

## **PART II.**

**REAL RIGHTS OF PROPERTY AND POSSESSION  
IN LAND AND MOVEABLES.**



## OF RIGHTS OF PROPERTY IN LAND AND MOVEABLES.

636. RIGHTS of that kind, in which there is an immediate connexion with the subject itself (§ 3.) may either relate to territorial possessions, or to moveables, goods, sums of money, debts, and effects of all kinds. As territorial, or as unconnected with land, they admit of very remarkable differences in respect of the forms of transference ; the extent and nature of the use ; and the duties implied in ownership.

Territorial property is naturally connected more intimately with the military and political arrangements necessary for public safety, and more liable to peculiarities in national jurisprudence ; while moveable property is left to the undisturbed guidance of rules and principles of more universal application.

A double system of jurisprudence, in relation to the subjects of property, has thus arisen in Scotland, as in most European nations ;—the one, regulating land and its accessories, according to the spirit and arrangements of the Feudal system ; the other, regulating the rights to moveables according to the principles of Roman jurisprudence which prevailed before the establishment of feus.

These different systems it may be proper to consider separately ; taking first into view the jurisprudence of land rights, and proceeding afterwards to the doctrines of property in moveables.

## I.

RIGHTS OF PROPERTY, POSSESSION, AND SERVITUDE IN LAND,  
AND ITS ACCESSORIES.

637. Without entering in detail into the history of the feudal law of territorial property in Scotland, it may be sufficient to observe, 1. That it was originally arranged on principles of

military duty and subordination, fitted more for defence than for conquest : 2. That before the Union with England, considerable advances had been made towards the converting of the ancient military tenure and law of feus, into a system more suited to agriculture ; 3. That the spirit of agricultural and general improvement spread rapidly in Scotland after the Union ; 4. That the progress of improvement received a check in the rebellions of 1715 and 1745, which after a time led to still further emancipation from the trammels of the feudal law ; 5. That the restraints of feudal subordination are now abolished in all that relates to the possession and use of land ; while the conveyancing of land continues to be regulated by the strict principles of the feudal system. And, 6. That the labours of a Royal commission appointed to review this department of the law may be expected soon to lead to legislative remedies for the more complex and expensive operations in feudal conveyancing, and the establishment of a simple, more certain, and more economical system.

#### I. OF PUBLIC PROPERTY IN THE SOVEREIGN, AS TRUSTEE FOR THE SUBJECT.

1 Craig, 16. 2 Stair, 1. § 5. 2 Ersk. Pr. 1. § 2. and t. 6. § 5. 2 Ersk. 1. § 5, 6.

638. Many things by law excepted from the ordinary rules of appropriation, are reserved for the use of the public. These are called *RES PUBLICÆ* in the books of the Roman law. Under this class are—Seas and Shores ; Rivers and Harbours ; Roads ; Bridges ; Fairs and Markets : These are all necessary for public use and intercourse, and as such are vested in the Crown in trust for the subject.

369. *SEAS.* The main ocean is common to all nations ; in which they meet on a footing of equal right. No nation has pre-eminent jurisdiction there, except over its own subjects within its own ships (*a*). But the Sovereign, as guardian of the people, and for their defence, and the purposes of their trade and intercourse, is proprietor of the narrow seas within cannon-shot of the land, and the firths, gulfs, and bays, around the kingdom (*b*).

(*a*) *Forbes v. Cochrane*, 1824 ; 2 Barn. and Cress. 448. See *American Case of Mariana Flora*, 11 Wheaton Reports, 38.

(b) 2 Stair, 1. § 5. 2 Ersk. 1. § 6. The Three Gebroeders, 3 Rob. Ad. 336. 2 Grotius, 3. § 10. Bynkershoek Qu. Juris. pub. lib. 1. c. 8. Vattel, Liv. 1. c. 23. § 289. See 9 Geo. II. c. 35. § 23, 4, and 9, and the American Statute, March 2. 1799.

640. This right to the narrow seas comprehends, 1. That of free and uninterrupted navigation. 2. The right of fishing, and of taking all wreck and goods found at sea; except such as are claimed and identified. 3. The right to forbid passage to enemies. 4. The right to levy tolls or duties. 5. The jurisdiction over those seas, and right of search, that the subjects may be safe, and the revenue protected (*a*.) 6. The right of flag, as the emblem of British sovereignty in those seas.

The two first are the great public uses to which the other rights are subservient.

(a) St Louis, 2 Dodson, Ad. 245. 9 Geo. II. c. 35. § 23, 4, 9.

641. SHORES. The shore comprehends all that is covered by the sea in ordinary tides—the land which lies between high and low water-mark. This holds true both in Scotland (*a*) and in England (*b*).

(a) 2 Stair, 1. § 5. 2 Ersk. 6. § 17.

(b) Sir H. Constable's Case in 5 Reports, 107. B. See also the cases cited below.

642. In England the shore covered by the sea belongs to the Crown; and all that is gained by sudden recess of the sea is held as the incrementa of that original property. The exception to this is, that what is gained to the land by gradual and imperceptible addition goes to the neighbouring proprietor (*a*), while that which is gained to the shore by similar imperceptible change is added to the right of the Crown (*b*).

The shore, according to the law of Scotland, shifts with the shifting of the tide; always corresponding to the above description of whatever is covered by the sea in ordinary tides. See § 643. It is not as in England held to be the property reserved to the Sovereign; but presumed to be granted as part and pertinent of the adjacent land, under the burden of the Crown's right as trustee for the public uses. See § 645. et seq.

(a) The King v. Lord Yarborough, 1824; 3 Barn. and Cress. 91; affirmed on the opinion of the Judges in House of Lords; 5 Bing. 163.

(b) Scrutton v. Brown, 1825; 4 Barn. and Cress. 485.

643. The shore, so far as capable of appropriation, may in

England be part of the manor of a subject. In Scotland it may be conveyed by the Royal grant, subject to the public use ; and grants of the adjacent land are under that implied burden.

1. If the sea or sea-shore be the boundary of any man's property, the grant is construed to include the shore to the ebb-mark, and to extend or recede with the waters (*a*) ; the shore, or what is covered at ordinary high water, being still subject to the use of the public. It has also been permitted to such owner, to prevent, by artificial operations, the encroachment of the sea ; and even by such means to gain by encroachment on the sea. Whether those decisions are to be entirely approved of, or whether the strict construction to which Royal grants are subject (*b*) should not lead to a different conclusion, may be doubted. But at all events the grantee who gains by embankment in such cases, must hold the shore as still subject to the public uses.

2. It has been held that there is no substantial distinction between a grant of land as bounded by the *sea*, and as bounded by the *sea-shore* ; and that the shore is given in both cases, subject to public use (*c*). But,

3. After a grant so bounded, nothing remains in the Crown but the public trust ; and no one can, by subsequent grant or otherwise, be allowed to interpose between the grantee and the shore (*d*).

(*a*) Campbell, Nov. 13. 1813 ; F. C. Boucher, Nov. 30. 1814 ; F. C.

(*b*) See the *Elsebe*, 5 Rob. Adm. 182.

(*c*) Magistrates of Culross, June 15. 1769 ; M. 12810 ; 1 Hailes, 291 ; and Tait's Cases, *Property*, 5 Brown's Sup. 556 ; F. C. Magistrates of Culross, Dec. 7. 1809 ; F. C. Campbell, ut supra (*a*).

(*d*) Campbell's case, and Boucher's supra (*a*). Lord Reay, Nov. 14. 1781 ; M. 5151 ; 2 Hailes, 890. See below, of Minister's Glebe. M'Alister, Feb. 7. 1837 ; 15 D. B. M. 490.

644. A right to the shore includes, by implication, 1. Sea-greens, which are occasionally covered by the water ; 2. Rocky islands also occasionally covered ; with their sea-weed, &c. In England the original right of the Crown comprehends every thing but imperceptible additions. See above, § 642.

2 Ersk. 6. § 17. The *Elsebe*, 5 Rob. Adm. Rep. 182. Benett v Pipon, 1829 ; 1 Knap. Privy Coun. 60. Bruce, Nov. 25. 1714 ; M. 9342. Earl of Morton, July 20. 1760 ; M. 13528.

645. USES FOR WHICH THE SEAS AND SHORES ARE HELD. Of these uses, navigation and fishing are the chief: the former being the primary, and inalienable.

1. *Navigation* is a use for the public; not to be interrupted, or encroached on, by grant of ferry, or by exercise of any ancient right of ferry. And those sailing in the course of the ferry cannot be stopt or impeded of their right of free navigation, unless it be shewn that they are encroaching on the proper right of passage from shore to shore. See § 652.

2 Ersk. 1. § 6. Campbell, Jan. 18. 1815; F. C. Ferguson, F. C.; same date. See also Grant, March 9. 1781; M. 12820. Colquhoun, Dec. 21. 1793, and July 4. 1804; M. 12827, and 14283.

646. 2. *Fishing* is a secondary use for which the Crown holds the seas and shores for the public benefit: But it is not inalienable like that of navigation. And,

1. The right of sea-fishing for salmon may be granted, either expressly by a grant of the fishing of salmon, or by a clause cum piscationibus, followed by possession of salmon-fishing (*a*).

2. The grant of salmon-fishing in the sea is the only monopoly of sea-fishing which has always been admitted. A grant of white sea-fishing has occasionally been made, but the effect of it has been questioned (*b*), and has never been fully tried. It seems to be sufficient to control the public right as to floating fish: but a monopoly of this kind of fishing, in any particular spot, is not granted by a general clause cum piscationibus with possession (*c*). A right to take oysters, mussels, &c. which are fixed to the spot, is effectual where expressly granted. Lobster-fishing seems to stand in the middle between floating fish, and oysters, and mussels; it is not conferred without express grant, or exclusive possession on a general grant. The fishing of small shell-fish, bait, &c. is open to the public; and, at least, is not barred by the general grant of salmon-fishing and other fishings without exclusive possession (*d*).

(*a*) 1 Craig, 16. § 38. 2 Stair, 3. § 69. 2 Ersk. 6. § 15. Ramsay, Nov. 22. 1776; 5 Brown's Sup. 445. 2 Hailes, 722.

(*b*) See Ramsay, ut supra. See Stair and Ersk. ut supra, § 641 (*a*).

(*c*) Same case. Tait's Cases, voce *Fishings*, 5 Brown's Sup. 445. See 29 Geo. II. c. 23. 1.

(*d*) Tait's Cases v. Property, 5 Brown's Sup. 556-7. Duke of Portland, Nov. 15. 1832; 11 S. D. 14.

647. 3. Other uses, as the taking of KELP on the shore, the convenience of bathing, &c. are not understood to be uses necessary for the public, and inalienable; but seem to go with the express or implied grant, provided the primary and secondary public uses are left uninjured.

Earl of Morton, *ut supra*, § 644. See, in England, *Blundell v. Caterall*, 5 Barn. and Ald. 268.

648. NAVIGABLE RIVERS. Navigable rivers are, like the sea, public; and are, for similar purposes, vested in the Crown. They are held as highways, or common passages. And,

1. It is not tide rivers only which are held public; but rivers above tide water where fit for the transportation of the country products, though that should only be *down* the stream, are public rivers.

Grant, March 9. 1781; M. 12820; affirmed. Sir J. Colquhoun, Dec. 21. 1793; M. 12827

2. Navigable lakes do not, generally speaking, appear to be inter regalia, as rivers are. If wholly within the land of one proprietor, the lake goes as a pertinent of the land. If not so, but touching the estates of various proprietors, the lake and its solum rateably belongs to them all (*a*). But if such lakes form great channels of communication in a district of country, there seems to be some reason to regard them as res publicæ; not to be held as implied in a grant of the adjacent land, but to be regulated in the conveyance, and in the exercise of the use, by the same rules which prevail with regard to a public river (*b*).

(*a*) 2 Stair, 3. § 73. 2 Bankt. 3. § 12.

(*b*) *McDonell against the Caledonian Canal Commissioners*, June 5. 1830; 8 S. D. 881.

649. The *Stream* of a navigable river is a highway for the people; of which the use is in the public without grant; and which no grant or exercise of secondary use can impede or hinder.

650. The *Banks* of public rivers are either the alveus, or proper shore, left dry by the tide at ebb; or the proper bank above the reach of the water. The former is free for the public use, but subject to any grants not detrimental to the navigation: The latter are not vested in the Crown, but be-

long to the owners of the land bordering on the river; and in England it has been held that they can be appropriated for the purposes of navigation, only by the force of custom.

2 Stair, 1. § 5. Ball v. Herbert, 3 Term. Rep. 253.

651. FERRIES. The right of *Ferry*, in public rivers and arms of the sea, is vested in the Crown for the use of the public. Ferries are public or private.

1 Craig, 15. § 15. 2 Ersk. 6. § 17.

652. Public ferries are under the management of the trustees of the roads connected with them; or under the regulation of the Justices of Peace; or ruled by special Acts of Parliament (*a*).

The right of ferry is not permitted to interfere with the general navigation; or to supersede the right of any subject of the Queen to navigate in the course of the passage, as a part of the sea, provided it be not done for avoiding the regular ferry; see § 645: nor, on the other hand, is any one entitled, under the pretence of the general right of navigation, to interfere with or encroach on the right of passage. As the ferryman is not bound to carry a passenger to any point but his own landing-place, he cannot prevent others from navigating to other points (*b*).

(*a*) See 4 Geo. IV. c. 56. 3 and 4 Will. IV. c. 33.

(*b*) Tarbet, Dec. 22. 1731; M. 4167. Campbell, Jan. 18. 1815; F. C. Fergusson, Jan. 18. 1815; F. C. Trustees of Kinghorn Ferry, Dec. 18. 1821; F. C.; 1 S. D. 209. Tripp v. Frank, 4 Term. Rep. 666.

653. Private ferries are such as the Sovereign has granted to individuals, with the benefit of a certain monopoly, for the public benefit. The monopoly empowers the grantee to levy fair and reasonable rates. It does not exclude neighbouring heritors from having a boat to transport themselves and their family, and servants and workmen. But as the condition of enjoyment of the right is, that the grantee shall provide safe and convenient boats, and boatmen, for the passage, no rival ferry is allowed to interfere with the right.

Magistrates of Montrose, Feb. 7. 1755; M. 4167. Martin, June 16. 1818; F. C. Campbell, Jan. 18. 1815; F. C. Hunter, Nov. 27. 1830; 9 S. D. 86.

654. PORTS AND HARBOURS. The Sovereign has the sole right of erecting or of holding public ports and harbours;

limited occasionally by the effect of royal or parliamentary grants to communities or to subjects. The duty of providing for the public safety in navigation, is naturally accompanied by the power of exacting shore and harbour dues, to prevent the burden of the artificial operations or civil establishments necessary for the safety of navigation from becoming a load upon the subjects generally. A port or harbour has accordingly been described as comprehending,—1. the natural access which makes a safe landing place ; 2. the artificial operations by which it is improved for the convenience or safety of navigation ; and, 3. the civil power and privilege of monopoly within a certain district or precinct, and of levying dues, § 655. 1. 3.

The right to levy dues, and the duty of keeping up the harbour in a state fit for navigation, are counterparts. And the right and duty, as vested in a grantee, depend on the original right of the Crown, and the limits of it.

1 Cr. 15. § 15. 2 Ersk. 6. § 17. M'Farlan, May 16. 1827 ; 5 S. D. 665. Bruce, ib. 668.

655. 1. In regard to the power of levying dues, the rules seem to be,—

1. That such dues are leviable as are sanctioned by immemorial usage (*a*).

2. That the fair construction of the grant, as affected by usage, is to be applied to new modes of navigation—to steamboats, for example (*b*).

3. That such dues form a fund for the maintenance and repairs of the harbour, and not for the emolument of the grantee (*c*).

4. That the improvement, as well as repairs of the harbour, seem to form a necessary burden on the grantee ; but in one case, where the parliamentary grant of the harbour appropriated “ the hail benefit ” to the maintenance of the clergy, it seemed to be held that this controlled the application of the dues so far as mere improvements were concerned (*d*).

5. That in so far as applied to the harbour, the dues levied do not subject the grantee of the harbour to poor-rates (*e*).

6. That the grantee is not bound to repair or improve the harbour out of his own means ; and is not entitled to levy additional dues, without authority of Parliament, in order to

indemnify himself for any extraordinary expenditure, or improvement, or repair (*f*). The proper course on such occasions is to apply to Parliament for a special act.

7. That a third party is not entitled to insist on having the dues assigned to him by the grantee, in order that he may repair the harbour (*g*).

(*a*) Cowan, Feb. 23. 1828; 6 S. D. 586. See the principle exemplified and applied in the construction of statutes relative to Leith Harbour. Magistrates of Edinburgh, June 21. 1838; 16 S. D. 1171.

(*b*) M'Farlan, *supra*. Girdwood and Co. Nov. 24. 1827; 6 S. D. 124. Same case, Dec. 14. 1830; 9 S. D. 170; affirmed March 30. 1830; 4 W. S. 76.

(*c*) Christie, May 16. 1828; 6 S. D. 1813. See also Stein's case (*g*).

(*d*) Ministers of Edinburgh, Jan. 27. 1838; 16 S. D. 400.

(*e*) Heritors of South Leith, Nov. 12. 1833; 15 S. D. 204.

(*f*) Christie's case, *sup*.

(*g*) Stein, Nov. 15. 1815; 4 S. D. 180.

656. 2. The public is entitled to insist that the harbour shall be maintained, as far as the means afforded by the dues lawfully leviable extend; but beyond this the only remedy is by an application to Parliament.

657. 3. Although the Sovereign has right to open harbours, he has no power to order the shutting or opening of the ports, so as to regulate the exports and imports: This power, however, may be exercised during war, by orders in Council, as a part of the war policy. The use of the port is free to the public on payment of the legal dues, when the harbour is once opened.

658. 4. Grants of ports and harbours are in all respects held under the conditions which qualify the Crown's right as trustee for the public. But they confer a monopoly within the precincts prescribed, so that no one can erect a harbour on his own ground within those precincts, to the effect of exempting ships and goods from the harbour dues exigible under the grant.

Magistrates of Edinburgh, June 10. 1836; 14 S. D. 922.

659. HIGHWAYS. Highways are vested in the Crown, on the principle already stated; but they are placed under regulations for the public benefit by special statute, or by the general road acts. Whether streets in cities and towns, or roads in the country, they are public passages. They are not to be encroached upon by private proprietors or communities on the one hand; nor can the pretence or reality of public

advantage authorize encroachment on private property on the other, except by act of the legislature, and on full indemnification. One difference there is, however, between a public road and a road acquired in the way of servitude. The former is held to be capable of extension, with a change in the mode of travelling or conveyance; the latter is strictly limited to the extent of the possession. See *infra*, § 1010.

Forbes, Feb. 20. 1829; 7 S. D. 441.

660. 1. *Streets of Burghs* are, on the above footing, held by the magistrates under the Crown, for the public benefit, and under the burden of the public use. And, 1. They cannot be appropriated by the magistrates, either for public building (*a*), or by feuing (*b*): Nor can they be encroached on by individuals (*c*). 2. No encroachment can be made on private property for the convenience of the public, without the authority of Parliament (*d*); and even when power is given under Police acts to regulate the line of houses about to be rebuilt, it is under the implied condition of full indemnification (*e*).

(*a*) Miller, Nov. 3. 1740; M. 13527. Magistrates of Montrose, Feb. 27. 1762; M. 13175.

(*b*) Young, Feb. 2. 1816; F. C.

(*c*) Sir W. Forbes, March 3. 1783; M. 13185. Gordon, May 21. 1819; House of Lords, 1 Shaw's App. Cases, 452; see also 5 S. D. 164.

(*d*) Smellie, May 12. 1803; F. C.

(*e*) Dougal, Jan. 19. 1827; 5 S. D. 224.

661. 2. *Roads or Highways proper* are under the regulation, 1. of the General Road Act; 2. of Special Acts; 3. of the same general principles with other public rights.

At first the public highways were under the direction of the Commissioners of Supply and Justices of Peace of the county. Afterwards, in almost every county, acts of Parliament were passed for regulating the roads; and giving power to trustees to arrange the statute labour, and to levy tolls, and borrow money on the produce of them. The abuses which prevailed in the obtaining and administering of those local acts led, in the year 1821, to an inquiry by a Committee of the House of Commons: And that Committee recommended, both for Scotland and for England, a general system of administration of roads and highways, which was carried into effect by 4 Geo. IV. c. 49. for Scotland, amended and consolidated by 1 and 2 Will. IV. c. 43. The object of these laws is to reform the old

and imperfect arrangements, and reduce to a uniform system the management of all the highways, with a reservation of whatever may be peculiarly necessary in certain situations. For that purpose (while local acts are continued as necessary for each county) it is, by the general act for Scotland, provided,—1. That the old acts of the seventeenth century, and such recent acts as are of the nature of general laws, be repealed: And the rules newly established are declared to extend to all local acts now in force, or to be enacted, for making, &c. roads in Scotland. 2. The qualifications of trustees, and their powers and proceedings, are regulated; with the officers to be elected; the books and accounts to be kept, &c. 3. Their powers to borrow money are defined, and the nature of the security to be given over the tolls prescribed. 4. Rules are established for levying of tolls; with certain exemptions. 5. Powers are conferred for widening all turnpike-roads to twenty feet of clear passable road, and for taking ground for that purpose without paying for it; but reserving the owner's claim of damages for fences removed or injured; and also for widening roads to forty feet, on giving compensation for the ground taken above twenty feet. Powers are also given to purchase lands necessary for improving the roads. 6. Some very just and useful rules are laid down for the taking of materials. 7. Rules are also laid down for the prevention of nuisances and obstructions; regulating buildings on the sides of roads; and providing for the safety of passengers. And, 8. Certain limitations in point of time are established for actions and complaints and appeals in matters relating to the roads (*a*).

On the interpretation and effect of this general act it has been held, under the 4 Geo. IV. c. 49,—

1. That each local act is to be read as if the general act were incorporated in it (*b*). But this does not apply to pontage acts (*c*).

2. That all regulations in local acts, not inconsistent with the rules of the general act, are effectual, notwithstanding the extension of the general act (*d*).

3. That the provisions of the act for limitation of actions supersede the rules of local acts (*e*).

4. On the general policy of the law relating to highways,

where any unwarranted obstruction has been occasioned de recenti by trustees or others, it may be removed brevi manu (*f*).

5. In the general act, there is an exemption from toll, of persons passing along their own lands; or being proprietors or occupiers of land through which private roads run. This will not authorize an evasion by means of the purchase of small patches (*g*).

6. The trustees are not entitled to compel the public to use the road, by shutting up a parish road, so as to bring travellers within the toll (*h*).

(*a*) 4 Geo. IV. c. 49. 1 and 2 Will. IV. c. 43. See Report of House of Commons, July 10. 1821. Simson, June 25. 1830. 8 S. D. 977. Wilson, June 11. 1831; 9 S. D. 725.

(*b*) Menzies, June 30. 1827; 5 S. D. 884; F. C. Mitchell, July 7. 1827; 5 S. D. 909.

(*c*) Armstrong, June 25. 1830; 8 S. D. 980.

(*d*) Sir W. Baillie, July 11. 1826; 4 S. D. 834. MacCallum, March 8. 1827; F. C.; 5 S. D. 541.

(*e*) Selkirk, June 10. 1826; F. C.; 4 S. D. 695.

(*f*) Glasgow Road Trustees, Dec. 10. 1825; 4 S. D. 303.

(*g*) Merry, Nov. 29. 1828; 7 S. D. 90.

(*h*) Trustees of Glasgow Road, Dec. 2. 1828; 7 S. D. 115.

662. There are other statutes relative to roads which demand attention—as, 1. An act relative to Highland roads (*a*); and, 2. An act to provide for the conveyance of the mails by railroads, and granting certain powers to the Postmaster-General (*b*).

(*a*) 3 and 4 Will. IV. c. 33.

(*b*) 1 and 2 Vict. c. 118.

663. 3. *Parish Roads*. These are maintained still on the old system of statute labour, under the management of Justices of Peace and Commissioners of Supply. The labour and a contribution of road and bridge money is supplied by tenants, cottars, and labourers, and the inhabitants of royal burghs. The legal breadth of such roads is 20 feet, with a discretion, in certain circumstances, to widen the road, or change the direction. The proportions of labour, and the penalties or conversions, are settled by the statutes.

1617, c. 8. 1661, c. 38. 1686, c. 8. 5 Geo. I. c. 33. 11 Geo. III. c. 53. 1 and 2 Will. IV. c. 43, § 70. Tait, Blair, and Hutchison on Justices of Peace.

664. **FAIRS AND MARKETS.** Fairs and markets are intend-

ed for the encouragement of manufactures and trade ; affording a place of resort for demand and supply ; relaxing occasionally the monopolies of cities ; and protecting the fair dealer by the regulation and control of public officers. The right of fairs and markets is vested in the Crown for the use of the subject ; and the right to hold a particular fair or market is commonly granted to a burgh or an individual, for the benefit of the inhabitants of the community or district. No market or fair can be held without a grant from the crown, or prescription implying a grant. Such grant has also been held as implied in a charter of regality or barony. But all grants of fair or market are made subject to any rights which have already been conferred, and are not to be interfered with.

Falconar, June 24. 1642 ; M. 4146. Farquharson, Dec. 24. 1619 ; M. 4147. Magistrates of Stirling, Feb. 7. 1706 ; M. 4148.

665. The privileges of market are directed to the safety and freedom of dealings there. One great privilege of a market, by the usage of Scotland, in early times, was the freedom from arrestment of person or goods for previous debts (*a*). In England it is a privilege of open market to bar the reclaiming of stolen goods, bona fide purchased there. But this is not law in Scotland ; the true owner may recover his property notwithstanding such sale. The only exception to this is, that corn subject to the landlord's hypothec, when sold in open market in bulk, and not by sample, cannot be reclaimed by the landlord (*b*).

(*a*) Gibson, Nov. 16. 1552 ; M. 4145.

(*b*) See above, § 527-8, also § 1320.

666. The power of levying market customs is regulated by Act of Parliament, or by usage, and the reasonable occasions of the market : And except on those grounds no market dues can be levied.

Magistrates of Edinburgh, Dec. 18. 1790 ; M. *B. Royal*, App. 6 ; remitted. Boog, Feb. 22. 1775 ; M. 1991. Tod, June 15. 1781 ; M. 1997. Fergusson, June 29. 1786 ; M. 1999 ; 2 Hailes, 922. Skene, June 7. 1794 ; Bell's Cases, 46. 116. Fleshers of Kirkaldy, Dec. 17. 1822 ; 2 S. D. 96. Magistrates of Edinburgh, March 3. 1826 ; affirmed, 2 W. and S. 588. Cowan, Feb. 22. 1828 ; 6 S. D. 586. See Fleshers of Glasgow, June 15. 1802 ; M. *B. Royal*, App. 11. Magistrates of Dunbar, Nov. 26. 1829 ; 8 S. D. 128. Hill, Feb. 4. 1830 ; 8 S. D. 449.

## II. OF THE PROPERTY OF THE SOVEREIGN.

1 Craig, 16. 2 Stair, 3. § 35-6, and 60. 2 Ersk. 6. § 13. et seq.

667. I. CROWN'S RIGHT IN LAND. This consists either of Reserved Rights, or of the Annexed Property or Patrimony of the Crown.

668. 1. *Reserved Rights*. The rights of subjects to land being derived from the Crown by grant, certain rights are by implication reserved from all such grants. These are,—

669. 1. Mines. Mines of gold, and all mines yielding a certain proportion of silver, are inter regalia (a). Such mines were formerly held inalienable by the Crown; but they were dissolved from the Crown in the end of the 16th century, and allowed to be feued to the proprietor of the ground; or to strangers, on the owner's refusal. The permission to feu to the proprietor, is held to give him a jus quæsitum to demand such feu; not in his character as vassal of the Crown, but as owner of the soil (b).

(a) 1424, c. 12. 1592, c. 12.

(b) Earl of Hopetoun, Jan. 4. 1750; M. 13527. Duke of Argyle, Dec. 7. 1739; M. 13526.

670. 2. Forests are tracts of land for the keeping of deer. By the old laws of Scotland, the King had the privilege of killing deer not appropriated and within enclosures; and ground kept as chases for deer belonged to the King. The Forest laws were oppressive chiefly in two ways:—1. The forests being unenclosed, continual encroachments were made on the property of neighbouring proprietors. 2. Cattle trespassing, or found at any time in the King's forests, though unenclosed, were forfeited. Till the end of the 17th century no man was bound to herd his cattle, so as to prevent their trespassing on the property of others, except in haining time while the corn was on the ground; and when the trespass was committed on enclosed grounds, the proprietor against whom the trespass was committed could do no more than drive the cattle off his land. But it was different with the King's forests; and hence arose great oppression. The grant of a right of forestry conferred on the grantee the same privilege as if the ground included had been originally a king's forest, and greatly extended the oppression of the forest laws. On occasion of a grant of this

kind made to a subject, a judicial inquiry and report were ordered as to the nature and effect of those grants, and a representation was made to the King against the granting of new forests. A grant of land in which a royal forest lies, does not carry the forest without express words. See § 753.

2 Ersk. 6. § 14. Marquis of Athole, June 24. 1680 ; M. 4653.

671. 3. Salmon Fishing. The right to fish salmon otherways than by angling, within sea-mark, or where the sea ebbs and flows, or in rivers, is inter regalia. This right is communicable by grant. See below, § 754. 1112. et seq.

672. 2. *Annexed Property of the Crown.* The Royal patrimonial estate consisted of lands, castles, strongholds, and palaces, throughout the country. These were often dissipated and transferred from the Crown ; and a series of statutes with regard to them, extends from the beginning of the fifteenth century down to modern times, in which two great objects may be distinguished ;—one, to counteract the grants which, from necessity, or in a spirit of profusion, the Crown had been induced to make ; another, to encourage the operations of feuing or leasing of the Royal property for a fair exchangeable value in annual payments, and in furtherance of the agricultural improvement of the country (*a*).

In modern times, the hereditary possessions and revenues of the Crown have been given up to the disposal of Parliament, and a settled sum appropriated for maintaining the Royal household and dignity. In the beginning of William IV.'s reign, a more unreserved renunciation than formerly was made of all the King's patrimony and heritable revenues to the consolidated fund (*b*), and a civil list of L.510,000 settled on the King. The whole of the King's patrimony and revenues in Scotland were on that occasion placed under the care of the Commissioners of Woods and Forests (*c*), and by commission from them the levying and management was entrusted to certain officers who had formerly acted in the Court of Exchequer. On the accession of the reigning Queen, a similar renunciation was made of her Scottish revenues, lands, castles, and feu-duties, to be administered by the proper officers as Parliament should appoint ; a certain sum being appropriated for supporting the Royal dignity and household,

freed from the burden of many pensions and salaries formerly paid out of the Civil List.

(a) 1455, 41. 1457, 71. 1587, 29. 25 Geo. II. 41. History of the Exchequer, printed by Sir Henry Jardine. 3 William IV. c. 13.

(b) 1 Will. IV. c. 25.

