

Sup. 711. *McNair*, May 18. 1802 ; *M.* 12832. *Laird*, Feb. 10. 1807 ; below, § 1052 (*b*).

(*b*) *Sinclair*, Jan. 29. 1829 ; 7 S. D. 343.

II.—NATURE AND EXERCISE OF THE RIGHT OF OWNERSHIP.

938. The right of ownership may be exercised either directly by the proprietor himself, or by his tenants.

1. OF THE USE AND OCCUPATION OF LAND BY THE PROPRIETOR.

939. The chief attribute of property is the right of deriving from land, and its accessories, all the uses or services of which they are capable. This right may be considered in relation to others, as EXCLUSIVE ; or in relation merely to the subject, as ABSOLUTE. The exclusive right may suffer limitation, wherever the public interest requires it : The absolute use also may be restrained on similar principles, where it tends to the injury or discomfort of the public. And both the exclusive and the absolute use may be extended or restrained by agreements, express or implied, which constitute servitudes : And they are under the burden of public taxes.

This subject may be considered under these heads :—

1. Exclusive use. 2. Absolute use. 3. Nuisance. 4. Servitude. 5. Public burdens on land.

Of the Right of Exclusive Occupation of Land.

940. The right to the exclusive occupation and use of land leads, in its exercise, to many difficult cases of interference between conterminous proprietors ; and between land-owners and the public. The proprietor of land has the exclusive right to the use and occupation, not merely of the surface, but of what is below, and what is above the surface, “ a cœlo usque ad centrum.” So,

941. 1. He has a right to have his neighbour prevented from projecting a building over his land ; or resting it on his wall ; or the rain-drop from his neighbour’s roof from falling on his ground (*a*) ; or trees from overshadowing it (*b*) ; or even a cornice or ornament from extending beyond the line of the boundary, however innocuously (*c*). When any of these rights to exclude are found to exist, they are held presumptive though not

conclusive of a right of property, and do not necessarily imply servitude merely (*d*).

(*a*) Garriochs, March 7. 1769; M. 13178. See also Stirling, below § 1004.

(*b*) Halkerston, July 3. 1781; M. 10495.

(*c*) Milne, June 12. 1828; F. C.; 6 S. D. 967.

(*d*) Scouller, Jan. 24. 1832; 10 S. D. 241.

942. 2. He may insist on the removal of conduit-pipes which have been laid below the surface of his land; or roots of trees which shoot into his ground.

943. 3. He may prevent others from coming on his land for taking fuel, however necessary to them, and however inexhaustible the supply; or from hunting on his land, or setting foot upon it, or encroaching, however inoffensively.

Baird, Jan. 19. 1825; 3 S. D. 448. Lord Breadalbane's case; M. 4999.

944. Individual benefit or convenience will not justify the invasion of this exclusive right of property (*a*). The right must be purchased if the party be desirous of using it. Such questions are most apt to occur relative to the placing of sign-posts in towns. And the rules seem to be,—1. That in the common case no conveniency of one proprietor or inhabitant can entitle him to place his sign-board on the more conspicuous wall of his neighbour (*b*). 2. That the mere circumstance of a wall being the front wall of a common close, lane, or cul de sac, does not render it common, so as to entitle tradesmen in that close to place their sign-boards there (*c*). And, 3. Although acquiescence is said to confer such a right, it does not seem that any thing short of a written consent, or prescription, will be sufficient for that purpose (*d*).

(*a*) Farquharson, June 25. 1741; M. 12779; Elchies, *Property*, 5; 5 Br. Sup. 668. See below, § 1102.

(*b*) Murray, Nov. 18. 1812; Bar. Hume, 520. Dickson, Nov. 23. 1824; F. C.; 3 S. D. 310.

(*c*) Murdoch, Feb. 27. 1783; M. 13184. Monro, Nov. 19. 1808; Hume, 518. Lowrie, May 13. 1812; F. C.

(*d*) Buchanan, Nov. 25. 1823; 2 S. D. 526.

945. The exercise of the exclusive right may be barred by ACQUIESCENCE. This doctrine has of late acquired considerable importance from the effects ascribed to it; and it is necessary to distinguish clearly the principle on which it depends.

946. The principle seems to be, that mere acquiescence may,

as rei interventus, make an agreement to grant a servitude, or to transfer property binding; or may bar one from challenging a judicial sentence: But that where there is neither previous contract nor judicial proceeding, there must be something more than mere acquiescence; something capable of being construed as an implied contract or permission, followed by rei interventus. Where great cost is incurred by operations carried on under the eye of one having a right to stop them; or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission, as a fair ground of right.

Marquis of Abercorn, May 20. 1820; F. C. Colonel Aytoun, May 19. 1801; *M. Property*, App. 1. Stirling, Nov. 26. 1829; 8 S. D. 131. *M'Nair*, *supra*, § 937.

947. 3. Although it is rightly said, that mere acquiescence cannot confer a right of property, it may confer a right of use of property or servitude.

Lord Melville's case, Dec. 12. 1828; 7 S. D. 186; and same case, May 29. 1830; 8 S. D. 841. *Monro*, Nov. 23. 1821; 1 S. D. 154.

948. GAME LAWS. The exclusive possession of land is the foundation on which the Scottish game laws rest; the right of hunting and killing game being an incident of property in land. Game is not property in Scotland; nor does it belong to the Sovereign; nor was there originally any restraint on the killing of game within one's own land. But, in the seventeenth century, the right of killing game was, from favour to landowners, restricted to proprietors of a certain measure of property (*viz.* a ploughgate), or those having authority from such proprietor (*a*). To the qualification thus established, has been added the necessity of a license for the increase of the revenue (*b*). This right has been made the subject of many penal regulations for the preservation and the protection of the privilege (*c*). A severe law has been passed against midnight destroyers of game (*d*), and for guarding against trespasses in the daytime (*e*).

(*a*) 2 Craig, 8. § 13. 1555, 51. 1621, 31. 1685, 20. 1707, 13. *Pollock*, June 5. 1828; 6 S. D. 913.

(*b*) 48 Geo. III. c. 55. 52 Geo. III. c. 93.

(*c*) 13 Geo. III. c. 54. 57 Geo. III. c. 90. See *Earl of Cassillis*, Feb. 8. 1826, in *Justiciary*; S. D. *Justiciary Cases*, 146.

(d) 9 Geo. IV. c. 69. See below, § 961, 3.

(e) 2 and 3 Will. IV. c. 68.

949. *Right to kill Game.* 1. Property in land in Scotland gives the qualification to kill game. It is not enough to have property in England (a). But such qualification gives no right to hunt on another's ground without permission from the proprietor (b).

(a) Earl of Mansfield, Jan. 18. 1810.

(b) Baird, Jan. 19. 1825; 3 S. D. 448.

950. Leave from a qualified person gives the right to hunt on that person's ground, or to have possession of game without challenge.

McEwan, July 8. 1809; F. C.

951. The right of hunting in a forest may, as a delegation from the owner, be conveyed to another, to the effect of giving to the assignee a qualification to kill game.

952. The right to kill game does not exist as a real right separate from the land, by sasine or lease; it is only a personal privilege in respect of the right of property.

Earl of Aboyne, June 22. 1813; F. C.

953. A tenant has no qualification, or leave to kill game, merely by having the possession of land (a); and a lease with leave to shoot (though as a lease of the land it is good against singular successors, under the act of 1449, c. 17. see below, § 1224), will not be effectual to confer the privilege of shooting, to the prejudice of a purchaser of the lands (b). But the landlord may hunt on his tenant's ground, paying surface damage (c).

(a) Marquis of Tweeddale, June 18. 1808; F. C. Earl of Hopetoun, Jan. 17. 1810; F. C.

(b) Pollock, Gilmour, and Co. June 5. 1828; F. C.; 6 S. D. 913.

(c) Ronaldson, Nov. 21. 1804; M. 15270. See below, § 961.

954. *Possession and Sale of Game.* The old laws relative to the possession and sale of game are repealed (a), and the rules seem now to be, that, 1. penalties are imposed on those having in their possession muirfowl or ptarmigan from 10th December to 12th August; or partridges from 1st February to 1st September; or pheasants from 1st February to 1st October (b): 2. A qualified person may possess or buy and sell

game ; 3. an unqualified person may buy from, or sell to, a qualified person ; 4. authority given by a qualified person to buy *his* game, will be a good defence in a prosecution ; throwing the onus probandi on the prosecutor, to shew the game not to be that of the licenser ; 5. an unqualified person not having leave is subject to penalties for having game in his possession ; but, 6. under this law, the sale of game is now open and avowed.

(a) 13 Geo. III. c. 54.

(b) 1 and 2 Will. IV. c. 68. See for England, 1 and 2 Will. IV. c. 32.

955. Prosecutions for offences against the game laws must be in forma delicti, and may be maintained by the agent of a game association, in the character of informer, for the penalties.

Buchanan, May 22. 1818. Gray, Jan. 23. 1816.

956. LIMITATION ON THE EXCLUSIVE USE. The exclusive right of a land-owner yields wherever public interest or necessity requires that it should yield.

957. Access must on this principle be allowed for extinguishing a fire ; for pursuing a criminal ; for destroying dangerous or noxious animals.

Colquhoun, Aug. 6. 1785 ; M. 4997. See § 943.

958. On the same principle with the above, rest the laws for the enclosing of lands and straighting of marches ; which, to a certain extent, interfere with the proprietor's exclusive right for the public benefit.

1661, 41. 1669, 17. 1685, 39. 1 Ersk. 4. § 3. and 2, 6. § 4. 2 Hutchison, 498. Tait's Justice of Peace, 253.

959. In the construction of those laws it is held, 1. That they apply not to every proprietor of a patch of land, but have in view the improvement of large estates (a). 2. That the conterminous proprietor must be called as a party (b). 3. That the line of fence is to be fixed by the Sheriff ; and where a stream is the boundary, the fence is to be on the one side, or the stream divided for watering (c). 4. That considerable portions of ground may be exchanged, provided they bear a reasonable relation in value to the whole march (d). 5. That entailed lands are comprehended under these laws ; provided the exchanged or purchased portion be duly brought under the entail.

(a) Penman, July 3. 1739; Elchies, *Planting*, 3; M. 10483; 2 Ersk. 6. § 4. Earl of Peterborough, June 15. 1784; M. 10497. Earl of Cassillis, Feb. 28. 1809; F. C.

(b) Ord, Feb. 23. 1738; Elchies' Notes, 331; M. 10479.

(c) Earl of Crawford, July 21. 1769; M. 10475.

(d) 1 Ersk. 4. § 3. Chalmers, July 29. 1756; M. 10484.

960. On the same principle also depends that power of taking the property of individuals, which the Legislature occasionally exercises in the course of public improvements, by roads, bridges, canals, &c.;—a power which implies as a condition that the value of what is taken shall be paid to the proprietor. In order to preserve the property, and protect the landholder's interest against encroachment beyond the strict limit of necessity, it is provided by the standing orders of both Houses of Parliament, that no Act of Parliament which touches private property shall be passed, without certain notices being given, affording full opportunity of being heard.

NOTE.—In Railroad acts, provisions are made for invasions of amenity, for severing of fields, &c. and the question in those cases will turn not as on nuisance at common law, but on the construction of the condition under which power is given to make the railway.

See Dict. and Dig. of the Law, by W. Bell, Esq. v. *Private Bills*.

961. ENFORCEMENT OF EXCLUSIVE RIGHT. In order to enforce the right of exclusive possession, and protect property exposed to depredators, contrivances have been employed to detain, or hurt, or even to destroy the trespasser.

The principles applicable to this matter seem to be, 1. That to *detain* a trespasser is lawful, and such engines as have lately been contrived for that sole purpose seem to be unexceptionable. 2. That to repel by force a midnight robber who breaks into a house is lawful; and as the life and safety of the owner is in such cases put in peril in the attack and defence, safeguards and means of protection to prevent the necessity of such conflicts, and produce the same end, seem unexceptionable;—as a watch-dog; or even a spring-gun, or a man-trap. 3. That those blind and indiscriminating means of defence, which are so often applied to the protection of gardens, and orchards, and enclosed grounds, are very questionable even where notice of the danger is given. And, 3. That such engines are illegal, even with notice, for preventing a mere trespass on grounds unenclosed (*a*); although most frequently employed in this way for the preservation of game. By statute

these engines are now prohibited in England; but it was thought there was no occasion that the Act should extend to Scotland, as this evil was already provided for by the common law (b); the statute, however, for protection against persons going at night into enclosures armed for the purpose of taking or destroying game, does extend to this country (c); and to this has been added the more recent Act against trespassers in the day-time.

(a) Case of *Craw*, Syme's Justiciary Cases, pp. 188, 202. See the English cases of *Vere v. Lord Cawdor*, 11 East, 568; *Dean v. Clayton*, 2 Marsh. 577; *Elliot v. Wilkes*, 3 Barn. and Ald. 304.

(b) 7 and 8 Geo. IV. c. 18.

(c) 9 Geo. IV. c. 69. 2 and 3 Will. IV. c. 68.

Of the Absolute Use of Land.

962. The land-owner has (under the exceptions to be immediately stated) a right to do what he pleases with his property within its limits, and to derive from it all the uses and services of which it is capable.

963. This right is subject to limitations, 1. from neighbourhood; 2. by the law of nuisance; 3. by servitude.

964. 1. LIMITATION OF ABSOLUTE USE BY NEIGHBOURHOOD. The principles on which this limitation is regulated are,—1. That one is not, by the faulty or careless use of his property, to occasion any real or actual damage to the property of another; and the remedies are either preventive, by interdict; or reparative, by action of damages. 2. That a neighbouring proprietor is not bound to wait till a threatened or impending mischief shall be done, but is entitled to protection where there is reasonable fear of injury. 3. That mere inconvenience to a neighbour from the beneficial or blameless exercise of a proprietor's right within his own limits, will not entitle him to damages, or to an interdict, anticipating evil, and restraining such proprietor in his operations. But, 4. No one is entitled, even within his own limits, to act wantonly, with the mere purpose of producing inconvenience and loss to his neighbour, in *æmulationem vicini*: This, however, is never to be presumed, but must be proved. Under the guidance and restraint of these principles, a proprietor may exhaust, convert, or destroy the substance of his ground, whether surface or internal materials.

2 Ersk. 1. § 2. et seq. and tit. 9. § 1. et seq.

965. A proprietor may dig, or build on, any part of his ground, even to the very verge, though the consequence should be to stop all his neighbour's lights; but not to the danger of property or life.

2 Ersk. 2. § 2. and t. 9. § 10. Somerville, March 10. 1613; M. 12969. See Wilson, Feb. 2. 1688; M. 12775. Dunlop, Dec. 1. 1803; B. Hume, 515. Glassford, May 12. 1808; Ib. 506; M. *Property*, App. 7. Blackwood, May 20. 1825; 4 S. D. 26. Murray, Dec. 4. 1834; 13 S. D. 119. Calender, July 19. 1826; 4 Murr. 108. Douglas, Sept. 19. 1826; Ib. 130. Robertson, May 12. 1835; 4 S. D. 6.

966. A proprietor may establish manufactories; erect chimneys, furnaces, steam-engines, or limekilns; open quarries of stone, or mines of coal; on the very verge of his ground, however disagreeable or inconvenient in direct or consequential effect, provided he avoid nuisance (§ 975), and act not in mere spite and malice, in *æmulationem vicini* (a).

The restraint which is grounded on the principle of *æmulationem vicini* may affect acts positive or negative; and, 1. to entitle one to redress against any operation of a proprietor on this ground, a case must be made out of mere malice, or at least useless caprice or annoyance. And it will not on this ground be lawful to interfere with the site of a useful erection, on merely shewing that it might have been placed elsewhere with equal convenience to the owner, and less offence to his neighbour (b). 2. Where one objects to the proceeding with any innocuous operation on a subject of common interest, he may be opposed by shewing that his opposition is merely in *æmulationem vicini* (c).

(a) Dewar, Jan. 20. 1767; M. 12803; 1 Hailes, 177. Ralston, July 29. 1768; M. 12808; 1 Hailes, 234. See Ross, Feb. 3. 1829; 7 S. D. 361.

(b) Dewar's Case, *supra* (a).

(c) Ritchie, June 21. 1833; 11 S. D. 771. See Graham, Dec. 6. 1838; 1 D. B. 6.

967. A proprietor cannot project his walls or roof beyond the boundary line; or so construct his roof as to throw the eavesdrop on his neighbour's ground. See above, § 941.

2 Ersk. 9. § 9.

968. The inferior ground must receive the natural drainage of the upper ground, but is not bound to submit to what is produced by artificial changes on the condition of the water. So, 1. The inferior must receive the superfluous water, even

under the operations of draining, in all the variations of agricultural improvement (*a*). 2. This rule extends to levels for draining coal (*b*). 3. It applies also to natural streams and rivers as the legitimate channels for the drainage consequent on habitation, as a natural use of the ground (*c*). But such drainage will not be allowed into a mill-course, which is artificial and private property (*d*). 4. This absolute right must yield to public necessity (see § 960); but whether this be at the disposal of the common law has not been cleared (*e*). 5. An opus manufactum for gain will not be permitted, to the effect of throwing an unnatural quantity of water on the inferior tenement (*f*). And, 6. The draining of a lake seems a questionable operation, so far as hurtful to the inferior ground (*g*).

(*a*) 2 Ersk. 9. § 2.

(*b*) Aitken, Feb. 16. 1734; Elch. v. *Property*.

(*c*) Downie, Nov. 12. 1825; F. C.; 4 S. D. 167.

(*d*) Eyre, July 10. 1827; 5 S. D. 912.

(*e*) Town of Edinburgh, Jan. 13. 1736; Elch. v. *Property*, 3.

(*f*) Miller, Nov. 1792; Bell's Cases, 334. Russell, Nov. 1791; M. 12823 Bell's Cases, 334. Hope, Jan. 14. 1779; M. 14538. See below, § 1100.

(*g*) Haining, 2 Brown's Sup. 292.

969. The inferior heritor is not entitled to cause the water to be thrown back on the land of the superior heritor; either by damming up a stream or by impeding the natural drainage. But the superior heritor may clear his land of superfluous water, without regard to consequential effects on the inferior tenement.

See Hope's casé, *supra*, § 968 (*f*).

970. Although a proprietor may, to the very verge of his property, dig his ground and remove the earth (§ 965), he is not entitled to do any direct injury to his neighbour; or to take away the support of his property; or to occasion reasonable apprehensions of danger; or within burgh to infringe the rules of the Dean of Guild, who has jurisdiction over buildings.

2 Ersk. 1. § 2. Ralston, July 29. 1768; M. 12806; 1 Hailes, 234. Ferguson, Nov. 12. 1816; F. C. Pirnie, June 5. 1819; F. C. Murray, March 10. 1825; 3 S. D. 639. Robertson, May 12. 1825; 4 S. D. 6. Grey, June 18. 1825; 4 S. D. 104. Dunlop, Glassford, and Murray, *ut sup.* § 965.

971. One may erect a bulwark for the defence of his land against the encroachments of a river, to the effect of preserving the ground such as nature placed it. He may fortify, but not raise the bank. But it has been settled by the House

of Lords, that he may not “erect any bulwark or other opus manufactum upon the banks of the river, which may have the effect of diverting the stream of the river, in time of flood, from its accustomed course, and throwing the same upon the lands of a neighbouring proprietor.” (See below, § 1100, Burgess, Nov. 30. 1790; Bar. Hume, 504.)

Menzies, July 4. 1828; House of Lords, 3 W. S. App. Cases, 235.

972. The inconveniences or restraints imposed by neighbourhood on the use and enjoyment of property, the interruption of light, of prospect, or of air, the want of a proper access to property, the inconvenience of irregular marches; all these must be endured, unless either the person who suffers shall buy the privilege; or the dominant proprietor shall consent or acquiesce; or the Legislature, for purposes of public policy, shall interfere, as in the laws regulating marches (§ 958, et seq.).

LAW OF NUISANCE.

973. The land-owner's right to the absolute use of his property is qualified by the law of Nuisance; which in some degree may be considered as part of the law of neighbourhood.

See for some important information on that subject, under the several heads of, 1. Fatal effects of particular operations. 2. Deleterious effects not fatal. 3. Disagreeable consequences. 4. Means of amelioration, Report of the French Institute, with Remarks, 2 Edin. Med. and Surg. Journal, p. 290.

974. Between public and private nuisance there is no useful distinction in the law of Scotland. In England, Public nuisance is punishable; and the nuisance removable by indictment: Private nuisance is remedied by civil action at the suit of an individual. The description of nuisance in Scotland is the same, whether the public or the individual be regarded. Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers (§ 649, 660); whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood (*a*); whatever is intolerably offensive to individuals, in their dwelling-houses, or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor), or by indecency (as a brothel next door), is a nuisance (*b*).

But what is not at common law a nuisance, may conventionally be declared so, in respect to some particular piece of ground or area. And so, in feuing ground, it is frequently stipulated that the vassal shall not be allowed to establish a brewery, tan-work, soap-work, distillery, &c.; and the chief difficulty in such cases arises where the enumeration is qualified by the words "whereby a nuisance can be created." The rule seems to be that the operations or works prohibited are not to be put to the test of what strictly is a nuisance at common law, but to be measured by the fair meaning of the parties as amounting to what is offensive in the circumstances and situation (c).

It has been held that even the indirect effects (if necessary or probable) consequent on any particular use or employment of ground may be a nuisance; as in England in the case of a person keeping premises for pigeon-shooting, causing idle persons to assemble on the highway with fire-arms, noise, and alarm (d).

(a) 1698, 8. Leith, Dec. 1748; Elch. *Pub. Pol.* 9. Carrubber's Close, Feb. 26. 1762; M. 13175. Edinburgh Procurator-Fiscal, June 20. 1787. Dewar and Ralston's cases, § 967. Palmer, May 1794; M. 13188; Bell's Cases, 11. Lauder, June 16. 1815; F. C. Dowie, Dec. 11. 1813; F. C. Jameson, June 24. 1800; M. *Property*, App. 4. Rae, March 3. 1809; F. C. Scott, July 5. 1810; F. C. Farquhar, Jan. 19. 1813; F. C. Vary, July 2. 1805; M. *Pub. Pol.* 4. Thomson, Dec. 15. 1807; M. *Pub. Pol.* 5. Kell, July 8. 1814; F. C. Eyre, July 10. 1827; F. C.; 5 S. D. 912. Downie, Nov. 12. 1825; F. C.; 4 S. D. 167.

(b) Clark, June 8. 1760; M. 13172. Kinloch, June 20. 1756; M. 13163. Fleming, Feb. 24. 1750; M. 13159. Robertson, March 2. 1802; M. *Pub. Pol.* 3.

(c) Lauder, June 16. 1815; F. C. Porteous, Feb. 23. 1839; 1 D. B. M. 561.

(d) *The King v. Moore*, 3 Bar. and Ad. 184. Dowie, ut supra (a).

975. Under the above general description questions may arise which lead to distinctions. And, 1. There are some operations which are destructive of health, and unquestionably nuisance. 2. There are others innoxious to health, but intolerable in a populous neighbourhood, or dangerous in the neighbourhood of a public seminary: As to which, the verdict of a jury is the proper test by which to settle the question (a). 3. It has been questioned whether, by removal of what is offensive to a greater distance from human habitation, it may not be rendered legal (b). 4. The intended establishment may be such as to admit of doubt whether the apprehensions of those who complain are reasonable, and whether proposed

means of curing the offence may not render it unobjectionable (c); and the proper course is to interdict what is at the time unquestionably a nuisance, leaving the party to proceed with experiments to prove that it is now abated.

(a) Dowie's case, *supra* (c). Swinton, March 9. 1837; 15 S. D. 775.

(b) Same case, as stated in Trotter's, 9 S. D. 144.

(c) Trotter, *ut supra*, and 10 S. D. 423; also in House of Lords, Sept. 6. 1831; 5. W. S. 649. See below, § 976 (a).

976. One is not bound to submit to the erection of what is avowedly a nuisance, or manifestly threatens to be so; but may by interdict stop the operations: Nor will it be a sufficient answer, that it is intended to apply remedies in order to remove what is offensive, unless it can be demonstrated that the proposed remedies will be successful (a). But interdict will not be granted in doubtful cases; or against what is admitted not yet to be a nuisance, but only such as may become a nuisance by abuse (b).

(a) Trotter's case, March 3. 1832; 10 S. D. 423.

(b) Scott, May 29. 1832; 8 S. D. 845; and March 7. 1835; 13 S. D. 646.

977. The doctrine of nuisance must be taken under two qualifications:—1. That one is not to complain of a nuisance, if he come to the nuisance (a): This proceeds on the ground of personal exception. And, 2. That a place in which already offensive works exist may be rendered still more offensive, without entitling the complainers to an interdict; provided the increase be not carried so far as to render the accumulated nuisance intolerable or dangerous (b).

(a) Colvil, May 27. 1817. Duncan, June 9. 1809. Lawrie, v. Obie, 3 Camp. 514.

(b) Glasgow Water Company, Dec. 20. 1814; F. C. Balleny, Feb. 3. 1813; F. C. Charity, July 5. 1808. Dowie, Dec. 11. 1813; F. C. Colvil, May 27. 1817; F. C.

978. In England, dovecots are a nuisance: In Scotland, the right to erect them is, on the same principle, restrained to persons having land yielding ten chalders of victual yearly.

1617, 19. Brodie, July 3. 1752. M. 3602. Kinloch, Jan. 19. 1731; M. 3601. Murray, Jan. 19. 1797; M. 7628.

OF SERVITUDES.

2 Stair, 7. and 4. 45. § 17. More's Notes, ccxx. Brodie's Stair, p. 332. 2 Ersk. 9.

979. Servitude is a burden on land or houses, imposed by agreement—express or implied—in favour of the owners of

other tenements; whereby the owner of the burdened, or servient tenement, and his heirs and singular successors in the subject, must submit to certain uses to be exercised by the owner of the other or DOMINANT tenement; or must suffer restraint in his own use and occupation of their property. Presupposing those extensions or restraints of the exclusive or absolute right of use, which naturally proceed from the situation of conterminous properties, a servitude is a further limitation of that right in favour of the owner of another subject.

Lawyers class servitudes as natural, legal, or conventional. But what are called *natural* servitudes, are not properly servitudes; such as the burden of receiving the water of the superior tenement (sup. § 968): The *legal* are more properly police regulations for public safety in cities; though in this class liferents by terce and courtesy have also incorrectly been ranked (§ 1038). The *conventional* alone are properly servitudes, by which those rights of use, which belong to proprietors by nature and law, are altered or modified.

The most frequent servitudes known in our practice are,
1. those relating to LANDS and other rural subjects; as a servitude of road or passage; of aqueduct; of watering of cattle; of pasturage; of fuel or feal and divot (§ 1010–1014); or,
2. those relating to HOUSES or BUILDINGS in town or country; as the servitude of support; of stillicide; of light; of prospect (1003–1008).

The law does not recognise as servitudes affecting singular successors, many burdens or privileges or uses of property which may be made the subject of personal contract (*a*). Servitudes properly constituted are effectual against singular successors in the servient tenement, and available to singular successors in the dominant, though not followed by infeftment; and it has therefore been held essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements (*b*).

NOTE.—What shall be deemed servitudes of a regular and definite kind is a secondary question, as to which the only description that can be given generally seems to be, that it shall be such a use or restraint as by law or custom is known to be likely and incident

to the property in question, and to which the attention of a prudent purchaser will, in the circumstances, naturally be called.

(a) *Nicholson*, Feb. 19. 1708; M. 14516.

(b) *Cochran*, Feb. 8. 1759; M. 14518. *Cleghorn*, Nov. 26. 1813; 2 Dow, 40. *Falkland*, Feb. 13. 1708; M. 10916. *Jaffrey*, Feb. 18. 1775; M. 14517. *Sinclair*, Feb. 10. 1779; affirmed March 8. 1780; M. 14519.

980. *General Nature of Servitudes.* Servitudes may be viewed either as real rights and privileges to the one proprietor; or as real burdens on the ground of the other; according as they are taken in relation to the subject benefited, or to that which is burdened.

Servitude differs from property; it is an accident of property, “non pars substantiæ sive fundi, sed accidens.”

981. Servitudes have been classed as prædial and personal. Those have been called PRÆDIAL, of which the benefit is conferred on another subject, or prædium; those have been called PERSONAL, which are conferred on a person, independently of property (a). But, practically, the only servitudes in Scotland are prædial. Usufruct, or Liferent, ranked by lawyers as the principal personal servitude, is more correctly to be considered as limited property (§ 1037); and the servitudes which are enjoyed by individuals, independently of any property of their own, have still reference to some prædium (royal burgh, &c.), the inhabitants of which hold the right (b). Prædial or proper servitudes are positive or negative.

(a) 2 Ersk. 9. § 5.

(b) *Sinclair* and *Cleghorn*, ut sup. § 979 (b). *Feuars of Dunse*, Nov. 22. 1732; M. 1824.

982. 1. POSITIVE SERVITUDE. The right conferred in positive servitude controls that of exclusive use and occupation which is a part of the right of property (§ 940), and enables the dominant proprietor to exercise some act of absolute use over the servient subject, which otherwise might have been prevented; as to rest a beam on the servient wall; to take water from a fountain; to use a road; to pasture cattle; to take fuel (a).

2. NEGATIVE SERVITUDE. In negative servitude the dominant owner holds a restraint over the servient, by which the servient is limited in that absolute use of his tenement, which entitled him to derive from it every benefit of which it is capable. So he may be restrained from any building which may

interrupt light or prospect; or perhaps from building at all on the servient tenement (*b*).

(*a*) 2 Stair, 7. § 5. 2 Ersk. 9. § 1.

(*b*) Stair, *ubi cit.* 2 Ersk. 9. § 35.

983. URBAN SERVITUDES relate to houses for habitation, although in the country: RURAL relate to fields, enclosures, gardens, &c. although in a city.

Another distinction has been made between servitudes, of CONTINUOUS or INTERRUPTED use; and again between servitudes MANIFEST or NOT MANIFEST: And both those distinguishing features may be of importance in the question of the constitution or extinction of servitude.

2 Stair, 7. § 5. 2 Ersk. 8. § 6.

984. EXERCISE of the SERVITUDE. As servitudes are thus limitations on the absolute or on the exclusive right of the servient tenement, they are passive merely, not active. The owner of the servient tenement is not bound to do any thing (*a*). Where one has a servitude of drain he must himself be at the expense of cleaning and repairing it (*b*). So the dominant of a road must keep it in order for his own use: The dominant of a servitude of support must repair the wall for his own security, though an opposite doctrine is sometimes laid down (*c*): And any stipulation to the contrary imposes a personal obligation superadded to the servitude (*d*).

(*a*) 2 Ersk. 9. § 1.

(*b*) Parson of Dundee, July 1687; M. 14521. Gray, July 30. 1762; M. 12800. Carlisle, Nov. 1731; M. 14524.

(*c*) 2 Stair, 7. § 6. 2 Ersk. 9. § 8. Murray, June and July 1715; M. 14521. Nicolson, July 18. 1708; M. 14516. See below, § 1003.

(*d*) Same cases.

985. It is a part of the servitude, that the owner of the dominant tenement has right to access for performing at his own expense, all the operations necessary for preserving and making use of the servitude. But it is only where such access becomes necessary by derangement, or immediately impending damage, that such intrusion on the proprietary right is justifiable: It were otherwise a right of way over another's ground.

Weir, Feb. 4. 1832; as reversed in the House of Lords, April 7. 1834; 7 W. S. 244.

986. The benefit of servitude is limited to the dominant

tenement; and is confined to the necessary use of that tenement, as fairly in contemplation of the parties in creating the servitude. So a servitude of fuel does not entitle the proprietor of the dominant subject to supply fuel to a lime-work opened on his land; nor to communicate the right to his feuurs: Nor does a servitude of taking slates entitle the owner of the dominant subject to take slates for sale; nor a servitude of passage, or of pasturage, entitle the dominant to extend it to another tenement.

Brown, Dec. 20. 1775; M. 14542. Leslie, Nov. 27. 1793; Ib. Clark, June 8. 1790; M. 13172. Wolfe Murray, Dec. 8. 1808; F. C. Scott, July 6. 1809; F. C. E. of Aboyne, June 22. 1813. Carstairs, May 14. 1829; 7 S. D. 607. Earl of Breadalbane, Nov. 22. 1745; Elchies, *Servitude*, 3.

987. The owner of the servient tenement is no farther limited than the servitude requires. So he is not restrained from watering his own cattle along with those of the dominant owner if there be enough for both. So also he may restrict the dominant owner to a part, if not detrimental to the servitude; or substitute one road for another, if equally convenient; or enclose a road, placing stiles or gates of easy access.

