

PART III.

LAW OF MARRIAGE AND SUCCESSION.

I.

RIGHTS ARISING FROM MARRIAGE, AND THE CONSTITUTION OF A FAMILY.

1. CONSTITUTION OF MARRIAGE.

1 Stair, 4. 1 Ersk. 6. 1 Black. Com. 15. Pothier, Tr. de Marriage, v. iii. p. 129. 2 Kent, Com. 75. Story, Con. of Laws, 100.

1506. The contract of marriage is the most important known in law. It is constituted by consent of the parties; but its effects both upon them and upon others are beyond their control, established and regulated by the public law. It binds the parties beyond recall; confers on their children the status and the right of legitimacy; establishes the relations of consanguinity and affinity; and is the direct fountain of the laws of succession. It produces its effects, and is accompanied by the duties and rights which attach to married persons, in whatever part of the world it may have been entered into, or whithersoever the parties may have wandered from their original domicile: Those rights and duties depending not so much on the *lex loci contractus*, as on the laws and regulations of the country in which the married pair are domiciled.

By the law of Scotland marriage is a consensual contract; requiring no particular solemnity, nor even written evidence, but deliberate and unconditional consent alone. There is no restraint on account of nonage, but that which proceeds from incapacity of consent in persons under puberty: There is no absolute necessity for publication, or solemnity, or celebration, or particular place or time of celebration. There is no necessity for the consent of parents or of guardians.

2 Craig, 18. § 18, et seq. 1 Stair, 4. § 6. 1 M'Kenzie, 6. 1 Ersk. Pr. 6. § 2, et seq. 1 Ersk. Inst. 6. § 2, et seq.

1507. In England, till 1757, the contract of marriage seems to have been as little encumbered with forms as in Scotland. But by the Marriage Act of that year it was required, that the consent of parents or guardians should be given where the parties were under twenty-one years of age; and that there should be publication by bans in a lawful chapel for three Sundays, and by celebration openly in the parish church, or in a chapel wherein marriage had usually been celebrated: And these requisites were imposed under the pain of nullity of the marriage (*a*). By later statutes, some relaxation is made in these regulations; and in marriage accomplished by fraud, the guilty party is deprived of the benefit of the other's property (*b*).

(*a*) 26 Geo. II. c. 33.

(*b*) 4 Geo. IV. c. 76. and 5 Geo. IV. c. 32. 6 and 7 Will. IV. c. 85 and 86. 1 Victoria, c. 22.

1508. Marriage is regular or irregular. In both kinds the essential requisite of the contract is unconditional consent *de presenti* to marriage (*a*). So, 1. If the consent be invalidated by error, or force and fear, or incapacity from extreme intoxication (§ 10, *et seq.*) there is no marriage (*b*). 2. A promise of marriage, not being *de presenti*, is not of itself marriage; nor is it even a ground of action for declaring marriage, or compelling implement of the engagement (*c*): But it may be a good ground of action for damages and solatium (*d*); such actions being now declared proper jury cases (*e*): And if followed by consummation it will make marriage. (See § 1915.)

NOTE.—See below for questions of Foreign Relations, § 1537.

(*a*) 1 Ersk. 6. § 11. See below, § 1514.

(*b*) 1 Stair, 4. § 5. 1 Ersk. 6. § 23. Thomson, June 27. 1767; M. 13915. Johnson, Nov. 15. 1823; F. C.; 2 S. D. 495.

(*c*) 1 Stair and Ersk. *ut supra*.

(*d*) Graham, Jan. 2. 1685; M. 8472. Hog, May 27. 1812; F. C. See § 25.

(*e*) 6 Geo. IV. c. 126. § 28. 1 Will. IV. c. 69. § 2.

1. *Regular Marriage.*

1509. A *regular* marriage, in Scotland, requires, 1. the publication of bans; and, 2. that the ceremony shall be performed by a clergyman, before at least two credible witnesses.

1510. 1. BANS are proclaimed on three several Sundays in

the parish church of the parties, while the people are met for divine service. They announce a purpose of marriage between the parties, proclaimed by their names and designations or descriptions; requiring all concerned to state any objection which they may know to the union. The only express regulations relating to bans are ecclesiastical, and have been recognised by the Legislature no further than by general statutory prohibitions against "clandestine and unordered" marriages, under pecuniary penalties (*a*). A certificate of the session-clerk is received as evidence of proclamation of bans (*b*).

(*a*) 1 Ersk. 6. § 10. Fergusson's Consistorial Law, 108. Consult further for the history and law of bans the 51st chapter of the 4th Lateran Council in 1215. *Sacro Sanct. Concilia*, tom. 9. p. 202. Statutes of Honorius in 1217, c. 56; *Ib.* tom. 11. p. 262. Gregory IX. in 1237; *Ib.* 550, 578, c. 13. Council of Trent, 1563; *Ib.* tom. 14. p. 876. Scottish Prov. Councils at Perth, 1269, c. 65. 1 Book of Discipline, General Assembly, 1638, art. 21. Directory for Worship, 1644. Act of Assembly, 1690, c. 5. 1711, c. 5. 1784, c. 8. Statute, 1661, c. 34. 7 Acta Parl. 231. 1698, c. 6. 10 Acta Parl. 149, 10. Anne, c. 7.

(*b*) 1 Ersk. 6. § 10.

1511. 2. PRESENCE OF A CLERGYMAN. It is not required to a regular marriage in *facie ecclesiæ*, that the ceremony shall be performed in church; but it must be performed by a clergyman. The want of his presence does not indeed affect the validity of the marriage (*a*); but it exposes the parties and celebrator to penalties (*b*). The clergyman must be either, 1. of the Kirk of Scotland (*c*); or, 2. of the Episcopal communion, duly qualified by the taking of the oaths of allegiance and abjuration (*d*).

(*a*) 1 Ersk. § 11. Fergusson, *Consist. Law*, 111. Canons of Perth, art. 65. See Carruthers, Dec. 11. 1705; M. 2252. Crawford's Trustees, Jan. 20. 1802; M. 12698.

(*b*) 1661, c. 34. 1672, c. 9. 1690, c. 27. 1698, c. 6.

(*c*) 1661, c. 34. 1695, c. 12. See 2 Hume's *Crim. Law*, 327. Ivory's *Ersk.* p. 125, n. 143.

(*d*) 10 Anne, 7.

1512. 3. WITNESSES. Two witnesses legally capable of giving testimony must be present, who know the parties.

1513. 4. CEREMONY. No special form of words is necessary. But there is generally, 1. a solemn admonition by the clergyman to the parties; 2. the question of mutual acceptance solemnly put, and an answer required; as in the Roman *stipulatio*; and, 3. a declaration made by the clergyman that the parties are married.

2. *Irregular or Clandestine Marriage.*

1514. Clandestine marriage is as effectual in law as the most regular ; but the parties, celebrator, and witnesses, are liable to penalties. Those penalties are seldom exacted ; though occasionally they are enforced against trafficking priests (*a*). Marriages are deemed clandestine, which are celebrated by a clergyman not of the established church ; or by a layman assuming the character of a clergyman ; or without bans ; or before a magistrate ; or before witnesses only ; or by written acknowledgment, or confession of the parties. Present unconditional consent in any of those circumstances is Marriage ; ipsum matrimonium (*b*) ; but the expression of present consent in a written contract of marriage, being accompanied by an obligation to solemnize the marriage, is not marriage, but only sponsalia de futuro (*c*). The most explicit promise or declaration of marriage to take effect in a certain future event, will not be purified into a legitimate proof of marriage by the event ; nor will a written declaration of marriage found in one's repositories after death, or so framed as to be effectual only after death, be a legal constitution of marriage. A man may de presenti declare a woman to be his *wife*, but he cannot otherwise effectually give her the rights of his *widow* (*d*).

(*a*) 1661, 34. 1695, 12. See 1 Hume's Crim. Law, 463, et seq. See cases of Carruthers and Crawford, supra § 1512 (*a*). Wylie, 1 Hume, 466, note 2. Joseph Robertson, March 18. 1818 ; *Ib.* note 4. Rutherford and Cogan, April 15. 1812 ; *Ib.* note 3.

(*b*) 1 Ersk. 6. § 11. Dalrymple's case, Dodson's Report, and 2 Haggart's Cons. Cases, 129. See M'Kie, Aug. 2. 1781 ; Bar. Hume, 355. Currie, July 2. 1806 ; *Ib.* 373.

(*c*) 1 Ersk. 6. § 3.

(*d*) Anderson, Nov. 13. 1795 ; Bar. Hume, 365. See also Walker, 1 Dow, 148.

1515. A promise of marriage in writing, or admitted on reference to oath, although not of itself marriage, nor a binding engagement to ground an action for implement (§ 1508), is, when followed by sexual intercourse, a legal ground of declarator of marriage ; and when so declared unites the parties as husband and wife as effectually as a regular marriage in facie ecclesiæ. In proper marriage (sponsalia de presenti) the law presumes, or takes no account of sexual intercourse ; consensus, non concubitus, facit matrimonium : In marriage by promise

subsequente copula, the sexual intercourse is not presumed, but being proved, the consent to marriage is inferred.

.1 Stair, 4. § 6, and 4 Stair, 3. § 42. Pennycook, Dec. 1752; M. 12677; Elchies, *Proof*, 10. Reid, Nov. 20. 1819; as affirmed, May 14. 1823; 1 Shaw's App. Cases, 440. Dalrymple's case, supra, § 1514 (b). Walker, March 4. 1807; 1 Dow's App. Cases, 148. Innes, July 7. 1835; 13 S. D. 1050.

1516. PROOF OF MARRIAGE. Marriage is judicially established by action of declarator in the Court of Session, now the great consistory (a); or the question may arise incidentally in the course of another cause (§ 1508) (b). In such judicial inquiries, a regular marriage is not to be set aside on pretence of a purpose different from marriage; or on probabilities arising out of subsequent acts and circumstances: An irregular marriage (§ 1514, 1515) suggests doubts, and justifies an investigation into the deliberate purpose of the parties (c).

(a) 1 Will. IV. c. 69. § 33.

(b) See cases of Farrell and Adair, below, § 1520.

(c) Dow, Dec. 9. 1814; Fergusson's Consist. Law Reports, 43. See § 1520.

1517. In this and other consistorial causes, 1. either the whole cause, or any issue or issues of fact connected with it, may, at the discretion of the Court, be tried by jury; and the old consistorial oath is changed for the oath usual in other Courts of Justice (a). 2. The decree once pronounced cannot be challenged or reduced after a year (b).

(a) 1 Will. IV. c. 64. § 37.

(b) See below, § 1536.

1518. In proving marriage, there must be *prima facie* evidence either of regular celebration (supra, § 1510, 11, 12); or of unconditional consent to marriage *de presenti* (§ 1514); or of a promise and engagement, followed by sexual intercourse (§ 1515). The promise can be proved only by writing or oath of the promiser: in the other cases, the evidence may be parole; or written; or by confession on reference; or by a train of facts and circumstances; habit and repute, and cohabitation inferring acknowledgment (a). But wherever by evidence of any of those descriptions present matrimonial consent is proved, it makes perfect marriage (b).

(a) 1 Stair, 4. § 6. 1 Ersk. 6. § 2, et seq. Dalrymple's case, and Walker's, supra, § 1515. Craigie, Jan. 19. 1837; 15 S. D. 379. Aitchison, below (b).

(b) Aitchison, Nov. 20. 1838; 1 D. B. M. 42. Hoggan, Feb. 17. 1838; 16 S. D. 584, under appeal.

1519. In construing the evidence, the following points are of importance :—1. The party must be of the age of puberty, and neither under the influence of force, nor of fraud, nor of essential error, in consenting to the marriage (*a*). 2. Cohabitation and habit and repute of marriage, if it be in Scotland, makes a marriage (*b*). 3. If the habit and repute of marriage have begun in avowed concubinage, a very palpable and recognised change of purpose must be shewn in aid of the proof by public opinion (*c*). 4. It must be a general repute of the neighbourhood, not the report of one or two persons ; and it must, as a very questionable kind of evidence, be supported by conduct or acquiescence uniform and consistent (*d*). 5. To establish marriage by promise and copula, the promise of marriage must precede the copula ; or, if the promise be after connexion, it must be followed by intercourse in such circumstances as to connect the intercourse with the promise (*e*). 6. The promise must be unconditional, and a declaration or promise of marriage conditionally, if there shall be a child born of the connexion, is not marriage (*f*). 7. It must not be an inference from mere courtship, or intention to marry ; but the copula must follow either on positive engagement and promise accepted (*g*), established by writing, or oath, or circumstantial evidence ; or on courtship and conduct amounting to an engagement (*h*).

(*a*) See above, § 6, 7. et seq. and § 1508. See also Turner's case in England.

(*b*) *M'Culloch*, Feb. 10. 1759 ; *M.* 4591. See *Sassen*, June 22. 1824 ; 3 *S. D.* 159 ; 2 *W. S.* 309.

(*c*) *Farrell*, Feb. 1. 1828 ; 6 *S. D.* 472. *Elder*, Nov. 17. 1829 ; 8 *S. D.* 56.

(*d*) *Cunningham* in House of Lords, Feb. 20. 1810 ; *Bar. Hume*, 376 ; reversed ; 2 *Dow*, 482. *Thomas*, July 8. 1829 ; 7 *S. D.* 872. See *Farrell*, *supra* (*c*). *Adair*, *infra*, § 1520.

(*e*) *White*, Nov. 18. 1785 ; *M.* 12686. *Kennedy*, Feb. 12. 1800 ; *Fergusson's Consist. Reports*, 163. *Sim*, Nov. 20. 1829 ; 8 *S. D.* 89. See also *Campbell*, below (*g*). *Hoggan*, Feb. 17. 1836 ; 16 *S. D.* 584 ; under appeal.

(*f*) *Kennedy's case*, *supra*. *Stewart*, Dec. 6. 1833 ; 12 *S. D.* 179.

(*g*) *Stewart*, July 8. 1818 ; *Bar. Hume*, 380 ; 1 *Illus.* 244.

