, roes, hares, moor-fowl, tarmagans, heath-fowl, partridges, or quails, is prohibited for the space of seven years, under the penalties contained in act 23, parl. 1600. Likewise destroying the nests or eggs of wild fowl, or killing them in moalting time, when they cannot fly, is prohibited under the penalty of 40*s*, and the offence declared to be a point of dittay, by 1457,[a] c. 84, and 1474,[b] c. 59.

—BUYING.

VARIOUS regulations were made respecting the time when it is lawful to kill game, but these having been repeatedly altered, it is only necessary to state how the law now stands.

—TIME.

[a] James II. [b] James III.

§ 3. REGULATIONS.

MUIRFOWL, or termagan, cannot be killed, bought, used, or had in one's possession, from 10th December to 12th August.[a]

HEATHFOWL cannot be taken from 10th December to 20th August.[b]

PARTRIDGES cannot be taken from 1st February to 1st September.[c]

§ 4. WHERE IS IT LAWFUL TO HUNT? Not on another's property. Qualified persons.

IV. THOUGH the act 1621, c. 31, excludes unqualified persons from hunting, even on their own property, yet it confers no new right on qualified persons; nor entitles them, any more than the common law did before, to search for or pursue game on the property of another, without his consent. A qualified person can hunt only on his own ground, or where he has obtained liberty from the proprietor. Every proprietor, whether qualified or not, is entitled, by the common law, to prevent every other person from coming on his ground,[d] even though it be uninclosed, and not likely to be actually injured.[e]

Uninclosed ground.

Particular regulations.

IN some particular cases, where the risk of damage from such trespasses seemed to be greatest, the common law right has been enforced by statutory penalties. Thus, the offences

[a] 13 Geo. III, c. 54.

[b] Ibid.

[c] 39 Geo. III, c. 34. It makes the time the same for England also; and under the penalties contained in 2 Geo. III, c. 19. viz. the penalty by that statute is £5 sterling, on conviction by one witness in any of the courts of record at Westminster, for every such fowl, with costs. It is not very clear, therefore, whether there is any penalty exigible in Scotland, under 39 Geo III, as it refers only to the £5 payable on conviction in the courts of Westminster. The penalty goes one half to the informer.

[d] Stair, B. ii, tit. 3. § 78: and Craig de Feudis, Lib. ii, dig. 8, § 13.

[e] June 16, 1790, earl of Breadalbane against Thomas Livingstone of Parkhall. Fac. Coll. In this case, the ground was not only uninclosed, but an extensive heath.

of hunting or hawking in their neighbour's corn, from Easter till the same be shorn; the travelling through wheat at any period of the year; or hunting in woods, parks, hainings, within banks or broom, without licence, are, besides damages to the proprietor, punishable with a penalty of £10 Scots to the king for the first fault, £20 Scots for the second, and escheat or forfeiture of moveables for the third.[a] It makes no difference whether the trespass be committed in the searching for the game, or in following it when started on the trespasser's own ground.[b]

§ 4. Where is it lawful to hunt? —Statutory penalties. Wheat, &c. Searching for.

This right belongs only to the proprietor: the tenant though actually in possession of the surface, and entitled to the emoluments thereof during his lease, cannot prevent his landlord, or those who have his permission, from hunting on his farm.[c] But the tenant will be entitled to damages. It seemed to be the opinion of the court, that the tenant could prevent any person from entering fields which were sown and prepared for a wheat crop, the damage, in such cases, being so evident and considerable.[d]

Tenant, can he exclude any from hunting on his farm? Tenant entitled to damages. Ground sown with wheat.

In those parts of the country chiefly occupied in the pasturage of sheep, it has been usual for the farmers and their servants to join in numerous parties, and traverse the fields, for the purpose of extirpating foxes. If, in the course of these pursuits, they do actual damage to any person's property, they are liable to repair it. These pursuits for

—Chace of foxes by sheep-farmers. Damage, reparation of.

[a] Act 1555, queen Mary, parl. 6, c. 51. This statute is still in force, and ratified by 1685, c. 20. Marquis of Tweeddale against Hugh Dalrymple, March 3, 1778. Fac. Coll.

[b] 3d March 1778, marquis of Tweeddale against Hugh Dalrymple. Fac. Coll. The decision was, "that the defenders are not entitled to enter or come into the deer park, or other inclosures of the pursuer, without his consent, either for hunting or following game, or drawing cover, or searching for game."

[c] Such was unanimously the opinion of the court of session in a case from Ayrshire, decided Nov. 1804, Ronaldson against Ballantine.

[d] Ibid.

§ 4. WHERE IS IT LAWFUL TO HUNT?

the purpose of public utility, however, the law regards more favourably than hunting for amusement. In the latter case, no person is more entitled to enter the property of another in pursuit of a fox than in pursuit of a hare or partridge.[a] But, in the former case, it has been found lawful to search for and pursue foxes through the grounds of any person inclosed or uninclosed, without his consent, or even against his will, as in the pursuit of a thief, mad dog, lion, or other savage beast escaped from his keeper.[b]

IN England it does not appear that this distinction is made between gentlemen hunting for amusement, and the country

[a] 3d March 1778, marquis of Tweeddale against Hugh Dalrymple. Fac Coll.

[b] Colquhoun against Buchannan, Aug. 6, 1785. Fac. Coll.

By the ancient statute 1427, c. 104, "it is statute and ordained be the king, with consent of his haill councell, that ilk baronne within his baronnie in gangand time of the zeir, chase and seeke the quhelpes of the woolfes, and gar slaie them. And the baronne sall giue to the man that slayis the woolfe in his baronnie, and bringis the barronne the head, twa shillinges. And quhen the barrones ordanis to hunt and chase the woolfe, the tennentes sall rise with the barroue, under the paine of ane wedder of ilk man, not risand with the barronne. And that the barronnes hunt in their barronnies and chase foure times in the zeir, and als oft as onie woolfe beis seene within the barronnie. And that na man seeke the woolfe with schot, but allanerlie in the times of hunting of them." And by act 1457, James II, parl. 14, c. 87, it was ordained, "for the destruction o woolfes in ilk countrie quhair ony is, the sheriff or the baillie of that countrie shall gadder the countrie folk three times in the year, betwixt St. Makie's day and Lammas, for that is the time of the quhelpes; and quhatever he be that rises not with the sheriff, baillie, or barrone, within himself, shall pay unforgiven a wadder, as is contained in the old act thereupon; and he that slays an wolf at ony time, he shall have, of ilk holder of that parochin that the wolf is slayn within, a penny. And gif any wolf happens to come in the country, that wit be gotten of, the country shall be ready, and ilk househalder, to hunt them, under the pain forsaid; and they that slay an wolf shall bring the head to the sheriff, baillie, or baron, and he shall be debtor to the slayer for the sum forsaid; and quhatsomever he be that slayes an wolf and brings the head, &c. sall have six pennies."

people turning out in order to extirpate foxes. To justify a man's going into the ground of another, it is sufficient that he is in chase of foxes or badgers, because, these being beasts of prey, the destroying of them is looked on as a public benefit: yet the digging and breaking of the ground to unearth them is held to be unlawful, and the owner may maintain an action of trespass in that case.[a] § 4. WHERE IS IT LAWFUL TO HUNT?

V. THE proprietor whose ground is trespassed on has an action of damages against the intruder; but he has no right of property in the game; which did not previously belong to him: and, as Vinnius expresses it, *prohibitio conditionem animalis non mutat*:[b] whereas the English law, which has not adopted this clear and broad rule of Roman jurisprudence, goes into divers distinctions, when the game caught on a man's estate belongs to him, and when it does not.[c] § 5. RIGHTS OF THE PROPRIETOR OF THE GROUND.

[a] Burn, tit. Game, § 2. An action was brought for breaking the hedges and trampling the grass of the plaintiff, with dogs and horses. The defendants, huntsmen to a qualified person, had trespassed in pursuit of a fox. "Lawrence for the plaintiff observed, that the question was, whether a person hunting has a right to follow foxes upon the ground of another? Lord Mansfield said, that by all the cases as far back as Hen. VIII, it is settled, that a man may follow a fox into the grounds of another.... Justice Willis said, that the case in Popham, 162, was much stronger than the present.... Justice Buller said, the question in this case was, whether the defendant is justified in following the fox over another man's ground; it is averred in the plea, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trample down another man's hedges, or maliciously ride over his grounds; if he does more than is absolutely necessary, he cannot justify it. Judgment for the defendant. Cas. by Durnf. and East. 334."

[b] Vinnius, ad Inst.

[c] Judge Blackstone observes, "if a man starts game upon another man's ground, and kills it there, the property belongs to him in whose ground it was killed, because it was also started there; this property arising *ratione soli*. Whereas, if after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because the game was not started

§ 5. RIGHTS OF THE PROPRIETOR OF THE GROUND.