2 Ersk. 9. § 4. Watson, June 21. 1667; M. 14529. Dunikier, Vassals, June 17. 1670; 2 Brown's Sup. 466. Earl of Southesk, Jan. 20. 1680; M. 14531. Beveridge, Nov. 18. 1808; F. C. Bruce, June 25. 1745; M. 14525. See Urie, June 25. 1747; M. 14524. Ross, Feb. 19. 1751; M. 14531. Elch. v. *Servitude*, 5. Wood, March 9. 1809; F. C.; Magistrates of Renfrew, July 5. 1823; 2 S. D. 458.

988. The owner of the servient tenement can do nothing to diminish the use or convenience of the servitude to the owner of the dominant. Nor can the owner of the dominant enlarge his use so as to increase the burden on the servient, unless in so far as such change of use may have become necessary in order to make the servitude effectual to the extent originally granted.

2 Ersk. 9. § 4. Laird of Garleton, July 20. 1677; M. 14536. See Bruce of Kennet, 1741; Elchies, *Servitude*. 2. Magistrates of Dunbar, May 23. 1829; 7 S. D. 672. Scouller, Jan. 29. 1829; 7 S. D. 344. Greenhill, July 8. 1825; 4 S. D. 160.

989. A Negative Servitude is not to be evaded, or the prohibited act justified, on pretence that if the servitude be insisted on, the dominant may do acts still more offensive.

Greenhill, July 8. 1825; F. C.; 4 S. D. 160.

990. 1. CONSTITUTION OF SERVITUDE. The constitution of servitudes may be considered, 1. as between the original parties ; or, 2. as against singular successors.

In relation to singular successors there are important differences between positive and negative servitudes. In all servitudes the *titulus transferendi* is a grant express or implied,—the *modus* is the exercise of the right conferred by the grant. But this exercise is manifested by possession in positive servitudes, while negative servitudes, which are mere prohibitions, are not thus made manifest (§ 982). Hence, 1. Positive servitudes, not constituted by disposition and *sasine*, must, in order to be effectual against singular successors, be followed by possession (either continuous or otherwise, according to circumstances), unless both the dominant and servient proprietors' rights remain still personal: Negative are effectual by mere force of the grant. 2. Positive servitudes may be constituted by prescription ; negative cannot. 3. The rule which denies effect to servitudes not already known and recognised (see above, § 979) is strictly observed with regard to negative servitudes. Singular successors are left to their own vigilance, aware of what is naturally suggested by the peculiarity of the situation, and safe enough if the effectual servitudes be of a known description ;—a servitude of light, for example, or of prospect. As to positive servitudes of an anomalous nature, they are less likely to escape detection, as the possession betrays them ; and long usage has been more easily admitted to rank them among proper servitudes ;—as bleaching (*a*), walking or golfing, (*b*), cutting wood (*c*), taking of slates or stones for the use of the dominant tenement (*d*).

(*a*) 2 Ersk. 9. § 3. Gun, Jan. 16. 1829 ; 7 S. D. 274.

(*b*) Jaffrey and Sinclair, ut sup. § 979 (*b*). Cochran and Cleghorn, § 979 (*b*).

(*c*) Gordon, Nov. 27. 1734 ; Elchies, *Servitude*, 1 ; M. 14517.

(*d*) Wolfe Murray, Dec. 3. 1808 ; sup. § 986.

991. POSITIVE servitudes (§ 982) are constituted either by grant, or by prescription.

992. 1. By grant, such a servitude may be constituted, in the charter either of the dominant or of the servient tenement ; or in a separate deed, contract, missive, or other authentic writing (*a*). And it will be effectual against singular successors, either if it qualify the recorded *sasine* ; or if the

grant be followed by such possession, or use, as it admits of; possession being in this case the badge, but not the measure, of the right (*b*). (See below, § 993 in fin.)

(*a*) 2 Ersk. 9. § 3. Turnbull, Jan. 26. 1622; M. 14499. Penninuir, Dec. 7. 1632; M. 14502. Kincaid, Jan. 12. 1750; Kilk.; M. 8404. Elchies, *Servitude*, 4. Garden, ut sup. § 990. Dinwiddie, Nov. 23. 1821; 1 S. D. 164. Davidson, May 15. 1822; 1 S. D. 385. Sievwright, Dec. 19. 1828; 7 S. D. 210.

(*b*) Pittaro, Dec. 12. 1673; M. 14503.

993. 2. By Prescription alone, with possession, a positive servitude may be established, without any grant or other title in writing, except charter and sasine in the dominant subject; law presuming a title (*a*). But, 1. the possession must be clear and unequivocal (*b*). 2. It must continue during forty years uninterrupted by minorities or otherwise, and no presumption from acquiescence short of that term will be sufficient (*c*). 3. The servitude must be possessed as accessory to a dominant tenement, and must not be excluded by a bounding charter (*d*). 4. Royal Burghs may, as the Crown's vassal, possess for individuals, but not burghs of barony (*e*). 5. The possession is in this case not merely the badge, but also the measure of the right: *Tantum prescriptum quantum possessum* (*f*).

(*a*) 2 Ersk. 9. § 3. Grant, Nov. 27. 1677; M. 10876. Earl of Breadalbane, Nov. 22. 1743; Elchies, v. *Servitude*, 3. Ross, Jan. 18. 1757; Elchies, No. 5. Porteous, June 17. 1773; M. 14512; 1 Hailes, 280; 5 Brown's Sup. 598. See Duke of Roxburgh, June 5. 1713; M. 10883. Rodgers, July 10. 1827; 5 S. D. 917; 3 W. S. 251.

(*b*) Purdie, July 20. 1749; M. 14511.

(*c*) Campbell, May 19. 1836; 14 S. D. 799.

(*d*) Saunders, Feb. 26. 1830; 8 S. D. 605.

(*e*) Liston v. Galloway, Dec. 3. 1835; 14 D. B. M. 97. Town of Dunse, ut sup. § 981 (*b*).

(*f*) Ersk. ut supra.

994. NEGATIVE servitudes (§ 982) can be constituted only by grant, being incapable of possession, and so of prescription (*a*). The deed must be authentic and binding, but does not require sasine or publication in the record (*b*). It must also be in such terms as unequivocally to create a burden or restraint on the proprietor of the servient tenement. So the mere circumstance of having made no objection to a neighbouring proprietor opening a window in his gable, will not infer a grant of servitude of light or prospect (*c*); though an express permission to open such windows may imply a servitude.

A negative servitude may be established by a building plan (*d*) (see above, § 867): or by articles of roup.

(*a*) 2 Ersk. 9. § 35.

(*b*) Town of Edinburgh, March 11. 1630; M. 14500. Clelland, Feb. 21. 1739; M. 14506. Gray, Jan. 31. 1792; M. 14513; affirmed. See note in 7 S. D. 212. for opinion of Judges. Mutrie, June 26. 1810; F. C.

(*c*) Morris, Feb. 19. 1830; 8 S. D. 304. Forbes, July 1. 1724; M. 14505.

(*d*) Young and Co., Gordon, Walker, and Pollock, § 867 (*a*), March 11. 1825; 3 S. D. 650.

995. 2. EXTINCTION OF SERVITUDE. Servitudes are extinguished in several ways.

1. Where by a change of circumstances the servitude is no longer available, it is either extinguished absolutely, or suspended till matters are restored to their former condition;—as a servitude of prospect destroyed by the building of a house on intermediate property over which there is no servitude. So a servitude of way for the watering of cattle, where the spring is destroyed. While the impossibility of exercising the servitude remains, it may be held as extinguished; but will revive when the obstruction is removed.

996. (2.) The extinction either of the servient or of the dominant tenement destroys the servitude. But the extinction must be total; otherwise, with revival, the servitude will revive.

2 Stair, 7. § 4. 2 Ersk. 9. § 37.

997. 3. Servitudes are extinguished *Confusioné*, when the dominant and servient tenements come both into one person (*a*). But the doctrine of Erskine that the servitude can revive only by a constitution *de novo*, must be taken with some limitation. Wherever a separation or disunion may be anticipated, the effect seems to be to produce rather a combination of the two rights, as if the proprietor had divided himself into two persons, with a *suspension* rather than an extinction of the servitude. Nor would it in such a case seem to be necessary, on a subsequent separation of the tenements, to constitute the servitude *de novo*. During the union of the rights the owner's use may, indeed, be said to be exercised *jure proprietatis*; but it seems that if, in the exercise of the right or otherwise, the owner has indicated no intention of extinguishing the servitude, it would, on separation of the tenements, revive (*b*).

(*a*) 2 Ersk. 9. § 37.

(*b*) Donaldson's Trustees, Feb. 1. 1839; 1 D. B. M. 449.

998. (4.) Servitudes, not being estates or property, but burdens or accidents of property, may be extinguished by the renunciation or discharge of the dominant proprietor.

2 Ersk. 9. § 37.

999. (5.) Positive servitudes may be extinguished non utendo, by prescription; a new term of negative prescription commencing after every interruption. But abstinence from the exercise of the full extent of the right will not extinguish or limit a servitude, where it is *res meræ facultatis* (a). Negative servitudes may be extinguished by abandonment in the titles (b).

(a) Bethune, July 13. 1670; M. 10912. Nicholson, Nov. 14. 1662; M. 11291.

(b) Monro, Jan. 4. 1760; M. 14533. Rodgers, July 10. 1827; 5 S. D. 917, 3 W. S. 251. Sievwright, Dec. 19. 1828; 7 S. D. 210.

1000. PARTICULAR SERVITUDES. Many servitudes are enumerated at great length in the books of the civilians, which are nothing more than agreements, express or implied, on the part of the owners of land or houses, to renounce the exercise of certain points of their right, absolute or exclusive: In other words, to abstain from certain uses of their property, which the dominant proprietor may desire to prevent; or to grant to the dominant the privilege of certain uses of their tenement, from which they might otherwise exclude him. Our servitudes are few and well known; and there are not many individual servitudes on which a particular commentary seems to be necessary.

2 Stair, 7. § 4. 2 Ersk. 9. § 37.

1001. Recurring to the distinction of urban and rural servitudes (§ 983), the chief difference between them in nature and effect is, that the rural are all positive servitudes; the urban chiefly negative, but some also positive.

1002. 1. *Urban servitudes*, relate to buildings, whether in town or country.

1003. 1. SERVITUDE OF SUPPORT. This servitude (*Oneris ferendi*, and *Tigni immittendi* of the civilians) gives a right to rest the whole, or part, or a beam of a building, on the house, wall, or property of another; controlling and limiting the otherwise exclusive right belonging to the servient proprietor (§ 941) (a). In regard to this servitude, an exception to the

ordinary rule of servitudes is said to exist; viz. that the servient is bound not merely to suffer the burden, but to maintain in sufficiency the wall, &c. on which the support is rested. But with us this requires a special contract.

(a) 2 Stair, 7. § 6. 2 Ersk. 9. § 8. Murray, June and July 1715; M. 14521. Young, Feb. 23. 1831; 9 S. D. 500.

1004. 2. *STILLCIDE*. A proprietor has a right to insist that the rain from his neighbour's house shall not fall on his property (§ 941), either in drops from the eaves, or collected in a spout. This servitude restrains that right, and imposes on him the burden of receiving the rain from the dominant tenement: If only the eavesdrop it is properly *stillicide*; if the collected water (flumen), the servitude is distinguished by the addition of *fluminis*.

2 Ersk. 9. § 9. Clark, § 986. Stirling, June 11. 1752; M. 14526.

1005. 3. *LIGHT* or *PROSPECT*. The servitude of light or of prospect is a restraint on the absolute use (§ 962), to the effect of preventing the servient proprietor from building, or raising any obstruction, by which the light in the one case, or the prospect in the other, of the dominant tenement, shall be obstructed (a). For light an ell's distance has been held sufficient (b). A servitude of this kind may indirectly arise from a stipulated tolerance of windows looking into the servient tenement (c). See above, § 994.

(a) 2 Ersk. 9. § 10. Simson, June 28. 1649; 1 Brown's Sup. 396. Ogilvie, Feb. 5. 1678; M. 14534. Blackwood, May 20. 1825; 4 S. D. 26. Greenhill, July 8. 1825; 4 S. D. 160.

(b) Ogilvie, Feb. 5. 1678; M. 14534.

(c) Forbes, July 1. 1724; M. 14505.

1006. (3). A servitude may be created for protecting a house or garden from being looked in upon by a neighbour. Such a servitude is a limitation of that natural right of absolute use which entitles the owner of a tenement to open a window in his wall (a). Independently of this servitude the only protection against such invasion of privacy, is the power of erecting an obstruction over against the window (b).

(a) Forbes, July 1. 1724; M. 14505.

(b) See Glassford, May 12. 1808; M. *Property*, App. 1.

1007. (4.) *ALTUS NON TOLLENDI*; or *NOT TO BUILD*. These

are restraints on the servient owner's legal power of building on his own ground; one of the absolute uses of property (a). And it has been held that under such a servitude the servient proprietor is not entitled to erect a shed supported on iron pillars with a flat leaden roof (b).

(a) Walker, July 7. 1825; 4 S. D. 148. Mutrie, § 994 (b). Cockburn.
(b) Magistrates of Edinburgh, Jan. 17. 1833; 11 S. D. 255.

1008. (5.) It is also said, that there is a servitude *ALTIVS TOLLENDI*. This, however, is, properly speaking, no servitude, but a restoration of the natural power of the proprietor,—an exception in favour of an individual from the operation of some general servitude *altius non tollendi*: And it may be doubted how far such an exemption will be effectual against third parties.

1009. 2. *Rural Servitudes*. There are several well-known servitudes of this class.

1010. (1.) *PASSAGE* is of three degrees: Foot-road, Horse-road, and Cart or Coach-road; to which may be added Loaning for cattle. This kind of servitude infers no obligation on the servient proprietor to maintain the road (§ 984); nor does it prevent him from changing the direction, provided the new course shall be equally convenient; or even from placing gates or stiles of easy access (a).

The distinctions between a public road and a servitude road are, 1. That the former is open to all the Queen's subjects; the latter only to the dominant proprietor. 2. That the former varies in extent with changes in the mode of conveyance; the latter is limited to the actual extent of use. See § 659 (b). 3. That the trustees on a highway whatever power they may have to shut up other roads, cannot at common-law interrupt a servitude road (c).

(a) Urie and Stewart, June 25. 1747; M. 14524. Bruce, June 25. 1748; M. 14525. Ross, Feb. 19. 1751; M. 14531; Elch. *Serr.* 5. Wood, March 9. 1809; F. C.

(b) Forbes, Feb. 20. 1829; 7 S. D. 441.

(c) Calder, Jan. 27. 1831; 9 S. D. 343.

1011. (2.) *WATERING OF CATTLE*. *Aquæ haustus* is a servitude of leave to water cattle at a stream or well in the servient tenement. It may be acquired by long use; and does

not bar the servient proprietor from the same use of the stream ; or prevent him from covering over the stream, provided he leave sufficient for the servitude, and free access to the water at a fit watering place (§ 987).

2 Ersk. 9. § 13. Beveridge, *ut sup.* § 987.

1012. (3.) **AQUEDUCT** is a right to conduct water by conduits, canals, pipes, &c. in the servient tenement. The dominant tenement is bound, by the implied nature of the servitude, to maintain the aqueduct in a fit condition to prevent injury to the servient by his operations, or by the insufficiency of the conduits ; and the servient proprietor is bound (when it becomes necessary, and within the limits of due discretion) to allow access for repairs.

The dominant proprietor is not bound to repair injury by re-stagnation from floods.

2 Ersk. 9. § 13. Parson of Dundee, July 1768 ; M. 14521. Carlisle, Nov. 1731 ; M. 14524. Wallace, June 16. 1761 ; M. 14511. Weir, Feb. 4. 1832 ; 10 S. D. 290 ; and House of Lords, 7 W. S. 244.

1013. (4.) **PASTURAGE** is the right to feed cattle or sheep on another's ground, or on a common. It is constituted by charter of the dominant tenement *cum pastura*, &c. either specific, or interpreted by use : Or by obligation or contract, with possession : Or by prescription, grounded on words in the title sufficient to sustain it (*a*). The number of cattle or sheep to be admitted to pasture is either specified in the grant ; or (in the ordinary case of several servitudes of pasturage on a common) the right of each is proportioned to the number of cattle or sheep which the several dominant tenements can fodder in winter (*b*). The servitude is not to be extended by communication to others ; the servient tenement being entitled to all the use left unoccupied by the dominant (*c*). The right is settled rateably among the commoners in an action of sowing and rousing, in which there are two issues of fact,—1. the whole extent of pasturage ; and 2. the several proportions. But this action is not competent against the proprietor (*d*). The servitude of pasturage on the sides of a loch does not include a right to cut the herbage (*e*), and is limited to the stock of cattle on the dominant tenement (*f*).

(*a*) 2 Ersk. 9. § 14. Duke of Athole, Nov. 18. 1825 ; 4 S. D. 197.

(*b*) 2 Ersk. 9. § 15. Earl of Breadalbane, June 15. 1741 ; 5 Brown's Sup. 710.

(c) Earl of Breadalbane, Nov. 22. 1743 ; Elchies, *Servitude*, 3 ; 5 Brown's Sup. 724.

(d) Ersk. ut supra, § 15. Dunlop, Jan. 23. 1679 ; M. 14531.

(e) Cunningham, Dec. 20. 1836 ; 15 S. D. 295.

(f) Same case, 16 S. D. 1080.

1014. (5.) FUEL, FEAL, and DIVOT, is a right by servitude to cut and remove peat and turf for fuel, or for fences, &c. It commonly accompanies pasturage, but is also a separate servitude, and may be separated or lost by non-use or consent.

2 Ersk. 9. § 17. Brown, Leslie, Dinwiddie, and Carstairs, § 986. Haining, Feb. 15. 1668 ; M. 2459.

1015. (6.) Among rural servitudes has been ranked a power to take materials for building ; wood, stone, slates.

Cases of Garden and Wolfe Murray, § 990 (c), 986. Sharp, May 28. 1829 ; 7 S. D. 679. Aikman, June 17. 1830 ; 10 S. D. 943. Keith, April 2. 1831 ; 5 W. S. 234.

RIGHTS GENERALLY CLASSED WITH SERVITUDES.

1016. There are several rights which lawyers frequently class with servitudes, although, properly speaking, they are not servitudes, and depend in a great degree on other principles : Such are Thirlage ; Usufruct or Liferent ; and Commonry.

1017. 1. THIRLAGE. This is a restriction of lands, and their inhabitants, to a particular mill, for the grinding of grain ; with the burden of paying such duties and services as are expressed or implied in the constitution of the right. It is not a servitude (which consists in *patiendi* merely, § 984) ; nor a restraint on the absolute or exclusive use of property. But being devised originally as an expedient for indemnifying the builder of a mill for extraordinary outlay in a rude age, it has degenerated in times of more improved manufacture, into a burdensome and inexpedient tax on the produce of land, and is now in a state of gradual extinction.

1018. The territory subject to the monopoly is called the THIRL or SUCKEN. MULTURES (*molituræ*) are a proportion of grain paid to the miller for the grinding of the rest. INSUCKEN MULTURES may be called the monopoly price of grinding : OUTSUCKEN MULTURES, the price paid by those not astricted. DRY MULTURES are duties in grain, or money, paid whether grain be ground or not ; and KNAVESHIP or SEQUELS, are a perquisite or allowance paid to the miller's servant.

2 Ersk. 9. § 18, 19, 20.

1019. *Constitution of Thirlage.* Thirlage is constituted differently in different circumstances. It may be implied; or created by grant; or raised by prescription.

1020. 1. A title to ground prescription of Thirlage is IMPLIED from the existence of KING'S MILLS, and mills in KIRK LANDS (*a*). It was also held once that no title to ground prescription of thirlage was required in a BARONY MILL (*b*), but the favour for freedom has relaxed this rule, and it is only when a baron is infeft in the barony mill and multures thereof, that he can claim thirlage or the use of resorting to the mill (*c*); and even in that case, an exception of particular lands is given, either by a clause cum multuris in a feu right, or where the mill is still in the hands of the Baron, or before it has been conveyed by a feu cum multuris in the tenendas, with a special duty pro omni alio onere in the reddendo (*d*).

(*a*) 2 Stair, 7. § 16. 2 Ersk. 9. § 28. Stuart, Jan. 3. 1662; 10854. Maxwell, Jan. 22. 1740; 16017; Elch. Multures, 184.

(*b*) 2 Ersk. 9. § 22.

(*c*) Nicolson, Jan. 14. 1662; M. 10856. Hopetoun, Nov. 21. 1753; 16029. Bruce, March 10. 1769; M. 16061.

(*d*) M'Pherson, Dec. 1. 1681; M. 15985. Buntin, Jan. 17. 1682; M. 15986.

1021. 2. In the constitution of thirlage by grant, it is held,
1. That an express agreement in writing is good against the party and his heirs, by force of the contract; against third parties, only if followed by possession. 2. That a reservation of the thirlage to a certain mill in a sale of lands is a good constitution of thirlage. 3. That a sale of the mill, with the multures of the granter's lands, will also constitute thirlage; and, 4. That a clause in a lease may constitute thirlage against the tenants, but not to the effect of binding singular successors; it expires with the tack.

2 Ersk. 9. § 21. Scott, June 25. 1776; 5 Brown's Sup. 627.

1022. 3. To establish thirlage by PRESCRIPTION, there is required (contrary to the rule in servitudes) a written title; unless in Royal mills, or church mills, or in barony mills, conveyed with multures (§ 1020) (*a*). Clear use of the servitude is also necessary to constitute the right against third parties. In evidence of such use, payment of dry multures will be enough; but payment of insucken multures will not, unless accompanied by services (*b*). Payment of dry multures will even

imply a title; being exclusive of any other supposition than astringtion (c).

(a) 2 Ersk. 9. § 28. Bruce, Stewart, Maxwell, Robertson, Hopetoun, ut supra, § 1020.

(b) Ersk. ut supra. McAlister, June 17. 1831; 9 S. D. 763.

(c) Kinnaird, July 22. 1675; M. 10862.

1023. 4. Where the words of the constitution of thirlage are indefinite, the degree and nature of the servitude are determined by usage; with a presumption, or bias of construction, for the lightest: And the sufficiency of the mill is an implied condition.

2 Ersk. 9. § 27. Couston, July 16. 1760; M. 16047. Wright, Dec. 13. 1768; M. 16057. Maxwell, June 26. 1766; M. 16057.

1024. *Kinds of Thirlage.* The several kinds of thirlage are attended with different effects.

1025. 1. *Grana Crescentia*; growing corns. This includes all the grain raised upon the lands; whether carried to the mill; or sold in the shape of corn to dealers; or even malted as barley (a). But it does not include,—Seed corn: Horse corn: Rent corn to the proprietor of the mill as landlord, where stipulated to be delivered unground: Feu-duty corn, deliverable to the proprietor of the mill as superior, though afterwards converted into money: Teind-sheaves: Grain purchased (b); or ground meal or malt imported into the thirl (c).

(a) 2 Ersk. 9. § 23. Earl of Wigton, Dec. 15. 1736; Elch. *Mult.* 3. Forbes, Jan. 1744; M. 16022.

(b) Lord Innerwick, July 7. 1635; M. 15972. Stewart, Jan. 3. 1662; M. 15974. Garden, Nov. 18. 1697; M. 15990. Halkerston, Jan. 7. 1709; M. 16003. Lord McLeod, June 18. 1778; M. 16070. See note in Ivory's Ersk. p. 441, note 202. See various cases, Brown's Syn. r. *Thirlage*, 2535.

(c) Earl of Wigton, supra (a).

1026. A clause astringing lands in general terms, has been held to import thirlage of omnia grana crescentia.

Lord Kilkerran, June 18. 1755; 5 Brown's Sup. 830. Yeaman, Nov. 17. 1759; M. 16044. Earl of Wigton, ut supra, § 1025.

1027. 2. *Grindable Corn.* This does not include all grain capable of being ground; but only such as is required to be so (even that which is necessary for the tenant's family), the mill being fitted to grind it. What is not so required to be ground, may, notwithstanding this servitude, be sold without paying multure (a). By usage, however, this has been held as extensive as thirlage of grana crescentia (b).

(a) 2 Ersk. 9. § 24. Lockhart, Feb. 1731; M. 16015. Lockhart, Feb. 17. 1736; M. 16016; Elch. *Mult.* 2. Low, July 14. 1742; Elch. *Mult.* 9; M. 16021. Musselburgh, Dec. 20. 1743; M. 16021; Elch. *Mult.* 11.

(b) Greig, June 14. 1781; M. 16068.

1028. 3. *Invecta et illata*. This thirlage comprehends all grain brought into the thirl, whether of the growth of the lands or not, and ground within the thirl; or that “tholes fire and water,” *i. e.* suffers an operation which the mill, or its appurtenances of kiln, &c. are fitted to perform; not baking or brewing (a). It does not thus include, 1. Meal or flour bought out of the thirl, and brought in and baked within it, if there be no fraud (b); nor, 2. Malt imported and brewed there, under the same qualification (c); nor, 3. Grain imported at a harbour within the thirl, to be carried beyond the thirl for grinding and baking, even where the bread is afterwards brought for retail into the thirl (d); nor, 4. Ale imported from a brewery, nor bread from a bakehouse, in the vicinity (e).

(a) 2 Stair, 7. § 19, 20. 2 Ersk. 9. § 25.

(b) M'Kenzie, March 23. 1624; M. 15965. Gray, Jan. 24. 1749; M. 16024. Bakers of Perth, Feb. 22. 1749; M. 16025. Town of Haddington, June 19. 1788; M. 16071. Earl of Fife, July 1. 1807; M. *Thirlage*, App. 2.

(c) Haddington, *ut supra*. Marquis of Abercorn, Feb. 13. 1798; M. 16074.

(d) Bakers of Dundee, Feb. 23. 1813; F. C.

(e) Arnot, July 20. 1757; M. 16035.

1029. It may be observed respecting the several kinds of thirlage,—1. That the above terms, by which they have been distinguished, are not, strictly speaking, voces signatæ; but the nature and extent of the burden may be modified by possession and use (a). 2. That thirlage does not operate as a restraint on the mode of culture: The tenant, for example, may lay down his land in grass, provided there be no fraud in the operation (b). 3. That grain may be liable to a second multure: Grain, for example, growing where it is liable to a thirlage of *grana crescentia*, and carried into a thirl where it is liable to a thirlage of *invecta et illata*, will be liable to both; unless the mill belong to the same proprietor (c). 4. That the lightest thirlage is to be presumed (d); and that no combination of different sorts of thirlage is to be inferred, but must be imposed in words perfectly clear and free from doubt (e).

(a) Greig, June 14. 1781; M. 16068.

(b) 2 Ersk. 9. § 24. Grant, Nov. 28. 1755; M. 16034. Slowan, Feb. 20. 1765; M. 16052. Chalmers, Feb. 16. 1769; M. 16060. Ayton, Jan. 23. 1785; M. 16069.

(c) Elphinston, June 14. 1749; M. 16026.

(d) 2 Ersk. 9. § 27. Duke of Argyle, July 12. 1832; House of Lords, 6 W. S. 98.

(e) Magistrates of Glasgow, Nov. 14. 1827; F. C.; 6 S. D. 19. Reversed in the House of Lords, March 31. 1830; 4 W. S. 81.

1030. *Exercise of the Right.* In the exercise of the right of monopoly conferred by thirlage, the monopolist is exposed to evasions. In repressing these, the grain seems of old to have been liable to seizure (a), but the remedy afterwards established was by summons of abstracted multures, before the Judge Ordinary. The evasion is of difficult detection, and recourse must be had to data such as the case affords,—as the quantity of grain known to have been growing on the lands, or used in baking, &c. But it has been held, that, under the operation of this right, the natural use of property is so far restrained, that mills for carrying on the same operation within the thirl, or capable of performing the same operation, are not to be permitted. A distinction, however, has been taken in these cases; and, 1. Where the new mill is unfit, without alteration, to grind the astricted grain, it has been held enough to find caution that no such alteration shall be made (b). 2. Where a corn mill is erected within the thirl, or the machinery of the new mill is fit, without alteration, to do the work of the thirl, it has been ordered to be demolished or altered, so as to be incapable of encroachment (c): a judgment not now likely to be repeated.

(a) 2 Cr. D. 8. § 9.

(b) M'Leod, July 29. 1757; M. 16037. Lockhart, July 29. 1757; M. 16039.

(c) 2 Ersk. 6. § 5. Urquhart, Dec. 26. 1752; M. 16028. Miller, Dec. 2. 1760; M. 16048. Magistrates of Glasgow, Feb. 11. 1813; F. C.

Extinction of Thirlage. Thirlage is extinguished, either by express deed; by prescription; by extinction, or insufficiency of the mill; or by commutation, under a recent statute.

1031. 1. By deed. This may be accomplished, 1. By a discharge and renunciation on the part of the owner of the mill (a); or, 2. By a clause cum molendinis et multuris in a charter from a person who is proprietor both of the land and of the mill. It is sufficient if these words shall be inserted in the tenendas of a subject's charter; not so if the charter be from the Crown (b). But the doctrine of Erskine, that payment of insueken multures, and other circumstances, will bar the effect of such a clause, though supported by one deci-

sion (*c*), is to be received with some qualification (*d*). 3. It is not sufficient to have a clause in the reddendo “pro omni alio onere,” for this cannot be construed as the discharge of an existing burden (*e*).

(*a*) 2 Ersk. 9. § 37.

(*b*) Ersk. ut supra. Veatch, Dec. 7. 1665; M. 15975. Stuarts, Jan. 8. 1662; M. 10854. Wedderburn, Nov. 8. 1641; M. 16020.

(*c*) M’Nab, July 19. 1758; M. 16041.

(*d*) Coltart, Dec. 13. 1768; M. 16058; as affirmed, Jan. 28. 1774. Duke of Roxburgh, July 21. 1785; M. 16070.

(*e*) Monteith, Dec. 4. 1716; M. 16009.

1032. 2. Thirlage is extinguished by prescription, provided the abandonment has been complete. It may be restricted by a prescriptive use of abstraction inconsistent with the thirlage.

Bruce Stuart, Nov. 17. 1741; M. 16020.

1033. 3. Thirlage may be extinguished by the transference consequent on judicial excambion, under the act 1695, c. 23.

Jardine, Feb. 26. 1793; M. 14152.

1034. 4. By extinction of the mill for forty years, the right to thirlage may be lost. The exemption arising from destruction of the mill, may be put an end to by rebuilding the mill within the forty years, provided the new mill be not beyond the limits of the thirl.

Ballardie, Feb. 8. 1781; M. 16063. Webster, Feb. 22. 1828; 6 S. D. 573. Kinloch, Dec. 18. 1830; 9 S. D. 244.

1035. 5. Where the mill is insufficient for the work of the thirl, those who are under the servitude are not bound, as of old, to pay multure; but are entitled to carry for manufacture elsewhere what is necessary for their families, after giving notice, and waiting forty-eight hours without having their work done (*a*); and even to require what for other purposes may be necessary, to be manufactured within a reasonable time, otherwise to be free to go elsewhere (*b*).

(*a*) Lockhart, June 27. 1736; Elch. *Mult.* 2. Earl of Wigton, Dec. 15. 1736; Ib. 3. Landal, Feb. 22. 1745; M. 16023.

(*b*) Clark’s Trustee, Feb. 29. 1828; F. C.; 6 S. D. 659.

1036. 6. Thirlage may be extinguished by commutation. In order to further the improvement of lands under thirlage, it has been enacted, that it shall be competent to proprietors of lands thirled, or of mills holding this monopoly, to apply to the Sheriff to have the burden commuted into an an-

nual payment. And, 1. The parties immediately concerned must be cited, and all interested called edictally. 2. The nature and extent of the right must be ascertained by a decree of declarator ; which is subject to advocacy. 3. The commutation is then struck by a jury of heritors, or tenants of L.30 of yearly rent, whose verdict is directed to be recorded in the Register of Sasines, converting the thirlage into a payment in grain or money. 4. This verdict is made irreversible, after having been recorded for three years. 5. The payment comes in place of the thirlage, payable in grain or by fiar prices, as the person paying may choose ; and landlords paying the commutation where the lands are let, are entitled to recover it from their tenants as rent. 6. A set of similar provisions is enacted for the thirlage of *invecta et illata* in towns and villages.

39 Geo. III. c. 55. Orr, Nov. 15. 1822 ; 2 S. D. 16. Bakers of Dundee, May 23. 1804 ; M. 16076.

OF USUFRUCT OR LIFERENT.

1037. The Romans classed three several rights under Servitude :—1. *Usus*, or the right to such of the fruits of a subject as the usufructuary or his family could consume ; 2. *Habitation*, the right to possess a house, in one's own person or in the person of another ; 3. *Usufruct*, a right to use and enjoy a subject during life, without wasting its substance. This last corresponds with *LIFERENT* in the law of Scotland ; which is more of the nature of limited property than of servitude. It is the right to use and enjoy a subject during life, without destroying the substance. The person entitled to such enjoyment for life is called the *LIFERENTER* : the person whose property is burdened with the liferent is called the *FIAR* ; and the reversionary right of use and enjoyment, after the liferent has expired, is called the *FEE*.