(*h*) *White*, *ut supra*. *Smith*, June 27. 1755 ; *M.* 12391. *Stewart*, March 6. 1817 ; 5 *W. S.* 151. note. *Campbell*, July 9. 1830 ; *F. C.* ; 8 *S. D.* 1039 ; and 5 *W. S. App. Cases*, 92. *Harvie*, Feb. 19. 1839 ; 1 *D. B. M.* 536. See *Cockburn*, July 19. 1676 ; *M.* 12386. *Harvie*, Feb. 19. 1732 ; *M.* 12388. *Cameron*, March 4. 1814 ; *Fergusson's Consist. Reports*, 139.

1520. 3. Marriage, once established by clear, deliberate, and conclusive consent, cannot be annihilated or recalled by retraction, subsequent writing, disclamation, or conduct of the

parties (*a*). But the evidence may be invalidated when, the marriage not being regular, the circumstances are ambiguous or inconclusive, and such as are fairly to be ascribed to deception, fraud, or an intention short of full and deliberate consent and purpose of marriage (*b*). Marriage being once lawfully contracted, no second marriage can have the effect of annulling it; or entitling the party in a second ceremony or attempt to marry, to bar, *personali exceptione*, the party in the first from vindicating their conjugal rights (*c*). But a question of great difficulty remains, whether promise with copula so constitutes marriage *ipso jure*, that it may be insisted on in prejudice of a second marriage solemnly celebrated. This is a question as yet undecided (*d*).

(*a*) M'Kenzie, March 8. 1810; F. C. See also Jolly's case (*b*).

(*b*) Allan, Dec. 9. 1773; Fergusson's Consist. Reports, 37. Cameron, Jan. 9. 1756; M. 12688; Fergusson's Consist. Law, 156. Jolly, Dec. 23. 1825; F. C.; 4 S. D. 254; House of Lords, 3 W. S. App. Cases, 85. Macinnis, Dec. 26. 1781; House of Lords, June 25. 1782; M. 12683. Taylor, Feb. 16. 1786; House of Lords, Feb. 16. 1787; F. C.; M. 12687. See opinion of Court in Ritchie, June 13. 1792; Bar. Hume, 363. Richardson, Aug. 3. 1785; Bar. Hume, 361. M'Gregor, Nov. 28. 1801; M. 12697. Cunningham, *supra*, § 1519 (*d*). See Farrell, *supra*. Adair, May 14. 1829; 7 S. D. 597. Thomas, July 8. 1829; 7 S. D. 872.

(*c*) Campbell, Jan. 31. 1753; quoted 3 W. S. 135, note; M. 10456; 5 Br. Sup. 789; 1 Cr. and St. App. Cases, 519. Napier, June 12. 1801; Bar. Hume, 307. Reid, Feb. 13. 1813; Bar. Hume, 378. See also Jolly's case, *infra* (*b*). See Bell's Report of a Putative Marriage, 1825.

(*d*) See Pennycook's case, *supra*, § 1515. Stewart, *sup.* § 1519 (*f*).

1521. In declarators of marriage where a second marriage has been attempted, and, of course, the interests of the party to that marriage, or perhaps of children, are deeply interested, the question was raised in the House of Lords, whether it was not necessary to call those parties? and on a search of precedents it was found that no such necessity exists; it being competent for the party, however, to appear or interpose in the suit.

Wright, March 7. 1837; 15 D. B. M. 767. See precedents quoted in Jolly's case, 3 W. S. 202. f. n. See also case of Dalrymple, *sup.* § 1514 (*b*).

3. *Parties who may enter into Marriage.*

1522. All persons may, by the law of Scotland, effectually enter into marriage who are, 1. legally capable of consent; 2. not already married; 3. not divorced on account of adultery

with the person with whom it is proposed to intermarry ; and, 4. not within the forbidden degrees.

1523. 1. INCAPACITY. This may either be incapacity of consent, or incapacity of conjugal duties. 1. Incapacity of consent is from nonage, or from mental infirmity. Males under fourteen, females under twelve, are incapable of consent ; and therefore of marriage. But minors after puberty may marry, or by solemn consent ratify a previous marriage ; and this without consent of parents or guardians (*a*). Idiots are incapable of marriage ; and madmen, unless during a lucid interval. See below, of Insanity (*b*).

(*a*) 1 Ersk. 6. § 2. Dig. 1. 23. t. 2. l. 4. De Rit. Nup. Robertson, Nov. 17. 1770 ; M. 8931 ; 1 Hailes, 368.

(*b*) Blair, June 28. 1748 ; M. 6293. McAdam, March 4. 1807 ; M. voce *Proof*, App. 4 ; 1 Dow, 176.

1524. 2. Incapacity of conjugal duties is a *ground* on which marriage may be declared void, at the instance of either of the parties ; but is not in itself a nullity pleadable by others.

1 Ersk. 6. § 7. See Thomson, June 27. 1767 ; M. 13915, *supra*, § 1508 (*b*).

1525. 2. IMPEDIMENT FROM PREVIOUS MARRIAGE (*a*). There can be no second marriage where the parties to the first are alive, and undivorced (*supra*, § 1520) ; and neither bona fides nor personal exception will protect the second marriage against challenge (*b*).

(*a*) 1 Ersk. 6. § 7. See cases of Dalrymple, Campbell, Jolly, *supra*, § 1520.

(*b*) See above, § 1520, Bell's case of Putative Marriage ; and below, of Legitimacy of the Children, § 1627.

1526. 3. IMPEDIMENT FROM ADULTERY. Although adultery was declared by the Legislature in 1600 to annul a marriage between the guilty parties, it does not seem ever, except in one case, to have been practically admitted to bar the succession of the issue.

1600, c. 20. 1 Stair, 4. § 7. 2 Stair, 3. § 32. 1 Ersk. 6. § 43. See Dig. 1. 34. t. 9. De his quæ ut indign. aufer. l. 13. Decretal. l. iv. t. 7. c. 6. Lyle, June 22. 1670 ; M. 329.

1527. 4. IMPEDIMENT FROM RELATIONSHIP. Relationship is either of Consanguinity or Affinity. 1. In consanguinity or relationship by blood, the forbidden degrees comprehend ascendants and descendants to the most remote degree ; col-

laterals in loco parentis, also in infinitum; and those of the whole or half-blood, who are within the second degree; cousins-german and all of more remote degree being free to intermarry (*a*). 2. In affinity or relationship by marriage, the husband and wife being *one*, the blood relations of each are held as related by affinity in the same degree to the one spouse, as by consanguinity to the other. But, 3. It is no legal impediment to marriage that one of the parties has had illicit connection with a near relation of the other,—as where a man married a woman who (unknown to him) had lived in concubinage with his brother (*b*). 4. The view on which, in England, it had been considered as lawful for a husband to marry his sister-in-law after the death of his wife, has never been admitted in Scotland (*c*); and by a recent statute all marriages subsequent to August 1835, within the prohibited degrees of affinity, are null, and not merely voidable (*d*).

NOTE.—See below for questions as to foreign relations in regard to the constitution of marriage, § 1536.

(*a*) 1567, 15. 1 Stair, 4. § 4. 1 Ersk. 6. § 8, 9. 1 Hume's Crim. Law, 447.

(*b*) Hamilton, May 26. 1827; F. C.

(*c*) 1567, 15. 1690, 5. art. 24; Fergusson's Consist. Law, 171. 1 Hume's Crim. Law, 449, 450. 2 Phillimore, Eccles. Cases, 16.

(*d*) 5 and 6 W. IV. c. 54.

II. DISSOLUTION OF MARRIAGE.

1528. Marriage is dissolved only by death or by divorce.

Nicolson de Nuptiis, as quoted by Stair, 1 Stair, 4 § 6; and 4 Stair, 45, § 19. 1 Ersk. 6. § 37.

1529. 1. DEATH. Although the death of either party dissolves marriage, this effect is not produced by Civil death.

Ersk. ut supra.

1530. 2. DIVORCE. Divorce, either for adultery or for desertion, dissolves marriage. See as to the wife's expenses of suit below, § 1545.

DIVORCE FOR ADULTERY. This proceeds by an action before the Court of Session (*a*); the success of which depends on proof of criminal intercourse with the defender. This must in each case depend on the circumstances of the case; but at least it is not indispensable to prove the identity

of the paramour (*b*). Formerly this action proceeded before the Commissaries of Edinburgh, in which great care was taken to prevent collusion (*c*); and by the recent statute the Lord Ordinary in the Court of Session is required to administer the oath of calumny; and when the pursuer is abroad, a commission may be granted to take the oath (*d*). Sufficient evidence of the ground of action is required, even where appearance shall not be made for the defender (*e*). It is also provided, that the cause, or any issue connected with it, may be tried by jury (*f*). It may be important, in the proof of adultery, to have the *date* of the marriage fixed, and it was held competent to conjoin a declarator to this effect with the divorce (*g*).

(*a*) 1 Will. IV. c. 69. § 33.

(*b*) Smith, Feb. 13. 1838; 16 S. D. 499.

(*c*) St Aubin, Dec. 16. 1814; Fergusson's Cases, 276. Greenhill, Feb. 7. 1822; F. C.; 1 S. B. 327; House of Lords, June 16. 1824; 2 Shaw's App. Cases, 435.

(*d*) A. B. June 16. 1838; 16 S. D. 1143.

(*e*) 1 Will. IV. c. 69. § 36.

(*f*) 1 Will. IV. c. 69. § 37.

(*g*) Sim, May 23. 1834; 12 S. D. 633.

1531. *Remissio Injuriae*. Adultery might, by our old law, be tried criminally. But the civil action of divorce is a private remedy, and may be discharged by the party, or met by personal exception (*a*). The discharge of the private remedy, or *Remissio Injuriae*, bars the action. It is inferred, 1. from cohabitation, after knowledge of the offence (*b*); involving of course many nice points of evidence, in distinguishing between knowledge and mere suspicion (*c*); 2. from long delay of the action importing acquiescence (*d*).

(*a*) 1563, 64. 1581, 105. 1592, 19. 1701. 11.

(*b*) Aitken, Feb. 6. 1810; F. C. Watson, July 15. 1681; M. 330. See anonymous case, Jan. 26. 1758; Monb.; 5 Brown's Sup. 863. See Greenhill's case, § 1531.

(*c*) Sir W. Cunningham in House of Lords, July 3. 1815.

(*d*) Duncan, March 9. 1809; F. C. Lockhart, below, § 1535. See Best's case, 2 Phillim. Eccles. Cases; see also anonymous case in Monb. ut supra, 5 Brown's Sup. 863.

1532. *Lenocinium* is a bar to divorce at the instance of the husband. It comprehends all that misconduct on the part of a husband, by which he becomes the pander to his wife's guilt; exposes her to pollution; or encourages and promotes licentious conduct.

Sir G. M'Kenzie's Crim. Law, voce *Adultery*, § 6. M'Kenzie, Feb. 28. 1745; M. 333.

1533. *Recrimination* is no bar to divorce (though admitted as such in the Roman, Canon, and English law) (a); but it may entitle the party first injured to have divorce preferably to the other, with all the benefit thence accruing (b). When there are mutual actions of divorce, the Court will, on demand of the party, pronounce decree, without abiding the discussion of the pecuniary effect (c).

(a) Logan, March 26. 1561; Balf. 99; M. 339; 1 Bank. 5. § 128. Correct by Lockhart, Dec. 7. 1799; M. *Adult.* App. No. 1.

(b) Sir W. Cunningham's case in House of Lords.

(c) McIntyre, Dec. 8. 1821; 1 S. D. 199.

1534. *Death of Party.* The action for divorce being entirely personal to the offended party, is barred, or after being commenced the action falls, by death; and cannot competently be commenced or continued by the heir or representative of the injured party.

Clement, March 4. 1762; M. 337. See Menzies, § 1536.

1535. 2. DIVORCE FOR DESERTION. Wilful desertion, by either spouse, if obstinately persisted in for four years, is a ground of divorce by the law of Scotland (a). And, 1. The action may be raised after a year's desertion, provided four years of desertion shall have elapsed before decree. 2. To prevent collusion, an oath of calumny is required. 3. The party complained against must be within Scotland; or, if absence abroad be part of the offence, personal notice must be given; unless, by concealment, and ignorance of the place of residence, that is rendered impossible (b). 4. The proceedings prescribed by the statute have been in practice supplanted by others. There was formerly a sentence of excommunication, on pronouncing of which "the malicious and obstinate defection of the party offender," was declared "ane sufficient cause of divorce." The proceeding now is, *first*, a decree of adherence; *secondly*, a charge to adhere, and denunciation; *thirdly*, an application to the presbytery who decline to interfere; when a protest closes the proceeding, and is in practice held equivalent to the excommunication of the old law: After which an offer to adhere comes too late to bar the divorce (c). 5. A sufficient ground of separation is a good defence.

(a) 1573, 55. 1 Ersk. 6. § 44. Gregor, March 11. 1836; 14 S. D. 707.

(b) Blake, July 6. 1826; 4 S. D. 803. Buchanan, Nov. 18. 1837; 16 S. D. 82.

(c) Murray, Dec. 21. 1838; 1 D. B. M. 294.

1536. *Res Judicata in Divorce, &c.* The rule that decrees of the Commissary Court, in consistorial causes, cannot be reduced after year and day from the sentence (*a*), is in observance (*b*).

(*a*) Instructions to Commissaries, 1563, confirmed by 1592, 25, and 1606, c. 6.

(*b*) Gardner, 2 S. D. 276, note. Donald, May 16. 1823; 2 S. D. 275. Menzies, Nov. 21. 1835; 14 D. B. M. 47.

III. INTERNATIONAL QUESTIONS OF MARRIAGE AND DIVORCE.

1537. These questions chiefly relate to the constitution of the marriage, or its dissolution.

1. CONSTITUTION OF MARRIAGE. As marriage is a contract *juris gentium*, it is effectual, wherever constituted according to the forms of the country in which it is contracted (*a*).

2. DIVORCE. It has been held in Scotland that, wherever the marriage may have been contracted, or the adultery committed, an action for dissolving the marriage is competent in the Consistory Court of Scotland, provided, .1. the parties are domiciled in Scotland; the husband's domicile being that of the wife; and, 2. that there is no collusion for evading the law of other countries (*b*).

