

PART IV.

RIGHTS OF THE PERSON.

IV.

RIGHTS OF PERSONS.

2026. The rights of persons may be distinguished, as, 1. Those which belong to individuals in their private character and relations ; or, 2. Those which belong to persons, individual or corporate, in public or political relations.

I. RIGHTS OF INDIVIDUALS.

2027. The rights which belong to persons in their individual capacity, may be distinguished as absolute or relative ; the former having reference to the condition of the person in respect of safety, freedom, and reputation ; the latter having reference to the relation in which they stand with other individuals.

1. ABSOLUTE RIGHTS OF INDIVIDUALS.

1. Right of Personal Safety.

2028. Every one who lives under the protection of the law, has an absolute right to the SAFETY OF HIS PERSON ; and wherever this right is invaded, there is in civil law a provision for redress of the injury, as well as in penal law a punishment for the crime.

2029. 1. ASSYTHMENT FOR HOMICIDE. The law takes cognizance of the loss and suffering of the family of a person killed, and gives Assythment, both as indemnification and as solatium (*a*). This was formerly taxed by the Barons of Exchequer, but in more modern times it is matter for the jurisdiction of the Court of Session. The rules are, 1. That capital punishment of a murderer, with forfeiture of his moveables, is a satisfaction at once of public justice and of private vengeance, and no assythment is due (*b*). 2. That if the criminal be not condemned to death, but to a lesser punishment,

the sentence is held to include a judgment for assythment, if the prosecution is by the private party; and not to exclude the demand where the public prosecutor pursues. 3. That a pardon is granted only under condition of paying the assythment; and so to plead a pardon is to admit the assythment, the amount of which may thereupon be taxed (*c*). 4. That a general indemnity by Parliament does not discharge the assythment (*d*). 5. That where the criminal has been outlawed, assythment is due (*e*). 6. That assythment is a solatium, as well as indemnification for damage (*f*); and the right of action is with the wife and family of the deceased; the division being like that of the goods in communion (*g*).

(*a*) 8 Stair, 9. § 7. 4 Ersk. 4. § 105. Kames's Law Tracts. Foster's Crown Law. 1 Hume, Crim. Law, 284; 2. 124.

(*b*) M'Harg, July 29. 1767; 1 Hailes, 192.

(*c*) 1457, 74. 1528, 7. 1592, c. 155. 1593, 174. 4 Ersk. 4. § 105. 1 Hume, 286.

(*d*) 4 Ersk. 4. § 106.

(*e*) Leith or Stuart, Jan. 8. 1768; M. 13904; 1 Hailes, 206.

(*f*) Moodie, June 12. 1741; 5 Br. Sup. 709. Stewart's case, ut supra; also, 5 Br. Sup. 646.

(*g*) Guild, July 18. 1605; M. 13903.

2030. 2. INJURIES SHORT OF DEATH. The law protects personal safety, not only against malice and crime, but also against negligence and gross disregard of the safety and interests of others: And to this class of cases Jury trial has been declared to be peculiarly applicable, as furnishing the best means for deciding whether damages ought to be given, and to what amount.

6 Geo. IV. c. 120. § 28.

2031. 1. *Injuries by Negligence.* These questions chiefly arise from the injuries so frequently caused by rapid travelling by land or water. See above § 543. And, 1. The statutes recently made for punishing such injuries, do not preclude the civil claim for reparation (*a*). 2. The cause of action is, insufficiency of the vehicle; or negligence; or overloading; or furious driving (*b*). 3. The presumption is against the coach proprietor, and so the onus probandi lies upon him (*c*). 4. The remedy extends not merely to reparation for loss sustained, but includes a solatium for pain and distress (*d*).

Reparation is demandable not only against the servant by whose fault the injury happens, but against the master who

employs him, provided the injury arises from the manner of doing the master's work, not from some cause unconnected; or some license used by the servant (*e*); so the tacksman of a quarry was held liable for injury done by his workmen incautiously blasting a rock (*f*).

Difficulties have been raised regarding the liability of police commissioners for damages occasioned by their officers, and it has been held, that the commissioners of police under the act of 3 Geo. IV. c. 78, are liable not only for acts of their officers proceeding under their immediate order, but for oppression or damage done by them in acting as police officers (*g*); and that, in libelling an action for such damage, the commissioners may be called by their clerk, and will be sufficiently charged with what substantially is wilful corruption or oppression, though not in the precise words of the act (*h*).

Similar difficulties have been raised as to the responsibility of road trustees for acts or negligence of workmen employed by them or their surveyors and contractors; and they have been held liable in Scotland, while the matter has been viewed otherwise in England (*i*). Under the act of 3 Geo. IV. c. 33. § 10, action has been sustained against the town-clerk of a burgh for damage done by a riotous mob (*k*).

(*a*) 50 Geo. III. c. 48. 1 Geo. IV. c. 4. 3 Geo. IV. c. 95. § 11. 3 and 4 Will. IV. c. 48.

(*b*) Anderson, 2 Murray, 261. Sharp, *ib.* 211. M'Lachlan, 4 Murray, 216.

(*c*) Lyon, Jan. 22. 1838; 16 S. D. 1188.

(*d*) Black, Feb. 9. 1804; M. 13905; affirmed. Smith, March 8. 1810; F. C.; 2 Dow, 390. Brown, Feb. 26. 1813; F. C.

(*e*) See *supra*, § 168. Allan, 2 Murray, Jury Court, 158. Gun, *ib.* 194. Baird, July 4. 1826; 4 S. D. 790.

(*f*) Sword, Feb. 13. 1839; 1 D. B. M. 493.

(*g*) Mitchel, Feb. 1. 1838; 16 S. D. 409.

(*h*) Stewart, May 16. 1834; 7 W. S. 343.

(*i*) Findlater, June 19. 1838; 16 S. D. 1150.

(*k*) Johnston, Nov. 24. 1837; 16 S. D. 104.

2032. 2. *Assault and Battery*. Personal violence is so direct and gross an invasion of the right now under review, as to require reparation wherever there is no justification on account of official duty; or absolute necessity; or self-defence; or the defence of one's wife or child, or property; or excuse by unavoidable accident. Verbal injury is no justification (*a*). The civil claim of damage is not merely for damage sustained, but in solatium for affront and insult (*b*). It is not discharged by

the interposition of the penal law ; and the demand is for indemnification of the injury, not for punishment (*c*).

(*a*) Thom, July 14. 1835 ; S. D. 1129. Falconar, May 23. 1827. Frazer v. Berkely, 2 Mood. and Rob. 3.

(*b*) Cruikshank, June 16. 1747 ; Kilk. ; M. 4043.

(*c*) Hyslop, 1 Murray, Jury Rep. 43. Haddaway, ib. 148. Bannerman, ib. 249. Forgie, ib. 410. Hall, ib. 442. Beatson, 2 Murray, 151. Scott, ib. 505. M'Kie, 3 Murray, 23. M'Farlan, ib. 408. Lang, 4 Murray, 82. Seymour, June 13. 1828 ; 6 S. D. 969.

2033. 3. *Seduction*. The seduction of an unmarried woman, although an injury in some degree proceeding with consent of the party, yet by the law of Scotland entitles the woman to damages for the consequences of that wrong by means of which the injury is accomplished (*a*). A husband may also competently sue the seducer of his wife, on the grounds of loss of her society and of domestic happiness, and of injury to his family. It is no answer in law that the husband was unfaithful, or that the parties lived separate : though these circumstances will no doubt weigh with a jury in assessing damages. The action is not, on the one hand, barred by the husband having afterwards obtained decree of divorce (*b*), nor is it necessary, as sometimes supposed, that a decree of divorce should precede the claim (*c*). But if the husband, after knowledge of the injury, continue to cohabit with his wife, he seems to have no action against the adulterer for damages (*d*).

NOTE.—In England the woman has no action for seduction. A father, or master, has action for loss of service ; and juries are uniformly directed, in awarding damages, to have regard to the wounded feelings of the party. See *Irwin v. Dearman*, 11 East, 23 ; 2 Selw. Nisi Prius, 1150.

(*a*) Hyslop, July 1596 ; M. 13908. Linning, Dec. 14. 1748 ; M. 13909. Buchanan, June 16. 1785 ; M. 13918.

(*b*) Stedman, Jan. 20. 1744 ; M. 13909 ; Elchies, *Adult.* 1.

(*c*) Maxwell, March 7. 1787 ; M. 13919. Paterson, Dec. 10. 1803 ; M. 13920.

(*d*) Aitken, Feb. 6. 1810 ; F. C.

2. *Right of Personal Freedom*.

2034. The right to the enjoyment of absolute freedom of the person may be lawfully abridged,—1. for debt ; and, 2. for crime, either in order to trial or for punishment. Wrongous imprisonment may proceed by abuse of the criminal law, or of

the civil ; as well as by an act of private violence and detention.

2035. 1. WRONGOUS IMPRISONMENT UNDER THE ACT 1701, c. 6. The Scottish statute of 1701, "for preventing wrongous imprisonment, and for preventing undue delays in trials," is analogous to the English Act of Habeas Corpus (*a*). The amount of bail was at one time placed in the discretion of the Court of Justiciary in cases of sedition (*b*) : But that discretionary power is now taken away (*c*). By the act 1701, under certain exceptions (as taking security for keeping the peace ; imprisoning for indignities to Judges ; for thieving and pickeries, &c.), it is necessary to a lawful imprisonment for a criminal cause, that there shall be a written and signed warrant, specifying by name or description the person against whom it is directed, and the particular cause of imprisonment ; that this shall proceed on an information of a precise criminal charge (not merely of suspicion), signed by the informer (*d*) ; and that the person accused shall have a copy of the warrant.

In bailable offences, *i. e.* in all cases not capital, including sedition, the prisoner is entitled to be released instantly on bail being found, as fixed by law, at L.1200 for a nobleman ; L.600 for a landed gentleman ; L.300 for any other gentleman, burgess, or householder ; and L.60 for an inferior person (*e*).

To prevent undue detention and delay by trial, it is enacted, that in crimes not capital, on a written application to the Judge-committor, or Lords of Justiciary, or to any Judge competent to try the crime, the prisoner shall, within twenty-four hours, be liberated on bail (*f*).

It is also provided, that, on petition by one in custody in order to trial, accompanied by production of the warrant, whether the crime be bailable or not, a precept shall be issued within twenty-four hours, for the Lord Advocate, Procurator-fiscal, or private prosecutor, to fix within sixty days a day for trial ; the person to be instantly liberated if no day of trial shall be so fixed ; and an application to this effect cannot be defeated by setting the man at liberty (*g*). It has been doubted whether the application is competent by one not in confinement ; but it rather seems the prevailing opinion that in such

case it is not competent (*h*). But the prisoner is not even thus assured that the trial shall take place within the sixty days: In the last moment of that term a day of trial may be fixed at the distance of forty days, if before the Justiciary, or thirty before an Inferior Judge. When, however, a day is so fixed, if no trial be brought within twenty-four hours after the expiration of the term so appointed, the prisoner must be liberated: And there can then be no new trial. If a trial have commenced, it is doubted whether the diet may not be deserted, and a new warrant of imprisonment granted and a new indictment brought. But at least, if so it must proceed and be concluded within forty days from the new imprisonment.

The breach of any of these rules, whether by magistrates or by individuals (*i*), is wrongous imprisonment. Action for the penalties is limited to three years (*k*); but this does not apply to the common law action for damages on account of injury (*l*). See § 2036, 2037.

(*a*) 31 Charles II. c. 2. See also 1 William and Mary, stat. 2. c. 2.

(*b*) 1701, c. 6. 39 Geo. III. c. 49.

(*c*) 6 Geo. IV. c. 47. § 5. 2 Hume's Crim. Law, 90. Alison's Practice of the Criminal Law of Scotland, vol. ii. p. 167.

(*d*) Peacock, Jan. 5. 1704; M. 17085. See M'Kenzie, Dec. 16. 1704; 4 Br. Sup. 595. Strachan, July 30. 1706; Ib. 655. Campbell, Nov. 26. 1736; M. 17067; Elch. *Wrong. Imp.* 1. Neil, June 26. 1739; Ib. 5; 5 Br. Sup. 565. Mure, July 10. 1811; F. C. Anderson, Nov. 26. 1814; F. C.

(*e*) 39 Geo. III. c. 49; amended as to bail for sedition by 6 Geo. IV. c. 47. § 5.

(*f*) Cameron, Aug. 9. 1754; M. 11742. Andrew, June 29. 1814; 2 Dow, 401. Arbuckle, July 10. 1815; 3 Dow, 173.

(*g*) M'Donald and Young, June 18. 1832; 2 Alison, 185.

(*h*) Same case.

(*i*) Paterson, Dec. 14. 1736; M. 17069; Elch. *Wrong. Imp.* 2. Sutherland, Nov. 1737; Elch. *Wrong. Imp.* 4. Ramsay, Dec. 19. 1799; M. *Wrong. Imp.* 1.

(*k*) 1701, c. 6. 2 Hume, Crim. Law. Mure, July 10. 1811; F. C. Anderson, Nov. 26. 1814; F. C.

(*l*) Sinclair, July 1. 1742; Elch. *Wrong. Imp.* 7. M'Christie, Jan. 21. 1831; 9 S. D. 312.

2036. 2. WRONGOUS IMPRISONMENT AT COMMON LAW.

The statute of 1701, imperfect even within its own range, would be still more so if it superseded the remedy at common law. It does not apply to criminal prosecutions before the Court of Session (*a*); or to imprisonment for further examination, which must, at common law, be terminated within a reasonable time (*b*); or to oppression not within its words, which

is left to common law (c); or to imprisonment for debt, against the abuses of which the common law gives remedy (d).

(a) Renny's case, Feb. 24. 1737; M. 6782. Rogers, Feb. 24. 1737; Elch. *Wrong. Imp.* 3. Ker, ib. 8. Stark, July 29. 1748; M. 3442. Blacklaw, March 11. 1777; 5 Brown's Sup. 507. Stark, July 29. 1748; M. 3442. Duncan, Jan. 21. 1823; F. C.; 2 S. D. 132.

(b) Fife, July 29. 1762; M. 11750. Andrew, June 20. 1806; M. *Wrong. Imp.* App. 3; Buchanan's Cases; and in House of Lords, 2 Dow, 401. See same case, June 12. 1823; F. C.; 2 S. D. 399. Arbuckle, May 1. 1815; 3 Dow, 160.

(c) Campbell, *supra*, § 2035 (c).

(d) Gordon, Feb. 10. 1705; M. 17066. Robertson, M. 17067.

2037. The right of action on the statute has been allowed to be assigned, and the conclusions to comprehend damages instead of the penalties (a). But action is not competent both for the penalties of the statute, and for damages at common law (b); nor will a summons libelled on the Act 1701 support a conclusion for damages at common law (c).

The action at common law does not prescribe in three years as under the Act 1701. See above, § 2035.

(a) Sinclair, *ut supra*, § 2035 (g). Sheriff of Sutherland, Nov. 27. 1739; 5 Brown's Sup. 674. Philp, June 23. 1748; M. 17071.

(b) Gibson, June 18. 1817; F. C.

(c) Millar, May 21. 1831; 9 S. D. 625.

2038. A magistrate or clerk will be liable on proof of malice in his proceedings (a). But he will also be liable if there be gross irregularity in imprisonment, though no malice can be shewn (b). Slight irregularity will not, however, be sufficient to dispense with proof of malice (c).

(a) Anderson, Feb. 3. 1837; 15 S. D. 481.

(b) Leitch, July 27. 1711; M. 13946. Wishart, June 10. 1698; 4 Brown's Sup. 409. Bell, Nov. 22. 1743; M. 17070. Pitcairn, Feb. 18. 1715; M. 13948. Laing, Dec. 20. 1790; M. 8555; affirmed. Anderson, Nov. 26. 1814; F. C. Strachan, Nov. 13. 1828; F. C.; 7 S. D. 4. Pollock, Nov. 12. 1829; 8 S. D. 7. Richardson, 10 S. D. 607. McCrone, Feb. 10. 1835; 13 S. D. 443. Orr, Feb. 22. 1839; 1 D. B. M. 551.

(c) McGregor, Feb. 9. 1826; F. C. Milhollan, Dec. 21. 1826; F. C.; 5 S. D. 170. Strachan, *ut supra*.

2039. It is not necessary to an action of damages against an individual, to prove malice, or even gross irregularity: And action of damages will lie against an individual for the improper use of diligence, or for diligence proceeding upon irregular warrants in civil cases (a); or for imprisonment wrongously on a criminal charge, or on a false charge, the proceeding always being *periculo petentis*.

(a) Fullarton, Feb. 19. 1715; M. 13949. Anderson, Jan. 3. 1750; M. 13955. Lesly, Nov. 18. 1761; Ib. Murray, May 15. 1810; F. C. Bryson, March 10. 1812; F. C. Dougal, Dec. 18. 1829; F. C.; 8 S. D. 275. See M Gregor, Feb. 9. 1826; F. C.; 4 S. D. 434. Swayne, June 27. 1835; 13 S. D. 103. Richmond, March 10. 1838; 16 S. D. 995.

2040. The mere failure of an accusation will not infer damages against the accuser, if the circumstances justify his suspicion.

Jamieson, Nov. 27. 1747; M. 17070. Henderson, Feb. 7. 1793; M. 17072.

2041. Messengers and their cautioners are liable for oppression or abuse of diligence. See above, § 2967.

M'Donell, July 21. 1834; 13 S. D. 701.

2042. The groundless confinement of a person in a lunatic asylum will give a good foundation for an action of damages.

3. *Protection of Character.*

2043. The chief remedy formerly against attacks on reputation, was by action before the Commissary Court, or Court of Session, for fine, palinode, and imprisonment; proceeding on the expediency of preventing breaches of the peace, and combining with punishment an acknowledgment or retraction of the calumny (a). But the modern and more frequent remedy is by action for damages and reparation, in the Court of Session, to be tried by Jury (b). In this action there are two points: viz. the injury or loss suffered, actual or probable, for which reparation is sought; and the insult and offence to the individual, for which a solatium is due. In this last respect, a material distinction is to be observed between the English and the Scottish law.