THE proprietor of the ground is not intitled to seize the trespasser's gun. By act 1707, the dogs, gun, and net, are forfeited; but it is by a process at law that they are to be recovered. It was decided in the court of session, that a proprietor qualified to kill game having, *brevi manu*, seized the fowling-piece of a common poacher, had acted unwarrantably, and was obliged to restore it in as good case as when he took it.[a] In the court of justiciary it was decided, that it is murder to kill in defence of a fowling-piece, which another advances to seize, not from a felonious intention, but from a mistaken notion that he has a right to take it.[b]

THE statuatory penalties recoverable by the landlord, whose property has been intruded on, are contained in the acts 1555 and others above mentioned; and in the act 1707, c. 13, which prohibits common fowlers to hunt on any ground without a subscribed warrant from the proprietor, under the penalty of £20 Scots, *toties quoties*, of which one half goes to the discoverer, and the other is left at the disposal of the judge before whom the offence shall be cognosced, besides forfeiting their dogs, guns, and nets, to the apprehenders or discoverers. Farther, a common fowler detected in any place with guns or nets, without the licence aforesaid, may be sent abroad as a recruit.

§ - IN GENERAL.

VI. The statute of the 8 Geo. I, c. 19, enacts, that, where a person shall, for an offence against any law in being for preservation of the game, be liable to pay a pecuniary penalty, upon conviction before a justice of peace, it shall be lawful for any other person, either to proceed to recover the said penalty, by information before a justice, or to sue

started in his soil; but vests in the person who started and killed it, though guilty in a trespass against both the owners. B. ii, c. 27, p. 419.

[a] 23d Jan. 1755, Gregory against Wemyss. Dict. V. iii, p. 248.

[b] Earl of Eglinton against Mungo Campbell, Dec. 1769. Maclaurin's (lord Dreghorn) Crim. Cases, p. 505.

for the same by action of debt, or on the case, bill, plaint, or information, in any court of record, where no essoign, protection, wager of law, or more than one imparlance shall be allowed; and the plaintiff, if he recover, shall have double costs: provided that all suits to be brought by force of this act shall be brought before the end of the next term, (by 26 Geo. II, c. 2, *extended to the end of the second term*), after the offence committed; and that no offender shall be prosecuted for the same offence both ways; and, in case of a second prosecution, he who is thus doubly prosecuted may plead in his defence the former prosecution pending, or the conviction, or judgment thereupon. § 6. In general. Double prosecution.

Lord Swinton inserts this statute in his abridgments with a query as to its application to Scotland. But the statute is expressed generally. Its object is to "render more effectual the laws for preservation of the game." It does not qualify this by saying "in that part of Great Britain called England." The English phraseology that occurs in it, is no reason for restricting it, being common to nine-tenths of the British statutes, confessedly intended to apply to Scotland. Had the act made it lawful to sue before the court of king's bench, or other English court *nominatim*, that necessarily would have excluded Scotland. But as it uses the word *court of record*, in general, that certainly may include the court of session or justiciary, although *court of record* is not a technical expression of our law. And those other terms, *essoigns*, &c. must, so far as they are inapplicable to our practice, be held *pro non scriptis*; but they afford no safe ground to deny the application of any statute to Scotland, as they occur in so many instances of general statutes, from the framers of them not adverting that English law terms are a peculiar language, not intelligible, nor explicable, nor convertible, in foreign courts of law.

§ 6. IN GENERAL. —LIMITATIONS OF ACTIONS.

BRITISH statutes which mention no particular limitation, must be qualified by the statute 31 of Elizabeth, c. 6, which declares all penal actions, at the instance of a private party, must be brought within a twelvemonth.

—REVIEW.

IN this consuetudinary jurisdiction which the justices of peace exercise in game questions, the ordinary review takes place from the sessions to the quarter sessions, and thence to the higher courts, according to the rules formerly mentioned. [a]

—MODE OF PROOF.

IN general, with respect to the mode of proof in actions brought upon the game acts, it was decided,[b] that, in an action for the penalty under the act 1707, against shooting hares, it is competent to prove the complaint by a reference to the defender's oath; and this has ever since been understood to be law.

Reference to oath.

IT was determined by the late lord justice-clerk Macqueen, that this reference to oath is competent in the case likewise of the British statutes touching the stamped certificate, when the penalty is sued for by a civil action before the court of session.[c] Whether the same thing obtains in the case of a prosecution for the penalty before the justices, has been the subject of judicial controversy, but has not yet been decided by the supreme court. [d]

[a] Book i, c. 7.

[b] June 1787, the procurator-fiscal of the county of Edinburgh against David Wilson.

[c] Solicitor of Stamps against Wilkie and others, June 1797.

[d] On a complaint at the instance of the procurator-fiscal of the county of Roxburgh against a man for killing game without a licence, the justices allowed a reference to the culprit's oath, and on his refusing to swear, subjected him in the penalty. This decision was affirmed by the quarter sessions; and being thereafter brought under review of the court of session by suspension, it was pleaded, that a reference to oath was incompetent, 1mo, because the 25 Geo. III, c. 50. is a British statute relative to the reve-

§ 7. WILD ANIMALS CONFINED.

VII. As horses, sheep, poultry, and other creatures, *domitæ naturæ*, are property, and of course the subjects of theft, so the same thing obtains in the case of wild animals so confined, that they cannot escape, but may easily at any time be caught, as rabbits in a house, young pigeons in a dovecote, they being then as much property as their carcases after slaughter.[a]

A PARTICULAR statute has extended the same law to wild animals, not in such a state of perfect appropriation, but rather in a kind of middle state; as deer in a park, rabbits in a warren, doves in a dovecote, fish in a pond. Animals in that state also are considered as property; and the taking or killing them is held and punished as theft. The act 1474, c. 60, enacts, that "na man hunt, schute, nor slay deer, nor reas, in utheris closes or parks, or take out cunninges out of utheris cunninghires, or any fowles out of utheris doucottes, or fish out of utheris puiles or stankes, but special licence of the owner's, under the pain of dittay, and to be punished *as theft*." So also the act 1535, c. 13,

nue, where the English law is made ours; and just as the court of exchequer always judge according to the principles of the English law, so, in revenue questions, do justices of peace. In England, reference to oath is neither admitted in criminal nor civil questions: neither, therefore, in this question, can it be admitted in ours. 2^do^, At any rate, the rule here must be the words of the statute itself, which leaves not this matter to depend on the common law of either country, but particularly specifies the mode of proof to be either by one witness, or by the party's confession. It does not authorize the reference to oath; and as the whole jurisdiction is statutory, there is no authority for going beyond the words of the statute. The fiscal contended, that the mention of these two modes of proof, viz. by one witness, and the party's confession, did not exclude reference to oath, that being competent by the common law of Scotland in the case of such sort of offences. The question was not decided. It stands on an order to give in duplies, dated 27th Dec. 1803. See Book i, c. 6, § 4.

[a] Hume's Criminal Law, Vol. i, c. 2, p. 99.

§ 7. WILD ANIMALS CONFINED.

which, to the above enumeration, adds the stealing of hives and bees, and further extends the same punishment "to them are airt, pairt, or gives assistance to sik misdoers." And some statutes[a] appoint such transgressors to be punished in certain cases with pecuniary or petty corporal pains; yet, as Mr. Hume observes, the "clear result of the whole seems to be their raising such offences to the rank of theft, and an authority for inflicting death in the case of flagrant and repeated guilt."[b] Rabbits, accordingly, though they leave the warren, and make depredations on the adjoining ground, cannot be destroyed, being still considered as property.[c]

A PARTICULAR statute has also interposed for the protection of hawks and hounds. It forbids to steal hounds or hawks, "maids, or wild out of nests," or even to take the eggs out of the "hawk's nest in another man's ground, under the penalty of £10 Scots."[d]

§ 8. MUIRBURN —SCOTTISH ENACTMENTS.

VIII. FOR the safety of the game, various regulations were enacted touching muirburn, that is, the practice of setting fire to the heath, in order to clear the fields. It was enacted by a statute of Robert III,[e] that "their sal be na muirburne, or burning of hedir, bot in the moneth of March; and not thereafter induring the time of somer or of harvest, under the pain of 40s. to the lord of the land quhair the

Time.

Penalty.

[a] 1503, c. 69; 1607, c. 3.

[b] Crim. Law, Vol. i, c. 2, p. 100.

[c] 11th July 1801, Dobie against Miller.

[d] 1474, James III, parl. 7, c. 59; whereon sir George Mackenzie remarks, by this act, it is clear that "stealing of dogs, hawks, and the like, are not to be punished as theft, but only by a fine or penalty of £10; and, in effect, this is not *contrectatio rei alienæ lucri faciendi causa*, these beasts being rather useful for sport than gain; but it may be doubted of a fowler who makes it his trade, *et sic lucrum facit*, may not be punished as a thief for stealing another poor fowler's dog who lives by that trade, and whose dog is his pleugh, and especially since dogs are now bought and sold." Observations, p. 79.

[e] c. 12.

burning is."[a] Muirburn was afterwards prohibited by the act 1424, c. 20,[b] from the month of March, till the corn be cut down, under the pain of 40*s*. Scots to the lord of the land, or otherwise of forty days imprisonment; and failing the lord of the land, power was given to the justice-clerk to bring the trespassers before the justice: by the act 1479, c. 75, from the last day of March until Michaelmasday, under the pain of £5 Scots, against those who are convicted in the justice ayr:[c] by the act 1493, c. 48, muirburn, in forbidden time, was declared to be a point of dittay; the person who commanded the thing to be done, was made liable in a penalty of 40*s*. Scots to the king, "because it is clearly understandin that the puir bodies that dwellis in maillinges are bot servandes to their maisters that awe the maillinges, and dois it for their command."[d] The person who did the thing was liable in another fine or unlaw; by the act 1535, c. 11, the fine or unlaw was for the first offence £5 Scots, for the second £10, and for the third £20:[e] by 1685, c. 20, it was forbidden after the last of March, and the masters were made liable for all upon their lands. §8. MUIRBURN—SCOTTISH ENACTMENTS.