(*a*) 2 Illus. 253. *Porteis v. Tondear*, 1 Hagg, Cons. Cases, 136; 2 Hagg, Cons. Cases, 417. Story, Conf. of Laws, 100. et seq. and the authorities cited. Forbes, Nov. 23. 1756; Elch. 365; Mon.; 5 Br. Sup. 853. MacCulloch, sup. § 1515. Scruton, Dec. 1. 1772; Hailes, 499; M. 4822.

(*b*) Story, Conf. of Laws, 168, and the authorities cited; 2 Illus. 258. Gordon, June 9. 1699. Brunson, Feb. 9. 1789; M. 4784; 2 Hailes, 1063. Pirie, March 8. 1796; M. 4594. French, June 13. 1800; M. Forum Com. App. 4. Wyllie, June 27. 1801; Ib. 2. Morcombe, same date; Ib. 3. Murray, March 8. 1805; Ib. 11. Lindsay, Jan. 26. 1807; Ib. 12; and 1 Dow, 118. Tewsh, 1812; Ferg. Cons. Law, 42. Sugden, March 20. 1812; Ib. 13. Lally's case, Edmonstone, June 1. 1816; F. C. Forbes, Ib. Lovett, Dec. 21. 1811; F. C. Kibblewhite, Ib. Blake, July 6. 1826; 4 S. D. 803. Sharpe, Nov. 14. 1829; 8 S. D. 49. Warrender, June 28. 1834; 12 S. D. 847; 2 S. M'L. 154.

IV. OF CONSORTIUM VITÆ, AND OF SEPARATION AND ALIMONY.

1538. CONSORTIUM VITÆ. In Marriage, the parties bind themselves to live together till death part them; and the mutual obligation may be enforced by an action called an action of adherence. To this (on the part of the wife) is added a separate action for aliment; in which she is allowed sufficient for her subsistence, and for carrying on her action, with a due

alimony on decree of adherence being pronounced. The decree of adherence may be followed by a charge on letters of horning. But there is no further means of enforcing the duty than either by decree and diligence for a suitable aliment, or by an action of divorce after four years' desertion. See above, § 1537.

1539. SEPARATION. What in England is called a divorce *à mensa et thoro*, is in Scotland distinguished as a mere separation. It is competent, notwithstanding the engagement to adhere; either judicially or by voluntary agreement. See below, § 1562.

1540. 1. *Judicial Separation* proceeds on satisfactory evidence of life being endangered; or of a fair and reasonable ground of apprehension of personal violence; or of continued annoyance, wearing out and exhausting the party; or of adulterous practices.

Baillie, March 5. 1714; Fergusson's Consist. Law, p. 184. M'Lelland, July 5. 1813; *Ib.* 185. Duchess of Gordon, June 8. 1697; *Ib.* 190. Letham, March 8. 1823; 2 S. D. 284. Sinton, Feb. 15. 1833; 11 S. D. 402.

1541. 2. *Voluntary Separation*, by contract of the parties, without judicial interference, is not sanctioned in England, but in Scotland it is competent. And,

1542. 1. The husband has been held entitled to assign a separate residence to his wife; but this is not a settled point, and the power is very questionable.

Colquhoun, March 7. 1804; *M. voce Husband and Wife*, App. 5.

1543. 2. The wife is not entitled to separate herself from her husband and family, unless for protection and safety against such danger or insult as will justify judicial separation (*a*), and she cannot exclude him from any separate house to which she may have removed (*b*). Her remedy is judicial separation.

(*a*) Letham, March 8. 1823; *supra*, § 1540.

(*b*) Russel, June 6. 1820; *Bar. Hume*, 224.

1544. 3. Although it was at first doubted (*a*), it is now settled, that a separation may be effected by mutual consent: But, 1. It is revocable by either party (*b*). 2. Courts of law, though they wink at the practice, will not interfere to aid or complete such contracts, by awarding alimony, if not settled by the parties (*c*). 3. If the grounds stated in the contract

be sufficient for a judicial separation, the agreement will receive effect as irrevocable (*d*). But, 4. a voluntary contract is no defence against an action for judicial separation (*e*). 5. A contract of separation is occasionally combined with postnuptial provisions, and those may be irrevocable, though the separation may not (*f*).

(*a*) Drummond, Feb. 11. 1624; M. 6152.

(*b*) Livingston, Feb. 6. 1666; M. 6153. Earl of Argyle, Nov. 7. 1695; M. 6054. Palmer, Jan. 25. 1810; F. C. Hunter, Sept. 19. 1831; 5 W. S. 455.

(*c*) Bell, Feb. 22. 1812; F. C.

(*d*) Shand, Feb. 28. 1832; 10 S. D. 384.

(*e*) Lawson, Nov. 28. 1797; M. 6157.

(*f*) See below, Miller and Sutherland's cases, § 1581 (*b*).

1545. ALIMONY. A wife is entitled to separate alimony,—1. in all cases of her husband's desertion; or, 2. in judicial separation; 3. during an action of divorce (*a*); the question formerly being proper in such cases to the Commissary Court, but now being competent to the Court of Session, or to the Sheriff Court (*b*); 4. the wife, even where she is the party accused, is entitled to have her costs of suit paid, in actions of divorce and separation (*c*). But she is not de jure entitled to aliment without proof; the Court being vested with a discretionary power to give or to withhold aliment, according to circumstances (*d*).

(*a*) Frazer, March 11. 1774; 1 Hailes, 572. De la Motte, Feb. 9. 1789; M. 447; Dec. 16. 1788; 2 Hailes, 1060. Gray, Dec. 7. 1832; 11 S. D. 185. Currie, Dec. 8. 1833; 12 S. D. 171. Scott, Jan. 20. 1835; 12 S. D. 178.

(*b*) 1 Will. IV. c. 69. § 32–3.

(*c*) Gray, March 10. 1813; Bar. Hume, 217.

(*d*) Currie's case, *supra*.

V. EFFECT OF MARRIAGE ON PROPERTY AND PERSONAL STATUS.

1546. Marriage, considered as the origin and establishment of a family, has in contemplation not merely the contracting parties, but the interest of their children, as members of the domestic society, for intermediate subsistence, education, and future provision.

1. *Effect on the Estates of the Parties.*

1547. The moveable property of the parties is, ipso jure, assigned to the husband as a fund, to be under his uncontrolled power during the marriage. It is the fund of main-

tenance of the parties and of their children during the marriage ; and is divisible in certain shares after the marriage is dissolved.

1548. 1. SUBJECTS OF COMMUNIO BONORUM. The moveable or personal estate of either party forms the common stock, including personal debts, or sums due ; goods belonging to either at the time of the marriage ; and effects or debts acquired or falling to either during the marriage, by their own industry, by gift, by succession, or otherwise ; with all rents, fruits, and profits.

1 Ersk. Pr. 6. § 6. and 1 Inst. 6. § 12.

1549. Heritable subjects, lands, houses, things attached to land, servitudes, teinds, patronage, do not fall under the *jus mariti*. The price also of lands (*a*), and real securities and heritable bonds, are excluded ; nor does the uplifting of heritable debts make them fall into communion (*b*). Bonds with a clause of infestment are excluded from the *communio bonorum* (*c*). Rights having a tract of future time are excluded (*d*). Bonds after the term of payment, if they bear interest, are excluded (*e*). But it seems doubtful what shall be the effect of excluding executors in a bond (*f*). (See as to those, *supra*, § 478. *et seq.*) Although heritable subjects and debts are excluded, their fruits, rents, and interests are not (*g*). Industrial crops, of which the seed is sown before the dissolution of the marriage, are reckoned as part of the common fund ; but not if the seed is not actually sown (*h*).

(*a*) Hill, Jan. 1719 ; M. 5797. Boaz, March 7. 1829 ; 7 S. D. 555.

(*b*) Cockburn, Feb. 21. 1679 ; M. 5794. Stewart, Dec. 17. 1687 ; M. 5793. Rollo, March 1685 ; M. 5795. Scott, Jan. 19. 1693 ; M. 5777. Ogilvies, June 11. 1609 ; M. 5794.

(*c*) Gordon, March 1684 ; M. 5777. Ramsay, June 22. 1825 ; 4 S. D. 108.

(*d*) Pennicuick, June 1582 ; M. 5764. See Phillips, Feb. 6. 1765 ; 5 Br. Sup. 903.

(*e*) Meuse, Nov. 22. 1748 ; M. 5506. Pitcairn, June 28. 1665 ; M. 5775. Phillips, Feb. 6. and 27. 1765 ; 5 Brown's Sup. 469. and 903, 908. Grays, Feb. 23. 1739 ; M. 5770 ; Elchies, *voce Her. and Mor.* 9. and Notes, p. 181.

(*f*) Barclay, Jan. 26. 1682 ; M. 5777.

(*g*) Donaldson, June 17. 1783 ; M. 5949 ; 2 Hailes, 921. Storrar, Nov. 1773 ; 5 Brown's Sup. 469. Philips, Feb. 27. 1765 ; M. 5772 ; 5 Brown's Sup. 469, 903, 908.

(*h*) Ballingal, Jan. 22. 1808 ; Bar. Hume, 214.

1550. The fund must not only accrue, but vest during the marriage, in order to characterize it as moveable, and so fall-

ing under the *communio bonorum*; the Scottish law regulating what shall fall under the *jus mariti*, the foreign whether the thing is personal or real (*a*). Legacies fall under the *communio*, although liferented by a third party who happens to survive the dissolution of the marriage (*b*). But conditional bonds do not vest before the purifying of the condition (*c*).

(*a*) Scott, Jan. 29. 1663; M. 5799. Wallace, May 18. 1821; 1 S. B. 17. Lawson, Jan. 8. 1614; M. 5798. Egerton, Nov. 27. 1812; F. C. Newlands, Nov. 22. 1832; 11 S. D. 65. Clarke, Feb. 16. 1836; 14 S. D. 488. See also the cases of Craigie, Milligan, and Robertson, § 1891, and 4 Geo. IV. c. 98. § 1; 1 Bell, Com. 142; Ivory's Notes on Ersk. p. 894. note 611.

(*b*) Frazer, Nov. 16. 1804; Bar. Hume, 210. Haining, Nov. 12. 1808; Ib. 214.

(*c*) Fotheringham, Dec. 18. 1694; M. 5764. Philps, Feb. 27. 1765; F. C.; and 5 Brown's Sup. 469. and 908.

1551. In things falling to either of the parties by succession, the character of heritable or moveable in this question depends on the state of the funds at the time when the succession opens; uninfluenced by any change under the executor's management.

Dunbar, June 20. 1744; Elchies, voce *Husband and Wife*, 22. Tansh (same case), M. 5842.

1552. All moveables, money, bonds, bills, &c. in the wife's possession, are presumed to be the husband's (*a*). Money lent or deposited by the wife is presumed to be part of the *communio bonorum* (*b*): So is money applied by a wife in payment of her own debt (*c*). This presumption, however, yields to proof (*d*).

(*a*) M'Donald, Jan. 29. 1793; F. C.

(*b*) Fenton, Nov. 17. 1635; M. 5801.

(*c*) Rigg, Jan. 30. 1727; M. 5801.

(*d*) Lauder, Feb. 2. 1677; 3 Brown's Sup. 130. Cockburn, Feb. 21. 1679; M. 5794. Dods, June 13. 1766; 1 Hailes, 12.

1553. The wife cannot, after betrothment or proclamation of bans, gratuitously alienate any fund or right, or discharge any debt, which falls under the *communio bonorum* (*a*). If there have been no bans proclaimed, or not regularly, the validity of such a conveyance will depend on grounds of reduction or preference at common law (*b*).

(*a*) 1 Ersk. 6. §. 22. Swyne, June 7. 1605; M. 6029. Fletcher, July 5. 1611; Ib. Scott, Jan. 29. 1633; M. 6030. Lady Bute, Dec. 1665; M. 6030; 2 Brown's Sup. 423. Auchinleck, Dec. 18. 1667; M. 6033. Ogilvie, Jan. 9. 1679; 2 Brown's Sup. 240. Gilchrist and Grant, March 1682; M. 6032. McLellan, July 23. 1722; M. 6028.

(*b*) M'Dougal, July 8. 1623; M. 6027.

1554. EXCEPTIONS TO THE GENERAL RULE. The general rule, which assigns to the *communio bonorum* all moveables belonging to the spouses, suffers two exceptions; the one of *parapharnalia*, the other of *peculium*.

1 Ersk. 6. § 41. in fin.

1555. 1. *Parapharnalia*. This term, which, strictly speaking, expresses what is over and above the dower, and peculiarly the wife's own, is in the law of Scotland applied to the wife's dress, and the ornaments proper to her person. These articles the law regards as peculiarly the property of the wife; and not attachable by the creditors of the husband.

1 Ersk. Pr. 6. § 8. Gray, June 1582; M. 5802. Davidson, June 23. 1610; M. 5802. Earl of Leven, below, § 1556 (*b*).

1556. Articles proper to a woman's dress are presumed to be parapharnal (*a*): But this yields to proof,—1. by writing; 2. by the character of family jewels (*b*); 3. where the husband is a jeweller, it has been doubted whether the *presumption* holds (*c*).

(*a*) Dick, Dec. 4. 1696; Jan. 16. 1697; M. 5824.

(*b*) Earl of Leven, Feb. 21. 1683; M. 5803.

(*c*) Craig, Jan. 1684; M. 5819, 5820.

1557. Dressing-plate and tea-plate are not parapharnal (*a*). A chest of drawers, or clothes-press, appropriated to a wife's clothes, is parapharnal (*b*). But articles of household furniture, though presented to the wife by her relations on her marriage, are not parapharnal; as bed and table linen, mirror, lady's work-table, &c.

(*a*) Countess of Wigton, June 7. 1748; M. 5771; Elchies, voce *Husband and Wife*, 30. Dick's case, supra. Gemmil, Jan. 15. 1735; Elch. *H. and W.* 4.

(*b*) Pitcairn, July 31. 1716; M. 5825.

(*c*) Hewit, Nov. 24. 1803; Bar. Hume 210.

1558. Articles not peculiar to woman's dress must be *proved* to be parapharnal.

Lady Rankeillor, July 8. 1709; M. 5824. Countess of Bute, June 27. 1711; M. 5824.

1559. Although *parapharnalia* are the property of the wife, they are not at her disposal *inter vivos*; but she may bequeath them by will: And they admit of a distinction in relation to creditors; proper *parapharnalia* not being attachable; but

things not properly paraphernal, though specially gifted, being attachable by creditors, with relief to the wife against the husband's estate.