(a) 4 Ersk. 4. § 80-1; and 1 Ersk. 5. § 30. Cruikshanks, June 16. 1747; M. 4034. Hamilton, June 19. 1750; Elchies, *Reparation*, 6. Warrand, Nov. 19. 1771; M. 13933; 5 Brown's Sup. 445. Menzies, July 12. 1776; 5 Brown's Sup. 576.

(b) 6 Geo. IV. c. 120. § 28. Tullis, July 17. 1834; 13 S. D. 698.

2044. Malice, actual or implied, is an ingredient in the action for redress of injuries of this kind. But malice is implied in all cases of insult and injury; except in those called privileged cases, where the law gives either absolute protection against such actions; or presumes what is complained of to

proceed from the impulse of duty, and requires malice to be averred and proved.

2045. *Cases are privileged*, where the due conduct of national or judicial inquiries, or course of private duty, require an exemption from the strict responsibility attendant on spontaneous interference with the conduct and character of others, and where injury alone does not imply malice. Of this there are several examples.

2046. 1. *Parliament*. It is an important privilege of Parliament, declared in the Bill of Rights as essential to the liberties of England, that there shall be absolute freedom of speech (*a*). The exception is, that no member is entitled to publish, out of his place in Parliament, what may affect the character of another (*b*). But an extraordinary question has arisen lately, How far the publication, under the order of the House of Commons, of Reports of Committees involving libellous matter are privileged? And the Court of Queen's Bench has correctly held that the authority of the House of Commons is no justification of the bookseller (*c*).

NOTE.—The House of Commons has declared such actions a breach of privilege, which seems an effectual bar against any of them in future.

(*a*) William and Mary, stat. 2. c. 2.

(*b*) *King v. Lord Abingdon*, 1 Esp. 226. *King v. Creevey*, 1 Maule and Selwyn, 273.

(*c*) *The King v. Wright*, 8 Term. Rep. 293. *Stockdale v. Hansard*, before Lord Denman, 2 Mood. and Rob. 9; confirmed, 9 Adol. and Ellis, 1. et seq.

2047. 2. *General Assembly of the Church of Scotland*. There is no privilege in this Assembly as in Parliament, but only as a court of justice. § 2048.

See *Porteous*, Dec. 12. 1781; M. 13937.

2048. 3. *Courts of Justice*. In courts there is, on the part of the Judge, of the parties, and of their advisers, a privilege to state whatever is pertinent to the inquiry. And,

2049. This privilege protects a Judge, and the dignity and independence of his place; but it is forfeited by malice. In an action against a Judge, therefore, malice must be libelled and proved. And the proof must be by other evidence than the mere construction of the words used (*a*); and this without distinguishing whether the words spoken be strictly within the case (*b*).

(*a*) Haggart, June 1. 1821; F. C.; April 1. 1824; 2 Shaw's App. Cases, 125.

(*b*) Robertson, May 14. 1829; 7 S. D. 601; reversed, Ap. 8. 1830; 4 W. S. 102. See McNeil, 1771; 5 Brown's Sup. 573. Sinclair, 1767; 5 Brown's Sup. 574.

2050. A Judge in checking the misconduct of practitioners, has the same privilege as in deciding a cause.

Haggart, *ut supra*, § 2049 (*a*).

2051. Parties are privileged in the statement of whatever they believe to be true, and which is relevant to the cause, unless malice be proved; and counsel have the same privilege provided their statement be within their instructions (*a*). But the privilege does not extend to the publication of those statements (*b*).

(*a*) Robertson, July 5. 1815; 3 Dow's App. Cases, 273; F. C. Davidson, May 12. 1821; F. C.; 1 S. B. 3. Hodgson, *v.* Scarlet, 1818; 1 Barn. and Ald. 232. Taylors, June 4. 1824; 2 Shaw's App. Cases, 245. Ewing, June 30. 1832; reversed, Aug. 24. 1833; 6 W. S. p. 566. Gray, July 12. 1837; 15 S. D. 6.

(*b*) Porteous, Dec. 12. 1781; M. 13937. See § 2043 (*b*).

2052. 4. Clergymen. Although the clergy have cognizance of the morals of their parishioners in general, and even of individuals, for private admonition; they are not privileged (except in the regular course of church censure) in expressing against individuals public reprehension (*a*), far less in printing their censure (*b*).

(*a*) Scotland, Dec. 19. 1775; 5 Brown's Sup. 575; 2 Hailes, 669, 716. Dudgeon, July 20. 1833; 11 S. D. p. 1013.

(*b*) Snodgrass, Jan. 1776; 5 Brown's Sup. 573. See above (*a*) and (*b*).

2053. 5. A member of a corporation is privileged in relevant inquiries into the conduct of members over whom the body have cognizance; and to ground damages, malice must be proved.

Hamilton, March 10. 1827; F. C.; 5 S. D. 569; 4 Murray, 222. Newlands, Dec. 2. 1833; S. D.

2054. 6. Private persons are privileged, when called on in self-defence, or by duty, to state what may be offensive or injurious. See above, § 188. So, 1. A master in giving the character of a servant, see above, § 188, is privileged (*a*). 2. A creditor in discussing the bankruptcy of his debtor is privileged (*b*). 3. A near relation is privileged to give information of misconduct which may have influence on an intended

marriage (*c*). 4. A merchant in one case was held privileged in stating in the long room of the Custom-House the misconduct of a broker to a foreign shipmaster (*d*).

(*a*) Christian, July 6. 1818; 1 Murr. 419. Anderson, July 13. 1818; Ib. 429. Matheson, June 4. 1832; S. D. Ewing, House of Lords, Aug. 24. 1833; 6 W. S. 566.

(*b*) Stein, Jan. 24. 1804; House of Lords, Bell, Com. Torrance, Nov. 21. 1834; S. D.

(*c*) Todd v. Hawkins, 1837; N. P. p.

(*d*) Mitchell, Feb. 24. 1829.

2055. 7. The press is free; but the party who publishes is responsible for any libel or defamation of which he may be guilty. And, 1. The conduct of a public man (a member of the Government, a functionary under Government, or a member of Parliament), is open to animadversion and censure; but that must be confined to his public character (*a*). 2. A person attending as a member of a public meeting and taking part in the proceedings, is subject to the same animadversion on his public conduct, and has the same protection of his private character (*b*). 3. An author is liable to criticism and animadversion in his capacity as an author, but protected as other men are in his private character (*c*).

(*a*) The King v. Cobbet, Holt, N. P. 114. Lord A. Hamilton, 1822; 3 Murr. 81. Alexander, July 15. 1826; 4 Murr. 94.

(*b*) Aiton, 1823; 3 Murr. 284.

(*c*) Carr v. Hood, 1 Camp. 355. Talbot v. Tipps, 1 Camp. 350. Leslie v. Blackwood, 3 Murr. 157.

2056. Libellous or defamatory matter contained in a private letter is actionable.

McCandies, March 21. 1827; 4 Murr. 197.

2057. Veritas convicii may be a defence in a civil action of damages, though not in a criminal action. It is in the ordinary case an answer to *implied* malice, and so pleadable in justification, provided it be set forth as such in circumstances to call for the statement, and an issue taken on the point; and even where the circumstances do not call for the statement, it will in general go to mitigate the damages.

Sinclair, 1767; 5 Brown's Sup. 574. Hamilton, Aug. 10. 1771; M. 13924; 1 Hailes, 439; 5 Brown's Sup. 574. Chalmers, Feb. 22. 1785; M. 13939. Peat, March 6. 1793; M. 13941. Thomson, May 16. 1810; F. C. McDonald, June 2. 1813; F. C. Dyce, July 4. 1816; F. C. Scott, 1821; 2 Murr. 486, 503. Walker, 1821; Ib. 512. Denham, March 19. 1827; 4 Murr. 195. Hamilton, ut supra, § 2053. Tytler, 1823; 3 Murr. 236. Brodie, Jan. 20. 1836; 14 S. D. 267. Ogilvie March 19. 1836; 14 S. D. 729.

II.—RIGHTS OF INDIVIDUALS RELATIVE TO OTHERS.

2058. Individuals, besides having the absolute rights now discussed, are, relative to other individuals, disposed in certain classes, to which the law either denies rights which other men enjoy, or grants protection beyond that which in ordinary circumstances is deemed requisite. The following classes may on this account be particularly taken notice of: 1. Persons of illegitimate birth; 2. Persons unable to protect themselves.

1. *Illegitimate Birth or Bastardy.*

2059. The rights of lawful children (already considered, § 1629, et seq.), are denied to bastards. But still out of the relation of parent and child although not by marriage, arise certain more confined rights and duties of which the law takes cognizance.

2060. The description of bastardy is the converse of that of a legitimate birth (§ 1624, et seq.).

2061. 1. PROOF OF PATERNITY. Law has here to deal with what, though not punishable as a crime, is secret and industriously concealed. And to detect the skulking paramour, in justice to the unhappy mother, the rule of evidence is stretched beyond the common extent. What is called a *semplena probatio* gives admission to the mother's oath in supplement (a). To this *semplena probatio* it is necessary either, 1. That intercourse shall be proved with the mother of the bastard child, at the time corresponding with the gestation: And to such proof in this respect it is no relevant answer that others also have had intercourse. Or, 2. Previous intercourse, with opportunity of further intercourse corresponding to the time of gestation, will raise a *semplena probatio*, to be completed by the woman's oath. Or, 3. Gross familiarity and indecency, with actual or possible opportunity, is construed as a *semplena probatio*. But, 4. Opportunity alone is not sufficient (b).

It is essential that the facts established for *semplena probatio* shall correspond and combine with the woman's oath as to the particular circumstances of the connection (c).

(a) 1 Ersk. 6. § 51.

(b) Lyon, 5 Brown's Sup. 556. Liddel, Jan. 1779; Ib. 553. Caldwell, ib. 555. Wightman, Nov. 17. 1807; M. Proof, App. 10. Craig, June 14.

1809 ; F. C. Hunter, June 15. 1811 ; F. C. ; and May 24. 1814 ; F. C. ; Humphrey, Feb. 18. 1822 ; 1 Shaw's App. Cases, 3. Robertson, Dec. 22. 1825 ; 4 S. D. 333. Bertram, Feb. 19. 1829 ; 7 S. D. 434.

(c) Greig, June 9. 1833 ; 15 S. D. 1132. M'Naughton, June 1. 1838 ; 16 S. D. 1103.

2062. 2. ALIMENT OF BASTARDS. The father and mother are both liable for aliment to the child. And the father while concealing himself, is debtor to the mother for his share, and she has all the remedies of a creditor. The amount and period of aliment are regulated by the condition of the parties, and the child's ability to subsist itself (a). The mother has the custody till seven in males, ten in females (b) ; after which, if the father is to maintain the child longer, he may make his own arrangements for it (c). If the child be insane, or otherwise incapable of providing for itself, the parent's obligation will continue during life (d). The father's obligation to aliment lasts in the common case till puberty, with such differences as circumstances fairly justify (e).

(a) 1 Ersk. 6. § 56.

(b) Goadley, July 7. 1815 ; F. C. Baxter, July 5. 1825 ; 4 S. D. 139.

(c) Kay, June 15. 1826 ; 4 S. D. 706.

(d) Finlayson, July 7. 1809 ; F. C.

(e) Glendinning, Nov. 19. 1782 ; M. 442. Paterson, Nov. 29. 1782 ; M. 445, Graham, July 25. 1740 ; M. 441. Oliver, March 7. 1778 ; M. 445. Burgess, March 4. 1758 ; M. 1357. Short, Feb. 21. 1765 ; M. 1358.

2063. 3. SUCCESSION. There is no succession to or from a bastard, except in the case of his having lawful issue (a). 1. He has no father recognised in law, and of course no relations to whom his property can go, unless where he himself is the father of lawful children. But he may dispose of his property inter vivos without control. 2. He may dispose of his land mortis causa in liege poustie. 3. He may now by testament dispose of his moveables (b).

(a) 4 Stair, 12. § 1. 3 Ersk. 10. § 8.

(b) 6 Will. IV. c. 22.

2064. 4. LEGITIMATION. Legitimation may be either, 1. absolute, by the subsequent intermarriage of the parents (already considered, § 1627) ; or, 2. by the Royal letters of Legitimation. But this last species of legitimation is limited. It only dispenses with the Queen's right of succession. It confers the power to convey the Queen's right to the bastard's agnates. But in this last case the letters of legitimation must bear a

special clause to that effect. It has no effect in restoring the bastard to the right of succession in prejudice of lawful children. By letters of legitimation, those who would have succeeded if the bastard had been legitimate, may acquire a right to take his succession as if legal heirs.

3 Stair, 3. § 45. 3 Ersk. 10. § 7. Ramsay, Jan. 4. 1758; M. 1359. Hunter, Feb. 10. 1784; M. 1362. See 2 Hailes, 942.

2. GUARDIANSHIP OF INFANCY, AND OF MENTAL INCAPACITY.

2065. The law provides guardians for the weak in intellect, whether from defect of age, or from disease, or from natural imbecility,

1. GUARDIANSHIP OF MINORS.

2066. Twenty-one is the age of presumed legal capacity in either sex. Until arrival at that age, a person is in law a minor; the term being divided into pupillarity, and minority strictly so called. Guardianship is a gratuitous office (*a*). But a factor for tutors, and even one of the guardians acting as such, is entitled to remuneration (*b*).

(*a*) Scotstarvet, Feb. 1642; M. 16266. Scott, Feb. 19. 1736; M. 13433. Muschet, Feb. 27. 1739; M. 9456. Lord M'Donald, Nov. 30. 1780; M. 13437.

(*b*) Lady Montgomerie, June 4. 1822; 1 S. D. 491.

1. TUTOR OR GUARDIANSHIP OF PUPILS.

2067. Pupillarity is, in contemplation of the law, a state of absolute incapacity (*a*); the period of this incapacity extending from birth to fourteen in males, and twelve in females. No act done by the pupil, or action raised in his name, has any effect without the interposition of a guardian; while a decree in an action against him, without the appearance of his tutors, is a decree in absence, and as such reducible; but not null and void (*b*). The tutors are lawfully cited when the pupil is duly cited, and edictally "his tutors, if he any has."

The guardianship is either that of the father or that of a tutor.

(*a*) 1 Ersk. 1. § 1.

(*b*) Sinclair, Jan. 15. 1828; 6 S. D. 336. Dick, May 15. 1828; Ib. 798.

1. *Father Administrator in Law.*

2068. A father is the natural guardian of his infant off-

spring. And, 1. The father is ipso jure administrator in law; requiring no appointment or judicial authority to give validity to his acts: And in the ordinary case he is not obliged to find security (*a*). But, 2. Where there is danger from the father's intromission, and the interests of the child require it, the Court of Session may interfere, and compel him to find security; or they may appoint a factor loco tutoris (*b*). 3. The father must authorize all actions or diligence by the pupil (*c*). 4. He may, under the above precaution, uplift and discharge debts due to his child in pupillarity (*d*). 5. But he cannot be auctor in rem suam (*e*). 6. The father has the custody and direction of the residence and education of his child during pupillarity; a power which, in England, may be controlled by the Lord Chancellor, where estates are left to the child (*f*); but in Scotland, only where the child is in danger from manifest cruelty, oppression, or contamination (*g*).

(*a*) 1 Ersk. 6. § 54.

(*b*) Govan, Feb. 12. 1633; M. 16263. Wilkie, Feb. 1688; M. 16311. Graham, Feb. 22. 1794; M. 16383. Johnson, July 11. 1822; 1 S. B. 558.

(*c*) Fleming, Feb. 9. 1545; M. 16221.

(*d*) Boswell, Feb. 25. 1747; M. 16353.

(*e*) Crawford, July 24. 1694; M. 16315.

(*f*) *Cruise v. Orby Hunter*, 2 Br. Chan. Cases, 500. *De Manneville*, 10. Vesey, J. 52. *Whitefield*, 12 Ves. 492. *Shelley*, Jacob's Rep. in Chan. 267; *Wellesley Case*, 2 Russell, 1; affirmed, 2 Bligh, New Series, 124. See these cases abridged, in 3 Illus. 58.

(*g*) Morison, July 19. 1716; M. 410.

2069. There is no such power of legal administration in the grandfather.

Leamington, Feb. 1685: M. 16306.

2. *Appointment of Tutors.*

2070. Tutors are either named by the father; or they take the office by legal title; or are appointed by the Sovereign's paternal power.

2071. 1. TUTOR-NOMINATE. The father alone can nominate tutors by will (*a*). In doing so, he delegates his own power of administration; and all other tutors must yield to his (*b*). One nominated by any other person is only a special guardian, in the character of trustee of special property left to the pupil; and so far the power of the tutor-nominate may be superseded by the appointment of a special guardian in the settlement of

a particular estate, for conducting the management of it : The guardian so appointed having the full power of acting with respect to that property (*c*). A tutor-nominate has the same general guardianship both of estate and person, which the father himself has by whom he is named. A natural child has no recognised father, and so his reputed father cannot appoint tutors, though he may, as a stranger, appoint a special guardian for property left to the pupil (*d*).

(*a*) 1 Ersk. 7. § 2, 3. Oliphant, 1528 ; M. 16216. Murray, 1555. Ib.

(*b*) Auchterlony, Dec. 17. 1631 ; M. 16253.

(*c*) Scott, Dec. 10. 1675 ; M. 8970. Kilpatrick, Jan. 25. 1793 ; M. 16381, is doubted.

(*d*) Johnston, Nov. 23. 1785 ; M. 16374.

2072. The father may name tutors, one or more, in any authentic deed, and may exempt them from liability for omissions, or for others. The nomination may be in a last will : But the father is thus far under restraint, that he cannot give exemption from the usual responsibility, except in liege poustie ; and even then only in relation to estates descending from himself.

1696, 8. See 3 Illus. 29.

2073. Any one may be named as tutor who is of the lawful age of twenty-one (*a*), except a married woman ; who, being herself under the curatory of her husband, cannot act as tutor during the subsistence of her marriage. One residing in England may be appointed (*b*).

(*a*) 1 Ersk. 7. § 4. Bell, March 10. 1784 ; M. 16374. Rob, Dec. 22. 1814 ; F. C. 1 Ersk. 7. § 12.

