

II.

RIGHTS OF PROPERTY IN MOVEABLES.

1283. The law of property in moveables is less peculiar than that of territorial property (§ 636). Moveables were of little consideration under our early law. Possession was the badge of property in them while a man lived ; and by equal division among his family on his death, those of his moveables were disposed of which were not requisite for the heir's equipment for his feudal duties. Moveables unaffected by any of the rules of the feudal law, remained under the rules of a jurisprudence immediately derived from the civilians ; in many of its doctrines modified, and in some respects improved by the Canonists.

Moveable property is frequently, in modern times, of much greater value than property in land. It is the part of the wealth of the people most generally diffused, and the most frequent subject of transaction and of transference. And although it makes not so great a figure in our law books, the modes of its transference being simple, and less exposed to those blunders and mistakes out of which so much litigation and so many doubts arise ; a correct knowledge of the rules by which it is regulated, and of their combinations, is of great consequence in the daily transactions of life.

Besides money, jewels, and goods, in immediate possession, one may have shares in Government or Bank stock ; ships ; commodities and money in distant countries ; or in the hands of manufacturers, factors, bankers, debtors : And those funds, so various and so widely scattered, may be subject to the laws of various countries, so as, on marriage, on death, or on bankruptcy, to give rise to many questions of conveyance and succession, in the decision of which the principles of international law mingle with those of the law of Scotland.

Referring to future discussions for the nicer discriminations between heritable and moveable property (§ 1470–1504), the

moveable estate may here be described as comprehending whatever moves, or is capable of being put in motion and transferred from place to place, without change of nature and structure, or destruction of any thing to which it may be attached : And in the same class are comprehended all personal debts.

1284. Ownership in moveables, is a right of exclusive and absolute use and enjoyment, with uncontrolled powers of disposal ; provided no use be made of the subject, and no alienation attempted, which, for purposes of public policy, convenience, or justice, are by the general disposition of the common law, or by special enactments of the Legislature, forbidden ; or from which, by obligation or contract, the owner has bound himself to abstain.

Of restraints on grounds of policy, in agriculture and in commerce, there are examples in the laws regulating exports and imports,—which, directly by prohibition, or indirectly by high duties, impose embargoes on commodities ; in the corn and distillery laws ; in the laws relating to forestalling and regrating ; in the navigation laws for the encouragement of British shipping.

Restraints by contract are chiefly indirect, by the operation of pledge, retention, and hypothec, as qualified rights of property.

The subjects composing the moveable estate, may be distinguished into two classes, Corporeal and Incorporeal.

1. PROPERTY IN MOVEABLES CORPOREAL.

1285. Moveables corporeal, in Scottish law, correspond with Chattels in England. They include all things which, being themselves capable of motion or of being moved, may be perceived by the senses, seen, touched, taken possession of ; as ships ; household furniture ; goods and effects of all kinds ; farm-stock and implements ; horses, cattle, and other animals ; corn, money, jewels, wearing apparel.

1286. 1. *Modes of acquiring the Property of Corporeal Moveables.* The property or ownership of moveables corporeal is acquired by modes which have been distinguished into original and derivative ; the former having reference to the first act of

appropriation, or subsequent change of the thing appropriated ; the latter being by transference from one who has already acquired the ownership. The latter is in the present day the more frequent and important mode of acquiring property ; yet the original modes of acquisition sometimes occur in argument or for decision.

The original modes of acquisition depend either, 1. on the first effectual apprehension of a subject having no owner ; or, 2. on a natural, accidental, or intentional change, by which a new subject of property is produced. The former is called *OCCUPANCY*, the latter *ACCESSION*. The derivative mode of acquisition is by sale or other *TRANSFERENCE*.

1. *Occupancy.*

1287. 1. *Occupancy* is the act of apprehending, with a purpose of appropriation, things which have no owner. It is distinguished as applicable to two classes of cases ;—one, comprehending things never before appropriated ; the other, things which have at one time been appropriated, but have ceased to belong to any one. The same rule was followed in both cases in the Roman law. But in Scotland, property is acquired by occupancy only in the former case ; in the latter, the right goes to the Crown, and is generally given as a donation either to the finder or to another.

1288. As to things not hitherto appropriated, the general rule is, that they belong to the occupant : “ *quod nullius est, fit occupantis.*” Shells, pearls, pebbles, or precious stones on the sea-shore ; animals *feræ naturæ*, beasts, birds, fish, fall under this rule ; so that game, salmon, &c. taken by a trespasser, belong to the taker, unless when forfeited by statute. And the only proper exception is of royal fish, which belong to the Crown.

2 Stair, 1. § 33. 2 Ersk. 1. § 10.

1289. The act of appropriation is effectual to vest the property only when complete. But it is held complete while fairly proceeding towards full accomplishment. So, if one wound an animal to death, or so that it cannot escape, or if one, without wounding it, have an animal in pursuit, and not beyond reach, another coming in and taking the animal does

not deprive the first of his right—the first being deemed the lawful occupant (*a*).

In WHALE-FISHING, an important branch of national industry, this general principle is not found to answer all the exigencies of the situation; and particular rules are established: 1. Where a fish is harpooned with the line attached, it is a fast fish, and belongs to the striker: And this is also the rule where the harpoon has come out of the fish, or has been detached from the line, but the fish is so entangled in the line as to continue in the power and management of the striker. 2. Another striking the fish, is held a friendly harpoon. 3. Where one has struck a fish, and another comes unsolicited and does an act which occasions the unfixing of the first striker's harpoon, and then kills it himself, he kills it for the first striker. 4. Where, without any such interference, the line breaks, or is not in management, it is a loose fish (*b*). 5. There appear to be in some fishing stations peculiar rules;—as in the South whale-fishery a rule, that where a fish is harpooned with a droug (which is a harpoon with a short line and buoy attached to it), a share is given (*c*).

(*a*) 2 Stair, 1. § 33.

(*b*) Stair, *ut supra*. Rose, Nov. 24. 1792; reversed on appeal, Ivory's Ersk. p. 224. *Littledale v. Scaith*, 1788; 1 Taunt. 243, note. *Hogarth v. Jackson*, 1827; 1 Mood. and Malk. 58. *Skinner v. Chapman*, 1827; 1 Mood. and Malk. 59, note. *Hutcheson*, March 8. 1830; 5 Murray's Reports, 164.

(*c*) *Fennings v. Lord Grenville*, 1808; 1 Taunt. 241.