2 Stair, 6. 2 Ersk. 9. § 39, et seq.

1038. *CONSTITUTION OF LIFERENT.* Liferent is either Legal or Conventional.

1. *LEGAL* liferents are two in number, connected with the conjugal relation of marriage, viz. *TERCE* and *COURTESY* ; which will more fitly be considered hereafter, in treating of Marriage. See § 1596, et seq. and § 1605, et seq.

1039. CONVENTIONAL liferent is either reserved out of a grant or conveyance; or newly created by direct conveyance of a liferent right of use.

NOTE.—For the constitution of liferent by settlement, marriage contracts, &c. see § 1708, et seq. and § 1953, et seq.

1040. 1. *Liferent by Reservation.* This form of liferent is constituted by a conveyance of land or other heritable subject in fee, reserving to the granter the liferent use. This may be either by one who is infeft in the land; or by one who holds only a personal right. In the former case, the liferent reserved depends on the granter's sasine in fee; the new conveyance being truly a limitation or restriction of it from a fee to a liferent. In the latter case, the liferenter can have no real right without an infeftment in his own person. The liferenter by reservation has, by force of his original sasine, a right to enter vassals; the liferenter, by constitution, has no such power. (§ 1055, et seq.)

2 Craig. 22. § 5. 2 Stair, 6. § 11. 2 Ersk. 9. § 42.

1041. 2. *Liferent by Constitution* is created in a marriage-contract, settlement, or other conveyance, by disposing an estate to one in liferent, and another in fee; or to two or more in conjunct fee and liferent; or by an annuity of a certain sum payable out of the estate. The right of the liferenter is not (like a servitude) constituted without sasine: It requires a sasine in the liferenter to confer a real right effectual against singular successors.

2 Ersk. 9. § 41.

1042. NATURE AND EXTENT OF LIFERENT. The liferenter has, during life, right to all the uses and services derivable from the land, but under the qualification, that the substance of the property shall not be consumed.

1043. The proper subjects of liferent, therefore, are such only as are not consumed by use: And so, coal, stone, lime, minerals, &c. as accessories of land, are excluded, though they may be expressly given in liferent; and if let for rent, the rent may be carried by a general settlement (α). But liferenters of lands are, to a certain extent, or in particular circumstances, allowed a limited use of things consumable; and this either

expressly or by tacit assent and usage; as the lime, coal, &c. necessary for the liferenter's beneficial possession of the land (*b*).

The Roman law admitted of a quasi or improper usufruct in fungibles; of which the liferenter was, on expiration of the usufruct, to deliver to the fiar as much of the same kind, and as good in quality, as he had received for use. To this we have nothing analogous but the liferent of money (*c*); or steel-bow in a liferent lease. In the liferent of a sum, the fruits, *i. e.* the interest of the money, may be regarded as the liferenter's proper right; but it has been held, that the liferenter of a sum is entitled to the actual use of the capital, on due security being given to the fiar, or on the money being reinvested, with due protection to the fiar (*d*); and the debtor in a sum so secured will pay at his own risk, if the fiar be not called (*e*).

Furniture not being consumable by use, though liable to deterioration by tear and wear, may be liferented; and in marriage-contracts it is a frequent provision, that the wife shall have the furniture in liferent. The rule of the Roman law of usufruct in fungibles will not apply here; the liferenter will not be bound to replace or renew the articles. Difficulties arise sometimes with creditors of the husband, in regard to such liferents. In such cases, the real right is not complete without possession, and the wife is not held as in possession during the marriage; so that her claim is only personal; not real or preferable. See below, of Contracts of Marriage, § 1946.

(*a*) Swinton, Feb. 1. 1814; F. C. Duke of Roxburgh, Jan. 19. 1816; F. C. Belscheir, June 30. 1779; M. 15863. Waddel, Jan. 21. 1812; F. C.

(*b*) 2 Ersk. 9. § 57. See Eiston, June 10. 1831; 9 S. D. 716.

(*c*) 2 Ersk. 9. § 40.

(*d*) Kinross, Dec. 10. 1661; M. 8262. Salton, July 15. 1697; 4 Brown's Sup. 377. Fleming, July 1661; M. 8256. Jardine, June 30. 1680; M. 8264. See Rutherford, § 1069. Malcom, *infra* (*e*).

(*e*) Wilkie, Nov. 11. 1692; Fount. 4 Brown's Sup. 2. Malcolm, July 13. 1731; M. 8266.

1044. The liferenter has right to all fruits, natural and civil.

1045. 1. *Natural Fruits.* All the natural or spontaneous, and all the industrial fruits, belong to the liferenter: The right to the spontaneous fruits ceasing with his death; the right to the industrial crop in the ground at his death going to his executors without rent.

2 Ersk. 9. § 65. Guthrie, July 25. 1671; M. 15891. Cockburn, Nov. 9. 1748; Elch. Liferenter, 5; Kilk.; M. 15911. 1 Bell, Com. 63.

1046. A liferenter's right to cut growing timber depends on the kind of timber. The general rule is, that the liferenter has no right to cut timber, even though planted by himself (*a*). The exceptions are, 1. *silvæ ceduæ*. Where the wood is laid out in portions (haggs) or lots for annual cutting, and regarded as part of the crop of the land (*b*); 2. a conjunct fiar, or a liferenter by reservation, is entitled to cut the timber which has come to maturity, though not laid out in haggs, but which, according to local usage, is cut at maturity (*c*). 3. To the extent of maintaining the houses, &c. in tenantable condition, liferenters are entitled to have wood of mature growth, notice being given to the fiar before cutting (*d*). 4. The liferenter is entitled to windfalls and underwood (*e*). And, 5. Even under a discretionary power to cut what shall not be injurious to the estate, the fiar is entitled to notice (*f*).

See below, § 1058.

(*a*) 2 Stair, 3. § 74. 2 Ersk. 9. § 58. Mousewell, March 1683; M. 8253. 4 Brown's Sup. 138. Gray, Feb. 25. 1789; M. 8250; 2 Hailes, 1067.

(*b*) Stair, ut sup. (*a*). Lang, Dec. 21. 1752; Elchies' Notes to *Liferent*, 6. p. 250. See Mousewell, supra (*a*). See Duke of Hamilton, Jan. 25. 1722; Rob. App. Cases, 443.

(*c*) Ferguson, July 26. 1737; M. 8254; Elch. *Liferent*, 1.

(*d*) Stanfield, July 16. 1680; M. 8244. Earl of Dunfermline, March 28. 1683; M. 8244. Dickson's case, infra (*e*).

(*e*) Dickson, Jan. 24. 1823; 2 S. D. 138.

(*f*) Duff Dingwell, Dec. 4. 1833; and March 8. 1834; 12 S. D. 216 and 541. See below, as to Heirs of Entail, § 1754.

1047. 2. *Civil Fruits* (*a*). The right of the liferenter of land to the civil fruits of the land, the rents, whether of corn, or grass farms (*b*), or houses (*c*), or mills (*d*), is regulated by the legal terms of payment; so that if he survive the term of Whitsunday, his executors have right to the first half of the year's rent; if he survive the term of Martinmas, to the whole year's rent from the Whitsunday preceding to the Whitsunday following: And it is sufficient, in either of those cases, that he live until the morning of the term day (*e*). This rule, according to the legal terms, is not subject to alteration by any conventional *postponement*; but conventional *anticipation* of the term of payment will vest the right at the stipulated term.

NOTE.—There is an English statute of 4 and 5 Will. IV. c. 22, the second section of which deserves attention.

(*a*) Kames' Elucid. art. 9. 2 Ersk. 9. § 64. 2 Bell, Com. 8.

(*b*) Carnegie, July 24. 1668; M. 15887. Trotter, Jan. 12. 1681; M. 15899.

Johnston, Feb. 1727; M. 15913. Pringle, June 4. 1741; Kilk. 565; M. 15907; Elchies, *Heir and Executor*, 1. Campbell, June 11. 1745; Kilk. 566; M. 15908; Elchies, *Heir and Executor*, 3. Kerr, July 2. 1760; 5 Br. Sup. 876. Marquis of Queensberry, Feb. 18. 1814; F. C. Elliot, Nov. 28. 1792; M. 15917. Swinton, June 20. 1809; F. C.

(c) Binny, Jan. 28. 1820.

(d) Guthrie, July 25. 1671; M. 15891.

(e) Brunton, Feb. 16. 1642; M. 15885. Paterson, Dec. 8. 1704; M. 15902. Tolquhon, Feb. 22. 1740; Elch. *Liferenter*, 2; M. 15907.

1048. A liferenter infeft in the liferent of a superiority, has a right to the feu-duties, as the ordinary fruits or profits of the land; but he has no right to the casualties, unless the liferent be by reservation, in which case he has power to enter heirs or singular successors. See above, § 1040, and § 1055.

2 Ersk 9. § 42. 20 Geo. II. c. 50.

1049. A liferent interest in an heritable bond, or an annuity secured on land, if payment be stipulated termly at Whitsunday and Martinmas, or Candlemas and Lammass, falls under the rule above laid down (§ 1046) (a): But if stipulated to be paid termly and continually during all the days of the liferenter's or creditor's life, he will have the fractional payments corresponding to the survivance (b).

(a) 2 Ersk. 9. § 66. 2 Bell, Com. 9. Murray Kynynmound, Nov. 6. 1739; Kilk. 563; M. 15906. Henderson, Jan. 8. 1624; M. 15878. Lindsay, March 10. 1630; M. 15881. Colebrok, May 14. 1635; 13 S. D. 756.

(b) Earl of Dalhousie, June 19. 1787; M. 15915. See below, § 1498.

1050. The liferenter has the dividends or interest of Bank stock. But he has no right to the bonus on accumulations,—only to the interest of it. The difficulty here rests on the consideration, that the bonus in such cases arises from a stoppage and accumulation of dividends, retained by order of the bank directors, and so is truly an Extra dividend. But it has been held rather as an additional capital, and the liferenter entitled only to the interest on it.

Rollo, Dec. 1. 1801; M. 8282; reversed, App. 1. Cumming's Trustees, Feb. 26. 1824; F. C.; 2 S. D. 744. Thomson, Nov. 18. 1836; 15 S. D. 32. Brande v. Brande, 4 Vesey, 800.

1051. As a liferenter has no right to those things of which the substance is consumed by use (see above, § 1043); so he is not entitled to draw the rents of subjects which he would not be allowed to take into his natural possession; ex. gr. the rent of coal: For such rents are truly the price of the substance.

Duke of Roxburghc, Feb. 17. 1815; F. C. See Waddel, Jan. 21. 1812; F. C.

1052. Liferent expands with the extension of the subject;— as the liferent of land on which houses come to be built (*a*); or of which the value or rents are improved by the opening of a road, bridge, canal, railway, or other communication. But if the liferenter's right be enlarged by means of meliorations bona fide made by the fiar, he must, in taking benefit by the melioration, pay the interest of such expenditure (*b*).

(*a*) Mitchell, Feb. 9. 1742; M. 8275; Elch. *Liferenter*, 3.

(*b*) Laird, Feb. 10. 1807; M. *Liferenter*, App. 3.

1053. The liferenter of an estate, or even of a superiority, whether by reservation or new constitution, was formerly entitled to vote for a member of Parliament; provided the lands which he held in liferent were of a sufficient extent, and held of the Crown. The fiar exercised the right in the liferenter's absence (*a*). Under the existing law, a liferenter so entitled formerly to a vote, is still entitled to a vote (*b*), and where a liferenter and fiar have right to any subject to which a right of voting is now annexed, the right of voting is in the liferenter, not in the fiar (*c*).

(*a*) 1681, c. 21. Wight on Elections, 238. Bell on Elections, 91.

(*b*) 2 and 3 Will. IV. c. 65. § 7.

(*c*) Ib. § 8. 6 Will. IV. c. 78. § 10.

1054. *Powers of the Liferenter.* These correspond with the rights already stated.

1055. 1. A liferenter by reservation has power, in virtue of his original infeftment (§ 1040), to enter heirs and singular successors. At one time it was conceded that he might so enter *heirs*; for the fiar himself being compellable to enter an heir, suffered nothing by the liferenter doing so: But the liferenter could not enter a *singular successor* without an encroachment on the fee, the fiar not being bound to enter a stranger. As heirs and singular successors now stand on the same footing, a liferenter by reservation may enter either an heir or a singular successor; and, as an accompanying right, he is entitled to the composition (*a*). A liferenter by reservation is entitled to the custody of the title-deeds (*b*). A liferenter by constitution has no right to enter heirs or singular successors (*c*). Neither has a proprietor, who, being himself uninfest, disposes the land reserving his own liferent, any right to enter heirs or

singular successors: He never had a feudal right, and so cannot give a feudal title (§ 1040).

(a) 2 Craig, 22. § 5. Clark, Dec. 13. 1596; M. 8251. Crawfordjohn, Jan. 11. 1611; M. 8352. 2 Ersk. 9. § 42.

(b) Bowes, Dec. 17. 1831; 10 S. D. 164.

(c) Henderson, Feb. 19. 1836; 14 S. D. 540.

1056. Although a liferenter, by reservation, may enter vassals, he has been held not entitled to grant a feu effectual beyond the liferent; and even although the fiar consent to the feu, if he be not infeft in the fee at the time, the feu will not be effectual beyond the liferent, unless in so far as the fiar or his heirs are barred personali exceptione.

Redfearn, March 7. 1816; F. C.

1057. A liferenter has no power to grant a lease, the term of which shall last beyond his own life (a). Sometimes, however, power is reserved, or conferred, in constituting the liferent, to grant leases for a definite term; and sometimes the liferenter and the fiar concur in granting a lease of certain duration beneficial for both.

(a) 2 Ersk. 9. § 57. 1 Bell, Com. 62. Fraser, Feb. 26. 1794; M. 8256. and 7849.

1058. The liferenter, as he is not in general entitled to cut timber (§ 1046), so he cannot sell trees; and although coppice-wood and woods laid out in haggs may be sold as well as cut, the liferenter's right ceases with his life, and so also does the right of the purchaser, the fiar being entitled to stop the cutting.

2 Stair, 3. § 74. 2 Ersk. 9. § 58. Lang, Dec. 27. 1752; Ib. No. 6; M. 8246. Gray, Feb. 24. 1789; 2 Hailes, 1067. Dickson, Jan. 24. 1823; F. C. 2 S. D. 156.

1059. In the reservation or constitution of a liferent, the exercise of the right of patronage may be vested in the liferenter.

Lady Forbes, Feb. 18. 1760, referred to in House of Lords; M. 9932. Duke of Roxburgh, June 25. 1818; F. C. More's Notes on Stair, p. ccxiii.

1060. *Liabilities of Liferenter.* He is not liable for the debts of the disponent if the fee be sufficient to discharge them; for the fiar is the proper representative and debtor.

Stewart, May 15. 1792. Bell's Cases, 220. Nixon, Feb. 19. 1806; M. *Liferenter*, App. 1.

1061. The right of the liferenter is subject to the burden of the public taxes, feu-duties, ministers' stipend, &c. during the liferent (*a*). But those which are only occasional, and are by law laid upon heritors, are not burdens on the liferenter; as the building of kirks and manses (*b*), and also the repairing of them (*c*).

(*a*) 2 Ersk. 9. § 61. Stamford, Feb. 1. 1636; M. 13070; Elshsheils, Jan. 1688; Ib. Lumsden, Dec. 13. 1704; M. 13072.

(*b*) 1663, 21. 2 Ersk. 10. § 57. Minister of Moreham, Nov. 14. 1679; M. 8499.

(*c*) Ersk. ut sup. Lady Anstruther, May 14. 1823; F. C.; 2 S. D. 306.

1062. A liferenter must keep up the liferented tenement, by necessary and proper repairs (*a*). And, 1. He may be called on by the fiar to make such ordinary repairs as are necessary to preserve the tenement in a habitable and tenantable condition (*b*). 2. If the fiar shall repair the tenement, the liferenter must pay the interest of the expenditure on necessary repairs (*c*). See below, § 1063.

(*a*) 2 Ersk. 9. § 60. See Borthwick, July 3. 1696; M. 8245. Cunningham, Dec. 18. 1733; M. 8275. Scott, June 27. 1823; 2 S. D. 435.

(*b*) Scott, June 27. 1823; F. C.; 2 S. D. 435. No. 3.

(*c*) Ersk. ubi cit. Laird, Feb. 10. 1807; M. *Liferenter*.

1063. The natural and irreparable decay of a subject liferented, or its accidental destruction by fire, or other calamity, will affect the right of the liferenter and of the fiar, according to the following rules: 1. Neither the liferenter nor the fiar will be bound to rebuild. 2. If the fiar do rebuild or repair the subject, the liferenter must, in order to enjoy the subject, pay proportionally to his interest in its restoration. 3. The liferenter may continue to draw the rent of the subject, such as it remains, without repairing the damage. 4. If the liferenter repair the subject, he will have right to indemnification from the fiar taking the benefit of it, to the extent of the *lucrum* accruing to him; or the fee will be burdened with the principal sum expended, but not with the interest during the liferent. 5. If the area of a house burnt or destroyed should be sold, the liferenter will be entitled to the interest of the price, the fiar to the reversion.

2 Ersk. 9. § 60. Scot, March 5. 1755; M. 8278. Haliday, Feb. 20. 1706; M. 13419. See above, § 1062.

1064. The liferenter in certain circumstances must find

caution (*cautio usufructuaria*) to maintain the buildings, woods, &c. without waste. The old laws on this subject were directed chiefly to the prevention of waste, while lands were in ward. And in modern times such caution will not be required, unless where there is shewn some reasonable cause to fear waste or neglect on the part of the liferenter.

1491, c. 25; 2 Act. Parl. 324, 6. 1535, 15; Ib. 344, 14. 2 Ersk. 9. § 59. Ralston, Nov. 18. 1803; Bar. Hume, 293.

1065. The liferenter of lands is bound to aliment the fiar as heir of investiture, when he has no other means of subsistence (*a*). But, 1. the burden has been held personal to the liferenter, and not effectual against his creditors (*b*). 2. There is no claim to aliment where the fiar has renounced the succession, and takes the estate by a singular title (*c*), or after he has sold the land (*d*). 3. This aliment is not due from an annuitant on the estate (*e*), nor from the liferenter of a sum of money (*f*).

(*a*) 2 Ersk. 9. § 62-3. 1491, c. 25.

(*b*) Blair, Nov. 4. 1737; Elch. *Aliment*, 5.

(*c*) Lyon, Jan. 18. 1712; M. 383; Blair, *supra* (*b*).

(*d*) Sandilands, Jan. 27. 1700; M. 385.

(*e*) Stewart, June 24. 1780; M. 398; 5 Brown's Sup. 377; 2 Hailes, 861.

(*f*) Mirrie, July 1731; M. 397.

1066. 3. EXTINCTION OF LIFERENT. Liferent is extinguished,—1. By the death of the liferenter; 2. by renunciation of the liferent, even without recording; the liferent being a burden of which by renunciation the fee is relieved.

2 Ersk. 9. § 68. 1 Bank. 668, § 33.

1066. 4. JOINT LIFERENT. Where two or more have conferred upon them a liferent right, and a question arises as to the way in which the right is to be enjoyed, it is held that the exercise of the right is to be regulated on the principles which rule the administration of common property. (See below, § 1072.) The expiration of the right in whole or in part, by the death of one or more of the joint liferenters, may raise a question of some nicety. And, 1. If a subject be given to A and B in liferent, without any indication of survivance, the subject (if in contemplation of parties a divisible one) will divide, and part fall to the fiar, while the liferent subsists as to the others;—if the subject be indivisible, or such as would suffer by division, the fiar would seem to have right to the pro indi-

visio possession, while the surviving liferenter would retain his liferent. 2. If the joint liferent arise by operation of law (as by the succession of heirs-portioners), the same rule has been applied; though that decision has been objected to.

Marquis of Tweeddale, June 14. 1821. 1 Sandford on Succession, 28. See 1 Illust. 150, and below, § 1219.

1068. 5. FIAR'S REVERSIONARY RIGHT. The fiar's right to the use and possession of the land is under burden of the liferenter's right.

1069. The fiar, therefore, cannot interfere with the liferenter's possession, unless for the necessary preservation of his own right; as to prevent waste, on cause shewn. See above, § 1063.

1070. He may work coal, lime, minerals, &c. which are excepted from the liferent. But, 1. He must leave enough for the liferenter's use. 2. He is liable for surface damage. 3. He must not hurt the amenity of the liferenter's possession; yet, if there be a going coal, however disagreeable the effects may be, the liferenter is not entitled to stop it. 4. The fiar may not cut the ornamental timber, though he may make the necessary thinnings, not hurting the amenity. See below, of Entails.

Duke of Hamilton, Rob. App. 443. Duke of Roxburgh, Jan. 19. 1816; F. C. Dickson, Jan. 24. 1823; F. C.; 2 S. D. 153. Tait, Dec. 2. 1825; F. C.; 4 S. D. 253.

COMMON PROPERTY, COMMON INTEREST, AND RIGHT OF COMMONTY.

1071. Although undivided right and possession of land is the best arrangement both for the public and for the individual, there being in that situation no opposition or interruption to the free use and enjoyment of property; yet it frequently happens that land is held in common; either by design, and by joint purchase; or by accident in the course of succession; or by the settlement of a former proprietor; or by the concurrence of separate rights in one subject of common use.

Of rights thus in common, three kinds may be distinguished:—1. Common property, in which the several parties have, pro indiviso, the same equal but undivided right; each being entitled to the joint use and enjoyment of the subject, and mutual consent being necessary in all acts of management

or disposal. 2. Common interest, in which there is a mixture of property in one, restrained or qualified by an interest in another for the maintenance and preservation of the subject. And, 3. Commonly, in which a right, not of common property, but only of common use, is conferred on several persons by the proprietor of the subject. These distinctions are not sufficiently marked by our institutional writers, but they are very important.

1072. 1. OF COMMON PROPERTY. Common property is a right of ownership vested pro indiviso in two or more persons, all being equally entitled to enjoy the uses and services derivable from the subject; and the consent of all being requisite in the management, alteration, or disposal of the subject. This common and undivided right is continued, either, 1. by necessity, if a subject belonging to several be indivisible; or, 2. voluntarily, if the subject be divisible, until it shall be divided.

1073. Although the whole subject cannot be disposed of otherwise than by mutual consent, each joint-owner may sell his own pro indiviso right; the purchaser coming into his place. The right may also be adjudged to the same effect.

1074. 1. *Management.* In relation to a common subject, difficulties may arise in the course of administration, or respecting operations on the subject. The following rules seem to be established:—

1075. In re communi melior est conditio prohibentis:—So one co-proprietor may prevent another from removing tenants, unless better rents or better security shall be offered (*a*). He may prevent any extraordinary use of the subject that may be attempted without his consent; as the letting of a lease with privilege of shooting (*b*). (See above, § 953.) He may also prevent any operations on the common subject, by which its condition is to be altered; as in a common stair or passage, he, whose property lies next adjoining, is not, without the consent of the rest, entitled to break the wall, and strike out a door (*c*): In this respect, the different effects of common property, and common interest, are to be marked (§ 1086, 2), and it is necessary to discriminate carefully whether the right be of the one class or of the other (*d*).

The exception to this rule is, that necessary operations in

rebuilding, repairing, &c. are not to be stopped by the opposition of any of the joint-owners.

(a) Bruce, Nov. 16. 1808; F. C.

(b) Campbell and Stewart, Jan. 24. 1809; F. C.

(c) A. against B. Dec. 21. 1680; M. 2448. Halliday, Nov. 9. 1681; M. 2449. Anderson, June 20. 1799; M. 12831. Reid, Nov. 16. 1799; M. *Property*, App. 1. Sandy, Feb. 5. 1823; 2 S. D. 195. Anderson, March 9. 1831; 9 S. D. 564.

(d) Ritchie, June 21. 1833; 11 S. D.

1076. Where any thing is built or planted on the common subject, it accresces to the common right. See above, § 937.

1077. Where parties cannot agree, either the will of the majority rules, or the ordinary state must be continued.

1078. Where a wall is common between conterminous proprietors, the expense of erection, or of necessary repairs, is common, in the proportions of the value of the share which each has in the subject. But operations on a common wall which are not necessary are to be done only by common consent (§ 1075). A division wall in urban subjects has been held common, though built by one of the proprietors.

Wallace, June 21. 1808; F. C. Ness, May 13. 1825; 4 S. D. 7. M'Kenzie, Nov. 18. 1829; 8 S. D. 74. Thorburn, July 11. 1822; 10 S. D. 822. Skinner, Feb. 5. 1833; 11 S. D. 353. Warren, June 13. 1835; 14 S. D. 944.

1079. 2. *Division*. Where property in land or houses is held in common, and a division is possible, it is a rule, that no one is bound to remain in community, but may insist for a division. To this, however, there is an exception in the special case of Conjunct rights to husband and wife, where the common right is, by its very constitution and the connexion of the parties, indivisible.

See Milligan, Feb. 8. 1782; M. 2486; 2 Hailes, 897.

1080. If the parties cannot agree, the subject must be divided, where that is possible. Of old, co-adjudgers were entitled to have the property adjudged by them, divided by brieve of division. But this clumsy expedient has, in the progress of improvement, been superseded by the process of judicial sale (§ 833).

1081. Joint proprietors may insist by brieve of division to have the subject divided, and, 1. A brieve is directed from Chancery to the Sheriff. 2. All parties having interest are called. 3. The rights of parties are fixed by decree. 4. A

remit is made to a jury to measure, value, and divide the subject. 5. The verdict settles the shares; and, lots being cast, the division is fixed by decree of the Court. 6. Extract and possession complete the separate rights of the parties in their shares of what formerly was common (*a*).

The same effect may be produced by an action of declarator and division, concluding, 1. That proper persons shall be appointed to survey, examine, and divide the subject. 2. That the division shall be ratified. 3. That the several portions shall be declared to belong to the several parties. 4. That they shall be ordained to execute the necessary deeds; and, finally, in cases where a division may prove inexpedient or impracticable, that the subject shall be sold and the price divided (*b*).

In the ordinary case this purpose is now accomplished by private arrangement and reference.

(*a*) 1 Jurid. Styles, 447.

(*b*) Ib. vol. iii. pp. 145, 147.

1082. If the subject be indivisible, it may be sold at the instance of any of the parties, and the price divided, unless where it is a thing of common and indispensable use, as a staircase or vestibule.

Milligan, Feb. 8. 1782; M. 2486; 2 Hailes, 897. 3 Jurid. Styles, 147. See Brydon, Feb. 4. 1837; 15 D. B. M. 486.

1083. Joint property arising in the course of succession to females, admits of some distinctions necessary to be observed. And,

1. If daughters or sisters succeed ab intestato to heritage, they are heirs-portioners and joint-owners. They are entitled to equal shares; with this difference, that where there is a right in its nature, exercise, or use, not capable of division, it goes as a præcipuum to the eldest,—as a peerage, an office, the mansion-house with its garden, orchard, and offices (*a*). But, 1. Superiorities, though going to the eldest, on account of the vassal's right to hold of one superior, yet are not indivisible in succession, since the feu-duties may be divided. And so, if there be one superiority, the eldest takes it, under the burden of paying a compensation to her younger sisters (*b*); and, 2. if there be more than one, the eldest has the choice, the second the next, and so on, compensation being made to the younger (*c*); 3. if

the subject of the succession be such as not to be divisible without injury, as a brewery, it will be ordered to be sold, and the price divided (*d*).

(*a*) 3 Ersk. 8. § 5-13. Cowin, March 6. 1807; M. 2453. Pedie, Feb. 2. 1743; M. 5367. Ireland, Nov. 14. 1765; M. 5373. Forbes, Jan. 24. 1774; M. 5378. M'Lachlan, May 27. 1827. Denniston, June 17. 1830; 8 S. D. 935.

(*b*) Houston, Nov. 3. 1744; M. 5369.

(*c*) Houston, ut sup. (*b*).

(*d*) Brydon, Feb. 4. 1837; 15 S. D. 486.

1084. 2. If daughters take a succession not ab intestato, but by a conveyance or settlement to them nominatim, or by description, equally among them, though the eldest may be entitled to indivisible subjects, it is not as a præcipuum, but she must give compensation to the rest.

Cathcart, Feb. 16. 1773; M. 5375. Wight, Dec. 12. 1798; and see M'Lachlan, sup. § 1083 (*a*).

1085. 3. Custody of Title-Deeds. In cases of common property, disputes arise to whom the right of custody of the title-deeds belongs. The general rules are, 1. That the person who has the chief interest in the common property has the custody; subject to an obligation to make the titles forthcoming to any of the rest having occasion for them (*a*). 2. That where no one has pre-eminence over the rest, the title-deeds (if the parties should not agree) ought to be deposited in neutral custody. 3. That the eldest heir-portioner has custody of the title-deeds (*b*). 4. That, although all the other shares should come to be vested in one, this right in the eldest heir-portioner remains unimpaired. And, 5. That transumps, where necessary, are to be made at the common expense.

(*a*) Stevenson, Dec. 25. 1711; M. 2456. Cowie, ut sup. § 1083 (*a*).

(*b*) Denholm, July 17. 1638; M. 2447.

1086. 2. COMMON INTEREST. A species of right, differing from common property, takes place among the owners of subjects possessed in separate portions, but still united by their common interest: It is recognised in law as COMMON INTEREST. It accompanies and is incorporated with the several rights of individual property. In such cases, a sale or division cannot resolve the difficulties which may arise in management: But the exercise and effect of the common interest must, when dissensions arise, be regulated by law or equity. Thus, in the common wall of one of the large tenements of Edinburgh, con-

sisting of many floors belonging to different proprietors, there is no common property among the owners of the several floors ; but a combination of individual property with common interest. Each is proprietor of the wall of his own floor, and can prevent all encroachments upon it ; but he is bound to the rest (having a common interest in it) to support it, and is not entitled to alter it, to such a degree as to encroach on or endanger the common interest. And so, 1. This common interest is distinguishable from *servitude*, in so far as each person concerned is bound by the common interest to maintain his own wall ; which in mere servitude he would not be obliged to do (§ 984). 2. It is distinguishable from *property*, in so far as no one having merely a common interest is entitled to break or touch the wall or space which belongs to another ; but has only the right to prevent injury, and insist on support. And, 3. Each party may make alterations and changes on his own wall, notwithstanding the common interest which is vested in others, provided he does not endanger that common interest, or expose those who hold it to reasonable alarm : It is different in common property ; no one common proprietor being entitled without the consent of all the rest to alter the state of the common subject. This rule, however, is qualified, as already explained, by the exception of acts done in *æmulationem vicini*. See above, § 1075.

Ferguson, Nov. 12. 1816 ; F. C. Pirnie, June 5. 1819 ; F. C. Murray, March 10. 1825 ; 3 S. D. 639. Gray, June 18. 1825 ; 4 S. D. 104. M'Nair, March 10. 1826 ; Ib. 546. See a good illustration of the distinction in Stewart, Feb. 3. 1829 ; 7 S. D. 362.

1087. 3. COMMONTY, or COMMON PASTURAGE. This is a right, neither of common property nor of common interest, but of joint perpetual use ; conferred, or presumed to be conferred, by the proprietor of land for the common use of many. The right to have common property divided (§ 1079), does not therefore extend to this species of right. But the Legislature interposed in the end of the seventeenth century, and, with a view to the agricultural improvement of the country, empowered each person having a right of commonty to apply for having the Common divided judicially. In England there is no such process. A private act of Parliament is required for the division of an English Common.

1695, 23.

1088. This peculiar right of usufruct in a Common, arose,

at first, from grants made by feudal lords and proprietors to their feuars and tenants, of rights to pasture their cattle on the grazing ground or wastes of the barony. Sometimes, also, by vicinage and custom, cottagers were suffered to establish a right of common over those wastes and pasture lands. Neighbouring towns, too, and hamlets, permitted reciprocal encroachments on their pasture ground, and so established commonty of pasture by mutual agreement or forbearance. The right is distinguishable from usufruct, as being not personal, but an accessory of the real property of the commoner; from liferent, as being perpetual, and without any reversionary right of fee in another; and from servitude, as being not a burden, but of the nature of limited property. There is a servitude of pasturage; but it is distinguishable from commonty, being a burden which, in the division of the common, gives to the person entitled to the servitude no right to demand a share; while the holder of it cannot be compelled to abandon his right to pasture, and take a share of the common instead of it.

Earl of Fife, Jan. 25. 1831; 9. S. D. 336.