Craig, *supra*, § 1556 (c), and Earl of Leven (b).

1560. 2. *Peculium*. A fund may be appropriated to the wife by custom, or by special gift. 1. By custom, certain presents are made to a wife (on the sale of lands with her consent) called the lady's gown. This and other analogous gifts, are held to be *peculium* (a). 2. A sum or provision may be secured to a wife as a *peculium* (b), either, *first*, by herself before marriage (c); or, *secondly*, by the husband by antenuptial contract, or while solvent renouncing his *jus mariti* (see below, § 1562); or, *thirdly*, by a stranger (d); a provision to children under the Ministers' Widow Act, is not arrestable, but it falls under the *jus mariti* of the husband of the child (e).

(a) Lady Pittferan, July 26. 1709; M. 5799. Mungel, Jan. 11. 1750; M. 5771. Douglas, Jan. 25. 1751; M. 6019.

(b) Dirleton and Stewart, voce *Aliment*.

(c) Sandilands, May 30. 1833; 11 S. D. 665.

(d) 1 Stair, 4. § 9. 1 Ersk. 6. § 14. Annand, March 4. 1774; M. 5844; affirmed, March 23. 1775. Robertson, § 1891 (b). Gordon, Nov. 16. 1832; 11 S. D. 36.

(e) Donaldson, June 17. 1783; M. 5949. 17 Geo. II. c. 11. See above, § 1494.

1561. 3. *JUS MARITI AND ADMINISTRATION OF THE COMMON STOCK*. The husband's administration, as the head of the family, is absolute; and his *jus mariti* comprehends every subject which forms part of the common stock. It operates ipso jure like an assignation without the necessity of intimation; and is available to his creditors either on the arrestment of particular funds, or by adjudging the right so as to make it available against the rents of the wife's estate (a). A distinction is to be marked relative to an alimentary provision settled on a wife; that it is not attachable for her husband's debt, but the administration of it for behoof of the family may be in the husband (b). But although the marriage is an assignation requiring no intimation to complete it, the doctrine of Lord Stair requires some modification, that an assignation before marriage, not intimated, falls by the marriage; for another principle operates in that case, the husband being bound to fulfil his wife's obligation to complete the assignation (c).

(a) 1 Stair, 4. § 9 and 17. Dirl. Dec. 154. Dirl. and Stewart v. *Jus Mar.* and *Jus Relictæ*. 1 Ersk. Pr. 6. § 37. 1 Ersk. 6. § 13. 1 Bell, Com. 61. Sinclair, Jan. 17. 1739; Kilk. 36. Menzies, Dec. 8. 1761; M. 5974. Calder, Nov. 19. 1818; F. C. McDonel, Nov. 25. 1819; F. C.

(b) Dick, Jan. 27. 1709; M. 5999.

(c) Till, June 16. 1763; M. 5946.

1562. The *jus mariti* may be renounced, 1. as to any particular subject or fund; or, 2. as to the administration generally; provided it extend not to the entire renunciation of the husband's right to act as the head of the family (a). 3. A separation, whether voluntary or judicial (sup. § 1539, et seq.), is not a renunciation of the *jus mariti*, but while the husband is bound to furnish the wife with the alimony stipulated or awarded, whatever moveable funds she acquires or succeeds to, strictly speaking, belongs to him (b). 4. The renunciation to be effectual must be made unequivocally and in direct and explicit terms (c). But 5. The husband cannot renounce it to the effect of withdrawing his effects from his creditors (d).

(a) 1 Stair, 4. § 9. 1 Ersk. 6. § 14. Foulis and Collington, Feb. 9. 1667; M. 5828. Murray, Feb. 5. 1745; M. 5842. Keggie, May 25. 1815; F. C. Greig, June 30. 1670; M. 5832. Walker, June 23. 1730; M. 5841. McPherson, Jan. 3. 1750; M. 6113. Annand, see above, § 1560 (d).

(b) Henderson, June 9. 1794; Bar. Hume, 202.

(c) Cuthbertson, Nov. 22. 1799; Bar. Hume, 206.

(d) Breichan, Jan. 23. 1810; Bar. Hume, 215.

1563. The husband's power of administration and disposal inter vivos is unlimited (a); but he cannot defeat the rights of his wife or children by deeds mortis causa; nor by deeds on deathbed, though ex figura verborum inter vivos; nor fraudulently (b). His power is not suspended till it shall be seen whether the marriage shall continue for a year, or produce living offspring (c). See below, § 1575, et seq.

(a) Campbell, Jan. 26. 1769; M. 5944. Tailors of Canongate, July 30. 1697; M. 5944.

(b) 3 Ersk. 9. § 16. Agnew, Feb. 28. 1775; M. 8210. Hog, May 14. 1800; M. voce *Legitim*, App. 2. Thomson, Dec. 8. 1675; M. 5941. Grant, Jan. 10. 1679; M. 5943. Henderson, Feb. 1728; M. 8199. Edgars, Nov. 22. 1672; M. 15837. Campbell, ut supra. Sorley, Dec. 5. 1761; M. 5947; 1 Hailes, 459.

(c) Tailors of Canongate, ut sup. (a).

1564. The husband is bound so to administer the funds as to implement his obligations, express or implied, in the marriage-contract; and he cannot defend himself against action on such obligation, on pretence of not payment of tocher, which he ought himself to have recovered.

Burd, June 24. 1625; M. 6064. Campbell, Feb. 22. 1665; M. 6065. Menzies, Nov. 21. 1671; M. 6066. Stewart, July 25. 1678; Ib. Hamilton, Dec. 6. 1682; 2 Brown's Sup. 28. Gowans, Nov. 1685; Ib. 83.

1565. PRÆPOSITURA. Certain departments of domestic economy naturally fall under the wife's management. This is by tacit or express delegation from the husband.

See More's Notes on Stair, xxii. Brodie's Stair, 31. f. n. 1 Ersk. Pr. 6. § 15; and Inst. § 20.

1566. 1. *Tacit præpositura in negotiis domesticis*. The wife is empowered, as by presumed mandate, to bind the husband for furnishings to the family; although she may have had money given to her for that purpose; and although he may be insolvent, and she enjoy a pension, furnishings to the family are the husband's debts, not hers (*a*). The creditor will be entitled to the benefit of her oath on reference, for proof of the debt (*b*). But this does not extend to transactions unconnected with the ordinary management of the family (*c*). The presumption of præpositura is removed by inhibition at the husband's instance; in the use of which he cannot be controlled, although the wife may have redress against any false or calumnious statement on which the inhibition may proceed (*d*). Mere separation is not a recall of the præpositura (*e*).

NOTE.—The rule was in one case extended to the case of a daughter's managing her father's house; Hamilton, Feb. 22. 1825; 3 S. D. 572.

(*a*) Robertson, May 22. 1801; Bar. Hume, 208.

(*b*) Kincaid, July 26. 1621; M. 6021. Dalling, Dec. 7. 1675; M. 6005. Alstons, Nov. 1682; M. 6007. Cochran, July 22. 1740; M. 6018. Paterson, Jan. 23. 1771; M. 12485. Young, Trotter, and Co. Dec. 2. 1802; M. 12486.

(*c*) Arnot, Nov. 19. 1698; M. 6017. See Nairn, below, § 1667.

(*d*) 1 Ersk. 6. § 26. Campbell, July 25. 1675; M. 5879. Auchinleck, June 23. 1675; Ib. Burton, July 22. 1747; M. Elch. voce *Husband and Wife*, 26. Countess of Caithness, Nov. 11. 1747; M. 6025; Elchies, 27.

(*e*) Harman, July 6. 1826; 4. S. D. 806.

1567. 2. *Express Præpositura*. This may be, 1. verbal or by sufferance; as where the wife is employed, or allowed to proceed, in managing a particular department; as a shop, tavern, lodging-house, &c. (*a*). The goods, furniture, &c. are his, presumptione juris (*b*), and he is liable for the debts incurred for furnishings made to her in the course of the trade so permitted. But he will not be liable for money lent to her

without proof of its application either to the family or to the permitted trade (*c*). The husband has been held liable on an obligation, by his wife keeping lodgings by his permission, for the value of articles stolen from the lodgings (*d*). 2. The wife may be authorized by writing; and this is *necessary* to entitle her to uplift money, and to make effectual her receipt for money, rents, interests, &c. (*e*).

(*a*) Wilson, Dec. 17. 1675; M. 6021. Muirhead, Nov. 23. 1609; M. 6020. Brown, Dec. 26. 1711; M. 6018. Buchanan, June 17. 1828; 6 S. D. 986.

(*b*) Cargil, Nov. 14. 1820; Bar. Hume, 223.

(*c*) M'Intyre, March 3. 1795; Bar. Hume, 203.

(*d*) Scott, Feb. 20. 1800; Bar. Hume, 207.

(*e*) Pitarrow, June 1587; M. 6014. Arnot, *supra*, § 1566. Calderwood, Jan. 18. 1693; 4 Brown's Sup. 50. Nairn, June 3. 1680; M. 6016. Binny, Jan. 26. 1836; 14 D. B. M. 353.

1568. 3. CHARGES ON THE COMMON STOCK. Debts of the husband, debts of the wife before marriage, debts arising during marriage, and the burdens which accompany the temporary enjoyment of the heritable estate, are all charges on the common fund.

1569. 1. *Debts of the Husband*. The personal debts of the husband, at whatever time contracted, are burdens on the common stock, and preferable to the wife's claim for subsistence (*a*). But heritable debts, or such as, if due to the husband, would not have belonged to the common stock, or have augmented the fund to the wife or children, are not chargeable against the stock in a question with wife or children (*b*).

(*a*) 3 Ersk. 9. § 22, in fin. Rob, March 8. 1794; M. 5900. Lisk, Nov. 23. 1785; M. 5887. Creditors of Ogilvie, Nov. 10. 1687; M. 5892. Turnbull, Nov. 25. 1709; M. 5895. Lee, Dec. 1795; M. 5889.

(*b*) 1661, c. 32. 3 Ersk. Pr. 9. § 7, more correct than 3 Ersk. Inst. 9. § 22.

1570. 2 *Debts of the Wife before Marriage*. Such debts of the wife before marriage as would, if due to her, have fallen under the *communio bonorum*, are, during the marriage, demandable from the husband as administrator (*a*). Even the aliment of her natural children before marriage if not recovered from the father is a debt on the common fund (*b*). And her heritable debts will also be demandable from him if he have had the *universitas* of his wife's property conveyed to him (*c*). He will not, however, be liable for any furnishings to her before marriage for which action would not have been competent against her; as while she lived as a child in her

father's house (*d*). If the wife's debts be still unpaid at dissolution of the marriage, they become again debts of the wife, and are not demandable from the husband, unless they shall have been fixed during the marriage as debts on his estate (*e*) (§ 1571); or, unless he shall be lucratus by the marriage beyond a reasonable tocher (*f*).

(*a*) 1 Stair, 4. § 17. 1 Ersk. 6. § 16. Osborn, Jan. 10. 1696; M. 5785. Gordon, Jan. 11. 1704; M. 5787. Inglis, Feb. 16. 1715; M. 5855.

(*b*) Aitken, May 27. 1815; Bar. Hume, 247.

(*c*) Dick, Jan. 24. 1738; M. 5787. Weir, Nov. 3. 1738; M. 5857.

(*d*) Bannatyne, Jan. 29. 1768; M. 5860. Countess of Caithness, June 23. 1774; 5 Brown's Sup. 473.

(*e*) Wilkie, Jan. 23. 1678; M. 5868. See next section.

(*f*) 1 Ersk. 6. § 17. Burnet, Dec. 23. 1665; M. 5863-4. Drummond, Feb. 19. 1740; M. 5858.

1571. Debts of the wife, 1. are fixed on the husband's estate by such diligence as is sufficient to create a security on his estate or effects, which he must relieve (*a*); but personal diligence against the husband for his wife's debt, falls on the dissolution of the marriage (*b*). It seems formerly to have been held that such diligence might proceed *summarily* against the husband (*c*); but this does not seem to be law. 2. The wife's debts do not become proper debts of the husband though fixed as burdens on his estate; and so he has relief against the wife's estate, for what he may be compelled to pay (*d*).

(*a*) 1 Stair, 4. § 17. 1 Ersk. 6. § 17. Wilkie, *supra*. Bryson, Nov. 16. 1698; M. 5869.

(*b*) Douglas, Feb. 27. 1623; M. 5861.

(*c*) A. B. Elch. *Husband and Wife*, 15; and Anonymous, July 25. 1743; Monb. 5 Brown's Sup. 743.

(*d*) Earl of Leven, Feb. 27. 1683; M. 5876. Gordon, Feb. 23. 1681; M. 5924.

1572. 3. *Debts contracted during the Marriage.* Such debts are burdens on the common fund, 1. if for furnishings to the family, aliment, education, medical attendance, &c.; 2. if for alimony of the family, from the husband's death to the first term, with alimony of a posthumous child (*a*); 3. if for alimony of a wife living in separation; either judicial or agreed to, or necessary and justifiable (*b*). And, 4. The funeral expense of the husband (*c*). But the funeral expense of the wife is not a common burden (*d*), and gives no preference as a privileged debt, except on the *jus relictæ* (§ 1406).

(*a*) 1 Ersk. 6. § 41; and 3. 9. § 22. Palmer, June 27. 1811; F. C. Moncreiff, June 20. 1713; M. 3945. Lord Justice-Clerk, Jan. 15. 1709; M. 5909 and 5912. Boswell, Nov. 18. 1737; M. 5916; Elch. voce *Aliment*, 6, and notes.

- (b) 1 Ersk. 6. § 19. Lady Kinfauns, July 19. 1711; M. 5382.
 (c) Dirleton, voce *Funeral Charges*. A, June 19. 1708; M. 5927. Moncreiff, ut supra, M. 3945.
 (d) 3 Ersk. 9. § 22. Marshall, Feb. 24. 1747; M. 3948. Gordon, Feb. 23. 1681; M. 5924. Dick, Jan. 16. 1695; M. 5822.

1573. 4. *Burdens accompanying the Possession of the Heritable Estate*, as interests, repairs, and expense of cultivation, affect the accruing right of possession.