BUT these Scottish acts, as well as the 6 Geo. III, c. 32, are superseded by the British statute 13 Geo. III, c. 54, by which this matter is now regulated. —BRITISH ENACTMENTS.

BY this statute it is enacted, that "any person who shall make muirburn, or set fire to any heath or muir, from the 11th April to the 1st November, in any year, shall forfeit 40*s*. sterling for the first offence, £5 for the second, and £10 for every subsequent offence; and in case of not paying within ten days after conviction by a final judgment, shall suffer imprisonment for *six weeks* for the first offence,

[a] James I, parl. 1.
[b] James III, parl. 10.
[c] James IV, parl. 4.
[d] James V, parl. 4. See also 1503, c. 71.
[e] James VII, parl.

§ 8. MUIRBURN —BRITISH ENACTMENTS.

two months for the second, *three months* for the third and every other offence.[a] The occupiers of the ground upon which such muirburn shall be discovered within the forbidden time, shall be deemed guilty of the offence, and shall be liable to the several penalties aforesaid, unless he shall prove that such fire was communicated from some neighbouring ground, or was raised by some other person not in his family.[b] But it is provided, that every proprietor of high and wet muirlands, the heath upon which frequently cannot be burnt so early as the 11th of April, may, when such lands are in his own occupation, burn the heath upon the same, at any time between the 11th and 25th of April, without incurring any of the penalties before mentioned; and when such lands are let, the proprietor, or his factor, may, by a writing, authorize his tenants in such lands, to burn the heath thereon, at any time between the 11th and 25th days of April, without incurring any of the said penalties.[c] The writing authorizing such burning must previous thereto be recorded in the sheriff or steward court-books of the county within which the lands are, upon payment of the usual fees[d] No penalty shall be recovered, unless the prosecution be commenced within six months after the offence committed."[e]

As to the mode of proof, the penalty, the appeal, finality of the sessions, these things are regulated by the sections of the statute which are inserted above.[f]

IN a late case, it was found that this enactment extends to the Highlands as much as to the other parts of Scotland.

[a] § 4. [b] § 5. [c] § 6. [d] § 7. [e] § 14.
[f] § 8, 9, 10, 11, 12, 13, 14.

CHAP. XIII.

Of the Laws concerning the Fisheries.

I. THE amusement of fishing, like that of hunting, was by the civil law a common right:[a] and, in the case of common fishes, that is, those which are not reckoned *inter regalia*, it still remains so by the law of Scotland.[b] § 1. IN GENERAL.

THE right of catching common fish, therefore, requires "no special concession by the king, or other superior, seeing there are common freedoms of every nation to fish in the sea, or into brooks and rivers, for common fishes."[c] Without any special clause in their charters, proprietors may fish in the waters that run through, or bound, their property.[d]

[a] Inst. de Rerum divisione et ad quis earum dominis, § 2. See Vinnius' Commentary thereon.

[b] De Feudis, Lib. i, dig. 16, § 38. *Per piscationum reditus non quascunque piscium commoditates sed tantummodo salmonum qui in fluminibus capiuntur, intelligendas putamus.*

[c] Stair, Inst. B. ii, t. 3, § 69.

[d] Bank, B. ii, t. 3, § 3.

§ 1. IN GENERAL —COMMON FISHES.

Neither to proprietors is this right otherwise exclusive, except indirectly, that they can prevent every other person from coming at all upon their grounds, whether to fish, hunt, or for any other purpose of amusement. It is only in this sense that the right of fishing is inherent in the property of the adjacent banks, or to be considered as a pertinent thereof; common fishes being truly *res nullius*, and liable to be lawfully catched by any person standing on a highroad or other public ground contiguous to the stream.[e] Nay, farther, as in the case of hunting, if a man trespass on the property of another, without his consent, or against his will, the fish which he catches will be his own property, though he may be liable in damages to the proprietor for intruding on his ground.

In what sense the right of fishing is inherent in the property.

Fishes not property.

Crown may give exclusive right of taking common fishes.

BUT public rights, or those *totius populi*, were transferred by the feudal law to the royal person, *ut qui patris patriæ et populi tutoris personam sustinet.*[f] Hence it has been decided, that a trout-fishing, for example, may become exclusive property; nay, farther, that it may be reserved from the grant to the lands, and transferred to a third party;[g] so also in

Trout-fishing.

[e] See Fac. Coll. Vol. x, p. 11.

[f] Craig, De Feudis, Lib. i, dig. 16, § 11.

[g] 20th Nov. 1787, Robert Carmichael against sir James Colquhoun. Fac. Coll.

The title deeds of Luss bear a right "to the fishing of salmon, and other fishings, in the water of Leven."

The proprietors of the grounds lying along the banks of the river, and who are all infeft in their lands, either "*cum piscationibus*," or with "parts and pertinents," instituted an action of declarator against sir James; in which they set forth, "that they and their authors had, by virtue of their titles to the lands, been in the immemorial practice of catching trouts with nets and rods in the river *ex adverso* of their respective properties;" and concluded, that they had a right so to fish, or "in such other manner as to them might seem proper; and that he ought to be prohibited from the exercise of trout-fishings *ex adverso* of their lands."

The court seemed unanimous in the opinion, that the right of trout-fishing in a river, though naturally inherent in the property of the adjacent banks, so as to accompany lands

the sea, the crown may grant to individuals the exclusive right of fishing within certain limits, as, for example, the exclusive right to a particular fishery of oysters. § 1. IN GENERAL. — COMMON FISH.

II. SALMON fishings are understood in Scotland, to be *inter regalia minora;* in this sense, that they do not pass as part and pertinent of land, but require an express grant to take them out of the crown. This rule is in practice so far relaxed, that a general clause, *cum piscationibus,* followed with possession, is held to be a sufficient title for acquiring right to a salmon fishing by prescription.[a] § 2. SALMON — *inter regalia.* A general clause, *cum piscationibus.*

A RIGHT to fish salmon in the small rivers, in which a few fishes are only now and then got, and which may rather be called a right to take salmon, is commonly given along with the lands adjacent to such rivers; in which cases, the fishery, though no pertinent of the lands, is yet never granted but along therewith.

IN great rivers, however, such as the Tay, where there is

as part and pertinent, might yet be reserved from the grant, or transferred to a third party, either expressly or by prescription; and that trouts were *res nullius* in this sense only, that any person standing on a high-road, or other public ground contiguous to the stream, might lawfully catch them.

Some of the judges thought the clause "other fishings" in the defender's charters sufficiently expressive of the exclusive right of fishing trout on the banks in question: which others did not admit; but all seemed agreed, that if he or his author's had that exclusive right, it had been lost by disuse.

The court pronounced the following interlocutor:

"In respect that Sir James Colquhoun's right to the salmon-fishing is not disputed in this cause, find he has right to the salmon-fishing in the river Leven, where it runs through the property of the pursuers: find the pursuers have a right to fish trouts opposite to their respective properties, with trout rods or hand-nets, but not with net and coble, or in any other way that may be prejudicial to the salmon-fishing belonging to sir James Colquhoun, the defender."

[a] Ersk. B. ii, t. 6, § 15.

§ 2. SALMON—WHEN IT GOES ALONG WITH THE LANDS.

such fishing as to be the subject of a separate grant, such grants were frequently made not only to the proprietor of the adjacent bank, but to any person, whether he had the adjacent lands or not, there being no connection between the lands and fishings other than what may called *a descriptive connection.*

Drawing nets on the bank.

ACCORDINGLY, charters or grants of lands are ever understood to imply a reservation of the right of the crown to grant, along with the fishery, the privilege of drawing nets upon the banks; without which, it would be impossible to exercise the right of fishing, when not given along with the lands.[a]

When is the grant of a salmon fishery exclusive?

WHERE a grant is made of a salmon fishery in any part of a great river, it depends on the terms of the grant, whether or not it be exclusive of all future grants in that part of the river. In general, a grant of the fisheries in the river, or such parts of the river, without limiting the grantee to the drawing his nets on one side, conveys the whole fisheries, and implies a power to draw on either side, though not mentioned in the grant, as what passes as a consequence of the right of fishing. But where a right of fishing is granted with power of drawing on one side, (the usual form of limiting the fisheries to one side), the right remains with the crown to confer, by a posterior grant, the fisheries on the opposite bank.[b]

Power of drawing on one side of the river?

THE mode of exercising these rights of salmon fishing has not been left to the discretion of individuals, but as an important object of public interest, has been anxiously regulated by many enactments.

—CLOSE.

IT was early the aim of the legislature that the fishing

[a] Kilkerran, p. 500. [b] Ibid.