(*b*) Sandilands, 1569 ; M. 16231. Earl of Wemyss, Dec. 1733 ; M. 14702. See Stodart, June 30. 1812 ; F. C. 3 Illus. 29. No. 3.

2074. If more than one be named, their powers may be regulated so that the nomination shall subsist, or the tutors act, jointly ; or by a majority ; or with a sine quo non ; or by a quorum ; or by the accepters or survivors (*a*). Where the nomination is simple, any of those named who accept are tutors entitled to act, and liable *singuli in solidum* (*b*). A joint nomination falls if any one die or refuse to accept (*c*). If a quorum be named, and the number fall below that of the quorum, the nomination was at one time held not vacated (*d*) ; but that is not law (*e*). A sine quo non has a negative on the acts of the rest (*f*) ; and the non-acceptance or death of the

«sine quo non vacates the nomination (*g*); unless there be plain indication to the contrary (*h*).

- (*a*) 1 Ersk. 7. § . Aikenhead, June 24. 1703; M. 14701.
- (*b*) Ellis, Feb. 14. 1672; M. 14695. Young, March 7. 1740; M. 16346.
- (*c*) Marquis of Montrose, Jan. 27. 1688; M. 14697.
- (*d*) Watt, Dec. 10. 1692; M. 14700. Callender, Feb. 23. 1693; M. 14701.
- (*e*) Lord Drumore, June 16. 1742; Kilk.; M. 14703.
- (*f*) Vere, June 1. 1791; M. 16378.
- (*g*) Lord Drummore, *supra* (*e*).
- (*h*) Same case, and Scott, June 1775; 5 Br. Sup. 633.

2075. The favour for the father's nomination is so great, that clear indication of an intention to prefer any of those who may be named, to the tutor at law, will be effectual.

See cases in § 2074. (*e*) (*g*) (*h*). See Fairside, Dec. 12. 1609; M. 14692. Young, Nov. 7. 1740; Elchies, *Tut. and Cur.* 13.

2076. Where the nomination has taken effect, it will fall by the death or incapacity of any one of those who are held indispensable in the nomination. See above, § 2074. But where a father names advisers, with whom his widow or other specially named tutor is to consult, the death or non-acceptance of these persons does not annul the nomination.

Clark, 1696; M. 16316.

2077. The father may name a factor along with the tutors; and such factor will have preference to one named by the tutors. He may empower them to appoint one to conduct the affairs (*a*); and indeed there is an implied power in this gratuitous office of tutor-nominate to appoint factors to carry on the business necessary. See above, of Trust, § 1998. 12. Where persons are appointed trustees, and also named as tutors, and act indiscriminately, they are bound in the character of tutors to make up inventories; and, unless exempted, are responsible *singuli in solidum* (*b*).

- (*a*) Tutor of Straiton, Feb. 11. 1743; M. 16348.
- (*b*) Mollison *v.* Reid, Dec. 19. 1833; 12 S. D. 237.

2078. 2. TUTOR AT LAW. Failing an effectual appointment of tutors-nominate, the child falls to the guardianship of a tutor at law. And, 1. The next male agnate of twenty-five years of age (or, of male agnates equally near, he who is heir at law), is entitled to the office of tutor, if there shall be no effectual nomination by the father (*a*). And a more remote agnate cannot be served while the nearest agnate is not in a situation

to claim or accept the office (*b*). He is held to be the best guardian of the pupil's estate, the worst of his person; which is therefore given to the mother or nearest cognate (*c*). 2. One who claims this office ought to be within the jurisdiction of the Court of Session; but it is not settled that this is indispensable (*d*). 3. There is not, as in the Roman law, a plurality of tutors at law; only one person can be appointed to that office (*e*).

(*a*) 1 Ersk. 7. § 4, 5. 1474, c. 51. Sinclair, 1563; M. 16221. Ruthven, Dec. 10. 1611; M. 16240.

(*b*) Ramsay, ut sup. (*a*).

(*c*) Ersk. ut supra, § 7. Higgins, June 7. 1821; F. C.; 1 S. B. 49.

(*d*) 3 Illus. 32. Hadden, Feb. 27. 1822; F. C.; 1 S. B. 397. See Ramsay, July 28. 1688; M. 16313. Bell, March 10. 1784; M. 16374. Robb, Dec. 22. 1814; F. C.

(*e*) Ersk. ut supra, § 5.

2079. The entry of tutor at law is by brieve and service, as of right. There are two points to be answered by the inquest,—*first*, Who is the next agnate of the lawful age of twenty-five, fit to manage his own affairs, and able to give security? and, *secondly*, Whether he is next heir? and, if the nearest agnate be the next heir, Who is the nearest cognate (*a*)? The brieve is directed to any Judge-ordinary. The jury return their verdict on a claim. A bond of caution to the satisfaction of the clerk to the service (*b*) must be lodged, and the cautioner must be a person within the jurisdiction of the Court of Session (*c*). The brieve is retoured to Chancery, and the extract of the retour is a warrant for a Letter of tutory under the quarter-seal, which vests the office; is the tutor's authority for acting (*d*); and finally binds the cautioner, whose bond will otherwise be ineffectual (*e*).

(*a*) 1 Ersk. 7. § 6.

(*b*) Liddel, Nov. 29. 1748; Kilk. M. 13965.

(*c*) Hadden, Feb. 27. 1822; 1 S. B. 397.

(*d*) 3 Bell's Forms, 258–9; see Kilk. ut supra (*b*).

(*e*) Liddel, ut supra (*b*).

2080. 3. TUTOR-DATIVE. Failing tutors-nominate, and a tutor at law, the Royal authority is granted in Exchequer to a person or persons to act for the pupil as tutors-dative. The application is by Signature presented in Exchequer, with consent of the two next of kin, after a year allowed to the tutor at law to deliberate whether to enter: Or by a summons,

the next of kin being cited to appear (*a*). A warrant for a gift of tutory is issued under the condition of finding caution. There may be more than one tutor-dative, and with various modifications of a quorum, sine quo non, &c. (*b*); and a woman may be named (*c*). The authority of tutors-dative, when two or more are appointed, terminates by the death of one of them, and the cautioner for a factor named by them is not liable for his subsequent acts (*d*). The jurisdiction in this matter is now transferred to the Court of Session (*e*).

(*a*) 1672, c. 2.

(*b*) 1 Stair, 6. § 14. Stewart, Jan. 28. 1829; 7 S. D. 330. See same case, 10 S. D. 392.

(*c*) A. and B., Dec. 19. 1548; M. 16222.

(*d*) Stott, April 7. 1834; 7 S. M'L. 211.

(*e*) 2 Will. IV. c. 54. 2 and 3 Vict. c. 36. § 4.

3. *Administration and Responsibility.*

2081. There is some difference to be observed, as to the mode of entering on the administration of their office, between tutors of different classes. And,

1. A tutor-nominate is entitled to enter on his duties immediately, and without finding caution: A tutor at law, or dative, only after finding caution, and the issuing of the letter or gift.

2. In all cases inventories must be made up, as a check on the administration of the tutor. When this is neglected, the tutors have no legal power to act, and debtors are not bound to pay to them; they are not allowed any expenses (however necessary or profitable) of legal proceedings or diligence; are not entitled to charge against the estate or pupil any expenditure, except for the pupil's maintenance, or the repairs of houses or occasions of the estate; nor sums lent out, and lost by failure of the debtor or of security, see below, (*e*); and they forfeit the benefit of any exemption which may have been granted from responsibility for omissions; and are liable *singuli in solidum* (*a*).

3. In the proceeding for making up inventories, the next of kin on both sides are called, unless they shall be abroad (*b*); a person is appointed by the Judge to examine the correctness of the inventory; three copies are lodged with the Judge ordinary of the place of the pupil's residence, subscribed by the tutors; one for the next of kin on either side, and one for

recording. On the Judge's sanction the inventories are recorded, and an act is extracted bearing the names of the subscribers, of the persons in whose custody the copies are left. The inventories must specify the lands, bonds, debts, and moveables; and no debtor is bound to pay, whose debt is not there stated. Where additional property is acquired, it must be added or *eiked* to the inventory after a similar course of proceeding.

4. Tutors seem in general not to be liable *singuli in solidum*, but each only for his own intromissions (*c*): At least it is a legitimate and effectual qualification in a nomination of tutors, that they shall not be liable for each other; in which case, the Court on a petition will dispense with calling as defenders those not directly liable. If the parent was illegitimate, the proceeding will be authorized at sight of the relations on the mother's side (*d*).

5. In the construction of the statute and act of sederunt, the neglect of inventories renders the tutor *suspect*, as well as chargeable with omissions, and liable to forfeiture of expenses debursed (*e*). But this, as being a penalty, does not transmit against heirs (*f*).

(a) 1672, c. 2. Act of Sed. Feb. 28. 1693. Murrays, Feb. 6. 1832, and May 30. 1833. 10 S. D. 276. Mollison and Reid, Dec. 19. 1833; 12 S. D. 237.

(b) Cruikshanks, Feb. 11. 1819; F. C. Hobbs, June 29. 1831; 9 S. D. 841. Shields, Feb. 2. 1832; 10 S. D. 282.

(c) M'Murdoch, July 7. 1699; M. 3509.

(d) Auchincloss, Feb. 2. 1831; 9 S. D. 300.

(e) Thomson, June 16. 1812; F. C. Gibson and Thomson, Dec. 21. 1811; F. C. Austin, Dec. 21. 1826; 5 S. D. 177. See cases in Morison—Gibson, Kennedy, Cathcart, Turnbull, Guthrie—16299, 16319; and Henderson, July 10. 1788; M. 16375. Robb, Dec. 22. 1814; F. C.

(f) Graham, March 6. 1798; M. 5599. M'Turk, July 2. 1838; 8 S. D. 995.

4. *Management and Powers.*

2082. Tutors act alone, the pupil having no legal person. But all proceedings ought to be in the pupil's name, as well as in that of the tutor, and in all actions the pupil ought to be called as a party. The tutor's powers relate to the person, or to the estate.

2083. 1. PERSON—CUSTODY and EDUCATION. In their powers over the person, there is a distinction among tutors. And, 1. The tutor-nominate having the entire confidence of

the father, is intrusted with the care of the person after seven years of age ; but not if he be next heir ; or has made a purchase of the succession (*a*). This care of the person entitles the tutor to direct the education and place of residence (*b*), but subject to the control of the Court of Session (*c*). 2. The mother has the custody of an infant pupil till seven ; unless she be unfit for the charge, as on account of a second marriage ; having had a natural child ; or the health or nurture of the child forbid it (*d*) ; the superintendence of education being with the tutor. 3. Failing the mother, the custody is with the tutor-nominate ; or even the tutor at law, if not heir ; or with the nearest cognate, if there be no tutor-nominate (*e*).

(*a*) Edgar, Jan. 1606 ; M. 16237. Chalmers, Jan. 14. 1611 ; M. 16239. Gibsons, July 10. 1834 ; S. D.

(*b*) Scott, Feb. 16. 1759 ; M. 16361. Walker, March 10. 1824 ; 2 S. D. 788.

(*c*) Reoch, Nov. 19. 1817 ; F. C.

(*d*) Walker, *ut supra*. Fisher, Dec. 24. 1827 ; 6 S. D. 270. Morton, March 7. 1835 ; S. D. Campbell, March 7. 1833 ; S. D. Paul, March 8. 1838 ; 16 S. D. 822.

(*e*) Higgins, June 7. 1821 ; 1 S. B. 50.

2084. 2. ESTATE and FUNDS. In this respect all tutors are on the same footing. And, 1. Tutors may intromit with, sue, receive, or discharge debts due to the pupil. 2. They may grant leases to continue during their office (*a*), and not at an under value ; but the Court of Session has authorized a tutor testamentary, on his making it manifest that rents would fall on a short or precarious lease, to let farms by roup for nineteen years (*b*). And tutors have also been authorized to renounce a lease to which the pupil has succeeded, when it threatened to prove ruinous to the child (*c*). The proper form is a declarator, with the report of persons of skill ; but it has been done on a summary application (*d*). It would seem justifiable, if not a necessary power of administration in tutors, to grant abatements of rent to tenants, when required by the state of the country (*e*). 3. Tutors may enter vassals. 4. They may implement the ancestor's obligations, in order to save the expense of an adjudication of the pupil's estate (*f*). 5. They have no power to sell or burden the heritable estate, except in cases of absolute necessity, either from the nature of the subject (*g*), or on account of debt (*h*) : But to shew this, an action of cognition and sale is competent and necessary before the Court of Session, in which heirs and creditors must be

called (*i*). 6. They may purchase land with the pupil's money, but not in their own name (*k*). 7. They may change securities, but not to the effect of altering the pupil's succession (*l*). 8. When in an entail an alternative is given to choose between two estates, there must be a power to make election; but this seems to require the authority of the Court of Session (*m*). 9. They may transact or compromise claims which are doubtful or intricate (*n*). 10. They may submit to arbitration (*o*). 11. They cannot engage the pupil in copartnership (*p*). 12. No tutor can be auctor in rem suam (*q*); a rule which in England has been carried farther than hitherto in Scotland, and on principles recognised in both (*r*). 13. Tutors may not in general encroach on the pupil's capital, for the pupil's maintenance or education; but circumstances may justify this (*s*). See above, § 2081. 5. 14. Tutors are not entitled to take titles to land in their own name, and were in one case held bound, having done so, to denude simply, without being allowed to retain for security of the pupil on her marriage (*t*).

(*a*) Hallows, March 1. 1794; M. 14981. Lord Reay, Feb. 5. 1800; M. 16385. Ross, March 9. 1820; F. C.

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

(*c*) Cockburn's Tutors, March 20. 1825; 3 S. D. 642. Meikle, March 7. 1823; 2 S. D. 242.

(*d*) Carrick, July 7. 1829; 7 S. D. 848.

(*e*) Armand, March 7. 1817; F. C.

(*f*) Earl of Aberdeen, Nov. 26. 1823; 2 S. D. 527.

(*g*) Plummer, March 8. 1757; M. 16358.

(*h*) Colt, March 6. 1800; M. 16387. Vere, Feb. 29. 1804; M. 16389. Finlayson, Dec. 22. 1810.

(*i*) Beatson, Feb. 24. 1810; F. C.

(*k*) Lady Kennedy, June 6. 1823; 2 S. D. 375.

(*l*) Ross, Jan. 31. 1793; M. 5545. Graham, March 6. 1798; M. 5599. Morton, Feb. 11. 1813; F. C.

(*m*) Cuninghame Bontine, Dec. 20. 1838; 1 D. B. M. 286.

(*n*) Aikenhead, Nov. 14. 1711; M. 16331. Balfour, Jan. 24. 1700; M. 16318.

(*o*) Ayton, Jan. 18. 1711; M. 16331.

(*p*) See 2 Bell, Com. 624.

(*q*) Wilson, June 26. 1789; M. 16376. Robertson, May 28. 1814; F. C.

(*r*) See in England the general principle, in *Wright v. Proud*, 13 Ves. 136, and other cases cited. See *Hylton*, 2 Ves. Senior, 547.

(*s*) Sandilands, Nov. 7. 1680; M. 16300. Blair, May 20. 1802; M. 16388. Duchess of Gordon, Dec. 12. 1755; M. 16356.

(*t*) Lord Kennedy, June 1823; 2 S. D. 333.

2085. 5. EXPIRATION OF OFFICE. 1. Tutors once accepting, cannot renounce. 2. The office expires by the death of either tutor or pupil, and is terminated by puberty: After

which the tutor cannot act, and is not bound to answer as tutor (*a*). His acts subsequently are null, and his discharge for money paid is ineffectual to the debtor (*b*). 3. Tutors may be removed as suspect, by action in the Court of Session; not by summary complaint.

(*a*) Cass, Jan. 3. 1672; M. 16285.

(*b*) Lockhart, Dec. 15. 1826; 5 S. D. 136; affirmed, June 24. 1820; 3 W. S. 481.

2086. 6. RECIPROCAL ACTIONS ON TERMINATION OF THE OFFICE. These actions are either, 1. Against the tutor and his cautioner for an account of intromissions, and for delivery of deeds to the pupil: The rules of accounting being to charge the tutors according to the inventory; to charge them with the interest which has been, or might have been, made upon the funds by depositing them in bank (*a*); to require them to communicate all *Eases* which they have received in settling transactions; and to give the benefit of all improvements, or rights acquired, to the pupil (*b*). The pupil will also have an action of damages against his tutors on account of any transaction or deed on their part to his hurt and injury, and against which he cannot obtain redress by action of restitution. But this action must be brought, or the privilege of minority for restitution resorted to, within the four years (§ 2099); the elapse of which time without challenge will operate as homologation (*c*).

2. An action also lies at the instance of the tutors against the pupil, for reimbursement of money laid out for him; for relief of engagements undertaken; for discharge of accounts of intromission, in which, however, there must be no charge for trouble or remuneration of risk (*d*), unless the tutor be law-agent or professional accountant for the other tutors (*e*). 3. The action prescribes in ten years (see *supra*, § 635). And it has been held that the tutor does not lose the benefit of the prescription by omitting to make up inventories (*f*).

(*a*) Lady Montgomerie, June 4. 1822; 1 S. D. 491; 4 Dow, 110.

(*b*) Cochran, Feb. 17. 1732; M. 16339. Wilsons, Jan. 26. 1789; M. 16376.

(*c*) Cunningham, July 25. 1727; M. 16338.

(*d*) McDonald, Nov. 13. 1780; M. 13437.

(*e*) Lady Montgomerie, *ut sup.* (*a*).

(*f*) 1696, c. 9. Mercer, Jan. 20. 1736; M. 10996. Gowans, Dec. 16. 1831; 10 S. D. 144.

2. CURATORY OR GUARDIANSHIP FOR MINORS.

2087. Minority is a state, not of total incapacity like p^ullarity (§ 2067), but of limited capacity; in which the minor is held capable of consent, but of inferior judgment or discretion, requiring the protection of the law: The rules are,—
 1. That a minor or his representatives have redress against any deed attended with lesion (*a*). 2. That where curators have been named or are chosen as guardians of the minor, all deeds are null which have not their assent (*b*). 3. That the appointment of guardians, while to a certain extent it protects the minor, is not conclusive to bar a challenge where lesion can be proved (*c*).