(c) 2 and 3 Will. IV. c. 112.

673. The hereditary keepers of the Royal palaces and parks have no right, without express grant, to exhaust or sell the soil or minerals, but merely to preserve from waste.

Officers of State *v.* Lord Haddington, May 26. 1826; 2 W. S. 468; and 5 W. S. 479.

674. II. PRINCIPALITY OF SCOTLAND. The lands held to belong to the King's eldest son, as Prince and Steward of Scotland, were in the fifteenth century erected by Parliament, to remain with the Crown till the birth of a son, and to vest in the eldest son as a perpetual appanage and personal provision, settled and limited for ever. The principality reverts to the Crown, when there is no Prince; and,

1. The charters, while there is no Prince, must bear to be granted by the Sovereign, in place and right of the Prince and Steward of Scotland (*a*): and, 2. when there is a Prince who is minor, the charter must be granted by the Sovereign, as his administrator (*b*).

(a) Johnston, June 16. 1608; M. 11685.

(b) Purves, Jan. 9. 1680; M. 11686. Hamilton, July 14. 1626, M. 11686.

### III. PROPERTY OF SUBJECTS UNDER THE RULES OF THE FEUDAL LAW.

Craig, Jus Feudale. Hope's Minor Practics. Dirleton's Doubts, and Stewart's Answers. Stair's Inst. b. 2 and 3, with notes of Lord Elchies and of More and Brodie. Ersk. b. 2 and 3. Ross' Lectures.

675. The property of land in Scotland is held either directly and immediately under the Crown as paramount superior of all feudal subjects; or indirectly, either as vassal to some one who holds his land immediately from the Crown, or as a sub-vassal in a still more subordinate degree. The two separate estates of Superiority and Vassalage, are held reciprocally either by the Sovereign and his immediate vassal; or by the Crown's immediate vassal, and his vassal under him; or successively by vassals still lower, down to the last step of the ownership of land.

NOTE.—In England, this long protracted chain, from the King to his vassals, and their sub-vassals indefinitely is unknown. By a statute passed in the reign of Edward I. (called the statute *Quia emptores*, 18 Ed. I. c. 1.), the direct effect of a conveyance by a land-holder to a purchaser is to place the purchaser in the seller's stead as a vassal of the Crown, and to banish from the system subordinate vassalage. With us this is left to be accomplished, in each individual case, by a particular operation of conveyancing, to be afterwards described in treating of Confirmation.

676. The estates of superiority and of vassalage are separate estates ; not burdens on each other. The proprietor who immediately holds possession of the land, cultivating it by himself or his tenants, and reaping the immediate fruits of the soil, is said to have the *DOMINIUM UTILE*, or Property. The right which the superior holds is called the *DOMINIUM DIRECTUM*, or Superiority.

677. The Superior's estate, or *dominium directum*, is held immediately over the vassal. From the first the superior could dispose of the superiority without the vassal's consent ; and clearly he may now do so, to the effect of changing the superior on the vassal. But, 1. he cannot create a mid-superiority between the vassal and himself, see below, § 857 ; and, 2. he cannot split his right of superiority, to the effect of multiplying superiors on the vassal. See below, § 859.

678. The Vassal's estate, or *dominium utile*, is held under the superior as over-lord. The superior by whose grant he directly holds, is called his *immediate* superior ; the superior of whom that superior holds, is called the vassal's *mediate* superior. The vassal was originally not permitted to alienate the land, so as to change the vassal on the superior. But now the vassal's power of disposal is unrestrained, and the superior is bound to receive either a creditor, or a purchaser, as his vassal, unless there be some restraint by special condition ; of which hereafter.

1469, c. 36. 20 Geo. II. c. 55. § 12, 13.

679. Of these two estates, and the relation which they bear to each other, it may be observed, that the superior is entitled at all times to have a vassal ; the vassal (at all times when necessary to him) to have a superior ; the duties being reciprocal. See § 704, 736.

## 1. THE SEVERAL HOLDINGS.

680. The kinds of holding enumerated in the older books are,—1. The military, or ward-holding ; 2. Blench ; 3. Feu ; 4. Burgage ; and, 5. Mortification. Of these, Feu, Blench, and Burgage alone remain.

681. 1. WARD-HOLDING, the ancient military holding, once the prevailing tenure of the feudal law was abolished by 20 Geo. II. c. 50. and has become mere matter of history. The clause of *tenendas* was,—“ *per servitium wardam et relevum in feudo et hæreditate in perpetuum.*” The service was military, “ *ut cum armis et equis ad domini imperium quoties mandaverit paratus sit;*” but there was seldom any specific obligation to this effect. The words of the *reddendo* were,—“ *Reddendo inde mihi et successoribus meis debita et servitia tali tenend. generi assueta, omnium aliorum onerum aut præstationum loco.*”

The fixed return or duty consisted of military and personal service. The occasional or incidental rights were,—Ward, Marriage, Recognition, Non-entry, Relief or Fine, and Escheat.

2 Stair, 4. § 33. 2 Ersk. 4. § 1.

682. 2. BLENCH-HOLDING was of old a sort of honorary holding, “ *ob proclara in rempublicam merita, et partam bello gloriam.*” It was without service or prestation, except as a mere badge or acknowledgment of superiority. The *Tenendas* was, “ *in libera alba firma feodo et hæreditate pro perpetuo.*” The *Reddendo*, a pair of gilt spurs, or a rose noble, or a penny, &c. *si petatur tantum.* And this, with a merely nominal return, continues to be the holding into which the ward-holding of all lands held originally ward of the Crown was converted by the 20th of Geo. II.; and those of the principality by 25 Geo. II. c. 20.

2 Ersk. Prin. 4. § 3 ; 2 Inst. 4. § 7. 20 Geo. II. c. 50. 25 Geo. II. c. 20.

683. 3. FEU-HOLDING was deemed an ignoble holding, in which, instead of military service, agricultural labour or services were exacted. But it now forms the great and important holding of land in Scotland. The *Tenendas* is “ *in feudofirma feodo et hæreditate.*” The *Reddendo* is a feu-farm or rent in cattle, grain, money, or services, generally agricultural. It is the

holding into which all ward-holdings of subjects were converted by the Legislature in abolishing the military holding; and it is now the prevailing tenure.

2 Ersk. Prin. 4. § 2; Inst. § 5.

684. It may be observed of these several holdings, that during the military age of feus, wherever the expression of the Tenendas was ambiguous, the presumption was for ward-holding; and that, ward-holding having been abolished, the presumption is now for feu-holding.

685. 4. BURGAGE-HOLDING is a peculiar sort of military holding appropriate to Royal Burghs. The Sovereign is superior; each individual holding directly of the Crown (the magistrates being commissioners), for the service of watching and warding. This holding will afterwards be considered as a separate system. See below, § 838, et seq.

2 Ersk. 4. § 8.

686. 5. MORTIFICATION, was a species of religious holding, for the service of prayers and masses for the dead. It was chiefly used in the bestowing of lands on the church, or in the endowing of hospitals, colleges, &c. The holding was abolished on the Reformation, and mortified lands declared to belong to the Crown: Lands mortified to the use of hospitals and corporations being now held like others in feu or blench by trustees.

1587, c. 29. 2 Ersk. 4. § 10, 11.

## 2. ESTATE OF THE SUPERIOR.

687. The original dominium directum, or superiority, in the Crown as over-lord, is not a right of use of the lands, but only a right to the civil fruits of feu-duty, &c. and to the casualties. So the right or dominium utile conferred on the Crown vassal may be converted into an intermediate superiority, by the granting of a sub-feu, which, transferring the dominium utile to a sub-vassal, leaves a mere superiority or dominium directum in the vassal of the Crown.

688. The right which, relatively to the feudal vassal, the Crown has thus in all lands, or which, under the King, or other superior, is held by a subject relatively to his own vassal, is

an estate ; constituted in the Crown *jure coronæ* ; in a subject, by a conveyance to the lands themselves. But although, in the proper and pure language of feudal conveyancing, the superiority is transferred by conveying the lands themselves ; so great a relaxation has been introduced in consequence of the recognised existence of the separate estates of superiority and vassalage, that a conveyance of the “ *superiority* of the lands specified ” has occasionally been used by conveyancers as a legitimate mode of conveying the superiority where that alone was intended. It is a practice condemned by Lord Stair (*a*) ; and though it has in one case been sanctioned so far as to sustain a vote under the former law of elective franchise (*b*) ; in the other cases on the subject, either the sasine proceeded on a precept duly assigned, authorizing infestment in the lands (*c*) ; or the lands were conveyed “ so far as may be extended to the right of superiority ” (*d*) ; or the conveyance was founded on to some limited extent only ; as for a title in a removing of tenants, or a conveyance merely of feu-duties (*e*). The feu-duties may be assigned without conveying the lands (*f*).

(*a*) 2 Stair, 4. § 1.

(*b*) Lord A. Hamilton, Feb. 23. 1819 ; F. C.

(*c*) McKenzie, Dec. 14. 1822 ; 2 S. D. 90.

(*d*) Hill, July 19. 1828 ; 6 S. D. 1133.

(*e*) Lag, Nov. 19. 1824 ; M. 13757. Park, May 16. 1816 ; F. C.

(*f*) Douglas, Jan. 30. 1671 ; M. 9308. See 4 St. 8, § 2.

689. The superior’s sasine in the “ lands ” may, with possession, be a good title of prescription to carry the property.

Bruce, Dec. 6. 1770 ; M. 10805 ; 1 Hailes, 378. Earl of Duncannon, Dec. 22. 1774 ; F. C. ; 5 Br. Sup. 614. Walker, Feb. 27. 1827 ; 5 S. D. 469. Waddel, June 19. 1828 ; 6 S. D. 999. Lord Elibank, Nov. 21. 1833 ; 12 S. D. 74. See Bald’s case, § 821.

690. The superior’s estate, or dominium directum, consists of, 1. Permanent rents, viz. feu or blench duties : and services ; 2. Occasional rights or casualties, viz. the payments to be made on the entry of an heir or singular successor.

### 1. *Permanent Rights of the Superior.*

691. 1. SERVICES. Military services are abolished by the statutes passed on occasion of the Rebellion 1715 (*a*). Civil services may still be continued, but are demandable only within the year (*b*).

(a) 2 Ersk. 5. § 2. 1 Geo. I. c. 54. See also Act of Sederunt, March 10. 1756.

(b) Duke of Argyle, Feb. 5. 1762; M. 14495. Feuars of Kinross, Dec. 7. 1693; M. 13071. Treasurer of Edinburgh, Feb. 25. 1696; M. 4188. Duke of Hamilton, Dec. 15. 1835; 14 S. D. 162.

692. 2. RENTS. Considering feu and blench holding as now the only surviving feudal tenures, it is only in the former that the rent or duty is of consequence enough to raise a question.

693. *Blench-duty*, payable si petatur tantum, must be demanded within the year, otherwise it is not actionable.

Archbishop of St Andrews, July 12. 1610; M. 15011. Lord Sempill, Feb. 16. 1627; Ib.; 1 Brown's Sup. 232.

694. *Feu-duties* vary exceedingly; sometimes almost a quit-rent; sometimes an ample rent, as in a lease, constituting, as a real burden of annuity, a valuable estate; sometimes accompanied by a certain stipulation of kain poultry, &c.

695. The feu-duty may be made payable in money, or in grain, or alternatively in either.

If payable *in kind*, as corn, it may be demanded in kind, whether the land produce it or not, unless otherwise stipulated in the grant (a); and the vassal is bound to bring it to the superior if within the barony (b). The superior cannot restrain the feuar from growing other grain than that stipulated for the feu-duty; but he is entitled, under a general stipulation of grain or victual feu-duty, to demand *in kind* such grain as the vassal grows on the land, although more valuable than the sort of grain cultivated at the date of the charter (c). If the feu-duty be payable in produce no longer to be found on the land (as peats, or coal, or lime, which have been exhausted), the obligation is not by such exhaustion extinguished (d); unless there shall be an express specification of "such as are produced in the land."

If the feu-duty be payable in *money*, no interest is due on arrears (e); the superior must demand his feu-duties. And this rule of their payment is so far different from that of a common debt.

(a) M'Leod, 5 Brown's Sup. 615.

(b) Treasurer of Edinburgh, Feb. 25. 1696; M. 4188.

(c) Same case.

(d) Monro, June 20. 1763; M. 14497.

(e) Kerr, 1790; Bell's Cases, 290. Napier, May 31. 1831; 9 S. D. 655; 2 Craig, 3. § 37.

696. If the obligation be *alternative*, as so much grain, or so much money in lieu thereof, or the value as converted by the fiars, the option will be with the vassal, unless it is otherwise indicated by the conception of the reddendo; or unless the delivery become imprestable; or be so long delayed that the superior shall not be bound to take it (a).

Where, in the reddendo, there is a stipulation of kain poultry, convertible at certain prices, it was held that, even although the option seemed, by the words, to be with the superior, he could not claim the ipsa corpora (b).

(a) See Anstruther, Dec. 2. 1742; Elch. *Alternative*, Notes, p. 23. McLeod, ut supra, § 695.

(b) Hope, May 15. 1838; 16 S. D. 1007.

697. *Means of compelling Payment of Feu-duties.* The superior may compel payment of his feu-duties either by means of his real right and preference as superior; or by hypothec; or by poinding of the ground; or by personal action against the vassal; or he may have forfeiture of the feu.

1. Superior's Preference by Real Security. The superior has, by means of his real right in the lands, a preference over purchasers and creditors, in voluntary or judicial sales, and in rankings of creditors. It extends over the whole lands feued, though divided in subfeuing, or on sale; each owner or subfeuar having relief against the others for excessive payment.

V. Stormont, Jan. 1682; Hare; 2 Br. Sup. 13. Crs. of Eymouth, Feb. 8. 1757; 5 Br. Sup. 556. Wemyss and Cowan, Jan. 19. 1836; 14 S. D. 233. See Little Gilmour, Jan. 22. 1839; 1 S. D. 403.

698. 2. Hypothec. The superior has a hypothec for security and satisfaction of the last or current feu-duty, over the crop, and invecta et illata; similar, but preferable, to the hypothec of a landlord. See below, § 1234.

2 St. 4. § 7. 2 McKenzie, 6. § 12. 2 Ersk. 6. § 63. Ross, vol. ii. p. 392. Hamilton, Jan. 13. 1756; M. 15109. Yuille and Lawrie, Jan. 24. 1823; 2 S. D. 155.

699. 3. Poinding of the Ground, is a peculiar action and diligence for attaching and securing (in order to payment of the superior's duties as *debita fundi*) not only the effects brought upon the land by the vassal; but those also brought on the land by tenants, to the extent of their year's duty (a). Questions may arise as to the degree of control which a supe-

rior may exercise for security of his feu-duties (*b*). Where a tenant, for example, pays only a small rent with a grassum, it would seem that the superior would be entitled to use his diligence to the extent of a fair rent; and either to hold the grassum as anticipated rent, or to demand legal interest on the grassum. See below, § 721. The superior has no preference ipso jure (except in his real right over the lands themselves), his right over the moveables being no more than a privilege to poind, which must be made real by poinding of the ground; a declaratory action, the calling of which in court operates by litigiousity to secure the preference against all diligence not completed into a real right (*c*).

(*a*) 4 Stair, 23; § 5, 10. 4 Ersk. 1. § 11. 2 Bell, Com. 58. 1597, 246.

(*b*) See Hamilton, Jan. 13. 1756; M. 15109.

(*c*) Tullis & White, June 18. 1817. Hay, July 7. 1824; F. C.; 3 S. D. 223; and 2 W. S. App. Cases, 71. Bell, Dec. 3. 1831; 10 S. D. 100; Note of Lord Ordinary. Kinnear, Nov. 17. 1832; 11 S. D. 46. Campbell, Jan. 13. 1835; 13 S. D. 237.

700. 4. Personal action is competent at the superior's instance against the original vassal himself ex contractu, the vassal by acceptance of the feu becoming personally liable for the feu-duties (*a*); or against singular successors entering as vassals, for the feu-duties of their own time; or against sub-vassals; or against tenants in the lands, while in possession; or intromitters with the fruits, during their intromission (*b*). The vassal's personal obligation is co-ordinate, and not alternative with the real right: And so the vassal cannot renounce his feu to the effect of discharging the personal obligation, whether his right is by charter or by contract. This is now settled law (*c*).

(*a*) Moncreiff, July 21. 1630; M. 4185. Rollo, infra (*b*). Bishop of Galloway, Feb. 24. 1632; M. 4186. Wallace, June 29. 1739; M. 9195.

(*b*) Scott, July 28. 1738; Elch. *Sup. and Vass.* 4. and M. 4191. Rollo, March 26. 1629; M. 4185. Hamilton, Jan. 22. 1712; M. 4189.

(*c*) 3 Craig, 1. § 9. 2 Stair, 4. § 48. and 11. § 6. See Moncreiff and Scott, supra (*a*) and (*b*). Wallace, June 29. 1739. Kilk. 189; M. 4195. Redfearn, March 7. 1816; F. C. Marquis of Abercorn, June 26. 1817; F. C. Napier, May 31. 1831; 9 S. D. 655. Hunter, Dec. 16. 1834; 13 S. D. 205. Mitchel, Jan. 23. 1834; 12 S. D. 322. Marquis of Abercorn, Dec. 16. 1835; 14 S. D. 168.

701. 5. Tinsel of the feu. The last remedy against non-payment of the feu-duties is Tinsel of the feu, or Irritancy ob non solutum canonem; which is a forfeiture of the vassal's

right for breach of the feudal contract. This irritancy is provided by statute; and sometimes enforced by conventional stipulation: But in all cases it requires a declarator, the forfeiture being purgeable at the Bar (*a*) before decree of declarator is extracted (*b*). As this remedy proceeds on the principle of *forfeiture*, the superior cannot both insist on the forfeiture and demand arrears (*c*). The annulling of the vassal's right is not necessarily attended with nullity of securities granted by the vassal; but unless the holders of such securities come forward to purge the irritancy, the superior will be entitled to the lands free of the burden (*d*).

(*a*) 1579, 246. Prior of Pluscardin, Jan. 1583; M. 7225. Wardlaw, Jan. 7. 1605; M. 7227. Carruthers, June 18. 1737; M. 7235. Lockhart, Nov. 14. 1770; M. 7244. Baillie, Dec. 15. 1693; M. 7254.

(*b*) Ballenden, July 6. 1792; Bell's 8vo Cases, 157; M. 7252.

(*c*) M'Vicar, July 14. 1748; Kilk. 531; M. 15095. Napier, *supra*, § 700 (*c*). Magistrates of Edinburgh, May 16. 1834; 12 S. D. 593.

(*d*) Drummond, March 23. 1686; M. 7235.

702. The vassal has right to retain the feu-duties, wherever any essential condition of the feu-contract is unperformed on the part of the superior. But the failure must be on the part of the superior in the proper character of superior.

Kerr, Dec. 7. 1790; M. 2692; 2 Hailes, 1092. Cockburn, July 1. 1825; 4 S. D. 128; 2 W. S. App. Cases, 293. See Heriot's Hospital, May 4. Nov. 17. 1809; F. C.; 2 Dow, 301.

703. Sale of Feu-duties. A superior may dispose of his feu-duties without selling his superiority. There was, of old, a form of conveyance by which, under the title of *alienatio feudifirmæ feudifirmarum*, the prohibition of alienation of the Crown lands was evaded; to prevent which, so far as the Crown was concerned, a statute was made after the act of annexation (*a*). But a similar conveyance, assigning the feu-duties payable to the superior, with power to uplift and discharge the same, and to use all modes of recovery competent to the superior, to be held blench of the superior, is an effectual constitution of a real right to the feu-duties (*b*).

(*a*) 1597, c. 239. See M'Kenzie's Obs. 15 Par. James VI. c. 239.

(*b*) Douglas of Kilhead, Jan. 30. 1671; M. 9306. And see below, § 8850, *et seq.*

## 2. Occasional Rights, or Casualties of Superiority.

The subsisting casualties are—Non-entry; Relief, or Composition; and Escheat. The casualties of ward, marriage, and recognition (§ 681), are abolished.

704. 1. NON-ENTRY. This is not so properly a casualty as the enforcement of the vassal's obligation to enter as such. The superior is entitled to have a vassal, feudally vested ; or to take possession of the lands himself, or to draw the rents, if there be no vassal. Non-entry gives occasion to the exercise of this right ; and it may proceed either from the heir's neglect to enter in the room of his predecessor, or from the neglect of a disponent to complete his feudal title.

705. The lands are in non-entry in the following cases ; 1. where the heir neglects to renew his investiture with the superior on his ancestor's death ; 2. where the vassal himself, or (after his death) his heir, delays to take sasine on an unexecuted precept ; 3. where the service of an heir is reduced ; 4. where the lands have been sold and resigned in favorem of the purchaser, but the new vassal does not come to the superior for his charter, or does not take sasine on that charter ; for although there is, in consequence of this, no forfeiture, the lands or rents fall as a surrogatum to the superior for the want of a vassal.

2 Ersk. 5. § 42.

706. General and Special Declarator of Non-entry. Of old the superior entered at once into possession of the lands by sentence of his own Baron Court ; but now a process of Declarator of Non-entry is requisite. This is called the *General Declarator of Non-entry*. And, 1. Before citation in it, the vassal is not in contumacy, and the superior can demand only his feu-duties or (in blench-holding) his retour-duties. 2. Citation unbayed infers contumacy ; and from that moment the superior has right to demand the full rents, unless there be a reasonable excuse for not entering. And, 3. He is entitled on decree to enter into possession, and to have action of maills and duties, or poinding of the ground. And the decree for thus accomplishing the purpose of making the feu-duties effectual, is called, though improperly, the *Special Declarator of Non-entry*.

2 Ersk. 5. § 29. 2 Stair, 4. § 22. Byres, July 4. 1626 ; M. 13791. Douglas, Jan. 30. 1671 ; M. 9306. Faa, June 12. 1673 ; M. 9307. Copland, July 26. 1771 ; 5 Br. Sup. 610. Coltart, Feb. 15. 1782 ; M. 9313. Robin, Dec. 13. 1823 ; 2 S. D. 359. Donaldson's Trustees, Feb. 5. 1833 ; 11 S. D. 367. Marshal, Nov. 20. 1835 ; 14 S. D. 30. Wallace, March 2. 1836 ; Ib. 599.

707. The object of the action of general declarator is to have it declared that the tenement is void ; that the bygone feu-duties, or in blench-holding the retour-duties, belong to the superior from the vassal's death to the date of citation ; that he has right to poind the ground for the full rent or duties, bygone from citation, and future till the heir's entry ; and that he has right to a year's rent for the heir's entry.

Hill, Feb. 5. 1824 ; 2 S. D. 681.

708. The superior's title to pursue is his sasine in the lands themselves.

Park, May 16. 1816 ; F. C.

709. The nature of the action, and the parties to be called, vary with circumstances ; and, 1. Where the vassal has died the action is a simple declarator of non-entry, and the heir is a proper party (*a*). 2. Where the vassal has alienated his fee, and on the procuratory there has been resignation, the superior's action is reduction-improbation of such conveyance, with declarator of non-entry ; and there seems to be no necessity to call the heir, but only the disponee. 3. If a vassal infest have disposed with procuratory, and have died, his heir cannot be compelled to enter (either by the superior or by the disponee) ; and it seems not to be necessary to call the heir (*b*). But if the heir choose in such circumstances to enter, the superior must receive him on the proper evidence of his right being produced (*c*). 4. If a disposition have been granted to the heir with a procuratory, and he sell, the disponee is not bound to take an assignation to the procuratory, but may compel the heir to complete his title (*d*). See § 723.

The tenants and sub-vassals must be called in all cases.

(*a*) Napier, Dec. 8. 1743 ; Elch. *Non-entry*, App. 2.

(*b*) Dundas, Feb. 10. 1769 ; M. 15035. Haig, May 16. 1821 ; 1 S. B. 8. Magistrates of Dundee, June 26. 1829 ; 7 S. D. 801.

(*c*) Piggot, Dec. 9. 1829 ; F. C. ; 8 S. D. 213.

(*d*) Gardner, March 7. 1799 ; M. 15037.

710. The grounds of defence relevant to exclude the superior in a declarator of non-entry are,—1. the heir's sasine (*a*) ; 2. the terce, to the extent of a third : or, courtesy as to the whole ; 3. the superior's refusal of a charter ; or not being himself entered, and so not able to give an entry ; or the title so perplexed that the true superior cannot be discovered, the

vassal having a right to call on the superior to shew his title, that he may be satisfied of his safety to enter with him (b); 4. the superior's tinsel of superiority (c).

The superior, though entitled to compel a vassal to enter, has no right to infeft him without his consent (d).

(a) Hay, May 23. 1630; M. 9291. Fullarton, July 18. 1678; M. 9293.

(b) Chalmers, June 29. 1745; M. 9330.

(c) Dickson, July 1. 1802; M. 15024.

(d) Earl of Eglinton, June 1581; M. 15026. Laing, March 1582; Ib. Stewart, Nov. 12. 1794; Bell's Cases, 75.

711. In order to procure an entry, and avoid the penal consequences of non-entry, the heir must offer, 1. proof, by retour, of his right; for calling him as a defender does not imply an acknowledgment of his title; 2. the relief and non-entry duties, viz. a year's rent; 3. the full rents after decree, unless there shall be a good or colourable excuse; and, 4. such a charter for signature as the superior is bound to grant; And in this, though the vassal is entitled to prescribe such destination as he pleases within the limits of the legal succession, the superior does not seem bound to comply when the destination goes beyond it.

Piggot, Fullarton, and Hill's Cases, ut supra. Laird of Kelhead, Feb. 10. 1671; M. 9292. Powrie, July 1687; M. 9296. Rolland, March 19. 1554; M. 9314. Lord Melvil, July 24. 1677; M. 9321. Robin, June 13. 1823; 2 S. D. 404. Spottiswood, July 25. 1771; M. 8004. See Duke of Hamilton v. Earl of Hopetoun, March 8. 1839.

712. If the proper heir offer to enter, the superior must comply, and has no title to inquire into any conveyances which may have been granted; to insist on the entry of a disponee; or to select among the disponees a vassal for himself. He may be compelled to give an entry to any one legally entitled to an entry. This is done by an order of Court in the process of non-entry requiring the superior to lodge a charter, and by the Court refusing to give decree in the declarator of non-entry till this be complied with.

Piggot, ut supra, § 709. Hill, Feb. 5. 1824; 2 S. D. 681. Observe Gordon's Case (June 29. 1814; F. C.) to be denied, as not law.

713. The superior is entitled to feu-duties or retour-duties before, and (unless there be some justification), to full rents after citation; and to possession from decree. So, 1. He has pointing of the ground for the duties before, and for rents

after citation ; and, 2. He may assume possession on decree, and remove a tenant by force of his decree, but not till after the next Whitsunday.

2 Ersk. 6. § 26. Coltart, Feb. 15. 1782 ; M. 9313.

714. No effectual declarator of non-entry can take place during the annus deliberandi. See below, of Succession, § 1685.

Lockhart, Dec. 21. 1708 ; M. 6878. Baillie, July 29. 1710 ; M. 6879.

715. 2. RELIEF, or COMPOSITION, is the acknowledgment or consideration given by one who enters as vassal to the superior for receiving him. Of old, every vassal paid this fine. It seems originally to have been the purchase-money for an entry, while yet the fee was personal ; and by consuetude was continued, so that even when the grant became hereditary, the renewal was still held to be under the implied burden of such payment. The fine was lighter for an heir ; heavier for one demanding an entry under a conveyance voluntary or judicial. An heir is the proper successor to the fee, and entitled, by the express or implied nature of the grant, to an entry as subsidiary grantee or universal successor to all the rights of the deceased : A singular successor has no such right as in relation to the superior ; and is entitled to compel an entry only by statute, and on payment of a fine.

The heir's fine is called RELIEF : The singular successor's, purchaser's, or creditor's, COMPOSITION for an entry.

716. 1. *Heir*. The relief payable by an heir, is a year's feu or blench duty, in addition to the duty payable for the year. This doubling of the feu-duty, or of the blench-duty, is the implied fine between the superior and the heir ; and the superior never can, but by special agreement, demand a year's rent of the land, for the fine of an heir, but only the dupli-cand. Singular successors, on the contrary, require a special stipulation to bar the superior's claim for the year's rent as his fine.

NOTE.—It has been twice decided, that without a special stipulation no relief is due in feu-holding for the entry of an heir (*a*) ; but that has been much doubted by Erskine (*b*).

(*a*) Kincaid, Dec. 1. 1610 ; M. 13579.

(*b*) Earl of Dundonald, Nov. 24. 1736 ; Elch. *Sup. and Vass.* 2. 2 Stair, 4. § 27. 2 Ersk. 5. § 48.

717. The superior is bound to enter as an heir, 1. the heir

of investiture, or person entitled by the destination of the existing charter to succeed ; 2. failing the heir of investiture, the heir at law ; 3. the heir entitled to an entry as such may demand it, although he have bought the estate, and holds a disposition as purchaser ; not being compellable to use that disposition ; 4. an heir may even demand to be entered on the footing of an heir under a settlement, provided it be not hurtful to the superior (see § 718). But, 5. one who is not heir *alioquin successurus*, is not entitled to an entry as heir, merely because he is heir by a deed of settlement : He is a singular successor ; and, 6. the Crown taking by forfeiture, or the Crown's donatary, is entitled to enter without paying as a singular successor.

Blair, June 25. 1680 ; M. 15045. Duke of Gordon, March 7. 1772 ; M. 15050 ; Hailes, 472.

718. The superior is not bound to give entry on an entail conceived in such terms as to exclude all chance of compositions for singular successors, confining the fee to substitutes in destination as heirs of investiture ; but is entitled to make a reservation in his charter of all rights and casualties, as if the destination had never been made or the charter granted.

Magistrates of Aberdeen, June 17. 1808. Lockhart, July 10. 1760 ; M. 15047. McKenzie, July 4. 1777 ; M. 15053 ; 2 Hailes, 760 ; 5 Brown's Sup. 613. Duke of Argyle, Nov. 19. 1795 ; M. 15068. Duke of Hamilton, Nov. 22. 1827 ; 6 S. D. 94. Wallace, March 2. 1836 ; 14 D. B. M. 599.

719. *Singular Successor.* A singular successor, whether purchaser or creditor, pays a year's rent of the land, without regard to the amount of the feu or blench duty, and the superior is not to be deprived of this payment without express consent (*a*). Creditors were first privileged to enter on tender of a year's maill, as the lands were set for the time (*b*), unless the superior were himself the debtor, in which case he was bound to enter the creditors *gratis* (*c*). Purchasers used at first to force an entry in the character of creditors : But, on the relaxation of the rigid maxims of feudal law, they were empowered in their own right to demand an entry on resignation on the same terms with creditors (*d*).

(*a*) Boyd July 25. 1751 ; Elch. *Sup. an l Vass.* 13. Magistrates of Inverness, Feb. 2. 1769 ; M. 15059. Brisbane, June 6. 1794 ; M. 15061. Thomson, May 22. 1810 ; F. C. Magistrates of Edinburgh, May 16. 1834 ; 12 S. D. 593.