§ 2. SALMON —CLOSE.

should be discontinued at certain seasons of the year, thence called *close* or *forbidden*. It had in this a twofold object; the fish being improper for food at those periods, when their preservation is necessary likewise for the multiplication of the species. It was, therefore, prohibited to kill salmon or red fish from the 15th day of August till the 30th November.[a] The punishment for killing salmon in close or forbidden time, was various by different statutes. By act 1449, c. 9,[b] the person guilty, (or art and part therein), was, for the first fault, to be punished with a fine of 40*s*. Scots; for the second, £4 Scots; and for the third fault, to lose his office for ever. By act 1457, c. 86, the punishment was £10 Scots, "but (without) remission;" and for the third offence, he was to buy his life: and the same fine is imposed on those who, in smelt time, set vessels, creels, wires, or any other engine, to intercept the smelts from going to sea.[d] By 1503, c. 72,[e] it was for the first offence £10 Scots; for the second, £20 Scots; for the third, death. By 1597, c. 261,[f] proprietors of ground adjacent to the rivers were ordained to find security that their tenants should not kill salmon in forbidden time; earls and lords in 1000 merks Scots each; and barons and gentlemen, and others whatsoever, in 500 merks Scots. And by another statute of the same reign,[g] the slaying of salmon in forbidden times, and of kipper, smolts, and such black fish, at any time, is ordained to be punished as theft.

Twofold object.

Landlords obliged to find security for their tenants.

[a] James I, parl. 2, 1424, c. 35.
[b] James II, parl. 5.
[c] James I, parl. 14.
[d] Ibid. cap. 86 and 1469, c. 48.
[e] James VI, parl. 6.
[f] Ibid. parl 15.
[g] James VI, parl. 16, 1600, c. 11. On this statute, however, sir George Mackenzie remarks, "Though the slaying salmon in forbidden time be theft by this act, yet none has ever been pursued capitally therefor, but the same is only punished as a penal statute by an arbitrary punishment." P 311.

§ 2. SALMON—CLOSE

BUT the act 1431, c. 131, declares that salmon fishing in the waters of Solway and Tweed "salt be reddie to all Scottismen all times in the zeir, als lang as Berwick and Roxburgh ar in the English mennis handes."[a] In like manner, the act 1600, c. 11, just now alluded to, which makes the slaying salmon in forbidden times capitally punishable as theft, specially excepts "the salmond, kipper, smolts, and all other fishes slaine or tane within the rivers of Annan and Tweed allanerly." The reason of this exception was, that the said "rivers at that tyme divyded at many parts the bounds of Scotland and England adjacent to them, whereby the forbearance of the slaughter of salmon, at forbidden tyme, and of kipper-smolts and black fish at all tymes, wad not have made salmond any mair to abound in these waters, if the like order had not been then observed upon the English side." But this impediment being removed on the Union of the two crowns, the statute[b] 1600, c. 5, "perpetually annulles and abrogates the said exception of the said waters of Tweed and Annand."[c]

Tweed and Annan.

[a] "But," says sir George Mackenzie, "it is rescinded upon our king's succeeding to the crown of England," by the 5 act, 18 parl. James VI. (Observations, p. 29.)

[b] 1606, c. 5.

This act takes no notice of the Solway.

At the instance of Mr. Thomson, writer in Dumfries, as agent for the proprietors of fisheries in that county, and of the procurator fiscal, a prosecution was lately brought against certain persons for killing salmon in close time. One plea in defence was, that in virtue of the exception contained in said act 1429, c. 131, it was not illegal to fish in the Solway in close time. The answer was, that the exception by said act was temporary.

But the action had been brought for recovering the penalties contained in the statute 44 Geo. 3, "for regu- "lating and improving the fisheries "in the arm of the sea between the "county of Cumberland and the coun- "ties of Dumfries, Wigton, and the "Stewartry of Kirkcudbright." The question therefore chiefly turned on this, Whether the Solway was included in that act? The sheriff pronounced the following interlocutor, 25th January 1806. "Having again "advised this petition, with the ans- "wers and replies, and seen the act "of parliament referred to in the pe- "tition, and having advised with the "sheriff depute, Finds that Mr. Wil- "liam Thomson, as agent for the "proprietors of fisheries in the county "of

§ 2. SALMON—CLOSE.

BUT the spawning time being different in different rivers, the opening and shutting of the fishing therein, respectively, is generally regulated by local acts.

—CATCHING OF.

THE statutory interposition concerning forbidden times, might have sufficed, had the fishery been exercised only by means of a line and hook, or spear or net, and coble or boat.[a] Line,&c.

" of Dumfries, has no title to insist " in any action founded upon the sta- " tute of the 44th of the King, unless " where the trespasses are stated to " have been committed within the " fishing grounds belonging to one or " other of the proprietors, but sustains " the title of the other pursuer, Mr. " Short, to insist in the said action: " Finds that the arm of the sea " which is there mentioned, must be " held to comprehend the whole " fishing grounds in the county of " Dumfries, within the line there " pointed out, between the hotel at " Skinburness, northward to the large " house at Carsethorn, as well as " those in the rivers and other waters " which run into, or otherwise com- " municate with the arm of the sea " so described, and in respect of the " offences charged against, are offer- " ed to be proved by the oaths of the " respondent; appoint them for that " purpose to appear on the " day of ."

This judgment being brought under review by advocation, the lord ordinary reported the cause to the court on printed memorials, on advising which the bill was refused, and the advocator found liable in expences. 27th May 1807. Short against Sadler.

[a] Even the net fishing, however, was exercised under various denominations. Thus, in charters, we find for example, grants of a tugnet fishing, of a cunach fishing, as well as of a coble fishing.

The tugnet was probably the same with the tootnet fishing, which is still used very generally in rivers or friths near the sea, all along the north of Scotland, as well as at the mouth of the Tweed, and on the south side of the Tay. These are long nets, which are run out from the shore slanting downwards to meet the tide. They stand perpendicular in the water from the bottom upwards, having weights to keep down the lower side, and pieces of cork to make the upper part swim. At the outer end, something, generally an anchor, is sunk in the frith, to which the lower end is fastened, and which keeps the whole line of nets fixed. A man watches on the shore, holding a rope which commands the net, and whenever a sufficient number of fish are supposed to be within the circle of it, he pulls the rope, draws in the net, and so incloses the fish.

But the most ancient mode of fishing, in the north of Scotland, was probably the currach, which was a small boat made of wicker and cover-

ed

§ 2. SALMON CATCHING OF.

BUT it seems to have become early customary to employ the aid of fixed machinery; two kinds of which, viz. yairs and cruives, are taken notice of in our ancient statutes, and, in certain situations, were tolerated under such limitations as seemed likely to render them as little detrimental as possible to the brood of the fish and to the free passage of the river.

Fixed machinery.

—YAIRS.

YAIRS, or zairs, or wears,[a] *piscaria stagna*,[b] or fish dams,[c] being places built round either with stone or timber, or close wicker work, which stagnates the water inclosed within the walls or the yair, and prevents the passage of the fish, confining them therein till they are caught and taken out by the owner of the yair, unless they can find their way back by one narrow, and commonly a crooked or winding passage, which conducts into the yair on one side, and this but a small proportion of the fish that enter are able to do.

—CRUIVES.

CRUIVES, again, are wooden boxes, placed in a cruive-dike, that is, a wear or dike of stone, stretching across the river from one side to the other. They are situated in the current or stream of the river, where all salmon, going up to spawn or returning from spawning, must pass. These boxes, on the one side, have inscales, or moveable boards, so disposed in an angle, that, being impelled in a contrary direction to the course of the river, they may open at the point of

Description of.

Inscales.

ed with hides, which floated down the stream, two men being placed in it, one of whom held one end of the net, while another person, or two persons, on shore held the other end, and dragged it along. The coble was a larger boat, the improvement of later times.

The currach fishing can be exercised only where the water descends in a current, the boat being carried down by the stream, while the fishers are employed in sweeping the water with the net. A currach fishing was always a night fishing.

[a] This latter term *weirs* first occurs in act 1457, c. 86, evidently in the same sense with yair.

[b] As they are called in the old laws.

[c] As they are termed in the act 1563, c. 68.

contact, and immediately shut again, closing the angle. The salmon enter the cruives, because they can find no other passage up the river; and they force their way into them by pushing up the inscales, from the strong impulse in their nature to get up the river. Out of the cruives there is no passage, but by hecks or grates, the bars whereof are so close as to allow only fry or small salmon to pass. The cruive dike being not quite so high as the surface of the water, presents a very great, though not an unsurmountable obstacle to the passage of all salmon. § 2. SALMON CRUIVES. Hecks. Cruived dike.

BOTH yairs and cruives, besides the injuries with which they threaten the brood of salmon, are encroachments on the stream and channel of the river: on both these accounts, therefore, they are viewed by the law of Scotland with a jealous and unfavourable eye.[a] —YAIRS & CRUIVES.

HENCE it is, that, to entitle any person to fish, either by the aid of a yair or cruive, such right must be specially expressed in the grant or title deeds; or, in the case of a barony or Exception.