(*a*) Kochler, Jan. 31. 1772; M. 8975. Stair and Ersk. *infra* (*c*).

(*b*) 1 Ersk. 7. § 34. Kincaid, March 17. 1561; M. 8979. Bruce, Dec. 1. 1569; M. 16231. Robertson, Jan. 1584; M. 8980. Hamilton, Feb. 1587; M. 8981. Paterson, July 11. 1613; M. 16241. Bell, Nov. 22. 1687; M. 16310. Harvie, June 1726; M. 5712. Bell, Jan. 1728; M. 8985.

(*c*) 1 Stair, 6. § 44. Ersk. *ut supra*, § 34. in fin. Clark, Dec. 6. 1699; M. 3668. Thomson, Dec. 13. 1666; M. 8982.

2088. There are two exceptions, however, to a minor's right to restitution:—1. In the marriage of a minor, the interests of others are so deeply implicated, that he cannot be restored against the marriage (*supra*, § 1523), although he may have restitution against hurtful provisions in a conventional marriage-contract (*a*). 2. Where the minor has engaged in trade, and held himself out as major, so as to deceive the party with whom he deals, he is not entitled to restitution (*b*).

(*a*) 1 Ersk. 7. § 38. Lyon's Creditors, Dec. 14. 1714; M. 6059. Davidson, July 4. 1632; M. 8988. See Johnson, Nov. 17. 1770; M. 8931; 1 Hailes, 368.

(*b*) Ersk. *ut supra*. Heddel, June 5. 1810; F. C. Sutherland, Jan. 19. 1825; F. C.; 3 S. D. 449. Crawford, Jan. 19. 1827; 2 W. S. 608.

2089. 1. MINOR'S PERSON. A minor's person is not subject to the control of curators.

Kincaid, Dec. 2. 1561; M. 16228. Scot, Dec. 10. 1675; M. 16291; 1 Br. Sup. 747. Lord Anstruther, Feb. 22. 1694; 4 Br. Sup. 159. Graham, Aug. 8. 1790; M. 8934.

2090. 2. DEEDS NULL. While the last will of a minor is as effectual as that of a major (*a*), a disposition or settlement of land mortis causa by a minor is null (*b*). So also are all acts by a minor having curators, without their concurrence (*c*). See above, § 2087, and 2088.

(a) Thomson, Nov. 30. 1680 ; M. 8949. Yorkston, Jan. 13. 1697 ; M. 8950. See Waddel, Jan. 16. 1739 ; M. 8965 ; Elch. *Prov. to Heirs.*

(b) Marquis of Clydesdale, Jan. 26. 1726 ; M. 8964 ; Rob. App. Cases, 564. Hunter, Dec. 24. 1728 ; M. 8964. McCulloch, Jan. 29. 1731 ; M. 8965. Cunningham, March 8. 1797 ; M. 8966.

(c) *Supra*, § 2087. 1.

2091. EVIDENCE OF MINORITY. This depends on the proof of the time of birth, and extends from the age of 14 in males, or of 12 in females, to 21.

Wilson, March 3. 1626 ; M. 12700. Bell, Jan. 30. 1639 ; M. 8493. Thomson, June 4. 1667 ; M. 12701. Hay, Nov. 1663 ; M. 9045.

2. *Appointment of Curators.*

2092. Curators are legal ; or necessary ; or voluntary.

2093. 1. FATHER LEGAL ADMINISTRATOR. As the father is ipso jure tutor to his infant child, so is he curator to the minor ; and this to the effect of annulling deeds granted without the father's concurrence, or in which he is auctor in rem suam.

1 Ersk. 6. § 54, 55. M'Kenzie, July 27. 1666 ; M. 8961.

2094. 2. CURATORS NAMED BY THE FATHER. As he has the nomination of tutors during pupillarity (§ 2071), the father may also, in liege poustie, name curators to his child, and thus delegate his right of administration during minority (a). Curators so named supersede or bar a nomination of curators by the minor (b) ; but it was held in one case that the father's nomination could not, under the statute, compel his son to act with the persons named (c). The father in liege poustie may exempt curators from omissions. The guardianship extends over the whole concerns of the minor (d). One who gives or leaves an estate to the minor may appoint a special curator for managing it during minority, as he may appoint a special tutor during pupillarity ; but this guardianship is limited to the estate or subject (e).

(a) 1696, c. 8.

(b) Primrose, Feb. 15. 1715 ; M. 16335. Pitcarrie, Feb. 1731 ; M. 16339.

(c) Lord Drummore, Feb. 27. 1744 ; M. 16349.

(d) 1696, c. 8. 10 Acta Parl. p. 34. c. 8. 1 Ersk. 7. § 11.

(e) 1 Ersk. 7. § 13. Scott, Dec. 10. 1675 ; M. 8970.

2095. 3. CURATORS NAMED BY THE MINOR. A minor may name curators, according to a certain proceeding pointed out by statute (a) : And, 1. An edict is issued by the Sheriff on

the minor's application ; or he raises a summons before the Court of Session, in either of which there is a warrant to cite two of the nearest of kin on either side, who are within the kingdom at the time (*b*). 2. Where the minor is a natural child, or where there are no next of kin in Scotland, the Court has authorized curators, after intimation in the minute-book (*c*). 3. The minor, either personally in Court or by deed, names curators. 4. They accept and find caution. 5. The Court sanctions the appointment, and decerns the persons chosen to be curators. 6. An inventory is made up and recorded. And, 7. An act of curatory is extracted, containing the inventory ; and this is the curator's title to act (*d*). The minor cannot, in his nomination of curators, give them the same exemption from omissions which the statute authorizes a father to declare (*e*). In order to prevent as much as possible the minor from being unduly influenced or compelled in the election of curators, the Court of Session will, on application, place him in neutral custody (*f*).

(*a*) 1555, c. 35. 1 Ersk. 7. § 11. See 3 Illus. 41.

(*b*) Wallace, July 29. 1674 ; M. 290.

(*c*) William Young, Feb. 19. 1818 ; F. C. Cruikshank, Feb. 11. 1819 ; F. C. See Wilson, March 10. 1819 ; F. C.

(*d*) See Jurid. Styles, 517.

(*e*) Watson, July 16. 1773 ; M. 16369.

(*f*) Bargany, July 14. 1702 ; M. 16319. Wilson, March 10. 1819 ; F. C.

2096. 4. NATURE OF THE OFFICE. 1. The curator is guardian of the estate, not of the person (*a*). 2. The minor acts, but with a presumed imperfectness of judgment, which the curator, as his adviser and the consentor to his deeds, supplies. Deeds done by the curator alone are null ; both he and the minor must concur (*b*). But the minor cannot be compelled to act with his curators (they being only advisers and curators), unless in so far as other parties refuse to act with him alone. 3. If the minor be obstinate in resisting what is proper to be done, the curator may apply to be discharged of his office ; but he cannot supersede the minor, nor compel him to concur (*c*). 4. The powers of administration, where minor and curators concur, are larger than in tutory. Leases may be granted to endure beyond the years of minority ; sales of land may be made, and heritable burdens created ; and the Court will not lessen the responsibility, by interfering to authorize what the minor and curator have full power to do (*d*).

- (a) See cases *supra*, § 2089.
- (b) Foster, June 26. 1610; M. 16238. M^cIntosh, Jan. 9. 1675; M. 16290.
- (c) Lord Drummore, Jan. 27. 1744; M. 8930. Elchies, *Min.* 10; 5 Brown's Sup. 737. 7.
- (d) Hamilton, Feb. 2. 1630; M. 8981. Wallace, March 8. 1817; F. C. Ogilvie, June 11. 1824; 3 S. D. 124. Campbell, Feb. 17. 1738; M. 8930.

2097. 5. EXPIRATION OF OFFICE. The termination of the office, and the reciprocal actions, are analogous to those of tutors (*supra*, § 2086. 7).

3. PRO-TUTORS AND PRO-CURATORS.

2098. These are persons who assume the office of guardian; and the whole doctrine relative to them depends on the principles of negotiorum gestio (*supra*, § 539). So, 1. Pro-tutors or pro-curators have no recognised powers. 2. They may be called to account at any time. 3. They are entitled to reimbursement and relief; and, 4. As excluding others, they are responsible for exact diligence for omissions as well as introductions.

1 Ersk. 7. § 28. Act of Sed. June 10. 1665. Cass. Nov. 18. 1671; M. 16285. Muir, Nov. 16. 1676; M. 16316. Fowler, Dec. 4. 1739; M. 16343. Elchies, *Tut.* 11. See Allan, July 1715; M. 5654.

4. RESTITUTION ON MINORITY AND LESION.

2099. Every deed in nonage, whether during pupillarity or minority, and whether with or without consent of tutors or curators, is liable to reduction on proof of lesion. The distinction chiefly to be observed is, that deeds null (*supra*, § 2067, 2090.) may be challenged at any time; while those which are duly authorized by tutors, or by a minor without curators, or by a minor with his curators concurring,—not only require to an effectual challenge a proof of lesion, but they must be challenged within four years after majority, called the QUADRIENNIUM UTILE.

1 Ersk. 7. § 34, 39, 42. M. of Montrose, Dec. 28. 1697; M. 9046.

2100. 1. *Reduction.* Mere revocation within the quadriennium utile is not sufficient. The deeds against which the minor is entitled to be restored must also be challenged by an action of reduction in the Court of Session within that term.

2101. 2. *Grounds and Effect of Restitution.* These are, minority and lesion (a). 1. *Minority* must be proved by the date of

birth (see above, § 2091). 2. *Lesion* must be shewn in point of fact; as the settlement of extravagant provision to the husband or wife in a contract of marriage (*b*). But there is a presumption to aid the proof of lesion in donations; in cautionary obligations; in loans of money to a minor (*c*); even in payments to a minor (*d*). These presumptions of lesion may be counteracted by shewing the lesion to be subsequent, and the result of mismanagement; or by proving that the character of trader, or of majority, was assumed in the transaction; or by homologation after majority (*e*). 3. The minor is entitled only to be replaced in his former state; not to derive an advantage which he could not otherwise have enjoyed. But he will not be entitled to redress against lesion, arising in consequence of payment by debtors, if with consent of curators.

(*a*) 1 Ersk. 7. § 36.

(*b*) Carmichael, Feb. 24. 1698; M. 8938. See Montgomery, Feb. 27. 1683; M. 8992. Byres, July 28. 1708; M. 8995. Chalmers, July 14. 1710. Gray, Dec. 14. 1714. See Anderson, Jan. 31. 1824; S. D.

(*c*) Harkness, July 20. 1833; S. D.

(*d*) In opposition to 1 Ersk. 7. § 36, and to Kochler, Jan. 31. 1772; M. 8975, see Hay, M. 8973. Kirkman, Aug. 1. 1782; M. 8977.

(*e*) Melville, July 5. 1782; M. 8998. Robertson, July 2. 1831; 9 S. D. 865.

2102. PRIVILEGES OF MINORITY. Minors have the privilege of Restitution already noticed. They have also the privilege of not being compellable to defend the validity of their paternal ancestors' rights to their lands, when vested in the ancestor by sasine, against one claiming preferably.

1 Stair, 6. § 45. 1 Ersk. 7. § 43, 44. Rollo, Jan. 31. 1665; M. 9063. Douglas, June 15. 1744; 5 Brown's Sup. 738.

2. GUARDIANSHIP OF PERSONS ON ACCOUNT OF NATURAL INCAPACITY.

Incapacity not proceeding from defect of age, is either total or partial.

1. *Total Incapacity.*

2103. This cannot, like the defect of years, be regulated by any general criterion, but must in each case be established either, 1. by the verdict of a jury, under a brieve from Chancery, directed to the Judge-ordinary of the territory in which the per-

son to be cognosced resides : or, 2. by an action directed to the annulling of a particular deed. The presumption of the law is for sanity ; which is overcome in either of these modes of proceeding. The presumption from a verdict of insanity is to be overcome only by an action and proof *pro re nata*, to establish sanity in a particular instance, or to reduce the verdict.

2104. 1. NATURE OF INCAPACITY. Incapacity is reducible to two classes ; Furiosity and Idiocy. The trial may be either by inquest and verdict ; or, in relation to a particular deed or transaction, by reduction. The former comprehending a period retrospective and prospective : The latter directed, in point of time, to the date of the deed. In the former, the person into whose state of mind the inquiry is to be proved, must be before the jury : In the latter this is not indispensable : The former can proceed only while the person is alive, and is intended as necessary to guardianship : The latter may proceed after the death of the party.

Loch, July 26. 1638 ; M. 6278. Christie, Feb. 13. 1700 ; M. 6283.

2105. *Furiosity*. The *briefe* is directed to inquire “ *si sit incompos mentis, prodigus, et furiosus, viz. qui nec tempus nec modum impensarum habet sed bona delaceranda profundit.*” The points to be made out in the cognition are, 1. The existence of unsound mind ; 2. The particular character of the furiosity, as admitting of lucid intervals or otherwise ; 3. The period of retrospect (*a*). The question of insanity presents many difficulties. One important distinction is between partial and intermittent insanity with lucid intervals. Wherever there is delusion with partial insanity, it seems to be a case for guardianship, on account of the uncertainty to what extent the delusion goes ; the partial insanity being held as general for the person’s own safety and that of his relations, as of one unfit to deal with human affairs, according to the sober estimate and standard of reason, and unsafe to be trusted to the accidental occurrence of the train of association which excites his malady. Another important distinction is between Insanity with Delusion excited by a particular train of associations, and Monomania ; in which a man is insane on one point only, and, during the prevalence even of the fit, sane on all

other points. The rule seems to be, that where there is a distinct interruption or lucid interval, an act done in that interval is not null (*b*); and that even in monomania, while such acts as are traceable to the delusion are null, whatever is done uninfluenced by the delusion is effectual (*c*). As to lucid interval, there seems to be one species of it which marks the disease as intermittent. But it does not appear that the law will always require this sort of case to be made out; and that proof of lucid interval in point of fact, as established by the act itself, rational in its own character, and rationally done, will be sufficient to sustain a deed (*d*).

(*a*) 1 Ersk. 7. § 51. Blair, July 1747; M. 6293. Pollock, Dec. 10. 1811; F. C. Dew v. Clark, Haggard's Eccl. Cases; 3 Addams, 40.

(*b*) Neill v. Morley, 9 Ves. jun. 478. Currie, June 23. 1827; 5 S. D. 835.

(*c*) Dew v. Clark, 1826, ut sup. Frazer, Nov. 7. 1834; 13 S. D. 703. Laing, Nov. 20. 1838; 1 D. B. M. 59.

(*d*) Clark v. Cartwright, 1 Phillim. Eccl. Cases, 90.

2106. *Idiocy*. The brieve is to try, “si sit incompos mentis fatuus et naturaliter idiota, sic quod timetur de alienatione tam terrarum suarum quam aliarum rerum mobilium.” The character here is, that of total incapacity without interval, and without cure.

2107. The distinction is important between the character of incapacity in idiocy and in furiosity; unremitting in the one, subject to remission, or capable of cure, in the other.

See authorities in § 2106. See also Carstairs, June 21. 1672; M. 13049.

2108. 2. TITLE TO PURSUE. The title to institute proceedings for a verdict and guardianship is with the next of kin.

M'Alister, June 7. 1798; 6 S. D. 440, note.

2109. 3. RIGHT OF GUARDIANSHIP. This rests with the nearest male agnate. If he be unfit, or under age, or unwilling to serve, the verdict is limited to the state of mind; and a tutor-dative is applied for (*a*). There is no power in the father to name testamentary tutors to an insane person, to continue after his majority (*b*). Nor would it be safe to enter into a transaction with such tutor after the insane person attains majority.

(*a*) Stewart, Jan. 21. 1663; M. 6279. Moncrieff, Feb. 23. 1710; M. 6286.

(*b*) Duke of A.

2110. 4. POINTS IN VERDICT. These are, 1. The present

state : 2. The time at which the malady commenced (*a*) ; the effect of this being only to overturn the presumption of sanity, not to prevent an investigation in any particular case : 3. Lucid intervals. The person, as already said, must be before the jury (*b*), and the cognition will be ordered to proceed at a place where this may be possible (*c*). A verdict shewing lucid interval on a particular day, is not conclusive to bar reduction of a deed made on that day (*d*).

(*a*) 1475, c. 67. 2 Acta Parl. p. 112. c. 8.

(*b*) Dewar, Feb. 25. 1709 ; F. C.

(*c*) Falconer, Feb. 25. 1709 ; 4 Brown's Sup.

(*d*) Currie, June 23. 1827 ; 5 S. D. 838.

2111. 5. CHALLENGE OF VERDICT. The verdict is not conclusive. 1. It may be reduced, and a new brieve directed (*a*). 2. If a lucid interval can be proved at the point of time when a deed was made, or a contract entered into, the retrospect of the verdict will not be held to preclude the inquiry in the shape of a reduction and declarator of lucid interval, or as a plea in a reduction of the deed. 3. Reconvalence may be established by a declaratory action, or the person cognosed may resume his administration, taking care to preserve evidence of sanity in any important transaction.

(*a*) Dewar, *supra* (*b*).

2112. 6. GUARDIANSHIP. The guardian of an insane person is bound to settle accounts with him on convalescence (*a*). And the recurrence of the malady will not reinvest the curator in his office (*b*).

(*a*) Millar, May 15. 1819 ; F. C.

(*b*) Edderline's Trustees, Feb. 27. 1740 ; Elch. Tutor, No. 12.

2. *Imbecillity and Partial Incapacity.*

2113. There are many cases which require protection, and yet in which no remedy by cognition and curatory can be obtained. The power of interposing in such cases (one of the most delicate that can be committed to a Judge), is vested in the Supreme Court. The occasions for its exercise are, 1. Imbecility from age ; from natural facility of temper ; from organic affection. 2. Temporary incapacity, as delirium. 3. Absence abroad. 4. The interval before a cognition can take

place. 5. The abuse of parental power and guardianship. In the four first of these cases the judicial remedies applied are, the appointment of a judicial factor or curator bonis. In the last the Court interferes with a sort of parental control of the natural power of the father.