1089. COMMONTY is constituted by a grant “cum communio;” or “cum communiis;” or “with commonty:” Or by a grant of “parts and pertinents,” accompanied by the explanatory possession of common pasturage. SERVITUDE is created by a grant “cum communi pastura in commune de B;” or “cum privilegio communitatis; or “with parts, pertinents, and pendicles, with common pasturage;” or “with pasturage of cattle, and privilege of commonty.”

Rattray, Nov. 27. 1724; M. 2463. Earl of Wigton, Feb. 1. 1739; 5 Br. Sup. 209; Elchies, *Commonty*, 2. Johnson, July 30. 1768; M. 2481. Duke of Buccleugh, June 16. 1812; F. C. Watt, Nov. 10. 1813; 2 Dow, 25. Bain, March 4. 1834; 12 S. D. 522. Earl of Airlie, March 11. 1835; 13 S. D. 691.

1090. As the right of commonty is derived from the paramount proprietor of the whole barony or estate, it may seem that there is an ipso jure reservation to himself of a right of commonty in his whole lands. But, 1. Although there *may* be such reservation and continuance of the over-lord's right; yet, if the reservation be *not* made, he will lose the privilege; unless the right be preserved by possession; or there be persons holding servitudes under him, and possessing on them; or the

possession shall be continued by the lord's tenants (*a*). 2. If the lord's right be continued by possession, it will not be measured by the precise extent of that possession, but will extend according to the proportion of land still in his hands unfeued, rated along with those of the feuars (*b*). 3. Servitudes form burdens on the proprietor's right of common (*c*). 4. The overlord had at one time right to a præcipuum, an allowance for his right of property over the servitudes: Now, he takes only what is not allotted to parties having commonty (*d*). 5. The superior has no præcipuum nor right of commonty on account of his dominium directum, and the feu-duties payable to him must be deducted from his valuations (*e*). And, 6. The holder of the dominium utile has the share of commonty corresponding to the land in his possession according to its valued rent, including feu-duties and other prestations payable to the Crown or other superiors (*f*).

(*a*) Trotter, House of Lords, Feb. 12. 1736; 1 Craigie and Stewart's App. Cases, 186. Duke of Buccleugh, ut supra.

(*b*) Balfour, Nov. 23. 1757; M. 2480.

(*c*) Stewart, June 3. 1748; Elch. *Commonty*, 7.; Kilk.; M. 14541. Laurie, see below, § 1093.

(*d*) Hog, Jan. 7. 1724; M. 2462. Lord Wigton v. Feuars of Biggär, Jan. 12. 1839; Monb.; 5 Brown's Sup. 662. Henderson, Feb. 21. 1782; M. 2487.

(*e*) The Queen v. Balfour, Feb. 2. 1838; 16 S. D. 420.

(*f*) Same case.

1091. The exercise of the right, according to the proportion of the property of the commoners, may be either by themselves or their tenants.

Barrowman, July 11. 1668; 1 Brown's Sup. 572.

1092. The Division of a Common is accomplished by a process before the Court of Session, the object of which is, 1. to ascertain the rights and interests of the several claimants; and, 2. to estimate and to divide the common according to the value and interest of the several parties concerned.

1093. The title required in the pursuer of this action is, an interest as a commoner. Servitude is not enough.

1695, c. 23. Stewart v. Feuars of Tillicoultry, Dec. 1739; Elchies, *Com.* 4; Kilk. 126; M. 2472. Lawrie, Feb. 21. 1771; M. *Com.* App. 2; 1 Hailes, 400. Gall, May 31. 1810; F. C.

1094. The proprietor has no right to insist in a division, if

there be only servitudes, and no right of commonty; although the servitudes should exhaust the whole use of the surface.

Stewart v. Feuars of Tillicoultry, sup. § 1093.

1095. The proceedings comprehend, 1. The production of the titles of the commoners, and proofs of possession. 2. The perambulation of the common. 3. The valuation of the right of each. 4. The ascertainment and valuation of servitudes. 5. The ascertaining of the mines and minerals. 6. The casting or allocating of the whole.

1096. The rules of division are,—1. To divide among the commoners according to their several rights and interests, taking the valuation of their respective lands according to the valued rent in the cess books (*a*). 2. To give to the commoners the share nearest to their own property. 3. To preserve the servitudes over the divided portions; or to commute them, if those holding the right will consent, and to give a portion of land in their stead (*b*). 4. To allow to the baron or proprietor a share of commonty corresponding only to the lands for which possession has taken place, not to the whole barony, under the burden of servitudes (*c*). (See above, § 1090, 4.) 5. To lay on each commoner the burden of any improvement which he may have made prematurely while under a usurped possession (*d*). And, 6. To continue as common such mosses as are indivisible.

(*a*) 1695, 23. *Earl of Wigton*, supra, § 1089. *Duke of Douglas*, Feb. 2. 1740; *Kilk.*; *M.* 2474; *Elch.* 5. *Sharp*, June 16. 1748; *M.* 2478.

(*b*) *Earl of Wigton*, supra.

(*c*) *Balfour*, Dec. 15. 1752; *M.* 2479; *Elch.* 8; and sup. § 1090 (*b*). *Duke of Buccleugh*, June 16. 1812; *F. C.*

(*d*) *Kinloch*, Jan. 14. 1814; *F. C.*

1097. The exceptions from the operations of this act are,—1. The King's commons. And, 2. The commons of Royal burghs.

Sandilands, Jan. 19. 1809; *F. C.*

Before leaving the consideration of rights held in common, there are certain rights which may here be explained as falling under the same category.

1098. 1. RUNRIDGE LANDS. This is a species of right and possession which seems to have arisen from out of the practice of the common defence and watching, and the common plough-

ing and labouring, necessary or natural in the occupation of burgh acres, and lands in the neighbourhood of towns. It is different from common property. The right of the several parties to the alternate ridges is absolute. But in the end of the seventeenth century the Legislature, with a view to the improvement of agriculture, introduced a power of dividing (or rather of allotting into consolidated portions) the scattered ridges, according to the rights of the parties.

1695, 23. 3 Ersk. 3. § 59. Davidson, June 2. 1748; Elch. Com. No. 6. and *Runridge*, No. 1.

1099. According to this statute, and the construction put on it, the rules are:—1. That the division is to be made with due regard to mansion-houses, however poor and mean (*a*). 2. That no regard is to be had to former possession, but due attention paid to the general interest (*b*). 3. That not burgh acres only should be excluded, but patches of four acres (*c*). 4. That small detached parcels of land, surrounded by great estates, are not within the remedy of the act (*d*).

(*a*) Taylor, Dec. 7. 1698; M. 14141. Gray, Jan. 15. 1777; M. *Runridge*, App. 1; Tait, Brown's Sup. 580; 2 Hailes, 741.

(*b*) Russell, Jan. 28. 1774; M. 14144; 5 Brown's Sup. 580; 1 Hailes, 554.

(*c*) Chalmers, July 29. 1756; M. 10485. Heritors of Inveresk, Nov. 13. 1755; M. 14142. Gray, Jan. 17. 1782; M. 14151; 2 Hailes, 846. Buchanan, Nov. 21. 1766; M. 14142; 1 Hailes, 158. Jardine, Feb. 26. 1793; M. 14152.

(*d*) Hall, Dec. 7. 1744; M. 14141. Morrison, July 14. 1780; M. 14151; 5 Brown's Sup. 582.

1100. 2. COMMON RIGHT IN WATER. This is a common right and interest in the several proprietors, opposite or successive, by or through whose lands water flows. Each has right to the water as it passes or runs through his land, 1. for all family purposes and uses to which, without deterioration, destruction, or waste, it can be applied; 2. for trout-fishing by rod or even by net, where there is no right of salmon-fishing thereby injured; 3. for taking salmon by rod or spear.

M'Kenzie, May 26. 1830; 8 S. D. 816; affirmed, May 14. 1832; 10 S. D. 864; 6 W. S. 31.

1101. 1. *Opposite Proprietors* on the banks have half the land covered by the stream, but no property in the water. They are on an equal footing in respect to the use of the water which flows between them; and which is held to be equally divided. But they have no right to alter the channel;

to take an aqueduct from the river so as to diminish the stream. A water-course for a mill may be prevented if the objector can shew that any use or expectation is thereby destroyed, or any amenity injured. But a pipe to supply the family with water may be taken.

2 Stair, 7. § 12. 2 Ersk. 9. § 13. Bannatyne, June 25. 1624; M. 12769. Kelso, July 1. 1768; M. 12807; 1 Hailes, 224. Town of Linlithgow, Nov. 13. 1767; 5 Brown's Sup. 935. Hamilton, March 5. 1793; M. 12824. Braid, Jan. 24. 1800; M. *Prop.* App. 2. Ogilvy, Nov. 24. 1791; M. 12824. Johnson, Feb. 15. 1822; 1 S. B. 304. Duke of Roxburghe, Bar. Hume, 524.

1102. An opposite heritor is not entitled to change the direction or level of the stream; or to augment its force; or to build in the bed of the river a bulwark for his own protection, which shall have any of these effects, or which shall make the water in its natural channel overflow, or leave its old course. See above, § 971.

Duke of Gordon, Feb. 12. 1735; M. 12778; Elchies, *Prop.* 2. Town of Nairn, July 28. 1738; M. 12779; Elch. 4. Fairly, see § 1108. Menzies, July 5. 1748; M. 12787; Elch. 8. Farquharson, June 25. 1741; M. 12779; 5 Brown's Sup. 688; Elch. 5. Menzies, July 4. 1826; 4 S. D. 783; reversed, 3 W. S. 235. See § 944.

1103. The privilege of doing any of those things is to be purchased; or may be acquired by sufferance; or by acquiescence implied from the permission of expensive operations.

Ayton, July 1. 1800; M. *Prop.* App. 5. See Ayton, § 945. Melville, § 945.

1104. *Successive Proprietors* have the use of the stream as it passes their lands. But, in ascertaining the nature and extent of the use, regard must be paid to the size of the stream, and to its condition of purity or pollution. There is a certain order of uses, primary and secondary, according to which, when they come into collision (especially in less considerable streams), the parties are bound to exercise their rights. The primary uses are for the support of animal life in man and beast; and for other domestic purposes of cooking, washing, &c.: The secondary uses comprehend other purposes, of manufacture, &c.

Miller and Russell, below, § 1105. Dun, March 11. 1837; 15 S. D. 853.

1105. 1. The superior heritor has the full use of the water, in passing, for the primary use of drink for man or beast, and for the family purposes of cooking, washing, bleaching, brewing for domestic use. He may even for those uses take off an

aqueduct, provided he return what is unused unpolluted to its channel before leaving his property. This use is not forfeited, but may be resumed by the superior heritor, even although, while he has not used it, works may have been erected by the inferior heritors which will require for secondary purposes the whole water. But this will be under qualification of the law of prescription. See below, § 1108.

1106. 2. In its course, therefore, the stream is not to be polluted by any manufactory, so as to be made unfit for the use of man or beast; but this under the qualification, that larger rivers are the natural conduits to the sea, for all the usual, and natural, and necessary uses of the subject, or for habitation.

Miller, Nov. 1791; M. 12823; Bell's Cases, 334. Russel, *ib.*; remitted by House of Lords for reconsideration. Downie, Nov. 12. 1825; F. C.; 4 S. D. 167. Dun, March 11. 1837; 15 S. D. 858. See § 968, *sup.*

1107. The superior heritor is not entitled to change the course of the stream; or to waste it in any course of deviation for manufacturing or agricultural purposes; even though he should return the water into the old channel. He cannot, therefore, take it off for irrigation; or for a distillery; or for a salt-work; or for a mill (*a*).

If, in the exercise of his secondary use, the superior heritor has erected a manufactory, the improvement of which may require more water than was used at first, he cannot be deprived of the right to take it by the erection, in the mean time, of works by inferior heritors, which may require the water not to be diminished (*b*).

A proprietor cannot object to the erection of works which do not interfere with the primary uses of the stream, on the ground of possible detriment to some work that he may afterwards think of erecting (*c*).

(*a*) 2 Stair, 7. § 12. Bannatyne, June 25. 1624; M. 12769. Kelso, July 1. 1768; M. 12807. Lord Glenlee, March 10. 1804; M. 12834.

(*b*) Lyon and Gray, June 7. 1749; M. 12789.

(*c*) Dun, *ut sup.* § 1105.

1108. The superior heritor is not entitled, by any opus manufactum, to increase the force of the stream upon his inferior neighbour; nor is the inferior heritor entitled to throw back the water on his superior neighbour.

Fairly, Jan. 26. 1744; Kilk.; M. 12780; Elch. *Prop.* 7.

1109. 3. SPRINGS rising in the superior ground could not, by the Roman law, be stopped if perennial, tributary, or feeders to the stream below. Those which only occasionally overflowed, might, for useful purposes, be stopped. With us, 1. Aqua pluvia or drainage may be stopped by the superior heritor. 2. A rivulet passing the various lands may not so be stopped. 3. Springs rising in one man's lands, and flowing down to those of others, may not be stopped.

Kelso, June 30. 1768; M. 12807; 1 Hailes, 224. Linlithgow, Nov. 13. 1767; 5 Brown's Sup. 935.

1110. 4. LAKES which give a permanent source to rivers, are not to be drained by the owner of the ground in which they are situated. But if the lake do not supply a stream, it is entirely within the power of the owner of the ground, provided there be no servitude over it.

Magistrates of Linlithgow, Jan. 14. 1768; M. 12805; 1 Hailes, 203. 5 Brown's Sup. 935.

1111. Lakes surrounded by the ground of various proprietors, are common property; but they are not under the act 1695, nor divisible otherwise than by consent or act of Parliament.

1112. 3. *Salmon-Fishing*. The right of fishing salmon otherwise than by the rod in rivers, or within sea-mark where the sea ebbs and flows, belongs to the Crown, and is communicable to subjects only by grant (*a*). The right may be given either with the land or separately. The Royal grant is, 1. *Cum piscatione salmonum*, which vests the right directly; the extent depending on the limits expressed, and the construction of the grant (*b*). Or, 2. *Cum piscariis*, or *cum piscationibus*, which grounds a title for prescribing a right of salmon-fishing, provided the possession is by the exercise of fishing salmon by net and coble, not merely by rod and spear (*c*). 3. A right to fish salmon with the rod is not conferred by a grant of fishing, though followed by rod-fishing (*d*).

Among the several grants which may subsist on the same river, the peculiar migratory habits of the fish confer on the successive grantees a common interest, like that in running water. On this principle, a sort of corporation of the heritors interested in a river is established by a recent statute, of which the object is to regulate this as a branch of national wealth (*e*).

But this common interest does not confer on proprietors of salmon-fishing in a river any interest to object to one fishing (in a lawful manner) opposite to his own lands, beyond their limits, although the person fishing has himself no right of salmon fishing (*f*).

(*a*) Leslie, June 29. 1593; M. 14249. Lord Garlies, July 1605, March 1606; M. ib. See 5 Br. Sup. 890.

(*b*) 2 Ersk. 6. § 6. Duke of Gordon, July 22. 1778; affirmed, M. 14297; 2 Hailes, 654; 5 Br. Sup. 547. Brodie, June 14. 1796; M. 12830.

(*c*) Ersk. ut sup. Maxwell, March 26. 1628; M. 14250. Forbes, Dec. 3. 1701; M. 7812. Duke of Queensberry, Aug. 4. 1773; M. 14257; 2 Hailes, 543. Smollett, 1779; 14 S. D. 963, note. Town of Inverness, July 27. 1775; M. 14257. Chisholm, June 17. 1801; Forbes, Jan. 13. 1824; 2 S. D. 515. Duke of Sutherland, June 11. 1836; 14 S. D. 960.

(*d*) Duke of Sutherland, ut sup.

(*e*) 9 Geo. IV. c. 39. § 10.

(*f*) M'Kenzie, Jan. 20. 1829; 7 S. D. 297. Same parties, May 25. 1830; 8 S. D. 796, and 5 W. S. 422.

1113. The public interest is combined with that of the private proprietors of fishings, in all those regulations which are directed to prevent the destruction of spawning fish, and also in those which are directed to prevent the obstructing of fish in their migration into rivers. The regulations relate, 1. to the time during which fish may be taken; 2. to the machinery by which they may be taken; 3. to the limits within which certain engines are prohibited.

1114. 1. *Close Time*. A time is fixed by statute within which no person shall take any salmon, or fish of the salmon kind, from any river, stream, estuary, or sea-coast in Scotland, under certain penalties. This time extends, in the Tweed and its tributaries, from the 15th of October to the 15th of February, for all but rod-fishing; and for rod-fishing the close time is from 1st November to 15th February (*a*). In the other rivers of Scotland, after much inquiry, it has been fixed to extend from 14th September to 1st February (*b*). There are heavy penalties also on the taking of spawn, fry, or unclean fish of the salmon kind.

(*a*) 1 Will. IV. c. 54.

(*b*) 9 Geo. IV. c. 39. § 1, 2.

1115. 2. *Machinery*. As to the method pursued in the taking of salmon, there is an absolute prohibition of all fixed machinery within certain limits (§ 1116); and regulations for diminishing the evils of such machinery in the situations where it is permitted (§ 1118).

1116. 1. There is a prohibition of all fixed machinery for fishing of salmon in the rivers and waters of Scotland, where the sea ebbs and flows. This prohibition comprehends cruives, or zairs; stent-nets; bulwarks across the river with nets; hang-nets, and stake-nets; sights (artificial shallows to disclose the passing of the salmon); towing paths; nets having one end fastened to the shore, and the other floating; all modes, in short (*prima fronte* at least), except net and coble. There is an absolute prohibition also of the use of light or fire in the taking of salmon, grilse, sea-trout, or other fish of the salmon kind.

1424, 11. 1503, 72. 1535, 16. 1581, c. 111. 9 Geo. IV. c. 39. § 6. Fishers of Don, Feb. 10. 1693; M. 14287. Duke of Queensberry, Nov. 19. 1771; M. 14279; 1 Hailes, 442. Colquhoun, Dec. 21. 1793, and July 4. 1807; M. 14281-3. Dirom, Nov. 25. 1797; M. 14282. Earl of Fife, June 18. 1807; M. *Salmon Fishing*, 2. Earl of Kinnoul, Jan. 26. 1802; affirmed, May 9. 1804; M. 14301. Duke of Athole, March 7. 1812; affirmed, June 20. 1816; 5 Dow, 282. Magistrates of Dumbarton, Jan. 16. 1813; affirmed, June 19. 1816. Scott, Dec. 11. 1812; F. C. Duke of Athole, Dec. 16. 1826; 5 S. D. 153. Forbes, Feb. 19. 1824; 2 S. D. 721; affirmed, June 28. 1825; 1 W. S. 583. See Frazer, Nov. 13. 1829; 8 S. D. 14; affirmed, Feb. 23. 1831; 5 W. S. 57. Gray, July 9. 1835; 13 S. D. 1089.

1117. In construing the statutes as to the limits within which machinery is thus prohibited, viz. "the rivers and waters of Scotland, where the sea ebbs and flows" (*a*), it has been held, 1. That the prohibition extends to all rivers and estuaries to the fullest extent to which the sea ebbs and flows, and down to the fauces terræ at the mouth of the firth, and the sands dry at low water, as well as in the channel (*b*). 2. That it does not comprehend the proper shores of the sea (*c*). 3. That stake-nets are prohibited in the land-locked estuary of a river; being the intermediate space between what is strictly the river and strictly the sea, but where the river and fresh water still exists with predominating influence; and that they cannot lawfully be placed either in the channel of such river or estuary, or on the sands which are left dry by the ebbing of the sea (*d*). And, 4. There is an exception, in the statute of 1563 (prohibiting machinery where the sea ebbs and flows), "that it shall not be extended to the cruives and yairs being upon the water of Solway" (*e*); this exception not being touched by the recent statute (*f*).

(*a*) Stat. Alex. II. c. 16. Rob. I. c. 12. 1424, 11, 12. 1427, 6. 1429, 131. 1457, 86. 1477, 73. 1479, 38. 1488, 16. 1563, 3. 1563, 68. 1579, 89. 1581, 111. 1585, 17. 1685, 20.

(b) Duke of Athole, March 7. 1812; Buchanan's Cases, 254; 5 Dow, 282. Dalglish, June 28. 1823; 2 S. D. 442; reversed, 1 W. S. 590. Little, Dec. 7. 1824; 3 S. D. 370. Carnegie, July 6. 1826; 4 S. D. 809. Carnegie, Jan. 17. 1829; 7 S. D. 284.

(c) Earl of Kintore, May 31. 1826; F. C.; 4 S. D. 641; affirmed, July 11. 1828; 3 W. S. 261. M'Kenzie, July 6. 1830; 8 S. D. 796 and 1013.

(d) M'Kenzie, July 10. 1838; 16 S. D. 1288.

(e) 1563, 68. Murray, July 6. 1821; 1 S. B. 111; reversed, June 9. 1824; 2 Shaw's App. Cases, 299. See Murray's Jury Court Cases. M'Whir, March 8. 1833; 11 S. D. 552; 1 Sh. and M'L. App. Ca. 393.

(f) 9 Geo. IV. c. 39. § ult.

1118. 2. The machinery permitted in rivers and streams is regulated on this principle, that there shall be a sufficient passage left to the young fry, and, to a certain extent, for the full-grown fish. And, 1. The cruives, zairs, &c. are not to be kept up during close time; and all boats, oars, nets, &c. are to be removed. 2. The hecks and obstructions are to be of the width asunder of three inches, for the passage of the fry. 3. The hecks of all cruives shall be pulled up every Saturday night at six o'clock, and shall remain open till Monday morning at sunrise; and during the whole of close time.

1424, 11. 1477, 73. 1489, 15. 9 Geo. IV. c. 39. § 7 and 9.

1119. The common interest which results from the migratory habits of the fish, gives to each heritor on a river having a grant of salmon fishing, a title to challenge all unlawful modes of fishing.

9 Geo. IV. c. 39. § 10. Colquhoun, July 4. 1807; M. 14283. Chisholm, June 17. 1801; M. *Salmon Fishing*, App. 1. Duke of Athole, Dec. 16. 1826; 5 S. D. 153. Earl of Kintore, May 31. 1826; 4 S. D. 641.

1120. A grant of fishing separate from the property of the bank, implies, as a pertinent, the right of drawing the nets on the bank: But where the grantee has but one bank, and his opposite-neighbour has a right of fishing, neither has an implied right to use the bank ex adverso. The grantee, although he has the privilege of using the bank, has it only so far as necessary for his fishing; and he can give no leave to another to angle, to the effect of using the bank.

2 Ersk. 6. § 15. Matthew, Jan. 18. 1612; M. 14263. Monimusk, Dec. 18. 1623; M. 14264. Miller, Nov. 22. 1825; F. C.; 4 S. D. 214. Forbes, May 31. 1826; F. C.; 4 S. D. 650.

1121. Whether a proprietor may be prevented from angling on his own bank, seems to depend on the question, whether

this operation be detrimental to the salmon fishing of the grantee. In the general case he cannot be prevented.

^{*}Forbes's Case, *supra*. M'Kenzie, *supra*, § 1100.

OF CHARGES ON LAND BY PUBLIC TAXATION, &C.

1122. The proprietor's right to his land is charged with the burden of paying such public taxes as are necessary for the great objects of protection, government, and religious instruction. These are either such as are directly payable to Government; or such as are appropriated for the maintenance of the clergy; or such as are levied for support of the poor; and other parochial burdens.

1. *Of the Land-Tax.*

1123. The cess or land tax is a tax, not on the land itself, but on the rent of land; assessed upon each district according to a certain invariable canon, and subdivided among the several proprietors by the Commissioners of Supply. It is now placed under the superintendence of the Commissioners for the affairs of Taxes.

3 Will. IV. c. 13. § 4.

1124. This tax became a permanent source of revenue in the end of the 17th century, superseding the occasional subsidies of the feudal government; and the old methods of valuing lands for the levying of subsidies were altered in 1640, and finally superseded in 1670. A new valuation was then established, which (like the valuation in England in 1692) has ever since furnished the rule of assessment (*a*). The land-tax, formerly a tax annually imposed, was, during Mr Pitt's administration, made perpetual at the rate of four shillings in the pound. The proportion payable by Scotland is settled at L.47,974. The tax has been made redeemable, so that each land-owner may purchase exemption from his share of the burden (*b*).

(*a*) 1597, 277. 1640, 34. 1645, 6. 1656, 14 and 25. 1670, 3. 1672, 4. 1690, 6 and 9.

(*b*) 38 Geo. III. c. 5. and c. 60. See below, § 1131.

1125. The Land-Tax is levied by charging a particular sum on each county, according to the valuation settled in the 17th

century, leaving it to be assessed on the estates of individuals by commissioners named in the Act. It is a personal burden on the landholder in respect of his land, not a burden on the land itself, or *debitum fundi*. And the arrears of land-tax are recoverable by process, ordered by the Commissioners to be issued as for Crown debt (*a*). But the claim for arrears does not affect singular successors (*b*).

(*a*) 3 Will. IV. c. 13. § 5.

(*b*) Graham, July 13. 1664; M. 10164.

1126. The burden is proportioned between shires and burghs in the ratio of one-sixth to be paid by the burghs.

1127. 1. The *Land-Tax payable by Counties* is levied on the proprietors of the land, and of subjects connected with it yielding a yearly revenue, under the direction of the Commissioners of Supply, named in the Act by which the land-tax is imposed; and the rent, as ascertained by them, is called the valued rent.

1128. The qualification to be a Commissioner of Supply is, 1. That he shall possess, in property, superiority, or liferent, land valued at L.100 Scots of valued rent yearly; the same land affording a qualification both to the superior and to every successive vassal whose infestment to that extent still subsists (*a*); or, 2. that he shall be the eldest son of one qualified as holder of L.100 Scots of valuation to be himself a Commissioner (*b*). 3. He must be of lawful age. And, 4. He must, before acting, take and subscribe the oaths of allegiance and adjuration, and the assurance (*c*).

NOTE.—The provisions of the Acts, as applicable to England, do not extend to Scotland.

(*a*) Gordon, Jan. 21. 1766; M. 2444. Hay, July, 25. 1725; 2436.

(*b*) Hepburn. July 25. 1735; M. 2436; Elch. *Com. of Supply*, 2.

(*c*) Sutherland, Feb. 22. 1751; 2436.

1129. The Commissioners of Supply proportion and allot the tax as it affects the county. They also divide valuations at the desire of those having interest; subject to the review of the Court of Session.

1130. 2. *The proportion of Land-Tax laid on Burghs* is allocated among the several burghs by the Convention of Royal Burghs; and the share laid on each is again, by stent-masters chosen by the Magistrates, allocated on the inhabitants, ac-

ording to their “rents and living, goods and gear, which they have within the burgh ;” by which are understood, 1. the rent of houses ; 2. the profit of trade or calling ; and, 3. personal estate.

1131. *Redemption of Land-Tax.* By the first Act authorizing the redemption of the land-tax, and by subsequent Acts amending and consolidating the system, it is provided, 1. that application may be made to two Commissioners of Supply to have the proportion of land-tax adjusted to the lands of which the exemption is to be purchased, and a certificate granted to that effect. 2. That the Commissioners appointed by the Redemption Acts may then bargain for the sale of it. 3. That when the sale is completed, and the land-tax of the lands redeemed, that land, or rather the owner of it, is thenceforward exempt from land-tax ; subject of course to any future imposition on land ; of which the share is to be ascertained correctly by schedule. 4. That the Commissioners must still, after such exemption of particular lands, state in the certificate of assessment the land-tax charged on the parish, till all be redeemed ; and they are to receive from the Commissioners of Taxes a certificate of the redeemed portion. 5. Powers are given by the Act to sell lands under entail, for redeeming the land-tax of the entailed estate, under certain precautions (*a*). Sales under these Acts must be fair in all respects ; and any unfairness, as a collusive lease with a view to affect the price, will be relevant to reduce the sale (*b*). But an error of judgment in the Court, in executing the Act, will not annul the sale (*c*).

(*a*) 38 Geo. III. c. 60. 39 Geo. III. c. 6 and 21. 41 Geo. III. c. 72 ; consolidated by 42 Geo. III. c. 116, and amended by 53 Geo. III. c. 142. 57 Geo. III. c. 100 ; and 1 and 2 Geo. IV. c. 123. 4 and 5 Will. IV. c. 11 and 60. Harrison’s Analysis of these Acts. Elliot, Feb. 9. 1826 ; F. C. ; 4 S. D. 425. Wilson, June 20. 1826 ; Ib. 732. Lawrie, Feb. 11. 1806 ; M. *Publ. Bur.* App. 2 ; and 2 Dow, 556.

(*b*) Hawellar, Dec. 10. 1830 ; 9 S. D. 165.

(*c*) Earl of Wemyss, House of Lords, Feb. 25. 1824 ; 1 Shaw’s App. Ca. 1.

2. *Of Parochial Burdens.*

These are directed to three objects :—1. Education ; 2. The maintenance of the poor ; 3. The maintenance of the clergy.

1132. 1. SCHOOLS. Provision is made for the maintenance of schools by means of a tax upon landholders or heritors, and tenants. Schools, which are not parish schools on the Esta-

blishment, depend on fees or voluntary contribution. See below, § 2151. The parochial schoolmaster must be qualified in morals, literature, and religion, and such branches of education as the minister and heritors shall require, and to the satisfaction of the presbytery of the bounds (whose decision on the qualifications required is not subject to any appeal); and he must sign the formula and Confession of Faith of the Church of Scotland (*a*). The appointment is for life, or during good behaviour; and the schoolmaster continues under the superintendence of the presbytery (*b*). They are authorized to proceed on a complaint from the heritors, the minister, or the elders of the parish (*c*). In these proceedings they are bound to have the proof duly authenticated (*d*); and they may censure, suspend, or depose without appeal.

(*a*) Act of Privy Council, Dec. 10. 1616, in Kames' Statute Law, 457. 1633, 5. 1693, 22. 1696, 26. 43 Geo. III. c. 54. Murray, Dec. 5. 1834; 13 S. D. 128. Simpson, July 7. 1835; Ib. 1066.

(*b*) Murray and Simpson, ut supra.

(*c*) Ross, March 2. 1826; 4 S. D. 514.

(*d*) Brown, Feb. 1. 1825; 3 S. D. 480; 3 W. S. 441. Ross, ut sup.

1133. The heritors and minister determine what branches of education are to be taught in the school; and also the amount of school fees from time to time (*a*). The schools are also under presbyterial visitation at least once a-year (*b*); and it is prescribed that the Bible shall be read as a regular exercise, and the Shorter Catechism taught.

(*a*) 43 Geo. III. c. 54. § 16.

(*b*) Acts of Assembly, 1766, c. 13. 1800, c. 11.

1134. By the subsisting Act it is provided,—

1. That in every parish there shall be a schoolmaster; or in certain parishes, two, at the discretion of the heritors and minister, subject to the review of the quarter-sessions. 2. That a school-house, a house for the master, and a garden, shall be provided by the heritors, with the advice of the presbytery; to be defrayed by assessment and relief according to the valued rents; a majority of the heritors, with consent of the schoolmaster, being empowered to remove the site of the school when they shall think it necessary, the jurisdiction in this matter being in the quarter-sessions without appeal. 3. That in large parishes additional teachers may be appointed, the sum or salary to be higher, and to be divided, but without school-

house, house, or garden, to the additional teachers (*b*). 4. That heritors of L.100 valuation, and the minister of the parish, shall meet and settle a salary for the master, not under 300 merks (L.16 : 13 : 4), nor above 400 (L.22 : 4 : 5); a new salary to be modified every twenty-five years, according to the average price of oatmeal: such salary to be assessed according to the valued rent; the landlords having relief against their tenants of one-half, and liferenters paying during their right the proportion laid on the land. 5. That the poor shall be taught gratis, while the fees for other scholars are to be fixed by the minister and heritors (*c*).

(*a*) Anderson, Nov. 26. 1808; F. C.

(*b*) Heritors of Annan, Feb. 21. 1837; 15 S. D. 645.

(*c*) 43 Geo. III. c. 54. Anderson, Nov. 26. 1808; F. C. Dawson, Feb. 18. 1809; F. C.

1135. 2. ASSESSMENTS FOR SUPPORT OF THE POOR. During the reign of the five Jameses and of Mary, that is, during the 15th and the greater part of the 16th century, various statutes were passed of extreme severity for repressing vagabonds and masterful beggars. Those laws, on the Reformation, were combined with provisions for the aged and impotent poor; not resulting, as in England, in the establishment of a permanent *fund* for the poor; but at all times restricted to the *actual* necessity, as it arises, of the disabled and impotent poor. The fund for the support of the poor is twofold:—1. those arising from voluntary contributions at the church-doors, mortifications, &c.; and, 2. in supplement of those funds, a sum levied by assessment. Here the latter only is to be considered, in so far as a burden is thereby imposed on landholders and residents in parishes.