[a] The same kind of contrivances appear to have been practised in England, and not to have been more favourably viewed by the English parliament. "The fishermen inhabiting the villages on the banks of the Thames were used to inclose certain parts of the river with what they called *stops*, but which were in effect *wears* or *kidels*, by stakes driven into the bed thereof; and to these they tied wheels, creating thereby a current, which drove the fish into those traps. This practice, though it may sound oddly to say so," sir John Hawkins observes, "is against *Magna Charta*, and is expressly prohibited by the 23d chapter of that statute. In the year 1757, the lord mayor Dickinson sent the water bailiff up the Thames, in a barge well manned, and furnished with proper implements, who destroyed all those inclosures on this side of Staines, by pulling up the stakes and setting them adrift." (Hawkins' Walton's Complete Angler, edit. 6th, p. 211.) The passage of *magna charta*, which sir John Hawkins alludes to, is in these words: "*Omnes kidelli* (wears for catching fish) *deponantur de cetero penitus per Thamesiam et Medweyam et per Totam Angliam nisi per costeriam maris.*"

§ 2. SALMON —YAIRS & CRUIVES —WHERE?

corporation, there must, at least, be uniform usage, following on a general clause *cum piscationibus*.[a]

FARTHER, neither cruives nor yairs are at all allowed in any part of a river where the sea ebbs and flows.[b]

[a] Heritors of the fishing of Don *ag.* town of Aberdeen, 26th Jan. 1665. The proprietors of a salmon fishing in the water of Don brought a declarator, that the town had no right of cruives, being only infeft *cum piscationibus et piscariis*. *Answered*, Such a clause, granted to an incorporation or community, or being *in barona*, with immemorial possession, is sufficient. "The lords found the town of Aberdeen's title to cruives, albeit conceived, but conform to the first clause, was sufficient." This general point also occurred in the late case of Murray of Broughton, wherein the court decided that the cruive fishing might be continued as formerly, with some alterations on the machinery specified by the decree.

[b] Ersk. B. ii, t. 6, § 15. James I, 1424, c. 11, "all cruives and zairs set in fresh water quair the sea fillis and ebbis, the quilk destroyes the frie of all fisches, be destroyed and put awaie for ever mair; not againe standing ony priviledge or freedome given in the contrarie under the paine of 100 shillinges." Renewed by James III, parl. 10, 1477, c. 73, and James II, parl. 2, 1489, c. 15.

The act queen Mary, parl. 9, 1563, c. 68, "ratifies and appruives the acte maid of before be her highness maist noble guidschir king James the fourth of gude memory." The act here alluded to was passed in the year 1488, by the first parliament of James IV. As it is quoted at length in this act of queen Mary, it is probably for this reason that it has not been printed either by sir John Skene, or sir John Murray, in their editions of the statutes. But in the quotation in queen Mary's act, there is a variation from the record, which has been avoided by the old edition of the statutes in the Advocates' library, commonly called the Black acts, where it stands as follows, (fol. 83): "It is statute and ordainit, that all cruives and fische dammis that war within salt watters, quhair the sey ebbis and flowis, be all utterlie destroyit and put downe, alsweill thay that pertenis to our soverane lord as uthers throw all the realme. And as anent the cruivis in fresche watters, that thay be maid of sic largenes, and sic dayis keipit, as is contenit in the actis and statutis maid thairupone of befor."

The act 1581, c. 3, ratifies and approves all acts without exception, "with regard to the destruction of cruives and zaires, slaughter of red fishes, smolts, and fry of fishes."..... under this exception, "that the present act and naething therein contained shall be prejudicial to his highness' subjects, being duly infeft and in possession

§ 2. SALMON —YAIRS & CRUIVES. —WHERE. Fresh waters, &c.

ONE reason for this prohibition seems to be, that, in that part of the river where the tide ebbs and flows, the surface of the water rises and falls with the tide, and a cruive dike, which is no more than the necessary height at high water, would, upon the ebbing of the tide, be so much above the surface of the water without the dike, that salmon either could not pass at all, or, at least, without greater difficulty than from an ordinary cruive dike in the upper parts of the river, which the tide does not reach. And in yairs, again, the consequence of the variation in the height of the surface of the water, occasioned by the tide, would be, that the yair may be so constructed that the top of its walls should be something below the surface of the water at full tide; whereby the fishes might enter, not at one opening only, but on every side; while, by the ebbing of the tide, the yair would be so much above the water as would completely confine every thing within it, and would therefore be more prejudicial to the brood of salmon than a yair situated in the upper parts of the river could be. Or, perhaps, the prohibition may have arisen from the attention of our ancestors to the natural history of the fry of salmon, which, in the course of their voyage to the sea, when they first meet with the tide, turn their heads from the salt water, and are instantly arrested in their progress; there they lie for some time in vast numbers, forming a thick compact body; the flowing of the tide carries them up the river, and again they come down with the ebbing of the water; at length, being accustomed to the salt water, they proceed rapidly in a mass to the ocean.[a] It is obvious, that this fact afforded reason

possession of holding of cruives, lines, or loupes, with fresh waters, but that they may use.... the same in time coming, according to their rightes, keepand Saturday's stop." 1600, c. 11, and 1606, c. 5.

[a] Dict. Raisonné Universelle d'Histoire Naturelle, par M. Valmont-Bornare, tom. xiii.

§ 2. SALMON —YAIRS & CRUIVES —WHERE.

for the statutory prohibitions against erecting cruives and yairs in such situations, where they would have been destructive to the fry.

Sands and Shawls.

ONE statute seems to carry the prohibition so far as to exclude cruives and yairs "from sands and schawls far within the water."[b] These words, however, in a late case where this statute underwent some discussion, were thought to apply only to the waters which spread on each side of a river, as the tide rises in it, and which are partly composed of the fresh water of the river, and partly of the salt water brought in by the sea, but not to extend to the coasts of the sea.[c]

—CONSTRUCTION.

THERE is no particular statutory direction as to the height of the mounds or cruive and yair dikes. In one controversy, touching the height of a cruive dike, where it was alleged, "that the same ought to be no higher than the water in its ordinary course, neither the time of the flood nor of drought; otherwise they might build the same as high as they pleased ... The lords considering there was no particular law as to the height of cruives, and that thir parties had suffered the other above forty years, found, that therefore the same should be, *uti possidebantur*, no higher than the old cruives."[d]

Mound or dike, height of.

If the dike may be above the surface.

In a subsequent case, the court decided, that the cruive dike ought to be "only a foot and a half above the water, as the stream runs at ordinary times from the 15th April to May,

[b] 1563, c. 68. This act, ratifying the statute of James IV, as already mentioned, "has the addition following, that is to say, that all cruives and zairs that are set of late upon sandes and schawls far within the water, where they were not of before, that they be incontinent taen down and put away, and the remanent cruives that are set upon the water sandes to stand till while the first day of October next to come and incontinent after the said first day of October to be destroyed and put away for ever.

[c] 3d March 1801, Lord Kinnoul against heritors of Seaside.

[d] 26th January 1665, heritors of the fishings of Don against the town of Aberdeen. Stair, Vol. i.

§ 2. SALMON —YAIRS & CRUIVES, —CONSTRUCTION.

"neither when it is in speat, nor two shallow and low, and "ordained the cruive-dike to be so altered and regulated."[g]

IN the case quoted, of the disputed cruives on the water of Northesk, it was determined, that the "cruive dike "ought to be only three ells broad."[a]

General rule.

IN the case of cruive dikes, the only general principle that can be laid down is, that the dike shall be built in such a manner as to form as little obstruction as possible to the progress of the fish up the river.

Sloping.

Accordingly, in regard to the Northesk, the order of the court was, that the "cruive dike ought to be built sloping from the top, "till it was two feet beneath the water, and then from "that perpendicular till the bottom."[b]

Hecks or bars of the grate.

IN another case, respecting the construction of machinery for a cruive fishing, on the said river of Northesk, it was decided that the "cruive boxes must be built upon the "channel or bottom of the river."[c]

Hecks, how many inches wide.

THE hecks must be three inches wide, that is, the bars of the grate must be each three inches asunder,[d] and must be

[g] 15th November 1701, Falconer of Newton and Scot of Cromiston, pursuers of mutual declarators as to their fishings in the water of Northesk. Lord Fountainhall, vol. ii.

[a] Lord Fountainhall, vol. i, p. 123.

[b] Lord Fountainhall, vol. ii, p. 123.

[c] 4th July 1769, Lord Halkerton against Scot of Brotherton. Fac. Col. The apology in this case for not having them on the bottom was, "the "cruive boxes, which must of neces- "sity have a foundation of stone to "rest on, are placed as near as pos- "sible to the channel of the river, "and only about six inches above it."

[d] James III, parl. 10, 1477, c. 73. The act Jas. IV, 1489, c. 15, says five inches; but this "the lords found to "be a mistake in the transcribing or "printing of the act of parliament, in "respect that both this and the for- "mer relates to the statute of king "David, as the pattern thereof, which "mentions but three inches, and that "hecks of five inches wide will be of "no use, nor hold in any salmon."

(Lord

§ 2. SALMON —CRUIVES.

perpendicular,[c] even though, in any particular river, they should have been from time immemorial placed horizontally.[a] In a cruive fishery on the river Dee, the hecks or bars had been sharp and pointed. This, with other particulars, being made the subject of judicial complaint, the court of session directed the hecks to be made round, and not, as formerly, sharp and pointed, as being obviously prejudicial to the fishes.[b]

Round, and not sharp.

(Lord Stair, Inst. B. ii. tit. 3, § 70). The decision lord Stair alludes to is that of the heritors of the fishings on the water of Don, reported by himself, and which was quoted above on another point.

[c] The ancient statutes do not say whether the hecks should be placed from side to side, or upwards and downwards. They enact generally, that they must be three inches wide, which the court decided must mean broad. Dec. 7, 1762, earl of Moray against Callender of Craigforth. Fac. Col.

[a] Ibid. Fac. Col. vol. iii, No. 100.