1290. Things which may be appropriated by occupancy, are not capable of being so acquired while the possession of the first holder continues;—as in the case of wild animals confined (deer in a forest, rabbits in a warren, pigeons in a dove-cot, bees in a hive); or tame and domesticated animals, though not confined (*a*). When wild animals confined and appropriated have regained their natural liberty, they are again free to be acquired by occupancy. But a different rule prevails in respect to such animals as have *animus revertendi*;—as pigeons; hawks in pursuit of prey; bees hiving while pursued by the owner (*b*): and also as to such as are marked for private property; as deer and swans with collars.

(*a*) 2 Ersk. 1. § 10.

(*b*) 2 Stair, 1. § 33. 2 Ersk. 1. § 10.

1291. Things already appropriated, but lost, forgotten, or

abandoned, fall under a different rule from that which regulates things that have never been appropriated (§ 1288). The rule is, “*quod nullius est fit domini regis.*” The principle on which this rests is public expediency, to avoid fraud, contests, and litigation, together with some slight purpose of adding to the public revenue.

Stair. Ersk. ut sup. See Sands, May 22. 1810.

1292. *Wrecks.* These belong to the Crown, on the principle (in modern times) of restraint on piracy and speculation. Even by our early law, wreck was given up to the owner, if any living thing escaped; or, although there should not be any living creature on board, if there were any marks to identify the property, and if within year and day (or while the thing was extant) satisfactory proof was made to that effect (*a*). It appears to have been found necessary, by statute in the 15th century, to introduce a rule of reciprocal dealing with other nations in respect to wreck, which was acted on so late as the close of the 17th century (*b*). But the old law of wreck, which held the existence of some living creature necessary to the claim of restitution, was rejected by the Court of Session in the beginning of last century (*c*), and half a century afterwards was, on an admirable argument of Lord Mansfield, banished from English jurisprudence (*d*). It may be considered as completely superseded by the modern statutes passed for the preservation of property in this condition (*e*). By those statutes the officers of the Customs and Excise are bound to keep all wrecks and goods for the owners: And although the right of the Crown, and those having right from the Crown, is secured by those acts, the grantee of the Crown is, in like manner with the officers of Customs, bound to preserve the property for the owners (*f*). Salvage is claimable against the Crown, or the Crown's grantee, taking the wreck (§ 443).

In particular circumstances there is so far a departure from the common rule of wreck and of first occupancy, that the person who succeeds in saving the property is entitled not merely to retain it for payment of salvage, but to the entire property: This, with a view to the saving of human life, prevails as the rule of usage in the North Seas (*g*).

- (a) 3 Stair, 3. § 27. 2 Ersk. 1. § 13. 1 Hume, Crim. Law, 485. 1420, c. 124. Hamilton, Dec. 12. 1622; M. 16791.
 (b) 1429, c. 124. Jacobson, Jan. 30. 1674; M. 16792.
 (c) Montier, Feb. 17. 1725; M. 16796.
 (d) Hamilton v. Davis, 1771; 5 Burr. 2732.
 (e) 12 Anne, c. 18. 5 Geo. I. c. 11. Commissioners of Customs, May 25. 1810; F. C.
 (f) Commissioners of Customs, Dec. 2. 1812; F. C.
 (g) Garrioch, July 7. 1818.

1293. *Treasure-Trove*. This goes to the Crown or grantee, unless proof of property can be shewn, or a reasonable presumption of former ownership.

1 Craig, 16. § 40. 2 Stair, 1. § 5, and 3. § 60. 2 Ersk. 1. § 12. Cleghorn, Dec. 29. 1696; M. 13523. Gentle, Jan. 26. 1788; Baron Hume.

1294. *Waif and Stray Goods*. These are generally considered as the same in Scotland. Waifs, strictly speaking, are goods stolen and thrown away by the thief; and in England they are forfeited to the Crown, in punishment of the owner's want of due vigilance in following them. Strays belong to the Crown or the grantee; and the property was forfeited by the old law after a year's silence, if the stray was an animal requiring to be fed; but the stray might be vindicated at any time, if inanimate. The grantee must not use or injure the stray; and the property is lost to the owner, if duly advertised and sold for the keep (a). The Crown has no claim to goods which have been lodged in a public warehouse and forgot for many years, and where the owner is unknown, unless there shall be evidence of total abandonment (b).

(a) 2 Ersk. 1. § 12.

(b) Sands, May 22. 1810; F. C.

1295. *Prizes*. What is taken in war belongs to the Crown, and is now adjudicated in the Court of Admiralty of England (a).

Prizes are either by way of reprisal, or in open war after a declaration of hostilities. Sea-prize, regularly, is and ought to be by the Royal Navy alone. But prizes may legitimately be made during war by private ships under Royal warrants, as privateers authorized to carry on war against the public enemy and to make captures. It may also be made under Letters of Marque and Reprisal, during peace, where injustice or oppression having been committed on individuals, indemnification has been refused, and Government chooses thus to compel

indemnification without necessarily incurring the evils of general warfare. In both cases privateers find caution for good behaviour to the amount of L.1500 ; or L.3000, if more than fifty men : But no precautions have been sufficient to prevent abuse (*b*) ; and the whole privateering system is greatly to be condemned, as contrary to the true spirit of a national contest, and disgraced by a selfish desire for plunder, very nearly allied to piracy (*c*).

Commissions to private ships are deemed indispensable on two grounds ; that war may be conducted with some regard to a regular system ; and that precautions may be taken against the enemy strengthening their hands by the capture of inadequate force opposed to them. But the *enemy* has no right to complain of capture by an uncommissioned ship, or to treat the captor as a pirate : The only effect is, that the prize becomes a droit of the Admiralty ; not prize for the captor. In self-defence, every private ship is entitled to make prize, though uncommissioned.

By the law of nations, and the Prize Acts passed in the commencement of each war, prizes, when taken, must be judicially condemned ; which forms a great and wholesome restraint on the conduct of captors. The general rules of condemnation seem to be,—1. That the ships, goods, and effects of either of the belligerents may lawfully be captured. 2. That the goods of an enemy on board the ships of a friendly state may be taken. 3. That contraband of war, though the property of a neutral, may be taken. 4. That neutral property not contraband, cannot be taken, and if on board an enemy's ship must be restored. 5. That the evidence to acquit or condemn must, in the first instance, come from the ship taken, the papers on board, and the examination of the master and officers. 6. That every ship must be provided with genuine papers ; and that if there be false or colourable papers, no proper papers on board, papers destroyed, prevarication, and fair ground of suspicion, the costs will be adjudicated, or not, to the claimant, in case of acquittal or restitution. 7. That if capture be made without probable cause, costs and damages will be given ; to which effect privateers are bound to find security for good behaviour (*d*).