See below, of the Condition and Provision for the Poor, and of the Law of Parish Settlements, § 2171, et seq.

1 Ersk. 7. § 63. with Ivory's Notes. Dunlop, Burn, and Monypenny on the Poor Law. Dunlop, Parochial Law, p. 161.

1136. The assessment for levying the funds necessary for the poor is regulated by magistrates in burghs, and by the heritors and kirk-session in landward parishes (*a*); all proprietors of land and houses liable in payment of poor-rates being entitled to vote by themselves or by proxy, at meetings of heritors and kirk-session, in relation to the administration of the

poor-laws, though not entered in the cess-rolls, nor in the books of the collector of cess (*b*).

(*a*) 1579, 74. 1594, 149. 1597, 272. 1600, 19. Proclamation, Aug. 11. 1693. 1672, 18. 1698, 21.

(*b*) Robertson, Feb. 23. 1830; 8 S. D. 587.

Parishes are in three situations :—1. Landward; 2. Burghal; and, 3. Mixed.

1137. 1. LANDWARD PARISHES. In these parishes (including burghs of barony and regality, see above, § 849) (*a*) every inhabitant is liable to a proportion of the tax, there being a double assessment; in respect of land as heritors, and in respect of personal property as inhabitants (*b*).

(*a*) Gemmel, May 31. 1832. Dunlop, Par. Law, App. No. 10.

(*b*) 1579, 74. 1663, 16. Proclamation, Aug. 11. 1692.

1138. HERITORS are liable in their parish to an assessment, in respect of all their landed property within the parish; not for landed property in other parishes (§ 1141), unless by convention or act of Parliament it has been otherwise settled (see below, § 1144). And, 1. Wadsetters and liferenters are liable to assessments as heritors (*a*). 2. Salt-works, coal-works, and mills, are assessed as real property (*b*). 3. Harbour-dues are not subject to taxation in so far as applied to the keeping up or improving of the port (*c*). 4. It would seem that superiors are not liable for their feu-duties, the land being already fully assessed (*d*). 5. A canal company is assessable for poor-rates in a landward parish through which the canal runs, in proportion to the annual value of the portion of the canal in that parish (*e*). 6. The exemptions are, the royal property (§ 1145); and the manse and glebes of clergymen, churches, churchyards, and school-houses (*f*).

(*a*) 1663, 16. Dunlop, 76; Par. Law, 230.

(*b*) Inveresk, May 28. 1794; M. 10585. Bakers' Society of Paisley, Dec. 6. 1836; 15 S. D. 200.

(*c*) Heritors of South Leith, Nov. 12. 1833; 15 D. B. M. 204.

(*d*) Dunlop, Par. Law, 230. Heritors of South Leith, Nov. 12. 1833; 15 S. D. 204.

(*e*) Anderson, May 7. 1839; 1 D. B. M. 648.

(*f*) Parish of Cargill, Feb. 29. 1816; F. C. Dunlop, 231.

1139. The rule for assessing the property of an heritor is the real rent; but still a discretion is given to the heritors and kirk-session to take either that, or the valued rent; provided

they shall apply the same rule throughout. Where the real rent is taken a deduction of one-fourth is given for repairs. The valued rent is taken as in the assessment for the county taxes. See above, § 1127 (*a*). Wherever the heritors take the valued rent, and that is found to be unequal and unjust, the Court of Session may interfere to direct the real rent to be taken; as in a landward parish containing a large town population, where the valued rent of the town was very small compared with the country district, the real rent with a proper deduction for repairs, &c. from the rent of houses (*b*).

(*a*) Scott, Jan. 19. 1773; M. 10577; 1 Hailes, 522. Cargill, *supra*.

(*b*) Howison Crawford, May 31. 1838; 16 S. D. 1072.

1140. The INHABITANTS of a parish (though they should not be heritors, nor, strictly speaking, householders, but only residents in the parish) are liable to a half of the assessment laid on the parish, in respect of their personal property, wherever situate; and individually they are liable, both as heritors in the parish of domicile, to their share of the heritors' assessment; and as inhabitants according to their whole substance, unless so far as already assessed (*a*). They are held so liable in every parish where they can be considered as residents, in so far as not assessed elsewhere (*b*). But clergymen are not liable as inhabitants on the amount of their stipend; nor, it would seem, are parochial schoolmasters (*c*).

(*a*) 1579, 74. Procl. Aug. 11. 1692. See below, Lawrie's case. Gemmil, May 31. 1822. Dunlop, App. 10. Cochran, Feb. 11. 1823; 2 S. D. 201.

(*b*) Buchanan, Feb. 21. 1827; 5 S. D. 391; also Cochran, *supra*.

(*c*) Cargill, *supra*. Dunlop, 88.

1141. Landed property in another parish is to be taxed there, not included in the personal charge for the parish of residence.

Cochran's case, *supra*.

1142. The rule of assessment is partly judicial, partly discretionary; and the Court cannot, in the way of suspension, interfere with it.

Gemmil, 1822, settled by compromise; Dunlop, App. 10. Ross, Dec. 16. 1800; M. *Poor*, App. 5.

1143. 2. BURGHAL PARISHES. In these all indwellers are liable who may spend L.100 Scots yearly, or are stented to be worth 2000 merks in free goods. And one who is a burgess,

having a place of business within the burgh, although residing with his family in a neighbouring parish, has been held an indweller liable to assessment (*a*). See next § 1144.

The assessment in the parish of residence is in respect of the whole personal estate;—money lent, stock in the funds, bank stock, money on security, but not including the produce of land in another parish (*b*).

(*a*) 1579, 74. Procl. Aug. 29. 1693. Buchanan, Feb. 21. 1827; 5 S. D. 390. Dunlop, 90, et seq.

(*b*) Lawrie, Dec. 2. 1797; M. 10587; and Cochran's case, *supra*.

1144. 3. MIXED PARISHES, partly landward, partly burghal.

It was held in the Court of Session that each part of the parish was liable to the support of its own poor; but this was reversed in the House of Lords, and the poor of both districts held as the poor of one parish (*a*).

Where lands have been disjoined by act of Parliament from a landward parish, and annexed to the royalty of a royal burgh and different parish, but with a provision, "still to remain liable for parochial burdens as if the act never had been passed," it was held that they were liable to both assessments according to the value of the whole property (*b*).

But, 2. Where the lands in question were disjoined from the parish to which they originally belonged, but have been included within the royalty of a burgh, they were by the House of Lords (reversing the judgment of the Court of Session) held assessable only in the royalty, but not in the original parish, nor even any compensation due to that parish (*c*). See below, § 2171.

(*a*) Town of Dunbar, April 10. 1835; 1 S. M'L. 134.

(*b*) M'Craw, Feb. 15. 1839; 1 D. B. M. 513. See Burns, May 17. 1837; 15 S. D. 936.

(*c*) M'Craw, July 14. 1837; in House of Lords, 2 S. M'L. 773.

1145. 3. LIABILITY OF CROWN PROPERTY TO THESE TAXES.

The property of the Crown may be distinguished, 1. as the original annexed property of the Crown; or, 2. as property of the church annexed in 1587; or, 3. as property purchased, or otherwise acquired by the Crown, for the public service. The first description of Crown property is exempt from public taxes, unless when held as a beneficiary possession by a subject (*a*): The second is liable to such taxes as the clergy were liable to

pay : And the third is liable as if it still remained in the hands of a subject, but exempt in so far as it has been increased in value by meliorations for the public service (b).

(a) Canongate against Lord Haddington, 1816. Dunlop, 77, note. Ross, June 8. 1824 ; 3. S. D. 115. See also *Rex v. Hurdis*, 3 Term. Rep. 497.

(b) Bruce, Nov. 28. 1810 ; F. C. Barrack Commissioners, Nov. 21. 1815 ; F. C. Officers of the Ordnance, June 14. 1825 ; 4 S. D. 89.

3. Of Teinds, Church-Stipend, and Glebe.

1146. The clergy of Scotland are maintained by an annual payment or stipend out of the produce of the land ; and in country parishes are entitled to a manse and glebe. The annual payment is supplied from the teinds of the parish ; the manse or dwelling-house is supplied by the contribution of the heritors, according to the extent of their property ; and the glebe is a portion of land designed for the minister, out of church lands, or temporal lands nearest to the church.

2 Stair, 8. 2 Stair, 3 § 40. 2 Ersk. 10. Connell on Teinds and Parishes.

1147. *Teinds or Tithes as a Burden on Land.* Teinds, which were at one time entirely appropriated to the maintenance of the clergy, came afterwards to be held by laymen, either separate from or along with their lands. See above, § 837. In the progress of this somewhat curious revolution, an act of annexation was passed in 1587, by which the lands of the church which had been held of the Crown before the Reformation, were restored to the Crown. But although that act does not seem to have comprehended teinds or the spirituality of benefices, a design appears to have been formed, on the accession of Charles I., to supply the wants of the Crown by a resumption of teinds as well as of lands. The threats of this proceeding excited great alarm ; and, in justification of the measure, two objects were professed as in view, in themselves fair and reasonable :—1. to make a competent provision for the clergy, and for education ; and, 2. to free owners of land from the great oppression suffered in the drawing and levying of tithes in kind.

In the settling of these disputes it was arranged, 1. That teinds, to whomsoever payable, should be liable to be valued, so as to be levied by a modus instead of being drawn in kind ; and, 2. That the landowner should further be entitled to pur-

chase the teind at a certain rate. This arrangement was ratified by the acts of 1663, 17. and 1690, 23.

Thus tithes, which in Scotland were formerly levied in kind, came to be regarded as a fixed burden on land, subject to be redeemed or purchased by the proprietor of the ground; and even while unredeemed, to be payable according to a fixed modus or valuation, like the land-tax.

1148. Teinds may therefore be taken, 1. As an estate in relation to the title of impropietor or titular, in which view they have already been considered (sup. § 837). 2. As a charge on land, affording a fund for the clergy entitled to a stipend; in which view they are now to be considered.

1149. All lands are liable to the burden of teind, with the exception, 1. of lands granted *cum decimis inclusis*; and, 2. of lands of which the teinds are redeemed, though still liable to a share of any augmentation of stipend.

1150. Teinds are payable either, 1. To the titular; or, 2. To a tenant; or, 3. To the clergyman, so far as his stipend has been allocated on the landowner.

1151. Teinds are in one of three situations—Drawn in kind; or Valued; or Redeemed.

1152. Teinds drawn in kind. While teinds are subject to be drawn in kind, they are distinguished as PARSONAGE, or VICARAGE. They may be generally described as one-tenth of the annual produce of the land; and not a personal tax, but a prædial burden.

2 Ersk. 10. § 24.

1153. 1. Parsonage teinds are payable out of grain raised by culture, and the terms are Whitsunday and Michaelmas. They are properly due to the parson, and are technically called *Decimæ Rectoriæ*.

1672, 13. 2 Ersk. 10. § 13.

1154. 2. Vicarage teinds. These were properly payable to the vicar; and where there was no vicar, to the parson. They are payable out of minor and accidental products; cattle, fowls, eggs, &c.; and are regulated chiefly by usage.

1155. 3. Between these two kinds of teind there is a remarkable difference. The right to parsonage teinds cannot be lost by prescription; vicarage may be lost *non utendo*.

3 Ersk. 7. § 13.

1156. 4. Teinds are debita fructuum, not debita fundi; arrears do not affect singular successors. But all intromitters with the rent are liable to a personal action for arrears.

2 Ersk. 10. § 42.

1157. 5. The right of the titular or patron to his tenth of teinds to be drawn in kind, is as good as that of the proprietor of the land to his nine-tenths. But in the actual *drawing* of the teind, the right was formerly more oppressive than a pro indiviso right of the ordinary description. Remedies were provided against this evil by several statutes, but they were imperfect; and, before the establishment of a better system, relief was chiefly obtained by means of private agreements: Either, 1. By TACKS to the proprietor of his own teinds; by which he was saved from the drawing in kind, paying a fixed rent; or, 2. By USAGE OF RENTAL BOLLS, which was a tacit agreement to pay so many bolls for teind, according to a valuation; subject to interruption, 1. by notice, and offer of the actual produce on the part of the landowner; or, 2. by inhibition of teinds on the part of the titular. But at last the general plan already alluded to was adopted, for giving to each heritor the drawing of his own teind, and the option of purchasing exemption.

1633, 17, 19. 1690, 23, 30. 1693, 21, 25. 1707, 11. 2 Ersk. 10. § 24, 5.

1158. The two parts of this improved system are, valuation, and sale of the teinds.

1159. 1. Valuation was appointed to be settled judicially by commissioners and sub-commissioners named in the statute. The rule of valuation was, 1. By a proof of the teind where drawn or separated from the stock, a deduction of a fifth being allowed; and, 2. By taking one-fifth of the whole when stock and teind were possessed jointly by the heritor (*a*).

As to the particulars included in a valuation, 1. The rent of quarries, minerals, mosses, &c. are deducted (*b*). 2. Rents of supernumerary houses not necessary for agriculture (*c*). Uncommon expenditure in improvement is a ground of reasonable deduction (*d*). 3. Orchards are deducted, as not giving such fruits as are the subject either of parsonage or of vicarage (*e*).

The benefits derived from this improved system were, 1. That the rent was fixed instead of being variable. 2. That

valuations of an early date became favourable to the heritor; even when in grain, much more when in money; insomuch that valuations in the seventeenth and beginning of the eighteenth century are not above one-thirtieth of the titheable produce of the present day.

(a) 2 Stair, 8, 14. 2 Ersk. 10. § 30, 33. 1 Connell, 260, 297, 312. Hay, Feb. 2. 1757; M. 15750. Dougl., Jan. 28. 1708. Hume, Feb. 7. 1711.

(b) Heritors of Calder, Dec. 11. 1734; M. 15739.

(c) Ib.

(d) Ib.

(e) Hay, *supra*, (a).

1160. 2. Sale. This still more beneficial process was regulated so that, 1. Teinds in the hands of titulars were made redeemable at nine years' purchase of the valued teind; the *modus* being made so low on account of the liability of such teinds to stipend; and the value in victual is convertible in this process of sale at a medium, according to the fiars of the last seven years. 2. Teinds in the hands of patrons are redeemable at six years' purchase. The privilege of a sale confined by 1633, 17 and 19, to two years from the valuation, is not now so limited.

Ramsay Irvine, May 14. 1794; M. 15698.

1161. In completing the sale of teinds, 1. The purchaser receives a disposition, with precept of sasine. 2. The sentence is not an adjudication of teinds to the heritor, but a mutual personal decree *ad factum præstandum*, decerning the pursuer to pay to the titular a certain sum, as nine years' purchase (or six years' purchase) of the teinds, parsonage and vicarage, of the pursuer's lands of A, with interest, till the titular shall give a valid heritable right to the teinds, and declaring the pursuer to have right to the teinds, specifying the crop and year. 3. All teinds may be the subject of this action, except teinds allocated to the minister for stipend; teinds reserved in the sale of the land; bishops' teinds vested in the Crown; teinds belonging to colleges and hospitals. All the excepted teinds may be *valued*, but not *sold*.

The jurisdiction in the matter of the valuation and sale of the teinds is in the Court of Session, as a Commission of Teinds.

6 Geo. IV. c. 120. § 54. &c.

1162. TEINDS AS A FUND FOR THE CLERGY. The teinds forming a charge on land, while unexhausted, afford a fund

for the augmentation of ministers' stipends. But the stipend of the clergyman is not a burden on the dominium directum, but only on the dominium utile; on property (*a*), not superiority.

In awarding a stipend, it has been held by the whole Court, that any extraordinary size of glebe is to be taken into account (*b*).

The localling or apportioning of the burden on the unexhausted teind, is under the jurisdiction of the Court of Session, as Commissioners of Teinds (*c*).

(*a*) *Pedie*, June 5. 1839; 1 D. B. M. See also *McDonald's case*, April 7. 1830; 4 W. S. 98.

(*b*) *Stewart*, May 20. 1835; 13 S. D. 787.

(*c*) 48 Geo. III. c. 138. 6 Geo. IV. c. 120. § 54. &c. See Act of Sed. Nov. 12. 1825.

1163. The only remarks proper to be made on the subject of augmentations here are,—

1. That augmented stipends, not localled on any particular heritor, may be demanded from *any* heritor to the extent of his teinds, but with relief against the other heritors.

2. That if the stipend shall have been localled, such locality gives the limits of the heritor's responsibility to the minister: It is an appropriation of the burden fixed judicially, under the superintendence of the common agent of all the heritors.

3. That the stipend is to be allocated in this order:—*first*, on teinds never erected; *secondly*, on teinds vested in titulars, and by them demandable from heritors; the whole, if not valued; or at least the valued teind; *thirdly*, on teinds let by the titular to tacksmen; *fourthly*, on teinds purchased by the heritor, and on the teinds of the titular's own land; *fifthly*, on the teinds of bishops in the hands of the Crown; and, *lastly*, on the teinds of colleges and pious foundations.

By 48 Geo. III. c. 138, no new augmentation is to be allowed till the expiration of fifteen years from any former augmentation previous to the act; nor till after the expiration of twenty years from any augmentation after the act.

A fund is provided for small stipends by 50 Geo. III. c. 84.

1164. CHURCH. It is now settled that the expense of building and of repairing the parish church lies on the heritors; so the term *parishioners* has been construed by inveterate usage (*a*). In the description of heritors, neither titulars of teinds, nor superiors, nor liferenters, are included (*b*). The

heritors are entitled, without the intervention of the Presbytery, to determine on repairing or rebuilding (*c*); and in a landward parish the assessment is according to the valued rent, but the heritors may take the real rent.

When the parish is mixed, both landward and burghal, the building or repairing of a church is a parochial charge to be defrayed by all the owners of lands and houses, in proportion to their real rents (*d*).

In the question of repairing or rebuilding the church, the heritors may, without concurrence of the presbytery, resolve to rebuild, the majority binding the minority; but any one being entitled to bring the resolution under review by suspension (*e*). The presbytery may, where necessary, decern for a new church, after appointing a visitation, and report by tradesmen, with public notice from the pulpit (*f*), but this under review of the Court of Session. But the heritors are not bound to rebuild, if the church be repairable, *i. e.* wherever the repairs will make it safe as originally built (*g*). The heritors are not bound, where the church is in good repair or repairable, to enlarge it for an augmented population (*h*). The presbytery have nothing to say as to the style of architecture, provided the church afford due accommodation (*i*).

In rebuilding a church (though not in the repairing) accommodation must be provided for the parishioners; and the rule is, to provide for two-thirds of all examinable persons in the parish (*k*).

The additional churches which, by statute, are provided for the Highlands and Islands of Scotland, are originally to be built, and the stipend paid from the Government fund. The church is to be repaired from the produce of the seat-rents, guaranteed by the heritor or heritors who apply for the church, and who are, "with their heirs and successors in their land," bound for what may further be necessary for repairs, to the extent of one per cent. on the original cost (*l*). The minister's house and offices are to be repaired from a certain proportion of the seat-rents; what more is necessary being defrayed by the minister (*m*).

(*a*) 1563, 76. 1572, 54. Act of Privy Council, Sept. 13. 1563. 2 Ersk. 10. § 63. Kirk-session of Lauder, Nov. 24. 1630; M. 7913. Boswell, Dec. 9. 1834; 13 S. D. 148.

(*b*) Bruce Carstairs, Jan. 23. 1773; M. 2333. Murray, Feb. 20. 1794;

M. 15092. Moreham, Nov. 14. 1679 ; M. 8499. Anstruther, May 14. 1823 ; 2 S. D. 306.

(c) Boswell, Dec. 9. 1834 ; 13 S. D. 148.

(d) Heritors of Peterhead, Jan. 19. 1802 ; reversed in House of Lords, June 1802 ; Connel's Sup. to Law of Parishes, p. 25 ; Dunlop's Par. Law.

(e) Boswell, Dec. 9. 1834 ; 13 S. D. 148.

(f) M'Niel, Feb. 24. 1828 ; 6 S. D. 422.

(g) Murray, Dec. 11. 1833 ; 12 S. D. 191.

(h) Lord Lyndoch, May 14. 1828 ; 6 S. D. 791. Earl of Glasgow, Feb. 1. 1831 ; House of Lords, April 7. 1834 ; 7 W. S. 185. See also M'Leod, below (k).

(i) Same Case.

(k) M'Leod, Feb. 9. 1830 ; 8 S. D. 475.

(l) 5 Geo. IV. c. 90. § 18. It may be doubted whether this is personal or a real burden on the lands. The reason of the thing should favour the latter opinion.

(m) Ib. § 18.

1165. MINISTER'S MANSE. The Legislature endeavoured by various statutes to afford a remedy to the reformed clergy against the alienation of manses on the eve of the Reformation. Where a parish church was not provided with a manse, the heritors were directed to build one at their own charge, and to repair those already built.

1563, 72. 1572, 48. 1592, 116. 1649, 45 ; reversed by 1663, 21.

1166. 1. *Title to a Manse.* The minister of a parish is entitled to a manse, whether it be a landward parish ; or a parish partly town partly landward ; or a parish partly landward partly burgh royal : landward being held to apply to a territory properly termed rural, in opposition to urban (a). The minister of a parish in a royal burgh is not entitled to a manse on the Act of 1663 (b). If, in a parish where the clergyman is entitled to a manse, he cannot be provided with one, a compensation is given under a late statute (c).

(a) 1649, 45. 1663, 21. Aberdeen, June 29. 1748 ; Elch. *Manse*, 2. Dunfermline, Nov. 19. 1805 ; M. *Manse*, App. 1 ; affirmed. See note in 2 W. S. 604. Adamson, Feb. 14. 1816 ; F. C. Auld, June 13. 1827 ; 2 W. S. App. Ca. 600, and July 5. 1828 ; 6 S. D. 1087. Baikie, March 8. 1827 ; 5 S. D. 546.

(b) Thomson, June 30. 1750 ; M. 8504 ; Elch. *Manse*, 4.

(c) 5 Geo. IV. c. 72. § 2.

1167. The minister is also entitled to house rent till his manse shall be built, or the question of right settled.

Steel, Jan. 29. 1712 ; M. 8502, 5131. Potter, Jan. 31. 1708 ; 4 Brown's Sup. 691. Gardner, June 17. 1823 ; 2 S. D. 409.

1168. 2. *Sum to be allowed.* A manse is held to include a stable, byre, barn, and other offices, with a garden (a) ; and

the expense is not now limited to the maximum of L.1000 Scots, appointed in the Act of 1663, but is extended to the expense of a competent manse (*b*).

(*a*) 2 Ersk. 10. § 57. Connel on Parishes, 291. Anderson, Nov. 22. 1791 ; M. 5152.

(*b*) Dingwall, Nov. 27. 1816 ; F. C. ; affirmed, March 2. 1821 ; 1 Shaw's App. Cases, 10.

1169. 3. *Persons liable to the expense.* These are, 1. The heritors (*a*) : But under this description of heritor are included neither a Superior (*b*), nor a Liferenter (*c*). 2. Tenants are not liable for part of the expense of building a manse (*d*). 3. Owners or holders of seats in the parish church, not being heritors, are not liable for the repair of the manse (*e*). 4. The proprietors in a burgh parish, where the minister is entitled to a manse, seem to be liable along with the heritors of the landward part : The magistrates being primarily liable, along with the heritors, reserving to them relief against proprietors or inhabitants of the burgh (*f*).

(*a*) Morham, Nov. 14. 1679 ; M. 8499. Millar, Dec. 18. 1769 ; 1 Hailes, 329.

(*b*) Bruce Carstairs, Jan. 23. 1773 ; M. 2333. Dundas, July 2. 1778 ; M. 8511 ; 2 Hailes, 802. Murray, Feb. 20. 1794 ; 15092.

(*c*) Anstruther, May 14. 1823 ; F. C. § 1061.

(*d*) Millar, ut supra (*a*).

(*e*) Fairie, Feb. 2. 1813 ; F. C.

(*f*) See Cases, § 1166. Lockhart, Jan. 24. 1832 ; 10 S. D. 243.

1170. 4. *Building or repairing of the Manse.* The presbytery may order whatever is necessary to make the manse habitable and capable of lodging the clergyman and his family (*a*) ; and where the defects or disrepair cannot otherwise be remedied, they may order a new manse (*b*). A manse, if in repair or repairable, is not to be enlarged to suit the accommodation or family of the minister ; but where a new manse is to be built, due regard must be paid to the change of times, and proper accommodation of the minister's family (*c*). But the power of the presbytery, in questions of Manse, is limited to that conferred by the Act of 1663 (*d*).

(*a*) Contrast Robertson, July 28. 1788 ; M. 8515, with Strathblane, July 10. 1827 ; 5 S. D. 913.

(*b*) Hamilton, March 9. 1826 ; 4 S. D. 543.

(*c*) Shiells, June 15. 1818. McKenzie, June 30. 1835 ; 13 S. D. 1014. Carmichael, May 25. 1837 ; 15 S. D. 1020.

(*d*) Auld, ut supra, § 1166 (*a*).

1171. *Free Manse.* The minister is by statute entitled to have the manse in good and sufficient repair ; and, on the

other hand, if it be so, he is chargeable with the burden of maintaining it in tenantable condition. On application of the heritors to the presbytery, the manse will be surveyed and declared sufficient, or what is called a FREE MANSE. The effect of this declaration is to impose the burden of repairs on the minister during his incumbency (a).

In the case of Parliamentary churches, the manse is to be repaired by the minister himself, in so far as the proportion of the seat-rents is not sufficient (b).

(a) 1612, 8. 1663, 21. 2 Ersk. 10. § 58. Duke of Hamilton, July 13. 1813; 1 Dow, 393.

(b) 5 Geo. III. c. 90. § 18.

1172. 3. MINISTER'S GLEBE AND GRASS. Every minister of a parish, of which any part lies in the country, or is properly a landward or country parish, is entitled to a glebe of four acres of arable land, or sixteen souns of pasture ground (a). He is entitled also to grass for a horse and two cows (b), to be designed out of kirk pasture lands, or if there be no such lands near the manse, to L.20 Scots yearly. See below, § 1176. Sometimes this has been extrajudicially arranged; but it is only where the statutory equivalent has been judicially settled and acquiesced in, that the minister is held to be now excluded from his right to a grass glebe (c).

(a) 1593, 165. 1606, 7. 1644, 31. 1663, 21. 2 Stair, 3. § 40. 1 Ersk. Pr. 57. § 16; 3 Inst. 10. § 39. Anderson, Dec. 17. 1664; M. 5121. Same Case, 2 Brown's Sup. 136. Fullarton, Dec. 17. 1779; M. 5123.

(b) 1663, 21. Beaton, Feb. 8. 1734; Elch. *Glebe*, 1. Forbes, Nov. 26. 1755; M. 5127; 5 Brown's Sup. 304. Pringle, Feb. 15. 1765; 5 Brown's Sup. 903. Dundas, Dec. 6. 1805; M. *Glebe*, App. 5. Carfrae, May 13. 1814; F. C.

(c) Dollar, July 9. 1807; M. *Glebe*, App. 7. Panbride, May 18. 1809; F. C. Anderson, July 6. 1814; 2 Dow, 433.

1173. 1. *Designation of Glebe*. 1. The glebe is to be designed from kirk lands in a particular order (a), which order must still be observed (b). The land nearest to the kirk and manse, or most commodious for the minister, though not nearest to the kirk, is to be taken (c). The provision of the Act to this effect is construed to be for the benefit of the heritors as well as the minister, and he is not to choose land remoter and better, if there be kirk lands nearer his manse (d). Temple lands were held not to be kirk lands (e).

2. It is only where there are no church lands, that the glebe

is to be designed out of temporal lands (*f*), the power to design temporal lands depending entirely on there being no church lands; and although doubts have been entertained on the subject, there has been no judgment to the contrary (*g*).*

(*a*) 1593, 161. 1606, 7. 1644, c. 31. 2 Stair, 3. § 40. 2 Ersk. 10. § 59. See More, May 21. 1827; 4 S. D. 351; 2 W. S. 550.

(*b*) Galloway, June 12. 1823; 2 S. D. 398.

(*c*) Anderson, May 22. 1810; affirmed, July 5. 1814.

(*d*) Fraserburgh, Dec. 1. 1680; M. 5140. Kingsbarns, June 10. 1794; Bell's Cases, 27.

(*e*) Duncan, Feb. 12. 1698; M. 5140.

(*f*) 1644, 31. 1663, 21. 2 Stair, 3. § 40. 2 Ersk. 10. § 59. Kingsbarns, June 10. 1794; M. 5140; Bell's Cases, 27.

(*g*) Balfour Hay, June 11. 1799; M. *Glebe*, App. 2. See Moore's Case in House of Lords, *supra* (*a*).

1174. The glebe is to contain at least four acres of arable land, *i. e.* of land in use to be cultivated as such (*a*); and if there be no arable lands near the church, the minister is to have sixteen sowms of grass (each sown being pasture for one cow or ten sheep) designed in like manner out of pasture church lands next adjoining to the church (*b*). If there be no manse or glebe ground, the minister is, by a late act, to receive a compensation out of the public funds (*c*).

(*a*) 1663, 21. Steele, July 27. 1748; M. 5161. Dunfermline, June 20. 1751; Elch. *Glebe*, 5. Grierson, June 26. 1778; M. 5162; 2 Hailes, 799, 888. See Panbride, below, § 1175.

(*b*) 1606, c. 7. 2 Ersk. 10. § 59.

(*c*) 5 Geo. IV. c. 72. § 2.

1175. 2. *Grass*. The grass to which the minister is entitled over and above his proper glebe (§ 1172), is to be designed out of grass lands, not out of arable lands, *i. e.* lands *de facto* in a course of cultivation (see above, § 1174) (*a*). Lands rich, and occasionally ploughed, not being properly grass lands by merely being for a long time kept as pasture land (*b*). The minister may insist on having his grass glebe out of kirk lands, although other lands equally good and convenient can be given out of other lands (*c*).

(*a*) Hodges, Feb. 27. 1756; M. 5162. Panbride, May 13. 1809; F. C. Stewart M'Kenzie, July 5. 1825; 4 S. D. 146; Jan. 24. 1828; 6 S. D. 422.

(*b*) Bruce, May 30. 1826; 4 S. D. 626.

(*c*) Moore, in House of Lords, May 21. 1827; 2 W. S. 558.

1176. 3. *Relief to Heritors*. The heritor whose land is taken

* The note in Connell on Parishes, 370, relative to Balfour Hay's case, is not to be relied on. See Dunlop's Parochial Law.

for manse or glebe, is entitled to relief from the other heritors, though their lands should be temporal lands (*a*); and in the same way, where a sum in lieu of grass is appointed to be paid to the minister, it is to be allocated at once on all the heritors (*b*).

(*a*) 2 Ersk. 10. § 60.

(*b*) Ferguson, Jan. 3. 1745; M. 5157; Elch. *Glebe*, 3. Dury, Dec. 12. 1755; M. 5161.

II.

PROPERTY IN THE HANDS OF TENANTS.

2 Stair, 9. 2 Ersk. 6. § 20, 64. Bell on Leases, with very valuable additions, by Mr W. Bell, Advocate, 1825. Hunter on the Law of Landlord and Tenant, 1833.

1177. Property in the hands of tenants may consist either of lands or other subjects let out for cultivation, or pasture, or the deriving of some other product from the possession; or of houses, manufactories, &c. for the habitation or use of the tenant. These may be taken separately.

1. AGRICULTURAL LEASES.

1178. In the connexion between landlord and tenant in agricultural leases, the matter which chiefly demands the attention of lawyers and of legislators is the union or opposition of their interests. While this contract confers on the tenant a permanent interest or estate, it fully reserves to the landlord on his part rights of great value; combining in one common concern their most important interests, without the dangers or consequences of partnership.

1179. An agricultural lease is an agreement entered into for the raising of a gross produce to be divided (after defraying necessary charges) between the landlord furnishing the land, and the tenant supplying capital, industry, and agricultural skill. The division of profits ought to be made in the largest proportions to each that their respective means and situations afford; giving the highest rent to the landlord, and the largest profit to the farmer; with due assurance to each for the preservation of his peculiar estate or interest in the land. To the attainment of these objects it is requisite,

1. That the landlord's right to the land as owner shall be preserved, and, at the close of the lease, his estate restored to him unimpaired, or improved. 2. That the tenant shall have absolute security for the continuance of his right during a term sufficient to indemnify him fairly for the employment of his industry and capital, and for the value of his improvements. And, 3. That the rent payable to the landlord out of each year's produce shall maintain an average proportion to that produce, varying with the changes to which it is naturally subject.

1. *Constitution of the Lease.*

1180. In considering the constitution of a lease, the first question regards the title to grant it; the next relates to the evidence requisite for the security of both parties.