[b] 13th Dec. 1799. Murray of Broughton against Stotts. The court of session "sustained the title of the "pursuers to insist in the action; found "that Mr. Murray had right to a "cruive fishing in the river Dee, at the "places marked in the plan, Meikle "Doach, Priory Doach, and Little "Doach, but found that the cruives or "doachs must be regulated in terms of "the laws regarding cruive fishings; "and that the blind eyes and other ar- "tificial obstructions or barricades, to "interrupt the run of the fish in the "river, within the bounds of the de- "fender's fishings, must be removed "as illegal: Found the defender bound "to place the cruive boxes to which "he had been found entitled at the "Meikle Doach, Priory Doach, and "Little Doach, *that the rungs or bars "of the cruive boxes must be placed at a "distance not less than three inches, and "must be made of an oval shape, with "the edges rounded off*; that the form "and construction of the cruive dike "and boxes, and the construction "and position of the inscales, are to "be so formed, constructed, and fix- "ed, as to answer the purposes of a "cruive fishery, and agreeable to the "practice of these fishings in the "north of Scotland, where the cruives "have been regulated according to "law; that the spaces between the "rocks, from which the blind eyes are "to be removed, are to be filled up "with proper materials, formed and "constructed like other cruive dikes; "that the Saturday's slope must be "observed in all the cruives, accord- "ing to law; and that the inscales, "during that time, must be taken out "and removed, or, when that cannot "be done, from the state of the river, "that the same shall be drawn back "and properly fixed, so as to leave "a free passage up the river for "the salmon; and that the pursuers "and

§ 2. SALMON—CRUIVES

THE proprietors of a cruive fishing in the Southesk had been in the practice of sheeting, (or putting a sheet all daub-

and their successors having right to salmon fishings in the upper part of the river, are to have the liberty, upon previous notice, to view the cruives and cruive dike, that they may know if the regulations now established are properly observed." This judgment was brought under the review of the house of peers, which, (18th February 1802), ordered and adjudged, "that the said interlocutor of 13th December 1799, complained of in the said appeal, be varied, by leaving out after the words 'are to be,' the words 'so formed, constructed, and fixed, as to answer the purpose of a cruive fishing, and agreeable to the practice of those fishings in the north of Scotland, where the cruives have been.' And it was further ordered, that the cause be remitted back to the court of session in Scotland to review this part of the said interlocuter, for the purpose of giving, and to give, precise directions to the parties for regulating the form and construction of the cruive dikes and boxes, and the construction and position of the inscales, according to law." And it was farther ordered and adjudged, "that, with the above variation to the said interlocutor, the several interlocutors complained of be affirmed." Thereafter, 25th June 1802, the lord ordinary having considered this petition, and remit thereon from the court, judgement of the house of lords, minute for the petitioners, and answers for the trustees of James Murray, esquire, to the petition and minute, found, decerned and declared, in terms of the said judgment of the house of lords: And further found, that the cruive dike shall be of the same height as it has formerly been, built of rough stones, in a compact and substantial manner, without loose or projecting stones: Found, that the spars of the hecks shall be perpendicular, and shall not exceed the same dimensions as at present, being five inches of depth in the direction of the stream, and two inches and a half cross the stream: that the lower edge shall be one inch thicker than the upper, and that they shall be rounded to a semicircle both at the upper edge and the lower: Found, that the inscale or combs shall be so constructed as to answer the purposes of a cruive fishing as formerly, and shall not be altered to the prejudice of the petitioners: Found, that the new cruives shall be of the same length, and breadth, and depth, as formerly, according to the plan in process, and shall be placed in the dike in the same manner as formerly; and decerns: Appoints the parties to give in minutes as to the proposed regulation, whether there shall be no openings or spars laid across on the top of the cruive box as formerly, or that the same should be closely covered over with wood: And also, as to the regulation, that there shall be no fishing from the 26th of August to the 11th of December in every year, and that, during that time, the cruives must be entirely removed,

§ 2. SALMON —CRUIVES —CONSTRUCTION

ed with pitch, on the cruive-box), whereby the fish going up to spawn were entirely stopt. This was considered to be unwarrantable, and ordered to be removed. It was pleaded in excuse, that "without this privilege of sheeting in low water to gather water to make their well go in drought, the rent of the mill would fall at least one half;" the court wished to devise a mode of determining at what particular height of water they should be permitted to sheet, taking off the sheeting when the water rose above it, so as to provide for the going of the mill, without any great damage to the upper fishing. "And for solving the inconveniencies on all hands, it was offered by the town that a slop should be fixed in the river, on which should be a mark or sedge for determining high or low water, and when the river sunk below the sedge, they might sheet, and when it rose above it, then it should be removed.[a]"

Shoeing or causewaying the channel,

IN one case already quoted, where the subject of cruives underwent much discussion, it was decided, that "the shoeing or causewaying in the river, further down than the lower end of the keying stones, must be taken away and removed."[b]

and the channel of the river kept clear and open, without any stones or other materials being allowed to remain in the opening of the said cruives; and to put printed copies of the said minutes into the lords' boxes, in order to report the same to the court," Minutes accordingly being given in, the court, (6th July 1802), "upon report of lord Methven, and having advised the mutual minutes for the parties, found that the cruive boxes must be closely covered with wood at the top; and that the hecks and inscales must be removed in forbidden times, and found it unnecessary to determine upon the demand of the pursuers, for observance of the act of parliament respecting close time." This judgment has been appealed from, as *ultra vires*, as far as regards the directions for building the cruive dike and covering the cruive boxes with wood.

[a] 26th Feb. 1704, heritors of Southesk against magistrates of Brechin. Lord Fountainhall.

[b] 4th July 1796, lord Halkerton against Scot of Brotherton. Fac. Col.

§ 2. SALMON—CRUIVES—SATURDAY'S SLOPE.

THE cruive dike affording so difficult a barrier against the progress of the large salmon up the river to spawn, the legislature thought it necessary that "the Saturday's slop be observed in all cruives; which was to continue by pulling up all the hecks to the breadth of an ell in every cruive, from Saturday at six o'clock till sun-rising."[c] In one case it was determined not to be necessary that the inscales should be taken out during the Saturday's slop, "but that it is sufficient in times of flood,[d] to fix them back, so as they may remain open for the purpose of the Saturday's slop."[e] In another case, it was not considered necessary, in forbidden times, to remove the soletrees, or sidepost of cruive boxes, but only the hecks and inscales.[f]

How observed.

THIS regulation concerning the Saturday's slop is still in force.[g] Being intended, however, merely to counteract the pernicious effects of cruives, it does not apply to the case of a salmon fishery, established by prescription at a mill-dam.[h]

Salmon fishing at a dam. By prescription.

[c] Sir George Mackenzie's Observations on act James I, parl. 1, 1444, c. 11, whereby it was ordained, "that they that hes cruives in fresh waters, that they gar keep the lawis anentis Satterdaie's stop... under the said paine 100s" The earliest of the laws concerning the Saturday's slop is one of king Alexander, whereby it is statute, "that all wateris sall be fre, and that within thame na man sall slay fisch fra the Saturday eftir the evin song or evening prayeris untill Monday after the son rysing." Balfour's Practics, p. 544.

[d] These words were added by the house of lords in their judgment, which so far varied the decision of the court of session.

[e] 4th July 1769, lord Halkerton against Scott of Broughton. Fac. Coll.

[f] 21st January 1783, lord Banff against earl Fife. Fac. Coll.

[g] 4th March 1765, Fraser against the duke of Gordon.

[h] 21st Dec. 1750, Robertson against Stewart Mackenzie. Here the fishing had been exercised at a particular kind of bulwark erected in the river, at a place where the water was contracted betwixt two rocks; and so great a fall of water occasioned by the dam, that no fish could get over it unless in great speats. The superior heritors brought a process, concluding to have it demolished, or, at least, that the defenders should be obliged to leave a Saturday's slop, and to keep such an opening at all times, as might give free passage to

§ 2. SALMON —MID-STREAM.

ANOTHER thing anxiously enjoined by ancient statutes, was the freedom of the mid-stream, or, to use the words of the statute enacted by king Alexander, with consent of the erles, barones, and judges of Scotland, "that the midst of the water sall be fre in sa mekil that ane swine of thre zeir auld, and well fed, is of length, and may turn himself within it, in sic ane manner that neither his grunzie nor his tail tuich ony of the sides of the cruives that are biggit on ilk side of the water.[a]" But this has fallen into complete desuetude.[b]

—MILL-DAM.

AGREEABLY to the general spirit of these enactments touching cruives and yaires, a special act was passed for regulating mill-dams. In respect that salmon fishing is much prejudiced by the height of mill-dams, there is ordained by the statute 1696, c. 33,[c] a constant slope in the mid-stream of each mill-dam-dike; and if the dike be settled in several grains of a river, there is to be a slope in each grain, except in rivers where cruives are settled. The slope must be as large as can conveniently be allowed, so as not to prejudice the going of the mill. Fishing at such dam-dikes is prohibited, under the pains to be inflicted against those who kill black fish, and destroy salmon fry.

the smolt or fry. "The court determined, that, in respect of the charter and act of parliament in favour of the defenders and auchters, and of the immemorial possession held by them in virtue thereof, the bulwark in controversy cannot now be demolished or taken away, and therefore assoilzied."

[a] Balfour, p. 544.

[b] Sir George Mackenzie's Observations, p. 8, 26th Jan. 1665, heritors of fishings of Don against town of Aberdeen. *Pleaded*, "the old acts anent the middle stream, were wholly in desuetude, and were, in effect, derogate by the act of king James VI anent cruives, which ordains Saturday's slop to be keeped, but mentions not the middle stream . . . The lords considering the middle stream has long been in desuetude, &c.