1574. 4. DIVISION OF THE COMMON FUND. The common fund is restored to the parties as before marriage; or divided in certain proportions according to circumstances. And, 1. If the marriage be dissolved within year and day, and without a living child, parties are restored as nearly as possible to their former state. 2. If the marriage have subsisted for a year, and part of the next day (b); or, if a child have been born of it, which has been heard to cry (c), the common fund suffers a division Bipartite or Tripartite as there are children surviving at its dissolution or otherwise. And in this question a child legitimated by the intermarriage of the parents, is held to be a living child of the marriage, to the effect of regulating the division of the common fund (d).

- (a) 1 Ersk. 6. § 39, et seq.
 (b) Waddell, Feb. 25. 1680; M. 3465.
 (c) Irvin, July 20. 1632; M. 6181. Dobie, July 17. 1765; M. 6183.
 (d) Crawford, Jan. 20. 1802; M. 12698.

1575. 1. *Marriage Dissolved within Year and Day, and without a Living Child*. In restoring things as nearly as possible to the state in which matters were before (a), 1. the tocher is paid back, and the moveable funds still extant restored to the party to whom they originally belonged; and this whether the parties or either of them had been married before or not (b). 2. There is no claim for terce or courtesy (§ 1595, et seq.) (c). 3. All the reciprocal engagements are discharged, if no stipulation be made to the contrary. 4. Estates conveyed, or provisions made, to either party, in contemplation of the marriage, are restored (d). And, 5. Presents made by relations, &c. are divided equally (e). See below, § 1632.

- (a) Dirleton and Stewart, voce *Jus Mariti*. 1 Stair, 4. § 19. 1 Ersk. 6. § 38-9. See Note from Fountainhall, M. 12699, foot note.
 (b) Maxwell, July 23. 1634; M. 6160.
 (c) Lady Maxwell, Jan. 1600; M. 6159. Maxwell, ut sup. § 1575 (b). Somervil, Feb. 22. 1751; M. 6161.

(d) Guthrie, Nov. 9. 1672; M. 6171. Calder, June 8. 1610; M. 6167. Burleigh, July 16. 1678; M. 6172. See Hunters, July 24. 1766; M. 6164. 1 Hailes, 120. Also Hood, Nov. 6. 1739; M. 6175. Cuming, Feb. 7. 1781; M. 6165.

(e) Waugh, Jan. 14. 1679; M. 6179.

1576. The restitution of tocher must be without deduction (a), except of debts of the wife, or her funeral expenses which the husband may have paid (b).

(a) Covington, Feb. 6. 1606; M. 6166. Guthrie, and other cases, supra (d). 1 Ersk. 6. § 38-9. Neilson, Nov. 21. 1776; M. 6165. Gordon, Feb. 19. 1743; M. 6161.

(b) Gordon, Feb. 23. 1681; M. 6180 and 5924.

1577. Moveables, or money not given in tocher, are to be accounted for under deduction of what has been bona fide consumed.

1 Ersk. 6. § 39, with Mr Ivory's Note.

1578. 2. *Dissolution of the Marriage after Year and Day, or the Birth of a Child.* In this case the division is bipartite or tripartite according to the state of the family (§ 1575): And to make this clear, the legal division may be considered, first, as unaltered by convention; afterwards, the effect of renunciation of the several rights.

1. Independently of convention, the division proceeds thus:

1579. i. On the husband's death,—1. If there be children of the marriage, or children existing by any former marriage of the husband, the division is tripartite: the surviving widow has a third called *JUS RELICTÆ*; a third called *DEAD'S PART* goes according to the husband's will, or to his children as his next of kin; a third called *LEGITIM* (*Legitima pars liberorum*) goes to the husband's children, whether of that or of a former marriage, in their own right; but of this the wife's children of a former marriage have no part. 2. If there be no surviving children of the father by this or a former marriage, the division is bipartite, between the widow and the next of kin, or legatees of the husband.

1580. ii. On the wife's death,—1. If there be no surviving children of the husband (of this or a former marriage), the division is bipartite; one-half to the wife's children of a former marriage, or, if she has no children, to her other next of kin, or to her legatees; the other to the surviving husband. 2. If there be children of the husband by this or a former mar-

riage, the tripartite division has the effect of ascertaining the wife's third, that it may go according to her will, or to her children, or her other next of kin, as her representatives: But the other two-thirds remain with the husband as his own, subject only to his children's claim of legitim on his death (*a*). 3. If the children of the marriage are minors, the father will retain the whole; but he in that case holds the mother's third as administrator-in-law for the children, and their debtor accountable to them or their representatives for it. 4. The father will be liable for interest while he holds this part of the fund—subject, however, to an equitable compensation for alimment (*b*). 5. Where there are specific subjects (as furniture) to a third of which the wife was entitled, the father would seem to hold these as trustee for his children; so that on his subsequent bankruptcy, so far as the identical things remain to which the wife had right, the children should be preferable to his creditors.

(*a*) 3 Ersk. 9. § 18, 19, 20. Home, Dec. 18. 1606; M. 8161. See Menzies's case, below (*b*).

(*b*) Steele's Trustees, June 16. 1830; 8 S. D. 926. Menzies, Feb. 27. 1839; 1 D. B. M. 601.

2. By convention the legal rights may be altered thus:

1581. 1. Renunciation by the wife of her *jus relictæ*, will, on the husband's death without children, make the whole dead's part (*a*): Or if there be children, the division on the husband's death will be bipartite between the dead's part and legitim; the children taking the legitim as their own; while, as dead's part, the other will go according to the will, or fall to them as their father's next of kin (*b*). 2. On the wife's death, after renunciation of her third, the whole remains with the husband, subject only to a claim of legitim by the children on his death. 3. If the children have all renounced, or been forisfamiated, the division is bipartite between the husband and wife. 4. If only some of the children have renounced, or been forisfamiated, the rest take the whole legitim. 5. If both wife and children have renounced, the whole becomes dead's part. The renunciation must in all such cases be express, or at least clearly implied; not inferred from ambiguous circumstances (*c*).

(*a*) Jervcy, Jan. 7. 1762; M. 8170. Nisbet, Jan. 18. 1726; M. 8181. Andrews, March 2. 1836; 14 S. D. 589.

(b) Johnston, June 23. 1814 ; Bar. Hume, 290.

(c) M'Auley, Dec. 12. 1712 ; M. 3848. Riddel, Nov. 28. 1781 ; M. 6457. M'Kinnon, Feb. 24. 1763 ; M. 6451. Tod, Dec. 12. 1770 ; M. 6451. 1 Hailes, 385. Miller, Jan. 19. 1776 ; M. 6456. Sutherland, July 1. 1772 ; 1 Hailes, 479. See Milne, Dec. 5. 1822 ; 2 S. D. 59.

1582. *Legitim or Bairn's Part.* Legitim, which is generally stated as a share of the goods in communion belonging to the children, on dissolution of the marriage, is more correctly a right of succession to a share of the father's moveable estate, vesting in the children ipso jure on their father's death, but expiring with the predecease of the children, and not transmissible in that event to their heirs.

3 Ersk. 9. § 15, et seq. Kilkerran in Robertson's case, June 2. 1742 ; M. 8204. Jervcy, see sup. § 1581 (a).

1583. The rules according to which the right of children to their legitim is regulated are,—1. That legitim is due on the father's death only (a). 2. That if the wife survive the husband, the legitim is a third ; if she has predeceased, or renounced her share, the legitim is a half (b). 3. That all the father's existing children, of whatever marriage, including both legitimated and posthumous children, are entitled to a share of the legitim, unless they have renounced or been forisfamiliarised (§ 1587, 5) (b). 4. That in legitim there is no representation or substitution of the children of a deceased child to the parent (c). 5. That if the father have left only one child, legitim is due, although that child is heir (d). 6. That the eldest son has a share with the rest, but is excluded from it if there be an heritable estate which he refuses to collate, or share with the other children (e). 7. That, by renunciation or forisfamiliarisation (§ 1587, 5), the legitim accrues to the other children, and even to the heir, if he be the only other child. (f).

(a) Ersk. ut supra. Nisbet, Jan. 18. 1726 ; M. 8181 ; affirmed. Rob. App. Cases, 594.

(b) Ersk. ut supra, § 17. Jervcy's case, supra, 1580 (a), and Johnston, Ib. (b). Nisbet, supra (a).

(c) 3 Stair, 8. § 44 and 52. 3 Ersk. Pr. 9. § 6-9. 3 Ersk. Inst. 9. § 15.

(d) Howden, May 18. 1821 ; 1 S. D. 14.

(e) Kennedy, July 15. 1622 ; M. 8163. Justice, Nov. 10. 1737 ; M. 8166. Elchies, voce *Legitim*, 2. Marshall, Feb. 25. 1747 ; M. 8166. Johnston, June 23. 1814 ; Bar. Hume, 290. See Little Gilmour, and other cases, § 1910, et seq. Lord Breadalbane, Jan. 20. 1836 ; 14 S. D. 309. 2 S. and M'L. 377.

(f) Sinclair, July 29. 1768 ; M. 8188. 1 Hailes, 247. Hog, June 7. 1791 ; M. 8193.

1584. Legitim is diminished by every deed of the father inter vivos and in liege poustie disposing of his moveable funds (a); provided it be not fraudulently contrived, in order to disappoint the children without touching the father's own right during his life (b).

(a) Montgomery, Agnew, Feb. 28. 1775; M. 8210. Hog, May 14. 1800; F. C.; as decided in House of Lords. Hay, March 6. 1795; Bar. Hume, 281. Black, Nov. 19. 1795; Ib. 290. Millie, June 7. 1803; M. 8215; affirmed, March 18. 1807. Craigie, June 12. 1811; Bar. Hume, 288.

(b) Hog's case, supra (a), see § 1585.

1585. Legitim may be defeated by a deed inter vivos though the term of payment is after the husband's death (a): But not by a deed mortis causa (b); though it may be diminished by rational provisions for his wife made by a husband having no other means of providing; nor per ambages (c); Nor on death-bed (d); and no deed or settlement of the father regulating the succession to the legitim is effectual even where the child is a bankrupt, a pupil, or an idiot (e).

(a) 3 Ersk. 9. § 16. Johnson, Jan. 12. 1697; M. 8198. Lady Balmain, Jan. 18. 1821; M. 8199. Lawrie, March 1. 1816; Bar. Hume, 291.

(b) Millie and Justice, supra. Allan, Nov. 31. 1763; Monb. 5 Brown's Sup. 897. McDonald, Dec. 13. 1801; Bar. Hume, 288. Johnston, June 23. 1814; Bar. Hume, 290.

(c) Dirlton, voce *Legitim Liberorum*, 3 Stair, 4. § 24. 3 Ersk. 9. § 16. Hog, ut supra. Anderson, Feb. 26. 1799; Bar. Hume, 282.

(d) Hog, Nov. 29. 1791; M. 4619; Bell's Cases, 491. Milroy, May 31. 1803; Bar. Hume, 285.

(e) Allan, June 17. 1762; M. 8209. Christie, July 13. 1681; M. 8197. Robertson, June 4. 1742; Kilk. and Elchies, voce *Legitim*, 6. Morton, Feb. 11. 1813; F. C.

1586. The right to legitim vests ipso jure on the child's survivance.

Yeaman, March 12. 1680; M. 8176. Russell, Dec. 8. 1687; M. 8177. Sibbald, July 19. 1623; M. 8176. Jervey, sup. § 1581 (a).

1587. The right to legitim is discharged or satisfied in one or other of the following modes:—1. By express discharge (a). 2. By a provision accepted, having a condition annexed that acceptance shall discharge the legitim (b). 3. By a reasonable provision being made for the child, in an antenuptial marriage-contract of the parents, accompanied by an express exclusion of the right to legitim. But the words “for all he can ask or claim by the father's death,” are not sufficient to discharge the legitim. The proper words are, “to discharge the legi-

tim or bairn's part of gear" (§ 1592) (*c*). But, 4. Such a condition in a post-nuptial contract is not effectual, unless acceded to by the child (*d*). 5. It is no sufficient forisfamiliation or bar to legitim, that a child has been married and has left the father's house, without a discharge of the legitim (*e*). And a child being married in England, and in the English marriage-contract a large sum given "as her portion," it was held no bar to her claim of legitim (*f*). 6. Legitim is not held to be excluded by a larger provision being given to the child (*g*), nor by a marriage-contract in which the whole stock and conquest of the marriage is settled (even if so settled on the child), unless it expressly bear to be in satisfaction of the legitim (*h*). And it may be for the interest of a husband's creditors that a more ample provision made to his wife by her father shall be rejected, and recourse had to her legitim if the conventional provision exclude the husband.

(*a*) 3 Ersk. 9. § 23. Lawson, Feb. 6. 1777; M. voce *Legitim*, App. 1. Anderson, Nov. 22. 1743; M. 5054. Hepburn, June 24. 1785; M. 5056.

(*b*) M'Gill, Feb. 17. 1671; M. 8179. Begg, Nov. 18. 1737; M. 12851; Elch. voce *Legitim*, 3. Campbell, July 2. 1738; M. 8187; Elch. Ib. 4.

(*c*) 3 Ersk. 9. § 23. Stirling, June 1732; Elch. *Legitim*, 1. Burden, June 29. 1738; Elch. *Mutual Contract*, 7; reversed, 1 Cr. and St. App. Cases, 214. Home, Jan. 1757; 5 Brown's Sup. 330. Stephen, Nov. 18. 1803; Bar. Hume, 286.

(*d*) Johnson, Nov. 29. 1825; 4 S. D. 234.

(*e*) Hog, June 7. 1791; M. 8193. Dirl. and St. voce *Bairn's part*.

(*f*) Lord Breadalbane, Jan. 20. 1836; 14 S. D. 308; affirmed, Aug. 16. 1836; 2 S. and M'L. 377.

(*g*) Howden, May 18. 1821; 1 S. D. 18.

(*h*) See cases above (*c*).

1588. Advances will be imputed to the legitim in the following circumstances:—1. If made for the purpose of setting the child up in trade; or for a settlement in the world; or for a marriage portion (*a*): And this equalizing of the right is called *collatio bonorum inter liberos*. 2. If the advances be not made from the common stock, there is no such collation; as when a father makes an advance from his heritage (*b*). 3. Advances for alimony, education, or apprenticeship, will not be imputed to the legitim (*c*).