The point of time at which the property of the prize passes, may be questioned by the original owner with a purchaser or

with a re-captor; and, 1. When a ship escapes from the captor, or is retaken and ransomed by the owner, he is immediately reinvested. 2. In other circumstances the sentence of condemnation alone passes the property; and in the interim the ship is under sequestration in possession of the government of the captor, in trust for those to whom the property shall be finally adjudicated. This is now the universal rule.

(a) 1681, c. 16. 2 Stair, 2. § 1, et seq. Hendricks, Jan. 30. 1781; reversed, May 20. 1782; M. 11959. 6 Geo. IV. c. 120. § 57.

(b) See Instructions by Orders in Council, May 16. 1803.

(c) Kent, Com. v. i. p. 96.

(d) See Paper by Lord Stowel and Sir John Nichol, published by Wheaton, Dig. of Law of Mar. Captures; and also by More, Notes to Stair, p. clii. See Lord Stowel's Judgments from 1798 to 1822, in Robinson, Edwards, and Dodson's Reports in Admiralty. 1 Illus. 376.

Accession.

1296. This mode of acquiring property depends on natural increase, by the production of the fruits of vegetables, or the young of animals; or on the accidental or intentional application of skill or art in manufacture; or by commixtion or confusion of substances, whereby an augmentation of value, or a new article is produced. Hence natural and industrial accession.

1297. *Natural Accession* consists of that increase or augmentation which proceeds from the production of fruits, natural or industrial; or from the propagation of animals. It confers the property on the owner of the principal.

1298. *Industrial Accession* is produced by the art or industry of man, and is either Adjunction; Specification; Confusion; or Commixtion. In all these the rule is, "accessorium sequitur principale;" *i. e.* of two things having intimate connexion, the property of the principal draws after it that of the accessory; and the only difficulty is to fix which is the principal. The rules by which this is to be ascertained are,—1. That of two substances, one of which can exist separately, the other not, the former is the principal. 2. That where both can exist separately, the principal is that which the other is taken to adorn or complete. 3. That in the absence of these indications, bulk prevails; next value. And in all such cases where there can be no separation, the property is with the owner of the principal, leaving to the other a claim for indemnification (*a*).

1. Specification is the forming of a new species from materials belonging to another; a change being produced on the substance: As flour out of corn, wine out of grapes. The questions which occasioned the controversy of the Sabinians and Proculians (*b*) are resolved with us according to the *media sententia* (*c*); on the plain principles of good sense and natural equity.

The rules are,—1. That if the materials, as a separate existence, be destroyed in bona fide, the property is with the workman; the owner of the materials having a personal claim for a like quantity and quality, or for the price of the materials. 2. That if still capable of restoration to their original shape, the property is held to be with the owner of the materials; a claim against him for work and indemnity, in quantum lucratus, being competent to the workman.

2. Confusion of liquids and Commixtion of solids have the following effects:—1. They raise a common property, if the commodities be of the same kind: And of such property pro indiviso the shares are in proportion to quantity and value; where either the union is by common consent, or where, having been made by accident or without fault, the commodities are inseparable. 2. The property is unchanged if the articles be capable of separation. 3. If the union be of substances different, so as to create a *tertium quid*, the property is (according to the rule in specification, § 1298) with the owner of the materials, or with the manufacturer, according to the possibility or impossibility of restoring the original substances (*d*).

(*a*) 2 Ersk. i. § 14.

(*b*) 2 Inst. 1. De Rer. Div. § 25. Vinnius, Com. in Instit. 148. Pothier Tr. de Droit de Propriété, § 188.

(*c*) 2 Stair, 1. § 41. 2 Ersk. 1. § 16.

(*d*) 2 Stair, 1. § 34, 36, 41. 2 Ersk. 1. § 14–17. 1 Bell, Com. 276.

Transference of Moveables by Delivery.

1299. The derivative mode of acquiring property is Tradition, or Delivery, as the *modus* following on a legal *titulus transferendi* (*a*). Lawyers distinguish in transference, the *Titulus transferendi dominii*; and the *Modus transferendi dominii*: The former being the conventional will to convey; the latter, the overt act by which the real right is transferred.

The *titulus transferendi* is, 1. Voluntary, and that either in-

ter vivos, or mortis causa; or, 2. Judicial. The Voluntary title of transference has already been considered under the Contract of Sale (see above, § 85, et seq.). The Judicial will be considered under Diligence. Transference of moveables mortis causa, will be discussed under Succession.

The *modus transferendi* is tradition or delivery (*b*).

(*a*) Voet. ad Pand. lib. 41. tit. 1. § 35.

(*b*) 2 Ersk. 1. § 18, et seq.

1300. DELIVERY, as the *modus transferendi* in moveables, is applicable to all the conventional titles of transference known in law. It is the delivery of possession by the owner, with the design of transferring the property to the receiver (*a*). By the laws of England, America, and France, the property of moveables is passed by the completed contract of sale; but the right of possession still remains with the seller (*b*). By the law of Scotland, neither the right of possession nor the right of property is passed without delivery; the rule being peremptory "*Traditionibus, non nudis pactis, dominia transferuntur.*" And it is not enough in transferring moveables by the Scottish law, to give symbolical delivery, or delivery by an instrument of possession: If the things themselves remain in possession of the person transferring, the instrument will avail nothing (*c*). See above, § 86, and below, § 1317.

The material distinction between the Scottish and the other laws alluded to is, That by those laws the property being passed, and the *possession* alone wanting, the seller has only the power of retaining the thing sold till the price be paid; and if bankruptcy should occur, the tender of the price will entitle the buyer to demand the thing. But in Scotland, the *property* being still untransferred, if the seller become a bankrupt, his creditors take the thing sold even should the price be paid or tendered by the buyer. No one can doubt that this rule of the law of Scotland, is inconsistent with equity; but it is clearly settled, and is not to be altered except by the Legislature. See below as to Actual and Constructive Delivery, § 1302-3.

(*a*) 2 Stair, 1. § 11. 2 Ersk. 1. § 19. 4 Pothier, Droit de Propriété, p. 419. Brown on Sale, 390.

(*b*) 2 Blackst. Com. 498. 2 Kent, Com. 492. Pothier, ut sup. (*a*).

(*c*) Ersk. ut sup. § 19-20. Corbet, July 6. 1666; M. 10602. Ker, Jan. 22. 1695; M. 9122. Carse, June 17. 1714; M. 9125. Henry, May 14. 1822; 1 S. D. 399. Borthwick, Feb. 17. 1829; 7 S. D. 420. Frazer, June 26. 1830; 8 S. D. 982.