1181. **TITLE TO GRANT LEASE.** The granter of a lease must be either the proprietor of the subject let; or one entitled to the full use and possession of the subject; or one in the administration of it. The proper title, therefore, of the granter of a lease as heritable proprietor, is an infeftment. Where the granter is not infeft, the lease does not confer an effectual or permanent right, though it may be made perfect by the granter's subsequent infeftment, provided no mid impediment has intervened. A sasine previous to that of the granter's will defeat the lease. The granter's death uninfeft will defeat it, if a stranger shall come into the feudal right who is not bound to represent him; as a purchaser; or a stranger substitute in a taillied succession; or a creditor adjudging the land. The heir of the granter of the lease, however, taking the land as his representative, will be bound by the contract (*a*). 2. A lease by an apparent heir is not secure to the tenant. Even if the granter have been three years in possession, it is not good on the statute of 1695 against an adjudger (*b*); and even its effect against a subsequent heir passing by the granter was at one time doubted (*c*), though afterwards it was found effectual (*d*). 3. A liferenter may effectually grant a lease; his title being complete either on his original infeftment if it be a reserved liferent, or by sasine if a liferent by new constitution, or by marriage as in a lease

granted by a husband of his wife's land (*e*). (See above, § 1057, and below, 1133.)

(*a*) 2 Ersk. § 21. Loudon, June 13. 1752; M. 5270. Gordon, Feb. 21. 1780; M. 10309.

(*b*) Loudon, June 13. 1752; Kilk. 5271.

(*c*) Same case. See below, § 1929.

(*d*) Knox, June 27. 1760; M. 5277.

(*e*) Grieve, June 15. 1797; M. 5951.

1182. 1. LEASES BY PERSONS UNDER LIMITATION. The power of granting leases may be under restraint by limitations on the granter's right as proprietor; by the temporary nature of his right; by the diligence of creditors; by the administrative character in which he acts.

1. The reduction of the lessor's right will be fatal to the lease. Long leases granted to the heir's prejudice on deathbed will, as acts of extraordinary administration, be challengeable (*a*). But ordinary leases for a fair rent are not, on this ground, exceptionable (*b*). See below, of Deathbed, § 1786, et seq.

(*a*) 3 Ersk. 8. § 37. Christison, Dec. 26. 1735; M. 3226. Bogle, June 19. 1759; M. 3235.

(*b*) Semple, June 1. 1813; F. C. Gordon's case, 1181 (*a*).

1183. 2. Although a liferenter may grant a lease effectually, it is limited to the duration of the liferent (§ *1057). (See 1181-3.) And an heir of entail, though not properly a liferenter, is often, by the prohibitions of the entail, prevented from granting long leases. See below, of Entails, § 1752 and 1764.

1184. 3. Leases granted by temporary administrators endure only during the office. So of a lease by tutors and curators (*a*); see § 2084; also § 2114. So also a lease by a husband of his wife's estate will last only during his administration (*b*). But the Court in one case gave power to a testamentary tutor to let leases for nineteen years (*c*).

(*a*) Marquis of Huntly, Jan. 3. 1672; M. 16285. Lord Reay, Feb. 5. 1800; M. 16385.

(*b*) Grieve, June 18. 1797; M. 5951. Lothian, Jan. 25. 1724; M. 16337.

(*c*) Forbes, Dec. 22. 1838; 1 D. B. M. 355.

1185. 4. The power of the proprietor to let leases is under restraint by the diligence of creditors. So by inhibition a lease of extraordinary duration, or for an inconsiderable rent,

will be objectionable; but, if according to the course of ordinary administration, it will be good (*a*). By adjudication, or ranking and sale, the debtor's powers are so far limited, that he can grant no lease beyond ordinary administration: But by mercantile, or common sequestration, being deprived of the possession, leases even of ordinary duration are bad (*b*).

(*a*) Gordon, Feb. 29. 1740; M. 7068. M'Lachlan, Feb. 1802; 2 Bell, Com. 150, n. 5. Wedgerrard, Nov. 13. 1817; F. C.

(*b*) Carlyle, Feb. 27. 1766; M. 8380. York Building Co. July 7. 1778; M. 8363. Earl of Wemyss, Nov. 17. 1815; F. C.

1186. **CONTRACT OF LEASE.** The contract of location is consensual (§ 16), and in its own nature merely personal, but by statute it is made real against singular successors in land, provided certain requisites shall be complied with.

Dirl. and Stewart, v. Tack, p. 296. 1 Stair, 15. § 4. 2 Ersk. 6. § 23; M. 1449, 17.

1187. *Verbal Lease.* A lease of land is not to be proved by parole evidence, if for more than for a single year; but only by writ or oath as against the granter and his heirs.

Baillie, June 5. 1611; M. 8398. Low, ib. Johnston, June 11. 1627; M. 8399. Stewart, Nov. 25. 1766; M. 15178; 1 Hailes, 174. A against B, June 29. 1791; M. 15181. Jackson, Jan. 20. 1705; M. 12413. Neill, Nov. 22. 1810; F. C.

1188. Although all authorities agree that a verbal lease for a year is good, such a lease for more than one year is not effectual even for a year.

2 Stair, 9. § 4. 2 Ersk. 6. § 30.

1189. A lease for more than one year though the writing be imperfect, may, by rei interventus, be fixed on the granter and his heirs as an effectual contract; provided such rei interventus shall distinctly apply to a right of longer duration than a single year (§ 26). But a lease established rei interventu, has no effect against singular successors without possession.

Leith, Dec. 5. 1776; M. 15178. 1 Hailes, 174. Skene, July 15. 1657; M. 8401. M'Kenzie, Nov. 28. 1729; M. 8437. M'Rory, Dec. 18. 1810; F. C.

1190. 2. *Written Lease.* 1. In a question with the granter

and his representatives, it is necessary to the validity of a written lease for years, that it shall be authenticated in terms of the statutes and delivered (see § 19, 20); or fortified by *rei interventus* (§ 26) (*a*); or sanctioned by homologation (§ 27); or if, in the shape of a mere offer, it must be followed by real evidence of acceptance (*b*); or it may be in the shape of written articles and conditions for the general regulation of the plan of leasing the estate, if proved by written evidence to have been adopted by the parties (*c*); or, finally, a written obligation to grant a lease has been held equivalent to a lease (*d*). These are all effectual modes of binding the granter and his representatives in whatever terms conceived, if legitimate; and this, independently of possession, in so far as not necessary in *proof* of the agreement.

2. Against singular successors, whatever is effectual and binding on the granter and his representatives, as above, will bind them (*e*) under two qualifications; 1. That the lease is special and definite in subject, in rent, and in the term of duration; and, 2. That possession shall have followed as the requisite badge of real right under the statute (*f*).

(*a*) Ross, Feb. 9. 1790; Bar. Hume, 774. Graham, Nov. 1792; *ib.* 784. Campbell, March 6. 1793; *ib.* 786. See Hamilton, Dec. 13. 1823; 12 S. D. 206.

(*b*) Countess of Moray, July 23. 1772; reversed, M. 4392, 6; 1 Hailes, 485. M'Pherson, May 12. 1815; F. C. M'Arthur, July 6. 1804; M. 15181. Clark, Jan. 27. 1816; F. C. Murdoch, June 18. 1812; F. C. Cairns, June 18. 1833; 11 S. D. 737. Russel, May 14. 1835; 13 S. D. 752. Lord Elbank, House of Lords, 5 W. S. 28. Burnet, Nov. 27. 1835; 14 S. D. 74.

(*c*) M'Cra, June 7. 1828; 6 S. D. 935.

(*d*) Garioch, Feb. 8. 1750; M. 15177. Grant, July 10. 1788; M. 15180. Arbuthnot, Feb. 27. 1793; Bar. Hume, 785.

(*e*) See Cases (*a*). Skene, May 20. 1790. 1 Bell's Leases, 313, note. Burnet, Nov. 27. 1835; 14 S. D. 74. Carruthers, Feb. 11. 1836; 14 S. D. 464.

(*f*) 1449, c. 17. 2 Stair, 9. § 4. 2 Ersk. 6. § 27. 1 Bell on Leases, 30.

1191. Thus a binding written contract of lease followed by possession is the sole title of that real estate of lease effectual against purchasers and creditors, which is so important in agriculture. The statute protects absolutely one who holds such a lease, with possession conformable; and without possession no lease has effect against singular successors.

1192. A written lease must, in order to be effectual to ground an action, be on stamped paper (*a*). The stamp may be supplied at any time on payment of certain penalties; though

the practice of sisting process till the stamp be obtained is at least of doubtful propriety : And no consent of the parties can waive the objection (*b*).

(*a*) 55 Geo. III. c. 184. Rollo, Feb. 27. 1787; M. 16944. M'Niven, March 10. 1836; 14 S.D. 685.

(*b*) Robb, Oct. 3. 1831; House of Lords, 5 W. S. 740.

1193. SUBSTANCE OF THE LEASE. The written lease, according to the requisites of the contract of location (§ 134), must fix the Term, the Rent, and the Subject.

1194. *Term of Duration.* The statute is in favour of such tenants as have "terms and zeires," they being entitled to "remain with their tacks unto the issheiw of their termes" (*a*). There is a marked distinction, however, between the parties to the lease and strangers, in this respect. See § 1190.

1. A lease of any duration will be effectual against the granter and his heirs; as, to possess "without ish;" or as long as the grass groweth up, and the water runneth down (*a*). If the term be not mentioned, it is construed to be for one year only; or for the most limited term which the words admit of (*b*).

2. In order to make a lease effectual against singular successors, it must have a definite term of duration (*c*). But exceptions are admitted to this rule:—1. where the purchaser is made aware specially of the nature of the lease, and taken bound to warrant it, the lease will be effectual against him (*d*); and, 2. it will also be effectual where the purchaser homologates the agreement (*e*).

Where the duration depends on the payment of debt, the lease is held, in a question with singular successors, to be without a definite ish in the sense of the act (*f*).

(*a*) 1449, c. 17. 2 Stair, 9. § 29. Arg. ex. 2 Ersk. 6. § 24. Stewart, July 26. 1631; M. 15191. Carruthers, Jan. 13. 1717; M. 15195. Kerr, Feb. 29. 1752; M. 10307. Redpath, Nov. 32. 1737; M. 15196. Frazer, Dec. 6. 1758; M. 13196, and 1 Bell on Leases, 44. Irvine, July 27. 1760; M. 15199.

(*b*) 2 Stair, 9. § 16. Redpath, supra, (*a*). Clark, Jan. 27. 1816; F. C.

(*c*) See the cases in (*a*). Hamilton, March 2. 1626; M. 15188. Oswald, July 20. 1688; M. 15194.

(*d*) Wight, Nov. 17. 1763; M. 15199; M. 10461.

(*e*) Scott, Feb. 19. 1771; 1 Hailes, 404; M. 15200; affirmed.

(*f*) Bennet, July 12. 1628; M. 15237. Geichen, July 17. 1628; M. 15238. Pringle, Jan. 16. 1629; M. 15238. Stewart, ut sup. Thomson, June 15. 1664; M. 15239. Cockburn, Feb. 10. 1698; M. 15247. Creditors of Auchinbreck, Feb. 11. 1748; M. 15248. Robertson, March 9. 1754; Elch. Tack. 20. Lesly, March 2. 1779; M. 15530; 2 Dow, 112; 1 Bligh, 510; 1 Bell, Com. 68. See Jordanhill's case, infra, § 1195. Wight (*d*).

1195. A question of some difficulty, however, arises on the construction of the statute 1449, in so far as a lease may have a definite term, and yet be equal to a perpetuity. It was manifestly not the design of that Act to create a species of leasehold estate equal to property (*a*), but only to protect proper tenants against singular successors. And not only by the words of the Act, but, by the spirit and design of it, the term ought to be limited to the proper temporary character of a lease; while any attempt to create estates of perpetuity by way of lease, must depend on other safeguards than the Act of Parliament (*b*). To what length of lease, then, the protection of the Act should be extended is a question on which much doubt has been entertained (*c*). The common term is of nineteen years; which, whether it corresponds to any physical revolution of the seasons or not, seems to give no recognised rotation of crops. A double term of nineteen, or thirty-eight, years has been usually recognised as fit for improving leases; while in mineral, or coal leases, a longer term still has been common; having regard to the extraordinary expense and slow returns. Long terms have also been sanctioned as suitable to building leases; where a large expenditure is necessary at the first, and the houses built remain long habitable. Amidst these varieties it may perhaps be held, 1. That leases for the usual period, either of agricultural, or even of improving, leases will be good against singular successors; 2. That liferent leases, or leases terminating with a liferent, will be effectual; 3. That building leases for such reasonable term as to indemnify the expense will be protected; 4. That mining leases may be greatly prolonged. But, 5. There are no cases which settle on any satisfactory footing the doubts that may be raised on this subject, and all that can be safely laid down is, that a lease in which a definite term is named, but with a renewal from term to term, is not effectual against singular successors (*d*); that though a lease for 2000 years, or even for 400 years, has been held not protected by the statute (*e*), those were cases not turning entirely on the point of duration: And that the criterion adopted in questions under entail prohibitions, annulling long leases as *alienations*, is not correct to be adopted in ordinary cases, where the singular successor has notice of the term of duration from the written lease followed by possession (*f*).

- (a) 2 Stair, 4. § 24, et seq.
 (b) Alison, Feb. 3. 1730; M. 15196. Creditors of Jordhill, Feb. 13. 1752; Elch. *Tack*, 18, and Notes, 446; 5 Brown's Sup. 977. Campbell, Nov. 30. 1785; M. 15233; 2 Hailes, 978.
 (c) Jordhill's case, supra (b). 1 Bell on Leases, 49, et seq.
 (d) Crichton, July 26. 1631; M. 15191. Oswald, June 20. 1688; M. 15194. Arg. ex. cases of Wight, and Scott, sup. § 1194 (e) and (f).
 (e) Alison, Feb. 3. 1730; M. 15196. Jordhill, Feb. 13. 1752; Elchies, *Tack*, No. 18. Kilk; M. 10307.
 (f) See below, § 1752, et seq.

1196. Where the lease is granted by one who holds the land under restraint against alienation (as by an heir of entail under prohibitions against alienating or disposing, or by a tutor or other temporary administrator), it must, in order to be effectual, not only be of definite duration, but of a duration not equivalent to alienation (a); nor beyond the duration of the administrative authority (b).

- (a) 1 Bell, Com. 69. Leslie v. Orme. See below of Entails, § 1752. 1 Bell, Leases, 126, note.
 (b) See § 2084, 2114.

1197. *Rent*. This is an essential part of the contract of location (§ 134). See further as to the principles on which rent is fixed, § 1227. But there is a distinction in this (as in regard to the term of duration), between questions with the granter and his heirs, and questions with singular successors.

1198. In questions with the granter of the lease and his heirs, the rent may be merely nominal, or it may be effectually discharged, or stipulated to be retained for debt. This is taken for granted in all the cases which have occurred with singular successors.

Ross, Jan. 31. 1627; M. 15167. Sinclair, Feb. 19. 1788; Bar. Hume, 773.

1199. In questions with singular successors, there must under the statute be a rent payable to the proprietor of the land (a). And that rent must stand undischarged, as some equivalent for the possession of which the purchaser of the land is deprived (b). Nor can there be any stipulation available against singular successors, by which the tenant shall be empowered to apply the rent in extinction of debt (c).

- (a) 1449, 18.
 (b) 2 Stair, 9. § 29. 2 Ersk. 6. § 29. Ross, Jan. 1627; M. 15167. Mac-
 laughlan, Feb. 11. 1748; M. 15248; Elch. *Tack*, 14. Lord Cranstoun's
 Creditors, Jan. 4. 1757; M. 15218; 5 Brown's Sup. 830.
 (c) Stair, ut sup. Cranstoun's case, supra, Douglas's Creditors, July 2.
 1757; M. 15219.

1200. There may, however, be, in consequence of the purchaser's agreement or acquiescence, a personal exception, which shall bar him from challenging such application of the rents ; as where the purchaser, with full knowledge of the leases, is taken bound to warrant them. See § 1194.

1201. The doctrine as to rent, delivered by Craig, is, that there must be a rent or something in its stead (*a*). And in so far as singular successors are concerned, the doctrine, as Erskine lays it down, is, that the rent in money, or grain, or service, must be expressed in the lease, and that, although below the true value, it will afford to the tenant an absolute security against removing (*b*). It is at the same time said, that the rent must not be elusory : But as there is no criterion according to which this can be ascertained, or the requisite rent fixed, the result on the whole seems to be, 1. That a rent, or annual return of some kind, is essential to the character of a lease (*c*). 2. That where rental-rights now exist, they are effectual against heirs, and even against singular successors with or without a grassum, provided the tenant has a written rental-right with possession (*d*). 3. That in consideration of a grassum the rent may be reduced to the lowest rate (a common resource for raising money to provide for younger children by heirs of entail ; see below, § 1229 and 1752) ; and the effect of such leases against singular successors has never been doubted. 4. That a discharge of the rent, in satisfaction of debt ; or a right to retain it for interest, or in extinction of the principal, is not good against singular successors (§ 1199) ; but it would seem that on the principle under which grassums and low rents have been sanctioned, the debt of a granter of a lease may so far be provided for, by taking the debt as a grassum, and reducing the rent to a low rate.

(*a*) 2 Craig, 10. § 2.

(*b*) 2. Ersk. 6. § 24.

(*c*) Ersk. ut supra, § 20, 24. 1449, 18 ; 2 Stair, 9. § 20.

(*d*) 2 Ersk. 6. § 37. See below, § 1279.

1202. Where the right of retention stipulated is not on account of a debt unconnected with the lease, but intended to render effectual some undertaking or counter obligation on the part of the tenant ; as the completing of fences, the building of farm offices, or for specified meliorations ; it will be effectual

against singular successors (*a*): In such case neither creditors nor purchasers have reason to complain, since, by the lease and possession, they have full means of learning how the stipulations and the rent stand, and so may regulate the price or their credit accordingly. But where the obligation is not in the lease, but separate, the same does not hold (*b*). Even where the retention for meliorations depends on local custom, it has been held effectual against singular successors (*c*). But it has been held that a stipulation of retention of part of the rent for personal services, as ground officer, was not binding on a singular successor (*d*). See for specific stipulations of the lease, improvements, particular outlays, &c. below, § 1256.

(*a*) Arbutnot, Feb. 5. 1772; M. 10424. H. Stewart, Nov. 12. 1834; 13 S. D. 4.

(*b*) Turner, March 1835; 13 S. D. 633. See § 1210.

(*c*) Bell, June 14. 1814; F. C.

(*d*) Ross, June 21. 1838; 16 S. D. 1179.

1203. Rent may be in money, grain, or other produce of the subject. And,

1204. 1. Money rent. Where the rent is in *money*, it is generally made payable at two terms in the year, Whitsunday and Martinmas (below, § 1230), held to be the LEGAL TERMS. Sometimes the term of payment is *before* the crop is reaped, sometimes *after*: The terms thus stipulated are called the CONVENTIONAL TERMS; the rent payable by anticipation being called FOREHAND RENT, that which is payable after the crop is reaped being called BACK RENT. The terms of payment of rent are important in questions with purchasers; between fiar and liferenter (§ 1047); and between heirs and executors (§ 1230 and 1499).

Kames's Elucid. art. 9. 2 Ersk. 9. § 64. 1 Bell on Leases, 220. Hunter on Leases, 294. Carnegie, July 24. 1668; M. 15887. Pringle, June 4. 1741; M. 15907. Marquis of Queensberry, Feb. 18. 1814; F. C. Elliot's Trustees, Nov. 28. 1792; M. 15917. Swinton, June 20. 1809; F. C. See also Murray Kynynmound, Nov. 6. 1739; M. 15906.

1205. 2. Grain rent. Where the rent is in *grain*, or otherwise payable in produce, 1. it is to be satisfied from the produce of the farm, if there be any. 2. If there be none, the tenant is bound and entitled to deliver fair marketable grain of the same kind (*a*). 3. If agreed to be converted into money, or if the grain be tendered and refused, it will be con-

verted according to the fiars (*b*). 4. If the fault of not delivering the grain be with the tenant, he will be liable to pay a conversion according to the market price (*c*). 5. The tenant failing to deliver grain when stipulated will be liable for damage, where the landlord has engaged to deliver grain to a merchant and is disappointed (*d*). 6. In order to reconcile with the imperial standard, the measures of capacity, according to which rents payable in grain are exigible under Scottish leases, it is ordered that an inquisition shall be taken (in like manner as in fixing the fiar prices) of the value according to the standard established by the act, of all rents in grain payable according to the measures formerly used in the county, to be transmitted to and enrolled at Edinburgh; the conversion to be the rule of future payment, according to tables to be made out and published (*e*). But, 7. It has been held that the 15th section of that act, annulling agreements in which any other than the standard weights and measures are specified without stating the ratio or proportion, does not apply to leases (*f*).

(*a*) Earl of Elgin, Jan. 11. 1825; 3 S. D. 422.

(*b*) 2 Ersk. 6. § 40. Barclay, March 1682; M. 4413.

(*c*) Ersk. ut supra. Earl of Elgin, ut sup.

(*d*) Ersk. ut supra.

(*e*) 5 Geo. IV. c. 74. § 18 and 19.

(*f*) Henry, May 25. 1832; 10 S. D. 572; affirmed, Aug. 9. 1834; 7 W. S. 111.

1206. *Subject.* The subject of the lease must be described so as to be fully identified. Where measure enters into the description, the recent statute is to be attended to, by which a standard yard is fixed, and the rood of land is to contain 1210, the acre 4840 square-yards, according to that standard yard.

5 Geo. IV. c. 74. § 2.

1207. The proper subject of lease is land, and the act of 1449 speaks of "the ground:." But mills, fishings, collieries, &c. fall under the same rules with leases of land.

2 Stair, 9. § 2. 2 Ersk. 6. § 27. 1 Bell on Leases, 31-33.

1208. The contract of lease implies a subject let; and 1. If it turn out that no such thing exists as the parties intended to be the object of agreement, the tenant cannot be bound to pay rent (*a*). 2. Where the subject fails (as where a house is

burnt; where a farm is by a flood or a hurricane reduced to sterility; where a coal is exhausted suddenly and unexpectedly), the tenant's obligation to pay rent will be discharged (*b*). 3. Where the destruction is partial, the point is more doubtful, and the distinction seems to be,—that if it be permanent, though partial, the failure of the subject let will give relief by entitling the tenant to renounce the lease, unless a deduction shall be allowed (*c*); that if it be not permanent, but temporary or occasional, it will not entitle the tenant to relief (*d*): And the ground of this distinction is, that while the contract implies the existence and warrantice of the subject, it is, in so far as belongs to the produce of that subject, a contract of risk. But in the decisions relief has been given to a greater extent than that distinction would authorize (*e*);—ex. gr. devastation of the crop by storm, &c. if plus quam tolerabile, has been admitted as a ground of abatement (*e*); but as the tenant takes the risk of the seasons, it must at least be some extraordinary event that will justify such a decision (*f*). Devastation by public calamity rests on another footing, as of this the tenant undertakes no risk, and it ought to fall on both alike (*g*). (See below, § 1253.) If the failure is by a supervenient law, it is held that the risk of such law is with the tenant; as in a lease of fishings in the North Esk, in which the close time was lengthened by 9 Geo. IV. c. 38 (*h*).

(*a*) See above, § 141. 1 Stair, 15. § 2, 3. 2 Ersk. 6. § 41. Gray, Jan. 11. 1706; 4 Brown's Sup. 635.

(*b*) Lindsay, June 13. 1612; M. 10120. Wilson, June 16. 1699; M. 10125. Murdoch, Feb. 12. 1829; 7 S. D. 404.

(*c*) Edmonstone, Jan. 13. 1675; M. 15172. Hamilton, Jan. 2. 1667; M. 10121. Futt, Jan. 12. 1671; 2 Brown's Sup. 504. Foster, July 16. 1762; M. 10131. Heriot's Hospital, July 1. 1709; M. 10126. Sharp, July 3. 1778; M. 10134. Walker, May 30. 1811; F. C.; 3 Dow, 233.

(*d*) Steedman, June 22. 1741; Elch. Tack, No. 9.

(*e*) 2 Ersk. 6. § 41.

(*f*) Earl of Eglinton, Dec. 3. 1742; M. 10128. Lindsay, *supra* (*b*).

(*g*) Wilkie, June 24. 1762; M. 10120. Ersk. *ut supra*.

(*h*) Holiday, May 28. 1830; 8 S. D. 831. Goldie, Dec. 16. 1796; Hume, 793.

1209. 4. *Possession on the Lease*. This is the proper completion of the real right of the tenant (*supra*, § 1190). Formerly it was questioned whether registration in the record of Reversions would supply the want of possession, and the answer was in the negative (*a*). In order to secure leases against singular successors, they were at one time completed by sa-

sine; but since 1449, possession is the sole badge of real right. Without possession commenced and continued, the tenant is a personal creditor on his contract: But possession *continued*, gives full effect in competition, or against singular successors (*b*). Assignment of the lease with intimation to the landlord is not sufficient (*c*). See below, § 1212.

(*a*) Dirlton and Stewart, v. *Tack*.

(*b*) 2 Craig, 10. § 7, 11. 2 Ersk. 6. § 25. 3 Stair, 2. § 6. Bell on Leases, 52. et seq. Johnston, Feb. 24. 1676; 15231.

(*c*) Grant, Nov. 27. 1802; Bar. Hume, 810.

1210. The possession must be *under the lease*. So, if the possession have begun on a verbal lease, and the term of entry by the written lease is not yet arrived, a singular successor will not be affected by such written lease: So, also, if an unexpired lease is at its close to be followed by a new one, written out and executed between the parties, possession *under the old lease* will not make valid the new (*a*). But if the right under the new lease is to begin *from its date*, although the old lease be not expired, and not renounced, the possession will be held to proceed upon the new lease, provided there be such difference of rent, &c. as fairly to shew the possession to be on the new lease (*b*). It has been held (but may be doubted) that by a separate and subsequent missive a prolonged term of possession was good against a purchaser (*c*).

(*a*) Drum, Jan. 5. 1602; M. 15209. Johnson, July 3. 1760; 5 Brown's Sup. 877. Cranstoun, Jan. 4. 1757; M. 15218; 5 Brown's Sup. 830; Douglas, July 2. 1757; M. 15219. Scott, Nov. 30. 1769; M. 15220.

(*b*) Neilson, June 21. 1671; M. 15231. Earl of Cassillis, Nov. 27. 1686; 3 Brown's Sup. 600. See 1 Bell on Leases, p. 63. et seq.

(*c*) Thomson, May 13. 1791; Bar. Hume, 780. See Turner, § 1203 (*b*).

1211. Possession must be actual. But it may be either natural or civil; a tenant possessing by his sub-tenant as effectually as if himself resident and sole cultivator of the farm.

2 Ersk. 1. § 22.

1212. *Lease as a Security for Money*. It was of old frequently attempted to render leases available securities for debt; and in more recent times the great expenditure necessary in particular branches of industry have made it desirable that a tenant (especially of ground for the erection of manufactories) should have the means of borrowing money on the security of an assignment to his lease. 1. The former attempts we

have seen proved abortive (see above, § 1194 and 1201) 2. The more modern proposal to secure the loan by sub-lease or assignation, has hitherto proved unsuccessful. So far as the matter can be stated as settled, the rules seem to be, 1. That actual possession as sub-tenant or assignee will make the right effectual to the lender, even although there should be a clause excluding assignees and sub-tenants; unless the landlord should object to it (*a*). 2. That if the security is by assignation of the principal lease, when a sub-lease has been already granted, possession by levying the surplus rent, or intimation of the conveyance to the sub-tenant, will complete the right; which truly resolves into an assignation of the surplus rent (*b*). 3. That it is not enough to intimate the assignation of a lease to the landlord (*c*). 4. That it is not enough to intimate the assignation of a sub-lease to the principal tenant; but possession, natural or civil, must follow in order to complete the right effectually against singular successors (*d*). 5. That an assignation to the lease, with delivery of it to the assignee, followed by a written sub-lease from the assignee to the principal tenant, under which alone (without any power of ascribing his possession to the principal lease) his possession proceeds, seems to be the most effectual completion of the conveyance which can be adopted in the present state of the law (*e*). 6. It has been attempted, under leases of very long duration, to create securities by heritable bond, but this has been found ineffectual (*f*).

(*a*) Wallace, July 11. 1627; M. 67. Wallace, Nov. 16. 1750; Kilk.; M. 2805; Elch. *Tack*, 17. See below, § 1218.

(*b*) Wallace's case; and Simc's Trustee, May 23. 1806; M. *Tack*, 13.

(*c*) Grant, Nov. 27. 1802; B. Hume, 811. Yeoman, Feb. 2. 1813; F. C. Russell, Dec. 3. 1822; 2 S. D. 62. 1 W. S. App. Cases, 620; 5 S. D. 891. See Kennedy, Feb. 19. 1829; 7 S. D. 435; Brock v. Cabell, Nov. 29. 1822; 2 S. D. 52; 3 W. S. App. Cases, 75. Same case, March 5. 1830; 8 S. D. 647; affirmed, Sept. 23. 1831; 5 W. S. 476. See Russel, in House of Lords, 1 W. S. 620; 5 S. D. 891; 5 W. S. 257. Hamilton, May 25. 1830; 8 S. D. 799. *

(*d*) Hardie Doaglas, June 6. 1794; M. 2802, as corrected in Yeoman's case. Inglis and Co. Feb. 26. 1829; 7 S. D. 469.

(*e*) Cases *supra* (*c*). M'Phail, Feb. 14. 1833; 11 S. D. 396.

(*f*) Grieve, May 27. 1790; Bar. Hume, 778.

Estate of the Tenant.

1213. The greater part of Scotland is in the hands of tenants; who contribute to the cultivation of it by their capital or credit, skill and industry, in reliance on certainty of posses-

sion, and on such returns from the land during the stipulated period, as one year with another may replace their outlay, and afford a fair profit. Two points arise for consideration; 1. Permanency of the lease; 2. Management and cultivation of the farm.

1214. 1. PERMANENCY OF THE LEASE. Leases, at will, and for services which were deemed base by military vassals, was the first stage of tenancy in Scotland; and it was at that time a great object to keep the ground so let in the hands of the selected tenants, and to prevent it from coming into hostile possession. With the permanency of the right arose the science of agriculture, properly so called; and such permanency came naturally to be regulated on an estimate of the rotation necessary for the indemnification of the tenant. To complete the security of the tenant, however, it is not only necessary to protect him against creditors of the landlord, and purchasers of the land; but also, in order to give him full confidence to engage with energy in his labour and improvements, that his right should be available to his heirs and family, and even to those to whom, amidst the misfortunes and accidents of life, he may find it necessary to make it over, on his own or his family's incapacity to reap advantage from it. But the dilectus personæ begun in an early age, and recommended by the nearness of the connexion of landlord and tenant, and the discomfort to the landlord from the introduction of a disagreeable or troublesome tenant, have contributed to give great force to the landlord's right of choice of his tenant's successor.

1215. *Assignees and Sub-tenants.* Farms are either already improved, and ready for successful cultivation; or such as require improvement: and for these a difference of duration of lease is suitable, in order to enable the tenant to perform his part, proportioned to the great difference of outlay, expense, and industry. See above, § 1195.

1. Where the farm is fully improved, and the houses and fences in good condition, nothing more is requisite on the part of the tenant than good cultivation, in order to do justice to himself and to the landlord, by producing good crops without exhaustion of the soil, affording a fair rent and reasonable profit, and enabling him to restore the land uninjured on quit-

ting possession. Short leases are sufficient for this purpose : And, 1. grass farms may be from year to year ; but, 2. corn farms require one, or two, or three rotations or courses of crops. In the richer soil of England, leases are commonly very short. In Scotland, the ordinary length of leases is nineteen or twenty-one years ; which, however, do not seem to correspond with any particular course of rotation. See § 1195.

2. Where the farm is in a state of dilapidation, the soil exhausted, the farm out of order, and much labour and outlay necessary to prepare it for successful cultivation ; either the landlord must be at the charge of restoring the farm, or the tenant, if he undertake the burden, must be allowed a longer lease than would in ordinary circumstances be required, or the rent must be made lower ; so that in the one way or the other the tenant may be indemnified. An improving lease, if the rent is kept up at an average rate, is generally of double the length of the ordinary lease,—thirty-eight or forty-two years.

Between the two cases above stated a practical distinction is observable. In a lease of ordinary length, by the law of Scotland, the *dilectus personæ* has full operation ; and assignees and sub-tenants are excluded, unless by stipulation admitted ; while in England the leasehold estate is absolute, and implies a power to assign. In longer leases, by the law of Scotland, the tenant may, without leave of the landlord, assign or subset ; and, unless there is a stipulated exclusion, the tenant's assignee, or heirs, or creditors, may enjoy the land, or be entitled to demand a compensation if deprived of it.