(*a*) 3 Stair, 8. § 45. 3 Ersk. 9. § 24. Russell, Dec. 8. 1687; M. 8177. Skinner, Dec. 20. 1775, M. 8172; 2 Hailes, 674. Nisbet, March 7. 1726; M. 8181; Rob. App. Cases, 594.

(*b*) Stair, ut supra, § 46, and Ersk. § 25. Duke of Buccleugh, Feb. 14. 1677; M. 2369.

(*c*) Irvine, Feb. 7. 1694; 4 Brown's Sup. 144. Skinner, ut supra.

1589. A father may, during his life, give to a child what sums he pleases, reserving the child's right to legitim (*a*), either in express words, or by declaring that the child shall continue a bairn in the house (*b*).

(*a*) 3 Stair, 8. § 45. Ersk. 9. § 25. Corsan, Feb. 19. 1631; M. 12849. Skinner, ut supra, § 1588 (*a*).

(*b*) Stair, ut supra, § 49. Begg, Nov. 18. 1737; M. 2379 and 12851 3 Ersk. 9. § 25. Spence, July 19. 1766; M. 8178.

1590. The effects of a discharge of legitim (§ 1587) are,—
1. That a discharge by all the children makes the division bipartite between husband and wife,—or, if the wife be already dead and her share paid, it converts the whole into dead's part (*a*). 2. That a discharge by one child operates like the death of that child (*b*); and the virtual discharge by the heir of the right to legitim by refusing to collate (§ 1583. 6.), will produce the same effect (*c*). 3. That a discharge of legitim after the father's death, accrues to the person entitled to the residuary right of succession (*d*).

NOTE.—See below as to the power over and modification of legitim by the father § 1949.

(*a*) Instruction to Commissaries, Feb. 28. 1688, in Act of Sed. p. 99; and see as to the rule of succession in that case, Chisholm, July 19. 1672; M. 8180; Forrester, Dec. 4. 1604; M. 8181.

(*b*) M'Gill, Feb. 17. 1671; M. 8179. Henderson, June 1728; M. 8187. Hog, June 7. 1791; M. 8193.

(*c*) Lord Breadalbane, ut sup. § 1587.

(*d*) Henderson, ut supra.

1591. *Jus Relictæ or Wife's Share*. The share to which the relict is entitled, or which devolves on her executors on her predecease, has already been explained (§ 1580, 1581). It is a share of the moveables of the husband domiciled in Scotland (*a*), a half or a third, according to the rules already laid down. The wife takes this right ipso jure (*b*). She may dispose of it by testament; and without a will it descends to her children or next of kin. The husband cannot encroach upon it more than upon the legitim, by mortis causa or by fraudulent deeds (*c*). It may be renounced, provided it be clearly expressed; and this may be effectually done in a post-nuptial contract of separation, provided it be onerous, and so irrevocable (*d*).

(*a*) Nisbet, Feb. 24. 1835; 13 S. D. 517.

(*b*) 3 Ersk. 9. § 30. M'Aulay, § 1581 (*b*). Stewart, Nov. 29. 1832; 11 S. D. 140.

(*c*) Ersk. ut supra, § 15.

(*d*) See Miller and Sutherland, sup. § 1581.

1592. *Dead's Part.* The husband may dispose by testament of the share belonging to him, called the dead's part; and if he do not exercise this power, the dead's part descends to his children or other next of kin. In marriage-contracts there is no necessity for stipulating a discharge of the dead's part, as of the legitim; since it is at all times within the husband's power. And the general words, "all that the child can ask or take through the father's death," though usually held to apply to the dead's part only, will, where the word legitim is used in the clause, be held as construed by that word to mean only the bairn's part.

See cases *supra*, § 1587 (c).

1593. 2. HERITABLE ESTATE OF THE HUSBAND AND WIFE. The rights of the spouses are either such as arise during the marriage; or such as arise after its dissolution.

1594. 1. During the marriage the husband has the sole administration and possession of the wife's heritable estate as well as of his own. He draws the rents, interests, and profits. But it has been held that the husband cannot compel his wife to bring an action against her mother to deprive her of heritable property, and have it vested in herself (a). The husband, in the administration of the wife's estate, is under restraint so far, that he can grant no lease to endure beyond his own life without his wife's concurrence (b). This right of administration to the effect of taking the rents, &c. his creditors may adjudge (c).

(a) Ferguson, June 3. 1819; Bar. Hume, 222.

(b) Grieve, June 15. 1797; M. 5951. Masterton Gibson, June 12. 1798; Bar. Hume, 205. See Gillon, March 9. 1775; M. 15286; 2 Ersk. 6. § 31. Hume, Jan. 1734; M. 15700.

(c) See above, § 1561.

1595. 2. After dissolution of the marriage there arises a liferent of the land, total or partial, to the survivor. The wife's liferent is called Terce; the husband's Courtesy.

1596. TERCE. This is a liferent of a third part of the heritable estate in which the husband dies infest as of fee, provided by law to a widow who has not accepted of a conventional provision.

2 Craig, 22. § 26. 2 Stair, 6. § 12, 13. 2 Ersk. Pr. 9. § 26. 2 Ersk. Inst. 9. § 45. 1 Bell, Com. 57. See of Liferent, § 1037. et seq.

1597. The terce may be claimed, 1. By the widow of a de-

ceased proprietor infest as of fee, if the marriage has subsisted for year and day, or produced a living child (*a*); and provided, 2. she has not accepted a conventional provision, or has done so with reservation of her right to terce (*b*). It may be questioned whether a conventional provision, which, if effectual, would have been fatal to the terce, will exclude it if that provision be defeated (*c*)

(*a*) See form of the Brieve, 1 Juridical Styles, p. 443; 1503, 77; 2 Acta Parl. 243. c. 23. 2 Stair, 6. § 17. 2 Ersk. Pr. ut supra, § 26. and Inst. ut supra, § 51. Crawford, Jan. 20. 1802; M. 12698. See § 1575.

(*b*) M'Kenzie's Observ. 3 Parl. Cha. II. c. 10. 2 Stair, 6. § 17. 2 Ersk. 9. § 45. Lady Craighleith, Jan. 25. 1681; M. 6450. M'Kenzie's Observ. ut supra. 1681, c. 10. Jankouska, Nov. 29. 1791; M. 6457. Ross, Jan. 20. 1797; M. 4631. and voce *Foreigner*, App. 9. 2 Stair, 6. § 17. 2 Ersk. Pr. 9. § 26. and Inst. § 44. Countess of Findlater, Feb. 8. 1814; F. C.

(*c*) Mowat's Creditors, Feb. 9. 1697; M. 6395.

1598. 2. The subjects out of which terce is demandable are, in general, all heritable subjects and rights in which the husband was infest (*a*). And in a question with the husband's representatives, it will not bar the widow of her terce that the husband's infestment has been reduced on informalities in making up his titles (*b*). In particular, terce is due, 1. from Corporeal heritage, as lands, houses, barns, &c. It may be doubted whether from the mansion-house and garden (*c*); though, if the mansion-house be let, or if there be more than one, the widow may claim her terce (*d*). 2. From Incorporeal subjects, as securities on land by infestment (*e*); but burdens by reservation do not seem to be comprehended within the description of subjects liable to terce. 3. Terce is not due from superiorities; and it has been held (but with strong expression of doubt), that no terce is due from the large feuduties which are now sometimes levied from lands in the neighbourhood of towns (*f*). Reversions (*g*); patronage (*h*); leases, as not feudal; coal, &c. as not proper for liferent—give no terce (*i*): Nor subjects held burgage (*k*); within which exception, however, subjects in burghs of regality and barony are not included, nor tenements within the royalty not held burgage (*l*).

(*a*) 2 Stair, 6. § 16. 2 Ersk. Pr. 9. § 27. and Inst. § 48, 49. See also 2 Craig, 22. § 26-29. Countess of Dunfermline, July 20. 1627; M. 15837.

(*b*) Rose, Jan. 26. 1790; M. Terce, App. 1.

(*c*) Montier, June 29. 1773; M. 15859. Sed quære?

(*d*) Mead, Feb. 24. 1796; M. 15873. See Logan, Jan. 26. 1665; M. 15842.

(*e*) 1 Bell, Com. 59. too absolutely expressed as to real burdens by reservation.

(*f*) 2 Ersk. 9. § 49. 2 Craig, 22. § 34. Lord Glenbervie, March 1541; M. 15835. L. Lamington, Feb. 14. 1628; M. 15840. Lady Dunfermline, Feb. 13. 1628; M. 14707. Nisbet, Feb. 24. 1835; 13 S. D. 517. See 1 Bell, Com. p. 58.

(*g*) M'Dougal, July 3. 1801; F. C.; M. voce *Terce*, App. 3.

(*h*) Duke of Roxburghe, June 25. 1818; F. C.

(*i*) Lamington, Feb. 14. 1628; M. 8240. Belchier. Waddel, § 1043 (*a*).

(*k*) 2 Craig, 22. § 34. 2 Stair, 6. § 16. and 1, 4. § 23. 2 Bank. 6. § 11. 2 M'Kenzie, 9. § 43. Lothian, June 10. 1801; M. voce *Annualrent*, App. 2; affirmed, April 7. 1803.

(*l*) Rose, Jan. 26. 1790; M. 15867. Wallace, June 28. 1749; 1 Brown's Sup. 395. Park, Nov. 15. 1769; M. 15855; 2 Hailes, 306.

1599. The infeftment of the husband must be "of fee" as at the time of his death (*a*); and real, not merely nominal, or in trust (*b*).

(*a*) 2 Craig, 22. § 27. 2 Stair, 6. § 12. 2 Ersk. 9. § 45.

(*b*) Cumming, Feb. 10. 1756; M. 15854.

1600. 3. The terce is diminished by all transferences and real burdens completed by infeftment before the husband's death (*a*). And, 1. Sasine must be actually and duly taken and recorded to exclude the terce (*b*). 2. Resignation in favorem will not have this effect, but resignation ad remanentiam will (*c*). 3. Real burdens by reservation affect the terce, although it is doubted whether the terce includes rights of this description (§ 1598) (*d*). 4. A trust conveyance or absolute disposition and sasine, with a back-bond, will not deprive the widow of her terce; though debt so secured will diminish her right (*e*). 5. An adjudication not completed by infeftment, though with a charge to the superior, does not bar the terce (*f*). 6. Conveyances in defraud of the terce, or undue delay in taking infeftment, will defeat the terce in a question with third parties, creditors, or purchasers: But the wife will, as a personal right, be entitled to redress or relief (*g*). 7. The Court will interfere to give reasonable aliment, if the terce should be inadequate or accidentally defeated, or if the husband's means consist of funds not yielding terce (*h*). And if lands liable to terce have been sold after the husband's death, the widow may claim indemnification against the seller (*i*); and even against the purchaser she would seem to have a real right of restitution.

(*a*) Campbell, Feb. 17. 1776; 5 Brown's Sup. 627.

(*b*) M'Culloch, July 10. 1788; M. 15866; 5 Brown's Sup. 843.

(*c*) See above, § 787-792.

(*d*) Stewart, March 18. 1792. See 1 Bell, Com. 686. note 3.

(*e*) Bartlet, Feb. 21. 1811, and Nov. 27. 1812; F. C.

(f) *Hunter's Creditors*, June 28. 1715 ; M. 15850. Carlyle, Feb. 9. 1725 ; M. 15851.

(g) *Marquis of Annandale*, Dec. 1. 1711 ; M. 15848. *Carruthers*, Jan. 29. 1706 ; M. 15846. *Thomson*, March 6. 1778 ; M. 434 ; 1 *Hailes*, 797 ; 2 *Ersk.* 9. § 46.

(h) *Thomson*, *supra*. See *Lord Braxfield's Opinion*, 2 *Hailes*, 797.

(i) *Bell*, Dec. 8. 1825 ; 4 *S. D.* 286.

1601. 4. The process for making the *terce* effectual consists of two parts ;—one called *Serving* to the *terce*, for vesting the right, the other called *Kenning* to the *terce*, for giving actual possession.

1602. *Service* to the *terce* is a judicial process proceeding on a *briefe* from *Chancery*, and directed to the *Sheriff* of the shire in which the lands lie.* A jury is impannelled to return an answer as to the lands out of which the claimant has a right to *terce*. To this verdict the *Sheriff* interpones his authority, and decerns. And the effect is,—1. To vest in the widow a right of possession *pro indiviso* ; with the benefit of the landlord's hypothec ; 2. To vest her with a right to demand a third of the interest of heritable debts ; or a third of the rents (a). It has been held that without such service the widow does not transmit to her executors the rents of the *terce* lands not drawn by her (b). But it has been well observed, that this decision would require to be reconsidered (c).

(a) 2 *Ersk.* 9. § 50. *Veitch*, March 5. 1632 ; M. 16087.

(b) *M'Leish*, Feb. 2. 1826 ; 4 *S. D.* 485.

(c) *More's Notes on Stair*, p. cexviii.

1603. *Kenning* to the *terce* is a secondary process, dividing the subject between the heir and the widow, and giving *liferent* *infetment* to the widow in her third. In the division,—1. The widow has a third of the lands, and of the barn and barn-yard. 2. Where there are more houses than one, the heir has the best. 3. The widow gets possession of the mansion-house, if not to be inhabited by the heir. *Sasine* is given on this process by delivery of earth and stone, and an instrument of possession follows.

Montier, June 29. 1773 ; M. 15859. *Logan*, Jan. 26. 1665 ; M. 15842. *Mead*, Feb. 24. 1796 ; M. 15873.

* In one case, where the lands lay in different shires, a commission was granted to an advocate as *Sheriff* in that part. But *Lord Elchies* doubts of this. *Lawsoun*, July 30. 4742 ; *Elchies*, voce *Terce*, l. Notes, 484.

1604. 5. Extent and nature of the right of terce. It is a liferent, conferring a pro indiviso right of possession before kenning; a proper liferent possession after kenning. It is effectual,—1. against third parties, according to the measure of the husband's infetment, which in this respect is also the wife's (*a*), and so it draws back to the husband's death (*b*); 2. against the heir, as an assignment of all rents and profits from the term subsequent to the husband's death (*c*); 3. against tenants, for their rents (*d*): But as a title to remove, the instrument of possession on the kenning is necessary (*e*).