(b) 1469, 37. 1669, 18. 1681, 7.

(c) Seton, Feb. 13. 1702; M. 15046. Cowper, Feb. 27. 1742; M. 150.

(d) 20 Geo. II. c. 55. § 12, 13.

720. The year's rent to be paid by a singular successor, is the actual rent of the lands at the time when the new charter is to be granted,—the rise or fall in rent affecting the superior's claim (a): But under deduction, 1. of feu-duties and annual burdens imposed with the superior's consent, and a reasonable allowance for annual repairs on perishable subjects (b); 2. of public burdens; 3. of one-fifth for teind (c).

(a) Heriot's Hospital, July 27. 1715; M. 7998. Anderson, Nov. 30. 1824; 3 S. D. 334.

(b) Aitchison, Feb. 14. 1775; M. 15060; 2 Hailes, 612. 5 Brown's Sup. 613.

(c) Reid, March 3. 1819; 4 S. D. 227, note. Thomson, Nov. 24. 1825; 4 S. D. 224.

721. In estimating the rent, these rules are observed:—  
1. The composition to be paid by the vassal for land on which he has built houses is the rent augmented by that of the houses (a). 2. If the land be sub-feued for building, the superior is entitled only to the feu-duty paid to his vassal; not to the rent of the houses built on the ground (b). 3. The effect of a sub-feu for a large price, with elusory feu-duties, is to give to the superior a right to the feu-duty with the interest of the grassum (c). 4. It is not yet settled whether the superior is to have any casualty falling to his vassal from a sub-vassal, in the year of the vassal's entry (d).

(a) Anderson, Nov. 30. 1824; 3 S. D. 334. See also Aitchison, supra (b).

(b) Bell on Conveyance of Land, 316, note. Elchies' Annot. on Stair. 177. Hay, Feb. 15. 1634; 1 Brown's Sup. 201. Lord Almond, March 9. 1639; M. 15056. Monkton, Feb. 15. 1639; M. 15020. Cowan, March 29. 1639; M. 15055. Cockburn Ross, June 6. 1815; affirmed, 1820; 2 Bligh. 707.

(c) Campbell, June 28. 1832; 10 S. D. 734.

(d) Campbell's case (c).

722. A superior is not bound to enter a corporation, which never dies, for he would so lose the heir's relief (a). This must be matter of special stipulation or of compromise (b).

(a) 2 Stair, 3. § 41. 2 Ersk. 7. §. 7. Hamilton, Feb. 24. 1713; reversed, May 9. 1716. 7 Robertson, App. Cases, 172. Hill, Jan. 17. 1815; F. C.

(b) Earl of Mansfield, May 22. 1829; 7 S. D. 642.

723. In conveyances to a purchaser it may be observed,—  
That the disponee is not bound to enter, although he shall

have been infeft base, or shall have assumed possession of the lands, if the fee be full by the disponer continuing infeft and alive; and that when the fee does fall into non-entry, and there are successive disponees, the superior cannot insist for more than one entry, and from the last disponee (a). 2. That if the disponer be not yet infeft, the purchaser may insist (if not otherwise stipulated) on his completing his title so as to render the fee full, that the purchaser may not be compelled during the disponer's life to enter. See above, § 709 (b). 3. That if the disponer should die, and so the fee fall into non-entry, the disponee cannot insist on the disponer's heir entering (c). But, if so inclined, the heir may by entering delay the necessity of the purchaser's entering; and the superior is not entitled to object.

(a) Gordon, June 29. 1814; F. C.; not law, though relied on in 3 Ersk. 396, note 158.

(b) Gardner, March 7. 1799; M. 15037.

(c) Dundas, Feb. 10. 1769; M. 15035; 1 Hailes, 275. Confirmed, Hamilton, Dec. 9. 1778; 5 Brown's Sup. 615.

724. Trust-disponees of the vassal (especially where other interests than those of the heir at law are introduced) must enter as singular successors: But, having once entered, it would appear that the superior is not entitled, while the trustee survives, to insist on a disponee from him entering; or to take advantage of any peculiarity in the state of the *personal* right, to declare non-entry; as, for example, to proceed on the ground of the purposes of the trust being exhausted.

Grindlay, Jan. 18. 1810; F. C. Hill, Feb. 5. 1824; 2 S. D. 574.

725. Although a substitute may not be entitled to insist on an entry as heir under a deed of entail (§ 718); or a vassal to require the superior to grant an unqualified charter of resignation on the procuratory in an entail; a *purchaser* demanding his entry on payment of a composition, is entitled to make what alteration he pleases on the destination in the original charter; to change it, for example, from a male fee by a general destination to heirs female or heirs whatsoever; but not to go beyond the line of succession by introducing an utter stranger. See above, § 711.

Magistrates of Aberdeen, June 17. 1808; M. *Sup. and Vass.* App. 10.

726. The superior may secure himself in payment of his composition by retaining the charter till the composition is paid; but if he deliver it, the entry may be completed by sasine, and then the claim for the composition becomes merely personal,—there is no pointing of the ground for it, as for *debitum fundi*.

727. The superior is not bound to enter the heir otherwise than by precept of *clare constat*, or by a charter not assignable: Nor can he be required to grant such a charter as the heir can assign to the effect of entering a stranger as vassal (*a*). Nor is he bound, under a destination to heirs and assignees, to enter a disponent from one infert, without payment of a composition as singular successor; a grant to heirs and assignees being intended only to include assignees before sasine (*b*). See § 728.

(*a*) Magistrates of Musselburgh, Feb. 21. 1804; M. 15038.

(*b*) 2 Stair, 4. § 22. Boyd, July 25. 1751; Elch. *Sup. and Vas.* 13. Magistrates of Inverness, Feb. 2. 1769; M. 15059, Brisbane, June 6. 1794; M. 15061. Thomson, May 22. 1810; F. C. See § 728 (*a*).

728. *Taxing of Composition.* It is a frequent practice to fix at a certain sum (or, in technical phrase, to tax) the composition payable on entering with the superior. The presumption is against taxing; and the taxing clause is strictly interpreted. Unless clearly made to comprehend singular successors, the superior is not thereby excluded from demanding his full composition from them. Where the charter with such a clause is conceived in favour of the grantee “and his heirs and assignees,” that is held to mean only assignees of the personal right before investiture, but not to give the benefit of the taxed composition to purchasers from the grantee infert (*a*). But where the superior is bound to enter “singular successors,” on their tendering a double of the feu-duty, it is effectual (*b*).

(*a*) Magistrates of Inverness, and Boyd, § 727 (*a*). Salmon, July 25. 1751; M. 4181. Lord Carnegy, Feb. 5. 1663; M. 10375. M'Lachlan, May 14. 1823; 2 S. D. 303. Thomson, *supra*, § 727 (*a*).

(*b*) Innes, June 22. 1822; 1 S. D. 479.

729. A composition once incurred has been held not to be discharged by the superior obtaining a decree of declarator *ob non solum canonem*.

Magistrates of Edinburgh, Feb. 27. 1835; 13 S. D. 571. See Mitchell's Trustees, Jan. 23. 1834; 12 S. D. 322.

730. 3. ESCHEAT. Escheat is the forfeiture to the superior of the annual profits of the land while the vassal remains in a state of rebellion against his superior or the Crown. Formerly, the death of a vassal, where no heir could be traced, or in technical words, the failure of the vassal's blood, reinstated the superior in the fee. But the Sovereign is now *ultimus hæres*; taking (by the donatary) the fee, with all its burdens, and all real debts created by the vassal, to the extent of the fee (*a*). The superior is bound to enter the donatary on declarator, without exacting the composition of a singular successor (*b*). Where the Crown is superior, there is consolidation *ipso jure*.

Rebellion against the superior by disclamation now obsolete, or by purpresture now superseded, or by alienation, forfeited the fee. Rebellion, civil or criminal, formerly excluded the vassal. Now, only the rebellion consequent on crime in penal law has that effect (*c*).

(*a*) 2 Ersk. 5. § 53. Balnagoun, July 30. 1662; M. 3409.

(*b*) Boyd, *ut supra*, § 727.

(*c*) 20 Geo. c. 50. § 11.

731. Escheat was of two kinds: one not properly feudal, called single escheat; the other directly affecting the feudal estate.

732. 1. By Single Escheat the rebel's moveables fell to the Crown, as *bona vacantia*. The Crown, or the donatary, had a year in which to levy them; which, of course, burdened the superior's right of *liferent* escheat: And the waste thus occasioned was compounded for by giving a year's rent.

733. 2. *Liferent* Escheat gives to the superior, while his vassal lives and continues in rebellion, right to possession of the fee. But it is merely the usufruct which falls: the fee is in the rebel, with every power of disposal which does not interfere with the usufruct. It falls, 1. by sentence of death, and escape; the sentence terminating the vassal's capacity to hold the fee, the existence of the vassal excluding the heir; 2. by denunciation of the vassal for a criminal cause unrelaxed for a year.

M'Rae Nov. 22 1836; 15 D. B. M. 54.

734. The Escheat falls, 1. on the heir's rebellion, although not yet entered, as if he were entered: 2. on the rebellion of

liferenters, terciers, husbands by courtesy, holders of real burdens: 3. on the rebellion of a tenant; the liferent going to the landlord.

The liferent escheat is burdened with the vassal's debts made real on the lands (*a*). But not with personal debts; nor with debts in virtue of voluntary deeds after denunciation; nor with subsequent debts or deeds; nor with obligations to convey, if not followed by infeftment within year and day of denunciation (*b*).

Relaxation restores the vassal *de futuro*, but does not affect the superior's right for the past (*c*).

See below as to the superior's power of disposal of his superiority, § 855.

(*a*) Countess of Sutherland, Feb. 26. 1771; *M. Sup. and Vass.* 1.

(*b*) 2 Ersk. Pr. 5. § 33.

(*c*) 2 Ersk. 5. § 65.

735. SUPERIOR'S DUTY TO HIS VASSAL. The superior is bound when required to enter his vassal (*a*). If the superior's titles be not complete, he is bound to complete them; and to this effect the vassal may charge him to enter within forty days, under certification that he will "tyne his superiority." The vassal may then bring a process of declarator of Tinsel of superiority during the superior's life, and, on obtaining decree of declarator, take his entry with the next superior, whether Crown or subject (*b*). The remedy under this act, however, was formerly held competent only to adjudgers and heirs, not to purchasers; and against the superior's heirs unentered, not singular successors holding the personal right: But the remedy is not thus confined in modern practice (*c*).

The importance to the vassal of obtaining a complete title to enable him to remove tenants, to grant heritable securities, to make effectual provisions for his children, has led to a strict construction of the act in which the words "fraud and guile" are held to indicate any delay to the prejudice of the vassal. The Court accordingly admit of no delay, but instantly give decree of declarator (*d*).

The superior in losing his tenant for life does not forfeit his feu-duty, but only the casualties of superiority. The effect is not to punish the immediate superior, but only by giving the vassal an entry with his mediate superior, to save him from the

inconvenience of the want of a feudal title, and to meet any proof of non-entry on the part of his immediate superior (e).

(a) See below, § 719, 781. 1469, 37. 1669, c. 18. 2 Stair, 4. § 6. 20 Geo. II. c. 55. § 12, 13. 3 Ersk. 8. § 79.

(b) 1474, 58. Dickson, July 1. 1802; M. 15024.

(c) Spalding, July 8. 1709; M. 15033. Christie, Dec. 14. 1776; 5 Brown's Sup. 608.

(d) Dickson, ut sup. (a).

(e) Hay, March 24. 1632. 3 Stair, 5. § 47. Wallace, Dec. 5. 1838.

736. The superiority is not subject to the burden of stipend unless by special stipulation. See below as to Teinds and Stipends, § 1147–1162.

### 3. THE VASSAL'S ESTATE.

2 Stair, 3. § 75. 2 Ersk. Pr. 6. 2 Ersk. 6.

737. The vassal acquires, by the charter of the superior, the right of property and exclusive use of the lands and teinds, and also of the pendicles, parts, and pertinents of the land; whether above the surface (as houses, woods, and enclosures), or below it, as coal, limestone, and minerals; with all the legal privileges belonging to the lands. But this right is under exception of all regalia (§ 669), unless expressly granted to him; and also of teinds, unless plainly meant to be included, or (if already feudalized), expressly conveyed.

In the charter may be distinguished, 1. the grant of the lands; and, 2. the grant of the pertinents.

738. 1. LANDS are conveyed, 1. By the general NAME, where an estate has been erected into a barony (a), or by the names, or situation, or boundaries of the particular lands in the common case. When the identity of the land is unquestionable, the grant includes all that forms a proper part of the land from the sky to the centre (b). It is otherways in a lease which is superficial only (see § 1225).

2. If the land be described by BOUNDARIES, the effect is different, as against the grantee, and against third parties. And, 1. If the boundary be the sea, or the the sea-shore, the right is extended or limited as the sea recedes or advances. See above, § 643. 2. If the boundary be a stream or river, the property may be subject to alteration; extended by alluvio or imperceptible addition to the bank, or by gradual and imperceptible variation of the channel; or the stream may cease to

be the boundary in consequence of some violent and manifest change or avulsio. See below, § 935, et seq. 3. If the boundary (as in urban or suburban property) be by walls, the expression may exclude, or include, or divide the wall. 4. The grantee cannot acquire by prescription what is beyond his express boundaries (*c*).

3. If described by MEASUREMENT it may be either taxative or demonstrative. When the subject is by name, or otherwise, clearly pointed out, a superadded measurement is generally to be held as taxative. When the measurement is used descriptively only, it is considered as demonstrative (*d*).

(*a*) Douglas, Feb. 3. 1630; M. 2262. Earl of Argyle, Jan. 15. 1668; M. 9631.

(*b*) Bruce, June 28. 1716; M. 9642. Dick, Nov. 16. 1769; M. 12813. Menzies, June 10. 1818; F. C. Livingstone, May 31. 1821; 1 S. D. 48. Logan, April 2. 1831; 5 W. S. 242. Baird, Feb. 2. 1836; 14 S. D. 396.

(*c*) Young, *infra*, § 739 (*b*). Thomson, Feb. 1688; 2 Brown's Sup. 118. Wilson, Jan. 4. 1695; 4 Brown's Sup. 236. Suttie, May 26. 1837; 15 S. D. 1037.

(*d*) Douglas, Feb. 2. 1630; M. 2262. Rochud, Jan. 31. 1679; M. 2264. Ure, Feb. 26. 1834; 12 S. D. 494.

739. 2. PARTS AND PERTINENTS are such accessory parts, and fixtures, and appendages to land, or houses, or such separate possessions, or privileges, as accompany the occupation and use of the land; or have for forty years been so enjoyed along with it. They are carried without being named or described in the charter (*a*). Even tenements lying separate and discontinuous from the main subject may be thus carried, unless excluded by a bounding charter which does not specify them (*b*).

(*a*) 2 Stair, 3. § 73. 2 Ersk. 6. § 4. Bruce, Dec. 23. 1709; M. 9638. Bruce, June 28. 1716; M. 9642. Menzies, June 10. 1818; F. C. Nisbet, Feb. 7. 1624; M. 9628. Lord Burley, Jan. 30. 1662; M. 9630.

(*b*) Forsyth, March 1. 1632; M. 9628. Young, June 21. 1649; 1 Brown's Sup. 390. Thomson, Feb. 6. 1688; 2 *ib.* 118. Wilson, Jan. 4. 1695; 4 *ib.* 236. Young, Nov. 17. 1671; M. 9636. E. of Moray, Feb. 20. 1675; *Ib.* Crawford, Nov. 17. 1714; M. 9641. Magistrates of Perth, Nov. 19. 1829; 8 D. S. 82. Lord Fife's Trustees, Jan. 16. 1830; 8 S. D. 326.

740. Among pertinents mines of minerals and coal, and quarries of limestone, marble, freestone, &c. are included (*a*). These occasionally are separate tenements; and under pertinents regalia cannot be included; ante, § 669, and below, § 750.

(*a*) 2 Ersk. 6. § 5. Bruce, June 28. 1716; M. 9642. Lord Burley, Jan.

30. 1662; M. 9630. Oughterlony, Nov. 28. 1755; 5 Brown's Sup. 837; M. 164.

741. Woods and trees are pertinents, or rather parts, of the lands on which they grow.

2 Ersk. 6. § 14.

742. Orchards, though lying discontinuous from the principal subject, are held to be pertinents.

Bruce, Dec. 23. 1709; M. 9638.

743. Houses and buildings (including mills (*a*), though sometimes a separate tenement), enclosures, and fixtures (*b*), are pertinents. Fortalices in the old law were not so held (*c*).

(*a*) 2 Stair, 3. § 75. 2 Ersk. 6. § 4, 5. Rose, June 17. 1777; M. 9645, and *Part. and Pert.* App. No. 1; 2 Hailes, 756.

(*b*) Billinge, Dec. 3. 1819; F. C. Niven, March 6. 1823; 2 S. D. 270. Lady J. Campbell, Feb. 22. 1825.

(*c*) 2 Stair, 3. § 65-6. Below, § 752. Home, June 16. 1612; M. 9627.

744. Seats in the parish church are held to be pertinents of the lands whose owners have possessed them as such.

Lithgow, June 15. 1697; M. 9637. Duff, June 29. 1769; M. 9644. 1 Hailes, 297. Peden, Nov. 21. 1770; M. 9644.

745. Servitudes, which are concomitant privileges, intended for giving the full exercise and enjoyment of the right of property, are pertinents.

Borthwick, Feb. 14. 1668; M. 9632.

746. Separate tenements and patches of land, houses, &c. may become pertinents of an estate in land by possession as such during the term of prescription.

2 Ersk. 6. § 3. Young, Nov. 17. 1671; M. 9636. Countess of Moray, Feb. 20. 1675; *ib.*

747. The right of trout-fishing in a river passing through the lands goes as a pertinent; but not the right of salmon-fishing, § 671. The rules seem to be, 1. That trout-fishing in a private river is a pertinent of the lands; but may be reserved, or even transferred to a stranger: 2. That, in a public river, access to the banks, or to the water, by a boat, gives to any one a right to fish: 3. That long possession and use of fishing will confer on the public a right to fish: 4. That salmon-fishing granted by the Crown to a stranger gives him, by access, a right also to fish trout; but not in close-time, when he has

no privilege of access: 5. That, in fishing trout, the proprietor of a private river is to do nothing hurtful to the salmon-fishing: 6. That a right in another to salmon and other fishing may be effectual to exclude the proprietor of the ground from trouting, provided it be exercised by excluding, not by mere abstinence on the proprietor's part: 7. That the proprietors of the shores of a loch have presumptioné common right of sailing and fishing, unless excluded by express grant, or exclusive possession on a general title.

Carmichael, Nov. 20. 1787; F. C.; M. 9645. 2 Hailes, 1033. M'Kenzie, May 20. 1830; 8 S. D. 816. M'Donald, Dec. 14. 1836; 15 S. D. 259.

748. Regalia are excepted from the ordinary rule of pertinents; and even when granted by the Crown to a vassal, they are not held to be transferred *from* that vassal by a conveyance of the land, unless expressly mentioned.

2 Stair, 3. § 60.

749. There are two species of Royal grants of land, which deserve to be particularly distinguished; though in modern times one of them has been abolished, and the other has much fallen from its ancient splendour. These are, grants of regality, and grants of barony.

1. REGALITY was an erection and feudal grant of land "in liberam regalitatem," with a high and almost royal jurisdiction. Scotland was in former times divided into the Royalty, where the King's jurisdiction was exercised by his ordinary Judges; and Regality, where under such grants as these, jurisdiction, civil and criminal, was exercised by the Lord of Regality. Regalities were abolished by statute on occasion of the rebellion of 1745 (*a*).

2. BARONY was the erection of land "in liberam baroniam," as one feudal tenement, accompanied also by extensive jurisdiction within appointed limits. The barony, though consisting of many separate lands and portions, is designated by a general name. And it is accompanied by pertinents and privileges not attendant on the property of ordinary estates. Barony is truly the only feudal dignity conferred on territorial proprietors; lordship, earldom, &c. being only nobler titles for a barony, as connected with personal dignities (*b*).

(*a*) 20 Geo. II. c. 43. 2 Stair, 3. § 45. 2 Ersk. 3. § 46.

(*b*) 2 Stair, 3. § 60. 2 Ersk. 3. § 46. and 2. 6. § 18.

750. As the name of the barony is *nomen universitatis*, a charter or disposition of the barony not only conveys all the lands and separate portions included in the barony, but all the pertinents belonging to it. And among those pertinents held to be conveyed, if not excepted, are such regalia as have been granted to, or conferred on, the baron.

2 Ersk. 6. § 18. Earl of Argyle, Jan. 15. 1668 ; M. 9631.

751. Jurisdiction, originally very extensive, but abolished, or at least restricted to the necessary enforcement of duties, rents, &c. within the barony, was a privilege conferred by the erection of a barony.

1 Ersk. 4. § 25-29. 20 Geo. II. c. 43 ; c. 50. § 16. See in Acts of Sederunt the proceedings for redeeming those rights of jurisdiction. See also Lord Monboddo's Notes of the Claims of Jurisdiction, 5 Br. Sup. 750-763.

752. Fortalices were the King's castles and forts, for public defence, which were in the custody of Constables, but are now ranked only as country-seats, and held as implied in grants of barony.

2 Stair, 3. § 65-6.

753. The right of forestry is not conferred by erection into a barony ; but may be conveyed by a conveyance of the barony.

2 Ersk. 6. § 18. See Sup. § 670.

754. A right to salmon-fishing is not conferred by mere erection of lands into a barony, unless specially granted ; but the charter of a barony is a good title by prescription to carry salmon-fishing. See below, § 1112.

2 Ersk. 6. § 18.

755. A right to ports and harbours is not created but may be carried by a charter of barony.

2 Ersk. 6. § 18.

#### 4. GENERAL VIEW OF THE FEUDAL TITLE TO LAND.

756. The leading principles of feudal conveyancing are :—1. That the superior is over-lord of the fee. 2. That the vassal holds directly of him, as if his proprietary rights were derived from the superior's grant. 3. That the grant of land is by a charter from the superior, with an instrument of sasine, recorded in the public register. 4. That on any termination of the

vassal's right (*i. e.* on transmission of it by death to his heir, or on voluntary transference to a purchaser, or on a compulsory judicial conveyance to a creditor), recourse must be had to the superior in order to have a renewal of the grant; which he is bound to give (on service, resignation, or adjudication), and which, like the original grant, is completed by sasine recorded. And, 5. That if the vassal choose to give only the dominium utile to another, without transferring his whole right; or to burden it with debt; he may do so by a grant, in subinfeudation of the land, to be held of himself as an intermediate superior; he himself continuing vassal to his own superior; and the sub-feu being completed by sasine duly recorded.

Thus, no real right to the property, and no real burden on land, can be created without a feudal grant completed by sasine and published in the public record.

Feudal grants are either, 1. original; or, 2. by progress; on the occasion of the transmission of the land from the original vassal.

#### THE FEUDAL TITLE BY CHARTER AND SASINE.

757. Originally, a feudal vassal swore fealty, on receiving a grant from his superior, and was thereupon invested in the land, by the hand of the superior himself, before the Pares Curiae. The written title was rather a record of what had already passed, than itself the grant: it was called Breve Testatum. The charter afterwards introduced expressed, in terms of conveyance, the superior's grant: And if the superior was not himself to give the investiture, the charter was accompanied by a precept commanding his bailie to give sasine. This precept afterwards became part of the charter. An instrument of sasine, under the hand of a notary, was the proof of the investiture, and was ordered to be registered for public inspection within a certain time. Thus there are three points to be marked:—

1. The charter containing the precept of sasine.
2. The sasine and instrument. And,
3. The registration of the sasine.

2 Ersk. Pr. 3. 2 Stair, 3. 2 Ersk. 3. 2 Ross, 117, &c.

758. 1. *Charter and Precept.* The charter is properly a

grant of land, forming the *titulus transferendi domini* ; and so far is complete without a precept of sasine. The precept of sasine belongs to the *modus transferendi*, being the mandate to give tradition : And such precept may be unnecessary, if the superior himself choose to give sasine *propriis manibus* ; or it may be supplied by a separate precept. But by the present practice the charter is a compound deed, containing, 1. a grant of the feudal subject ; and, 2. a precept authorizing a person to represent the superior, and to give sasine in the land to the vassal.

759. The parts of the charter, properly so called, are the dispositive clause, the *tenendas*, and the *reddendo* ; these expressing the grant and its conditions. The precept of sasine is not, as a part of the charter, indispensable, but has been superadded to the proper charter.

760. 1. *The Dispositive Clause.* This contains (besides the name and description of the granter and grantee, and the cause of granting), the grant *de presenti* of the superior to the vassal ; the description of the subject ; and the destination or line of succession to which the superior gives his consent. And, 1. The words of conveyance must import a grant *de presenti*. Words of preterite or of future grant will not do, unaccompanied by words *de presenti*. 2. The subject of the grant must be described ; both its extent and local situation ; and its nature, as of fee or liferent, &c. : And in all questions on such points, this clause contains the proper evidence. Where the dispositive clause is clear and without ambiguity, the grant is not to be enlarged or limited by the words of any subsequent clause : If ambiguous, other clauses may be referred to in aid of the construction. 3. The destination is here set forth ; forming the contract between the superior and vassal as to the heirs whom the superior shall be bound to receive as such, on payment of a double feu-duty (§ 717.), or the persons to be regarded as purchasers, and so held liable for a full composition. 4. This clause contains the essence of the charter, which is the grant. And if the deed were to stop here, sasine might be obtained by means of a separate precept ; or by the judicial process of Adjudication in Implement.

2 Stair, 3. § 14, 60. 2 Ersk. 3. § 21. 2, 3, and 6. § 1. 17. 2 Ross, 164.  
1 Juridical Styles, 8. et seq. 1 Bell's Forms of Deeds, 12. Simson, Jan.

10. 1752. Elch. v. Tidemont, and notes, 486, 5 Br. Sup. 794. Montgomery, June 9. 1795, Bell's Cases, 203.

761. 2. The *Tenendas* clause sets forth the holding thus :—  
 ‘ To be holden and to hold, all and sundry the lands, &c. by  
 ‘ B, &c. of and under me, &c. as their immediate lawful supe-  
 ‘ rior of the same, in feu-farm (or in blench-farm), fee and  
 ‘ heritage, for ever, by all the righteous meaths and marches,’  
 &c. Where such a clause was omitted in a charter formerly,  
 the presumption was for ward-holding; now the tenure would  
 be presumed to be Feu; or Blench if held of the Crown.

2 Stair, 3. § 13, 60. 2 Ersk. 3. § 24. 2 Ross, 164.

762. 3. The *Reddendo* clause expresses the regular return to be made by the vassal, of services, or of feu or blench duty; and also the occasional or casual return on the entry of an heir or singular successor.

763. These clauses express all the parts of the proper charter; and, with the authenticating or testing clause, make a perfect grant, transferring the *jus ad rem*, and forming the *titulus transferendi* to be completed by sasine, the *modus transferendi domini*.

764. 4. The *Precept of Sasine* is an order or mandate addressed by the superior to his bailie, by means of which the conveyance is to be completed by sasine. The process commands the bailie to give “ actual, real, and corporal possession,” to the vassal, or his attorney, by delivery of “ earth and stone,” or such other symbols as law has prescribed for tradition of the subject of the grant. This precept plainly bears the marks of having been once a separate deed; and is awkwardly incorporated with the charter, by being added at the end of it. It was first made part of the charter by a statute for regulating the tenor of Crown charters; and the practice was imitated by subjects superior, in their grants or dispositions.

2 Stair, 3. § 16. 2 Ersk. 3. § 33. 2 Ross, 65. 1672, c. 7.

765. Where Sasine is to be given *propriis manibus*, no precept is necessary. A charter, or even an instrument bearing the fact of sasine being so given, signed by the superior, and containing words of *de presenti* alienation, is enough. But, in

practice, *sasine propriis manibus* is almost obsolete ; and never used but in *sasines* to wives and children under family settlements.

*Sasine* given *manu aliena* requires a precept.

2 Stair, 3. § 19. 2 Ersk. 3. § 38.

766. The precept, being a mandate, expired formerly by the death of either party (§ 228). This was remedied by Act of Parliament, and the *jus quæsitum*, which a purchaser has in the warrant for completing his title (as being a procuratory in rem suam), was made effectual by declaring, ' that precepts of *sasine* shall in all times coming continue in full force, and be sufficient warrants, not only for taking *sasine* in favour of the parties to whom they are or shall be granted, but likewise in favour of their heirs, assignees, and successors, having right to the said precepts, either by a general service, or by disposition and assignation, or by adjudication, as well after as before the death of the granters, or parties to whom they are granted, or both ; provided always that the *sasines* taken after the death of either party express the titles of those to whom the *sasine* is granted, and that the same be deduced therein, otherways to be null and void.'

NOTE.—An exception is made from the statute of the precept of *Clare constat* for entering an heir, which is necessarily personal, and not assignable. See § 778.

1693, c. 35. 9 Act. Parl. p. 461. c. 73. 3 Ersk. 3. § 42.

767. The precept of *sasine*, according to the above Act, is a warrant to give *sasine* to the person named as grantee ; or to his heir proved by service ; or to the assignee of the grantee. But in these two last cases the connecting evidence (or *mid-couple*) must be shewn to the person who gives *sasine*, and published to the witnesses, and expressed in the instrument. While a precept of *sasine* is still unexecuted, the charter containing it is called an open charter ; and the precept may be assigned either in whole or in part.

768. The mandate is to give heritable state and *sasine*, real, actual, and corporal possession. And, 1. The party to whom *sasine* is to be given (or whose heir or assignee, under the Act of 1693 (§ 766), is entitled to take *sasine* under the precept) must be named. 2. The lands must be described so as to be

known, or capable of identification by written evidence. See below, § 876. 3. The possession to be delivered is *corporal*, not *actual* possession, of the lands or subjects themselves. The possession is delivered symbolically, by delivery of some token or badge. See § 769.

See Davidson, Nov. 14. 1827; F. C.; 6 S. D. 8.

769. 2. *Sasine*. SASINE is the delivery of possession, by certain symbols; as earth and stone for lands; clap and happer for mills, &c.; and this symbolical delivery is indispensable; while, without it, real and actual possession of the land is of no avail in completing the title, and not necessary to its completion. Of this symbolical possession, the only evidence admissible is a notarial instrument duly recorded.

770. SASINE is given by delivery, on the ground of the lands, of the proper symbol, by the bailie of the superior to the attorney of the vassal; the warrant to that effect being read and published by the notary to the witnesses present; and instruments being taken, by placing a piece of money in the hands of the notary, for the purpose of calling the attention of him, and of the witnesses, to the ceremony. The ceremony is this:—1. The bailie, attorney, notary, and two witnesses, being on the ground, the attorney of the vassal delivers the deed containing the precept, with the proper connecting title, to the bailie, requiring him to perform the duties according to the mandate. 2. The bailie delivers the warrant and its accompaniments to the notary, to be read and published to all present. 3. The notary reads the warrant and the connecting evidence. 4. The bailie delivers the symbols to the attorney. 5. The attorney receives the symbols, and takes instruments in the hands of the notary, by giving him a piece of money. And, 6. The notary and witnesses see, and must by their subscription attest, the truth of the ceremony as stated in the instrument.