[c] Will. parl. 1.

§ 2. SALMON —MID-STREAM.

IN like manner, on the common law, the court of session has occasionally interfered to put a stop to whatever seemed either injurious to the brood of fishes, or obstructive in the channel of a public river.

—MASKING NETS.

THUS stent nets, (that is, nets fixed by stakes, and going across the river), have been prohibited.[a] So also masking nets;[b] for "every heritor, through whose lands a public river runs, has a right to all the ordinary uses of it; but the channel is *juris publici*. The crown may give a right of salmon fishing, but it can give no right of putting any permanent interruption in the channel. Every heritor has a right to prevent it, and no length of time can authorize its continuance. The crown may, indeed, under certain regulations, which are intended partly for the benefit of the heritors, grant a right of cruives. This is, however, to be considered as an exception from the common

d 10th Feb. 1693, fishings of Don, Lord Fountainhall.—19th Nov. 1771, duke of Queensberry against marquis of Annandale, (not collected), see Report of the case—21st Dec. 1793, sir James Colquhoun against the magistrates of Dumbarton.

b In Loch-Lomond, and the river Leven, a right of salmon fishing had been exercised by means of masking nets extending across the river. These nets, the meshes of which were from six to eight inches wide, were put loose into the water a little above the mouth of the river, and reached as near the shore on each side as there was depth of water for a coble. They were sunk on the water with slates, and floated on the other by cork; and to prevent their being carried down by the stream, they were supported by, but not fastened to, stakes stuck into the channel, at certain distances from each other, leaving an empty space of about twenty feet in the middle, in order to allow boats to pass. This being complained of, "the court of session almost unanimously decided, that the defender having produced no right to a cruive fishing, he is not entitled to exercise his right of fishing by stobs and nets . . . nor to interrupt the navigation either in the water of Leven or in the mouth of Loch-Lomond." 27th Dec. 1793, sir James Colquhoun against the duke of Montrose and magistrates of Dumbarton. Fac. Coll.

§ 2. SALMON —MASKING NETS.

law."[a] On these principles, the court of session again decided, that the "mode of fishing by means of stented nets, and stobs or stakes, stretching nearly across the mouth of the river ... being of a very destructive nature, and impossible to be regulated in the manner of a cruive fishing, is illegal, and cannot be sanctioned by any usage."[b] In like manner it has been determined, that it is illegal to exercise the right of fishing by means of hang-nets, which have nearly the same effect with stent nets, and are hurtful both by the obstruction they occasion, and, when the fish are left hanging in them, by frightening other salmon from coming up the river.[c]

—HANG-NET.

AND still more lately, the same principle was followed, in putting a stop to a mode of fishing, of which the proprietor and his predecessors had been in the practice for time immemorial.[d]

[a] Observation of the court. See above, ch. ii, § 3.

[b] Sir James Colquhoun against duke of Montrose, July 4, 1804. Fac. Coll. The cause having come again before the court of session by remit from the house of peers.

[c] In the river Annan, a salmon fishing was exercised from time immemorial, by hang-nets. The net is fixed by one extremity on the shore, and there drawn diagonally downwards across a smooth part of the river, and reaching not above one half of the breadth of it. The other extremity of the net is left loose. The one side of the net is sunk by small pieces of lead, and the other supported by cork, so as to make the net stand perpendicular in the water; and when the fish come into it, the net yields, and the fish is caught by being entangled into it.

The court of session prohibited the defenders from erecting "any engines, or using any method not for the purpose of catching fish, but for obstructing or preventing them from passing up the river; and, in particular, from using stent nets or hang nets of any sort or denomination." May 1797, lieutenant-colonel Dirom *ag.* Little. Fac. Coll.

[d] Earl of Fife *ag.* Peter Gordon, Esq. of Abergeldie, 1807, 23d May.

Some time in the summer, when the water is in the low state usual in warm weather, the practice was to erect a rickle or pile of stones in the form of a dike across the river, at the

§ 2. SALMON—LARGE INCLOSURES.

IN the Solway frith[a] the rights of salmon fishing had long been exercised in a particular manner, which lately was attempted in the river Tay, where in high water it is two miles, but in low water only half a mile broad. At the distance of a mile and a quarter from the river, an inclosure, containing a space of about fifteen acres, is made of stakes and netting, which opens as the tide flows, and shuts when it ebbs detaining all the salmon that enter during the flowing of the

Solway frith.

Mode of fishing there.

the lowest part thereof belonging to Abergeldie. This dike caused a temporary accumulation of water which flowed down it, and besides went round at each end. Salmon, in their passage up the river, could not only get over the dike, but also, it was said, could pass at each end. About the middle of this pile, there was left an opening of a few feet, in which is placed a basket, with its mouth up the river. In the upper part of the river belonging to Abergeldie, the water was disturbed so as to drive the fish down the stream into the basket; which, however, was not like a cruive, adapted of itself to retain the fish, but was watched by persons who killed the salmon as they entered it. It was said, that the practice was never to repair the dike the same year, and that, of course, it never stood above a few weeks each season.

The Earl of Fife presented a complaint to the sheriff of Aberdeenshire, who found "that the defender was not entitled to build the dike complained of across the river Dee." The cause having come before the court of session by advocation, Lord Armadale, ordinary, found "that the mode of fishing practised by the defender is illegal; and therefore repels the reasons of advocation, and decerns." On advising a petition and answers, the court adhered to this interlocutor, and afterwards refused, without answers, a second reclaiming petition.

[a] Queen Mary's act ordaining "all cruives and fish dammes within salt waters, that ebbis and flowes, be all utterlie destroyed and put down," specially provides, "that this acte on nawayes be extended to the cruives and zairs, being upon the water of Solway."

In a case presently depending between Murray of Broughton's trustees and the Earl of Selkirk, a question occurs concerning the import of "the water of Solway." It is maintained, on the one hand, that the "water of Solway" is the same as the frith of Solway, extending to the mouth of the water of Dee: And, on the other hand, it is maintained that the sea at the mouth of the Dee is properly the Irish sea. If it be finally decided before this edition is printed off, the case will be stated more particularly in Appendix III.

§ 2. SALMON —LARGE INCLOSURES.

tide. And a line of netting, eight hundred and twelve yards in length, running obliquely down the river, directs the fish to the inclosure, as well as takes the fish returning with the ebb tide. The meshes of the nets are twelve inches in circumference. This being complained of by the proprietors of the superior fisheries, the court, on the same general ground that governed so many former cases, viz. the illegality, by the common law, of other modes of fishing, excepting cruives and yairs, as regulated by special statute, decided, that it was illegal, and ought to be discontinued.[a] This decision was affirmed by the house of peers on appeal. But the general question has again been brought under discussion by actions of declarator not yet decided.

Statutory restriction.

THE statutory restrictions extend no farther than to rivers where the ebbing and flowing of the tide is discernible.

What they apply to.

SOME proprietors of fishings, farther down the river, have attempted the same machinery, alleging, that the previous decisions affect not their fishings, as being not on the river at all, but either in the frith of Tay, or in the ocean. This plea has not yet been decided, nor any clear limits affixed to the debateable space where the river ends and the sea or frith begins.

—LOBSTERS.

Time of catching.

Two justices.

BY the statute 9 Geo. II, c. 33, § 4, there is a prohibition against killing lobsters on the coast of Scotland, from the 1st day of June to the 1st day of September. The penalty is £5 sterling, which any person may sue for, on a summary complaint before two justices of peace of the shire on the coast where the offence is committed. The person who brings the complaint gets the penalty.

III. WE have numerous enactments for the encouragement

[a] 26th Jan. 1802, earl of Kinnoul against Hunter.

§ 3. GENERAL REGULATIONS.

and right conducting of the fisheries. With the same vain and overweening attention, which marks the early legislation of most countries, our legislature anxiously interposed their authority as to the selling of all fish publicly,[a] to all men,[b] in the king's market;[c] when it was lawful, and when not to take the fish to a house;[d] the unlawfulness of buying to sell again at the sea coast; buying to sell again, or cutting in pieces before the first hour in summer and the third in winter; selling at the water instead of the market.[e]

[a] Leges Burgorum, c. 67.

[b] Ib. c. 72.

[c] Ib. c. 79.

[d] Ib.

[e] Iter Camerarii, c. 16. Here the measure and size of the barrel is particularly regulated. The statute, parl. 1477, c. 76, intitled, "of the bond of salmond," sets forth, "that it is heavily murmured, and the realme greatly slandered be strangers and uthers that byis salmond, of the minishing of the veschels and barrelles that the salmond is packed in," and for this reason, all salmond are ordained to be packed in barrelles of the measure of Hamburgh. The first seller who sells the fish in barrelles under this standard, is to forfeit the fish to the king, and the cooper who made the barrelles is to pay to the king £5. And by parl. 1487, c. 110, the barrel is to contain fourteen gallons, and every barrel is to be marked with a burning iron. If any barrel be found less than this measure, the salmon it contains are to be escheated, if it be unmarked, the barrel is, in this case, to be escheated. By act 1493, c. 52, it is declared to be a point of dittay for any craftsman to make the barrel of a less capacity; and the person convicted is to be liable in the penalty of 10*s*.