2114. 1. FACTOR LOCO TUTORIS (*a*). This office is not conferred as a matter of course. It is competent to be applied for where a father, or a tutor already named, is incapable of acting; or, during the year allowed to the nearest agnate to deliberate (*b*); or, where the tutor cannot interfere (*c*). But not where a wife is insane and the husband alive; even though separated by voluntary contract (*d*).

(*a*) 1 Ersk. 7. § 10. Act of Sederunt, Feb. 13. 1730.

(*b*) Morrison, July 1770; 1 Hailes, 359.

(*c*) Anstruther, March 3. 1818; F. C. Donaldson, Dec. 21. 1770; M. 16364. Weir, June 27. 1829; 7 S. D. 805.

(*d*) Haliburton, June 1791; M. 16379.

2115. Not more than one person is ever appointed to the office (*a*); nor any one who is entitled to be tutor at law if not willing to act gratuitously (*b*); nor a bankrupt if he has any interested object in the appointment (*c*). A clergyman of the Church of Scotland is never appointed (*d*); though a seceding clergyman may be named to the office (*e*). But although one entitled to be tutor at law will not be appointed unless he agree to act gratuitously, the office is not necessarily gratuitous. If a stranger be appointed and comply with all points of his duty, he is entitled to commission and professional emoluments or expenditure under the equitable control of the Court (*f*).

(*a*) Brown, Feb. 1. 1815; F. C. Small, Dec. 21. 1822; 1 S. D. 106.

(*b*) Jackson, Dec. 7. 1821; F. C.; 1 S. B. 210. Robertson, July 14. 1830; 8 S. D. 307, 435.

(*c*) Dixon, Jan. 20. 1832; 10 S. D. 209.

(*d*) Whitson, Jan. 28. 1833; 10 S. D. 268. Thomson, Nov. 13. 1829; 8 S. D. 12.

(*e*) Hall, Feb. 18. 1830; 8 S. D. 553.

(*f*) Craigmoun, Dec. 1. 1836; 5 S. D. 62.

2116. The application is intimated on the walls of the Court, and in the minute-book, and served on the next of kin of the father and mother's side (*a*). And in case of undue keenness in competition, the Court will appoint a neutral person (*b*). The person applying must in his petition, 1. state the ground

of necessity or expediency for the appointment; and, 2. suggest the person to be appointed; that both may be intimated with the petition. In cases of urgency the Court will, during intimation, make an interim appointment (*c*). The authority is conferred and the power vested in the factor only by the extracted act and warrant, the finding of caution being a condition precedent of the extract: and payment to a factor loco tutoris before extract is unavailing, and at the risk of the person who pays (*d*).

(*a*) Cowans, Jan. 19. 1788; M. 7452. Heatley, Feb. 2. 1828; 6 S. D. 477.

(*b*) Urquhart, March 10. 1824; 2 S. D. 789.

(*c*) Kirk, March 10. 1827; 5 S. D. 564. A B, Nov. 20. 1829; 8 S. D. 89. Davidson, July 8. 1830; Ib. 1027. Weir, June 27. 1829; 7 S. D. 805.

(*d*) Donaldson, June 18. 1833; 11 S. D. 740.

2117. The powers of such a guardian are not distinguishable from those of a tutor in regard to the estate (*a*). He may enter into submissions (*b*). Administration and responsibility are regulated by Act of Sederunt (*c*); and the Court is most justly averse to interfere in sanctioning any act of the factor, but leaves him to act on his own responsibility (*d*). In cases in which judicial authority is necessary, the Court will interfere to empower the factor to act (*e*): and the cases of necessity are,—1. where a loss is to be guarded against; 2. where an obvious advantage is to be secured; 3. where there is danger of heirs, or of the estate being torn in pieces by the diligence of creditors proceeding or threatening to proceed with adjudication, &c; 4. where the interest of third parties as superiors or vassals requires something to be done; or, 5. where for the subsistence of the pupil a fund must be provided (*f*). Even in other cases, where there is danger of the factor injuring the person whom he is appointed to protect, from too great dread of responsibility, and leaving useful acts unperformed, the Court will interfere (*g*). Such special powers must be specially applied for (*h*). The salutary reserve or aversion on the part of the Court to interfere has sometimes been relaxed of late years perhaps to a dangerous extent: But whether the Court authorize the act or not, the application is so far a protection to the factor that the statement and evidence laid before the Court are useful in establishing the facts in the event of any future challenge or inquiry.

The factor is held liable for interest on the interest of sums

which he has neglected to recover (*i*). And he will not be held entitled to commission if he neglect the rules of the Act of Sederunt.

The factor has no power over the person of the pupil (*k*).

- (*a*) Robertson, May 28. 1814 ; F. C.
- (*b*) Brown, June 17. 1758 ; M. 16359. Falconar, Feb. 17. 1792 ; M. 16380.
- (*c*) A. S. Feb. 13. 1730.
- (*d*) Craigie, June 17. 1758 ; M. 16361. Home, March 7. 1793 ; M. 16382. Henderson, Jan. 19. 1803 ; M. 14982. Hay, June 20. 1811 ; F. C. Meikle, March 7. 1823 ; 2 S. D. 274.
- (*e*) Meikle, March 7. 1823 ; 2 S. D. 274. Cockburn, March 10. 1825 ; 2 S. D. 642.
- (*f*) Sommerville, Feb. 6. 1836 ; 14 S. D. 451. McGruther, Feb. 27. 1835 ; 13 S. D. 569. Finlayson, June 4. 1835. Ib. 861.
- (*g*) Carrick, July 7. 1829 ; 8 S. D. 208. Mark, Dec. 5. 1829 ; Ib. 195. Slade, Dec. 20. 1831 ; 10 S. D. 167. Morison, Jan. 19. 1832 ; 10 S. D. 204, and cases of Peddie, Robertson, and Busby, there cited.
- (*h*) A B, Jan. 27. 1829 ; 7 S. D. 327.
- (*i*) Cranston, Dec. 1. 1826 ; 5 S. D. 62. Miller, Nov. 26. 1836 ; 15 S. D. 147 ; and other cases, 3 Illus. 53-4.
- (*k*) Robertson, May 28. 1814 ; F. C. Carrick, July 7. 1829 ; 7 S. D. 848. Philip, Nov. 22. 1827 ; 6 S. D. 103.

2118. Duties. The duties are generally prescribed in the Act of Sederunt, 13th Feb. 1730 ; and, in particular, the factor is ordered regularly to lodge annual factor accounts, under certain penalties ; and those penalties the Court rigorously exacts.

Lambe, Dec. 14. 1837 ; 15 S. D. 219.

2119. The office expires in the same way with tutory ; or by the serving of a tutor at law (*a*). In order to exoneration the curator must call a proper contradictor (*b*).

- (*a*) Bell, March 10. 1784 ; M. 16374.
- (*b*) McGavin, June 21. 1821 ; 1 S. D. 78.

2120. 2. FACTOR LOCO ABSENTIS. This appointment proceeds strictly on the principles of interdict and sequestration, and for the purpose of preventing waste and preserving the estate of a person while abroad.

White, March 7. 1829 ; 7 S. D. 555. McLean, June 25. 1828 ; 6 S. D. 1018.

2121. 3. CURATOR BONIS. In cases not marked by any infallible criterion of incapacity, and definite and acknowledged necessity for interference, the appointment of a stranger to supersede one's own management of his affairs is a delicate and difficult exercise of judicial power. But the remedy sanctioned

by long usage in Scotland is not properly a judicial curatory of a permanent character, as sometimes has been supposed; it is intermediate only. As such if the application is sanctioned by all those who are naturally interested in the person to be protected, it is a very convenient and beneficial proceeding. Where there is opposition by the person himself whose capacity is in question, or by another having interest, the question of judicial interference becomes exceedingly delicate; and perhaps the proper limit of jurisdiction in such cases is that which the principle of interdict supplies, for the intermediate preservation of property in danger of being dissipated, abused, or encroached upon (*a*). The proper case for such interference is incapacity of a kind in which no verdict of insanity will be returned, while yet the person is unfit to do those acts which may be essentially necessary. And the points of inquiry for such a remedy are, 1. the degree of incapacity; to be cleared by the visitation and evidence of Physicians; and, 2. the necessity for interference (*b*). The power of appointing such temporary guardians belongs properly to the Court itself; and they will not delegate the authority to the Lord Ordinary on the Bills (*c*). But when the occasion has arisen during vacation, the Ordinary on the Bills will make an interim appointment (*d*). The Court will not give authority to the curator to bring a reduction of a deed; leaving it to his own responsibility (*e*); nor to carry on a manufactory (*f*). And on the whole, the general rule is, not to grant special powers; yielding only in cases of obvious necessity (*g*).

(*a*) Graham, May 26. 1826; 2 W. S. App. Cases, 481; 6 S. D. 425; 3 W. S. 323. See Gordon, June 30. 1832; 10 S. D. 742.

(*b*) Gordon, June 30. 1832; 10 S. D. 742. Dewar, Jan. 21. 1834; 12 S. D. 345. Howden, March 9. 1833; 11 S. D. 561. Dalrymple, June 25. 1836; 14 S. D. 1011.

(*c*) Bremner, March 8. 1833; S. D.

(*d*) Ellis, Dec. 14. 1836.

(*e*) Howie, Dec. 6. 1826; 5 S. D. 55.

(*f*) Philip, Nov. 22. 1827; 6 S. D. 103.

(*g*) Drummond, Jan. 21. 1832; 10 S. D. 216. Borthwick, June 1. 1832; 1b. 620. Blaikie, Feb. 1. 1827; 5 S. D. 268. Campbell, Jan. 10. 1829; 7 S. D. 296. Pultney, Feb. 21. 1832; 10 S. D. 362.

2122. 4. FATHER'S ABUSE OF PARENTAL POWER. Although unquestionably the Supreme Court has jurisdiction to superintend and control, and even to supersede the exercise of a father's guardianship, where it manifestly tends to the injury

of the child, or of property held independently of the father, it is a power to be exercised only under the pressure of extreme necessity, and with a very cautious and delicate reserve. In England, when a fortune is bestowed on an infant, the Lord Chancellor seems to be considered as guardian; and the infant, as a ward of Chancery, is not only under protection directly as to the estate, but indirectly in regard to the marriage of the child, and the education fit for its condition (*a*). But no such principle is recognised in Scotland, and the power of the Supreme Court is limited to the redress or prevention of actual injury sustained or threatened (*b*).

(*a*) See cases *supra*, § 2068 (*d*), and 3 Illus. 58.

(*b*) *Morrison*, July 19. 1716; *M.* 410. *Walker*, March 10. 1824; 2 S. D. 788. *Fisher*, Dec. 24. 1827; 6 S. D. 270.

2123. 5. INTERDICTION. Interdiction is a restraint laid on those who are in danger of suffering by their profusion or facility of temper; disabling them from signing any deed to their prejudice, without the consent of their interdictors. The case for which this remedy is provided, as described in the modern summons, is that of a person "lavish and prodigal; of weak and facile disposition; easily imposed on, and liable to be concussed to do deeds to his lesion or prejudice." The protection thus afforded proceeds on the general right to redress against all attempts to take advantage of avowed imbecility; and thus it becomes an indispensable part of the protection, that the restraint shall be published.

2124. Interdiction is either judicial or voluntary.

2125. 1. *Judicial Interdiction*. This is an adverse proceeding. It is pursued by the next of kin, or presumptive heir, by summons in the Court of Session; or *ex proprio motu* it may be ordered by a Judge: and, 1. There is a judgment finding and declaring the person to be of a weak and facile disposition; interdicting him to A, B, C, &c.; discharging and prohibiting him from selling his lands or other heritage; from contracting debts, entering into cautionary obligations, or doing any deed, direct or indirect, whereby the rights of his lands, &c. may be adjudged; and declaring all deeds so entered into void and null, and of no force, &c. 2. Letters of publication are issued on that decree; and they are executed at the market-cross of the jurisdiction. The interdiction is

recorded in the Register of Inhibitions of the county in which any lands lie which are to be protected (*a*). At one time private knowledge of the Interdiction was not held sufficient to ground a challenge, but this was afterwards altered (*b*).

(*a*) 1581, c. 19. 3 Acta Parl. p. 223. c. 24. 1 Ersk. 7. § 54-6. 2 Ersk. 11. § 45. Eaton and Ellis, Dec. 11. 1628; M. 7128. Robertson, Feb. 17. 1681; M. 7134. Thomson, July 17. 1776; Tait's Cases; 5 Brown's Sup. 488.

(*b*) Tenant, Dec. 27. 1725; M. 7165.

2126. 2. *Voluntary Interdiction*. This is a proceeding not older than the beginning of the 17th century. It proceeds by consent of the party himself, expressing in a bond or other writing his consciousness of facility, and binding himself to certain persons, that he shall not, without their consent, grant any deed. Letters of publication follow, which are published as in the judicial interdiction, and then registered in the Record of Inhibitions; without which the whole is unavailing.

1 Ersk. 7. § 54. 2 Ersk. 11. § 45. Stewart, Nov. 10. 1676; M. 7132. Michie, Dec. 1685; M. 6147. Napier, Jan. 2. 1706; 4 Brown's Sup. 633.

2127. 3. *Effect of Interdiction*. This proceeding has the effect, 1. to restrain the person interdicted from alienating or burdening lands, or contracting debts to affect his heritage, within the shire where it is published and registered (*a*): But 2. it has no effect on deeds relative to moveables (*b*): 3. it affects acts or deeds, not so as to annul, but only to reduce them so far as prejudicial; not defeating onerous or rational deeds (*c*). And even a sale to one of the interdictors has been sustained (*d*). 4. A will is not defeated by it; but it is said a settlement of heritage is, like a minor's deed, ineffectual; though this may be doubted (*e*).

(*a*) Ramsay, Feb. 11. 1662; M. 7131.

(*b*) Davidson, Feb. 8. 1684; M. 7142. Erskine, Dec. 27. 1694; 4 Brown's Sup. 231. Arbuthnot, Jan. 31. 1724; M. 7144.

(*c*) Lundie, Feb. 24. 1672; M. 7149; 1 Brown's Sup. 654.

(*d*) Kyle, Dec. 14. 1826; 5 S. D. 128. See Frazer, Feb. 6. 1827; Ib. 301.

(*e*) See 1 Ersk. 7. § 58; correct this by the cases, Gray, Nov. 8. 1751; Elchies, *Prov. to Heirs and Child*. 14; M. 10803; 5 Brown's Sup. 790.

2128. 4. *Termination of Interdiction*. This may take place, 1. By death of the interdictors (*a*). 2. By sentence of a Judge recalling the interdiction, on proof of rationality and strength

of mind, or of the interdiction having been improperly obtained
(*b*). 3. By consent of the interdictors.

(*a*) Hepburn, Dec. 8. 1708; M. 7154.

(*b*) Gichen, Dec. 4. 1623; M. 7160. Robertson, Jan. 30. 1618; M. 7158.
Wilkie, July 25. 1666; M. 7160. Hunter, Feb. 10. 1698; M. 7161.

II.—RIGHTS OF PERSONS IN THEIR PUBLIC RELATIONS.

2129. Without entering on constitutional questions here, there are several relations in which individuals and corporate bodies stand to each other, and to society generally, so intimately connected with the rules of private jurisprudence, that they require to be explained. We may here consider,

1. Persons in the relation of subject or alien.
2. The two classes of nobility and commonalty.
3. Those associations of individuals, which by public authority are, under the general name of corporations, erected into legal persons, with a view to advance the interests of the public generally, or of some particular department or community. And,
4. The elective franchise, as recently established.

1. DISTINCTION OF SUBJECT AND ALIEN.

2130. There are now few distinctions remaining among the people, in respect to their political rights, arising from religious divisions (*a*); and the only distinction material to be taken notice of here is, that of subject and alien.

(*a*) 10 Geo. IV. c. 7. 2 and 3 Will. IV. c. 115. 3 and 4 Will. IV. c. 49, and c. 82. Resolution of House of Commons, April 18. 1833, in relation to persons professing the Jewish religion.

2131. **NATURAL BORN SUBJECTS** are those born within the British dominions. By this they are placed at once under the protection of the Crown, and under an implied original and virtual allegiance. And this applies not only to children, so born, of the Queen's subjects, but also to those of aliens (not being enemies) born within the realm. The oath of allegiance

may enforce this tie by the addition of perjury, but it does not create it.

2132. The description is extended by particular statutes. And, 1. The children of all natural born subjects, though born out of the allegiance of the Queen, are declared to be natural born subjects (*a*). 2. Children so born of fathers who at the time of the birth are natural born subjects (not attainted of high treason, or felony, or in the service of a foreign prince at enmity), are natural born subjects (*b*). But children of British mothers and alien fathers are not within the rule (*c*). 3. Grandchildren, *i. e.* children of fathers so naturalized, are also held natural born subjects (*d*). 4. By a Scottish statute for erecting the Bank of Scotland it was provided, "that all foreigners who shall join as partners of this bank, shall thereby become naturalized Scotsmen to all intents and purposes whatever" (*e*). But this has been solemnly held to apply only to the original partners. (*f*)

(*a*) 7 Anne, c. 5.

(*b*) 4 Geo. II. c. 21. § 1.

(*c*) *Doe v. Jones*, 4 Term. Rep. 300.

(*d*) 13 Geo. III. c. 21. § 1.

(*e*) Act, July 19. 1695.

(*f*) *Macao*, Nov. 14. 1820; F. C.; 1 Shaw's App. Cases, 138.

2133. Allegiance is natural or local. 1. Natural allegiance is that of natural born subjects, whom the Sovereign is at all times bound to protect; and this allegiance is held not to be dissoluble without the royal consent. Such consent was given by the declaration of the independence of America; and this had the effect, 1. of dissolving the allegiance of natural born subjects adhering to America, so that one continuing in America forfeited the character of natural born subject to his children not subjects; and, 2. of depriving subjects of Great Britain, adhering to the Crown, of the right of inheriting lands in America (*a*). 2. Local allegiance is temporary. It is such as is due from an alien or stranger born, while he continues within the British dominions and protection.