2 Ersk. 3. § 35. Primrose, Nov. 22. 1612; M. 14326. Lady Lamberton, Dec. 23. 1680; M. 14309; and Jan. 1682; M. 14321. Urquhart, June 27. 1752; M. 9921. Livingstone, March 3. 1762; 5 Brown's Sup. 587. Henderson, March 6. 1776; M. *Memb. of Parl.* App. 2; 5 Brown's Sup. 586; 2 Hailes, 695. Douglas, 5 Brown's Sup. 587. Davidson, Feb. 14. 1827; 6 S. D. 8.

771. The *Instrument of Sasine* (which is the only admissible

evidence of the sasine) is an attestation by the notary and witnesses, subscribed by them, that symbolical possession was duly given to the vassal (*a*). It consists of,—1. An invocation ; “ in the name of God.” 2. The date, by the day and year, and also by the year of the sovereign’s reign : And the date is important as regulating the recording. 3. The compearance and name of the attorney, and the name of the person whom he represents. 4. The compearance and name of the bailie as representing the superior. 5. The description of the charter as in the attorney’s possession, with such a narrative as may connect it with the precept. 6. The exhibition of the charter by the attorney to the bailie, with a request to execute his office as bailie. 7. The bailie’s compliance, by delivering the charter and precept to the notary for publication. 8. The reading of the precept, which must be verbatim engrossed in the instrument, so far as it relates to the lands in which sasine is given (*b*). 9. The giving of sasine and real and corporal possession by delivery of the symbols by the bailie to the attorney. 10. The taking of instruments by the attorney in the notary’s hand. 11. The attestation, that those things were done on the ground of the land, at a certain hour of the day of the date of the instrument, in presence of the witnesses duly named and described. 12. The conclusion is the notary’s Latin doquet, authenticating the instrument, and again attesting the truth of the ceremony, as seen, known, and heard by the notary and witnesses personally present.

NOTE.—The detail of questions which may arise on this instrument will be given below, § 869, et seq.

(*a*) 2 Stair, 3. § 16. 2 Ersk. 3. § 34–38.

(*b*) Don, Feb. 4. 1813 ; F. C. Lamberton, Dec. 23. 1680 ; M. 14309.

772. 3. *Registration of the Sasine.* The laws establishing the record of sasines had two objects in view :—the first was to guard against forgery, by making conveyances known ; the next (suggested as an improvement on the system) was to give information to all persons interested in knowing the state of the property. Hence the rule in the statutes is twofold, that the sasine shall be recorded within sixty days ; and that priority of registration shall give preference.

1503, c. 89. 1540, c. 79. 1555, c. 46. 1581, c. 64. See Convention of Holyrood in 1598; 4 Act. Parl. c. 184. 1600, 4 Act. Parl. 237. c. 36. Act of Sederunt, Jan. 6. 1604. 1617, c. 16. See 1 Hume's Com. on Criminal Law, 139.

773. The words of the act 1617, as applicable to sasines, are, 'that there shall be a public register, in the which all instruments of sasine shall be registered within threescore days;—'the extract of the which register shall make faith in all cases, except where the writs so registered are offered to be improven; and gif it shall happen any of the said writs which are appointed to be registrate as said is, not to be duly registrate within the said space of threescore days,' 'the same to make no faith in judgment, by way of action or exception, in prejudice of a third party who hath acquired a perfect and lawful right to the said lands and heritages; but (without) prejudice always to them to use the said writs against the party maker thereof, his heirs and successors' (a).

The requisites of registration under this Act, and subsequent Acts and regulations, are,—1. That the sasine shall be recorded within threescore days from the date of the instrument. 2. That the sasine shall, on being presented to the keeper of the record, be entered in a minute-book, with a general description of the lands, and a reference to the pages of the record where the transcript is to be found (b). 3. That the sasine, with the notary's doquet, shall be transcribed verbatim et literatim, either in the General Record at Edinburgh, or in the Particular Records of the county where the lands lie; all records being, after a certain time, deposited in the Register House at Edinburgh (c). And in deciding in what Particular Register the sasine shall be recorded, it is to be observed, that although in baronies, and under clauses of union, sasine may be taken at a particular part of the lands, the instrument must be registered either in the Record of each County, within which any of the lands lie, or in the General Register (d). 4. That there shall be a certificate written on the back of the instrument, stating the fact of recording, with an exact reference to the page of the record where the instrument is to be found recorded. 5. That the preference of the sasine shall depend on the priority of its being duly booked and inserted in the Register (e).

NOTE.—The sasines of burgage subjects are excepted from these acts, and regulated by another statute. See below, § 843.

(a) 1617, c. 16. 4 Act. Parl. 545. Simpson, June 23. 1678 ; M. 13553. Gray, March 24. 1626 ; M. 13540. Compare Keith, Jan. 1. 1703 ; 4 Br. Sup. 542 ; with Paterson's Creditors, Nov. 29. 1705 ; M. 13564.

(b) 1672, c. 16. 1693, 14. 1696, 18.

(c) Act of Sederunt, Jan. 17. 1756. Stair, App. 2 Ersk. 3. § 40-43. 1 Bell, Com. 676-680.

(d) Dalrymple, Dec. 20. 1711 ; 4 Brown's Sup. 862.

(e) 1693, 13.

774. The rules of recording are these :—1. The sasine is held as recorded within the sixty days, if the date of presentment, as proved by the minute-book, is within that time, and the sasine has been actually recorded, or is still in the keeper's hand (a). 2. The sasine, as appearing in the record, must be correctly transcribed, in order to have effect in competition against third parties having acquired a perfect and lawful right to the lands (b). And so, (1.) If incorrectly recorded, or imperfectly, the error or omission of an essential part is fatal (c) ; and, (2.) After expiration of the sixty days an error cannot be corrected (d), unless by a new sasine ; of which below, § 879. 3. Between sasines, both entered in the minute-book, but reversed in order in the transcription, the preference rather seems to be with the sasine first actually recorded, though last presented (e).

NOTE.—The complicated requisites of this part of the feudal title (the charter and sasine), as in a long course of practice they have grown up and been accumulated, have suggested the obvious improvement of simplifying the proceedings, and abolishing forms which have now become useless. And in the report of the Law Commissioners will be found suggestions for very extensive alterations. How far those suggestions may appear to the wisdom of Parliament fit to be adopted, it is not easy to anticipate ; but to whatever length improvement shall be carried, it will still be necessary to keep in mind the rules and principles which regulate the present practice.

(a) 1 Stair, Appendix, 790. Sir A. M'Kenzie, Feb. 9. 1768 ; M. 8800. Earl of Fife, Feb. 7. 1768 ; M. 8850. Kelly, July 7. 1774 ; Tait's Reports, 5 Brown's Sup. 589. Dunbar, March 10. 1790 ; M. 8799.

(b) Grey, Feb. 23. 1790 ; M. 8796.

(c) M'Queen, Jan. 23. 1823 ; 2 S. D. 637. Denniston, Nov. 16. 1824 ; 3 S. D. 285.

(d) Dundas, Dec. 15. 1824 ; 3 S. D. 281 ; F. C. (correcting Tait, Jan. 17. 1822 ; 1 S. B. 229).

(e) Lord Cardross, Nov. 26. 1678 ; M. 13554. Drummond, June 24. 1809 ; F. C. Adam, June 19. 1810 ; F. C. Marr, March 1684 ; M. 13557.

## II. GENERAL VIEW OF THE TRANSMISSION OF THE FEE TO HEIRS.

775. The original charter and sasine present the simple view of the feudal title, and the constitution of the relation of superior and vassal. The right of the vassal, so completed, was originally personal to the grantee himself; it now descends to heirs or to assignees. And the renewal of the fee to a successor of either of these descriptions, is effected by a new grant, with a precept and sasine duly recorded.

776. 1. RENEWAL TO HEIRS. The rules of succession under which the heir has right, will be afterwards explained (§ 1637, et seq.). But assuming those rules at present, the title of the person who has right as heir under the destination is completed by grant or charter from the superior, with sasine recorded. And this renewed grant proceeds either on the superior's knowledge of the heir's right; or on the verdict of an inquest.

In studying the history of the heir's title the points to be marked are, 1. Originally the acknowledgment of the heir by the over-lord, with the swearing of fealty, and investiture before the Pares Curie; 2. The inquiry before them as an inquest into the heir's title; 3. The introduction of a more regular judicature for ascertaining the heir's title by a verdict under the superintendence of the King's judge, the Sheriff of the county.

Of the method of completing the heir's title, a very general idea will here suffice;—the proper place for the explanation of it in detail, will be found under the doctrines of succession. See below, § 1817, et seq.

777. 1. *Entry of Heir by Precept of Clare Constat.* The precept of clare constat is a mandate by the superior to his bailie, stating the death of the vassal last vest and seised in the lands; declaring the superior's knowledge and conviction that the person named in the instrument is nearest and lawful heir to the deceased in the said lands; and therefore commanding his bailie to infeft him as heir.

2 Stair, 5. § 76. 2 Stair, 3. § 14. 3 Ersk. Pr. 8. § 34. 3 Ersk. 8. § 71. Juridical Styles, 571. 5 Bell's Forms of Deeds, 564.

778. 1. This species of entry can be given only by a superior who is feudally invested; or by one who, although not

yet invested, is truly the superior, and whose precept is held to become effectual jure accretionis, on his subsequent investiture. (See below, § 881.) 2. The superior can thus enter only the heir at law, or of investiture. The fee not being by the vassal's death reinvested in the superior, so as to enable him to make a *new* grant, he can only recognise the fact of the fee opening in terms of the destination of succession, as expressed or implied in the grant. 3. In proof of the character of the heir entitled to an entry, the superior may proceed upon other documents than the investiture itself, and enter an heir of provision who falls within the destination. 4. It is not essential that, in the precept, the precise description and character under which the heir takes should be set forth; provided the meaning of the precept be clear. 5. A precept of clare constat has been found an incompetent mode of entering one who is not the heir immediately next in succession (§ 819). 6. The precept is strictly personal; falls by death, and cannot be assigned. (§ 766, note.) But if sasine has been taken on such a precept granted before the superior was infert, it subsists to the effect of being capable of confirmation after the death of the parties. (See below, § 813, (b). And, 7. The superior may grant a precept of clare constat to himself, where he is the heir.

The sasine on the precept of clare constat, duly recorded, completes the feudal right of the heir.

779. 2. *Entry of Heir by Service.* The use of the Service (properly so called) is to prove by the verdict of an inquest the heir's right (either at law or by provision) to succeed to the person who was last feudally vested in the special estate in question; and so entitle him to demand an entry or renewal of the feudal grant of that estate, from the superior feudally vested in the estate. But another form of service has been introduced, which merely establishes the general character of heir to the person, without relation to any particular lands. The former is called, SPECIAL SERVICE; the latter GENERAL SERVICE; and the detail of the nature and doctrine of each will be afterwards given. See § 1824 to 1855.

780. Under the SPECIAL SERVICE the verdict of the jury, confirmed by the Sheriff's signature, and returned into Chancery, entitles the heir to demand his entry, and have his title completed by sasine. And, 1. If he hold of the Crown, he obtains at once a precept from Chancery, directing the

Sheriff, as the King's bailie, to give infeftment. 2. If he hold of a subject, he is in the same way entitled to demand a precept from his superior for the same purpose.

By the infeftment thus authorized, when duly recorded, the feudal grant is renewed, and the title to the lands again complete.

3 Ersk. Pr. 8. § 28. 3 Stair, 5. 28. et seq. 3 Ersk. 8. § 59. 79. 80. 1 Juridical Society Styles, 368. 5 Bell's Forms, 514. 1 and 2 Geo. IV. c. 38. § 11.

781. A GENERAL SERVICE, proving the heir's right to the general character of heir at law, or heir of provision according to the destination of the charter or disposition, when returned to Chancery, entitles the heir, 1. to take the benefit of all unexecuted precepts or procuratories of his ancestor, and thereon to obtain infeftment; and, 2. to take all rights belonging to the heir which do not require infeftment.

3 Ersk. Pr. 8. § 29. 3 Stair, 4. § 33. and 5. § 25. 3 Ersk. 8 § 63. 66.

782. 3. It is of importance, in considering the transmission of the fee to heirs, to observe, with regard to these forms of service, 1. That a special service includes a general service in the same character. 2. That neither the precept from the Crown, nor the precept from a subject superior following on such a service, is assignable. 3. That if sasine do not follow on a special service where the ancestor was infeft, the inchoated right of the heir expires, and the next heir must serve heir, not to the person thus served heir and not infeft, but to the *vassal last infeft*. 4. That where the ancestor has not been infeft, the title of the heir is so far completed by the retour of the general service, or of the special service including a general, as to enable him to take sasine on the unexecuted precept; or to dispose of the succession, and assign the unexecuted precept or procuratory: And his heir may, on his death, take up the right by general service to him. The infeftment on a precept or procuratory thus transmitted, will be complete and valid, provided the retours, one or more, or assignments, be produced and read at the giving of sasine, and "deduced" in the instrument (§ 766). 5. That in relation to this distinction, the register of retours of general services, or of special as including general services, is very important.

See below, another anomalous mode of entry as heir, § 835.

### III. TRANSMISSION OF THE FEUDAL ESTATE TO SINGULAR SUCCESSORS.

783. Singular Successors are distinguished from successors by the law of descent, as taking the land by a special, or singular title ; either, 1. as purchasers ; or, 2. as creditors attaching the heritable estate of their debtor, by adjudication, judicial sale, or sequestration.

#### 1. *Transmission to Purchasers.*

784. The disposal of land to a purchaser is in general regulated by the principles of the contract of sale already explained (§ 85-132), taken along with some peculiarities in the application of these principles to land, which will be afterwards stated. See below, § 889.

785. As every feudal proprietor holds as vassal, either of the Crown, or of some subject superior, and at the same time has a power of granting base fees to be held of himself ; it may be the object of the parties in a sale of land, either to convey it to the purchaser as it stands in the seller (the purchaser becoming vassal to the seller's superior, and the seller being dropt out of the feudal chain) : Or to leave in the seller a superiority intermediate between his own superior and the purchaser ; the purchaser in this last case becoming vassal of the seller. Sometimes a superiority is thus reserved because it is valuable, on account of the stipulated feu-duty : and formerly lands held of the Crown by the seller, gave him, as Crown vassal, the elective franchise, which belonged only to Crown vassals only : though occasion for the creation of intermediate superiority has passed away.

Sometimes the purchaser may prefer to have his title completed as vassal to the seller, because he is thus vested instantly with the dominium utile, which is the valuable estate, and secured against competitors ; while some time is necessary to complete the title in entering with the superior ; during which there is danger of being cut out by purchasers or creditors of the seller.

It may be proper, in order to explain this matter clearly, to consider, 1. The transmission of the seller's whole estate. 2. The transmission of the base right or dominium utile alone.

And, 3. The combination of both in the modern disposition, empowering the purchaser immediately to complete his title to a base fee, convertible by confirmation into a public holding under the seller's superior.

786. 1. TRANSMISSION OF THE VASSAL'S WHOLE ESTATE. The vassal's estate continues unextinguished in his person, till, with his consent, and with the sanction and authority of his superior, a new sasine shall supplant the first, and transmit the estate. The regular way of accomplishing this is by means of resignation in the superior's hands; either for the purpose of conveying the vassal's whole estate to the superior himself; or for the purpose of obtaining from him a new grant in favour of another. The former is called RESIGNATION AD REMANENTIAM (§ 787), the latter RESIGNATION IN FAVOREM (§ 792). Another irregular mode of conveyance was introduced, by which the vassal disposed his estate with a precept of sasine to be held of his superior; a subsequent confirmation of this imperfect deed by the superior being held sufficient to ratify it: This is called a title by CONFIRMATION, § 806.

787. 1. *Transmission to the Superior by Resignation ad Remanentiam.* The superior is reinvested in the dominium utile, and the vassal's estate merged in the superiority, or, in other words, the two estates consolidated, by a simple disposition containing words of conveyance de presenti, which the vassal completes by resigning propriis manibus in his superior's hands. The same effect is produced by the vassal granting a disposition containing a procuratory of resignation or mandate by the disponent, to persons whose names are left blank, to compare before the superior, or his commissioners in his name, wherever they may be (it not being necessary as in sasine to perform this ceremony on the ground of the lands), and there to resign and surrender, upgive, overgive, and deliver the lands described, in the superior's hands "ad perpetuam remanentiam, to the effect that my right of property of the said lands shall be consolidated with the said B's right of superiority thereof." And,

1. If the resignation be made propriis manibus, there is no procuratory or mandate; but the vassal signs the instrument of resignation (*a*).

2. When resignation is not propriis manibus, a procuratory

of resignation is like a precept of sasine executed in presence of a notary (*b*), and an instrument of resignation ad remanentiam is extended and recorded, § 791. And,

3. The symbol is not, as in sasine, earth and stone, but staff and baton (*c*).

(*a*) 1555, 38. 1563, 81. 2 Stair, 11. § 3. 2 Ersk. 7. § 19 and 20. 2 Ross, 225.

(*b*) 2 Ersk. 7. § 19.

(*c*) Act of Sed. Feb. 11. 1708. Carnegie, Dec. 2. 1729; M. 14316. Earl of Aberdeen, June 25. 1742; Kilk. 504; M. 14316. Elch. *Sup. and Vass.* 7. Redfairn, March 7. 1716; F. C.

788. Resignation ad remanentiam is to be distinguished from a *renunciation*. The vassal's estate is not a burden to be thrown off, but an estate of which the conveyance is completed by a ceremony strictly feudal, and equivalent to sasine.

3 Craig, 1. § 21. 2 Stair, 11. § 1-6. Kaimes' Eluc. art. 11. Landales, June 12. 1752; M. 14469. Elch. *Service*, No. 6.

789. In order to render the resignation effectual, it is necessary, 1. That where the feudal grant by which the vassal's estate was created has been completed by infeftment, any one coming into the place of the vassal so infeft must himself be infeft before he can effectually resign for the purpose of reinvesting the superior. 2. That, on the other hand, the superior must be infeft, in order to be capable of receiving an effectual resignation in his own favour. 3. That if there be an intermediate superiority, there can be no resignation ad remanentiam from the sub-vassal to the first or higher superior. 4. That where the land is effectually resigned, and the vassal's estate consolidated with the superior's, it goes to the superior with all its burdens.

2 Stair, 11. § 5, 6.

790. Formerly a procuratory of resignation, like a precept of sasine, was held (on the principle of mandate) to expire on the death of either party; but by the same statute which perpetuated the precept of sasine, procuratories of resignation also are declared to subsist after the death of the parties, and to the benefit of heirs or assignees (see above, § 766), provided "that the instruments of resignation express the titles of those in whose favour the resignation is made, and that the same is deduced therein."

791. The ceremony of resignation takes place before a notary and witnesses, in presence of the superior, or of his commissioners for receiving resignation; and an instrument of resignation is extended and signed by the notary and witnesses; and also by the vassal if the resignation be made *propriis manibus* (a).

This instrument (which operates as a *sasine* consolidating the property and superiority) is recorded, and so the title is complete (b).

(a) 1555, 38. 1563, 81.

(b) 1669, c. 3. 2 Ersk. 7. § 20.

792. 2. *Transmission by Resignation in favorem.* This is a provisional resignation by the vassal in the hands of the superior, on the condition and requisition that the superior shall grant a new charter to the person named. Such resignation, which the vassal might at all times have made with the consent of the superior, the superior is now bound to receive; and a singular successor in whose favour such resignation shall be made may demand an entry from the superior. The deed of conveyance in this case, as in a sale to the superior (§ 787), is accompanied by or contains a procuratory for resigning in the hands of the superior. And the holder of such a deed is, on the superior's refusal to give him an entry, entitled either, 1. to charge the superior within fifteen days to accept resignation and enter him as vassal, on the tender of a year's rent and arrears; and so to proceed as in an obligation *ad factum præstandum*; or, 2. after such charge he may resort to the next superior, and so up to the Crown, who refuses no vassal.

2 Ross, 240. 2 Ersk. 7. § 22. also 7. 20 Geo. II. c. 50, § 12.

793. Resignation, in order to be effectual, requires the concurrence of a vassal infeft, and so having the feudal right to be resigned; and of a superior also infeft, and so capable of receiving provisionally the feu. Without resignation the feu continues with the vassal last infeft. See § 789.

3 Craig, 1. §. 14. 3 Stair, 2. § 8. 2 Ersk. 7. § 18. Grieve, Dec. 11. 1760; M. 3022. Landales, June 12. 1752; M. 14465; Elch. Notes, 424.

794. The ceremony proceeds, like that of *sasine*, or resignation *ad remanentiam*, before a notary and witnesses. And,

1. If the resignation is to be made to the Sovereign as superior, one of the Macers of Exchequer appears as procurator in presence of the Judge of Exchequer, and by the symbol of a pen, resigns the lands in his hands as commissioner of the Crown (*a*). 2. If the resignation is to be made in the hands of a subject superior, the procurator for the disponent makes the resignation by the symbol of staff and baton: Then, changing hands, and acting for the disponent, he receives back the symbol as attorney for the disponent, in token of the superior having accepted the condition and acceded to the new grant (*b*). And, 3. On this ceremony an instrument is sometimes extended in the case of a Crown-holding; but not usually where the lands hold of a subject (*c*).

(*a*) 1 Bell's Forms of Deeds, 271. et seq. 1 Juridical Styles, 508.

(*b*) 3 Cr. 1. § 17. 2 Ersk. 7. § 17 and 22. Act of Sed. Feb. 11. 1708.  
2 Duncan, June 23. 1742; Elch. *Sup. and Vass.* 7; M. 14316.

(*c*) 1 Bell's Forms of Deeds, 215. 1 Juridical Styles, 508.

795. There is a marked distinction between this form of Resignation, and Resignation *ad remanentiam*. In Resignation *ad remanentiam*, the Resignation is itself the infeftment of the superior, and the instrument is full evidence of it; completing the investiture when duly recorded: In Resignation *in favorem*, the resignation is only the surrender, empowering the superior to make a new grant; and this grant he makes by his charter, in which he recites the surrender; the instrument of resignation not being extended except where the lands hold of the Crown, § 799.

796. The transmission by resignation *in favorem* is completed by the charter from the superior (called from the preceding ceremony Charter of Resignation), bearing a precept for infeftment; by sasine taken on the precept; and by the recording of the sasine. The feudal estate is thus vested in the new vassal, and thereby the sasine of the former vassal superseded, and he denuded of the fee.

797. While the disposition and procuratory were separate deeds, the procuratory was necessary as the connecting link of the title. The inconvenience of this (formerly very important) was, to a certain extent, corrected by a statute which dispensed with the production of the procuratory after possession for forty years. This Act is of little consequence now,

for the procuratory is invariably incorporated with the conveyance.

1594, 214. 2 Ersk. 7. § 25.

798. The procuratory may, under the provisions of the statute, be executed, and the title completed in favour of an heir or assignee of the purchaser, provided the title be deduced in the charter. See above, § 766 and 790.

1693, c. 35.

799. The charter of resignation differs from the original charter, *first*, as being the echo of the resignation ; *secondly*, as proceeding on the consideration of the composition paid for an entry ; *thirdly*, in having a clause inserted, called Quæquidem, deducing the title as flowing by resignation from the person last infeft.

By the Act of 1693, c. 35, it is necessary in the instrument of resignation to express the title of heir or assignee, and deduce the same where a procuratory is executed in favour of another than the person to whom it is granted. This, in the case of a Crown-holding, is generally (though gradually falling into neglect) complied with, by extending an instrument of resignation. In the case of a resignation in the hands of a subject superior, the Act is held to be sufficiently complied with, by expressing and deducing the title in the quæquidem of the charter.

1 Bell's Forms, 221. et seq. Supplement to Spottiswood, 195. 1 Juridical Styles, 477. et seq. 557.

800. *Questions as to the effect of Resignation.* 1. Till resignation has been made, the superior has no power to grant a new charter otherwise than by confirmation (§ 806), of an infeftment proceeding from the vassal infeft.

Grieve, Dec. 11. 1760 ; M. 3022.

801. 2. If a superior have accepted of a resignation in favour, he is personally bound to the disponent to grant him a charter when demanded : and this jus quæsitum binds the superior to refuse a new resignee.

2 Ersk. 7. § 23.

802. 2. The resigner is not divested of the feudal estate, till sasine be taken on the charter of resignation. And yet the lands are held as if in non-entry, the superior not being

entitled to demand his feu-duties from a vassal from whom he has accepted a resignation ; nor from the disponent, who is not yet entered.

Dirleton, voce De Resignationibus, 6. and 7. Duobus investitis, &c. p. 170. Hope's Min. Pract. tit. 5. § 14. to be corrected by Craig, 3. 1. § 17, 18. Stewart's Answer to Dirleton. 3 Stair, 2. § 12. 2 Ersk. 7. § 23. Bell, Conveyance of Land to a Purchaser, p. 262, &c. Arbuthnot, June 14. 1677 ; 3 Brown's Sup. 209. Sir W. Purves, Nov. 14. 1677 ; M. 6890 ; 3 Brown's Sup. 194.

803. 3. The resignee is not invested till infeftment have been taken, and so a simple renunciation before infeftment will discharge his right.

3 Stair, 2. § 12.

804. 4. Resignation is the only regular form of transmission recognised by statute, and the superior is not bound to enter the heir in any other way.

20 Geo. II. c. 50. § 12.

805. 5. As the superior, in entering a singular successor, acts by compulsion of the statute, it is salvo jure.

806. 3. *Transmission by Confirmation.* Resignation (as already explained) is the regular way of placing the purchaser in the room of the seller, and vesting him with the full estate which the seller holds under the superior. There is another mode of accomplishing the same end, but it requires the spontaneous act of the superior to confirm and make it effectual. It consists of two parts,—A conveyance, containing a precept of sasine proceeding from the seller himself, and requiring infeftment to be given to the disponent *to be held of the disponent's superior*. But as the disponent has no power to authorize such a sasine, it is necessary that it be confirmed by the charter of the superior reciting the conveyance or disposition by the vassal, with the sasine following on it, and ratifying, approving, and confirming them. This is called entry by confirmation. See below, the alternative mode of entry, § 818.

NOTE.—In England, as explained already (§ 675), the conveyance by the vassal is in itself sufficient, without express Confirmation, to invest the grantee as vassal of the Crown. Whether such a rule may not now be safely introduced in Scotland, deserves to be considered ; but it is a mistake to imagine that such a law ever was enacted in Scotland ; an express confirmation having always been required to complete the disponent's title as a fee held of the granter's superior.

English statute Quia Emptores, 18. Edw. I. c. 1. Kames's Statute Law, note 18. 2 Ross, 258. Bell, Conveyance of Land to a Purchaser, 281. See Lord Stair's Proposal, 2 Stair, 4 § 6.

807. The vassal's conveyance of his feu, with a precept of sasine, "*to be held from him of his superior*," "*a me de superiore meo*," is effectual to confer a good title of possession in regard to tenants, so as to entitle the purchaser to draw the rents: But it is null and ineffectual, in so far as respects the superior and the feudal right, until confirmed by the superior's charter. Till then the disposer is still undivested: His death before confirmation will open the casualty of non-entry; his creditors may attach the estate; and the disponee has no more than a right transmissible by general service, although the superior may confirm after the disponee's death. See § 813.

The Queen, March 6. 1566; M. 3007. Lord Balmerino, March 8. 1620; Ib. Douglas, July 10. 1713; M. 3008. Rowand, June 30. 1825; F. C.; 3 S. D. 196; and see 5 S. D. 903, and 4 W. S. 177. Struthers, Feb. 2. 1826; F. C.; 4 S. D. 418.

808. No effective base infeftment can follow upon a precept authorizing sasine, *to be held of the superior*. The superior's sanction and confirmation is essentially necessary to give such a sasine any feudal effect. And the complete title requires, 1. the vassal's conveyance; 2. sasine proceeding on it duly recorded; and, 3. the superior's charter of confirmation.

809. The charter of confirmation refers by name and description to the deed and sasine confirmed; expressly ratifies, approves, and perpetually confirms them; and decerns and ordains, that the confirmation shall be as valid and effectual as if they were verbatim recited; or as if the confirmation had been made and granted before the taking of the infeftment (*a*). The sasine confirmed is identified by the date, but not by this exclusively: Other features in the description may serve the purpose as well (*b*). And confirmation generally of all deeds granted by such a person, of lands described or enumerated, is good (*c*).

NOTE.—In practice the sasine always precedes the confirmation; and notwithstanding the above words of confirmation, it has been doubted whether it would be a good title if the confirmation were prior to the date of the sasine. Adam's case, *infra*, (*b*).

(*a*) 1 Jurid. Styles, 486, 562. 1 Bell's Forms of Deeds, 193. et seq.

(*b*) Adam, June 12. 1810; F. C.

(*c*) Drummond, May 1793; F. C.

810. The first confirmed infeftment is the first effectual, though the sasine should be last in date, or last recorded (*a*) : And the confirmation is held, in the case of a Crown charter, to be of the date of passing the seals (*b*) : in the case of a subject superior's charter, it has been held to be of the date of delivery, not of subscribing (*c*). The date which the charter bears will, however, be held the true date, unless in particular circumstances of the withholding of delivery.

(*a*) 1578, 66. 2 Ersk. 7. § 14. Hope's Min. Pract. tit. 5. § 1. and 3. Polmaise, July 12. 1580 ; M. 3026. Henderson, July 5. 1821 ; F. C. ; 1 S. B. 103.

(*b*) Miln, Dec. 6. 1678 ; M. 3028. Clackmannan, Feb. 26. 1680 ; M. 3029. Kincardine's Creditors, March 1682 ; M. 3030. Sinclair, July 8. 1691 ; 2 Brown's Sup. 128.

(*c*) Dalziel, March 12. 1685 ; 2 Brown's Sup. 81.

811. The confirmation of a sasine to be held *à se*, operates retro ; giving the same effect to the sasine as if confirmed of its date ; or as if it had proceeded on the superior's own precept.

2 Stair, 3. § 28. 2 Ersk. 7. § 15. Bishop of Aberdeen, July 15. 1680 ; M. 3011.

812. But the operation of the confirmation retro is stopt or barred by the existence of any real right adverse to the grantee's. So a base right or feu granted by the vassal, and completed by sasine, will bar the confirmation as a completion of the conveyance of the dominium utile ; leaving to it the effect of carrying the superiority.

M'Kenzie, June 1. 1791 ; M. 275. Hope's Min. Pract. ut supra, § 810.

813. Confirmation may take place at any time, if there be no impediment ; and it is important to observe that it is as valid after the death of the disponent, or of the disponentee, as during their lives (*a*) ; and that this applies to a sasine on a precept of clare constat, if taken during the life of the parties (*b*).