1301. The simple act of delivery by the hands of the seller to a buyer, can seldom take place amidst the wholesale dealings of traders; and it is necessary to note many situations in which distinctions may be taken and questions raised. The situations chiefly deserving of notice are, 1. where the goods to be transferred are in the seller's possession; and, 2. where they are in the custody or under the care of another.

1302. 1. DELIVERY OF GOODS IN THE SELLER'S POSSESSION (*a*). In the delivery of goods which are in the seller's own hands, or in what law deems to be his custody, these cases may be distinguished:—

1. *Actual Delivery*. The simple act, as exemplified in purchasing a book in a shop, and bringing it away; 2. Delivery into the buyer's cart, or warehouse, or shop (*b*); 3. Delivery into the buyer's ship; or into a ship hired on time, and entirely at his command (*c*); 4. Delivery into a bonded warehouse for the buyer, and at his own risk (*d*); 5. Delivery into the warehouse of a public warehouseman, used by the buyer as his own (*e*); or to a carrier's warehouse to be there at the buyer's order (*f*); 6. Delivery of the key of a warehouse or cellar in which the goods are placed (*g*). In all these examples the delivery is held to be actual and complete, effectually to transfer the property beyond recall or stoppage.

(*a*) 2 Ersk. 1. § 18, 19. 1 Bell, Com. 172. Brown on sale, 390.

(*b*) Collins, Nov. 23. 1804; M. 14223. Blakey v. Dimsdale, Cowp. 661.

(*c*) Fowler v. McTaggart, 7 Term. Rep. 442; 1 East, 522; 3 East, 396. Inglis v. Rusherwood, 1801; 1 East. 515. Bothlingk v. Inglis, 3 East, 381. See below, Robertson and Aitken, and Pierson, § 1304 (*b*).

(*d*) Strachan, Jan. 21. 1817; F. C.

(*e*) Richardson v. Goss, 3 Bos. and Pul. 127. Leeds v. Wright, 1803; Ib. 320. Scott v. Pettit, Ib. 469. Dixon v. Baldwin, 1804; 5 East, 175, 188.

(*f*) Foster v. Frampton, 6 Barn. and Cress, 107. Black, May 30. 1828; 6 S. D. 894. See 1 Illus. 411, 412, note.

(*g*) 2 Ersk. 1. § 19. See 2 Just. Instit. 1. § 44. Dig 1. 41. 1. 1. 9. § 6.

1303. 2. *Constructive Delivery*. When goods sold are in the seller's custody, but some impediment prevents the completion of the act of delivery, the rule is, that wherever the delivery is as far perfected, and the commodity as much separated from the seller's stock, as in the circumstances is possible for the completing of the transfer, the property is passed; with this sole qualification, that if the price be unpaid the seller may retain the goods in security. The effect produced is analogous, in short, to that which takes place in England by com-

pletion of the contract: So that the bankruptcy of the seller will not entitle his creditors to take the goods if the price be paid or secured, but only to retain possession if the price should not be paid.

Such are the following cases:—1. Where the delivery of goods sold by entire contract is necessarily protracted (of a cargo of corn for example), and an interruption takes place in the course of the delivery; the unloading and delivery of part is held delivery of the whole; though the part undelivered may be retained for the price if unpaid (*a*). 2. Where the thing sold is not yet separated from the soil, and cannot instantly be separated and delivered, it is held as delivered, and the property passed, subject to retention for the price, when the commodity is marked for the buyer (*b*). 3. Where cattle are sold while grazing, and are marked for the buyer; or sold by public roup, and put into the seller's field till they can be removed; or wine is sold and placed in a bin for the buyer; the delivery seems to be complete if the price is paid (*c*). 4. When a manufacture in the workman's hand unfinished, is purchased, and the price paid; or when, by periodical payments, it is appropriated as it advances; the law holds it as delivered (*d*).

But in this class of cases, some doubts remain where the delivery is left imperfect, not from *necessity*, but in mere *convenience* to the buyer: There seems, however, upon the whole, now to be a prevailing opinion, that the distinction is to be disregarded, when no question arises respecting the payment of the price (*e*). In English practice, wherever the custom of trade has sanctioned sales of goods, in which the custody is left with the seller, and the goods are distinguished or marked for the buyer; or there is an agreement to pay warehouse rent, and the rent is received from the buyer; the property is held to be completely transferred (*f*), provided nothing remains to be done in ascertaining or preparing the goods (*g*). See below, § 1315.

(*a*) *Abbot*, 377. 1 Bell, Com. 172, 197. *Collins*, Nov. 23. 1804; M. 14223. *Sluby v. Hayward*, 1795; 2 H. Blackst. 504. *Hammond v. Anderson*, 1 Bos. and Pull. New Coll. 71. See *Hanson v. Meyer*, 6 East, 614.

(*b*) *Grant*, July 21. 1758; M. 9561. 1 Bell, Com. 176.

(*c*) *Lang*, July 6. 1832; 10 S. D. 777. *Gibson*, July 9. 1833; 11 S. D. 916.

(*d*) *Mucklow v. Mangles*, 1 Taunt. 318. *Simson*, Aug. 2. 1786; M. 14204. 1 Bell, Com. 177. notes 3 and 4. *Wood v. Russel*, 5 Barn. and Ald. 942. See *Atkinson v. Bell*, 8 Barn. and Cress. 277. *Clarke v. Spence*, 1836: 4 Ad. and Ellis, 448.

(e) Broughton, Nov. 15. 1809; F. C. and 1 Bell, Com. 180. Gibson, July 9. 1833; 11 S. D. 916. See also Lang, *supra* (c). See § 1316.

(f) Flynn and Field, 1 Atk. 185. Goodal v. Skelton, 2 H. Blackst. 316. Thackthwaite v. Cock, 1811; 3 Taunt. 487. Knowles v. Horsfall, 1821; 5 Barn. and Ald. 134. Hammond v. Anderson, *supra* (a). Hurry v. Mangles, 1 Camp. 452. Stoveld v. Hughes, 14 East, 308.

(g) White v. Wilks, 1813; 1 Marsh. 2. Bloxham v. Sanders, 1825; 4 Barn. and Cress. 941. Busk v. Davis, 5 Taunt. 622, note. Hurry v. Mangles, 1 Camp. 452. New v. Swain, 1 Dam. and Lloyd, Mer. Cases, 193. Townley v. Crump, 4 Ad. and Ell. 58. See Tansby v. Turner, 2 Bing. New S. 151.