(*a*) *Doe Thomas v. Aiklam*, 2 Barn. and Cress. 779. See American cases in Wheaton's Rep. 535.

2134. ALIENS are persons born beyond the dominions of the Queen, of parents who are not themselves natural born subjects (§ 2131-2). They are while in this country entitled to

protection; but the effects of the revolutionary war of France introduced many special regulations as to aliens, which have only of late been relaxed (*a*). By the most recent statute on the subject the regulations of the 7th Geo. IV. are repealed, and from 1st July 1836, 1. masters of ships are to declare, under a penalty, what aliens they bring into the country; 2. all aliens are on arrival to enter their name and shew their passport under a penalty of L.2; 3. the registration of their name and description is to be transmitted to the Secretary of State, and a certificate granted without fee; 4. on leaving the realm the alien is to return his certificate to be sent to the Secretary of State; and, 5. these regulations are not to affect foreign ministers, or aliens who have been in the country for three years, or persons under fourteen years of age (*b*).

(*a*) 33 Geo. III. c. 4. 38 Geo. III. c. 50 and 77. 42 Geo. III. c. 92. 43 Geo. III. c. 155. 58 Geo. III. c. 97. 7 Geo. IV. c. 54.

(*b*) 6 and 7 Will. IV. c. 11.

2135. Aliens are either friendly or hostile. 1. Friendly aliens, under allegiance to a government at peace with Great Britain, are yet incapable of acquiring heritage either by purchase or succession (*a*). And an alien woman marrying a landholder in Scotland seems to have no right to terce; nor an alien husband to courtesy. An alien cannot hold even a lease for years, but may hire a house for habitation. He cannot exercise the elective franchise (*b*), or be a Peer or Member of Parliament. He may trade as freely as a subject, and acquire property in goods, money, and moveable estate, and make a will, and sue for personal debts. 2. Alien enemies have no right or title to pursue for debt in this country, unless by the Queen's special licence (*c*) (see above, § 43). But their right to debts due to them before the war is only suspended, not forfeited: The assignee of an alien enemy is in the same condition as to the recovery of debt with himself (*d*).

(*a*) 4 Ersk. 16. § 10. Leslie, June 8. 1749; M. 4636.

(*b*) Wight, 291. This has been doubted under the Reform Act.

(*c*) Carron, Nov. 28. 1809; F. C.

(*d*) Johnson and Wight, Feb. 13. 1809; F. C.

2136. The disabilities of aliens may to a certain extent be relaxed, but not to the effect of identifying them with natural born subjects. And,

1. *Naturalization*. Aliens may be naturalized by Act of

Parliament to all intents and purposes, but the capacity of holding a seat in the Privy Council or in Parliament, and the power of holding offices of trust, or receiving grants from the Crown (a).

2. *Denization* is by letters patent issued by the Queen. Certain privileges of British subjects may be thus conferred; and, 1. a denizen may purchase lands, or take them by deed, and transmit them to his heirs born after the grant; not to heirs born before the grant, till which time he had no inheritable blood: But he cannot take by inheritance: 2. A denizen cannot be a Member of the Privy Council or of Parliament, nor hold any office of trust, nor take a grant of lands from the Crown (b).

(a) 12 Will. IV. c. 2. 1 Geo. I. c. 4. 14 Geo. III. c. 84. 58 Geo. III. c. 97. 7 Geo. IV. c. 54. 1 Blackst. 374.

(b) 3 Ersk. 10. § 10. 12 Will. III. c. 2.

2. NOBILITY AND COMMONALTY.

2137. The great division of the subjects of the Crown, is into nobility and commonalty.

1. *Of the Peerage or Nobility.*

2138. The peerage is a privileged order of the people, having precedence in the intercourse of society; distinguished by their titles; exempt from personal diligence of imprisonment; and members, either in their own right, or by election, of the House of Lords. They are either, 1. Scottish peers; or, 2. Peers of Great Britain raised to that dignity since the Union.

2139. 1. OF THE SCOTTISH PEERAGE. The ancient records of our peerage are in a very imperfect state. 1. While there are some peerages on the ancient rolls of Parliament of which the creation is not to be traced, it is certain that before the reign of James VI. titles of honour were conferred on the erection of lands into Earldoms and Lordships, and descended according to the destination in the titles of the land: 2. frequently they were resigned with the lands, and a new charter and descent settled: and, 3. since James VI.'s time honours were granted by patents containing a destination of descent, some of those patents being connected with particular entails of

land, while others bore a descent to such persons as the grantee might name to succeed to the peerage (*a*). At the Union the Scottish peerage was fixed, so that there could be no subsequent augmentation of it; and after that event a return was made to the House of Lords by the Lord Clerk Register of Scotland of 154 peers (*b*); and afterwards, in 1740, another list was made up by the Lords of Session of the subsisting peerages (*c*).

(*a*) Report by the Lords of Session to the House of Peers in 1740.

(*b*) Journals of the Lords, 618, p. 468. Robertson on Scottish Peerage.

(*c*) Roll or List and Report in Wight's App. Bell's App. and Connell's App.; also Wood's Peerage, App. No. 5, vol. ii. p. 697.

2140. By the Act ratifying the treaty of Union "all peers of Scotland, and the successors to their honours and dignities, shall be peers of Great Britain;" and, 1. shall have rank and precedency next after the peers of the like orders and degrees in England, at the time of the Union, and before all peers of Great Britain of the like orders and degrees created after the Union. 2. They shall be tried as peers of Great Britain. 3. They shall enjoy all privilege of peers as fully as the peers of England do now; except, 4. they are not to enjoy the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting on the trial of peers.

1707, c. 7.

2141. *Representative Peerage in the House of Lords.* The election is regulated by the Act passed after the conclusion of the treaty of Union (*a*); and, 1. The representative peers are in number sixteen, and are elected only for the Parliament for which they are chosen. They are not like the Irish representative peers elected for life. 2. Scottish peers (of twenty-one years of age) alone can vote or be elected (*b*). 3. The vote of a Scottish peer is not destroyed by his holding an English peerage, or a British peerage (*c*). 4. There is now no disqualification to vote or sit in Parliament on account of popery, provided the oath prescribed shall be taken (*d*). 5. No alien, although naturalized, can be a representative peer, or vote in the election (*e*). 6. Peers may vote by proxy (no peer, however, holding more than two proxies at a time), or by a signed

list (*f*); but a peeress cannot vote. 7. If a vote be objected to, a protest is the only competent proceeding at the election meeting. 8. The Clerks of Session are bound to give effect to any resolution of the House of Lords, of which they have notice by order of the House (*g*). 9. In case of equality there is no casting vote.

(*a*) 1707, c. 8.

(*b*) 1707, c. 8.

(*c*) Resolution, Jan. 1709. Duke of Hamilton's case, 1711; and again in 1782, in 1787, and June 6. 1793. Robertson's Proceedings, 42, 154, 441. Journal of House of Lords, c. 39, 693, 726, 7, 8.

(*d*) 10 Geo. IV. c. 7. § 2 and 5.

(*e*) 12 and 13 Will. III. c. 2. 1 Geo. I. 112. c. 4.

(*f*) 1707, 8, 6, and 23.

(*g*) Resolution, April 21. 1788.

2142. 2. *Of the British Peerage.* Since the Union, peers created by the Crown are either British or Irish peers (limited in number); not English or Scottish. British peers sit in the House of Lords in their own right. Creation is by writ or patent.

2143. 1. Creation by Writ. This is effected by the Sovereign's summons to attend the House of Peers, followed by actually taking seat in the House of Lords (*a*). The dignity thus conferred moves to the peer, and his heirs descending from his body, although there be no such words in the writ (*b*).

(*a*) Blackst. 400.

(*b*) Ib. 401.

2144. 2. Creation by Patent. It would appear, that in England, down to Henry VII.'s time, parliamentary consent was required to the creation of a peer by patent: But this has been long abandoned. The patent may be personal, and is adjudged to be so, if there be no words of inheritance; as to heirs general or limited.

1b. 401.

2145. The privileges of the peerage are these:—1. They are, as a personal not a parliamentary privilege, exempt from imprisonment for a civil cause, even when Parliament is not sitting; and this is extended to peeresses by marriage, but forfeited in widowhood on marrying a commoner. 2. They are privileged to be tried by their peers in treason, and felony, and misprision; but in other crimes, like a commoner, by a

jury. 3. They give verdict on trial of peers on their honour ; but in giving evidence even in the House of Lords, as well as on ordinary occasions, they are put upon oath. 4. Scottish peers have the privilege of electing or being elected as representative peers of Scotland (see above, § 2141). 5. Scottish peers who are not elected as representatives, and hold no British peerage, are excluded from Parliament ; for they cannot, like Irish peers not elected, sit for English or Irish counties or burghs, although their eldest sons may.

Bryson, Feb. 7. 1710. Earl of Winton, Feb. 9. 1711 ; M. 10028. 9. Duke of Montrose, Dec. 19. 1711 ; Ib. Erskine, June 17. 1712 ; 4 Br. Sup. 897. Earl of Breadalbane, Feb. 11. 1736 ; 1 Cr. and St. 181. Campbell, Nov. 13. 1772 ; M. 9404. 2 and 3 Will. IV. c. 65. § 37.

2146. Although peers themselves are a privileged order, their families are in all senses commoners, except, 1. That the lady of a peer (but not the husband of a peeress) enjoys the privilege of nobility during her marriage and widowhood. (a). 2. That the eldest son of a Duke, Marquis, or Earl, enjoys by courtesy a title of nobility. And, 3. That the eldest son of a Scottish peer, by the former law, could not elect or be elected a member to the Commons House of Parliament for a Scottish county or burgh (b) ; but may now, by the act to amend the representation of the people in Scotland (c).

(a) McDonald, July 29. 1756 ; M. 10031.

(b) Lord Daer, Jan. 24. 1792 ; F. C. See Connell on Elections, 260, note.

(c) 2 and 3 Will. IV. c. 65.

2147. *Descent and Extinction of Peerages.* The title and privileges descend according to the destination of the patent ; and 1. Patents may be to the female as well as to the male line. 2. Where the patent is lost, or the original so destroyed that the line of descent cannot be read, it was in one case held, that the descent is to the heir of line, though a female ; but this is said to have been afterwards adjudged otherwise (a). 3. There is no occasion for service to vest the right (supra, § 1679). 4. There appear to have been many instances, before the Union, of resignations of titles of honour along with estates ; and charters on such resignations were held to carry the title as well as the land, provided the signature was superscribed by the King. It was also not unusual to grant honours to heirs of tailzie ; and even to give a power of altering or no-

minating heirs. But although the two former practices might be lawful, the latter was by our best lawyers held unlawful, and the nomination under the power null and void. 5. When the title to the peerage is contested, it seems that the proper tribunal is the House of Lords. It undoubtedly is a correct and legitimate proceeding for one who claims a Scottish peerage, to apply to the Queen to have his title recognised; and Her Majesty may refer it to the House of Peers as her commissioners and great council. The question of right may be raised on the election of a representative peer, in consequence of an objection to the vote of one claiming his right to elect; and it rests with the House of Lords to determine the objection (*b*). But it seems to be correctly held, that in a strict judicial inquiry as to the point of title, and where no patrimonial interest is in question, the jurisdiction as to peerage is in the House of Lords, and not in a court of law subject to appeal to the House of Lords (*c*).

Peerage is extinguished only by, 1. death; or, 2. attainder; or, 3. degradation by act of Parliament.

(*a*) Oliphant, July 11. 1633; M. 14866. Lovat, 1729; *Ib*.

(*b*) Wight, 125.

(*c*) 1707, 8, 19. Oliphant, July 11. 1633; M. 10027. Kincardine, March 28. 1707; M. 3167. Lovat, 1729; M. 14866, and July 3. 1730. See resolutions of the Lords, May 2. 1822, *Journal of House of Lords*. Campbell in the Crawford Peerage, Feb. 25. 1824; F. C.; 2 S. D. 737; House of Lords, May 26. 1836; 2 W. S. 440.

2148. II. OF THE COMMONS. The only distinctions recognised in this class of Her Majesty's subjects comprehend Members of Parliament; the clergy; and the poor.

2149. *Members of Parliament*. Members of Parliament have certain privileges. 1. They enjoy freedom from arrest for debt during forty days before the meeting of Parliament, and forty days after its prorogation (*a*). 2. Privilege of speech in Parliament (see above, § 2046). 3. Till the reformation of the postage duty, they have the privilege of franking letters; strictly speaking, a parliamentary privilege (*b*).

(*a*) 10 Geo. III. c. 50. 4 Geo. III. c. 33.

(*b*) Com. Journ. Dec. 17. 1660; Dec. 22. 1660; April 16. 1735; 4 Geo. III. c. 24. 24 Geo. III. sup. 2. c. 37.

2150. *Clergy*. The clergy, at one time a privileged and distinct body, are now in all respects, except what pertains to

their clerical functions, on the same footing with the laity. From the time of the Reformation, and full establishment of the present system of church government in Scotland, a clergyman, after due presentation or call, and act of admission by the Presbytery, and ordination as a presbyter, has full right to his benefice as minister of the parish, and is thenceforward a constituent member of the church judicatories, and subject in all spiritual matters to the jurisdiction of the church courts; but in all other respects he is, like the laity, subject to the civil magistrate, and ordinary courts of law, civil and criminal, and holds no privilege or exemption beyond other subjects:

1560. 1567, 2. 1592, 116. 1597, 231. 1606, 3. 1690, 5.

2151. *Schools.* Referring to what has already been said as to parochial schools (§ 1132–4), it is to be observed as to private schools, 1. That they are not under the superintendence of the Presbytery. 2. That, by a statute of George II. (*a*), no one can keep a private school in a parish for teaching English, Latin, Greek, or any part of literature, until the description of the school has been registered, and the master has qualified himself by taking the oaths to Government. But of schools not parochial, a distinction is admitted between public schools or academies, and schools strictly private.

The schools established in burghs by the magistrates not being parochial, are held to be public, and the schoolmaster's public officers holding a *munus publicum*; their offices being *ad vitam aut culpam* (*b*).

As to academies and schools established by royal charter (*c*), the directors have no power to elect schoolmasters to hold the office at pleasure, or to dismiss him when duly elected, without just cause shewn. But there may be special powers conferred by the charter; and among others, that of making byelaws; under which, provided they are consistent with the chartered constitution, the schoolmaster may be more in the discretionary power of the directors (*d*).

Private schools established under Settlements or Trusts, are on a different footing from public schools. The schoolmaster has no *munus publicum*; his office is at the discretionary will of those who have the management; and the deed of consti-

tution and contract of the parties give the rule of their respective rights and powers (*e*).

(*a*) 19 Geo. II. c. 39. and 21. Geo. II. c. 34. § 12.

(*b*) Magistrates of Montrose, Jan. 18. 1710; M. 13118. Hastie, June 29. 1769; M. 13132.

(*c*) Inverness Academy, July 7. 1815; 14 S. D. 714, note; 4 S. D. 65. Tain Academy, March 11. 1836; 14 S. D. 710.

(*d*) Tain Academy, Dec. 23. 1837; 16 S. D. 301.

(*e*) Mason, Jan. 23. 1836; 14 S. D. 343. Bell, June 15. 1838; 16 S. D. 1136.

2152. *Of the Poor.* The principle and policy of the Scottish poor law is to provide a compulsory fund only for the diseased and impotent poor, and in that proportion only which is found to be necessary to supply the admitted claimants, the deficiency of the church-door and other contributions; the able-bodied being left to the resources of private charity. Referring to what has already been said of the assessments imposed for the levying of the compulsory provision from the heritors and inhabitants of parishes (§ 1135; 1144), it is now to be considered who are comprehended within the description of poor entitled to relief.

2153. 1. Description of Poor entitled to Relief. Generally, under this description, are included all poor persons of seventy years, if unable to gain a livelihood by their work; and all (even foreigners) possessed of a settlement in any parish, who by infancy, mental or corporeal weakness, disability or permanent disease, are unable to earn their subsistence by labour (*a*), and who have no separate means of subsistence (*b*).

(*a*) 1661, 38. 1672, 18. 1 Ersk. 7. § 63. Dunlop on the Poor, 25. et seq. M'Cowan, May 20. 1809; F. C. Com. of Supply of Wigton, Feb. 21. 1823; 2 S. D. 236; and June 5. 1827; 5 S. D. 767. Scott, Nov. 13. 1818; F. C. Higgins, July 9. 1824; F. C.; 3 S. D. 239.

(*b*) Ettrick, Feb. 14. 1824; 2 S. D. 715. See above, § 1629. et seq. and Maidment, May 25. 1815; F. C.; as reversed, May 27. 1818.

2154. It has been doubted, whether a woman, who in her own person is not within the above description, is brought within the class of poor entitled to relief by having the burden of children? And in one case the Court has refused to interfere with the allowance given by the heritors and kirk-session, or to authorize a rate of aliment till the children attained an age able to assist the mother (*a*); in another the Court remitted for further investigation (*b*). Such a person is entitled

only to temporary aid, not permanent supply, when her father-in-law is able to support the children, and she has an action depending against him for aliment (c).

(a) Robert, Feb. 5. 1825 ; 3 S. D. 500.

(b) Watson, March 7. 1828 ; 6 S. D. 736.

(c) Watson, Feb. 28. 1829 ; 7 S. D. 495.

2155. The great difficulties of the poor laws have arisen from temporary distress by dearth, stagnation of trade, discharge of workmen from great manufactories, &c. But it seems to be law that persons who are able-bodied and fit to labour for subsistence, are not entitled to the benefit of this relief.

1 Ersk. 7. § 63. 1 Bankt. 2. § 60. Dunlop, 33. Pollock, Jan. 17. 1804 ; M. 10591. See remarks on this case, and the opinion of Sir Ilay Campbell, in Dunlop's Parochial Law, p. 344.

2156. Those who do not fall within the description of chargeable poor, are by law left to private charity and voluntary arrangements for relief.

2157. 2. Law of Parish Settlement. The poor entitled to relief, are by law chargeable only on the parish in which they have a settlement ; and this depends on residence, parentage, birth, or marriage.