(*a*) Johnston, July 17. 1634 ; M. 3020. M'Dowall, Jan. 19. 1793 ; M. 8807.

(*b*) M'Donald Lockhart, Nov. 16. 1837 ; 16 S. D. 76.

814. The confirmation adopts the title such as it is.

Adam, June 12. 1810 ; F. C. Bell, Election Law, 242 ; Bell's Conveyance of Land, 288, note. Kibble, June 16. 1814 ; F. C.

815. Confirmation, is not the regular form of transmission to singular successors (§ 806), but it has been found not

only effectual as such, but a legitimate mode of altering the destination of the investiture, without any resignation (*a*). The Charter of Confirmation is sometimes (though not by good conveyancers) combined with the Charter of Resignation, for the purpose of being used alternatively. If sasine be taken on the precept, and resignation made on the procuratory, in the same disposition; and one title be completed by charter of resignation and sasine, another by a clause of confirmation of the sasine already taken; it has been held that they are not inconsistent, that the disponent may use either as his title, and that the existence of the one does not annul the other (*b*). See below, § 822.

(*a*) Gibson-Craig, July 10. 1838; 16 S. D. 1332. This case, however, is under appeal.

(*b*) Campbell, Jan. 4. 1754; 5 Brown's Sup. 809. Elchies, *Memb. of Parl.* 61, and Notes, 282. Stewart, Feb. 20. 1827; 5 S. D. 383.

816. 2. TRANSMISSION OF BASE FEES. When the feudal proprietor of land disposes only of the dominium utile of the whole, or of part of his estate (as in feuing it out for building, or in selling the estate, with reservation of the mid-superiority), he creates a SUB-VASSALAGE, or BASE FEE, to be held of himself; the principles of which operation have already been explained in treating of the original charter, § 806, et seq.

817. As, under a conveyance of the whole estate, with a restricted precept of sasine to hold "a me de superiore meo," no effectual base sasine can be taken (see *supra*, § 808);—so, under a conveyance of the dominium utile, with a precept "de me," no sasine can be taken which can either constitute a public right holding of the seller's superior, or even become the subject of confirmation to that effect.

#### FACILITIES IN THE MODES OF TRANSMISSION.

818. *Conveyance with an alternative Holding.* The old contract of alienation of land was accompanied by, or contained, three mandates for completing the right:—a procuratory for resigning in favorem; a precept of sasine, to be held of the superior, a me de superiore meo; and a precept of sasine, de me, to be held of the disponent himself (*a*). The modern disposition combines these. It contains, besides the dispositive

clause, an obligation to infeft the disponee, either to be held of the disponer's superior, or to be held of the disponer himself; and for that purpose there are, 1. a procuratory of resignation; and, 2. a precept of sasine, which (to serve the purpose of the two precepts of sasine formerly used) is conceived in terms *indefinite*, and equally applicable to a public and to a base right (*b*).

(*a*) 1540, c. 105. 1693, c. 13, and 35. Hope's Min. Pract. Spottiswood's Notes, 217.

(*b*) 2 Ersk. 7. § 16. Bishop of Aberdeen, June 15. 1680; M. 3011. Bell's Conveyance of Land to a Purchaser, p. 250. et seq.

819. The effect of sasine taken on this indefinite precept is, to complete at once a base right, or perfect feudal estate of dominium utile; and to be convertible by the superior's confirmation into a sasine for a public holding, so as to place the disponee exactly in the place of the disponer, provided there be no mid-impediment.

2 Ersk. 7. § 16. Bishop of Aberdeen, July 15. 1680; M. 3011.

820. The true criterion by which to determine, whether a precept, conceived in terms indefinite or ambiguous, is public or base, is found in the obligation to infeft. 1. If it be an obligation to infeft by two manners of holding, one to be held *de me*, the other *a me de superiore meo*, the precept is alternative. 2. If it be only to be held *a me de superiore meo*, it is a *public* precept, and no sasine can proceed upon it that will be effectual, without confirmation. 3. If it be to hold *de me*, the precept is *base*, and cannot be confirmed to the effect of creating a public holding.

Sasine under a definite precept can give no tenure, but of the specific kind expressed. See § 877.

Bellenden, June 6. 1823; 2 S. D. 369. Rowand, June 30. 1824; 2 S. D. 196. Peebles, Dec. 9. 1825; F. C.; 4 S. D. 290. M'Nair, Feb. 16. 1827; 5 S. D. 372. Struthers, Feb. 2. 1826; 4 S. D. 418. Rowand, July 6. 1827; 5 S. D. 903.

821. 2. *Doctrine of Consolidation.* The two estates of superiority and vassalage are sometimes vested separately in the same person. It was long contended, that the absurdity of a man being his own vassal, necessarily inferred *ipso jure* a consolidation of estates thus circumstanced. But this subtilty

has been fully refuted ; and there is an end to all those doubts and questions. And, 1. Consolidation of the two estates separately vested, can be directly accomplished only by resignation ad remanentiam in the proprietor's hands, as his own superior (a), (§ 787). But, 2. If, on a title to the superiority (which correctly is constituted by sasine in the lands), there has been possession for forty years, it has been held to work off the base infeftment in the property, and so to consolidate the two estates ; a most important qualification of the general doctrine (b).

(a) 2 Ersk. 7. § 19 ; and 3, 8, § 81. Bell, Conveyance of Land, 319, 335 ; and notes by Mr William Bell, B. Supplement, June 21. 1634 ; M. 6917. Elies' Supplicant, July 23. 1687 ; M. 3086. Daughters of Morton, Nov. 26. 1668 ; M. 6917. Porteous, Feb. 4. 1757 ; 5 Brown's Sup. 655. Campbell, Dec. 19. 1765 ; Ib. 917. Lord Elibank, 1833 ; 12 S. D. 98.

(b) Bruce, Dec. 6. 1770 ; M. 10805. Grieve, Feb. 27. 1827 ; 5 S. D. 469.

822. 3. *Combination of Resignation and Confirmation.* In the making up of the titles to land, either where sasine has been taken on the indefinite precept (§ 819), and it is desirable to have an entry by resignation, and at the same time to avoid the circuitous operation of consolidating the property and superiority by resignation ad remanentiam (§ 821) ; or where one wishes to have alternatively a title both by confirmation and by resignation ; it has been the practice to take a charter of resignation with a clause of confirmation. The intention of this is, 1. to make the disposer (hitherto base infeft) hold public by the confirmation ; and so to render his procuratory valid, and the charter of resignation following on it effectual to carry the whole estate, property and mid-superiority ; or, 2. to give the benefit, such as it is, of a double title, one by confirmation, and another by resignation ; which being constituted, the one without prejudice of the other, have been found not inconsistent with each other.

See above, § 815, and the cases there cited.

#### TRANSMISSION OF THE ESTATE TO CREDITORS.

The estate of the debtor may be transferred to creditors, 1. by Adjudication for Debt ; 2. by Judicial Sale ; 3. by Adjudication on a Trust Bond ; and, 4. by Adjudication in Implemen-

1. *Transmission by Adjudication for Debt.*

823. By statute, a creditor is empowered to proceed to adjudge his debtor's estate in satisfaction of his debt; and in virtue of the decree of adjudication to demand a charter of adjudication from the superior, on which he may be infeft (*a*). At first, the superior had his choice, to take the land to himself, paying the debt; or to enter the creditor as vassal, provided he should tender a year's rent of the land. But now the superior must enter the adjudger *periculo petentis*, and *salvo jure*, on payment of a year's rent: And if he himself be the debtor, he is bound to enter the adjudger without a composition (*b*).

NOTE.—The view here to be given of adjudication, is intended merely to explain the nature of a feudal title by charter of adjudication and sasine, in the person of an individual creditor. The particular forms and varieties of adjudication, with the regulations relative to *pari passu* preference, will demand attention hereafter.

(*a*) 2 Ersk. Pr. 12. § 1, 2, 6, 7, 13–19. 2 Inst. 12. § 39, 46. 1 Bell, Com. 701, et seq.

(*b*) 1469, 37. 1669, 18. 1672, 19. 1681, 17. 1690, 20.

824. The creditor's right is constituted by an action and decree called ADJUDICATION. It is either SPECIAL, in which the debtor appears and consents to the adjudication of a certain portion in value equal to the debt, and a fifth part more; or GENERAL of the whole estate, in which last case the decree pronounced by the Court adjudges from the defender, and decerns and adjudges to belong and pertain to the creditor, for payment and satisfaction to him of the debt, annualrents, &c. accumulated into one principal sum, the specific lands described, with "all right, title, and interest whatever of and concerning the same competent to the said debtor, with all charters, dispositions," &c. &c. This is intended to comprehend all possible rights belonging to the debtor. The decree concludes with a decerniture against the superior to enter the creditor as vassal.

Norvel, Aug. 9. 1782; M. 94. Lesly, Dec. 23. 1692; 1 Fount. 538, 543. Pedie, Dec. 13. 1776; M. v. Process, 2. Graham, Nov. 14. 1828; 7 S. D. 13.

825. After the decree is pronounced, an abridgment or AB-

BREVIATE is made out, and signed by the extractor, and recorded in a register called the Register of Abbreviates of Adjudication, within sixty days of the date of the decree. If the time of recording have expired, a new term is granted, reserving all objections.

2 Ersk. 12. § 43. 1661, 31. Reg. 1695, Act. 24. 1 and 2 Geo. IV. c. 38. § 17. Seton, Jan. 3. 1750; Kilk. 5 Brown's Sup. 239. Sibbald, June 21. 1764; Ib. 373. Smelhome, Nov. 22. 1774; M. 206; 5 Brown's Sup. 273.

826. To the completion of the decree of adjudication as a feudal right, there are required, a charter of adjudication from the superior (which is granted in obedience to, and in terms of, the decree); and a sasine thereon duly recorded. The decree of adjudication is also a judicial assignation by virtue of which sasine or resignation may proceed on a precept or procuratory unexecuted.

Pierce, June 20. 1791; M. 244.

827. Adjudication may proceed, 1. against a debtor, proprietor of heritage, for his own debt (*a*). Or, 2. against the heir of a deceased heritable proprietor, held to represent him on taking benefit of his estate; or required (by charges to enter heir, § 1855-6) to make his election, whether to enter under the condition of so far representing his ancestor; or to abandon the estate to the adjudger: In which last case, adjudication is competent against the estate itself so abandoned (*b*). Or, 3. against the debtor succeeding to an estate, and required by a charge to make up his titles to it, so as to open it to the diligence of the charger (*c*).

(*a*) 2 Ersk. Pr. 12. § 1, 4, and 15. 2 Ersk. Inst. 12, 39, 40. 1 Bell, Com. 708.

(*b*) 1540, 106. 1621, 27. 2 Ersk. Pr. 12. § 5. 2 Ersk. 12. § 47, et seq. 1 Bell, Com. 711.

(*c*) Ersk. loc. cit. 1 Bell, Com. 709. 1621, c. 27.

828. The charter of adjudication, and sasine thereon duly recorded, complete the feudal right of the creditor. But it must be observed, that although, in the decree of adjudication, general words are used to carry "all right and interest," and these may be effectual in vesting a personal right to rents, &c. and in carrying a right to an unexecuted precept of sasine, the description of the subject must, in the charter of adjudication and sasine, be precise, in order to complete the feudal right.

Graham, Nov. 14. 1828; ut sup. § 824.

829. The transmission accomplished by adjudication and charter and sasine, has not at once the effect of a sale of the vassal's estate to the creditor: It is a right redeemable at first; a mere security, or *pignus prætorium*. It may be extinguished by payment or intromission with the rents (*a*). It has not the effect of an absolute conveyance either to give the adjudging creditor of the superior a right to enter vassals; or to bar a charter of confirmation of an existing base right (*b*). It is to be held as transferring the land in satisfaction of the debt only, after the lapse of a certain period allowed to the debtor for redeeming his estate with declarator. This period for redemption is called the *LEGAL*; and at any time during the legal, the debtor, on paying the debt, or shewing it to be paid by intromission with the rents, is entitled to have his estate restored.

(*a*) *E. of Dalhousie*, Feb. 13. 1713; *M.* 9992.

(*b*) *M'Kenzie*, June 1. 1791; *M.* 275.

830. On the expiration of the term of redemption, the right to redeem may be foreclosed either by an action brought for declaring the power expired, or by prescription. The former is the *DECLARATOR OF EXPIRY OF THE LEGAL*; on the pronouncing and extracting of which, the creditor's right under his charter of adjudication and sasine becomes absolute.

*Campbell*, March 7. 1794; *M.* 326. *Bell's Cases*, 8vo, p. 15. fol. 109. *Ormiston*, below, § 831. *Stewart*, Nov. 26. 1811.

831. The same absolute right is produced, if forty years have been allowed to elapse after sasine has been taken on the adjudication, without redemption. It thus operates retro, so as even to make effectual an entail executed by the adjudger before declarator or prescription.

*Johnston*, June 7. 1745; *M.* 10789. *Elch. v. Prescription*, 26. *Spence*, Jan. 21. 1807; 1 *Bell*, *Com.* 707. *Dalziell*, Jan. 17. 1810; *F. C.* *Robertson*, May 10. 1815; *House of Lords*, 3 *Dow*, 108; 1 *Bell*, *Com.* 705, *et seq.*

832. An adjudication is competent not only for satisfaction of debts actually due; but on debts not yet due; or even on contingent debts in certain circumstances (§ 45–48): but such adjudication is in security only. It never can, by declarator or otherwise, be converted (like the ordinary adjudication for debt) into an absolute right of property: But it confers the

right of ranking on the estate; entitles the creditor to payment of a dividend on bankruptcy; or to consignment of the dividend if the debt be contingent. See above, § 48.

2 Ersk. 12. § 42. 1 Bell, Com. 714. Nisbet, Feb. 16. 1759; M. 59. Dunlop's Creditors, Nov. 14. 1781; M. 62. M'Neil, March 7. 1794; M. 122 Duke of Queensberry, July 11. 1817; F. C.

## 2. *Judicial Sale.*

833. Decree of Judicial Sale is truly an adjudication; proceeding at the instance of a creditor holding a real security over the estate, where the debtor is insolvent; or, without insolvency, at the instance of an apparent heir of the debtor as trustee for the creditors, and for his own eventual interest. The object of the action is to have the debtor's estate brought to public sale, and the price divided among the creditors. It differs from adjudication so far, that there is no Legal; no power or time left for redemption; it is an absolute adjudication to the purchaser. The decree adjudges the estate, as in a common adjudication, but irredeemably, to pertain and belong to the purchaser, and ordains the superior to infeft and seise the purchaser as vassal in the lands.

The decree of sale is followed by a Charter of sale and adjudication; containing a precept for infeftment. And sasine being taken, and duly recorded, the feudal title is complete (a). This is esteemed a title of a very eligible kind (b).

(a) 2 Ersk. 12. § 59, et seq. 1681, c. 17. 1690, c. 20. 1695, c. 24. 54 Geo. III. c. 137. § 10. 3 Juridical Styles, 435, et seq. 2 Bell, Com. 250.

(b) 2 Bell, Com. 277.

## 3. *Adjudication as a tentative title of Heir.*

834. Taking advantage of the facilities provided for creditors, two indirect methods of proceeding were devised:—the one for compelling the superior to enter a purchaser, before the law had provided means for that purpose; the other for entering heirs tentatively, without the necessity of their assuming that character and responsibility.

1. If a purchaser was in danger of being refused by the superior, he took a bond from the seller for the price, and so adjudged the estate as a creditor.

2. Sir Thomas Hope invented the mode of proceeding on the part of an heir desirous of challenging adverse deeds, and yet

unwilling to incur responsibility as representative. By this device the heir grants a bond to a confidential person, for a sum above the value of the estate; on such bond the holder, as a creditor, charges the heir to enter, and, on his refusal, adjudges the estate or *spes successionis* of the heir: The holder of the bond then proceeds to challenge the adverse deed: And, finally, in case of success, the bond-holder being a trustee, conveys the bond and adjudication to the heir, in whose person confusioné (§ 580), the debt is extinguished. It was first doubted whether this formed a good title to carry land: But afterwards it was recognised as a good and valid title.

3 Ersk. 8. § 72. See below, § 1859.

#### 4. *Adjudication in Implement.*

835. Adjudication in Implement is a judicial method of completing a conveyance to the vassal's estate. It is in the form of an adjudication, and is founded upon an obligation by the vassal to convey; or upon a conveyance without precept or procuratory. The decree decerns and adjudges the lands heritably and irredeemably to the pursuer, in implement and satisfaction to him of the obligation; and ordains the superior to enter the pursuer as vassal absolutely. Sasine duly recorded, proceeding on a Charter of adjudication in implement, in terms of the decree, completes the right of the adjudger, and is as absolute a transference as if the right were completed on the vassal's disposition (a). It is irredeemable; and is not superseded like an adjudication for debt by a ranking and sale (b).

Adjudication in implement has been attempted to be used for facilitating the entry of heirs; but this attempt has been discountenanced and abandoned (c).

(a) 2 Ersk. 12. § 40. 1 Bell, Com. 748. 3 Juridical Styles, 333.

(b) Hutchison, June 26. 1830; 8 S. D. 982.

(c) Dunlop, July 4. 1820; affirmed in House of Lords, 2 Shaw's App. Cases, 115. See Murray, Jan. 17. 1811; F. C.

#### 5. PATRONAGE AS AN ESTATE OCCASIONALLY FEUDALIZED.

836. Patronage is the right of presenting to the vacant office of the ministry in a parish church, a person duly qualified

to officiate as a clergyman. On the abolition of Popery, the right of presentation in patrons was reserved (*a*). It was afterwards abolished (*b*), and restored by a statute still in observance (*c*). The right originally belonged to the founder of a church; or, if not claimed by him, was held to be vested in the Pope. Patronages which were appendant to a lordship or barony, held by the Church before the Reformation were, as accessaries, annexed to the Crown (*d*): Those which belonged to archbishops, bishops, and chapters, are now in the Crown: And those which belonged to subjects, either appendant or separate from land, are still with them.

1. *Title to Patronage.* The right of patronage may be in a subject, as an accessory of his land; or as vested in him by infeftment; or as a right never feudalized and vested or transferred by disposition without infeftment (*e*). And if once vested by infeftment, patronage must ever after, like land, be transferred by sasine (*f*). Patronage is held to be in the Crown where no other right appears, to the effect of operating as a good title of prescription (*g*). A grant of patronage by the Crown to a subject is not objectionable on the annexing acts, and does not require a dissolution; as these acts do not specify patronage as a right to be annexed to the Crown (*h*); and when lands annexed to the Crown have been dissolved, the dissolution extends to the patronage (*i*).

2. *Rights of Patronage.* The right of the patron is principal or accessory.

The principal right is, that of PRESENTATION; and this right as to a second minister, belongs as accessory to that of the first charge (*k*). But this right of presentation may be excepted from the grant; and where it is so, the grant will not be a prescriptive title (*l*). The right of presentation may be exercised by a woman (*m*); by a liferenter (*n*); by a commissioner (*o*); by the tutors of a pupil; by a minor with his curators; but whether a minor having curators can present without their concurrence is doubtful (*p*). If the patron shall neglect to present, or the presentee within six months to declare his acceptance, in writing, the right devolves on the Presbytery (*q*). When parishes, of which the patronages are separate, are united, the presentation is alternate (*r*). A substitution in presenting will not exclude the patron then in possession from

presenting (s). This right of presentation has lately given occasion to questions agitated with great heat, as connected with a question of conflicting jurisdiction between the Church and the Supreme Civil Court. Those questions arose from the right of rejection claimed by congregations as fortified by an Act of the General Assembly of the Church, in 1835, providing that no one should be admitted on the patron's presentation, if a major part of the male heads of families, communicants, should dissent from his call. But this Act has been held in the Civil Courts to be *ultra vires* of the General Assembly; and a person who had been rejected under the provisions of that Act, was ordered to be restored (t).

The patron has right to all the teinds not heritably disposed (see below, § 837) (u).

The patron has right to the vacant stipends; to be applied to pious uses within the parish, and now, by statute, in aid of the fund for clergymen's widows (x).

The patron has right to a seat in the church, and a burial-place in the churchyard (y).

(a) 1567, c. 7. 1592, c. 110. 1612, c. 1.

(b) 1649, c. 23. \*1690, c. 23.

(c) 10 Anne, c. 12.

(d) 1587, c. 29.

(e) 2 Craig, 8. § 37. 2 Stair, 8. § 35. 1 Ersk. 5. § 15. Parson of Morham, July 6. 1666; M. 9897.

(f) Urquhart, July 1753; M. 9915; affirmed, M. 9923. Elch. *v. Patronage*, 5 and 7; 5 Brown's Sup. 257.

(g) Earl of Home, July 28. 1758; 5 Brown's Sup. 867.

(h) Donaldson, Jan. 8. 1755; M. 9926; 5 Brown's Sup. 279. Lockhart, Kilk.; 5 Brown's Sup. 279. Murdoch, Feb. 22. 1783. See Lord Dundas, May 18. 1830; 8 S. D. 755.

(i) Graham, Jan. 17. 1758; M. 9927.

(k) Town of Haddington, Nov. 16. 1689; M. 9901. Town of Dundee, Jan. 10. 1683; M. 9904. Cochran, Jan. 21. 1749; Kilk. M. 9909.

(l) Earl of Mansfield, May 18. 1830; 8 S. D. 765.

(m) See Brown, June 9. 1830; 8 S. D. 899.

(n) Duke of Roxburgh, June 25. 1818; F. C.

(o) Tait, Jan. 22. 1778; M. 9938. See Inverness Presbytery, June 10. 1823; 2 S. D. 334. and 1 S. D. 404.

(p) 2 Bank. 8. §. 100. Connel on Parishes, 521. More's Sup. to Stair, p. xliii.

(q) 1 Ersk. 5. § 16. 10 Anne, c. 12. 5 Geo. I. c. 29. § 8. Connel on Parishes, 496. Applegirth, Nov. 1652; 9959. Procurator for the Church, March 2. 1762; 9961. Presbytery of Paisley, Aug. 10. 1770; 9966. Presbytery of Strathbogie, Aug. 2. 1776; 5 Brown's Sup. 533. Lord Dundas, March 15. 1795; M. 9972. Bell's Cases, 169.

(r) Officers of State, Nov. 13. 1821; 1 S. D. 129. Earl of Hopetoun, March 11. 1835; 13 S. D. 655.

(s) Lord of Invernytie, Jan. 24. 1677; M. 9899.

(t) Presbytery of Auchterarder, March 8. 1838; affirmed in the House of

Lords, May 3. 1839 ; Report and Supplementary Report, by Mr Charles Robertson, 2 vols.

(u) 2 Ersk. 10. § 49.

(x) 1 Ersk. 5. § 13. 54 Geo. III. c. 169.

(y) Ersk. ut supra, Lord Torphichen, Feb. 13. 1765 ; M. 9936. Acts of Assembly, Aug. 9. 1649. Connel on Parishes, 546.

## 6. TEINDS AS AN ESTATE.

837. A tenth part of the produce of lands was early claimed by the clergy as their right, and gradually came to be by law appropriated to their maintenance. How teinds came to be held by laymen, as a separate estate, or a yearly payment out of land, can be understood only by attending to the several situations in which they originally stood. Teinds of lands which had belonged to the church were, previous to the Reformation, either feued out by churchmen separately from the land, for an annual duty, as ground-rent : Or they were feued out along with the lands (*cum decimis inclusis et numquam antea separatis*), so that the grantee enjoyed land and teind together ; and although such grants by churchmen were annulled by 1564, 88. unless confirmed by the Crown, confirmation was easily obtained. Those which were not feued out, but still in the hands of the church at the Reformation, fell, on that event, to the Crown ; and those which were feued out but not confirmed, also fell to the Crown. The right to teinds which had been constituted as a separate estate, was completed by infestment ; the Crown having right to the duties payable for land : and this right sometimes remained with the Crown, sometimes was bestowed on a subject.

After the Reformation, teinds of land belonging to the Church at that time were conferred on lords of erection ; and were vested in them by sasine ; while certain teinds which continued after the Reformation to be payable to the bishops of the reformed church, were left in the hands of the Crown on the abolition of Episcopacy ; and were granted out in many instances to subjects.

The original right to teinds was vested in the clergy without sasine, but now the right can be completed only by sasine. Teinds feued out by the churchmen were vested by sasine : Teinds granted by the Crown to laymen, after the Reformation, were vested by sasine. To teinds originally granted

along with the lands as *decimæ inclusæ*, when constituted as a separate estate on the alienation of the land, the title was by *sasine*. Teinds to which in none of these ways an heritable right could be shewn, belonged to the patron of the parish, subject to stipend, by 1649, 39. 1690, 23; and these are either held by the title which gives the patronage; or, where granted to others than the patron, the right is completed by *sasine*.

Such being generally the state of this peculiar sort of estate, the titles to it are, 1. a charter and *sasine* of a barony carrying the teinds as an integral part of it (*a*); 2. a charter and infeftment in land cum *decimis inclusis*, with pertinents, the intention being clear to include teinds, carries the titularity (*b*); 3. a conveyance of teinds completed by infeftment (*c*); 4. a grant of patronage cum *decimis*, carries the titularity of the teinds, not the mere patron's right (*d*); 5. a personal right by adjudication without *sasine* has been held a good title to prescribe a right to teinds (*e*).

See below, of Teinds as a burden on land, and a Fund for the Maintenance of the Clergy, § 1146.

(*a*) Trotter, July 7. 1736; Elch. *Teinds*, No. 2.

(*b*) Creditors of Tillibole, July 5. 1748; Elch. *v. Teinds*, No. 26. Scott, Feb. 27. 1672; M. 15638. Callender, July 29. 1698; M. 15649.

(*c*) Minister of Morbottle, June 26. 1745; M. 15657; Elch. No. 23.

(*d*) Spalding, July 20. 1753; M. 15670. Stewart, Feb. 15. 1797; M. 15703.

(*e*) Gordon, July 11. 1758; Kilk. 5 Brown's Sup. 353. Irvine of Drum, Nov. 1764; M. 10830.

## 5. GENERAL VIEW OF THE TENURE AND TRANSMISSION OF BURGAGE PROPERTY.

838. Burghs are of two kinds: 1. Royal Burghs connected with the Royalty of Scotland; and, 2. Burghs of Regality and Barony connected with the Regality. In the former there is a peculiar system of feudal holding and conveyancing; the latter is regulated by the ordinary rules and principles. Royal burghs were immediately under the protection of the Crown; the feudal service or *reddendo* being a species of military duty for the safety of the community, namely, watching and warding. Burghs of Regality and Barony had a constitution analogous to these,—but were held under the lord of regality, or baron to whom they belonged, according to the charter of erection.

839. 1. PROPERTY IN ROYAL BURGHS. 1. The ROYAL BURGH is a corporation, or legal person, created by a charter from the Crown, and holding its lands and privileges from the Crown, by the tenure of watching and warding. The charter in favour of the burgh does not require, or perhaps admit of sasine ; and the fee is always full.

2 Stair, 3. § 38. 2 Ersk. 3. § 38. 2, 4. § 8 and 19. Marquis of Tweeddale, July 3. 1740 ; Kilk. ; M. 6896. Ayton, June 4. 1833 ; 11 S. D. 676.

840. 1. *Constitution of Burgage Holding.* Each burgage proprietor holds immediately of the Crown “for services of burgh used and wont.” The magistrates give him entry and sasine ; but it is as Commissioners of the Crown empowered to enter vassals, and receive resignations, and give sasine. If the burgh is annihilated, the burgage holders continue as Crown vassals (a). Where there is no provost, one of the magistrates (with the town-clerk as notary), enters vassals, and where there is no magistrate or clerk, the sheriff and sheriff-clerk have been held competent to give sasine (b).

(a) 2 Stair, 3. § 38. 2 Ersk. 4. § 89. Urquhart, Jan. 17. 1758 ; M. 15079. Lockhart, July 1662 ; Brown’s Sup. 482.

(b) Thomson, July 3. 1662 ; July 19. 1666 ; M. 6892.

841. Each burgess holds immediately of the Crown, but he can receive his entry only from the magistrates ; inasmuch that in competition a charter and sasine from the Crown will not avail against a subsequent entry by the magistrates.

1567, c. 27. Countess of Kincardine, Feb. 1686 ; M. 6894.

842. The title of each burgage holder is completed by sasine, given by one of the magistrates and the town-clerk as notary.

1567, c. 27.

843. The sasine must be recorded in the books of the burgh. By statute, after the model of the Act 1617 (§ 773), all “instruments of sasine of tenements within burghs royal, or liberties, or freedoms thereof, holding burgage, shall be inserted in the town-clerk’s books of the several burghs respectively, within threescore days after the date of the same,” the extract to make faith in all cases where the writ is not to be *improven* ; and ‘if it shall happen any of the said writs which are appointed to be insert as said is, not to be duly insert with-

‘ in the space of sixty days, then the same to make no faith  
 ‘ in judgment, by way of action or exception in prejudice of a  
 ‘ third party who hath acquired a perfect and lawful right to  
 ‘ the said tenements, without prejudice always to them to use  
 ‘ the writs against the makers thereof and their heirs’ (a).  
 By a recent statute the practice of omitting the doquet in  
 the registration is corrected, and its registration required in  
 future, but dispensed with as to sasines before the statute (b).

(a) 1681, c. 11, 8. Act. Parl. 248. c. 13. See below, § 847.

(b) 10 Geo. IV. c. 19.

844. 2. *Transmission to Singular Successors.* 1. The conveyance of burgagé property to a PURCHASER, is made by disposition, containing words of transference de presenti, with a procuratory for resigning in the hands of the magistrates in favour of the dispoonee. It is strictly regulated by the feudal principle; and so, 1. a precept is in such a case invalid and incapable of confirmation; and, 2. there can be no base right granted by a burgage holder, so as to constitute a sub-vassalage in the tenement. The receiving of resignation by the symbol of staff and baton, and giving of sasine by earth and stone, is one act and proceeding; and one instrument is evidence of both, the town-clerk being notary (a).

2. An ADJUDGER is entered and infeft at once by the magistracy, in obedience to the decree of adjudication, if the debtor himself be infeft; if his right be still personal, the entry is by an instrument of adjudication, resignation, and sasine.

3. An HERITABLE CREDITOR strictly ought to be entered by means of a procuratory of resignation in the bond. But the constitution of a burden by annualrent right held of the granter has been held valid (b); and, under the sanction of this decision, the practice has been introduced, of granting heritable bonds with precepts to hold of the granter over burgage subjects.

(a) Act of Sed. Feb. 11. 1708. See Thomson, July 3. 1662; M. 6892.

(b) Bennet, July 5. 1711; M. 6895.