1304. 3. *Transitus*. There is another class of cases, in which, though the thing is, at the time of the sale, in the seller's hands, the delivery to the buyer is not direct and immediate, but circuitous and transitory, through a middle hand (a);—as, 1. where the goods are delivered to a wharfinger to be sent to the buyer; or, 2. where they are delivered to a carrier or ship-master to be transported to him, even though the ship should be freighted by the buyer, if not on time (see § 1302, c) (b); or, 3. where materials bought are sent to a manufacturer by the buyer's order. In these cases the delivery is complete to pass the property, with reservation of a privilege to reclaim them before they have reached the actual custody of the buyer, if the price be still unpaid.

See below, of Stopping in Transitu, § 1307.

(a) Dunlop, Feb. 22. 1814; F. C. Dixon v. Baldwin, 5 East, 175. Ellis v. Hunt, 3 Term. Rep. 464. Fragano v. Long, 4 Barn. and Cress. 219. Noble v. Adams, 2 Marsh. 366. Craven v. Rider, 6 Taunt. 433. Ruck v. Hatfield, 5 Barn. and Ald. 632. Litt v. Cowley, 7 Taunt. 169.

(b) Robertson and Aitken, July 3. 1801; Sale, App. 5. Pierson, July 8. 1807. 1 Illus. 393. See below, § 1308.

1305. 2. DELIVERY OF GOODS IN THE CUSTODY OF ANOTHER. The principle which rules delivery in such a case is, that there shall be a complete transfer of the custodier's duty, so as henceforward he shall hold for the buyer instead of the seller. This comprehends, 1. all the cases of sale of goods placed in Bond warehouses for the duties (§ 1306); or in dock warehouses, provided delivery is given by transfer of the dock warrant (a); 2. all goods in the hands of wharfingers or brokers, to whom notice is given to change the custody (provided nothing remain to be done to ascertain the price or the quantity), or who acknowledge that they hold for the buyer (b); 3. goods sold, while in the hands of carriers by sea or land, by transfer of the bill of lading (c); 4. goods deposited or left in the carrier's warehouse, subject to the buyer's order (d).

(a) 4 Geo. IV. c. 24. § 82. 6 Geo. IV. c. 105. § 9. as to goods imported. 4 Geo. IV. c. 94. § 66. as to spirits, &c. See also below, § 1363, et seq. *Tod and Co.* Feb. 1. 1809; *F. C. McEachern*, Feb. 19. 1824; 2 S. D. 724. *Campbell, Ruthven, and Co., Robertson, Harvie, and Co., and Auchie, Ure, and Co.*, 1 Illus. 395-6, 1 Bell, Com. 195. note 2. *Spear v. Travers*, 4 Camp. 351. *Lucas v. Dorrien*, 7 Taunt. 278. *Zwinger v. Samuda*, ib. 265.

(b) *Main*, July 27. 1710; *M.* 9124. *Harman v. Anderson*, 2 Camp. 243. *Stonard v. Dunkin*, 2 Camp. 344. *Hawes v. Watson*, 2 Barn. and Cress. 540. *Bloxham v. Morley*, 4 Barn. and Cress. 952. *Hanson v. Meyer*, 6 East, 614. *Wallace v. Breed*, 13 East, 522. *Whitehouse v. Frost*, 12 East, 614. *Busk v. Davis*, 2 Maule and Selw. 397.

(c) *Buchanan and Cochran*, June 13. 1764; *M.* 14208. *Arthur*, 1770; *M.* 14209; 1 Hailes, 258. *Bogle*, Feb. 2. 1787; *M.* 14216; 2 Hailes, 1018. *Young*, July 23. 1789; *M.* 14218.

(d) See *Foster and Black*, supra, § 1302 (f).

1306. There is a difference, however, in the mode of transference between goods bonded in a warehouse belonging to a third party, and those which are bonded in the warehouse of the seller.* In the former, the matter is left to the general rule by which the transfer of goods in the custody of a third party is regulated (§ 1305), with such further observances as may be necessary, according to the situation of the goods. In the case of goods bonded in the seller's own warehouse, the transference must be in writing (§ 1457, below); the officer being, by the recent Warehousing Act, ordered to keep a book, in which a transfer of such commodities may be marked. And where the goods have been sold by written agreement, and the price paid or secured, an entry of the transfer in the officer's book completes the transfer (a). But this rule is not exclusive of all others which may be applicable to the circumstances. So, in a case of this description, where the goods sold were the only goods in the cellar, the delivery of the key was held a complete transference (b).

(a) 6 Geo. IV. c. 112. § 9. *Auld and Co.* June 11. 1811; *F. C. Maxwell and Co.* March 2. 1830; 8 S. D. 618; reversed, 5 W. S. App. 269. *Knowles v. Horsfall*, 5 Barn. and Ald. 134.

(b) *Maxwell and Co.* supra, as decided in House of Lords. See above, § 1302.

1307. 3. STOPPING IN TRANSITU. The doctrine of stopping in transitu is, as Lord Stowell has observed, a proprietary right recognised by the general mercantile law of Europe; or

* The Act of 6 Geo. IV. c. 112. applies only to goods imported, not to spirits under the Excise laws: they are regulated by 4 Geo. IV. c. 94. See § 1368, 1378.

rather an equitable extension of the right to retain possession of the goods sold till the price shall be paid, proceeding on the principle and effect of mutual contract (§ 71) (*a*). It is a doctrine of English law adopted in America, and not unknown in Scottish jurisprudence. It was first applied to Scottish bargains of moveables, by a decision of the House of Lords in 1790, in place of a rule of presumed fraud, *intra triduum*; which had formerly been held to entitle a seller to restitution of his goods, even after delivery (*b*). It proceeds on the ground of a right to retain the goods sold, or to recover them, if they have not yet got into the buyer's hand, in security of the price unpaid (*c*).

(*a*) Abbot, 364. Brown, 433. 6 Robison, Ad. Rep. 498. 1 Bell, Com. 205. 2 Kent. Com. 540, 552. Code de Commerce, No. 576, 580, 2.

(*b*) Allan, Stewart, and Co. Dec. 23. 1790; M. 4949.

(*c*) Tucker v. Humphreys, 4. Bing. 516.

1308. The rules of this doctrine of stopping in transitu are,—

1. That actual delivery by the seller to the buyer *de manu in manum* puts an end to the transit (*a*); with the exception, *first*, of goods sold for ready money, and delivered before the price is paid, or where the reciprocal obligations are contemporary, the delivery then being conditional (*b*); and, *secondly*, of goods taken into the buyer's custody for safety after insolvency (*c*).

2. That goods delivered into a bond warehouse (§ 1303), or any public warehouse, for the buyer, there to abide the market at his orders, are no longer in transitu, or subject to stoppage (*d*).

3. That goods delivered into the buyer's ship, or into a ship hired by him on time, are no longer in transitu (§ 1302); but if the ship is hired only for the voyage, they may be stopt (*e*).