By act 1540, c. 109, one bind and measure is ordained to be made for salmon and herring; and each cask must be marked by the maker, and also by the mark of the town where it is made; for which purpose the town is to have a searcher who shall have the town's mark in his keeping, to burn each barrel with the mark, so that the king's custom be not defrauded: and if any fish, salmon, herring, or keeling, be found in such barrels unmarked, the same are to be escheated.

By act 1573, c. 57, every salmon-barrel must contain twelve gallons of the Stirling pint, and every barrel of herring and white fish must contain nine gallons of the same stope. The cooper is to burn and mark the same with his own proper mark; and

§ 3. GENERAL REGULATIONS.

THE act 1705, c. 2, which, as well as 1693, c. 5, contains general regulations with regard to the loyal curing and packing of herrings and salmon, empowers sheriffs, bailies of regality, and magistrates of boroughs, or any having commission from them, to visit, on all occasions, the curing and packing of herring and white fish in their respective bounds; and also to break open any barrel, and to secure the whole casks, where insufficient herring or white fish are found: the proprietor is to pay 100 merks for each last; the half to the discoverer, and the half to the poor of the parish.

BY the 8th article of the Union, it is provided, that, from and after the Union, the acts of parliament in Scotland for pining, curing, and packing of herring, white fish, and salmon, with foreign salt, for exportation, shall be continued in force; and that fish exported from Scotland, so secured, shall have the same premiums that are allowed in England. In order, also, to encourage the herring-fishing, the sum of 10*s.* 5*d.* sterling is to be allowed for every barrel of white herrings exported from Scotland. And by the 7th Anne, c. 10, regulations are made for the better ascertaining and securing these allowances given by the articles of Union to those who export fish from Scotland, cured with foreign salt.

SINCE the Union, there have been numerous enactments concerning the fisheries, particularly the herring fishery; as,

and whoever fails herein is to be punished according to the former statutes. And the statute, act 1584, c. 141, ordains a just measure and standard for salmon to be made by the boroughs, conform to the old acts of parliament, and the same to remain at the borough of Aberdeen; and that there be a just standard and measure for herring and white fish which shall be marked, and remain in the keeping of the provost and bailie of Edinburgh. And by act 1691, c. 33, every salmon-barrel must contain at least ten gallons of the Stirling pint, and must be marked by the cooper, and by the borough.

§ 3. GENERAL REGULATIONS.

for example, against damnifying any of the nets or other materials belonging to the free British fishery.[a] Various acts have been passed, giving bounties for encouragement of the herring fishery; but which it would be improper to state at length, because they are temporary statutes, and are from time to time varied.[b]

THE importation of any fish, except eels, lobsters, and turbots, was prohibited by various statutes,[c] under certain penalties; and in order to diminish the expence attending the recovery thereof, it was provided by 26 Geo. III, c. 81, § 113, that all such penalties may be recovered before any two justices, on proof, by confession or oath of one witness. The penalty is levied by distress, and goes to the informer; and for want of distress, the offender may be sent to the common gaol for one year: and, that persons may not by flight evade imprisonment, the offender may be detained any time, not exceeding forty-eight hours, as shall be allowed for the warrant of distress.[d]

[a] 28 Geo. II, c. 14, § 9. If any person shall damnify or destroy, without consent of the Society of the Free British Fishery, any of the nets, sails, cordage, stores, or other materials belonging to the said society; he shall, on conviction on the oath of two witnesses before one justice, forfeit to the society treble value, by distress; and for want of sufficient distress, be committed to the house of correction to hard labour for any time not exceeding three months, or till satisfaction be made. Prosecution to be in six calendar months.

[b] Thus, after June 1787, an annual bounty was given for seven years by 26 Geo. III, c. 81, which was continued and varied by subsequent statutes, (35 Geo. III, c. 56, till 5th April 1801; by 39 Geo. III, c. 100, and till 15th April 1804, 41 Geo. III, (U. K.) c. 97, § 6; 42 Geo. III, c. 79, § 1.)

[c] 1 Geo. I, c. 18; 9 Geo. II. c. 33; and 26 Geo. III, c. 81.

[d] § 47.

Provided, that if it shall appear to the satisfaction of such justices, either by confession, or other witness, that such party hath not goods sufficient to answer the penalty, such justices may, without issuing any warrant of distress, commit the party so convicted as if such warrant had actually issued, and a return of *nulla bona* been made thereon. § 48.

Provided also, that if any such offender, ordered to be committed, shall before

§ 3. GENERAL REGULATIONS.

THERE were various statutes respecting salt-bonds, granted by persons shipping salt to be transported coastways, for the purpose of curing fish, such persons being exempted from the duties. These statutes [k] were repealed, and new regulations substituted in their stead by 41 Geo. III, c. 91, intitled, "an act for the better regulation and collection of

before his commitment procure security, to be given by two sufficient sureties, for payment of the penalties and charges, within fourteen days, exclusive of the day of conviction, the justices may accept such security; and on non-payment within the time limited, any two justices may commit the party convicted, and also his sureties, to the common gaol, for the same time as the person convicted would have been liable to if no security had been given, unless the penalty and charges are sooner paid. § 49.

Any person thinking himself aggrieved may, within three months, appeal to the sessions, giving six days notice to the informer, and with two sureties entering into recognizance before one justice, to appear and prosecute such appeal, and abide the order of, and pay the costs awarded at such sessions (if any), and if such judgment be affirmed, the party appealing shall pay double costs, to be ascertained by the court. § 50.

And in case the party appealing shall have paid the penalty into the hands of the justices by way of deposit, or shall be then imprisoned, such person may appeal, on his entering (without sureties) into recognizance as aforesaid, and remaining in prison in the meantime; or depositing such penalty with the justices until the appeal shall be determined. § 51.

And no conviction or judgment shall be set aside by the sessions for want of form, or through the misstating of any fact, circumstance, or other matter, provided the material facts on which such conviction is grounded, be proved to the satisfaction of the court: And no proceeding of the said court shall be removed by *certiorari* into any other court. § 52.

Witnesses not appearing, having been duly summoned, may be apprehended by warrant of such justices, and brought before them: and if any witness shall refuse to be sworn, and give his evidence, or wilfully forswear himself, or prevaricate in his evidence, such justices may commit him to the common gaol for one year without bail. § 44.

And the examination of every witness shall be taken down in writing; and in case the party accused cannot be made to appear at the time of such examination, or any witness cannot be made to attend when such offender shall appear; in that case, such examination in writing may be read and made use of, and shall have the same effect as if such witness had been examined *viva voce*. § 45.

[k] § 7 and 8 of Geo. III, c. 65.

certain duties of excise;" for the particulars of which enactments, recourse must be had to the statutes themselves, or to Mr. Huie's accurate compilation. § 3. GENERAL REGULATIONS.

IV. A LATE statute has been passed for the protection of oyster fisheries. By the 31 Geo. III, c. 51, it is provided, that if any person shall, with any net, traul, dredge, or other instrument or engine whatsoever, take or catch any oysters or oyster brood, within the limits of any oyster fishery of this kingdom, or make use thereof for the purpose of catching oysters or oyster brood, although none be actually taken; or shall drag upon the ground of any such fishery with any net or other engine; every such person (other than the owner, lessee, or occupier of such fishery, or person lawfully entitled to catch oysters therein), shall be deemed guilty of a misdemeanor, and may be indicted at the assizes or quarter sessions for the county or division; and the justices in sessions may hear and determine all such offences: And every such offender being convicted by verdict, or on his own confession, may be punished by fine and imprisonment, or either of them, as the court shall think proper; such fine not to exceed £20, or be less than 40*s*; and such imprisonment not to be for more than three months, nor less than one month.[a] § 4. OYSTER FISHERIES.

ANY justice, upon complaint on oath within 30 days of such offence having been committed, may by warrant cause such offender to be brought before himself, or any other justice, who may commit him to the common gaol or other prison, until the next assizes or quarter sessions, which ever shall first happen, unless he enter into recognizance with two sureties in £20 each, to appear and answer to any indictment which may be preferred against him by virtue of this act.[b] Offenders may be punished.

[a] § 1. [b] § 3. And if any such person (except as aforesaid) shall be found taking or using engines for taking oysters or oyster brood, within the limits of any oyster fishery, who shall refuse to dis-

cover his name and place of abode to the owner, lessee, or occupier of such fishery, or his apprentice or servant, he may seize and detain such offender, and carry him before a justice, who, on oath being made of the offence, shall proceed against him in the same manner as if he had been apprehended and brought before him by virtue of a warrant. § 4.

But no justice shall commit any such person, or require security from him for his appearance as aforesaid, unless one sufficient householder, being an owner, lessee, or occupier, or otherwise lawfully entitled to catch oysters in such fishery, shall enter into recognizance in £20, for his appearance at such assize or quarter sessions, and there to prefer a bill of indictment against such offender. § 5.

If after any such person shall have been committed, two sufficient sureties shall, before any justice, enter in recognizance in £20 each for the appearance of such person so committed at such next assizes or quarter sessions, and to answer any indictment which may be preferred against him; such justice may by warrant order such person to be discharged out of custody. § 6.

It is provided, that nothing herein shall extend to hinder any person from catching or fishing for any floating fish in the waters or creeks within the limits of any oyster fishery. § 2.

It is further provided, that this act shall not affect any act now in force respecting any particular oyster fishery; or preclude any prosecution at the common law, for any offence herein described: but no person shall be liable to have an action brought against him for any offence for which he shall have been punished by this act. § 7, 8,

END OF THE SECOND VOLUME.