(*a*) Boyd, March 7. 1805; M. 15874. Yeoman, Dec. 1666; M. 15843.

(*b*) Carlyle, Jan. 22. 1725; M. 15853.

(*c*) Lady Dunfermline, Jan. 31. 1628; M. 15839. Creighton, Feb. 21. 1532; M. 15835. Semple, Nov. 25. 1624; M. 15837. Tenants, Nov. 31. 1627; M. 15838. Wamphry, Jan. 20. 1669; 2 Brown's Sup. 440.

(*d*) A. v. B. March 5. 1632; M. 15842.

(*e*) Lady Maxwell, March 18. 1630; M. 15842.

1605. COURTESY. This is a right in the surviving husband of an heiress (where the marriage has produced a living heir to her estate) to continue during the husband's life the possession of the heritable estate in which his wife died infet as heiress to her predecessor.

2 Craig, 22. § 40. 2 Stair, 6. § 19. 2 Ersk. 9. § 52. 1 Bell, Com. 61. See above, of Liferent, § 1037. et seq.

1606. The requisites are,—1. That there shall have been a child born of the marriage which shall have been heard to cry (*a*). 2. That there shall be no heir of the wife by a former marriage (*b*). 3. That the land shall have come to the wife by succession, as heir of line, tailzie, or provision (*c*). 4. That the wife shall have died infet: and even if her infetment be irregular, it is held sufficient (*d*). 5. There is no exception, as in terce, of lands held burgage (*e*).

(*a*) See above, § 1575.

(*b*) Darleith, Feb. 20. 1702; M. 3113.

(*c*) Lawson, June 22. 1709; M. 3114. Hodge, Jan. 11. 1740; M. 3119. Primrose, Dec. 10. 1771; M. voce *Courtesy*, App. 1; 1 Hailes, 458; Paterson, Feb. 1. 1781; M. 3121; 2 Hailes, 879. Knight, July 26. 1786; M. 8815.

(*d*) Ersk. ut supra. Hamilton, June 15. 1716; M. 3117. Porteous, Feb. 4 1757; 5 Brown's Sup. 855.

(*e*) See above, § 1598. 3. Gordon, June 16. 1715; M. 3116; 2 Craig, 22. § 43; 2 Stair, 6. § 19; Skene, voce *Curialitas*; 2 Ersk. 9. § 54.

1607. The wife's personal debts are effectual against the courtesy, with relief to the husband against the wife's other property.

Monteith, Jan. 3. 1717; M. 3117.

1608. No service or title is necessary (as in *terce*, § 1601) to enable the husband to continue his possession; and as his right is merely a right of possession, rents not levied, or fruits not reaped, do not vest, and are not demandable by the husband's heir.

2 Ersk. 9. § 55. M'Aulay, Jan. 19. 1636; M. 3112.

Effect of Marriage on the status of the Parties.

1609. Marriage affects chiefly the status of the wife. Her person is sunk, but not so completely as by the English law.

1 Blackst. 442. 1 Ersk. 6. § 19.

1610. The husband is curator of his wife (*a*). Her deeds require his concurrence, unless they be in his own favour. Even when in favour of his relations, a deed is null without his concurrence (*b*). In all actions at the instance of the wife, his name is requisite as a party; or in his room a curator ad litem is named by the Court of Session on summary application, or incidentally by the Judge before whom the suit depends; and it has been held that a wife separated from her husband, may bring an action for damages on account of slander against her (*c*). Her written authority must be shewn to sanction proceedings as to her property (*d*). She must be a party to any submission in which she has interest (*e*). The husband must be called as a party in all actions against her (*f*).

(*a*) 1 Ersk. 6. § 20. also § 21. Scott, Feb. 17. 1703; M. 6050. Ross, Nov. 16. 1704; Ib. M'Pherson, Jan. 18. 1773; M. 6052. Finlay, Feb. 5. 1748; M. 6051. M'Lachlan, May 25. 1809; F. C. Jeffrey, June 28. 1826; 4 S. D. 773. Wight, March 9. 1827; 5 S. D. 549. Borthwick, Feb. 17. 1829; 7 S. D. 420. M'Kenzie, Nov. 19. 1830; 9 S. D. 31; Sh. Sup. 101. Paul, Feb. 13. 1834; 12 S. D. 431; Sh. Sup. 168. Laird, Nov. 16. 1833; 12 S. D. 54.

(*b*) Boyle, March 5. 1822; 1 S. D. 350. Brownlee, Nov. 22. 1831; 10 S. D. 39.

(*c*) Ewing, Nov. 19. 1830; 9 S. D. 31; affirmed, 6 W. S. 566.

(*d*) Aiken, Feb. 11. 1802; M. 16140.

(*e*) Macally, June 15. 1821; S. D.

(*f*) Spence, Feb. 9. 1739; M. 6080. Freebairn, Dec. 8. 1709; Ib. Earl of Strathearn, Sh. Sup. 10.

1611. As to the wife's personal obligation,—1. The general rule is established, that she is incapable of legal obligation; and it has been exemplified in many cases, according to almost every test.

1 Stair, 4. § 16. 1 Ersk. Pr. 6. § 15. and Inst. § 25. Kerr, June 14. 1715; M. 5991. Menzies, Dec. 8. 1761; M. 5974. Watson, Dec. 10. 1772; M. 5976; 1 Hailes, 508. Harvey and Fawel, Feb. 21. 1791; Bell's Cases,

255. Scott, May 22. 1818 ; Bar. Hume, 221. Lenox and Co. May 19. 1821 : 1 S. D. 22. Walker, Dec. 4. 1827 ; 6 S. D. 204. Hannah, Nov. 27. 1828 ; 7 S. D. 71. Dollar, Feb. 10. 1827 ; 5 S. D. 333. Balfour, March 5. 1831 ; 9 S. D. 558.

1612. 2. Exceptions have been admitted in the following cases ;—1. Diligence has been authorized against her estate for money in rem versum (*a*) ; either as furnishings to her, or debts of hers before marriage ; but not for furnishings to the family, the husband being alive (*b*). 2. This has been allowed, more especially when she is living separate from her husband (*c*). And, 3. Above all, such remedies have been given when the wife, living separate, is engaged in trade for herself (*d*). 4. She may grant mandates and other deeds relative to her separate property ; but not to the effect of binding her person (*e*). 5. Even personal obligations to sell or dispoise her heritable estate, or to infeft a creditor, may be considered as imperfect dispositions, competent to sustain an adjudication in implement (§ 836), though not to authorize a demand or diligence against the person ; and her procuratories or precepts are effectual to validate infeftments (*f*). The wife may act as a trustee independently of her husband : But she cannot act as tutor or curator (*g*).

(*a*) Zibbis, Dec. 12. 1609 ; M. 5982. Sinclair, Nov. 8. 1677 ; M. 5648. Primrose, Jan. 13. 1610 ; M. 5982. Douglas, March 14. 1623 ; M. 5983.

(*b*) Walker, Dec. 4. 1827 ; 6 S. D. 204. See also Rutherford, Nov. 20. 1630 ; M. 6071. Nairn, Nov. 17. 1785 ; M. 5860 ; 2 Hailes, 983. Buie, July 9. 1831 ; 9 S. D. 923.

(*c*) Nelson, Feb. 23. 1672 ; M. 5984. Robin, July 6. 1688 ; M. 5955.

(*d*) Hog, Jan. 9. 1611 ; M. 5955. Russell, Jan. 19. 1629 ; Ib. Hay, June 23. 1663 ; M. 5956. Churnside, July 11. 1789 ; M. 6082. Orme, Nov. 30. 1833 ; 12 S. D. 149.

(*e*) Consider 1 Ersk. Pr. 6. § 16. along with the cases of Ellis, Dec. 15. 1665, as reported by Dirleton, 5988 ; Pringle, July 13. 1711 ; M. 5970. Clark, Jan. 24. 1826 ; 4 S. D. 388. Brown, Dec. 3. 1830 ; 9 S. D. 136. Buchan, March 1. 1834 ; 12 S. D. 511.

(*f*) Watson, July 9. 1802 ; Bar. Hume, 208.

(*g*) Stodart, June 30. 1812 ; F. C. Darling, Jan. 14. 1824 ; 2 S. D. 607 ; affirmed, May 11. 1825 ; 1 W. S. 188.

1613. The following are not proper exceptions to the nullity of the wife's obligations, though sometimes so laid down :—1. The wife's obligation as *præposita* is effectual ; but it is so only against the husband (*a*). 2. A bond to take effect after the wife's death is good (*b*). 3. She is bound to indemnify for damage proceeding from her delict (§ 544) (*c*). But she cannot, during her marriage, be imprisoned for a fine imposed on her for delinquency (*d*).

(a) See § 1565. Mitchelson, Dec. 12. 1780 ; M. 5886. Robertson, May 22. 1801 ; Bar. Hume, 208.

(b) 1 Ersk. Pr. 6. § 17. Colquhoun, Feb. 1720 ; M. 5973. Bruce, Jan. 23. 1678 ; M. 5965-6.

(c) Murray, July 2. 1724 ; M. 6079. Chalmers, Feb. 19. 1790 ; M. 6083 ; April 6. 1791, House of Lords, M. 6086.

(d) Chalmers, ut sup. (c). M'Luckie, Jan. 20. 1796 ; Bar. Hume, 204.

1614. The wife may, with her husband's consent, dispose of her own estate, or of her peculium (§ 1560).

1 Ersk. Pr. 6. § 17. Cunningham, March 26. 1686 ; 3 Brown's Sup. 593. Clark, Jan. 31. 1717 ; M. 5996. Pringles and Brown, § 1612.

1615. Deeds of alienation by the wife of her own property, or in which she consents to concur in conveyance by the husband, are presumed to proceed from the husband's undue influence ; the presumption being counteracted by her judicial ratification (a). Deeds done by the wife with her husband's concurrence, which have the effect of altering her property, and bringing it within the jus mariti, are objectionable (b) ; and the proceeds of her heritable estate, or money in an heritable bond to her, though allowed to go into a bank, are held to be hers as surrogatum, and not to fall under the jus mariti (c).

(a) 1481, 84. 1 Ersk. Pr. 6. § 17. and Inst. § 34, 36.

(b) Gow, Dec. 11. 1807. M'Conochie, Dec. 11. 1816. Anderson, Nov. 19. 1816 ; Bar. Hume, 218.

(c) Nisbet, Dec. 18. 1818 ; Bar. Hume, 220.

Contracts and Donations inter Virum et Uxorem.

1616. The spouses may enter into contracts with each other ; but in so far as gratuitous, or without equivalent consideration, all that they do is revocable (a) ; and,

1. The law presumes donation ; but the contrary may be proved (b). 2. There is not required an absolute and scrupulous equality of opposite considerations to bar revocation ; but even where the form of a transaction has been adopted, substantial inequality will authorize revocation (c). 3. Contracts and mutual settlements, truly onerous, are as effectual as between strangers (d). 4. Gratuitous deeds or donations are effectual if not revoked : And a provision by a wife in favour of a husband's children of a former marriage is not revocable after the husband's death (e). 5. An interest in a stranger,

as one of the contracting parties, provided it be real and not nominal or collusive, bars the revocation (*f*).

(*a*) 1 Stair, 4. § 16. and cases cited by him. 1 Ersk. 6. § 29. and cases. Palmer, § 1540 (*b*). M'Diarmid, May 17. 1826; 4 S. D. 589. M'Neil, Dec. 8. 1829; 8 S. D. 210. Hunter or Roughhead, Dec. 1. 1827; 5 S. D. 266; 5 W. S. 455. Henderson, Nov. 27. 1833; 12 S. D. 133. See below, § 1617 (*a*).

(*b*) Creditors of Brownlee, Jan. 1735; Elchies, *Presumption*, 3.

(*c*) Stewart, Nov. 22. 1769; M. 6100; 1 Hailes, 310. Hepburn, Jan. 6. 1814; 2 Dow, 343.

(*d*) Stair and Ersk. ut supra. Stirling, July 31. 1716; M. 6111. Shearer, July 13. 1733; M. 4892. Hepburn, ut supra. Anderson, Jan. 27. 1837; 15 D. B. 435.

(*e*) Gentles, June 23. 1826; 4 S. D. 749.

(*f*) Hislide, Dec. 1591; M. 6106. Sanders, Feb. 1. 1728; M. 6108; 1 Ersk. 6. § 29. Scott, Feb. 10. 1776; reversed, M. 6108. Muir, Feb. 19. 1663; M. 6107. Hamilton, Jan. 15. 1669; M. 6107. Sommerville, Feb. 1680; M. 6108.

1617. Donations between husband and wife may be revoked after dissolution of the marriage; and they continue pendent, with all their effects, during the giver's life (*a*). When revoked, all that has followed is annulled (*b*).

(*a*) 1 Ersk. 6. § 32. M'Lellan, Dec. 22. 1758; M. 6098. Watson, June 17. 1774; M. 6103. Hepburn, ut supra; 2 Dow, 342. Moffat's Trustees, Dec. 7. 1821; 1 S. D. 184. M'Diarmid, May 17. 1826; 4 S. D. 581; affirmed, March 28. 1828; 3 W. S. 37. Dickson, Feb. 1. 1827; 5 S. D. 266. Gaywood, June 3. 1828; 6 S. D. 909. Jardin, June 17. 1830; 8 S. D. 937. Thomson, Feb. 20. 1838; 16 S. D. 641. Cousin, June 5. 1838; 16 S. D. 1109. Blaikie, Nov. 14. 1838; 1 D. B. M. 18.

(*b*) Sinclair, Feb. 7. 1739; Monb.; 5 Brown's Sup. 658.

1618. Revocation is either Express or Implied (*a*). Express is by a deed directly recalling the donation, or disposing of the universitas of the estate, including the subject of the donation (*b*). Revocation may be implied from deeds inconsistent with the donation; and has been inferred from the mere contraction of debt when the husband has no other fund of payment (*c*). But that is correctly ascribed by Erskine to another principle, viz. that creditors may exercise the faculty, when necessary for their payment (*d*). The mere contraction of debt does not imply an intention to revoke.

(*a*) 1 Ersk. 6. § 31.