4. That goods which are still with a workman to be finished; or with a warehouseman or broker for sale, and transferred by notice, or by an entry in the books, or by payment of warehouse rent, or by marking; are no longer in transitu (§ 1303) (*f*).

5. That goods in the seller's warehouse in bond, if sold by written contract, and entered in the officer's books as transferred to the buyer, cannot be stopt as in transitu (*g*). See

above, § 1306. But this rule does not apply to spirits in the bond warehouse of a distiller, unless on payment of the duties (*h*).

6. That goods in dock warehouses are conclusively transferred by indorsation of the dock warrant; the indorsee being in bona fide, and giving a valuable consideration for the transfer (*i*).

7. That where goods are still on their passage from the seller to the buyer in the hands of a middleman, they may be stopped (*k*). The description of middleman includes all those who are employed in the transit of goods;—as common carriers by land or water; shipping companies; masters of ships on general freight; packers, wharfingers, and warehousemen aiding in the transit (*l*). But this general rule admits of several exceptions. Thus, if, with the seller's permission, goods be taken by a shipmaster on a special receipt, "as goods shipped by the *buyer*," they are no longer in transitu (*m*). So where a bill of lading transferable, is indorsed for value, and without notice and collusion, there can be no stopping as in transitu against the indorsee (*n*); but this does not hold where the seller's factor is indorsee, although he be under advance or acceptance on general account (*o*). Where the middleman is, by agreement of the parties, converted into a special agent of the buyer, there is no stoppage (*p*). And, acts of ownership exercised at the close of a voyage (if not conditional), will finish the transitus, although the goods be still with a middleman (*q*).

8. That part payment of the price of goods does not divest the seller of his right to stop for the part unpaid (*r*).

9. That the privilege of stopping in transitu is given only to sellers against buyers (*s*).

10. That it is not defeated by any claim made on the goods by a creditor of the buyer; as by an arrestment (*t*).

(a) See authorities under § 1302.

(b) *Bishop v. Shellito*, 1819; 2 Barn. and Ald. 329. note. *Cowan*, May 21. 1824; 3 S. D. 42. *M'Cartney*, Nov. 26. 1799; F. C. *Brodie*, May 20. 1814; F. C.

(c) *Steins*, Nov. 16. 1810; F. C. See below, § 1310.

(d) *Strachan*, Jan. 21. 1817; F. C. See Cases, § 1302 (*e*). *Allan v. Gripper*, 2 Tyr. 217. *Row v. Pickford*, 8 Taunt. 89.

(e) *Fowler v. McTaggart*, 7 Term. Rep. 442; 3 East, 396. *Bothlingk v. Inglis*, ib. 395. *Robertson and Aitken*, July 3. 1801; F. C. *Pierson*, July 8. 1807; F. C.; Bar. *Hume*, 689. *Drake*, ib. 691. *Nish*, ib. 693.

(f) *Main*, July 27. 1710; *M.* 9124. *Lawrie*, Nov. 12. 1831; 10 S. D. 1. *Harman v. Anderson*, 2 Camp. 243. *Withers v. Lyss*, 4 Camp. 237. *Stonard v. Dunkin*, 2 Camp. 344. *Hawes v. Watson*, 2 Barn. and Cress. 540.

(g) 6 Geo. IV. c. 107. § 9. 3 and 4 Will. IV. c. 57. § 9. See § 1306.

(h) *Wyld*, May 17. 1832; 10 S. D. 538.

(i) *Keyser v. Suse*, 3 Gow's Cases, 58. 1 Bell, Com. 192. et seq. *Zwinger v. Samuda*, 7 Taunt. 265. *Lucas v. Dorien*, ib. 278.

(k) *Snee v. Prescott*, 1 Ald. 243. *Wiseman v. Vandeput*, 2 Vernon, 303. *Stokes v. La Reviere*, 3 East, 397. *Hunter v. Bial*, ib. 466. See *Dixon v. Baldwin*, 5 East, 184. *Hodgson v. Loy*, 7 T. R. 440. *Coates v. Railton*, 6 Barn. and Cress. 422. *Tucker v. Humphrey*, 4 Bing. 516.

(l) *Hunt v. Ward*, 3 Term. Rep. 467. *Smith v. Goss*, 1 Camp. 282. *Hodgson v. Loy*, 7 Term. Rep. 440. *Feise v. Wray*, 3 East, 93. *Tucker v. Humphries*, 4 Bing. 516. *Nicholls v. Hart*, 5 Car. and P. 179.

(m) 1 Bell, Com. 203-4. *Fragano v. Long*, 4 Barn. and Cress. 219. *Noble v. Adams*, 2 Marsh. 366. *Craven v. Ryder*, ib. 129; 6 Taunt. 433.

(n) 1 Valin, 572. 1 *Emerigon*, 320. *Lickbarrow v. Mason*, 1 H. Blackst. 357; 5 Term. Rep. 683; 4 Brown's Parl. Cases, 57. *Wright v. Campbell*, 4 Burr. 2046. *Westzinthus v. La Page*, 5 Barn. and Ald. 817. *Bogle v. Dunmore*, Feb. 2. 1787; *M.* 14216. *Tod*, Feb. 1. 1809; *F. C.* *Salomons v. Nissen*, 2 Term. Rep. 674. *Cuming v. Brown*, 9 East, 506. *Cox v. Harden*, 4 East, 211.

(o) *Patten v. Thomson*, 5 Maule and Selw. 350.

(p) *Richardson v. Goss*, 3 Bos. and Pull. 126. *Scott v. Pettit*, ib. 469. *Dixon v. Baldwin*, 5 East, 175, 188. *Leeds v. Wright*, 3 Bos. and Pull. 320. *Contrast Foster v. Frampton*, 6 Barn. and Cress. 107, with *Black*, May 30. 1828, 6 S. D. 894. See doctrine in *Tucker's case*, supra, § 1307 (b).

(q) *Ellis v. Hunt*, 3 Term. Rep. 464. *Holst v. Pownal*, 1 Esp. 240. *Northey v. Field*, ib. 613. *Foster v. Frampton*, supra (p). *Mills v. Ball*, 2 Bos. and Pull. 457. *Nichols v. Le Feuvre*, 2 Barn. and Ald. 81. *Morley v. Hay*, 3 Man. and Ry. 396.

(r) *Hodgson v. Loy*, 7 Term. Rep. 440.

(s) *Fuse v. Wray*, 3 East, 93. *Siffken v. Wray*, 6 East, 371. *Kinloch v. Craig*, 3 Term. Rep. 119, and 783.

(t) *Butler v. Woolcot*, 2 New Rep. in c. pl. 64.