845. 3. ENTRY OF HEIRS IN BURGAGE. 1. If an heir at law of one infeft is to be entered, the magistrates, on a cognition by two or more witnesses of the claimant's character as heir in the fee, give sasine forthwith by earth and stone of the

land, and hasp and staple of the house: and an instrument of cognition and sasine is extended and recorded (§ 843) (*a*). In Edinburgh, however, there is in practice no cognition (*b*). 2. If the claim be under the destination of a deed, the magistrates require proof by a service as heir of provision, and thereupon give sasine (*c*). 3. If the ancestor has not been infeft on his disposition, the magistrates require a general service as heir of provision, to prove the right under the disposition; and on production of such service they give sasine on the original procuratory (*d*). 4. If the title is to be completed in favour of one purchasing from the heir, they require a general service of the heir. 5. In some burghs a form of special service has been introduced, in which the proceedings in the ordinary special service are followed in the Burgh Court, but without any brieve from Chancery. A claim is made with a prayer for service and cognition. It is remitted to a jury, and the Court interposes a decree to the verdict (*e*). 6. The sasine duly recorded completes the title in all those cases.

(*a*) 3 Ersk. 8. § 72. 1 Juridical Styles, 592.

(*b*) 1 Juridical Styles, 596.

(*c*) 1 Juridical Styles, 602.

(*d*) 1b. 595. Cumming's Creditors, Dec. 4. 1783; M. 14446.

(*e*) Duff's Feudal Conveyancing, 516.

**846. FEUING OF BURGAGE SUBJECTS.** Although it has been doubted whether magistrates can convey the burgh lands to be held burgage, it is not doubted that, under certain conditions, they may feu, for a feu-duty adequate to the rent, where the act is unequivocally beneficial to the burgh; but they cannot part with a superiority (*a*).

Sometimes there is a confounding of holdings; and it is doubtful whether the subject is to be held in burgage, or in feu; or whether the titles are to be made up in the usual way, or "more burgagio." The rule seems to be, that in dubio the tenure is to be held burgage, with a ground-annual (see below, § 884); the holdings of burgage and feu not being inconsistent to this extent (*b*).

(*a*) Deans, July 4. 1752; M. 2522. 2 Stair, 2. § 38. 2 Ersk. 4. § 9. See below, Dawson (*b*). See 3 Geo. IV. c. 91. § 5-8. Magistrates of Kilmarnock, Dec. 19. 1776; 5 Brown's Sup. 406. Stewart, Jan. 22. 1822; 1 S. D. 246. Magistrates of Selkirk, June 11. 1828; 6 S. D. 955.

(*b*) Edgar, June 1743. Monboddo, 5 Brown's Sup. 730. Dawson, Nov. 14. 1827; 3 S. D. 136. 2 W. S. App. Cases, 230. See also same case, 6 S. D. 19. and affirmed with findings, March 31. 1830; 4 W. S. 81.

847. The community may have held lands in feu before its erection into a burgh, or may purchase and hold lands in feu. These are to be held according to the common rules; and whatever effect may be given to the privileges of the burgh, over the lands so held, their tenure is not burgage (*a*). Sasine in such lands, which, though lying within the territory of the burgh, are not held in burgage, must be recorded in the County Register (*b*). And where lands or tenements are granted out in feu by the Magistrates, the sasine must also (though the subject be within the territory of the burgh) be recorded in the County Register (*c*). Where the matter is doubtful, it is advisable to record the sasine in both registers.

(*a*) 2 Ersk. 4. § 9.

(*b*) 1681, c. 11. 49 Geo. III. c. 42.

(*c*) Davie, June 2. 1814; F. C. Dixon, Feb. 1. 1823; 2 S. D. 176, is not to be relied on.

848. II. PROPERTY IN BURGHs OF REGALITY AND BARONY. Burghs of Regality and Barony are erected by the Crown to be held of lords of regality or barons: and, 1. They are sometimes erected with a constitution and jurisdiction in the Magistrates and community, independently of the superior: 2. Sometimes, of old, they were made dependent on the superior for their set. But this sort of dependence was abolished by 20 Geo. II. c. 50.

849. The feudal holding of such a community is regulated by the ordinary principles; but burghs under the old constitution so far still proceed on the analogy of royal burghs, that the Magistrates act as commissioners having power to receive resignations.

850. The record for the sasines in such burgh is the County or General Register.

#### 6. GENERAL VIEW OF THE TRANSMISSION OF INCOMPLETE OR PERSONAL RIGHTS TO LAND.

851. The feudal title is completed by sasine duly recorded (§ 756, et seq.). But the right of the grantee or disponee before sasine, or of an heir before entry and infestment, or of one named in a destination, is imperfect; and called PERSONAL, in opposition to the REAL right. Two questions of importance occur respecting personal rights to land:—1. The Effect of the

Conveyance of a personal right in divesting the granter ; and, 2. The Discharge, or Sopiting, of a personal fee remaining under a destination or marriage-contract.

852. 1. *Conveyance of a Personal Right to Land.* The personal right to land may be conveyed, and a feudal title, completed, in one of two ways. 1. By voluntary disposition, containing an assignation to the unexecuted precept or procuratory in the disposition by which the seller himself holds his right ; when, in virtue of the assignation, the buyer may (under the Act 1693, c. 32 ; see § 766, and 790) be infeft ; or, 2. By a disposition, containing a precept of sasine, which, although proceeding a non habente potestatem (*i. e.* from one who is not himself infeft), and therefore in the first instance ineffectual, will yet authorize a sasine to be taken provisionally ; so as to become effectual jure accretionis, if the disposer's feudal title shall be afterwards completed by a sasine in his person, without any mid-impediment intervening. See below, § 881.

3 Stair, 2. § 2. 2 Ersk. 7. § 26. Henderson, July 5. 1821 ; 1 S. B. 103.

853. Although the disposer holds in such a case nothing but the personal right, his conveyance will not so fully exhaust that right as to preclude a subsequent disponee from acquiring, by means of the first sasine, a preference. This was at one time doubted, and the judgments of the Court varied on the question. But it was at last fully settled, that a conveyance by one holding a personal right, is completed only with the completion of the disponee's title by sasine ; and that if double conveyances be granted, the first sasine will carry the land.

2 Ersk. 7. § 26. in fin. 1 Bell, Com. 21. Rule, Dec. 8. 1710 ; M. 2844. Erskine, Dec. 19. 1710 ; M. 2846. Sinclair, Nov. 20. 1733 ; M. 2848. Bell of Blackwood-house, June 22. 1737 ; M. 2848 ; 5 Brown's Sup. 198. Henderson, ut sup. § 852.

854. 2. *Sopiting of Personal Fees.* Under the destinations of settlements, and in consequence of securities, voluntary or by adjudication, by one who afterwards acquires right to the estate, there sometimes remain personal rights to lands, or affecting them, which, in completing the feudal title, are neglected or not taken up. On a divergence of the lines of succession, such personal fee may fall to an heir different from him who holds the feudal right ; and by making up titles on the personal right, a part of the estate, or valuable interest in

it, may be carried off. Rights of this kind, therefore, arising from destinations, ought never to be neglected, but ought either to be taken up and completed along with the other feudal titles; or merged and sopited. This is accomplished either, 1. By a new disposition or settlement granted by one who is in the substantial right of the personal fee (*a*): Or, 2. By a new charter and investiture (*b*). But, 3. it is not enough to extinguish the personal fee, that a title shall be made up in a character which includes the right to the fee; unless a new destination be given to it. 4. As to incumbrances, it would seem that they are held as extinguished *confusione* (*c*).

(*a*) 1 Illus. 68. Edgar, July 6. 1636; M. 3089. Harvie, Dec. 12. 1811; F. C.; Buchanan's Cases.

(*b*) Molle, Dec. 13. 1811; F. C. Zuille, March 4. 1813; F. C. See Lord Reay, Nov. 25. 1823; F. C.; 2 S. D. 520; affirmed, June 7. 1825; 1 W. S. 306.

(*c*) 1 Illus. 71. Duke of Gordon, Feb. 15. 1750; M. 9597; Robertson, Nov. 27. 1751; M. 3044. See Lord Monboddo's Report, 5 Brown's Sup. 792.

## 7. REVIEW OF SOME IMPORTANT QUESTIONS RELATIVE TO THE TRANSMISSION OF FEUDAL ESTATES.

855. 1. OF THE SUPERIOR'S POWER OF DISPOSAL OF HIS SUPERIORITY. Of old the vassal was not entitled to dispose of the feu without his superior's consent; but at no time does the superior appear to have been under restraint in transmitting his superiority to another. The rules as to such transmission are these:—

856. 1. The superior may, without the vassal's consent, sell his right or estate of superiority, so that when the conveyance is completed by *sasine*, the vassal holds of the new, as he did formerly of the old superior.

2 Ersk. 5. § 4. Dreghorn, Aug. 5. 1774; Tait, 5 Brown's Sup. 607.

857. 2. The superior cannot, without his vassal's consent, create a superiority intermediate between them; his powers of alienation being so far restrained by force of his grant to the vassal, as to give the vassal a right to object. Such a conveyance is not, however, a nullity; nor has any one a right to oppose it but the vassal. Even without the vassal's consent the superior may sell a part of his feu-duties, and assign his right to demand them and enforce their payment: But the disponent

is only his assignee to the feu-duties, unless the vassal consent or acquiesce. See above, § 703.

2 Stair, 4. § 5. 2 Ersk. 5. § 4. Douglas, Jan. 30. 1671; M. 9306, 9292, 9366, 15012. Monimusk, Dec. 1682; M. 15015. Hotchkis, Dec. 6. 1822; F. C.; 2 S. D. 70.

858. 3. The superior succeeding by forfeiture to his vassal, and so becoming superior of the sub-vassal, may revive the intermediate superiority, if he have not barred himself by accepting the sub-vassal (*a*). But where the Crown has become superior in place of the Church, the vassal is a proper Crown vassal under the Act of Annexation, and no intermediate superiority can in such circumstances be now raised (*b*).

(*a*) Earl of Argyle, Nov. 26. 1672; M. 15013. See also Duke of Gordon, July 8. 1714; M. 10975.

(*b*) Stewart, Nov. 6. 1610; M. 15012.

859. 4. The superior cannot split the superiority into parts, where there is one fee and one reddendo, so as to compel the vassal to seek his entry from more than one superior (*a*); and so when heirs-portioners succeed to land, the entry must be by the whole, or by the eldest; and, strictly, it is only the eldest who is superior: And in the same way joint superiors must concur; and it is no splitting of superiority to vest it in two or more jointly, and pro indiviso (*b*). But the mere circumstance of separate subjects, holding of the same superior, coming into the person of the same vassal, will neither entitle him to demand one charter and a single entry, nor to object to the superior selling his right to different parties, for this is not to multiply superiorities, but to continue them (*c*): And although the superior should have included the separate subjects in one charter, they still may be disjoined by a sale of the superiorities separately; provided the charter shall contain distinct Quæquidem and Reddendo (*d*).

(*a*) 2 De Feud. 55. § 1. 2 Cr. 2. 2 St. 4. § 5. Sir J. Maxwell, June 9. 1741; M. 8817; 5 Brown's Sup. 696. Sinclair, Feb. 1754; Elch. Sup. and Vass. 16; 5 Brown's Sup. 812. Duke of Montrose, Jan. 31. 1781; M. 8822; affirmed, Feb. 19. 1782; 2 Hailes, 877. Graham, May 26. 1826; 4 S. D. 615.

(*b*) 2 Stair, 4. § 17. Baillie, June 14. and July 30. 1678; Fount. Stair, M. 15928. Cargil, Jan. 21. 1837; 15 S. D. 408. 3 Brown's Sup. 234.

(*c*) Dreghorn (Hamilton), Aug. 1774; M. 15015. Tait, 5 Brown's Sup. 607.

(*d*) Lamont, June 23. 1813; F. C.; reversed, Feb. 8. 1819. Dreghorn, supra (*c*).

860. The Effects of this in the operations formerly so frequent for election purposes, were,

1. That the vassal himself had right to object to the splitting of the superiority, or the interjection of a mid-superior. But,
2. That no such right was conferred on the Freeholders: To them it was *jus tertii*.

Campbell, Feb. 17. 1781; M. 7786. Hotchkis, Dec. 6. 1822; F. C.; 2 S. D. 70. Sir J. Colquhoun, May 25. 1824; F. C.; 3 S. D. 59.

861. 2. OF CONDITIONS IN FEUDAL GRANTS. In order to understand the effect of conditions in feudal rights, and their effect against heirs and purchasers, it is necessary to premise the general doctrine of real burdens. By the law of Scotland the right to lands sold may be limited or burdened, 1. by reservation of certain parts of the land; as coal, lime, mines, &c.; or, 2. by reservation of certain uses; as servitudes; or, 3. by reservation, in a well-known form, of a certain burden, or faculty to burden, to a limited extent. All of these depend on the principle, that the seller excepts from the transference, and reserves, as under his original right, some part of the subject, or some of the rights or powers of a proprietor. And all that the law requires in order to give effect to such reservation, is, that it shall be clear, and certain, and duly published to all concerned.

The efficacy of conditions, introduced into the title by which the property is transferred, depends on another principle, and much doubt has been entertained as to their effect.

In the sale of moveables no condition is effectual to limit the right of the buyer, unless in so far as it *suspends* the sale, or reserves the property untransferred. If once transferred by delivery, the property passes unqualifiedly; and the strongest *resolutive* condition that the property shall *revert* to the seller in a particular event, has no effect on creditors or purchasers from the buyer (see above, § 109, 110). So it is in a question between seller and purchaser in a sale of land where the above established mode of qualifying the transference by reservation is not followed. The seller who claims performance of a condition of pre-emption, or the performance of any act, or the observance of any stipulation, against the creditors of the purchaser, can be ranked only as a personal

creditor, for fulfilment of the condition, as an engagement of the purchaser; but can have no preference, as by real right, on the land (*a*). It was attempted to provide for this imperfection, and produce the effect of a real qualification of the right to land when sold or conveyed in a deed of settlement, by means of irritant and resolute clauses: But this device, applied first to fortify provisions of entail, was found ineffectual; and a statute was necessary to overcome the right of an owner to the uncontrolled disposal of property, and render the resolute clauses effectual (*b*).

We have seen the inefficacy of such resolute clauses in qualifying the owner's right in moveables. But the peculiarity of the feudal contract allows the introduction of another principle: viz. the force of a condition as entitling the superior to refuse a renewal of the feu, if the conditions stipulated in his contract with the vassal have not been observed; and to insist on such condition against singular successors as well as against heirs. In considering the subject, it is to be observed, 1. That some conditions are inter naturalia of feus; as annual payments, or services to the superior; and these, if not contrary to the act of 20 Geo. II. c. 50, § 10, are held effectual both against heirs and purchasers. 2. That other conditions are not inter naturalia, but properly engagements ad facta præstanda, stipulated in the shape of conditions: Such is a clause of pre-emption by which the vassal is bound to offer the feu back to the superior before disposing of it to a stranger: And after some doubts whether it was under the prohibition of the Act of Geo. II. this has been held legitimate and effectual to entitle the superior to refuse an entry to heirs or singular successors. Such also is a clause prohibiting sub-feu. These, however, if not inter naturalia, partake so much of a legitimate stipulation for preserving the rights of the superior, that there has been little difficulty in giving effect to them (*c*). 3. Other conditions of a more personal description have occasioned much difficulty. Such are conditions that the superior's agent shall be employed to draw out the charters; which occasioned great doubt here and in the House of Lords, and has been left undetermined (*d*). 4. Others, again, have been introduced for preserving the plan of a town, preventing nuisances and encroachments, completing

streets and pavements, &c. as to which, also, much doubt has been entertained whether they are real burdens; or, if not properly so, whether they are not engagements so interwoven with the feudal title that the superior may refuse an entry to singular successors contravening the prohibition, or not complying with the condition. The doctrine which hitherto has regulated such cases is, that the condition is effectual to the superior, so as to entitle him not only passively to refuse an entry, but judicially to insist on compliance with the condition (*e*). But the point is now in dependence in the House of Lords, after a remit for the opinion of all the Judges, who have concurred in holding that doctrine to be sound (*f*).

As the case stands at present (subject to the judgment soon to be pronounced in the House of Lords), the rules seem to be, 1. That lawful conditions for maintaining valuable interests on the part of the superior, when inserted in the vassal's investiture, and published in the Record of Sasines, may be enforced by the superior refusing an entry to an heir or a singular successor, if the condition be not complied with (*g*). 2. That if such lawful condition be enforced by irritant and resolute clauses, the superior will not only have the passive right of refusing an entry, but an active title to challenge and reduce; as to which the Judges seem now to think that irritant and resolute clauses are not necessary (*h*). 3. That when such a condition does not enter into the sasine and appear in the Register, though it will affect the personal right before sasine, it will be ineffectual against a purchaser from the vassal infeft (*i*).

(*a*) 1 Stair, 14. § 5.

(*b*) 1685, c. 22.

(*c*) See below, § 863. and cases there cited.

(*d*) See below, § 865.

(*e*) See below, § 867.

(*f*) Taylors of Aberdeen, 2 S. M'L. Ap. 609. See App. for final decision.

(*g*) Sir R. Preston, March 6. 1805. 1 Bell, Com. 28. note 1. Campbell, May 28. 1823; F. C.; 2 S. D. 341. Same case in House of Lords, June 29. 1825; 1 W. S. App. Cases, 690. Same case, March 4. 1828; 6 S. D. 679. Brown, May 14. 1823; 2 S. D. 261.

(*h*) Stirling, Jan. 4. 1757; M. 2343; Kilk. 5 Brown's Sup. 323.

(*i*) See Sir R. Preston, *supra* (*g*).

862. Conditions in the grant intended to protect the casualties of the superior, require, to their efficacy, besides an interest existing in the superior, 1. that the condition shall be lawful; 2. that it shall be incorporated in the title.

863. The condition must be lawful; that is to say, neither at common law exceptionable as *pactum illicitum*; nor falling under the prohibitions in the statute of Geo. II. After the abolition or decay of the military system of feus, conditions were frequently introduced into feu-holdings, similar in import to the casualties of marriage and recognition, and called clauses, “*de maritagio*,” and “*de non alienando sine consensu superiorum*.” These it was the object of the Act to abolish; an additional feu-duty being substituted in their stead. The words of the Act are, “that the casualty of marriage consequent upon such holdings, and all such prohibitory clauses restraining the power of alienation, be taken away and discharged;” and it is declared lawful for the subjects-superior or vassals in land so held, to apply to the Court of Session to modify such additional feu-duty by the vassal as they shall judge a reasonable recompense.

20 Geo. II. c. 50. § 10.

Conditions of pre-emption, and prohibitions to sub-feu, are not held to be forbidden by this enactment.

864. 1. The Clause of Pre-emption is an obligation by the vassal to give the first offer to the superior, if he mean to sell his land. It is intended, not for preserving the feudal influence of the superior (the abolition of which was the object of the act), but for conferring on him a valuable right to the repurchase of the estate, and is legitimate and effectual.

Sir C. Preston, Dec. 20. 1781; 1 Bell, Com. 28. note. Irving, March 6. 1767; M. 2343. Farquharson, Dec. 2. 1800; F. C.; M. *Clause*, App. 3. Sir R. Preston, March 6. 1805; 1 Bell, Com. 28. note.

865. 2. The Prohibition to sub-feu, is a condition intended to preserve the superior's casualty of composition for an entry. It prohibits alienation to be held base (*de me*). The effect of such a clause is, 1. That although a sub-feu will not be null, the superior cannot be compelled to enter his vassal the mid-superior, when the lands shall fall into non-entry; and so the sub-feuar suffers the inconvenience of non-entry. 2. That an heritable security, as being a mere burden, and no alienation, is not thus defeasible.

See Cases, *supra*, § 861 (*g*).

866. Special stipulations for preserving the superior's right are good as personal engagements. They seem not to be effectual as real burdens; and it has been much doubted whether the superior is bound to give an entry to the vassal on any other condition than compliance with the stipulation.

Stewart, Nov. 12. 1794; M. 15027; Bell's Cases, 75. M'Ritchie, Jan. 21. 1801; 1 Bell, Com. 26. Campbell's case, *ut supra*, § 861 (g). Napier, March 31. 1831; 9 S. D. 655. See above, p. 325.

867. A superior is not entitled to refuse an entry to one having a lawful title to the personal right in the charter, on the ground of his declining to pay an entry for intermediate disponees.

Gordon, June 29. 1814; F. C. See above, § 723.

868. A condition may be inserted for the purpose of preventing encroachments or abuses, or for enforcing a particular plan of building, which it may be of consequence to the value of the property to preserve; and it still remains a doubt whether that, when clearly made a condition, it will not have effect, 1. against the vassal by contract; and, 2. against purchasers by force of the condition (a). The construction of such clauses is according to the fair understanding of the parties (b). But see above, p. 325.

(a) Dirom, June 5. 1812; F. C. New Club, March 1. 1814. Schultze, Nov. 29. 1815. Young and Co. Nov. 17. 1814. Stewart, Dec. 9. 1820. Walker, March 11. 1825; 3 S. D. 455. Pollock, Jan. 16. 1827; 5 S. D. 195. See also Gibson, House of Lords; 2 Dow, 301; Gordon, 6 Dow, 87.

(b) Scott, Dec. 18. 1830; 9 S. D. 246.

869. The condition, in order to be effectual against singular successors, must be incorporated in the title. A condition lawfully bargained for by the superior, will qualify the vassal's right, and that of his heirs or assignees, while the right remains personal; but unless it appear in the sasine duly recorded, it will not affect the feudal right or singular successors. See above, § 861.

### 3. SOME POINTS OF DIFFICULTY RELATIVE TO SASINE AND REGISTRATION.

870. 1. OBJECTIONS TO SASINE (see *supra*, § 771). The notary's instrument is the only admissible evidence of sasine. And it is much to be regretted, that from the time when the records were introduced, the instrument of sasine

should not have been held conclusive proof of the ceremony. It may be expected that, in consequence of the recent report of the law commissioners, the law in this respect will be altered.

2 Stair, 3. § 16. 2 Ersk. 3. § 34. et seq. Bell, Conv. of Land, 186. et seq.

871. The objections to sasine, while the law remains on its present footing, are intrinsic or extrinsic.

1 Illus. 83. No. 8. Scott, July 1. 1779 ; 5 Br. Sup. 542.

872. 1. *Intrinsic objections*, i. e. objections appearing ex facie of the instrument, are fatal, if in essentialibus. Sasine is regarded as an actus legitimus, requiring a regular instrument in proof of it, which must be perfect as to all necessary particulars of the act (*a*). As to the essential points, 1. In reciting the ceremony, there are no verba solennia, absolutely indispensable: And so it is enough if the ceremony, in all its essentials, be stated in plain and intelligible words (*b*). The reading of the charter and precept must be stated, and in the instrument the precept transcribed, or as much of it as relates to the land (*c*). The testing clause and subscriptions are also transcribed, though perhaps not indispensable (*d*). 2. The omission of the christian name of the bailie has been held not fatal (*e*); nor a confounding of the names of the bailie and attorney, if capable of being extricated and understood (*f*); nor the omission of a date, if it can be consistently presumed, or if not essential (*g*); but when it is important the omission is fatal (*h*). 3. The omission to state in the instrument the delivery of "heritable state and sasine, real, actual, and corporal possession," is fatal (*i*). 4. Although the instrument commonly and correctly bears that sasine was given on the grounds of the several parcels "respectively and successively;" yet where the expression is *not exclusive of this fact* (as that sasine was taken on the ground of the said lands), and the words are such as accord with the supposition of the correct delivery of sasine (*k*), it seems to be sufficient: Where the words are exclusive of the supposition of successive acts (as if the instrument should bear that sasine was taken on a particular spot), it will be bad as to all the separate portions. 5. The statement in the instrument, that a wrong symbol has been used, is fatal (*l*). And although it has been held a sufficient sasine where the symbol was not specified, but the instrument bore only that the usual symbols were used (*m*);

this was a very old sasine, and the judgment is not to be relied on absolutely. 6. The instrument is null, if the notary's doquet do not bear that he was personally present, and the words " Vidi, sciivi, et audiivi" (*n*). 7. An error in the doquet as to the number of pages is not held fatal, if demonstrably a clerical error (*o*). 8. At common law, if any essential part of the instrument was written on an erasure not duly authenticated, it was held fatal; as the date; the King's reign; the name of the lands (*p*). But, by a recent statute, the law as to erasures is placed on a new footing, and no erasure is fatal unless proved to have been made fraudulently, or where the record is not conformable to the instrument as presented for registration; reserving the effect of objections judicially made before 12th May 1835 (*q*). See below, § 875.

(*a*) Duke of Monmouth, Nov. 12, 1667; M. 12266. Stair and Ersk. *ut supra*, § 869.

(*b*) Tait's Cases, Douglas, *et seq.*; 5 Brown's Sup. 587, 588. Davidson, *infra* (*d*).

(*c*) Don, Feb. 4. 1813; F. C.

(*d*) Bell's Conveyance of land to a purchaser, 203.

(*e*) Morton, Dec. 16. 1828; 7 S. D. 172; affirmed, Nov. 26. 1830; 4 W. S. 379.

(*f*) Hilton, Feb. 24. 1676; M. 14331. Douglas, *supra* (*a*). Henderson, March 8. 1776; 5 Brown's Sup. 586; 2 Hailes, 695.

(*g*) Hamilton, July 24. 1824; 2 S. D. 640.

(*h*) McMillan, March 4. 1831; 9 S. D. 551.

(*i*) Davidson, Nov. 14. 1827; F. C.; 6 S. D. 8.

(*k*) 2 Ersk. 3. § 45. Maxwell, March 21. 1628; M. 14318. Lord Hermiton, July 6. 1630; M. 14326. Gordon, Aug. 1773; Tait, 5 Br. Sup. 587; 1 Hailes, 535; Bell, Election Law, 254. See M'Intosh, Dec. 17. 1825, below (*n*).

(*l*) Carnegie, Dec. 2. 1729; M. 14316. Duncan, June 25. 1742; Elch. *Sup. and Vass.* 7.

(*m*) Urquhart, July 27. 1753; Elch. *Sasine*, 8; 5 Br. Sup. 257; affirmed in House of Lords.

(*n*) Primrose, Dec. 22. 1612; M. 14326. M'Intosh, Dec. 17. 1825; 4 S. D. 192.

(*o*) Duke of Roxburgh, July 17. 1731; M. 14332; Elch. 9. Clark, Feb. 7. 1752; M. 14333; Elch. 7. McLean, July 2. 1777; 5 Brown's Sup. 590. Morrison, Dec. 16. 1826; 5 S. D. 150. M'Ghie, June 5. 1827; 5 S. D. 758. Dickson, March 3. 1829; 7 S. D. 504.

(*p*) Innes, March 10. 1827; 5 S. D. 559; affirmed, June 20. 1827; 2 W. S. 639. See cases under § 879 (*c*). McMillan, March 4. 1831; 9 S. D. 551. Earl of Cassillis, June 2. 1831; 9 S. B. 63. Hoggan, Feb. 13. 1835; 13 S. D. 461. Howden, July 10. 1835; 13 S. D. 1097.

(*q*) 6 and 7 W. IV. c. 33.

873. 2. *Extrinsic Objections to Sasines.* Although much to be regretted (as tending to shake the stability of land rights by parole evidence), extrinsic objections, *i. e.* objections to the truth of the statement in the instrument are still competent as grounds of reduction, if supported by sufficient proof.

874. As sasine must be taken on the ground of the lands (§ 769), the ceremony must be separately performed on each tenement, either where the lands lie discontinuous; or where they hold of different superiors; or where they are held by different tenures; or where they have been acquired by different titles: And defects in those points may, as grounds of reduction of the sasine, be established either by reference to the instrument (§ 872. 4.), or by extraneous evidence (*a*).

If the lands shall have been erected into a BARONY, sasine on any part, or on a part appointed, and by the symbol of earth and stone, is sufficient for the whole (*b*). The Crown has also power, by a CLAUSE OF UNION in a charter, to unite subjects lying locally discontinuous, or requiring different symbols; so as to make sasine at any point of the lands, or at a place specified, good for the whole; or to make one symbol serve (*c*). But it is indispensable that sasine shall be duly recorded, either in the General Register of Sasines or in the Particular Register of each shire in which any of the united parcels lie (*d*). The rules for sasine under such charters are,—1. That if in the charter of a barony, or in a clause of union, a place is appointed for taking sasine, it must be taken at that place; otherwise only the contiguous portions derived from the same superior will be carried (*e*). 2. That if no place be named, but sasine is authorized *super aliquam partem fundi*, &c. it may be taken on any part of the barony or united lands (*f*). 3. That separation of a part does not dissolve the union, but each part is held to be joined to each; and neither the part alienated nor the part retained is deprived of the benefit (*g*). 4. That a clause of union has no effect in dispensing with separate sasine, where the subjects are derived from different sources, or held of different superiors, but only when they are locally discontinuous, or require different symbols. 5. That the Crown alone can give such dispensation; a subject superior can only communicate the privilege when conferred. But the objection on this ground being extrinsic, if the years of prescription have run, the presumption is, *omnia rite et solemniter acta esse* (*h*).

(*a*) 2 Ersk. Pr. 3. § 17. 2 Ersk. 3. § 36, 44–5. Bank of Scotland, July 1729; M. 16404. Grant, Feb. 16. 1837; 15 S. D. 565.

(*b*) 2 Ersk. 3. § 46.

(*c*) 2 Craig, 7. § 17, 19. 2 Stair, 3. § 44–5. 2 Ersk. 3. § 45. Montgomery, March 2. 1813; F. C.

(d) See Dalrymple, Dec. 20. 1711; 4 Brown's Sup. 862.

(e) Lauriston, March 19. 1636; M. 14330. Bank of Scotland, July 1729; M. 16404.

(f) Skene, Jan. 19. 1768; M. 8792; 1 Hailes, 210. as reversed in House of Lords.

(g) 2 Cr. 7. § 19. to be corrected by 2 Stair, 3. § 45. and 2 Ersk. 3. § 45. Skene, Jan. 19. 1768; and Dundas, Nov. 15. 1767; both reversed in House of Lords; M. 8792; 1 Hailes, 210.

(h) Heron, Feb. 14. 1771; M. 8684; 1 Hailes, 401. Scott, Jan. 21. 1777; M. 13519; 5 Brown's Sup. 588; 2 Hailes, 730, 811; correct Brown's Syn. Scott, July 1. 1779; M. 13519. Wood's Trustees, July 6. 1832; 10 S. D. 773.

875. 3. *Erasures in Sasines.* There is this important distinction between deeds and instruments of sasine or resignation, that the former is of the essence of the conveyance, the latter only the notice of it; and that, in the latter, an entry on the record consistent with the deed of conveyance, is all that is truly useful. In a deed, words erased are presumed to have been different when the deed was signed, unless the alteration be authenticated by the tenor of the testing clause. In an instrument, the same presumption holds, unless the alteration is authenticated by the doquet of the notary. In practice, it happened that vitiations were more frequent in sasines than in deeds, and that they were less accurately authenticated, from the less familiar use of Latin in the doquet. But some cases occurred which gave great alarm; where vitiations in sasines were found fatal to the titles of an estate, while every sasine coming into improper hands was exposed to such fatal operations (a). These obvious dangers led to a statute (b), whereby, 1. no challenge of an instrument of sasine or instrument of resignation shall receive effect by reduction or exception, on the ground that any part of it is written on an erasure, unless it be proved that it has been done for the purpose of fraud; or unless the record is not conformable to the instrument as presented for registration; 2. the law is to apply only to cases in which the objection has been judicially made after the 12th May 1835; 3. the law does not apply to sasines propriis manibus, for those are conveyances rather than mere instruments of sasine.