1216. The general rule, then, as to assignees and sub-tenants, is, that where there is no stipulated exclusion of them, the law presumes and gives effect to the landlord's selection of a tenant, and exclusion of all of whom he does not approve. This at first was held to exclude even heirs at law ; now it excludes only assignees and sub-tenants (*a*).

See below, of Urban Tenements, where a different rule prevails, § 1274.

To the above rule these exceptions are admitted :—1. Creditors adjudging their debtor's lease, are not excluded, without an express clause of exclusion (*b*). 2. In improving leases of long duration (*c*), and in liferent leases (*d*), the possession may

be effectually assigned or sublet, if there be no clause of exclusion. 3. If there be a clause of exclusion of assignees, it is held also to exclude sub-tenants (*e*).

(*a*) 2 Ersk. 6. § 31, 32. 1 Bell, Com: 75, 76. 1 Bell, Leases, 145, 175, et seq. 187. Thomson, Nov. 25. 1750; Kilk.; M. 10337. Rattray, Feb. 14. 1623; M. 10336. Lady Binney, Jan. 2. 1672; M. 10382. Hume, June 21. 1680; M. 10391. Alison, Jan. 22. 1788; M. 15290. Lord Peterborough, March 8. 1791; M. 15293.

(*b*) 2 Stair, 9. § 26. 2 Ersk. 6. § 32. 1 Bell, Com. 77. Elliot, Dec. 4. 1747; M. 10333. Elchies v. *Tack*, 12. and p. 444. Kinloch, July 6. 1791. See § 1218.

(*c*) Simson, May 22. 1794; M. 15294. Earl of Cassillis, Dec. 5. 1806; M. 15301, note.

(*d*) Ersk. ut supra. Duff, July 16. 1672; M. 10282.

(*e*) Trotter, Nov. 22. 1770; M. 15282.

1217. Where the lease contains express power to assign or sublet, the whole stipulations are available to any assignee or sub-tenant who shall acquire right.

M'Guffog, Feb. 22. 1822; 1 S. D. 342.

1218. Where the lease contains a clause of exclusion, the construction and effect are regulated thus:—1. Express exclusion of assignees excludes creditors adjudging (*a*); and although on bankruptcy (where bankruptcy is **not** made a stipulated forfeiture of the lease) the tenant may himself continue in possession, and communicate to his creditors the benefit of the lease, no manager or trustee is admitted; that being regarded as a virtual assignation (*b*). 2. At one time such exclusion was held fatal to the lease on the marriage of a female tenant, as being a legal assignation to the husband; but the rule is now settled the other way, the husband not taking the lease as assignee, but as administrator for the wife (*c*). 3. A lease excluding assignees “unless approved of by the landlord,” has the same force with an unqualified exclusion; the tenant has no right under such a clause to require the landlord to justify his refusal (*d*). 4. A clause of exclusion, fortified by a declaration of irritancy on bankruptcy, will effectually prevent any arrangement for continuing the lease to the benefit of creditors on bankruptcy. 5. A stipulation of residence on the farm, with exclusion of assignees and sub-tenants, will bring the lease to an end, if the tenant shall have absconded; and without such condition of residence his leaving the country is considered an abandonment (*e*). See below, § 1260. 6. Clauses of exclu-

sion are personal to the landlord, and confer no right of challenge upon any one not coming in his right (*f*): Neither are creditors entitled to take advantage of such a change to get rid of the tenant's obligation to continue the lease or to avoid a claim of damages (*g*).

(*a*) Elliot, ut sup. § 1216 (*b*) Cunningham, Nov. 21. 1770; M. 10410.

(*b*) 1 Bell, Com. 80. Bell on Leases, 161. Jameson Durham, Jan. 23. 1773; M. 15283. Laird, June 30. 1791; M. 15294; Bell's Cases, 296. Earl of Dalhousie, Dec. 1. 1802; F. C. Monro, Dec. 11, 1811; F. C. Watson, Dec. 4. 1811; F. C. Earl of Galloway, June 6. 1803. Buchan Sydsarf, March 8. 1814; F. C.

(*c*) 2 Craig, 10. § 6. 2 Ersk. 6. § 31. 1 Bell, Com. 76. Hume, Jan. 1734; M. 5700. Elliot, ut supra (*a*). Gillan, March 9. 1775; M. 15286; 2 Hailes, 631; affirmed in House of Lords.

(*d*) 1 Bell, Com. 78. 1 Bell, Leases, 181. Duke of Roxburgh, March 5. 1785; 4 Dict. of Decisions. Elliot, supra (*a*). Ramsay Irvine, June 29. 1791; 1 Bell, Com. 78, note 2. Muir, Jan. 20. 1810; F. C.

(*e*) 1 Bell, Com. 81. Copland, Dec. 7. 1805. Forbes, June 2. 1812; F. C. Hog, March 4. 1825; 3 S. D. 617. Scott, Feb. 27. 1829; 7 S. D. 481. Tenant, June 16. 1836; 14 S. D. 976. Richardson, June 24. 1835; 13 S. D. 972.

(*f*) 2 Ersk. 6. § 31, as corrected by Hay, Dec. 8. 1801; M. 15297. Lord Minto, Nov. 20. 1798; M. 15295. McCoag, May 12. 1803; Bar. Hume, 813.

(*g*) Kinlock, June 7. 1836; 14 S. D. 905.

1219. *Heir of the Tenant.* The death of the tenant may raise questions of much importance, both to the landlord and the tenant's family. And, 1. The tenant's heir at law succeeds to the lease, although there be no express destination to heirs. 2. Where a lease is granted to two tenants, and their heirs and successors, the heir of the tenant who dies first, is entitled to continue the joint possession with the survivor (*a*). 3. Where the tenant is succeeded by daughters, they, as heirs-portioners, take the lease pro indiviso. The pro indiviso share of each descends to her heirs: But if such heirs-portioners succeed as liferenters in a lease provided to a man "during his lifetime and that of his heirs," this seems to be limited to the life of his immediate heirs; and so the death of one of the heirs-portioners will put an end to her pro indiviso share, instead of giving the succession to the survivor, who can take only as *her* heir (*b*): 3. A lease, terminating with a liferent to any "person to be condescended on by the tenant by a writing under his hand," was held to be effectually destined to his "eldest daughter then in life" (*c*). 5. Although it is of importance to the tenant in many situations, to have the power of regulating the succession to the

lease, a destination of the lease to heirs, with a clause excluding assignees and sub-tenants is held to prevent the tenant from naming an heir; hæredes nati, not hæredes facti, being intended. A conveyance inter vivos to the heir-at-law will indeed be effectual (*d*); but the tenant has been held to have no power to name an heir different from the heir-at-law, without the landlord's assent (*e*).

(*a*) Dickson, July 10. 1821; 2 S. D. 462.

(*b*) M. of Tweeddale, June 14. 1821; 1 Illus. 150.

(*c*) Irvine, March 6. 1827; 5 S. D. 534.

(*d*) Hepburn, Feb. 14. 1759; M. 10409.

(*e*) 1 Bell, Leases, 157. Deuchar, Nov. 20. 1798; M. 15295. Grieve, March 8. 1803; M. 15298; House of Lords, Nov. 21. 1805; 1 Bell, Leases, 162, note. Lowden, Nov. 21. 1805; M. Tack, App. 10.

1220. 2. MANAGEMENT AND CULTIVATION OF THE FARM.

The interests of the landlord and of the tenant are nearly the same during the early part of the lease; and diverge only as the lease draws towards its close. It is, at first, for the benefit of the tenant as well as of the landlord, to keep the land in good heart and cultivation. But gradually, as the lease advances, the interest of the tenant, in contemplation of his removal, prompts him to seek the largest possible profits while his possession continues. To avoid litigation on questions so doubtful as the settling of the rules of good husbandry suggest, the parties commonly fix certain points by the lease. The general principle of such conventional arrangement is, that injury to the landlord is to be prevented, without unduly restraining the spirit of improvement and fair profit on the part of the tenant. And the most approved practice seems to be, to leave the tenant less fettered towards the commencement of the lease; and even at the close to introduce only *negative* regulations for preventing the breaking up of old pasture land, or the exhausting of the land by a bad course of cropping; as the taking, for example, of two white crops in succession. *Positive* regulations are chiefly directed to the rotation of crops, and to secure the consumption of the straw made on the farm; and, as far as possible, the application to the land of the manure made from its produce. Such views have directed Lord Kames, and others, to certain proposals for arranging the adverse interests of landlord and tenant; and have of late years dictated many extensive systems of leasehold management in Scotland.

Kames' Gentleman Farmer, Supplement, 6th edition. 1 Bell, Leases, 246, 258; and in App. No. 2. p. 161, will be found a very valuable collection of the practical arrangements throughout Scotland on this matter. See also Hunter, Landlord and Tenant, p. 764, et seq.

1221. Where positive regulations of the course of cultivation are introduced, the rules are, 1. That if clear, they will be enforced. 2. That where they are fortified by a penalty, it is subject to modification according to the damage actually sustained (*a*). 3. That where an additional rent is stipulated, such rent is held the conventional value of the different use and possession which the tenant may derive from the farm; and as such not subject to modification (*b*). See above, § 34.

(*a*) 1 Illus. 42. Muir, M'Kenzie, June 18. 1811; F. C. Wortley M'Kenzie, Dec. 13. 1811; F. C. Pollock, Feb. 24. 1777; M. Tack, App. 4; 2 Hailes, 766.

(*b*) Frazer, Feb. 25. 1813; F. C. Graham, in House of Lords, May 11. 1789. See Morison, Feb. 22. 1823; 2 S. D. 241. Miller, May 26. 1824; 3 S. D. 65; affirmed, March 3. 1826; 2 W. S. 52. Lawson, May 16. 1832; 10 S. D. 531.

1222. There are certain *implied* obligations of the tenant, relative to the cultivation and management of his farm, which may be judicially enforced. And, 1. He is bound, according to the nature of location, to enter to the farm: In which it is implied that he shall properly stock it,—both from the necessary obligation to cultivate it properly, and from the implied engagement to afford security for the rent (*a*). 2. He is bound to labour it honestly and tanquam bonus vir, during the whole stipulated term (*b*). But this implied obligation will yield to express rules laid down and observed (*c*). 3. Where no rules have been prescribed, and the landlord has not objected to the tenant's operations during the lease, he has no right to claim damages at the close (*d*).

(*a*) Randiford, Feb. 1623; M. 15256. Scott, see § 1218 (*e*). Horn, Jan. 19. 1830; 8 S. D. 329. See below, § 1258.

(*b*) 2 Ersk. 6. § 39, with Ivory's Notes, and cases there cited. Murray, Feb. 1665; M. 15257. Lord Haddo, Feb. 6. 1633; M. 7539. Maxwell, July 12. 1776; 5 Brown's Sup. 515. Thomson, Nov. 12. 1824; 3 S. D. 275. Wemyss, Feb. 7. 1809; F. C.

(*c*) Stark, Nov. 28. 1826; 5 S. D. 45.

(*d*) Frazer, March 9. 1824; House of Lords, 2 Shaw's App. Cases, 37.

1223. A Court may interfere for the prevention of any inequitable departure from the implied, or any breach of the express, obligations of the lease. But it is not the office of a

judge to prescribe positive regulations of cropping or cultivation to be followed.

Meldrum, June 21. 1737; Elch. *Tack*, 4. Muir M'Kenzie, June 18. 1811; F. C. Wortley M'Kenzie, Dec. 13. 1811; F. C. See 1 Bell on Leases, 256. note.

1224. TENANT'S USE OF THE LAND. The tenant's right of possession of the land comprehends,

1. The *exclusive* possession, with all the rights to prohibit encroachment which the landlord would himself have enjoyed if the lands had been in his natural possession (§ 940. et seq). The tenant is entitled, for preservation of his crop, to kill rabbits (*a*), but not to destroy pigeons (*b*). The tenant's right to exclude others is under the exception of the landlord's right to come upon the farm, in exercise of his reserved interest in mines, &c.; of his right to preserve or cut timber; and even of his privilege of hunting and shooting; responsible, of course, in all those cases, for any surface damages which he may occasion (*c*).

2. The tenant has also the *absolute* use, in so far as necessary for habitation, and for the cultivation and reaping of the fruits of the land. He has the benefit of any servitude belonging to the subject (*d*), and a right to suitable accommodation in the parish church, out of the area belonging to the landlord (*e*). The tenant of a grass field has been held entitled to enter it at Candlemas, and dress it for the ensuing season, without leave of the tenant in possession; who is not entitled to graze it at that season (*f*). It has not been settled whether the tenant (if otherwise qualified to kill game) has the right of hunting or shooting on the farm; but it rather appears that without the landlord's express permission, he has no such right (*g*).

(*a*) Moncrieff, Feb. 13. 1828; 6 S. D. 530.

(*b*) Easton, May 18. 1832; 10 S. D. 542.

(*c*) 1 Bell on Leases, 433. Ronaldson, May 21. 1804; M. 15270.

(*d*) Wood, March 9. 1809; F. C.

(*e*) Skirving, June 21. 1796; M. 7930.

(*f*) Marquis of Tweeddale, June 18. 1808; F. C. Earl of Hopetoun, Jan. 17. 1810; F. C.

(*g*) Hamilton, June 19. 1830; 8 S. D. 955.

Estate of the Landlord.

1225. The landlord's estate is either, 1. reserved as not included in the lease; or, 2. stipulated, as rent.

1226. 1. RESERVED RIGHT OF THE LANDLORD. This comprehends the following particulars:—

1. *Mines and minerals, clay, lime, and shell-marl.* The landlord has an implied right to work these; and even to open the ground, so far as may be necessary for that purpose, on paying surface damage. But he is not entitled, without stipulation, to manufacture the rude materials on the land (*a*).

2. *Woods* are also reserved to the landlord; the tenant being entitled to the yearly fruits, thinnings for repairs, willow twigs while young for basketwork, &c. (*b*). The planting on farms is specially protected by statute (*c*).

3. *Kelp* on the shores of a farm does not belong to the tenant (*d*).

4. *Hunting.* The landlord has by implication the right to hunt or shoot over his tenant's farm (*e*).

(*a*) 2 Stair, 9. § 31. 2 Ersk. 6. § 22. Colquhoun, Feb. 15. 1668; M. 15253. Smith, June 21. 1768; M. 15266; 1 Hailes, 223. Bethune, Feb. 10. 1778; M. 15267; 5 Brown's Sup. 517; 2 Hailes, 786.

(*b*) 2 Ersk. 6. § 22. Touch, June 16. 1664; M. 15252. Bogue, Nov. 21. 1806; M. *Planting*, App. 2.

(*c*) 1685, 39. 1690, c. 16. Ferguson, June and July 1734; M. 10479. Robertson, July 21. 1744; Kilk.; M. 10484; Elchies' Notes, 331. Stirling, Dec. 4. 1762; M. 9403; 5 Brown's Sup. 536, 888. Logan, July 21. 1775; M. 10492; 2 Hailes, 644. Cooper, Jan. 18. 1805; F. C.; M. *Planting*, App. 1. Gillies, Dec. 3. 1824; 3 S. D. 358.

(*d*) Campbell, June 2. 1795; M. 9646.

(*e*) Ronaldson, Marquis of Tweeddale, and Earl of Hopetoun, supra, § 1224.

1227. 2. RENT. The great object in all stipulations respecting rent, is to reconcile the interest of the landlord and of the tenant in the varying results of the operation of the skill, industry, and capital of the tenant, upon the natural and inherent powers of the soil, which is the property of the landlord. Rent, according to its legal definition, is the stipulated annual return or consideration paid by the tenant to the landlord for the use and possession of the farm, and for the produce derived from it. To do justice to both parties, and prevent loss on either side by sudden changes on the value of money and of farm produce, 1. The yearly rent, or a considerable portion of it, should be regulated by the fiars of such grain, or other produce, as the farm is likely to yield; and in such proportions of the several kinds as are likely to be raised: And, 2. a maximum and minimum should be fixed, above or below which the augmentation of the money conversion, or its diminution, ought not to go. The same rules may be applied to dairy farms, or sheep farms; the conversion of the cheese or wool being made by arbitration.

1228. Rent is naturally periodical; but sometimes part is paid by anticipation in grassum. And so, grassum, which is a fine paid for a lease during a term of years, is, when analyzed, a proportion taken from each year's rent, and paid at once by anticipation; either to supply some necessity for ready money, or to disappoint some future possessor of the estate. At one time grassums were much used as a fund of provision for the families of the proprietors of entailed estates; more recently, for defeating indirectly the interest of subsequent heirs of entail.

1229. Purchasers and creditors have, generally speaking, no right to challenge leases let on grassums (*a*). Neither have heirs of entail any such right, where there is no prohibition to alienate or let leases with diminution of the rental; but such prohibitions strike against grassums (*b*). See § 1752.

(*a*) 2 Ersk. Pr. 6. § 10. 2 Ersk. 6. § 27. Supra, § 1201.

(*b*) Queensberry Leases, 1 Bligh. 339, 534; 5 Dow, 297. Duke of Hamilton, May 21. 1816; 2 Bligh. 196. Wellwood, Nov. 12. 1823; 2 S. D. 475. Earl of Elgin, House of Lords, 1 Shaw's App. Cases, 44.

1230. The legal terms for payment of rent are Whitsunday and Martinmas, subject to alteration according to the agreement of the parties (above § 1204). The entry to the houses and grass is generally at Whitsunday; to the arable land at the separation of the crop, or at Martinmas. The first half-year's rent is regularly payable at the Whitsunday after entry; the second half-year's rent is payable at the second Martinmas. The rent may be stipulated *forehand*, *i. e.* payable at the Martinmas after entry to the houses and grass; and at Whitsunday, while the first crop is still on the arable land; or at Lammas and Candlemas of the first year. *Back-rent* is payable, one-half at the Martinmas after the separation of the first crop, and the other at the following Whitsunday; or at Candlemas and Lammas after the first crop is reaped.

NOTE.—The effect of these arrangements on hypothec, and on the succession of the landlord and of the tenant, will deserve attention. Below, § 1240 and 1499.

1231. *Means of enforcing payment of Rent.* The payment of rent may be enforced by personal diligence; or by diligence against the crop and stocking; or by force of irritancy, or for-

feiture of the lease. And there is no retention of rent admitted on the ground of illiquid claims of damage (a).

It is competent to insist in the personal action and in the sequestration for rent at one and the same time (b).

(a) Dun, Nov. 12. 1824 ; 3 S. D. 274. Heriot, Jan. 29. 1825 ; 3 S. D. 479. Fraser, July 9. 1828 ; 6 S. D. 1117. Mouat, Nov. 29. 1828 ; 7 S. D. 88. Johnston, Jan. 28. 1832 ; 10 S. D. 260.

(b) Booth v. Pentland, House of Lords, March 31. 1831 ; 5 W. S. 228.

1232. 1. *Personal Diligence*. The tenant is, under his contract, liable in his person and funds to summary diligence for the rent. On registration of the lease, under a clause to that effect, personal diligence may be issued for the rent as summarily as if the debt were constituted by bond. And diligence may thus be raised at the first, for the whole periodical payments of the rent, to the effect of authorizing a charge for each term's rent as it falls due, "the term of payment being first come and bygone" (a). But although a creditor is entitled to a warrant de meditatione fugæ, if the tenant be about to leave the country, it is very doubtful whether he can insist for caution to the full amount of all future rents, without giving a reasonable allowance for the value of the abandoned lease (b). The charge on personal diligence must be definite (c).

(a) 3 Jurid. Styles, 634. 2 Bell on Leases, 4.

(b) McGill, March 9. 1838 ; 16 S. D. 934. With great deference, I cannot hold this case to settle the law in favour of so unjust a right.

(c) M'Martin, Nov. 12. 1824 ; 3 S. D. 275.

1233. 2. *Landlord's Hypothec and Sequestration*. The landlord has security for his rent by hypothec ; with a power of having the hypothecated subjects converted into a specific pledge, and finally applied to his payment, by the process of sequestration and sale.

2 Ersk. 6. § 56. 2 Ross, 392. Kames' Law Tracts, No. 4 ; Elucid. art. 10. 2 Bell, Com. 28. 1 Bell, Leases, 362. Hunter, Landlord and Tenant, 668.

1234. 1. *Hypothec*. This is a real right of security similar to pledge, but not requiring possession. See below, § 1385.

1235. *Subjects of Hypothec*. These are various, according to the nature of the lease. 1. In arable farms, the hypothec extends over the produce of the land, and the cattle and sheep fed on it (a) ; and over the stocking, and horses used in husbandry (b) ; but it is doubted whether it extends over the te-

nant's furniture (*c*). 2. In grass farms, it extends over the grass-mail, if the fields are let out in pasture; but not over the cattle of others taken in to pasture (*d*). 3. In dairy farms, the cheeses made and stored are subject to the hypothec (*e*). See below, § 1276, for urban hypothec.

(*a*) 1 Stair, 13. § 15, and 4, 25. 2 Ersk. 6. § 56—61. 2 Bell, Com. 29. M'Dowal, Feb. 15. 1781; M. 6215. Crichton, Dec. 11. 1672; M. 6203.

(*b*) Hepburn, Jan. 1726; M. 6205.

(*c*) Alison, July 1748; M. 6246.

(*d*) Correct 1 Bank. 17. § 10. by 2 Ersk. 6. § 63. Brown, Nov. and Dec. 1724; M. 6204. Ross M'Kye, Dec. 4. 1780; M. 6214.

(*e*) Goldie, Jan. 25. 1839; 1 D. B. M. 426.

1236. Operation of Hypothec. The right operates differently where there is no other person concerned in the possession than the original tenant, and where there is a sub-tenant: It also operates differently against the crop, and against the cattle and stocking.

1237. Where there is a sub-tenant, there is not only a hypothec to his immediate landlord, the tenant; but, if the landlord have not authorized or assented to the sub-lease, the sub-tenant is liable to hypothec for the principal tenant's rent also.

If the landlord have sanctioned the sub-lease, the sub-tenant is saved from responsibility to any greater amount than his own rent. And he is also safe from the landlord's hypothec to any extent, if he have paid his rent regularly, and in bona fide to the tenant (*a*). The principal tenant is primarily liable to the landlord, not a mere cautioner for the sub-tenant. If the landlord have proceeded to sequester the sub-tenant, he may abandon that proceeding without discharging the principal tenant; who has it in his power himself to sequester, or on paying the rent, to take up the landlord's sequestration. But if the landlord should not only abandon his diligence, but give time to the sub-tenant, the principal tenant will be freed (*b*).

(*a*) 2 Ersk. 9. § 63. 2 Bell, Com. 32. Lord Saltoun, June 25. 1700; M. 1821. Blane, March 8. 1785; M. 6232.

(*b*) Williamson, Jan. 28. 1830; 8 S. D. 405.

1238. A cautioner for rent may, on paying the rent to the landlord, insist for an assignation to the hypothec (*a*). But the landlord will not lose his recourse on the cautioner by neglecting to enforce his hypothec (*b*), provided he does not give time to the tenant (*c*). See above § 262.

(a) Stewart, May 31. 1814 ; F. C. Christie, Dec. 14. 1814 ; F. C. M'Arthur, Dec. 14. 1822 ; 2 S. D. 84.

(b) M'Queen, June 11. 1811 ; F. C.

(c) See Williamson, *supra*, § 1237.

1239. The hypothec over the CROP entitles the landlord to retain the entire crop, at the tenant's risk, if the rent is not yet due, or at least to the full amount of the rent ; but if bona fide sold, or given in payment of debt, while enough is left for the rent, the landlord cannot attach, by poinding for debt, what remains, and seek restitution of what has been so disposed of, as under hypothec. The hypothec covers the rent of the year of which that crop is the produce ; remaining effectual while the crop is in the tenant's possession (a). The crop cannot be sequestrated for the rent of a former year ; and if such sequestration be taken the landlord will be liable in damages (b).

(a) Correct 2 Ersk. 6. § 58. by 2 Ersk. Pr. 6. § 26. 2 Bell, Com. 33. notes. Pringle, June 30. 1736 ; M. 6216. Rutherford, June 29. 1736 ; M. 6226. Hay, July 25. 1623 ; M. 6188. Crawford, 1737 ; M. 6193. Taylor, Jan. 11. 1750 ; M. 6197. Brims, May 31. 1815 ; F. C.

(b) Horn, Feb. 5. 1830 ; 8 S. D. 454.

1240. The hypothec over the CATTLE and STOCKING is effectual for each year's rent successively as it falls due ; the hypothec expiring as to each year's rent, if no sequestration follow within three months after the last term's payment of the rent.

Hepburn, Jan. 1726 ; M. 6205.

1241. The landlord is not entitled to a preference as against the superior for his feu-duties (a) ; nor to farm-servants claiming wages (below, § 1407) ; nor to funeral expenses (b) ; nor to the Crown (see below, § 1247). But the landlord is entitled to retain the crop on the farm ; to stop poinding ; and to recover and bring back under the operation of his hypothec, and subject to sequestration, the crop for the rent of the year of which it is the produce ; and at any time, within three months, the stocking for the rent of the current year (c).

(a) 2 Ersk. 6. § 63. Lawrie, Jan. 24. 1823 ; 2 S. D. 155.

(b) Rowan, June 29. 1742 ; M. 11852 ; see § 1406.

(c) Crichton, Dec. 11. 1672 ; M. 6203. Rorison, June 19. 1766 ; M. 6211 ; 1 Hailes, 41. Smart, in House of Lords, Oct. 26. 1796.

1242. He is entitled to vindicate the corn grown on the farm, even against bona fide purchasers, unless sold in bulk in

public market (*a*). There is no such right of vindication against the purchasers of stocking (*b*). See below as to Urban Tenements, § 1277.

(*a*) Smart, Dec. 10. 1793. 1 Bell on Leases, 375. Hunter, Landlord and Tenant, 706. Dalhousie, Feb. 27. 1828; 6 S. D. 626; affirmed, Dec. 7. 1830; 4 W. S. 420.

(*b*) Hay, March 29. 1639; M. 6219. Scot, June 11. 1678; M. 6223. Tenant, Feb. 28. 1833; 11 S. D. 471.

1243. The hypothec is communicated,—1. To an assignee to rents; 2. to a creditor infeft in security; but, 3. not to adjudgers uninfeft.

1244. 2. Sequestration. By this process the real security of hypothec is converted into a special pledge, and the subject of it brought to sale for payment of the rent. While the effects sequestrated remain after sequestration in special pledge, no one is entitled to intromit with them, without judicial authority; and his doing so is a breach of sequestration, punishable as a contempt of court (*a*). But where horses and corn have been sequestrated, and part of the sequestrated corn thrashed out by the tenant and given for the subsistence of the horses, it has been held justifiable (*b*).

(*a*) Love, Jan. 19. 1832; 11 S. D. 280.

(*b*) Millar, June 23. 1831; 9 S. D. 792. Gordon, Nov. 14. 1823; 2 S. D. 486. Gordon, June 11. 1836; 14 S. D. 954.

1245. The process of sequestration is competent either during the currency of the term, or after the rent is due. It commences by a summary application to the Judge Ordinary, but with a different prayer in the two cases now mentioned. When the rent is already payable, the prayer is to sequester, take inventory, and grant warrant to sell. When the application is made before the term, the prayer is only to sequester in security, and take inventory. But this latter process is not, after the term, convertible into a proceeding in which the effects may be sold (*a*).

The usual procedure in a sequestration for sale has been, that the Sheriff granted a warrant to take inventories; and on a report made to him of the effects inventoried, he sequestered them. But by Act of Sederunt, the Sheriff may, on the application, pronounce an interlocutor sequestrating the crop, stocking, and effects, and grant warrant to take inventories, and serve the application on the tenant (*b*). This inventory is the criterion and measure of what is sequestrated (*c*).

After sequestration, a warrant is, on application of the landlord, granted by the Sheriff, authorizing the sale of the articles sequestered. But such warrant must be carried into execution at the sight of the Clerk of Court, or some one authorized by the Sheriff (*d*).

(*a*) Millar, June 23. 1831 ; 9 S. D. 792.

(*b*) Act of Sederunt, Nov. 12. 1825, and July 11. 1839.

(*c*) Horsburgh, Feb. 26. 1825 ; 3 S. D. 596.

(*d*) Act of Sederunt, ut supra.

1246. A report of the sale must be made within fourteen days after the warrant shall have been issued, and the roup rolls lodged in process, with an account of expenses, and a state of the debt, shewing the exact difference between the debt and the proceeds of the sale.

Cargill, May 27. 1829 ; 7 S. D. 662. Act of Sederunt, ut supra.

1247. As, by virtue of his hypothec, the landlord has no preference over the Crown, so, even by sequestration and a warrant to sell, he does not acquire such preference (*a*). But after sale of the effects, an order on the Sheriff-clerk to pay the price to the landlord seems to prevail over the Crown (*b*).

(*a*) Ogilvie, June 29. 1791 ; M. 7884, as decided in House of Lords ; M. 7889. Robertson, July 6. 1802 ; M. 7891.

(*b*) See Tait's Justice of Peace, 175.

1248. 3. *Irritancy of the Lease*. This is another, though an indirect, mode of enforcing the payment of the rent ; and it is either by force of stipulation, or by law.

1249. 1. *Stipulated Irritancy*. At common law, the tenant's breach of engagement grounded an action of declarator and removing ; and the conventional penalty was at one time held to strengthen it into an absolute forfeiture not purgeable. But it is not so held now. A conventional forfeiture of the lease on failure to pay rent is independent of the claim of damage for the breach of the contract. It is an agreement that the tenant shall forfeit his lease if he shall fall two years' rent in arrear. When a lease is to be forfeited, extra ordinem, and without any forfeiting clause, it must be done by declarator before the Court of Session : But if there be a conventional forfeiture, the Sheriff may decern the tenant to remove on account of the breach of condition.

Scott, Feb. 27. 1829; 7 S. D. 481. Horn, Jan. 19. 1830; 8 S. D. 329. College of Aberdeen, July 14. 1675; M. 7230. Ogilvie, June 28. 1834; 12 S. D. 857. Hall, May 19. 1831; 9 S. D. 612.

1250. 2. Legal Irritancy. After the example of feus, there appears to have been formerly a stipulation in cases of irritancy, *ob non solutum canonem*; under which it was held competent to require from tenants, who had fallen into arrear, caution for the rent of the remaining years of the lease. In several cases where no such irritancy had been incurred, it appears formerly to have been the practice to require caution from tenants *vergentes ad inopiam* (a). But the only competent ground for judicially requiring caution for future rents was the irritancy (b). And this has been taken as the groundwork of an Act of Sederunt, by which it is declared that when a full year's rent shall fall in arrear, instead of a declarator of irritancy, an action shall be competent before the Judge Ordinary, to compel payment of arrears, with caution for five year's rent, otherwise to remove (c).

(a) Kinnaber, June 22. 1594; M. 15301. Lawson, Feb. 27. 1627; M. 15302. Stevenson, July 25. 1639; M. 15303.

(b) Binney, Jan. 3. 1672; M. 15304. Cunningham, Jan. 16. 1677; M. 15305.

(c) Act of Sederunt, Dec. 14. 1756.

1251. In construing this act it has been held, 1. That a full year's rent means the *amount* of a full year's rent (a). 2. That the amount must be due not only at raising the action, but at the date of decree; the landlord, however, not being bound to accept of a partial payment, so as to defeat his remedy (b); and, 3. That payment of a part in the course of legal diligence, will not discharge the proceeding (c). 4. That by consignation of the rent before decree, the irritancy is purged, so that the judge shall not be warranted in requiring caution for five crops (d). 5. That the Act of Sederunt applies to tenants possessing on verbal tacks (e).*

(a) Urquhart, May 28. 1824; 3 S. D. 84.

(b) Campbell, Dec. 1763; M. 13867.

(c) Marshal, July 8. 1803; B. Hume, 569.

(d) McDonald, Nov. 25. 1825; 4 S. D. 227. See MacChristie, May 14. 1825; 4 S. D. 11.

(e) Monro, June 16. 1827; 5 S. D. 807.

Reciprocal Obligations of the Parties.

1252. The tenant's obligations may be either incumbent on

himself; or on his sub-tenant, as in the natural possession; and, 1. By convention the sub-tenant may be directly liable to the landlord for the prestations in the lease. 2. If there be no such convention, there seems to be no direct obligation by the sub-tenant to the landlord.

Purves, June 21. 1797; Bar. Hume, 794.

1253. 1. OBLIGATIONS AS TO THE SUBJECT. 1. From the nature of the contract, warrantice is implied on the landlord's part to make the subject effectual to the tenant, or fit for its purpose (§ 141), and so, to put the houses and fences in due repair (*a*). 2. On the other hand, the tenant is liable for the effect of negligence (*b*). It is not, however, to be reckoned a fault for which he is responsible, if the loss has been occasioned by the officious act of his servant, not within the scope of the servant's employment (*c*). The implied obligation on the landlord does not make it incumbent on him to restore the houses on their destruction by extraordinary and inevitable accident (*d*): The rule has been settled in the House of Lords, that neither the landlord nor the tenant is bound to restore; and that the loss accrues to each according to his interest; reserving to the tenant any right of relief he may have by abandonment, or by abatement of rent (*e*); and that any hardship arising from the rule is to be avoided by special agreement.