2158. 1. Settlement by residence. The rule universally applicable to all persons above fourteen, and not of the class of chargeable poor, and to foreigners as well as natives, is that mere residence within a parish (a), "haunting and resorting" (b) continuously for three years, without interruption of any one year (c), and though not possessed of house, land, hiring or service, within the parish (d), will confer a right of settlement.

(a) Ross, June 8. 1824 ; 3 S. D. 81.

(b) Higgins, supra, § 2172. Inveresk, March 3. 1757 ; M. 10571 ; 5 Br. Sup. 334. Gladsmuir, June 11. 1806 ; M. Poor, App. 5. Howie, Jan. 25. 1800 ; Ib. 1. Pennicuik, March 3. 1813 ; F. C. Cockburnspath, June 9. 1809 ; F. C.

(c) Dunse, June 5. 1745 ; M. 10553. Crailing, March 7. 1767 ; M. 10573 ; 1 Hailes, 198. Hutton, Dec. 6. 1770 ; M. 10574 ; 1 Hailes, 380. Waddell, June 14. 1781 ; M. 10583. Runciman, supra (a).

(d) Dalmellington, Dec. 3. 1800 ; M. Poor, App. 2.

2159. A settlement once obtained by residence can be lost only by acquiring a new settlement in another parish (a) ; that parish in which the pauper last resided during the three years immediately previous to his application, being the parish

of his settlement. A woman's settlement by residence, however, is suspended, not discharged by her marriage (*b*).

(*a*) Brown, March 4. 1806; *M. Poor*, App. 4. Crailing, and Hutton, sup.

(*b*) Pennicuik, March 3. 1813; *F. C.*

2160. A parish in which a pauper requiring immediate aid is found, must advance an interim aliment, having relief against the parish of settlement.

Scott, Nov. 13. 1818; *F. C.* Tranent, June 29. 1737; *M.* 10552.

2161. 2. Settlement by Parentage. A child has a settlement in the settlement of the parent, without regard to the child's residence, lawful children following the father's; illegitimate the mother's.

• Inveresk, March 3. 1757; *M.* 10571; 5 Br. Sup. 334. Guthrie, July 31. 1777; 5 Br. Sup. 539; 2 Hailes, 772. Coldingham, July 28. 1779; *M.* 10582. 5 Br. Sup. 539. Howie, Jan. 25. 1800; *M. Poor*, App. 1. Rescobie, Nov. 28. 1801; *M.* 10589. Gladsmuir, June 11. 1806; *M. Poor*, App. 5. Edinburgh, June 11. 1806; *Ib.* 6.

2162. This derivative settlement is lost beyond revival by the acquisition of a settlement by residence; or by a girl's marriage.

1 Ersk. 6. § 54. 1 Bankt. 6. § 13. Arg. ex. Gladsmuir, Howie, Cockburnspath, and Inveresk, supra; Dunlop, 52.

2163. 3. Settlement by Birth. Failing other grounds of settlement, one is entitled to relief from the parish of birth.

1579, c. 74. 1672, c. 18. Dunlop, 54.

2164. 4. Settlement by Marriage. A woman by marriage acquires the settlement of the husband, retains it (her own being suspended) during the marriage, and seems, even on the dissolution of the marriage by death of the husband, to enjoy it during her widowhood.

Pennicuik, supra. § 2178. Dunlop, 49.

2165. 5. Removal of Paupers. 1. Paupers becoming chargeable, may be removed to the parish of their settlement; the expense to be borne in the first place by the parishes through which the pauper is passed, with relief against the settlement parish. 2. No one, who does not beg, can be removed from a parish in which no settlement has yet been acquired, merely from apprehension of becoming chargeable; and this by a late statute is also law in England.

1579, c. 74. Proclamation, Aug. 11. 1692. See in England, 35 Geo. III. c. 101. Dunlop, 57.

2166. 3. Of making up the Lists. It is by the law of Scotland wisely ordered, that the application of those who desire relief shall be subject to the cognizance of a tribunal, combining those who have an interest to restrain the relief within the narrowest limits, with the humane spirit of a neutral body, and subject to the control of Courts of justice. And, 1. This tribunal is composed of the ministers, elders, and heritors of the parish (*a*); the heritors being entitled to vote by proxy (*b*). This, however, is only in landward parishes; the jurisdiction in relation to the poor being with the Magistrates in royal burghs; entitled (and in use) to take the aid of the heritors and kirk-session in investigating the circumstances of claimants (*c*). 2. The meetings of the ministers, elders, and kirk-session, are ordered to be held twice a-year; and they may meet at any other time when occasion calls. 3. The right of determining in the first instance on all claims for aid is with this tribunal (*d*); and it is the peculiar duty of the kirk-session to investigate each claim, and report to the general body (*e*). 4. The name and surname of each person admitted in the list, with the age and condition, are entered in a register-book (*f*). 5. This tribunal is properly judicial and inquisitorial; but the heritors and kirk-session are not liable to paupers for relief, with a right to be indemnified against the parish. They may be complained of to the Court of Session, if they refuse a remedy; as other judicatories may for failure in the execution of their duties (*g*).

(*a*) 1672, c. 18. Proclamations, Aug. 11. 1692; Aug. 29. 1693; March 3. 1698; and statute 1695, c. 43. 1696, 29. 1698, 21. Humble, Feb. 15. 1751; M. 1055. Earl of Galloway, Feb. 22. 1810; F. C.

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

(*c*) Proclam. Aug. 11. 1692. 1672, 18.

(*d*) Paisley, Nov. 29. 1821; 1 S. D. 212. Higgins, July 9. 1824; 3 S. D. 239.

(*e*) 1672, 18.

(*f*) *Ib.* See also 1579, 74.

(*g*) Telford, March 10. 1826; 4 S. D. 545. Glassford, July 10. 1827; 5 S. D. 921.

3. OF CORPORATIONS.

2167. A corporation may be described as an ideal and legal person, intended to perpetuate the enjoyment of certain rights and privileges for the public benefit. In former times, the

erection of corporations for the advancement of religion, learning, and commerce, formed an important department of public policy. The object was to maintain a perpetual succession, and carry on to maturity, from generation to generation, institutions liable to fall into decay on the death of individuals. For this purpose, many persons were united into one society by the Royal authority, with particular privileges—a power to hold property; to make by-laws for regulating their community; a course of succession; and on many occasions a monopoly in trade, in manufactures, or in teaching. Such are the royal burghs of Scotland; the guildry and corporations of which they consist; and universities. With the same view of perpetuating the interest, and continuing the right from generation to generation, another kind of corporation is known in law, called by English lawyers a corporation sole; of which the highest example is the sovereign, and almost the only other example in Scotland, the minister of a parish.

2168. There can be no corporation in Scotland without a charter from the Crown, express or implied. Many implied grants are to be found in burghs whose charters of erection are not now extant, but are by the law supposed to have perished. Express grants of corporate privileges, are either by the Royal authority, with consent of Parliament; or by Royal charter, without legislative interposition. 1. An Act of Parliament is necessary wherever the corporation is invested with a monopoly; for the power of granting monopolies was taken from the Crown in James VI.'s time (*a*). 2. The Crown has the power of creating a corporation, and this either directly or indirectly. Directly by grant of corporation privileges: Indirectly by giving a delegation of authority to make inferior corporations, as in a burgh. By a recent statute, it may in such charters be provided, that the members of the corporation shall be individually liable in their persons and property, for debts, contracts, and engagements of such corporation, to such extent, and subject to such regulations and restrictions, as may be thought fit and proper, and as shall be declared and limited in and by such charter (*b*).

(*a*) 21 James I. c. 3. 1641, 76.

(*b*) 6 Geo. IV. c. 91.

2169. The incidents to a corporation are these:—1. As a

legal person the corporation has *persona standi in judicio*. It may sue or be sued, grant and receive, by its corporate name. 2. It has a power of electing officers to represent the community. 3. It has a power to elect new members, unless by the charter, or by any by-law made under the powers which it confers, this right be limited or regulated. 4. It may purchase and hold lands, and be infeft by its corporate name and title. 5. It has perpetual succession; and hence arise, in relation to the feudal superior when lands are purchased, the difficulties already explained (§ 722). 6. It has power, for the better government of the corporation, to make by-laws or private statutes binding upon the corporation and its members, unless contrary to the laws of the land. 7. The act of the majority is the act of the whole, unless it shall be otherwise appointed in a charter, or ruled by a by-law. 8. The King is by law visitor or head of all Corporations. But the jurisdiction which is vested in the Supreme Court is not of a visitatorial nature, nor in any degree discretionary, but strictly judicial.

2170. A corporation may be extinguished in one or other of the following modes:—1. By expiration of time, if of limited duration. 2. By Act of Parliament, when the powers or privileges of a corporation are deemed fit to be recalled. 3. By inability to fulfil the purposes of its institution; as by insolvency of a chartered trading company. 4. By forfeiture of its privileges, by abuse of its powers, and breach of the implied condition of its existence.

2171. The effect of a dissolution of a corporation is, 1. to entitle the Crown, or other donor of lands to the body corporate, to resume them; 2. to entitle the creditors of the corporation to insist for sale and distribution of its property in payment of its debts; but, 3. not to expose the members to personal responsibility beyond the amount of this stock.

2172. The corporations most deserving of attention are royal burghs and city corporations, burghs of regality, universities, and chartered companies.

1. *Of the Scottish Burghs.*

2173. The early history of cities and towns forms a very interesting feature in the progress of Europe from barbarism to civilization. That of the cities and towns of Scotland is very

obscure. One class of burghs, belonging to the Royalty (as Edinburgh, Stirling, Dumbarton, &c.), seems to have grown up in the neighbourhood of the king's castles; acquiring privileges and immunities in return for subsidies and benevolences, contributed from the growing wealth of the inhabitants: Another class of burghs, analogous to these, grew up within the Regality around the castles of nobles (as Dunbar, Thirlstane, Doune, &c.), with similar privileges for like aids. The former are the ROYAL BURGHS, the latter are BURGHS of REGALITY and of BARONY. See above, § 830.

By recent statutes, a new constitution has been provided for royal burghs, and also for those burghs not being royal burghs, which have a right of sending, or contributing to send, a Member to Parliament (see below, § 2176 and 2190). And provision has also been made for enabling all burghs in Scotland, whether royal burghs or burghs of regality, or barony, to establish a general system of police.

3 and 4 Will. IV. c. 76 and 77.

2174. 1. ROYAL BURGHS. The royal burghs became important as bearing a regular share of the public burdens. Called only occasionally at first to Conventions for the purpose of imposing taxes, they were at last recognised as one of the estates of the realm.

The royal burghs were sixty-six in number.

2175. 1. *Convention of Burghs*. The royal burghs having a common interest in matters of trade, were accustomed to meet occasionally at Edinburgh. This Convention appears to have been at first a Court under the direction of the Chamberlain, called the *Court of the Four Burghs*; that officer being assisted by delegates from Edinburgh, Stirling, Berwick, and Roxburgh. In the 15th century delegates were directed to come to the meeting from all the burghs, to treat of their common interests. The Chamberlain seems to have ceased to hold those Courts, but the delegates formed a convention which gradually assumed a regular and systematic constitution. The records of this assembly commence in the 16th century, and annually, for a long series of years, the convention has regularly met at Edinburgh by delegates from every royal burgh,

with two from Edinburgh. The Convention has been held entitled to regulate the setts of the several burghs.

1487, 111.

2176. 2. *Constitution of Royal Burghs.* The royal burghs derive their existence and constitution from royal charter,—either express ; or which is presumed to have existed, and by the accidents of war and time to have perished. The right of electing the Common Councils and Magistrates was in ancient times in large classes of the inhabitants, merchants, and craftsmen. By statute in the 15th century (*a*), a constitution was established in the royal burghs ; but by deviations in the several burghs, and gradual abrogation, the system of election lost its former free and popular form, and at last a close and exclusive plan of power and rotatory election was established in the persons of the leading members of corporations. This close system has, by a statute following up the spirit of the acts for reforming the representation of the people in Parliament, been abolished, and the ancient free constitution substantially restored (*b*).

By this Act, 1. The election of the town-council of every royal burgh, with nine exceptions,* is placed in such owners and occupants of premises within the royalty of the burgh as shall be qualified to vote in the election of a member of Parliament for such burgh, by the Act of 2 and 3 William IV. c. 65, and who shall have resided six months previous to 30th June preceding the election, within the royalty, or within seven miles thereof. 2. Provision is made for enrolling persons entitled to vote in such burghs as were not at the date of the Act entitled to send members to Parliament, and for deciding on their claims, and keeping lists of their names. 3. Lists of persons entitled to vote in both these classes of burghs are to be kept by the town-clerk. 4. The burghs of Edinburgh, Glasgow, Aberdeen, Dundee, Perth, Dunfermline, Dumfries, and Inverness, are to be divided into districts and wards by commissioners, to be appointed (and who have accordingly made such division) for the purpose of choosing a certain num-

* Dornoch, New Galloway, Culross, Lochmaben, Bervie, Wester Anstruther, Kilrenny, Kinghorn, and Kintore.

ber of councillors for each ward, so as to make up the whole number required. 5. Each royal burgh, with the exception of the nine already mentioned, on the first Tuesday of November, choose by open poll, in one day, from those qualified to elect, such a number of councillors as by the sett or constitution of each burgh constitutes the common council of the burgh, or the smallest number authorized by the sett. 6. The polling lists, sealed up and transmitted to the Provost or head magistrate, are by him publicly opened, summed up, and the result declared. 7. In royal burghs not enumerated in any of the lists above given, the election of councillors is by signed lists. 8. In the small burghs enumerated above, the election is as hitherto in use. 9. No one is entitled to be a councillor unless he shall be a burghess of the burgh; to which he shall be admitted on payment of the ordinary fees; no merely honorary burghess being admissible. 10. Each succeeding year a new election of a third of the council takes place, a third of the old council going out of office; those who had the smallest number of votes at the election going out first, but being capable of re-election. 11. On the third day after the election of the council, the councillors elect from their number the Provost and Bailies, and other officers: the Provost continuing for three years in his office. 12. While the rights of the Guildry, Trades, &c. to elect their own Deacons, Dean of Guild, &c. are preserved, these are in most of the burghs no longer recognised as official and constituent members of the town-council; and the functions of those officers are now performed by a member of the council, elected by the majority of councillors: But the Dean of Guild and Deacon Convener of Trades in Edinburgh and Glasgow, and the Deans of Guild in Aberdeen, Dundee, and Perth, elected as formerly, are continued as constituent members of the council, to perform all the functions of those offices. 13. Annually, on the 15th October, a state of the affairs, funds, properties, and revenues, and all transactions regarding them, is ordered to be made up and lodged with the town-clerk; open to the inspection of the electors; no magistrates or councillors being, as such, personally responsible for the debts of the burgh, or acts of his predecessors, otherwise than as a burghess or inhabitant.

(a) 1424, 39. 1469, 30.

(b) 3 and 4 William IV. c. 76.

2177. The burgh acting according to its reformed sett or constitution, has the power of making by-laws (not inconsistent with the laws of the land) for the good government of the burgh; the management of its funds; and the regulation of its corporations.

2178. The burgesses and guildbrethren have within the limits of the burgh a monopoly of trade and manufacture unless on market days, when the sale is open to dealers and manufacturers in the country, or unfreemen in town, to sell their wares.

2179. The burgh bears a share of the public taxes allocated among the burghs by the Convention of Royal Burghs, and levied by stenting and assessment. See § 1130.

2180. The expense of general and local prisons is to be borne by burghs assessed according to the rules laid down in the late statute.

2 and 3 Vict. c. 42. § 46, et seq.

2181. The burgh as a corporation holds its property and privileges without sasine, of the Crown, for the services of watching and warding. The several holders of burgage property are also Crown vassals, entering with the Magistrates as commissioners of the Crown. See above, § 839, et seq.

2182. To remedy disorders in the revenues of royal burghs, it was enacted—that certified accounts should be annually deposited with the town-clerk, to remain for thirty days open to inspection and complaint in writing to the Exchequer: the power of feuing was regulated and checked; and the power of contracting debt was limited (a). The annual account is now ordered on a better footing, by the recent act for reforming the constitution of burghs. See above, § 2176 (b).

(a) 3 Geo. IV. c. 91. See Reports of House of Commons on the state of the Scottish Burghs.

(b) 3 and 4 Will. IV. c. 76. § 32.

2183. 3. CORPORATIONS IN BURGHS. The burgh, as a corporation for the advancement of trade and manufactures, consists of several inferior corporations. And the rights of those

corporations are preserved by the act for reforming the constitution of royal burghs.

3 and 4 Will. IV. c. 76. § 21.

2184. 1. *Merchant Guild*. The great mercantile corporation is recognised in our old laws and deeds, under the name of the Guild. By an Act in the 16th century, the jurisdiction of the Dean of Guild is declared in all causes between merchant and merchant, and merchant and mariner; but this jurisdiction has gone into oblivion. Guildbrethren must be burgesses; and the privilege of the guild is that of trade within the burgh. Under this privilege, 1. None but a guildbrother can import for sale in the burgh; except on market days. 2. Inhabitants may buy beyond the burgh, and bring the commodities so bought for consumption within it. 3. Craftsmen may import the rude materials of their manufactures to be worked up for sale. 4. Craftsmen and inhabitants may export the produce of their labour; and, 5. The members of guild may buy from unfree craftsmen and sell within the burgh.

1593, 184. 1690, 12. 1693, 31. 1698, 19. Buchan, Jan. 10. 1695; 4 Br. Sup. 239. Stirling, Jan. 8. 1697; M. 1916. Edinburgh, March 2. 1802; M. *Burgh Royal*, App. 10.

2185. 2. *Crafts*. These are manufacturing corporations, erected either, 1. by Crown-charter; or, 2. by a seal of cause or grant from the Magistrates, as delegates from the Crown; or, 3. by prescription, implying a charter now supposed to be lost.

1555, 52. M'Kenzie, Obs. 6, Parl. Mary, c. 52.

2186. The privilege of the crafts is a monopoly of the combined right of manufacture and sale within burgh. And, 1. Inhabitants may manufacture for their own consumption; or for exportation out of the burgh; or they may sell on market days. 2. They may import the manufactures of the craft bought out of burgh for their own use; and, 3. The guild may buy, import, and sell work done out of the burgh. It is a fraud on the privileges to combine collusively to defeat the monopoly; called "packing and peeling."