1309. As to the mode of stopping, the rules are,—1. That in England bankruptcy alone is not sufficient or equivalent to stoppage (a): But in Scotland there is at least a bias toward an opposite rule (b). 2. That notice, even verbal, is enough (c). 3. That notice to the buyer's creditor is not enough (d). 4. The most correct and effectual mode of stopping is by warrant of the Judge Ordinary or a Magistrate. But, 5. It would seem that a vender is not entitled to intercept the voyage of a general ship in order to stop his goods in transitu (e).

(a) *Haswell v. Hunt*, 5 Term. Rep. 231, and 226, 230. *Scott v. Pettit*, 3 Bos. and Pull. 471.

(b) 1 Bell, Com. 229, and cases there cited. See *Brown*, Dec. 21. 1816; *Hume*, 709.

(c) *Robertson and Aitken*, supra, § 1304 (b).

(d) See the above case (c).

(e) *Goodhart v. Lowe*, 2 Jac. and Walker, 349.

1310. 4. *Rejection on Insolvency.* The buyer may and ought

to reject the goods when offered to be delivered, if he be unable to perform his engagement ; and (although it has been doubted whether bankruptcy alone would not be sufficient to operate as stoppage) it seems to be law,—1. that if the goods be taken by the buyer, they cannot afterwards be rejected : 2. that if taken only by a clerk, without authority, they may still be rejected by the buyer (*a*) : 3. That if taken *custodiæ causa* with the intention only of preserving them for the seller, the seller's right to them is preserved (*b*). See above, § 1308.

(*a*) 1 Bell, Com. 233. Wallace and Co. June 13. 1766 ; M. 8475 ; 1 Hailes, 27.

(*b*) Steins, Nov. 16. 1810 ; James v. Griffin, 2 M. W. 623. See Carnegie and Co. Feb. 25. 1815 ; B. Hume, 704.

Effect of Possession of Moveables.

1311. Possession is detention, with the design or animus of holding the subject as the property of the holder. It differs from custody, which is conditional and limited possession, held not for the custodian, but for another. It is acquired, originally by mere occupancy of things not formerly appropriated ; and derivatively, by tradition. See § 1287 and 1299, et seq.

2 Stair, 1. § 42. 2 Ersk. 1. § 20, et seq.

1312. Possession is *Natural*, *i. e.* held by the owner himself ostensibly and manifestly ; or *Civil*, held by others for him,—as his servants, clerks, factors, consignees, or persons having the custody, or use of the thing.

2 Ersk. 1. § 22.

1313. Possession (provided it be actual) presumes property in moveables,—in *pari casu potior est conditio possidentis*. It is on this principle that in Scotland a factor in possession of goods has at common law power to pledge, which in England is given by statute. See above, § 229.

Stair and Ersk. § 20. ut sup.

1314. The legal presumption of property from possession may be overcome by other presumptions, or by proof (*a*). In proof of property to counteract the presumption, there must be evidence of right, and also of the loss of possession ;—as, that the thing was stolen ; that it was given in pledge, in loan, &c. (*b*).

(a) Warrander, Feb. 15, 1715; M. 10609.

(b) Scott, Jan. 28, 1665; M. 11616. Ramsay, Jan. 1666; M. 9113, et seq. Pringle, Jan. 3, 1710; M. 9123.

1315. *Collusive Possession and Reputed Ownership.* Considering the force of the above presumption, and its effect in raising credit in a commercial country, collusive possession of any thing is a natural ground on which the creditors of the person allowed so to possess may attach it for debt; creditors trusting to the apparent ownership in their debtor, and giving credit accordingly. It is necessary, however, carefully to distinguish between such possession as is required in the course of legitimate contracts and such as may be needlessly, carelessly, or fraudulently given to, or left with, one who is not the owner. Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor; or on which creditors are entitled to rely: For the goods in their debtor's possession may be with him, not as owner, but under some contract requiring temporary possession. Hence, every legitimate cause of possession makes an exception to the credit of apparent ownership (a). So, 1. In *Commodate*, the possession of the borrower is no lawful ground of credit to him. 2. In *Hiring*, neither the subject let, nor materials in the hands of a workman under *locatio operis*, can afford a fair ground of enlarged credit to the possessor. 3. In *Deposit*, though the thing deposited may appear as part of the custodier's stock, it remains separate on his bankruptcy, as the property of the depositors: So furniture deposited is not liable to the landlord's hypothec: So also fungibles deposited, if separate and distinguishable, and even money, if specifically distinguished, are not to be held the custodier's. 4. In *Pledge*, the goods remain distinct from the creditor's stock. 5. In *Factory*, goods of the principal are often mingled with the factor's; and difficult cases arise where the identity is lost: But where the distinction is traceable, the rule applies. 6. Goods on *Sale and Return* are not attachable by the consignee's creditors (b); nor, 7. Goods consigned for *Advances and Sale*. And, 8. Goods left with the seller if properly separated (as wine in a bin, or corn in a warehouse, of which the key is delivered), and marked and distinguished as the buyer's, are not to be taken by the seller's creditors (c).

(a) 1 Bell, Com. 254. See the several contracts alluded to. 1 Selwyn, N. P. 217, et seq. and cases cited.

(b) *Gibson v. Bray*, 8 Taunt. 76.

(c) See § 1303, and cases there cited. Ex parte Marrable, 1 Glen and Jamieson, 402.

1316. Collusive possession is when the appearance of ownership is carried beyond the purpose or occasion of a legitimate contract; and powers of disposal are ostensibly given or allowed to be assumed. Such neglect by misleading creditors to trust the possessor on his apparent ownership, justly exposes the owner to the loss of his goods, when attached for the debt of the possessor. In England, ownership was held originally to give right to the creditors of the owner to take the goods; but a statute of James I. introduced an exception in cases of reputed ownership and collusive possession, giving to the creditors of persons holding such possession a right to attach the subjects of it (a). In Scotland, credit raised on apparent ownership has been long favoured, and is the ground of a statutory privilege given to the creditors of an apparent heir in land (b). Both proceed on the same principle (c).

(a) 21 James I. c. 19. 6 Geo. IV. c. 19. § 72.

(b) 1 Bell, Com. 248. 1695, c. 24. See below, § 1929.

(c) *Knowles v. Horsfall*, 5 Barn. and Ald. 134. See *Lingard v. Nupitor*, 1 Barn. and Cress. 315. See the cases cited in the preceding section (b).