(*a*) 2 Ersk. 6. § 39. Buchanan, 5 Brown's Sup. 515. Belshes, Feb. 1776; Ib. 516; 2 Hailes, 688.

(*b*) 1426, 75. Sutherland, Jan. 6. 1737; M. 13979; Elch. *Reparation*. 2 Hardie, March 3. 1768; M. 10133. M'Clelland, July 5. 1797; M. 10134.

(*c*) M'Kenzie v. M'Leod, 10 Bing. 385.

(*d*) Walker, May 30. 1811; F. C.

(*e*) Ib. Annuitant of York Buildings Company, June 5. 1741; M. 10127. Clerk, July 10. 1741; M. 10128. Swinton, Jan. 16. 1810; F. C. Walker, as determined in House of Lords, 3 Dow. 234.

1254. There are two kinds of disrepair; one allied to injury or dilapidation, and arising from negligence or hard usage; the other from the inevitable and imperceptible tendency of all the works of man to decay and destruction by use. With the exception of the latter (tear and wear), the tenant is bound to maintain and restore the houses and fences as he received them (*a*). But an exception has been admitted to this rule, in relation to fences erected by the landlord after the tenant's entry: Where such fences are not stipulated to be erected,

and are not of a kind which the landlord may be compelled to erect (as march fences with contiguous heritors), the landlord is not entitled by erection of them to enlarge the tenant's obligation to uphold (*b*). It has also been held (though at one time otherwise decided), that a tenant is not bound to repair fences spontaneously erected by himself, which he is not entitled to remove (*c*).

(*a*) Ersk. ut supra. Whites, Dec. 30. 1707; M. 15258. Campbell, March 1776; 5 Brown's Sup. 518. See Taylor, Jan. 28. 1800. Baron Hume, 308.

(*b*) Dudgeon, Nov. 22. 1813; F. C.

(*c*) Thomson, Feb. 8. 1822; F. C.; and 1 S. B. 340; as contrasted with Andrew, Jan. 19. 1811; F. C.

1255. It is implied in the contract of lease, that any buildings, fences, or improvements which the tenant may spontaneously make, are made in contemplation of his own interest, and for his own use only. And so he has no claim for such meliorations at the end of his lease, without special stipulation (*a*). But he has been held entitled to remove trevisses, mangers, &c. with which he had fitted up a barn as a temporary stable (*b*); and if the tenant's possession be terminated abruptly and prematurely, he ought in equity to be entitled to recompense. The most distinct example of this emergent claim for recompense, occurs where houses or fences have been built by a tenant whose lease excludes assignees and subtenants, and the tenant is prematurely deprived of the use of them. In such a case it is equitable that, the landlord getting the benefit while the tenant has not derived the expected advantage, the creditors of the tenant or his family should be allowed a proportion of the value of the meliorations (*c*).

(*a*) 2 Ersk. 6. § 39. Whites' case, supra, § 1254. Ducat, May 14. 1803; M. 15264; Ivory's Note, Ersk. p. 372. No. 119.

(*b*) Scott, Dec. 1. 1824; 3 S. D. 344.

(*c*) Morton, Feb. 22. 1822; 1 S. B. 383.

1256. The repairing or building of houses and fences is generally made the subject of express stipulation. The tenant usually agrees to accept them as in good and sufficient repair: Or he takes an assignation to the obligation on the outgoing tenant under the expiring lease; in which case it is incumbent on the incoming tenant to see the repairs complete; and commonly this is settled by survey of skilled or neutral persons.

Sometimes the stipulation is directed to secure that the houses, &c. shall be of equal value at the termination of the

lease; and in that case it is held that if, on the whole, the tenant leaves what is of equal value, though the whole is not in complete repair, it is sufficient compliance with the covenant (*a*).

The tenant sometimes undertakes to make the necessary repairs and meliorations, on being allowed their value at the end of the lease; and questions arise on the construction of such stipulations. In such cases an obligation to uphold, with a right to indemnification of any excess of value in additions, restrains the tenant to mere renewal or rebuilding of what becomes ruinous, and to make necessary or suitable improvements; but gives no right to pull down old houses or erect new ones, not necessary or suitable to the farm (*b*). Express clauses as to buildings supersede local customs, as to indemnification for meliorations (*c*).

A claim for meliorations under an express clause in a lease, is good against singular successors (*d*): But retention of the farm at the end of the lease for meliorations, is not allowed; unless assented to by the purchaser, or supported by local custom (*e*).

The burden of meliorations may be made effectual against succeeding heirs of entail to the extent of three-fourths, provided care be taken to follow out the directions of the Act of 10 Geo. III. § 9 (*f*). See below, of Entails, § 1768–1771.

(*a*) *McDonald*, June 25. 1830; 8 S. D. 974.

(*b*) *Sinclair*, in House of Lords, Feb. 21. 1821; 1 *Shaw's App. Cases*, 1. *Jollie*, Dec. 12. 1827; 6 S. D. 236. as reversed June 29. 1831; 5 W. S. 280.

(*c*) *Gordon*, June 14. 1831; 9 S. D. 735.

(*d*) 2 *Bankton*, 9. § 25. *Rae*, Feb. 5. 1680; *M.* 15216; *McDougal*, Dec. 17. 1760; *M.* 15259; contrasted with *Arbuthnot*, Feb. 5. 1772; *M.* 10424; 1 *Hailes*, 464. *Maxwell Morrison*, Feb. 3. 1787; *M.* 10425. *Crawford Bruce*, House of Lords, July 8. 1822; 1 *Shaw's App. Cases*, 213. *Fraser*, in House of Lords, March 6. 1824; 2 *Shaw's App. Cases*, 37.

(*e*) *Campbell*, July 2. 1790; *B. Hume*, 779. *Bell*, June 14. 1814; *F. C. Stewart*, Nov. 12. 1834; 13 S. D. 4. *Turner*, March 6. 1835; 13 S. D. 633.

(*f*) *Dillon*, Jan. 14. 1780; *M.* 15432. *Webster*, Dec. 1791; *Bell's Cases*, 207, and *M.* 15439. *Taylor*, Dec. 1791; *Bell's Cases*, 214. *Tod*, Jan. 14. 1823; 2 S. D. 213; affirmed, May 27. 1825; 1 W. S. 217. *Fraser*, May 29. 1827; 5 S. D. 722, and 8 S. D. 409; affirmed, Feb. 25. 1831; 5 W. S. 69. *Innes*, Dec. 21. 1827; 6 S. D. 279; affirmed, Nov. 10. 1830; 4 W. S. 305. *Barclay*, June 5. 1829; 7 S. D. 708.

1257. 2. OBLIGATIONS AS TO POSSESSION AND MANAGEMENT. It is implied in the contract, that the tenant shall possess and labour the farm *tanquam bonus vir* (§ 1222). Under this obligation the following points seem fixed:—

1258. The tenant is bound to enter into possession with a

sufficient stock (*a*); and he may be removed, on summary application to the Sheriff, if he should fail to stock the farm (*b*). But failure of any essential stipulation on the part of the landlord will free the tenant (*c*).

(*a*) *Randifuid*, Feb. 27. 1623; *M.* 15256.

(*b*) *Tait*, July 3. 1828; 6 *S. D.* 1055.

(*c*) *Duncan*, Dec. 6. 1796; *Bar. Hume*, 792.

1259. He is not entitled unduly to exhaust the soil: And it is on this general principle, that questions as to rotation of crops, or regulations on that subject, are to be settled. See above, § 1220.

2 *Ersk.* 6. § 39. and cases cited by *Mr Ivory*, pp. 372, 373. *Murray*, Feb. 1665; *M.* 15257. *Maxwell*, July 12. 1776; 5. *Brown's Sup.* 515. *Earl of Wemyss*, Feb. 7. 1809; *F. C.* *Frazer*, June 6. 1834; 12 *S. D.* 684.

1260. The tenant cannot, where assignees and sub-tenants are excluded, abandon the possession and cultivation to others. See above, § 1218.

Lord Dalhousie, Dec. 1. 1802; *M.* 15311.

1261. The tenant is bound to use the dung made on the farm in its cultivation, during his possession, and on the same principle to consume by his cattle the fodder from which dung is produced (*a*). But there is room for distinctions in the application of this implied obligation, during the last year's possession: These arise from the impossibility of the tenant using the straw, or applying the dung, in the cultivation of the farm, after his possession is at an end. The general usage in Scotland is, for the tenant leaving the houses and grass at Whitsunday to have access to cut down his corn after the new tenant is in possession, and along with his crop to be allowed to carry off the straw, and take away or sell the dung (*b*); though in some counties a usage prevails, of giving the straw to the new tenant. In leases this is commonly regulated by stipulation; as that the fodder shall be consumed on the farm; that none shall be sold or carried off at any time, hay excepted; and that dung shall be laid on the farm the last year of the lease. These clauses truly make steelbow of the straw and dung left by each tenant to his successor (§ 1264). Doubts, however, have arisen on the construction of these clauses, as affected by usage. The

Court of Session have held that the words are to be interpreted by the usage: The House of Lords have viewed the matter differently; and leaving, on the one hand, the ordinary rule and usage untouched where no stipulation is made, they have, on the other, given full effect to the plain words of the stipulation as exclusive of any usage (*c*). The custom of a particular estate has not the force of an express stipulation to prevail against the general rule (*d*).

(*a*) Duke of Roxburghe, 1785; 5 Brown's Sup. 519. Pringle, June 30. 1796; M. 6575. Earl of Northesk, Feb. 2. 1797; M. 15254. Scott, May 27. 1813; F. C. See Gordon's case, below (*c*).

(*b*) Jamieson, May 16. 1792; M. 15263. Duke of Roxburghe, *supra*.

(*c*) Duke of Roxburghe, June 28. 1816; reversed, 2 Bligh, 156. Gordon, March 11. 1825; F. C.; 3 S. D. 656; 4 S. D. 13; and in House of Lords, May 16. 1826; 2 W. S. App. Cases, 115. Gordon, May 24. 1833; 11 S. D. 647. Berry, Jan. 17. 1827; 5 S. D. 212; affirmed, 3 W. S. 417. Stirling, Dec. 14. 1827; 6 S. D. 251.

(*d*) Allan, June 23. 1829; 7 S. D. 784. See in England, Smith's Leading Cases, 305. *et seq.*

1262. When the lease terminates at Whitsunday and Martinmas, it may be doubted what the tenant's right is in relation to sown grass. The entry to the natural grass is at Whitsunday, and so the removal is at Whitsunday: The entry to the arable land is at Martinmas, and so is the removal. Formerly, the hay was only from natural grass; but in the modern system, grass sown down with grain is a crop, for which the preparation is laborious and expensive. The rule has altered with the practice, and seems now to be, that the tenant in such a case has the away-going crop of grass.

Sinclair, Dec. 7. 1744; M. 5421. Marquis of Tweeddale, Nov. 19. 1816. Keith, Dec. 3. 1825; 4 S. D. 267. Lyal, Nov. 27. 1832; 11 S. D. 96.

1263. In respect to fallow left by the outgoing tenant, it has been held that, independently of express stipulation, he has right to claim its value; and this has proceeded on the principle, that as the tenant might have taken a crop from the land instead of leaving it fallow, and as the incoming tenant reaps the advantage which the other has abstained from taking, he is in equity entitled to the value.

Purves, Dec. 3. 1822; F. C.; 3 S. D. 59.

1264. STEELBOW. It was a frequent practice formerly for the landlord to stock the farm, on an agreement by the tenant to restore the articles, or their equivalents, at the end of the lease. This was called STEELBOW, and is a species of mutuum

(see § 200). In questions relative to the landlord's right in steelbow, in competition with creditors, although in the earlier cases steelbow stock did not fall under the escheat of the tenant but under that of the landlord (*a*), yet it was in one case held to belong to the tenant, and to be liable for his debts (*b*). In a more recent case, preference on the steelbow stocking of a farm was given to the landlord over the tenant's creditors; but this seems to have proceeded chiefly on the principle of hypothec (*c*). Those covenants relative to straw and dung in the last year of the lease, which now so commonly occur, rest on the principle of steelbow (see § 1261). The tenant sometimes gets the straw and dung of the last year of his predecessor's possession at his entry, and leaves the straw and dung of the last year of his own possession to the succeeding tenant. If he do not get this at his entry, he is entitled to the value of what he leaves (*d*). When he gets it from his predecessor he is held bound to leave the dung and fodder unconsumed, without any claim for the value (*e*).

(*a*) 2 Stair, 3 § 81. 2 Ersk. Pr. 6. § 2. 2 Ersk. 6. § 12. and 3 Ersk. 1, § 18.

(*b*) Turnbull, Nov. 24. 1624; M. 14777.

(*c*) Butter, July 27. 1764; M. 6208; 5 Brown's Sup. 899.

(*d*) Heriot, Feb. 20. 1826; 4 S. D. 446. Berry, Jan. 17. 1827; 5 S. D. 212.

(*e*) Stirling, Dec. 14. 1827; 6 S. D. 251.

1265. TACIT RELOCATION. In order to put an end to the lease, notice must be given forty days before Whitsunday preceding its stipulated termination, that advantage is to be taken of its close. See below, § 1267. This must be regular and binding notice (*a*). The parties are otherwise held to renew their agreement for another year; and so from year to year, till notice shall be duly given (*b*). But this general rule and presumption admit of some qualifications. And, 1. There is no tacit relocation in judicial leases (*c*); nor, 2. in the lease of pasture fields (*d*). 3. It is doubtful whether it has place in a lease of an arable farm for a year (*e*). 4. Where there is a sub-lease, and the tenant has quitted the natural possession after the landlord has recognised the sub-tenant, warning to the sub-tenant is enough; but if the sub-tenant be not recognised, the tenant must be warned (*f*). 5. Tacit relocation is not a renewal of the lease for the original term, but only for a year. And, 6. The original lease expires, so as to liberate the cautioners (*g*).

- (a) M'Intyre, Dec. 11. 1829 ; 8 S. D. 237 ; affirmed, July 8. 1831 ; 2 W. S. 299. See below, § 1271.
 (b) 2 Stair, 9. § 23. 2 Ersk. 6. § 35. 2 Bell on Leases, 132. Forsyth, Nov. 22. 1827 ; 6 S. D. 101. M'Intyre, ut sup. (a).
 (c) 2 Ersk. 6. § 36.
 (d) M'Harg, March 9. 1805 ; M. *Removing*, App. No. 4.
 (e) 2 Stair, 9. § 23. 2 Ersk. 6. § 36. Forsyth, ut sup. (a).
 (f) D. of Queensberry, July 7. 1810. Thomson, Dec. 13. 1823 ; 2 S. D. 408.
 (g) Forbes, Dec. 1735 ; Elch. *Cautioner*. 4.

Termination of the Lease.

1266. Leases terminate, 1. by removing ; 2. by renunciation.

2 Craig, 9. § 2. 1546, 2. 1555, 39. 2 Ross, 509. Act of Sederunt, Dec. 14. 1756. 2 Ersk. 6. § 45. 2 Bell, Leases, 51.

1267. 1. REMOVING. Under the old law, removing proceeded on a precept in the landlord's name, as granter of the lease, or as purchaser, heir, joint-proprietor, &c. infeft in the lands (a). This precept was executed against the tenant personally, or at his dwelling-house, and also on the ground of the lands, and at the parish church, forty days before the 15th day of May of the year in which the lease was to expire (b). This was followed by action of removing before the Sheriff, or before the Court of Session ; decree in the former being carried into immediate execution by precept of ejection ; decree in the latter requiring a charge, as the Court of Session never executed its own decrees (c).

(a) 1555, c. 39. 2 Stair, 9. § 41, 43. 2 Ersk. 6. § 51, 53. 2 Bell, Leases, 51. et seq. and App. 333. Paxton, Feb. 1749 ; M. 16121. See also as to heirs, Ersk. ut supra, and cases. Elphinstone, Jan. 20. 1625 ; M. 13270. Bruce, Nov. 16. 1808 ; F. C. as to Tercer. Lady Maxwell, March 16. 1630 ; M. 15842.

(b) 1690, 39. 24 Geo. II. c. 23. 2 Craig, 9. § 2. 2 Stair, 9. § 39. 2 Ersk. 6. § 46. Kames's Elucid. art. 34. Duchess of Buccleugh, Feb. 8. 1715 ; M. 13836. Earl of March, March 6. 1754 ; M. 13843. Campbell, March 1. 1793 ; M. 13849.

(c) Stainhill, June 30. 1675 ; M. 13894. Pringle, July 13. 1739 ; M. 13894 ; Elchies, *Ejection*, 1 ; Notes, 119.

1268. A better form was introduced by Act of Sederunt, 14th December 1756. 1. Where the tenant is bound by the lease to remove without warning, a charge of horning on the registered tack, given forty days before the Whitsunday of the expiration of the lease, is a good warrant for a precept of ejection by the Sheriff within six days after the term of removal (a). 2. Alternatively with the process under the act of 1555, an action of removing before the Judge Ordinary of the county where the lands lie, is, by the Act of Sederunt, made

competent (*b*). This proceeding may be by summons, or by summary application (*c*), and on due citation, the calling in Court forty days before Whitsunday is equivalent to a warning in terms of the act 1555. The Sheriff proceeds thereupon to decern in the removing (*d*), following up his decree with a precept of ejection within forty-eight hours. 3. In these proceedings there has been some relaxation from the strictness of the rule under the act 1555. But infetment is still necessary as a title to pursue (*e*). 4. If assignees and sub-tenants are allowed, and the lease have been assigned, or the farm sub-let, and intimation made to the landlord, the assignee or sub-tenant must be called; if there be no intimation, this is not necessary (*f*). 5. Advocation is not competent against a decree of removing (*g*). See § 1278.

(*a*) See 2 Craig, 9. § 11. 4 Stair, 26. § 14. 2 Ersk. 6. § 50. 2 Bell, Leases, 69. Brown, Feb. 27. 1822; 1 S. B. 337. Heron, June 28. 1825; 4 S. D. 118, and cases there cited. Act of Sederunt, Dec. 14. 1756, § 1.

(*b*) Cameron, June 30. 1804; M. 13875.

(*c*) Tait, July 3. 1828; 6 S. D. 1055.

(*d*) Act of Sederunt, Dec. 14. 1756, § 2. Carruthers, July 4. 1764; M. 13868. Hoy, June 2. 1810; F. C. Stevenson, June 23. 1821; 1 S. B. 87.

(*e*) 2 Ersk. 6. § 52. Paton, Dec. 15. 1757; M. 5273. Ferguson, June 24. 1802; M. 13806. Brown, Feb. 10. 1802; Bar. Hume, 565. Stewart, Dec. 18. 1802; Ib. 568. Campbell, March 2. 1808; M. *Removing*, App. No. 5. Milne, Nov. 23. 1807. Johnson, March 3. 1810; F. C. Scott, Feb. 2. 1832; 10 S. D. 284.

(*f*) Act of Sederunt, § 3.

(*g*) 6 Geo. IV. c. 120. § 44. Gibson, Jan. 28. 1826; 4 S. D. 407.

1269. Much difficulty has arisen about way-going crops, in leases with Whitsunday entries. The general rule as to arable farms is, that the tenant is entitled to reap the crop which has been sown before the term of removal; the right of exclusive possession being his during seed-time (*a*). But he is not entitled to the use of the barns in thrashing, &c. the corn (*b*).

(*a*) Brodie, Feb. 7. 1777; *Tack*, App. 3. Scott, March 2. 1803; Ib. 3. Fullarton, March 4. 1814; F. C.

(*b*) M'Ewan, Nov. 19. 1803; M. 13891; B. Hume, 571.

1270. In liferent leases, and leases from liferenters, there is a peculiarity as to the termination of the possession: Where the liferent tenant, or the liferenter of lands, has held the natural possession, no new possession is to be taken by his heir or representative; but the removing may be summary between terms, the heir or representative being entitled to reap the

crop on paying a proportion of the rent, and having right to recompense for labour in preparing the ground (*a*). If sub-tenants have held under the person having such right, they are not to be summarily ejected, but may remain till the next Whitsunday (*b*).

(*a*) 2 Craig, 4. § 13. 2 Ersk. 6. § 49. Baron Gordon, Dec. 13. 1794; M. 13851. Stewart, June 24. 1796; M. 13853. Baron Hume, 561.

(*b*) 1491, 26. 2 Ersk. 6. § 49.

1271. RENUNCIATION. A renunciation during the currency of the lease, requires writing formal and binding (see above, § 1265). But if the lease itself be informal, it is said that the renunciation may also be informal: In such case, however, it will require corroborative circumstances to the renunciation to balance *rei interventus* on the lease (*a*). No particular form of renunciation is required; further than that, it must contain a clear and explicit notice to the right party forty days before Whitsunday (*b*). If the term be expired, renunciation may be proved by oath of party; but not by parole evidence (*c*). When the renunciation of the lease is in the shape of an obligation to remove without warning, it will not save from the necessity of giving a regular warning, unless it be dated at the regular time for giving warning (*d*).

(*a*) 2 Craig, 9. § 2. 2 Stair, 9. § 35. 2 Ersk. 6. § 44.

(*b*) M'Intyre, Dec. 11. 1829; 8 S. D. 237; affirmed, July 8. 1831; 5 W. S. 299.

(*c*) Schaw, July 23. 1605; M. 12301; 1 Bell, Leases, p. 524, note.

(*d*) Magistrates of Perth, Feb. 20. 1798; Baron Hume's Cases, 562. Lockhart, March 8. 1800; *Ib.* 564. Paxton, May 26. 1803; *Ib.* 568. M'Laren, Dec. 17. 1831; 10 S. D. 163. See Stevenson, June 23. 1821; 1 S. D. 84.

2. LEASES OF URBAN AND OTHER SUBJECTS NOT AGRICULTURAL.

1272. In considering the doctrine of leases, as applied to other than agricultural subjects, there are some points on which a real or supposed difference exists.

1273. 1. CONSTITUTION AND EFFECT OF THE LEASE. Here the same rules apply as in agricultural subjects. 1. Verbal leases are good only for a year; while *rei interventus* may, if clearly applicable, establish a right for a longer term. 2. Possession is the completion of the lease; and it is equally effectual, under the Act 1449, against singular successors in other subjects, as

in agricultural leases. See above, § 1190–1 (*a*). 3. As a tenant in land is bound to enter and stock the farm, so is the tenant of a house bound to furnish it (*b*). 4. The landlord of an inn is not to set up a rival inn without abating rent (*c*).

(*a*) 2 Ersk. 6. § 27. 1 Bell, Leases, 34. Waddel, Dec. 10. 1794.

(*b*) Thomson, Dec. 27. 1833; 12 S. D. 557.

(*c*) Campbell, June 18. 1795; Bar. Hume, 788.

1274. 2. POWER TO ASSIGN OR SUBSET. The rule (differently from agricultural leases, § 1217) is, that the tenant, even for a single year, has power to assign or subset, when not expressly prohibited (*a*). But it is implied, that the appropriate use of the subject shall not be altered or encroached upon (*b*), or an inn or shop shut up (*c*); and when the use of the subject is combined with the arrangements of a manufactory, the *delectus personæ* prevails to prevent sub-lease or assignation (*d*).

(*a*) Aitchison, Jan. 7. 1748; M. 10405; Elchies, *Tack*, 13. Notes, 444. Anderson, July 10. 1811; F. C.

(*b*) Gordon, June 15. 1825; 4 S. D. 95.

(*c*) Graham, Feb. 21. 1792; Bar. Hume, 781.

(*d*) E. of Elgin's Trustees, May. 14. 1833; 12 S. D. 555.

1275. 3. HYPOTHEC. In urban subjects comprehending dwelling-houses, shops, warehouses, cellars, manufactories, breweries, &c. the hypothec is over the *invecta et illata*. And the same rule applies to dwelling-houses in the country, which are let merely as such.

1276. *Invecta et illata* comprehend, 1. Household-furniture, plate, paintings, books, and all moveables belonging to the tenant and his family (*a*). 2. It does not seem to comprehend cash, bonds, bills, or other documents of debt. 3. Neither does it seem to comprehend wearing-apparel (*b*). 4. Shop goods, raw materials of manufacture, implements of trade, &c. are subjects of hypothec; but the goods are vendible till sequestered (*c*). 5. The shop-books are not subject to hypothec, to the effect of entitling the landlord to levy the debts. 6. Goods of third parties in a warehouse, or cellar, or inn, are not subject to hypothec; whether they be there on pledge; or deposit; for manufacture; for sale; or in transitu (*d*). But, 7. Where the tenant has furniture on hire, a different rule has been introduced, in consideration of the landlord's right to have the house furnished, and the presumed consent of the hirer that the furniture let shall supply the requisite security; So where the tenant has the furniture on hire from a broker, the

articles are liable to the hypothec of his landlord (*e*). Where furniture is with the tenant on gratuitous loan, it seems now to be held that it is to be classed with hired furniture, and liable to hypothec (*f*): But when taken possession of, or detained in a house against the will of the owner, furniture is not subject to the landlord's hypothec (*g*): Or when *deposited* in the house, it is not so liable (*h*). As to the right of Hypothec in relation to Cautioners for the rent, see above, § 1238.

(*a*) 2 Ersk. 6. § 64. 2 Bell, Com. 31. Bell, Leases, 387, note. 2 Pothier, 277. § 241-3. Tait's Justice of Peace, 174. Countess of Callander, June 13. 1703; M. 6244. Christie, Dec. 14. 1814; F. C.

(*b*) Countess of Callander (*a*). 2 Bell, Com. 30.

(*c*) 2 Ersk. 6. § 64.

(*d*) Cowan, Jan. 31. 1804; 2 Bell, Com. 30, note 6, and 31, note 2. Girdwood and Co. May 13. 1834; 12 S. D. 76.

(*e*) Wauchope, Nov. 30. 1805. Stewart, May 31. 1814; F. C. and App. Penson and Robertson, June 6. 1820; F. C.

(*f*) Wilson, Dec. 17. 1813; F. C. See Fountainhall's note, 2 Brown's Sup. 670.

(*g*) Jaffray, Nov. 18. 1836; 15 S. D. 43.

(*h*) Cowan's case, *supra* (*c*).

1277. Effect of Hypothec on Invecta. 1. It gives security for each year's rent successively; the same space of three months after the term which is allowed in following the hypothec on cattle in agricultural farms, being given to make it effectual in urban tenements (*a*). 2. In the rent so secured will be included whatever is so combined with the rent as a consideration for the use of the particular subject, that it fairly makes a slump consideration for the whole (*b*). 3. In competition with other rights, it will not prevail over the Crown; or the superior; or servants; or undertakers for funeral expenses (see above, § 1241). It will not bar the tenant from selling his goods in his shop or warehouse. But a buyer, though he has paid the price, if he have not got delivery, will not prevail against the landlord (*c*): And yet it has been doubted in particular cases, whether the buyer will not prevail; and, *first*, as to one who has got delivery by the key of the repository (that repository being the landlord's), it would seem that the warehouse of a trader would, in a sale of this kind, in the ordinary course of trade, be held to be open market, and the purchaser safe. *Secondly*, By statute (*d*) it has been provided, that goods imported into the owner's cellar may be effectually sold by him on observing certain requisites; and such a sale would seem to protect the buyer against the landlord. *Thirdly*, By another

statute (*e*), distillers are allowed to warehouse spirits somewhat on the same footing with goods under the statute last referred to, but there is no such provision for sale, and the landlord was preferred to a purchaser who had received an order of delivery (*f*); the purchaser being declared entitled to an assignation to the hypothec as extending over other effects.

(*a*) Dick, Dec. 7. 1630; M. 6243.

(*b*) Catterns, June 6. 1834; 12 S. D. 686.

(*c*) Kinniel, Nov. 18. 1790; M. 4973.

(*d*) 6 Geo IV. c. 112. § 9. See below, § 1306.

(*e*) 4 Geo. IV. c. 94.

(*f*) Wyld and Co. May 17. 1832; 10 S. D. 538.

1278. 4. REMOVING. 1. The regular possession in urban subjects is from Whitsunday to Whitsunday. 2. Where a garden in which vegetables are cultivated is let along with a house, the rule in practice sanctioned by the Court is, that possession of the garden is given at Candlemas: But the small gardens and greens of houses in town are entered to along with the house (*a*). 3. The mode of warning and removing from urban subjects (including houses in the country, without land), is generally regulated by local custom; the forms of the statute 1555, or even of the Act of Sederunt, 14th December 1756, not being necessary (*b*). But there must be warning or verbal notice, or chalking of the door by a burgh officer, forty days before the term of removal (*c*). In Edinburgh, the custom is to give warning at Candlemas; but that is not an absolute rule (*d*). 4. The same term of warning must be given by the tenant to the landlord, in order to put an end to the lease on his part. 5. A summary process of removing has been provided for subjects let for less than a year, at a rent not exceeding L.30 (*e*).

The parties may stipulate for a break in the term; which, according to its fair construction, will entitle the tenant to remove, or the landlord to resume possession: But a break in favour of the landlord will not entitle a trustee or agent for him to take the benefit of it (*f*).

(*a*) Renton, Feb. 26. 1823; 2 S. D. 244.

(*b*) 2 Ersk. 6. § 47. Riddel, Nov. 21. 1671; M. 13828. Lundin, Dec. 19. 1758; M. 13845.

(*c*) Tait, July 23. 1766; M. 13864. Jollie, July 10. 1781; M. 13865.

(*d*) Jack, June 20. 1795; M. 13866.

(*e*) 1 and 2 Vict. c. 119. § 8, 14.

(*f*) Davidson, June 7. 1838; 16 S. D. 1125.

3. RENTALLERS AND KINDLY TENANTS.

1279. That sort of right which, originating in villanage in England, became copyhold, and is now of so much importance in the territorial law of that part of the island, arose in a manner nearly similar in Scotland; but it is now to be found existing only in particular districts, under the name of RENTAL-RIGHT and KINDLY TENANCY. The villains of the ancient law grew into kindly tenants, under the Crown, the Church, and the Barons. They held their land at first by sufferance, or at will; for the performance probably of agricultural services in the mains of the manor or barony. They were enrolled in the rental-book of the King's steward, or in that of their Lord; and this, or a copy of the entry, was their sole title. They came to be admitted to a sort of hereditary right; their widows being permitted to continue their possession, and their sons to succeed.

Rental-rights had no term, or term of expiration; and so the alternative was, either to regard them, the rentallers, as perpetual tenants (which they could not effectually be against singular successors without sasine), or as liferenters.

1280. 1. The Crown rentallers were by statute declared to be mere liferenters (*a*). But the King's kindly tenants of the four towns of Lochmaben were, by successive warrants and protections of the King, in 1592, 1602, 1664, declared to have right to continue their possession undisturbed, and at the old rent, as long as they should pay the same; and the Act of 1587 was not held to operate after a barony was vested in a subject. Accordingly, in an action of declarator, it was held, "that the pursuers had such a right of property to the lands that they could not be removed, and might dispoise these rights to extraneous persons" (*b*). It has been further held, that the dominium utile of those lands has been fully dissolved from the Crown, and so is liable in teind-duty for the minister's stipend (*c*). The right of those kindly tenants may also serve as the ground of real securities for debt by feudal form (*d*).

(*a*) 1587, 69.

(*b*) Kindly Tenants of Lochmaben, Nov. 24. 1726; M. 15195; also 15185; affirmed, April 24. 1732; 1 Craigie, 77.

(*c*) M. of Queensberry, Feb. 5. 1838; 16 S. D. 439.

(*d*) Irving and Jop, Feb. 4. 1795; M. 10316; Bell's Cases, 145. Mounsey, Nov. 30. 1808; F. C.

1281. 2. On the eve of the Reformation, the possessions of the kindly tenants of the CHURCH seem to have been much disturbed, by the anxiety of the clerical Lords and Monasteries to feu out their lands: But the number and influence of those tenants induced the Legislature to give them protection to a certain extent (*a*); and when questions arose with singular successors in kirk lands, those rights were viewed as ordinary leases, and, being without ish, they were held good only for a year: Afterwards they were construed to be liferents (*b*), renewable at will to the heir, but not alienable; the dilectus personæ being strict.

(*a*) 1563, 77.

(*b*) 2 Craig, 9. § 24. 2 Stair, 9. § 15, 20. 2 Ersk. 6. § 37. 2 Ross, 480.

1282. Ordinary rentallers, holding of subjects, were considered as mere liferenters; or, if heirs were mentioned, the first heir only was held to have right.

2 Ersk. 6. § 38. Earl of Galloway, March 15. 1631; M. 7194. Ahannay, March 13. 1632; M. 15191.