Polmaise, July 5. 1671; M. 1907. Brown, Feb. 20. 1707; 4 Brown's Sup. 656. Culross, Jan. 13. 1725; M. 1924. Merchant Company of Edinburgh, Jan. 26. 1737; Elchies, *Burgh Royal*, 8. Hog, Jan. 26. 1743; M. 1926.

Dunfermline Guildry, Nov. 24. 1743; Elchies, *Priv.* 5. Coopers of Perth, July 8. 1752; M. 1938. Boyle, March 11. 1757; M. 1857. Fotheringham, Dec. 13. 1776; M. 1861; 2 Hailes, 732. Tailors of Edinburgh, Jan. 31. 1824; F. C.; 2 S. D. 660. Wrights of Portsburgh, Jan. 22. 1818; F. C. Incorporation of Masons, &c. Feb. 16. 1813; F. C. Paterson, Dec. 6. 1810; F. C. Wrights of Glasgow, Feb. 24. 1809; F. C. Bakers of Perth, July 5. 1808; M. *Burgh Royal*, App. 22. Bakers of Haddington, June 10. 1808; Hammermen of Canongate, Dec. 11. 1807. Goldsmiths of Edinburgh, March 2. 1802; M. *Burgh Royal*, 10. Bakers of Edinburgh, Dec. 4. 1783; M. 1976; 2 Hailes, 932. Wrights of Haddington, 1771; M. 1966. Wrights of Glasgow, March 8. 1765; M. 1961. Coopers of Perth, July 8. 1752; M. 1938. Cordiners of Glasgow, Dec. 3. 1756; M. 1948. Hammermen of Glasgow, Feb. 18. 1757; M. 1950. White, Nov. 23. 1762; M. 1959. Christie, June 12. 1829; 7 S. D. 759. Simpson, Jan. 9. 1830; 8 S. D. 903.

2187. The freedom of those corporations may be acquired either by—Apprenticeship, or by services as a soldier or sailor.

2188. 1. *Apprenticeship*. In England, by a general law, an apprentice serves during seven years for a universal privilege over all England. In Scotland an apprentice gains only the freedom of his corporation within the burgh of which it forms an integral part. The obligation of the apprentice is to be faithful, punctual, and obedient; that of the master is to teach his calling to the apprentice, and to be reasonable in his requisitions of service and obedience within the fair line of the contract and usage of the trade.

2189. 2. *King's Freemen*. The freedom acquired by military or naval service extends over the whole country (*a*). By statutes passed on the termination of successive wars, officers, mariners, soldiers, marines, and militiamen called out into actual service, are, after a certain period of service (and after their death their wives and children) allowed to exercise such trade as they are apt and able for in any part of Great Britain or Ireland (*b*). But this does not entitle one to exercise a plurality of trades (*c*). And the privilege is not communicable; so that a soldier's daughter marrying, does not confer it on her husband (*d*).

(*a*) Portsburgh, Jan. 17. 1809; F. C. Mary's Chapel, Jan. 22. 1814.

(*b*) 3 Geo. III. c. 8. 24 Geo. III. c. 6. 37 Geo. III. 42 Geo. III. c. 69. 52 Geo. III. c. 68. § 122, 179. 54 Geo. III. c. 19. 56 Geo. III. c. 67.

(*c*) Muir, Feb. 19. 1793; M. 2004.

(*d*) Tailors of Glasgow, March 25. 1777; M. 2014; Hailes, 732. Shoemakers of Perth, Feb. 24. 1790; M. 2014; 2 Hailes, 1079. Dundee Fleshers, Feb. 24. 1808; M. *Burgh Royal*, App. 20. Kirkwood, Jan. 19. 1811; F. C. McEwan, June 27. 1816; F. C. Fleshers of Haddington, Jan. 26. 1819; F. C. Moodie, Dec. 17. 1822; F. C. Coopers of Glasgow, Feb. 23. 1822; F. C. Tailors of Glasgow, June 13. 1828; 6 S. D. 973.

2. *Burghs newly Constituted, not being Royal Burghs.*

2190. Certain burghs, not being Royal Burghs, have been recently admitted to the privilege of sending, or contributing to send, members to Parliament, and a new constitution has been conferred on them by an act analogous to that made for regulating the setts of Royal Burghs (a). These are, Paisley, Greenock, Leith, Kilmarnock, Falkirk, Hamilton, Peterhead, Musselburgh, Airdrie, Port Glasgow, Cromarty, Portobello, and Oban. For each of these burghs a certain number of councillors is appointed to be chosen (for some sixteen, for others twelve, for others nine, and for Oban six): The election to be with the persons qualified to vote for a Member of Parliament: To be concluded in Paisley, Greenock, Leith, and Kilmarnock, by open poll in one day, the polling books to be summed up, and the result declared by the Provost: In Falkirk, Hamilton, Musselburgh, Airdrie, Port Glasgow, Peterhead, Portobello, Cromarty, and Oban, to be by signed lists: A third of the Council to go out and others to be elected every year; and the Provost and Magistrates to be chosen by the Council from their own number.

(a) 3 and 4 Will. IV. c. 77. 4 and 5 Will. IV. c. 86 and 87.

3. *Burghs of Regality and Barony.*

2191. Certain burghs deriving their privileges as corporations from royal charters, hold of subjects, and are governed by magistrates elected by the lord of regality or baron, or by the inhabitants of the town. Their only privilege is that of trade and manufacture within the burgh (a). But sometimes a power is granted to the burgh to erect corporations in crafts, analogous to royal burghs (b). The general law of incorporations applies to those burghs. They have power to administer their common good; to elect officers; to make by-laws; and the burgesses are entitled to challenge the alienation of the burgh's property (c).

(a) Edinburgh, Feb. 4. 1630; M. 1823; Kelso, Feb. 2. 1739; M. 1829; and Jan. 3. 1755; M. 1830, 10737.

(b) Fleshers of Canongate, Nov. 22. 1677; M. 1824. Kelso, ut supra.

(c) Wilson, Feb. 1775; 5 Br. Sup. 629. Stewart, Jan. 22. 1822; F. C.

2192. As to jurisdiction, there is a distinction between such

burghs as had a local magistracy depending on the superior, and those held independent of him: the former being abolished with other heritable jurisdictions, the latter preserved (*a*). And, by a recent statute, means are provided for establishing in all burghs of regality and barony, as well as in royal burghs, a general system of Police (*b*).

(*a*) 20 Geo. IV. c. 43. Walkinshaw, May 27. 1794; Bell's Cases, 15.

(*b*) 3 and 4 Will. IV. c. 46.

Of Universities.

2193. Universities are corporations; and whether they are directly corporations under the Crown, or, like the corporations of a burgh, subordinate to the magistrates or founder, the law of corporations is generally applicable to them.

College of Aberdeen, July 13. 1669; M. 2533. University of Glasgow, Dec. 10. 1675; M. 2535. College of Aberdeen, Jan. 31. 1678; M. 2536. Halden, July 22. 1707; M. 2387. Burnet, Dec. 21. 1711; M. 2389. Gordon, Feb. 19. 1712; M. 2397. Leechman, Nov. 22. 1770; M. College, App. 1. Arnot, Jan. 21. 1807; Ib. 3; remitted by House of Lords. Muirhead, May 16. 1869; F. C. Magistrates of Edinburgh, Jan. 15. 1829; F. C.; 7 S. D. 255.

ELECTIVE FRANCHISE.

2194. An extensive department of law has been rendered obsolete by the passing of the acts for "amending the representation of the people in Scotland" (*a*). By those acts there are fifty-three representatives for Scotland to the House of Commons, instead of forty-five. Of these, thirty are the representatives of counties, several or conjoined; and twenty-three for burghs and towns: And corresponding with this arrangement, there is a combination of certain counties with each other, or with parts of other counties; and a combination of certain burghs and towns, together with a description of the boundaries of the several towns (*b*).

(*a*) 2 and 3 Will. IV. c. 65. 4 and 5 Will. IV. c. 88. and 6 and 7 Will. IV. c. 78.

(*b*) 2 and 3 Will. IV. c. 65. § 1-4, and Schedules B. E. M.

2195. I. REPRESENTATION OF COUNTIES. The representation is regulated, 1. as to those entitled to vote in counties; 2. as to the mode of registration; 3. as to the mode of election; and, 4. as to the return to the writ.

2196. 1. *Persons entitled to vote for Counties.* Persons en-

titled to vote require, 1. personal qualification ; and, 2. qualification by property.

2197. 1. No person subject to legal incapacity can be registered to vote ; as Scottish Peers, minors, lunatics, idiots, women, aliens ; nor sheriffs, sheriff-substitutes, sheriff-clerks, and town-clerk, in their respective counties. A disqualification which existed under the former law, is now removed ; the eldest son of a Scottish Peer may be registered or elected.

2 and 3 Will. IV. c. 65. § 7. 37.

2198. 2. In respect of property, if not disqualified, the following persons may be registered and vote, viz. 1. Those who, on 17th July 1832, were lawfully on the roll of freeholders of any shire in Scotland ; or entitled so to be ; or who, previous to March 1831, had become owners or superiors of lands affording the qualification for being so enrolled, so long as they retain such qualification : And under this rule there is an alternative vote to a liferenter and fiar so qualified (*a*). 2. Every person not subject to legal incapacity who, when the Sheriff proceeds to consider his claim of registration, shall have been, for not less than six calendar months previous to the last day of July in that year, the owner (though not infett) of any lands, houses, feu-duties, or other heritable subjects (except debts heritably secured), within the shire, of the yearly value of L.10, actually yielding, or capable of yielding that value to the claimant, after deducting feu-duty, ground-annual, or other consideration, which he is bound to pay or account for, as a condition of his right ; provided he is in actual possession of the subject, or in receipt of the profits and issues thereof, to the extent of L.10, although payable at longer intervals than once a-year. 3. Every person to whom by inheritance, marriage, marriage-settlement, or mortis causa disposition, or by appointment to place or office, such property shall come within the six months before the last day of July, is entitled, at the first registration after such acquisition, to be enrolled. 4. Each joint proprietor is entitled to vote if his interest is worth L.10 a-year. 5. Liferenters may be registered and vote, not fiars. 6. Husbands are entitled to vote on the property of their wives, or on their own possession under Courtesy. 7. Tenants in lands, houses, or other heritable subjects, are entitled to be registered, if, when the Sheriff proceeds to con-

sider their claim, they shall have held, for not less than twelve months previous to the last day of July, on a fifty-seven years' lease, missive, or other written title, exclusive of breaks, or on a liferent lease, subjects in which his interest is of the clear yearly value of L.10, after payment of rent and other consideration ; or on a lease of not less than nineteen years, subjects of clear yearly value to the tenant, after payment of rent, of L.50 a-year ; or where the rent is L.50, and the tenant in the personal occupancy ; or where the tenant has paid a grassum of not less than L.300 ; the value of grain-rents to be estimated by the average fiar prices of the county for the three preceding years, or the average market prices for three years, where payable in other produce. 8. Tenants succeeding to a lease of the above description, within the six months, are entitled to registration. But, 9. No sub-tenant or assignee to any fifty-seven or nineteen years' lease is entitled to be registered, unless in actual occupation of the premises (*b*).

(*a*) See 5 and 6 Will. IV. c. 78. § 10.

(*b*) 2 and 3 Will. IV. c. 65. § 7, 8, 9.

2199. 2. *Mode of Registration.* No one can vote unless he be registered ; and this registration takes place,—1. In the case of those on the old roll of freeholders, by transference of their names by the Sheriff-clerk to his list or register of voters on the new constituency, without requiring any claim to be made (*a*). 2. Others must, on or before 20th July, give in a claim, subscribed by himself or his agent, to the schoolmaster of that parish of the county in which the property on which he claims is situated, according to a form prescribed by the act, and to be furnished for sixpence each by the schoolmaster (*b*). 3. The time of lodging the claim is filled up by the schoolmaster on his receiving it. 4. Each schoolmaster makes up, immediately after 20th July, an alphabetical list of names, designations, and places of abode, of claimants ; and before 24th July he is to affix a copy of it to the church-door of the parish (under certain exceptions), with a notice annexed of the time at which the Sheriff is to commence the examination of claims, and a requisition on those intending to object, to lodge a note of objections on or before 5th August. 5. Any one registered, or claiming to be registered, is entitled to object ; and all persons, whether registered or claimants, may be objected to. 6. The objections are to be in a certain form, pre-

scribed in schedule H ; and the objector is bound to give notice to the person to whom he objects by sending a copy of the objection. 7. On or before 8th August, the schoolmaster delivers over to the Sheriff-clerk the whole claims and objections, with a duplicate of the list of claimants affixed to the church-door. 8. On or before the 12th August, these are all laid before the Sheriff ; and he appoints open Courts to be held between 12th August and 15th September, for deciding on claims. 9. The Sheriff first settles the claims to which no objections are made, and which are supported by written titles : Then he takes those not supported by a written title, examining the evidence summarily. Next he proceeds to examine objections (on being satisfied that due notice has been given), according to the order of the dates of the claims. He is to allow no written discussion ; and is merely to *admit* or *reject* as the case may be. 10. The Sheriff's judgment is subject to appeal (on notice lodged in writing with the Sheriff-clerk) to a Court of the Sheriffs liable to attend at the circuit of the district, or three of them ; the Court of Appeal to be held between 15th and 25th September, without relation to the holding of the Circuit Court, and the appeals to be determined before 20th October. This judgment is final and conclusive ; but has no effect on any election that may have taken place before it has been pronounced, unless in so far as a committee of the House of Commons shall give effect to it. 11. The lists, as settled by those judgments, compose the register, which, remaining in the custody of the Sheriff-clerk, and open to public inspection for ten days after 20th June each year, without fee, furnishes the rule for election ; and the Sheriff-clerk is bound at any time to furnish a signed copy of any entry to any one requiring it, on payment of sixpence (c).

(a) 2 and 3 Will. IV. c. 65. § 20.

(b) *Ib.* § 13. schedule F.

(c) *Ib.* § 13, 14, 17, 19, 20, 23—25, 26. 4 and 5 Will. IV. c. 88.

2200. 3. *Mode of Election.* 1. After proclamation of the writ at the market cross of the county town, if there be only one candidate, the Sheriff, on a show of hands, proclaims the candidate duly elected. If there be more than one, and a poll is demanded, the Sheriff orders it to proceed within two days. 2. Certain polling places are appointed by the Sheriff, where, under the superintendence of the Sheriff, or substitutes named

by him, and proper clerks, every person whose name is on the registration list, being properly identified on oath if necessary, gives his vote ; or any one rejected may vote under protest. 3. The poll shall not be kept open for more than two days, from nine till four the first day, and from eight till four the second. 4. The polling books being sealed up, the seals are, on the next day but one after closing the poll, to be broken by the Sheriff, who is to make the return to the writ, the numbers cast up, and the state of the poll openly declared, and proclamation made of the member chosen. 5. The return is made to the Clerk of the Crown in England under the hand and seal of the Sheriff,—a double return being made in case of equality.

2 and 3 Will. IV. c. 65. § 26, 27, 28, 29, 32, 33.

2201. II. REPRESENTATION OF BURGHS. The great principles are the same on which this election is regulated ; but necessarily with certain differences in detail.

2202. 1. *Persons entitled to Vote.* The election is no longer in town-councils of burghs, but in individual voters, and the qualification consists of the following particulars :—1. That the voter not being subject to legal incapacity, not having been in the receipt of parochial relief within twelve calendar months, and not being town-clerk or depute town-clerk of the burgh, shall, when the Sheriff proceeds to consider his claim of registration, have been for not less than twelve calendar months previous to the last day of July, in the occupancy as proprietor, tenant, or liferenter, of any house, warehouse, counting-house, shop, or other building within the limits of the burgh or town, which separately is of the value of L.10 yearly, or which, taken jointly with any other house, shop, or other building, is of that value ; or shall, previous to the 31st July, be the true owner of such premises, though not occupant of premises of the necessary value ; or the husband of the owner. 2. That on or before the 20th day of July he shall have paid all assessed taxes, payable in respect of such premises, previous to 6th April then preceding. 3. That he shall have resided for six calendar months previous to the last day of July, within the city, burgh, or town, or within seven miles of it. 4. That it shall be enough for the title of occupancy, if the voter shall have been, during the twelve months requisite, in possession

of different premises in succession, provided he have paid the assessed taxes for them all. 5. That where the premises are of the yearly value of L.20 or more, joint-occupants, provided their share shall be of the yearly value of L.10, are entitled to vote.

2 and 3 Will. IV. c. 65. § 11, 12.

2203. 2. *Mode of Registration.* 1. The claim to be registered, subscribed by the claimant himself, or his agent, must (with a fee of two shillings) be given in before the 25th July to the town-clerk. 2. It is necessary to prove ownership by written evidence, but not necessary that the owner should be infest: Occupancy and value may be proved prout de jure. 3. Evidence of the payment of assessed taxes must be produced. 4. If the voter once registered have changed his occupancy, or qualification, it seems necessary, before the 20th July, to make a new claim. 5. The mode of claiming and filling up the dates; of lodging objections; and of deciding on claims, is the same as in the case of counties (supra, § 2199). 6. The registration lists are to be kept by the town-clerk; and where there are burghs combined, the several lists are to be sent to the town-clerk of the returning burgh, and to be reduced into one list for the whole district, to be kept in the returning burgh: And those lists are to be kept, inspected, and extracts given, as in the case of counties.

2 and 3 Will. IV. c. 65. § 15, 16, 21.

2204. 3. *Mode of Election.* The mode of election is, with the necessary differences, the same in cities, burghs, and towns, as in counties. The Sheriff, within two days after receiving the writ for cities, towns, or burghs, is to announce a day of election, not less than four, nor more than ten, after receipt of the writ: He is to arrange the polling places, so that not more than 300 shall be apportioned to each, or even to a greater extent, the candidate paying the expense: And the poll for cities is to be kept open for one day only, with power to adjourn it, if interrupted by riot or violence.

5 and 6 Will. IV. c. 78.