(a) 1 Illus. 81. Hoggan, Feb. 13. 1835; 13 S. D. 461. Howden, July 10. 1835; Ib. 1097.

(b) 6 and 7 Will. IV. c. 33. See 1 Illus. 82.

876. 4. *General Precept.* The precept must contain a warrant to give infeftment to a certain person, and in certain

lands. But it seems not to be necessary that either the person or the lands should be *named*, provided they shall be sufficiently distinguished and identified. Hence, 1. If the lands be described in such a way as to be capable of identification by written evidence, the sasine will be good, provided written evidence to identify the lands be produced to the notary, and read and published, and stated in the instrument (*a*); and in such a case the extract of a sasine from the record is sufficient where the sasine is lost (*b*). 2. A precept to infest A nomination, and his heirs and assignees, is a good warrant of sasine in favour of a person though not named who shall produce to the notary proof of his character of heir or assignee (*c*). 3. A precept to infest "the heirs of A" is not good to sustain a sasine, if taken in the same terms (*d*): But if sasine be taken to B, and a general service be produced and "deduced" in the instrument proving B to be the heir, it seems to be sufficient.

(*a*) Wallace, June 23. 1742; M. 6919. Elch. *Sasine*, 3. York Building Co. Jan. 9. 1739; Elch. *Serv. and Com.* 8. Graham, Aug. 3. 1753; M. 49. Belches, Jan. 21. 1815; F. C. Hill, July 10. 1833; 11 S. D. 958.

(*b*) 1617, c. 16.

(*c*) 1693, c. 35.

(*d*) 2 Ersk. 3. § 33. Blackwood, Nov. 7. 1740; M. 14327. Melville, Feb. 1794; Ib. Peacock, July 22. 1826; 4 S. D. 749.

877. 5. *Special Precept*. If the precept be special in its nature, it is not a warrant under which sasine of a different description can be given; as a precept for "sasine in security," or "in liferent," will not authorize a sasine in fee or in property. It has been thought, however, that a precept to infest one in trust, may, when such trustee has power to sell, be assigned to a purchaser so as to authorize a sasine in his person: And at least where the precept is to infest the trustee and his assignees, a purchaser may be infest on the assigned precept. A precept for sasine generally, or in fee, will authorize a sasine in security or in trust. The greater being held to include the less, it is good if the sasine be of the same nature, and by the same symbols.

Mitchell, July 16. 1767; M. 14335; Lord Pitfour in 1 Hailes, 185. See 1 Bell, Com. 697. note 2 and 3. More, May 29. 1805. Cockburn, June 1836; 14 S. D. 389.

878. 6. *Mandate presumed from Possession of Precept*. The possession of the precept presumes a mandate to take sasine. But this may be redargued by him in whose name it is

taken ; as where sasine would infer representation ; or where it is taken differently from the warrant, in leaving out conditions protected by irritancies.

2 Stair, 3. § 17. 2 Ersk. 3. § 33. in fin. 2 Craig, 7. § 6.

879. 7. *Defects in Registration.* The record of the sasine must be complete. And so, 1. If lands are omitted in an essential part of the record of the instrument, the sasine is held not recorded as to them (a). 2. An erroneous transcription of the date of the instrument in the record, annuls the registration (b). 3. An error in the record as to the year of the King's reign, in transcribing the date of the precept, is fatal (c). 4. The effect of omitting to record ; or of not recording in due time ; or of omitting any subject ; or of any error which annuls the registration, is not to destroy the sasine to all intents. Against the granter, and his heirs and representatives, it is effectual (d) : But it is null against a third party, who has completed his real right ; nor will it be a good answer to him in competition, or a bar to his completing his right, that he was aware of the existence of a prior right of which the sasine was not duly recorded, unless he be participant in the fraud. So an adjudger, or creditor obtaining a security, &c. with sasine duly recorded, will prevail in a competition, notwithstanding private knowledge of the error (e).

(a) Gray, Feb. 23. 1790 ; M. 8796. Stewart, Feb. 20. 1827 ; F. C. ; 5 S. D. 383.

(b) M'Queen, Jan. 23. 1824 ; F. C. ; 2 S. D. 637.

(c) Denniston, Nov. 16. 1824 ; 3 S. D. 285. Same case, Dec. 15. 1824 ; Ib. 400.

(d) 1617, c. 16. See above, § 773. Simpson, June 28. 1678 ; M. 13553.

(e) Leslie, May 21. 1824 ; F. C. ; 3 S. D. 48. See also Lang, June 29. 1813 ; F. C. ; decided on the ground of acquiescence in a public work and homologation.

880. 8. *Exhausting of the Precept.* The precept is exhausted when duly executed. By such execution only does the fee become full in the person of the disponee, so as to extinguish the feudal right, which enables the granter to issue a precept. But when not duly executed, or so as not to complete the feudal right in another and entirely to divest the granter, the precept is still in force. And so, 1. A fatal error in the *taking* of sasine may be remedied by a new sasine ; the precept in that case is not exhausted. 2. A fatal error in the

*instrument*, as it annuls the sasine, leaves the feudal right undivested, and the precept still in force. 3. Even a fatal error in the *recording* (as to a certain extent it destroys the sasine), has also the effect of permitting a new sasine to be taken, as on an unexhausted precept. This has been doubted on the words of the Act of 1617. (See above, § 773.) But according both to legal principle and the practice of conveyancers, the precept is in such a case good authority for a new sasine.

1599, Act of Sed. pp. 29, 30. 1600, c. 36. 1617, 16. 1669, 3. Stewart's Ans. to Dirl. 275. 1 Bell, Com. 696. Kibble, June 16. 1814; F. C. Baxter, May 15. 1818; 1 Bell, Com. 697, note 1. Kibble, Dec. 18. 1830; 9 S. D. 233; affirmed, Sept. 23. 1831; 5 W. S. 553. Fulton, Feb. 15. 1831; 9 S. D. 442.

881. DOCTRINE OF ACCRETION. A sasine taken on the precept of one who has the right but is not infeft, is ineffectual: But it may become effectual on the subsequent completion of his title. This is the doctrine comprised in the maxim, *Jus superveniens auctori, accrescit successori*. It is held to depend on the principle of warrandice express or implied; the law doing what the granter is bound to do.

8 Stair, 2. § 1. &c. 2 Ersk. 7. § 3. 1 Bell, Com. 698.

882. The rules of this doctrine are,—

1. That a conveyance of land with sasine proceeding from one in the substantial right, but whose title is not complete, is made perfect by the subsequent completion of the granter's title (*a*). So if an heir or disponee convey the land to which his right as yet is only personal and the disponee is infeft, the subsequent sasine of the granter makes valid the imperfect conveyance. So also if one, infeft on an indefinite precept unconfirmed, dispose with a precept to be held a me, a subsequent confirmation of his sasine will validate the public sasine proceeding from him (*b*). So in the same way, if one, infeft public without confirmation (and so having no complete feudal right), dispose with a precept, the subsequent completion of his title by confirmation will render valid, accretione, the otherwise inefficacious infeftment of the grantee.

2. If the granter of the precept have at the time no right to the subject, but acquire a right by subsequent title, it may be doubted whether accretion will take place (*c*). The ground of this doubt is, that there can be no proper conveyance where there is no right existing: that law may fictionè supply so-

lemnities, but not substantial right; and that in such cases there is nothing but an implied obligation to convey which requires a different mode of completion (*d*).

3. If one not yet infeft grant a conveyance, or an heritable bond, and on the precept sasine be taken, and the granter die without his title being completed, and his heir make up titles to the land; this will not avail the grantee, nor will the heir's title accresce to his sasine (*e*).

4. Accretion is available to infeftments according to their priority in date; and even when the title is completed on the application of one of the competitors, and with the intention of validating his right alone, it nevertheless will accresce to the other if his sasine be prior in date (*f*). But where the title is completed on the *diligence* of any creditor, it has been said by Lord Stair to accresce only to that creditor (*g*).

5. The effect of accretion is important in bankruptcy; and on the principle stated by Lord Stair, it would appear, that after bankruptcy, no accretion to render valid the securities of particular creditors to the prejudice of the general body should take place in consequence of an act of the trustee intended for the general benefit. But the point is not settled (*h*).

(*a*) 3 Stair, 2. § 1. 2 Ersk. 7. § 2, 3. 1 Bell, Com. 698.

(*b*) Henderson, July 5. 1821; 1 S. D. 104. Macdonald Lockhart, Nov. 16. 1837; 16 S. D. 76.

(*c*) Dirlton and Stewart v. *Jus Superveniens*. 2 Ersk. 7. § 2. See 2 Stair, 3. § 14. Buchan, Dec. 11. 1739; M. 6528. Town of Musselburgh, Dec. 22. 1675; M. 7759. Forbes, Jan. 8. 1668; Ib. Stewart, Jan. 7. 1681; M. 7762.

(*d*) In consultation with the late Mr Jamieson, we differed in opinion; that sound lawyer inclining to hold the maxim applicable.

(*e*) Keith, Nov. 14. 1792; M. 2933. This was delivered by Lord Justice Clerk Macqueen, and assented to by all the Court except Lord Henderland, who doubted (as Stewart does,—Dirlton and Stewart, ut supra) whether being bound in warrandice the completion of his title did not accresce.

(*f*) 3 Stair, 2. § 2. Neilson, Dec. 22. 1738; M. 7773. Elch. *Jus Super.* 1 Paterson, Dec. 10. 1742; Kilk. M. 7775; Elchies' Notes, 236. Alison, Feb. 28. 1708; M. 7773. See Henderson, July 5. 1821; F. C.; 1 S. D. 108.

(*g*) Stair, ut supra.

(*h*) 1 Bell, Com. 699. See Tatnal, Feb. 2. 1827; 5 S. D. 277. Baron Norton, July 6. 1813; F. C. Redfairn, March 7. 1816; F. C. See Wilson, July 8. 1836; 14 S. D. 1117.

883. LOSS OF TITLES. The loss of titles may be supplied by an action called Proving of the Tenor; and when the deed is of the nature of a title, or ground of a permanent right, this process is necessary in order to supply the defect (*a*). It can proceed only before the Court of Session (*b*); two

points are necessary to the effect of completing the title:—  
1. The tenor of the deed; and, 2. The casus amissionis. And being a dangerous, though a useful, remedy, great strictness of proof is required in making out those points (*c*).

1. Proof of the Tenor. 1. When the deed is of a nature not to be extinguished by mere delivery to the debtor, attention is chiefly or entirely to be directed to the proving of the tenor; the fact of the loss of the deed being enough, in the ordinary case: And the proof of the tenor will vary with circumstances. In some cases, that proof will consist of scrolls and copies, aided by parole evidence; in other cases more suspicious, or more special in terms, conditions, provisions, &c., adminicles will be required, *i. e.* authentic writings which of themselves make faith without the aid of parole evidence,—as sasines, instruments of resignation, retours of service, precepts of clare constat (*d*). 2. Where the deed is not of a permanent nature, but such as may be extinguished by mere delivery (as a bond), it is not to be expected that there shall be found *adminicles*; and then the proof of the tenor by scrolls, parole, copies, &c. must be supported by clear evidence of casus amissionis (*e*). 3. In proving the tenor of a deed, if it should be established by the defender that it was informal, not duly authenticated, or not written on a stamp as required by law, the action would fail. But the presumption in those points would be in favour of the deed on proof of the casus amissionis (*f*). 4. Great difficulty has been found in sustaining a proving of the tenor of judicial proceedings; and so of titles by adjudication (*g*).

2. Casus amissionis. The point here is to prove that a deed once existing has accidentally perished, and has not been intentionally destroyed by one having power to cancel it (*h*); the same strict evidence, however, of a casus amissionis is not required in such cases as in the restoring of obligations (*i*).

(a) 4 Stair, 32. § 1. et seq. 3 Ersk. 1. § 56. Maxwell, Nov. 9. 1742; M. 15820; Elch. Tenor, 4. and Notes, 483. See Seton, Jan. 17. 1766; 5 Brown's Sup. 924.

(b) Balnagoun, Jan. 28. 1663; M. 15790. Smart, July 23. 1673; 3 Brown's Sup. 149. Frazer, June 16. 1784; M. 15830. Robertson, June 22. 1833; 11 S. D. 775. Lillie, Dec. 4. 1832; 11 S. D. 160.

(c) Fraser, June 16. 1784; M. 15830.

(d) Gordon, Nov. 21. 1749; 5 Brown's Sup. 776. D. of Roxburgh, Feb. 17. 1835; 13 S. D. 476.

(e) Gordon, ut sup. (*d*), and cases in 1 Illus. 89, 90.

(f) Blackwood, July 17. 1813; reversed, Rob. App. Ca. 211.

- (g) Lord Airth, May 13. 1707; M. 15813. Duncan June 26. 1827.  
 (h) 4 Stair, 32, § 46-7. 4 Ersk. 1. § 54. Muir, Jan. 21. 1663; M. 15789. Moffat, Jan. 31. 1809; F. C. Paterson, Dec. 14. 1837; 16 S. D. 225.  
 (i) Ersk. ut supra. Gordon, Nov. 21. 1749; M. 15823; 5 Brown's Sup. 776. Carson, May 14. 1811; F. C. Merry, June 21. 1834; 12 S. D. 764. D. of Roxburgh, Feb. 17. 1835; 13 S. D. 476. McLeod, Feb. 27. 1835; 13 S. D. 581. Magistrates of Brechin, Dec. 15. 1835; 14 S. D. 154. Forbes, Feb. 28. 1827; F. C.; 5 S. D. 497.

## 8. OF GROUND-ANNUALS.

884. Out of the peculiar state of church lands, as affected by the Reformation, and from the great demand in more recent times for building ground in towns, a description of estate called GROUND-ANNUALS, has arisen, intermediate between that of the superior and that of the vassal, of the nature of a perpetual annuity. ANNUAL is technically used to mean a yearly duty or revenue; and when payable from land, it seems formerly to have been distinguished by the different names of ground-annual, top-annual, and feu-annual; the distinctions of which are not very accurately ascertained.

Skene, De Verb. Sig. *Annual*. 1 Craig, 10. § 38. 2 Stair, 5. § 7. 1551, c. 10. 2 Act. Parl. 489.

885. 1. *Ground-Annual, arising out of Church Property as affected by the Reformation.* One-fourth part of the territory of Scotland is reckoned to have been the property of the Church at the time of the Reformation; in the administration and cultivation of which, by means of feus, rental-rights, and kindly tenantry, the early agriculture of Scotland was chiefly promoted. At the Reformation, this property, which all merged in the Crown, was parcelled out in various lordships erected by the Crown; the grantees being called lords of erection; not as being of the order of nobility, but merely feudal lords. In 1587 this profusion, by which the Crown greatly suffered, was checked by a general annexation of the church lands, with the exception of the lordships of erection. Other grants were subsequently made, however, and were stopt only by another Act of Annexation 1592, with the exception only of those lands which had been granted to Lords of Parliament (a). The lands which belonged to the Knights Templars were excepted from the Annexation Acts, and hence the successors

of the Knights Templars are the proper superiors of those lands. In the beginning of the 17th century, the lords of erection resigned their superiorities to the Crown, with the exception of the feu-duties; and for those feu-duties a redemption price was to be given, such as King Charles I. should award. The King's decree-arbitral settled the rate of this redemption at 1000 merks for each chalder of victual, or L.100 of money, of feu-duty, and the feu-duties were to be retained till that price should be paid; no power being given of interposing superiors between the King and the former church vassals (*b*). But no benefit accrued to the Crown from this reserved power of redemption; and it was, on the eve of the Union, renounced, that the feu-duties might remain irredeemably and for ever with the lords of erection, and those having right from them (*c*).

(*a*) 1587, 29. 1592, 121. 1633, c. 10, § 4. 1690, 13, and 29. 1770, c. 11. 2 Ersk. 10. § 18.

(*b*) 1653, 10, and 14. 1690, 23, 29.

(*c*) 1707, 11.

886. In virtue of that series of statutes, property of this sort came to stand thus:—1. The King was superior of church lands; the vassals holding formerly of the church being entitled to an entry with the Crown, wherever they had not recognised the lord of erection as an intermediate superior. 2. A feu-duty was payable, as a GROUND-ANNUAL, to the successor of the lord of erection; the holding of the Crown being blench, under the real burden of the feu-duties. 3. This real burden has, by practice, been usually conveyed by resignation and infestment only.

Earl of Aberdeen, Feb. 8. 1699; M. 7974. Blair, July 6. 1790; 2 Bell, Com. 283. Governors of Heriot's Hospital, July 9. 1714; M. 8986-9; House of Lords. Magistrates of Inverness, Nov. 28. 1827; 6 S. D. 160.

887. 2. *Ground-Annals in Building Feus*. The usual course with those who speculate in building ground, is to grant sub-feus to builders, from whom they stipulate for a high feu-duty. But if sub-feus be prohibited, and there is great demand for building ground (as formerly in Edinburgh, where the grants from the town, and from the Governors of Heriot's Hospital, contain such exclusions), those who take the land in feu with the intention of again disposing of small portions to builders,

find their advantage in stipulating for an annual rent from the builder, rather than in demanding a price payable at once. This is accomplished by the creation of a GROUND-ANNUAL. The disposition is granted to be held public (*a me de superiore meo*), in compliance with the condition of the feu-charter ; but the subject is charged with an annual payment to the granter, and his heirs and assignees. Either a burden or annuity is reserved, which is declared a real burden (§ 917) ; or a bond and disposition in security of the annuity is granted by the purchaser, on which infeftment is taken ; and in either way the payment appears in the Register of Sasines as a real burden (*a*). When the payment is by proper ground-annual, 1. it is postponed to the feu-duty ; 2. it gives no active title to enter into possession, though, as a *debitum fundi*, it may be made the foundation of poinding the ground. No interest is due on ground-annuals (*b*). The ground-annual is, like a burden by reservation, transmissible by assignation to third parties, and by general service to heirs (*c*).

(*a*) 1 Bell, Com. 30.

(*b*) Scott Moncrieff, Nov. 24. 1835 ; 14 S. D. 61.

(*c*) See below, § 923.

888. Care is usually taken by builders, in feuing out ground from which a ground-annual is payable, to have the payment so divided and apportioned, that, in disposing of the several lots when built upon, each purchaser may be liable only for his own share of the ground-annual. But even if such precaution be not taken at the first, purchasers who receive and complete their right, with a burden of only a portion of the ground-annual, are liable for no more ; at least have been held no farther liable to poinding of the ground ; which is a process of execution.

Thomson, Feb. 12. 1828 ; F. C. ; 6 S. D. 526.

#### 9. SOME DOCTRINES OF THE LAW OF SALE PECULIARLY APPLICABLE TO LAND.

889. 1. EVIDENCE OF BARGAIN. Written evidence is indispensable to the contract of sale of lands. There is generally a previous agreement in writing, to fix the bargain while the necessary examination of titles and preparation of the for-

mal conveyances are in progress. This is in the form of mis-sives or minutes of sale (*a*), to which the doctrines already explained as to authentication, locus pœnitentiæ, rei interven-tus, and homologation, are applicable. (See § 18-27) (*b*). A virtual obligation to dispoſe lands has been inferred from an assignation to the perpetual rents of the subject (*c*): And a promise in writing to dispoſe land, if delivered, is good without acceptance (*d*).

(*a*) 1 Bell's Forms of Deeds, 144. 1 Illus. 92. et seq. Cockburn, Jan. 30. 1639; M. 4187. Stewart, Feb. 5. 1765; 5 Brown's Sup. 902.

(*b*) Bell's Completing of Title to Land, 141. Earl of Aberdeen, Nov. 26. 1823; 2 S. D. 527. Rait, Nov. 26. 1833; 12 S. D. 131.

(*c*) Sinclair, July 2. 1667; M. 16464. Fullarton, Jan. 5. 1699; M. 16465.

(*d*) Ferguson, Nov. 23. 1748; M. 8440. Muirhead, Aug. 10. 1759; M. 8444. Fulton, Feb. 26. 1761; M. 8446. Barrow, Jan. 23. 1794; M. 8463.

890. 2. SELLER'S TITLE. There are two obligations implied in a sale of lands—one, to give an unexceptionable title; the other, to warrant or indemnify the seller in case of eviction. As to the TITLE, it is implied in a sale of lands (although commonly expressed in the previous minutes or agreement), that the seller shall give one that is unexceptionable: in which respect it differs from a sale of moveables (§ 114.) The rules on this subject are, 1. That in a sale of land the buyer has an absolute right to a good title; and unless he shall have unequivocally discharged this right (below, 5), he is not bound to take a defective title with warrandice; or to wait till his right is challenged (*a*). 2. That it is a sufficient ground of exception to the title, if it be liable to challenge (*b*); and although at one time it seems to have been held sufficient to offer a progress against which no challenge had been made, with warrandice in case of challenge (*c*), this is not law, and has been uniformly rejected in subsequent cases (*d*). 3. That the buyer must either take the title offered or give up the bargain, but is not entitled to insist on a deduction from the price (*e*). 4. That a reasonable time must be allowed to the seller on such an objection being started, to furnish an unexceptionable title; and the necessary discretion for that purpose can be excluded only by fixing a day against which the title must be completed by the seller (*f*). 5. That if it be specially and clearly agreed, that the title shall be taken as it stands; or that the buyer shall be held to have examined

the titles and satisfied himself; all that is demandable in absence of an actual challenge is warrandice (*g*). (See § 894.) 6. That while formidable objections do exist, the buyer is not bound to pay the price: And, accordingly, a known method of trying the validity of objections to titles is, by suspension of a threatened charge for payment of the price (*h*).

(*a*) Nairn, June 13. 1676; M. 14169. Lockhart, June 13. 1742; M. 14170. Tait, Dec. 20. 1743; Elchies, *Tailzie*, 21. Smith, Feb. 13. 1827; 5 S. D. 340. Dick, Dec. 12. 1826; in House of Lords, 2 W. S. App. Cases, 522.

(*b*) Nairn, and other cases, *supra* (*a*).

(*c*) Paton, March 1682; M. 14170.

(*d*) Little, Feb. 14. 1749; M. 14177.

(*e*) Earl of Morton, Nov. 14. 1738; Kilk. M. 14176. Hepburn, Dec. 10. 1772; M. 14179; 1 Hailes, 509; 5 Brown's Sup. 586; affirmed April 30. 1773.

(*f*) Smith, Nov. 19. 1829; 8 S. D. 84. Dick, Nov. 30. 1830; 9 S. D. 93. Raeburn, July 5. 1832; 10 S. D. 762.

(*g*) Rowand, Nov. 24. 1769; M. 14178; 1 Hailes, 312. Hay, July 10. 1783; M. 14183. Anderson, Dec. 4. 1816; F. C. Carruthers, May 26. 1826; F. C.; 4 S. D. 34. Smith, *supra* (*a*). Sorley, Feb. 14. 1832; 10 S. D. 319.

(*h*) Pollock, June 19. 1828; 6 S. D. 999.

891. 3. SALE OF LAND UNDER A POWER OF SALE. In securities over land for debt, it has become the uniform practice to give to the creditor a power, under certain precautions, to sell the subject of the security for satisfaction of the debt; and questions often arise out of the exercise of such powers. The doctrine on this subject is, 1. That although such power is a mandate, it is as procurator in rem suam that the creditor is authorized to act; and it is held not revocable by the grantor's death or bankruptcy (*a*). 2. That a creditor proceeding regularly, under such a power, to sell the lands, is not to be interrupted by a process of ranking and sale raised by other creditors (*b*). 3. That sequestration under the bankrupt act has no effect in interrupting the creditor in the exercise of those powers (*c*). 4. That the precautions enjoined or made conditions of the power must be carefully observed; and if there be no express stipulation, the Court of Session will in equity interpose to order all reasonable precautions to be observed. 5. That a publication in a newspaper containing advertisements only, is sufficient compliance with the condition of advertising in a newspaper (*d*). 6. That if the burdens exceed the price, the purchaser has not the same protection as under the bankrupt acts (*e*), but must trust to his

right as assignee of the preferable securities paid off and conveyed to him. 7. That the creditor exposor of the lands to sale cannot bid at the auction (*f*). 8. That he is, to a certain extent, trustee for the debtor, and bound to act with due regard to the debtor's reversionary interest, and liable to restraint judicially, on the undue exercise of his power (*g*).

(*a*) *Steven, Glen, and Co.* Feb. 19. 1811. 2 Bell, Com. 295. *Robertson*, May 23. 1815. *Marshal*, Jan. 19. 1821. See *Beveridge* (*c*).

(*b*) *Simson*, Nov. 25. 1831; 10 S. D. 66. *Bell*, Feb. 24. 1838; 16 S. D. 657.

(*c*) *Beveridge*, Jan. 17. 1829; 7 S. D. 279.

(*d*) *Dickson*, Jan. 15. 1831; 9 S. D. 202. *Maxwell*, Jan. 21. 1823; 2 S. D. 122. *Jeffrey*, June 16. 1826; 4 S. D. 728.

(*e*) 1695, c. 6. 54 Geo. III. c. 127. § 42. See *Lord Alloway* in *Beveridge* (*c*).

(*f*) *Maxwell*, Jan. 21. 1823; 2 S. D. 122. *Jeffrey*, supra (*d*).

(*g*) *Dicta* in *Beveridge*, supra (*c*).

892. 4. BURDENS AND INCUMBRANCES. The seller is bound to discharge all incumbrances. And, 1. The burdens by real security (see below, § 897, et seq.), remain as incumbrances on the land, although extending beyond the price which the purchaser has agreed to pay. A receipt from the creditors whose debts are paid off, with a discharge of the price by the seller, will not free the land. The purchaser must trust for the fortification of his title to the due vesting, by assignation in his own person, of the preferable debts when paid off. 2. In judicial sales, and in sales under the sequestration act, the burden is limited to the amount of the price. Payment of the price to creditors as ranked in judicial sale, disburdens the land (*a*), and in sequestration, payment of real securities to the amount of the price, with a discharge by the trustee, completely disencumbers the land (*b*). 3. In judicial sales, the holders of heritable securities when they receive payment, grant not a discharge and renunciation, but a discharge and assignation of their debts to the purchaser, by which the extinction of the debts confusione, is prevented, and they are kept up in fortification of the purchaser's right. But they are not held to form a separate estate in the purchaser, so that they can be transferred by him, separately from the land, to the effect of being excluded from a ranking and sale of the land, if the purchaser should become bankrupt (*c*). 4. The purchaser is entitled to retain the price till incumbrances shall be purged (*d*). But this right is subject to equitable limitation (*e*): It may be restrained conventionally by limiting the right of retention to a

certain number of years (*f*): or, if the years of prescription have expired, and warrandice be given with security for relief, the Court will in equity interpose to order payment of the price (*g*).

(*a*) 1695, c. 6. Seton's Creditors, July 10. 1788; M. 13371; 2 Hailes, 1054; 2 Bell, Com. 277.

(*b*) 54 Geo. III. c. 137. § 42. Ferrier, July 8. 1812; F. C. M'Lean, Nov. 29. 1825; F. C.; 4 S. D. 232. Kirkland and Sharp, Jan. 22. 1824; 2 S. D. 630.

(*c*) Seton's Creditors, July 16. 1788, &c. in House of Lords, April 7. 1789; M. 13371.

(*d*) Cargill, April 1. 1822; 1 Shaw's App. Cases, 134.

(*e*) Calderwood Durham, July 9. 1800; M. 16641.

(*f*) Smith, July 2. 1706; M. 14184.

(*g*) Marjoribanks, Feb. 22. 1715; M. 14187.

893. 5. EXTENT OF THE RIGHT. The seller is bound to convey and deliver the whole subject sold. And,

1. The purchaser is entitled to every thing included in the description, but not to demand any thing which it excludes (*a*); and so when, in a judicial sale, lands were sold on which a ground-annual was constituted (§ 886), the purchaser was held not entitled to the benefit of that separate estate (*b*).

2. A description by measurement, entitles the purchaser to insist for the quantity described and no more; any valid objection on account of error entitling him to the option of giving up the purchase, if it amount to error in *substantialibus* (*c*).

3. If the description include a subject not intended to be sold (as formerly a freehold qualification relied on by the buyer), the question will depend either on warranty or on the effect of error. When there is any room for doubt, the purchaser must secure himself by a distinct warranty, under which he will have action for the subject of that warranty. If there be no warranty, he can have remedy against the deficiency only on one of two grounds: Either he must make out a case of misrepresentation and fraud; or he must prove an error in *substantialibus* sufficient to annul the whole contract.\* He can have no remedy on the principle of the *actio quanti*

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\* In a late case, Lord Cuninghame refused to sanction any other issue in a question of this kind than "fraud," or "error in *substantialibus*," and so negatived the *actio quanti minoris*. Warranty was out of the case. This was acquiesced in. M'Kenzie v. Girvan, summer session. 1839.

minoris of the civil law; a doctrine not recognised in Scotland. But it was not held enough to raise this plea that the subject sold was a superiority of forty shillings of old extent, if there was no warrandice of a vote (*d*).

(a) Earl of Morton, Nov. 14. 1738; M. 14175. Wilson, Nov. 14. 1764; M. 13330. Lloyds, Feb. 13. 1782; M. 13334; 2 Hailes, 897.

(b) Blair, July 6. 1790; 2 Bell, Com. 283.

(c) Hannay, Jan. 26. 1785; M. 13334. Gray, Jan. 23. 1801; M. v. Saleage, 3. Hepburn, July 4. 1781; M. 14168. See 2 Bell, Com. 283. 4. Gray, Jan. 23. 1801; M. *Sale*, App. 2. Earl of Morton, ut supra.

(d) McLean, Jan. 23. 1757; M. 14164. Gordon, June 15. 1815; F. C.; reversed in House of Lords, May 20. 1819; 1 Bligh. 287. (overruling so far McLean's case). Balmer, March 11. 1830; 8 S. D. 718; and in House of Lords, 10 S. D. App. 862.

894. 6. WARRANDICE IN SALES OF LAND. Keeping in view the double obligation incumbent on a seller of land, and the buyer's right to insist for a complete title (§ 890); if a sale of land has been completed by the execution of those deeds by which the property is transferred, there is still implied (and commonly expressed in the conveyance) an obligation of warrandice to indemnify the purchaser in case of eviction. This is absolute in sale where a full price is paid, unless a limitation has been stipulated (§ 121, 2, 3).

Ramsay, Jan. 26. 1830; 8 S. D. 399. Blair, June 10. 1833; 14 S. D. 445.

The obligation may be personal or real.