(*b*) Scott, July 24. 1770; M. 11367.

(*c*) Henderson, March 1683; M. 6095. M'Adam, March 1684; M. 6096.

(*d*) Ersk. ut supra.

1619. The power of revocation is barred by the acceptance of provisions made under that condition (*a*); but if this

have proceeded from ignorance or error, it will not operate as a bar. Revocation is barred by divorce for adultery (*b*). The right to revoke is not renounced by the wife's judicial ratification (*c*). And this right may be exercised by creditors in case of insolvency (*d*).

(*a*) Dixon, Feb. 8. 1839; 1 D. B. M. 474.

(*b*) Murray, June 16. 1575; M. 328.

(*c*) 1 Ersk. 6. § 35. Gordon, Feb. 15. 1678; M. 6144. Borthwick, July 21. 1724; M. 6149; correcting, 1 M'Kenzie, 6. § 14, and Richardson, Dec. 4. 1685; M. 6147.

(*d*) 1 Ersk. 6. § 31.

1620. Action and diligence are competent reciprocally by the spouses against each other; for alimony, for separation, for divorce (*a*); and in such cases, the husband pays both sides. And it would seem, that in taxing the account of the wife's agent, it is to be taxed as between agent and client, not as between party and party (*b*).

(*a*) Glenbervie, July 13. 1638; M. 6053. M'Lachlan, May 25. 1809; F. C. Thomson, March 7. 1815; F. C.

(*b*) Taylor, Nov. 17. 1831; 10 S. D. 18.

1621. 3. EFFECT OF DISSOLUTION OF MARRIAGE. The effect of the dissolution of marriage by death has already been stated—1. where the marriage is prematurely dissolved (§ 1576, et seq.); and, 2. where it has subsisted for a year, or with living progeny (§ 1579, 1608).

1622. Of DIVORCE as a mode of dissolving marriage, the effects are,—1. That the innocent party has the benefit of all legal and conventional provisions, and the guilty is barred from revoking donations (*a*). 2. That the guilty party forfeits the tocher and donations propter nuptias (*a*). 3. That the guilty party seems, by personal exception, barred from claiming any benefit from the dissolution (*a*). But, 4. Death before decree of divorce bars these consequences (*b*).

(*a*) 1573, 55. 1 Stair, 4. § 20. 1 Ersk. 6. § 48. Auchinleck, Dec. 18. 1540; M. 339. Anderson, Feb. 8. 1734; Elchies, *Husband and Wife*, 2 Justice, Jan. 13. 1761; M. 334. See above, § 1619 (*a*).

(*b*) A. against B. Jan. 25. 1734; Elchies, *Husband and Wife*, 2. Clement, March 4. 1762; M. 337.

1623. The rights of the parties are fixed as at the date of the decree of divorce; and the innocent party can claim no

right or interest in any estate afterwards acquired by succession or otherwise.

Earl of Elgin, Jan. 26. 1827 ; 5 S. D. 243 ; F. C. See Greenhill, June 24. 1824 ; 3 S. D. 169.

IV.—RIGHTS OF LAWFUL CHILDREN.

1. *Character of Lawful Child.*

1624. A lawful child, according to the law of Scotland, is one born in wedlock, or within a certain time after the dissolution of the marriage ; or born of parents who, at the conception, were under no impediment to marry, and have since intermarried. See below, § 1627.

1 Ersk. Pr. 7. § 36, 37, and Inst. 1, 6, § 49, 52. See cases under § 1626.

1625. Bona fides in both or one of the parents, though it will not validate marriage where one of the parties is already married (§ 1525), seems to legitimate the offspring.

4 Decret. 7. § 14. 2 Reg. Mag. 16. § 73, 74, with Skene's Note. 2 Craig, 18. § 18, 19. 3 Stair, 3. § 42. 1 Ersk. 6. § 51. Bell's report of a case of Putative Marriage. See also Jolly, *supra*, § 1520 (*b*).

1626. The presumption of legitimacy from the birth of a child during marriage is of great value in protecting every man's legitimacy ; as expressed in the maxim "Pater est quem nuptiæ demonstrant." It may indeed be overcome by opposite proofs : But 1. The mere circumstance of birth occurring soon after marriage will not be sufficient for that purpose (*a*). 2. Impossibility of access within the period of gestation will overturn the presumption (*b*). 3. Actual proof of non-access within that period is now admitted ; the English rule by which such proof was excluded unless the parties were separated by seas, having been abandoned in both countries (*c*). But 4. Moral proofs will not be admitted to counteract the presumption of legitimacy—far less moral probabilities (*d*). 5. In England divorce à Mensa et Thora seems to overturn the presumption : But a decree of separation in Scotland has not that effect.

(*a*) See Sandé, Dec. Fris. 1. 4. tit. 8. dig. 10. 1 Ersk. 6. § 56. Sandy, July 4. 1823 ; F. C. ; 2 S. D. 406. Gardner's Peerage, 1824 ; Le Marchant's Report. Innes, July 7. 1835 ; 13 S. D. 1050.

(b) *King v. Luffe*, 8 East, 207.

(c) 4 Decret. 17. § 3; 2 Craig, 18. § 20; 3 Stair, 3. § 42; 1 Ersk. 6. § 49. *Pendrel v. Pendrel*, 2 Strange, 924. *King v. Luffe*, ut supra. Routledge, Jan. 20. 1810; May 19. 1812; F. C.; Buchanan's Cases, 121. Douglas Cause.

(d) Cases, supra. Banbury Peerage, 1813. Routledge, Jan. 20. 1810; F. C.

1627. Legitimation of children, by the subsequent marriage of their parents, (a,) has been referred to various fictions invented to explain its several effects: one that the parents were married at the time of gestation; another that the child was not born till the marriage. None of the suppositions entirely accord with the effect: But the general rule is fixed, and not to be shaken on the inadequacy of any fiction to account for it. 1. The parties must have been under no legal impediment to marry at the procreation of the child. And so children born of an adulterous intercourse will not be legitimated by the subsequent marriage of their parents. 2. Children legitimated by subsequent marriage will, as lawful children, take precedence of those born afterwards in marriage. 3. This effect of legitimation would seem to follow although the children should have died before the marriage, so as to confer on their descendants all the rights which belong to the children of one lawfully born. 4. It has been lately questioned whether the intermediate marriage of either of the parties with another than the parent of the child bars the legitimacy which would otherwise arise from their intermarriage. And after much division of opinion among the Judges of the Second Division, the question now stands over for argument and the opinion of all the Judges (b). But 5. The children of the intermediate marriage cannot be prejudiced by the legitimation.

(a) 1 Ersk. 6. § 52. 1 Bank. 5, 57, 8.

(b) *Kerr v. Martin*, Summer Session, 1839. See Kerr, July 1836; 14 S. D. 1104.

1628. Difficulties on this subject naturally arise from difference in the laws of different countries, relative to the effect of subsequent marriage in legitimating offspring; and the following points have been held as law:—1. Subsequent marriage has no effect to legitimate the previous issue, if the child is born and the marriage take place in a country by the law of which subsequent marriage does not legitimate previous issue (a). 2. That when the domicile of the parents at the

birth and at the marriage is actually or constructively in Scotland, the child is legitimate (*b*). 3. A person having illegitimate children born in England, will not, by going into Scotland, acquiring a domicile there, and marrying there the mother of those children, legitimate them (*c*). 4. It has been said, that a child born where the law of legitimation is recognised, may be legitimated by the marriage of the parents in a country where it is denied. See below, *Monro's case* (*c*). 5. The Judges of England have held, that a child legitimated by subsequent marriage in Scotland, though in point of status legitimate in England, cannot, contrary to the territorial law of England, succeed to lands there (*d*).

(*a*) *Sheddan*, July 1. 1803; affirmed March 2. 1808; *M. voce Foreign*, App. 6. *Strathmore Peerage*, House of Lords, 1821; 4 W. S. App. No. 5. *Symon Monro*, Nov. 15. 1837; 16 S. D. 18.

(*b*) *McDowal*, Nov. 15. 1838; 16 S. D. 6.

(*c*) *Monro*, May 15. 1827; F. C.; 5 S. D. 605; as reversed in House of Lords, July 14. 1830; 4 W. S. App. Cases, 289, and Appendix.

(*d*) *Birtwhistle v. Vardill*, 5 Barn. and Cress. 438. See questions for opinion of the Twelve Judges; 4 W. S. App. No. 6. See opinions delivered June 10. 1830, in House of Lords; 6 W. S. App.

See Hubert *Prælect.* 1. 3. § 10, 12, *De Conflictu Legum*. Voet. de Statutis. Hertius de *Collisione Legum*, § 4, 10, 16. 3 Pothier, Tr. 320. Storey, *Con. of Laws*, 85, et seq.

2. *Right to Maintenance, Education, and Guardianship.*

1629. Besides Legitim as a provision for lawful children after the father's death (§ 1582, et seq.), the children have right during his life to maintenance, education, and protection.

1630. 1. MAINTENANCE OR ALIMENT. A child is entitled to maintenance, 1. In the father's house, and for necessary furnishings the father is liable (*a*); or, 2 Elsewhere, if the father's conduct endanger the child's safety, or if the father choose to give him separate maintenance (*b*). 3. The amount above bare subsistence, according to his condition in life, is at the father's discretion (*c*). 4. The mere name of a profession is not enough to satisfy the obligation (*d*); but an occupation in the lower ranks, by which a livelihood may be gained, is sufficient (*e*). 5. The obligation ceases with forisfiliation (*f*), unless the child shall fall into indigence and want. And, 6. It extends to the son's wife in the higher ranks during the son's life; or after, if she be the mother of an heir of entail (*g*).

(*a*) 1 Ersk. 6. § 56. *Dick*, Jan. 13. 1666; M. 409. *Buchan*, Feb. 23.

1666; M. 411. Barclay, July 11. 1758; M. 9624. Ferne, Dec. 23. 1680; 3 Brown's Sup. 384.

(b) Morrison, July 19. 1716; M. 410. Hepburn, July 30. 1734; Ib.

(c) Maule, July 9. 1823; F. C.; 2 S. D. 464; reversed, June 1. 1825; 1 W. S. App. Cases, 266.

(d) Maule, ut supra. See Maidment's case, below, § 1631.

(e) Dick, ut sup. (a).

(f) Campbell, Feb. 1741; M. 448.

(g) Duncan, Feb. 17. 1810; F. C. Yuill, Dec. 21. 1815; F. C. Adam, March 1. 1762; M. 398; and July 11. 1764; M. 400. Chrystie, July 6. 1802; M. voce *Aliment*, App. 2. Brown, July 10. 1824; 3 S. D. 247. Lauderdale, June 14. 1765; M. 15419. De Courcy, July 3. 1806; *Aliment*, App. 8. Tait, Feb. 28. 1802; Ib. 3.

1631. The father is bound to give aliment in the lower ranks, till the child is able to earn a livelihood; in the higher, still longer, if the child be destitute; especially in the case of daughters.

1 Ersk. 6. § 56. Cairns, July 1687; M. 410. Ayton, July 25. 1705; M. 451. Dalziel, Dec. 14. 1788; M. 450. Maidment, May 25. 1815; F. C.; reversed, May 27. 1818; 6 Dow, 257.

1632. The duty of maintenance devolves on the father's representatives, if lucrati by his succession (a); not on the son merely as such (b).

(a) 1 Ersk. 6. § 58. Lowther, Dec. 15. 1786; M. 435. Buchanan, Jan. 21. 1813; F. C.

(b) 1 Stair, 5. § 10. Anderson, Jan. 25. 1754; M. 427. Malcolm, Jan. 16. 1756; M. 439.

1633. The duty devolves on the mother if she be rich, and the father indigent or dead; and the grandfather is bound to aliment his destitute grandchildren in his own house; or to allow a reasonable aliment according to his means. But he is not bound to aliment the wife of his son.

Tait, Feb. 28. 1802; M. voce *Aliment*, App. 3. Chrystie, July 6. 1802; Ib. 5. Belch, Dec. 1. 1798; Bar. Hume, 1. Hamilton, June 27. 1807; Ib. 3. McKissock, Feb. 14. 1817; Ib. 6. Pagan, Jan. 27. 1838; 16 S. D. 399.

1634. Indigent parents have a reciprocal right to maintenance from their children, who are in circumstances to afford it.

1 Ersk. 6. § 57, and cases there quoted by Mr Ivory. 1 Stair, 5. § 6. White, March 10. 1829; 7 S. D. 567.

1635. 2. EDUCATION. Education of children seems to be at the father's discretion.

See 1 Kames' Prin. of Equity, 109. Maule's case, ut supra.

1636. 3. GUARDIANSHIP. The father is administrator-in-law for his children.

See below, of Tutors and Curators.

II.

LAWS OF SUCCESSION.

I. OF SUCCESSION IN GENERAL.

1637. No department of municipal law is more intimately connected with the state of society than that which relates to the rights of heirs, and the rules of descent; and in none perhaps are differences so essential to be found in comparing the laws and institutions of various countries. While in most European countries, and particularly in England and Scotland, the equal division of the Roman law prevails in relation to the succession in moveables; the law of primogeniture, and the preference of males, is the distinguishing character of the descent of land. But in France, in Holland, in Spain, in Normandy, and partly in Denmark, and almost universally in America, the rule of equal partition has been adopted in the descent of land.

3 Stair, tit. 4. 3 Ersk. tit. 8. 2 Blackst. Com. c. 14. Pothier, Tr. des Successions, œuv. posth. tom. 3. Code Civile, No. 718-892. Chabot, Com. sur la loi des Successions, Toulier, Dr. Civ. tom. 4. Van Leeuwin, 63. Kent, Com. on American Law, v. iv. p. 373. Story, Conf. of Laws, 403.

1638. In the law of Scotland the universitas of the estates and property of one deceased is called his HÆREDITAS; and comprehends both lands and moveables: the one descending to the heir, the other to the executor; or both to one person, if these characters be united. While it still remains untaken up by the heir, it is called HÆREDITAS JACENS. The person who takes the benefit of the hæreditas is burdened with the debts of the deceased: He is called the REPRESENTATIVE of the deceased, and considered as eadem persona cum defuncto. The act or mode of taking up the succession is either a judicial or an extrajudicial proceeding, by which the heir's right