1. Personal warrandice is an obligation, express or implied, to indemnify the purchaser in case of eviction.

2. Real warrandice, is also either express or implied:—1. Express, where one heritable subject is conveyed to the purchaser of another, in security and real warrandice against eviction of that other, “so that, in case of eviction, the said A shall have immediate access to the said lands” (*a*). In this case the security is completed by sasine in the warrandice lands bearing the above qualification, and the right so created is merely provisional (*b*). Effect is given to this provisional right by a declaratory action proceeding on the conveyance and the eviction, and concluding for immediate entry to possession, and payment of the maills and duties. 2. Warrandice is implied where land-owners make exchange or excambion of their lands with each other; in which case, the person who shall by eviction lose the subject conveyed to him, may have recourse upon his original property by a declaratory action

similar to that on express warrandice (*c*); but it is doubtful whether, without being specified in the sasine, this right is effectual against third parties (*d*).

(*a*) 1 Juridical Styles, 150.

(*b*) 2 Ersk. 3. § 28. Blair, Nov. 6. 1741; Elchies, Warr. No. 5.

(*c*) Earl of Melrose, Nov. 25. 1623; M. 3677. Wards, July 14. 1629; M. 3678.

(*d*) Balfour, Jan. 14. 1788; M. 10267.

895. Warrandice is not an obligation to *protect*, but only to *indemnify* in case of eviction (*a*); and out of this peculiarity (too often overlooked) arise several important consequences. Thus, 1. There is no action of warrandice till judicial eviction, unless the ground of demand be unquestionable, and proceeding from the fault of the seller (*b*) (§ 121). 2. Indemnification must be made for a partial eviction. 3. A burden must be removed; but if transacted by the buyer, he can demand only indemnification (*c*). A servitude does not, however, seem to be a burden in this sense (*d*), neither will the purchaser have any claim of warrandice if the purpose of his purchase is defeated as a nuisance (*e*). 4. The purchaser is entitled to demand the whole worth of the subject at the time of eviction, and not merely the sum which he has paid (*f*). 5. The person bound in warrandice is entitled to have notice of the claim or attempt to evict (*g*). But the buyer is not bound to enter into a litigation in defence of the right, provided he give due notice (*h*). If he undertake the defence without notice, and omit the proper plea, the seller will be free. 6. The seller is not bound to defend against the claim; and if the buyer choose to do so while the seller declines it, and fails, he is not entitled to the expense of litigation (*i*). 7. Warrandice indemnifies only against loss from defective right; and from losses properly anterior to the sale; but not from burdens natural to the right (*k*), nor from losses caused by supervenient laws (*l*); or arising from the nature or legal effects of ownership (*m*). To protect the purchaser against these, a special stipulation is required (*n*).

(*a*) 2 Stair, 3. § 46. 3 Ersk. 3. § 9. Inglis, Feb. 26. 1771; M. 16633; 1 Hailes, 412.

(*b*) Stair and Ersk. supra. Earl of Home, Jan. 21. 1663; M. 16584. Greive, June 25. 1635; M. 16579. Smith, Feb. 17. 1672; M. 16596; 2 Brown's Sup. 624. Hepburn, Feb. 2. 1710; M. 16617. Sutherland's Creditors, Jan. 4. 1749; M. 16629.

(c) Logan, March 8. 1632; M. 9224. Greive, July 26. 1735; M. 16579. Dewar, July 1780; M. 16637.

(d) More's Sup. p. xcii.

(e) Murray, Jan. 19. 1776; M. 16636; 1 Hailes, 66.

(f) Houston, Feb. 22. 1717; M. 16619. Hill, Dec. 18. 1769; M. 16631; 1 Hailes, 328. Lord Napier's Trustees, Feb. 7. 1777; 2 Hailes, 750. 5 Br. Sup. 636.

(g) Lyon, July 6. 1620; M. 16572. Brown, Feb. 3. 1630; M. 16579. Clark, June 23. 1681; M. 16605.

(h) 2 Stair, 3. § 46. 2 Ersk. 3. § 32. Downie, Jan. 31. 1815; F. C.

(i) Inglis, Feb. 26. 1771; M. 16633. 1 Hailes, 412.

(k) Drummond, May 28. 1549; M. 16565. Cunningham, Jan. 27. 1829; Sh. Teind Cases, 175. McRitchie, Feb. 26. 1836; 14 S. D. 578.

(l) 2 Stair, 3. § 46. 2 Ersk. 3. § 29. Watson, July 15. 1667; M. 16588. Muirhead, June 23. 1715; 5 Brown's Sup. 125. Sprot, May 29. 1829; 7 S. D. 682. See Holliday, May 28. 1830; 8 S. D. 831.

(m) Lumsden, Jan. 6. 1682; M. 16606. Plenderleith, Jan. 31. 1800; M. 16639.

(n) See Earl of Hopetoun, July 3. 1811; F. C. Alexander, June 9. 1812; F. C. Duke of Roxburghe, Jan. 23. 1838; 16 S. D. 341.

## 10. GENERAL VIEW OF SECURITIES ON LAND.

896. Land is a source of credit, directly and indirectly. 1. Indirectly, in so far as the credit of the owner of the land is augmented, either by the rents of his lands, which may be attached for his debt; or by the value of the estate, which also may be attached and brought to sale for debt. And, even after his death, the value of his land may be appropriated by his creditors, not only in preference to the right of succession of his heir, but in preference also to the claims of the creditors of the heir; provided advantage shall be taken of this privilege, by completing the proper diligence within three years after the debtor's death. See § 1931. The diligence or execution by which land is made available for debt is either Adjudication or Judicial sale (§ 827, 833), or Sequestration, under more recent statutes. See Appendix. And the land may be secured exclusively for the benefit of a particular creditor by inhibition, which is a prohibition against the voluntary alienation of the land, or further contraction of debt, to the prejudice of the inhibitor's claim. 2. Land is made directly the means of security to creditors, by the creation of a burden entitling the creditor to appropriate the rents and uses of the land until the debts shall be paid. The right conferred on the creditor may be considered as a separate estate, distinct from the property.

2 Stair, 10. 2 Ersk. 8. 2 Ross, 320. 1 Bell, Com. 670. et seq.

897. Real securities on heritable estates are constituted in various forms, and either by base or public holding. In the latter, the superior is entitled to his composition; but if he be himself the debtor, he must enter the creditor gratis. (See above, § 719.) The chain of feudal titles to the land continues unbroken and unaffected by these rights in security; which are held as excrescences on the property, and may be created or dissolved without affecting the radical right to the estate, or touching the progress of titles. As mere accessories of the debt, they are discharged by its extinction, or annihilated by renunciation, without any feudal form of reconveyance.

2 Stair, 10. § 13. Hope's Min. Pract. 6. § 2. 2 Ersk. 8. § 18. 2 Ross, 368.

898. Whatever be the form in which an heritable security is created, it requires, in order to its effect as a real right, the constitution of a jus in re.

899. Such securities are reducible to two classes:—one in which the real right is constituted by infeftment in favour of the creditor; the other in which the real right depends on the force of a condition qualifying the right of property.

900. 1. *Securities by Infeftment in the Person of the Creditor.* The securities which depend for their effect on sasine to the creditor are,—Wadset; Infeftment of Annualrent; Heritable Bond; Disposition in Security; and Absolute Disposition with Back-bond. And these are distinguishable into two classes:—the one including Wadset, Annualrent right, and Absolute Disposition with Back-bond, as being dispositions under reversion: The other comprehending Heritable Bond and Disposition in security, as infeftments in security merely; in which the land is pledged or burdened, but not transferred; the right not being convertible into property by a discharge of the reversion; and the efficacy of the infeftment depending on the subsistence of the debt, to which it is a mere accessory.

2 Ersk. 8. § 2—36. 1 Bell, Com. 670. et seq.

901. 1. *Wadset.* This is a security created by disposing the land to the creditor, but redeemably, on payment of a specified sum: the security being completed by sasine duly re-

corded. The creditor is called the Wadsetter; the debtor the Reverser. This form is now little used.

902. The right of reversion is either, 1. incorporated in the conveyance, as a condition of the disposition; or, 2. expressed in the form of a contract (introduced about 1661): And when this security is used in present practice this is the form made use of; or, 3. the power of redemption may be in a separate deed, called a Reversion, which, in order to limit and qualify the real right, must be recorded in the Register of Reversions (*a*). The right of reversion remains unextinguished till declarator of expiry of the right, and may competently be claimed by one having a title to the lands (*b*).

(*a*) 2 Ersk. Pr. 8. § 1. 2 Stair, 10. § 1. et seq. 2 Ersk. 8. § 3. et seq. 1469, 28. 1617, 16. 2 Ross's Lectures, 329. Dallas's Styles, 709. et seq. 1 Jurid. Styles, 274. 2 Bell's Forms of Deeds, 27. et seq.

(*b*) Lord Dundas, June 11. 1836; 14 D. B. M. 751.

903. The estate created in the creditor or wadsetter, when this form of security was in use, might have been held public or base.

904. When the entry was public as vassal of the superior, the reinvestment of the debtor or reverser was necessary on redemption. And this was formerly secured by letters of Regress, binding the superior to enter his old vassal on redemption; but under 20 Geo. II. the necessity of such an express obligation was superseded, and the wadsetter's conveyance on redemption entitled the reverser to enter on paying a year's rent. Letters of regress came to be used only for the purpose of forcing the superior to enter the reverser as vassal without composition; and even singular successors in the superiority must so enter the reverser, if letters of regress have been granted and recorded in the Register of Reversions. Where the wadset is held base, a resignation ad remanentiam (§ 787) restores the fee to the vassal. Erskine's doctrine is doubtful, that a mere renunciation is sufficient.

2 Ersk. Pr. 8. § 6. 2 Inst. 8. § 16. Correct by 2 Stair, 10. § 13.

905. Where the reverser wishes to have back his land, and the security discharged, he must either use the order of redemption prescribed in the wadset; or, without the formality of a premonition and order of redemption as in the old practice, he must call the creditor in an action of declarator of re-

demption, concluding that the lands shall be declared to have reverted to the debtor; and the decree in this action extinguishes the feudal right of wadset, and restores the debtor to his full right (a).

If the debtor shall, on the other hand, be unable to redeem his land, the wadsetter may have his right made absolute, and the security converted into a right of property, by an action of declarator of expiry of the redemption (b).

(a) 2 Ersk. 8. § 17. et seq. and § 23. 2 Bell's Forms, 52. Campbell, March 10. 1786; 2 Hailes, 993. Lord Alva, Jan. 1791; M. 16555.

(b) 2 Ersk. 8. § 25.

906. Wadsets are either, 1. Proper; in which the wadsetter takes the land in pledge, the rents and profits going in extinction of the interest. Or, 2. Improper; in which the wadsetter takes the rents generally to account of principal and interest. In the former, the wadsetter holds as a proprietor; in the latter, he holds as a steward of the wadset subject.

2 Ersk. 8. § 26-7.

907. The loan may be enlarged by an extension of the security, called an EIK TO THE REVERSION; which, like the principal security, requires to be recorded in order to have effect against third parties.

2 Ersk. 8. § 30. 1 Juridical Styles, 284. 2 Bell's Forms, 46.

908. 2. *Infestment of Annualrent.* This was at first a perpetual annuity from land, not redeemable; a feudal estate secured and completed by sasine: But, a little before the Reformation, a redemption clause came gradually to be added to the security; by which it approached to the nature of a wadset. In this state it was an impignoration of a rent out of the land, as the wadset was of the land itself, for the debt. On the Reformation it underwent another change, by the addition of a power of requisition on the part of the lender. It is seldom used; but is still a legitimate form of real security.

2 Ross, 373. 2 Stair, 10. § 1. et seq. 2 Ersk. 8. 31. Campbell, July 3. 1829; 7 S. D. 826.

909. 3. *Heritable Bond.* This is the first of that class of securities which are mere accessory burdens, annihilated by the extinction of the debt, or discharged by renunciation. The heritable bond first brought into use was an obligation to

infest the lender in an annualrent for security of the principal sum under reversion, and with a power of requisition of the principal, and a corresponding obligation to repay the principal sum (*a*). This security was imperfect, as giving a right only to levy the interest from the lands; and it was converted into a combination of the common personal bond (§ 67, 8), with a real right of annualrent payable out of the land, accompanied by a conveyance of the lands themselves in security (*b*). The sasine in an annualrent payable out of the lands, and in the lands themselves in security, when duly recorded in the Register of Sasines, vests a feudal estate; but still it is of the nature of a mere burden, which payment of the debt, or confusio, or mere renunciation of the security, will extinguish.

(*a*) Dallas, 694. 8, and 701.

(*b*) 2 Ross, 376. 1 Juridical Styles, 286. 2 Bell's Forms, 93. 2 Ersk. 8. § 35. Hog, Dec. 11. 1832; 11 S. D. 198. See Earl of Dalhousie, § 829.

910. 4. *Bond and Disposition in Security* consists of a bond, accompanied by a disposition of the lands themselves, redeemably and under reversion, for real security of the principal, interest, and penalties, accompanied by a power of sale to the creditor under certain conditions and precautions (*a*). The right is completed by infestment duly recorded. The exercise of the power of sale has given rise to many questions (*b*).

(*a*) 1 Juridical Styles, 309. et seq.

(*b*) See above, § 891.

911. 5. *Securities for Future Debts*. In practice the commerce of money required facilities in the mode of security beyond those afforded by the forms now enumerated. Hence such expedients as an eik to the reversion in wadsets; a clause declaring that the wadset should stand effectual for all debts, engagements, and sums to be advanced; or a clause in annualrent rights, that all other debts and engagements should be discharged before the power of redemption should be exercised. All those expedients were liable to abuse, as covers to fraud on the eve of insolvency; and by 1696, c. 5. it was enacted, "that all dispositions, or other rights, that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any debts contracted after the sasine following on the

said disposition or right." Under this act a security for money, of which part only is advanced at completing the security, is bad as to the part which is not advanced at that time (*a*); but not if the obligation for the balance is absolute (*b*): So also under this act heritable security for a cash-account is ineffectual (*c*). But, 1. in construing this act against fraud, the *delivery* of the sasine duly recorded, is held the date of the sasine (*d*); and, 2. the difficulties at common law, and under this act, are overcome by disposition and back-bond; or by a form authorized by statute (§ 913).

(*a*) Dempster, Feb. 1750; Kilk.; M. 10290. Johnston, Aug. 1777; 5 Br. Sup. 386.

(*b*) Fulton, June 22. 1826; 4 S. D. 740.

(*c*) Pickering, Jan. 16. 1788; M. 1155. Stein, Nov. 14. 1759; M. 1158, and 1236.

(*d*) Dunbar's Creditors *v.* Abercromby, July 30. 1739; M. 1156. Bell's Cases, 57, note. Drummonds, Bell's Cases, 54.

912. 1. Absolute disposition, with Back-bond, is a form of security which confers, by the disposition and sasine, a right of property, qualified only by a personal obligation or back-bond to denude on payment of the debt. This obligation to denude comes to have the force of a real limitation of the right, by registration of the back-bond in the Record of Sasines and Reversions. While it remains unrecorded, the borrower is exposed to the risk of the lender's bankruptcy (*a*).

It covers all advances and debts, whether before or after the date of the sasine (*b*).

(*a*) 1696, 25. 1 Bell, Com. 672. 2 Bell's Forms, 291. See Tierney, June 16. 1832; 10 S. D. 664.

(*b*) Drummonds, see § 911 (*d*). Riddel, Feb. 16. 1782; M. 1184. Keith, July 8. 1755; M. 1163; Bell's Cases, 254. Maitland, Nov. 23. 1827; 6 S. D. 109.

913. 2. Securities in Relief and for Cash-accounts. To avoid the inconvenience of the absolute disposition and back-bond, and chiefly to facilitate cash-accounts with bankers and securities in relief to cautioners, it was provided, that heritable securities may be given for cash-accounts, or for relief of cautioners in cash-accounts, on condition that the principal sum and interest to become due under the bond should be limited to a certain definite sum, not exceeding the amount of the principal sum, and three years' interest (*a*). In construing this act, it is fixed that a security for a certain sum,

and three years' interest thereon, is a sufficient compliance with the act (b).

(a) 33 Geo. III. c. 74. § 12; continued by 54 Geo. III. c. 137. 1 Bell, Com. 673. Ib. ii. 236. 1 Jurid. Styles, 315. et seq. 2 Bell's Forms, 176, 183.

(b) Morton, Dec. 10. 1828; 7. S. D. 172; affirmed, Nov. 26. 1830; 4 W. S. 379.

914. *Questions on the Effect of Heritable Securities.*

1. An heritable creditor is not entitled to demand possession of the title-deeds of the land; though sometimes it may be necessary for him to have exhibition of them, in order to satisfy an assignee; or even to have them so deposited as to avoid the danger of a law agent's right of retention (§ 1438). *After* the term of payment, there seems to be no room to doubt the creditor's right to have such exhibition of the title-deeds as may be necessary in negotiating a loan by assignation. But it has been held that he has no such right *before* the term of payment (a). It is sometimes stipulated that the title-deeds shall remain in neutral custody (b).

2. The expense of any transfers of the security made necessary by the debtor's failure to pay at the stipulated term, falls on the creditor who makes such transfer for his own convenience, not on the debtor (c).

3. The creditor is entitled to enter into possession, or by decree of maills and duties to take the rents, and sequesterate the tenant (d). When a creditor so enters into possession, his intromissions with the rents go to payment of his interest, and to diminution or extinction of the principal, and discharge of his security. But although he has taken possession, he is not bound to intromit beyond the interest; and may safely pay over the balance to the debtor, without being responsible to postponed creditors: If, however, he has taken possession in opposition to the diligence of such creditors, and to their exclusion, he will be bound to account strictly, and either to pay to such creditors the balance, after taking his interest, or to hold such balance in diminution of his debt (e).

4. Although, in such securities, a term is fixed for payment (generally the next term), it is not understood that payment is then to be exacted, but the money is to lie on a permanent loan for at least some reasonable time; the terms being appointed only in order to make the debt absolute, instead of future.

But payment may be required at that term, and enforced by personal diligence; or the money may be offered by the debtor: To guard against the inconveniences thus arising, certain terms of premonition are commonly stipulated, which the parties are bound to observe, and not easily presumed to discharge (*f*).

5. Where a debt is made a burden on an entailed estate, the heir in possession may (unless prohibited by the entail) pay the debt, and take an assignation to it, so as to keep it up against the estate. It has been held that a proprietor in fee-simple may pay up a debt heritably secured on his estate, by means of a trustee to the effect of keeping up the security (*g*).

6. Where a real security extends over several estates, on one of which there are other securities, the debt of the catholic security falls to be paid rateably from all; and the purchaser of the estate on which there are no other securities, is not entitled on an assignation to the catholic security to discharge the estate over which it alone extends, keeping up the debt against the others, to the prejudice of the creditors holding the securities over them (*h*).

(*a*) Hamilton, May 15. 1839; 1 D. B. M.

(*b*) M'Niel, Nov. 17. 1835; 14 S. D. 14.

(*c*) Bell, Nov. 13. 1835; 14 S. D. 3.

(*d*) Railton, June 20. 1834; 12 S. D. 757.

(*e*) Brown, Jan. 14. 1835; 13 S. D. 256.

(*f*) Monro, Jan. 19. 1838; 16 S. D. 335.

(*g*) M'Kenzie, Jan. 16. 1838; 16 S. D. 311.

(*h*) Earl of Moray, June 4. 1836; 14 S. D. 886.

915. 2. SECURITIES BY FORCE OF A CONDITION QUALIFYING THE RIGHT OF PROPERTY. When land is disposed under the burden of a sum to be paid; or under burden of a power reserved; or under the burden of a power granted to another to burden the right with payment of a specific sum; the real securities thus created are incorporated as qualifications of the right of property which the conveyance bestows, and which the sasine on that conveyance renders complete.

916. The force and effect of such securities may be considered either in relation to the grantee or in relation to third parties. 1. Against the disponent and his heirs the obligation implied in the condition is effectual, provided it be clear; and it may be made effectual by inhibition or adjudication. 2. Against third parties it is effectual only in so far as a real

right is created, accompanied with these three requisites,—that the burden shall affect the land itself, not the disponee merely; that it shall be of specific extent; and that it shall be published in the record of sasines.

917. 1. *Reserved Burden.* A burden reserved is effectually constituted where, in a conveyance of land, a specific sum is declared (in terms appropriate) a burden on the land, and on the right of the disponee; and where this condition enters the infestment, and is recorded.

2. Stair, 3. § 55. 2 Ersk. 3. § 49–51. 1 Bell, Com. 686. 3 Bell's Forms, 35. et seq.

918. The condition may be imposed either, 1. In the disposition and sasine, so as to affect the base fee and dominium utile; or by confirmation, to affect the public right; or, 2. Where the title is completed by resignation, the burden must appear in the sasine (*a*); or, 3. Where the conveyance is to the superior of the lands, if the burden appear in the disposition and instrument of resignation ad remanentiam to the superior, it is enough; although this was said to be rather an extinction of a right than a new constitution (*b*).

(*a*) 2 Ersk. 3. § 49. 1 Bell, Com. 686.

(*b*) Wilson, Feb. 13. 1822; 1 S. B. 350; affirmed, 2 Shaw's App. Cases, 162.

919. In point of expression it is necessary, 1. That the burden shall be specifically and pointedly stated as a real debt and burden on the lands disposed; the strongest expression of mere personal obligation, though conditional, being insufficient (*a*). 2. That it must be precise and clear in amount, and in the name of the creditor, either in the recorded sasine, or in a list recorded in the register of sasines as relative to it (*b*).

(*a*) 2 Ersk. 3. § 49. 1 Bank. 579. Martin, June 22. 1808; *M. Pers. and Real*, Appendix, No. 5. Stewart, May 18. 1792; *M.* 4649. *M'*Intyre, Feb. 3. 1824; 2 S. D. 664–9; 1 Bell, Com. 686.

(*b*) 2 Ersk. 3. § 50. Innes, July 1719; *M.* 10244; Lovat, Dec. 24. 1719; both reversed in House of Lords, April 1. 1721; Robertson's App. Cases, 355, 372. Calderwood's Creditors, July 1730; *M.* 10245. Creditors of McLellan, July 1734; 1 Bell, Com. 690, note 4. Smith, July 10. 1738; *M.* 10246; Elchies' Notes, 329. Broughton's Creditors, July 20. 1739; *M.* 10247; Elchies' Notes, 329; 5 Brown's Sup. 665. Allan, *infra*, § 920. Place, Feb. 24. 1821; 1 Bell, Com. 689. note 1.

920. The burden must be declared in the dispositive clause.

Ersk. *ut supra*. 1 Bell, Com. 688. Allan, July 19. 1780; affirmed, May 15. 1781; *M.* 10265.

921. The burden must be incorporated in the recorded sasine by which the burdened estate is conveyed.

2 Ersk. 3. § 51. Stenhouse, Feb. 21. 1765; M. 10264. Broughton's Creditors, ut supra, § 919. Douglas's Creditors, Feb. 15. 1765; Monb.; 5 Br. Sup. 906; and Chalmer, Jan. 27. 1791; both stated in 1 Bell, Com. 689. Place, supra.

922. A reserved burden, though real (and so giving the remedy of poinding of the ground), gives no active title to raise an action of maills and duties, so as to affect the rents (a), nor power to assume possession. In order to accomplish that, adjudication must be led; and a personal bond is commonly granted by the disponent, collateral with the burden, and referred to in the reservation (b).

(a) 4 Stair, 35. § 24. and 4, 23. § 5.

(b) 2 Stair, 10. § 1. Baillie, July 7. 1821; 1 S. B. 108.

923. A burden by reservation is not in the creditor's person a feudal estate; requires no sasine in the creditor's person (a); is carried by general service (b); and is transferable by assignation (c).

(a) 1 Bell, Com. 691.

(b) Cuthbertson, March 7. 1806; M. Serv. and Comp. App. No. 2.

(c) Miller, March 7. 1820; 1 Bell, Com. 691. note 4. Baillie, sup. § 922.

924. 2. *Faculty to Burden*. This is a power reserved by the granter of a conveyance (or conferred on another as the condition of it), to burden the lands disposed with a specific sum. It may be viewed either as a mere power; or as exercised in conformity with the condition.

2 Ersk. 3. § 50. 1 Bell, Com. 40, et seq.

925. 1. While the right exists as a mere power, it has been thought that there is room for a distinction between a right reserved to the granter, and the right conferred on a stranger. 1. The granter reserving the right has been held to have more ample power, and his creditors a right to adjudge for his debts, even after his death, without distinction between anterior and subsequent creditors (a). A stranger, it has been suggested, will not confer on his creditors any right but that of adjudging during his life, on the principle that he is bound to exercise the power in their favour (b). The faculty forms a burden on the disponent, whose creditors can take his estate only under the condition.

- (a) Elliot, Dec. 16. 1698; M. 4130. Rusco, Jan. 17. 1723; M. 4117.  
 (b) More's Sup. to Stair, xcii. M'Lean, *infra*, § 928.

926. 2. When the faculty has been exercised in due form, a real burden is constituted on the estate. See § 929.

927. In the creation of such a power it must be made specific; both as to the extent of the power to be exercised, and as to the person by whom it is to be exercised.

928. The power remains with the disponent before sasine is taken on the conveyance in which it is declared. After sasine it is vested as a real right in the person to whom it is reserved or given. It may be exercised by testamentary deed, or on deathbed; and is regarded so much as a mere power, that it expires with that person if he should die without exercising it.

Pringle, Feb. 28. 1765; 5 Brown's Sup. 444. M'Lean, Tait's Cases; *Ib*.

929. In order to confer a real right and preference on the person in whose favour the power is to be exercised, the deed of exercise must be completed by sasine recorded, or adjudication with sasine. It may seem anomalous that a warrant for sasine should be given by one not the proprietor of the land: But it is correctly given in virtue of the power reserved or granted.

2 Ersk. 3. § 50. 1 Bell, Com. 40. Romes, Feb. 1719; M. 4113. Sinclair, Dec. 23. 1724; M. 4123. Ogilvie, June 26. 1735; June 21. 1737; Elchies, *Faculty*, 1. Creditors of Douglas, July 28. 1737; *Ib*. 3; Elch. 3. Cunningham, Nov. 14. 1739; Kilk.; M. 4133; Elch. 5; 5 Brown's Sup. 681. Henderson's Children, Aug. 7. 1760; M. 4141. Montier, June 29. 1773; M. 15859; 1 Hailes, 530.

930. The exercise of the faculty by personal deed, raises to him in whose favour it is exercised a personal debt against the disponent; and the person so favoured, or the creditors of him who holds the power, may proceed to attach the faculty; but there is no preference to either till the burden be made real.

1 Bell, Com. 42-3. Learmonth, July 11. 1671; M. 4099. Davidson, Dec. 16. 1708; M. 4109. Rome and Ogilvie, *ut supra*, § 929. Cunningham, *ut sup*. *Ib*.

931. In Road and Canal Acts, and the like, where power is given to sell, or borrow money, there are sometimes special provisions introduced respecting the form of conveyance. In such cases, the particular Act prescribes the form in which the

conveyance is to be given; and the terms of the statute must be strictly adhered to.

#### 9. UDAL RIGHTS IN ORKNEY AND ZETLAND.

932. In Orkney and Zetland the land appears, while under the Kings of Norway, to have been held free from all burdens analogous to feudal duties or services, and liable only to a Government-tax called *SKAT*. The lands so held were called *SKAT-LAND*: and an exemption from *skat* was given to such lands as were enclosed for cultivation,—called *UDAL*, or free lands. There was nothing analogous to *feus* (*a*). The title to lands was judicial; by an entry of the heir in presence of the *Foude* or Governor's Court; a decree of that Court being the title (*b*). The law of succession was different from the feudal. The children had equal shares (as is still the law of Norway), leading to a minute division of land (*c*). No alienations could be made without the judicial consent of the heirs. And the term of prescription was thirty years (*d*).

(*a*) E. of Galloway, July 1. 1752; M. 16393.

(*b*) 2 Stair, 3. § 11. 2 Ersk. 3. § 18. 2 Bank. 3. § 10, 17, et seq. Peterkin's Notes on Orkney. Sinclair, March 29. 1624; M. 16393.

(*c*) See Charter, Dec. 3. 1498; Peterkin's Notes, 97; also App. p. 95. Sinclair, March 29. 1624; M. 16393; Peterkin's Notes, App. 94. Laing's Norway.

(*d*) See Dundas, Jan. 24. 1777; 5 Brown's Sup. 609.

933. Those islands held at one time of the Crown of Denmark by the Earls of Orkney, came, on failure of those earls, into the family of Sinclair by investiture. They were annexed to the Crown of Scotland in the fifteenth century; and after much confusion, and a partial adoption of feudal titles in many parts of those islands, there was a new annexation to the Crown a little after the middle of the seventeenth century. A grant was made to the Earl of Morton in 1707, the reversionary right of which, in the Crown, was discharged in 1742. The right was afterwards purchased by the family of Dundas. The lands of Orkney and Zetland stand now in one of two situations: 1. Some lands are held feudally of the Crown; and, 2. Others, and a considerable part, still continue to depend on the judicial title of udal property; convertible into feu, at the option of the proprietors, to be held either of the Crown or of Lord Dundas (*a*). And it is provided that

vassals whose valuation does not exceed L.20 Scots, may possess by their udal right without renewal of infeftment (*b*).

(*a*) Rendall, Dec. 15. 1836; 15 D. B. M. 265.

(*b*) 1690, 32. in fin.

#### OF THE ACQUISITION OF LAND, &c. BY ACCESSION.

934. There are several modes in which a land-owner's property may be enlarged by the accession of other land to that which formerly belonged to him.

935. 1. ALLUVION is a process of gradual and imperceptible addition to land, by the slow retiring of a river, or of the sea, or by the successive accumulation of soil brought down by a stream or floated in by the sea. Such addition becomes a part of the property. (See above, § 642.)

2 Stair, 1. § 35. 2 Ersk. 1. § 14.

936. 2. This gradual addition is to be distinguished, on the one hand, from ALVEI MUTATIO, and, on the other, from AVULSIO. The former of these is, the change frequently occasioned by a river, which bounds the property of conterminous heritors, deviating from its course; the latter, is the violent tearing away of a part of the ground of one proprietor, and depositing it in a shape capable of identification, along the bank of another's land. In neither of these cases is there an acquisition by accession; unless, by acquiescence on the part of the proprietor whose land is diminished, a right shall be conferred on the other. (See below, § 947.)

Instit. de Rerum Div. lib. 2. t. 1. § 21. Marquis of Tweeddale, May 14. 1822; F. C.; 1 S. B. 435.

937. 3. PLANTING OR BUILDING ON ANOTHER'S LAND. The property of the ground carries that of buildings, fixtures, or trees united to the soil. Buildings by a tenant remain to the landlord. Even buildings by the owner of ground with materials of another follow the property of the soil; leaving it (as a question of recompense) to be determined how the owner of the materials is to be indemnified (*a*). (See above, § 538.) The claim for recompense gives no ground for retaining the property in security of the amount (*b*).

(*a*) 2 Ersk. 1. § 15. and 3. 1. § 11. See Stenhouse, June 26, 1741; 5 Br.

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