1317. Collusive possession proceeds, 1. on the appearance of uncontrolled possession and power of disposal; 2. on acquiescence in something beyond the possession requisite to a fair contract—the proof of collusion varying of course with circumstances. Thus, where possession is continued by a former owner, creditors are more easily misled into a belief of ownership: And the same takes place where a disposition or assignation of moveables is made *retenta possessione*: And in such a case neither an instrument of possession, nor even actual delivery if the thing be immediately restored, has any effect in passing the property, so as to counteract the presumption of property arising from possession. See above, § 1300, and cases there referred to.

1318. *Recovery of Possession when lost.* Besides the provisions of the criminal law operating indirectly for the protection of property, the owner is by civil process entitled to follow and recover his property; or to demand restitution; or to insist for damages for the loss of it.

1319. The owner is entitled to follow after and recover his

property without the aid of a Judge, provided he *ex incontinenti* follow it, but not *ex intervallo*.

2 Ersk. 1. § 23.

1320. The owner may proceed judicially against any one who shall illegally possess himself of his property. The action is summary, grounded on the *jus in re*. It comes in place of the *rei vindicatio* of the Roman law; has for its object the recovery of the subject to the use of the owner; and requires, as a title to pursue, the right of ownership, with proof of the loss of possession (*quomodo desit possidere*), as by fraud, theft, deposit, loan, &c. in order to counteract the presumption of property which arises from possession (*a*). Goods, therefore, bought, but not delivered, cannot be so vindicated by the buyer in a summary process; the action in such cases is personal, grounded on the contract or *jus ad rem*; the demand is, as a creditor, not as proprietor. 2. The action of restitution can be directed only against the possessor, or one who has fraudulently put away the thing in order to evade the action. 3. It will not lie against a purchaser in *bona fide* from one acquiring the goods by fraud: But one who has bought goods that have been stolen, will be liable to such demand of restitution; even where they have been bought in public market (*b*).

(*a*) Russel, Dec. 23. 1699; 4 Brown's Sup. 468. See § 1314 (*b*).

(*b*) Bishop of Caithness, July 2. 1629; M. 4145. Forsyth, Nov. 18. 1680; M. 9120. Mackay, Jan. 20. 1758; M. 4944. Alexander, Jan. 17. 1816; 1 Bell, Com. 287, note 3. Henderson, June 17. 1806; M. *Moveables*, App. 1.

1321. The owner who cannot recover his property, is entitled to maintain, against the party by whose fault or delict he has lost it, an action of damages; and the establishment of his right to the thing itself, will entitle him to indemnification on account of the want of it.

3. *Of Property in certain Moveables under peculiar rules.*

1322. 1. PROPERTY IN SHIPS. The right of property in a ship is conveyed by written title, registered in a particular way. The rules respecting the titles and ownership of this species of property, have arisen with the growth of a system of national policy for the encouragement of British shipping

and navigation. The series of statutes enacted for this purpose have had for their object, 1. to breed up a race of skilful and able seamen; 2. to augment the shipping of Great Britain; and, 3. to encourage ship-carpenters. They began with the Long Parliament, and have been continued down to the present day.

12 Cha. II. c. 18. 1661, 45. 26 Geo. III. c. 60. 4 Geo. IV. c. 41; repealed, 6 Geo. IV. c. 105; re-enacted, 6 Geo. IV. c. 104–110. 3 and 4 Will. IV. c. 54, 55. See also c. 56 and 57, and 5 and 6 Will. IV. c. 19. Abbot on Shipping, 5th ed. 23. et seq. Story's ed. 25. et seq. 1 Bell, Com. 151. et seq.

1323. PRIVILEGED SHIPS. There are two descriptions of ships privileged.

1. *British ships* enjoy a monopoly, 1. of the British trade with her colonies and settlements; 2. of the coasting trade; 3. of the *importation*, not only from the place of growth, but from any port in Asia, Africa, or America, in which they may happen to be, of goods known by the name of enumerated articles,—this right being shared, however, with the ships of the country in which those articles are produced, or from which they are accustomed to be brought; and, 4. of fisheries for importation. These privileges are confirmed and protected by forfeitures and alien duties (*a*).

2. *Foreign ships* also are privileged to share with British ships in the importation into this country of commodities produced abroad, in respect of being vessels of the country of produce, or of manufacture, or from which the goods are imported (*b*). In order to enjoy this privilege, it is requisite that the ship shall be, 1. of the build of such country; or, 2. prize of war to such country, and as such condemned and adjudged; or, 3. forfeited to such country under the Slave Trade laws, and as such condemned; or, 4. British built, not being a prize of war from British subjects; and, 5. the ship must in those several cases be owned by subjects of that country, and three-fourths of the crew must be subjects of that country (*c*).

(*a*) 3 and 4 Will. IV. c. 54. § 2.

(*b*) *Ib.* § 3. et seq.

(*c*) *Ib.* § 15.

1324. DESCRIPTION OF BRITISH SHIPS ENTITLED TO PRIVILEGE. To this it is indispensable, 1. that the ship shall be

of the build of Great Britain or her colonies ; or condemned in Admiralty as prize of war ; or forfeited under the Slave Trade Acts. But even such ships are excluded, if repaired in a foreign country at an expense exceeding 20s. a-ton ; unless such repair has been occasioned by damage in the voyage, and for enabling her to return. Ships also, though British, if captured, and as prize sold to foreigners, are excluded (*a*). 2. The owners must be British subjects ; the master British ; and three-fourths of the crew British, or one British seaman for every twenty tons (*b*) ; and in the coasting and fishing trade, the crew must be entirely British. 3. The ship must be registered in terms of 4 Geo. IV. c. 41, if above fifteen tons ; if under that burden, or if under thirty tons, not having whole deck, and employed in fishing on the banks of Newfoundland, or of Canada, Nova Scotia, or New Brunswick, &c. the ship must be owned and navigated by British subjects (*c*).

(*a*) 3 and 4 Will. IV. c. 55. § 5.

(*b*) 3 and 4 Will. IV. c. 54. § 16 ; c. 55. § 12. et seq.

(*c*) Ib. c. 54. § 12, 13.

1325. REGISTERING OF BRITISH SHIPS. Registration is the test of the right to enjoy the privilege of a British ship (*a*). And ships not duly registered, and not having certificates as such, are liable to forfeiture (*b*). The registry is to be made by the collector and comptroller of the customs in any port in Great Britain or the Isle of Man, and by certain other officers in Guernsey, &c. (*c*) ; or at the port to which the ship belongs (*d*) ; after giving certain proofs of the build, &c. ; accompanied by a survey (*e*) ; and, on proof of ownership, by document and oath : And the name given to the ship at first, and in which she is registered, is not to be changed (*f*).

(*a*) 3 and 4 Will. IV. c. 55. §. 2.

(*b*) Ib. § 4.

(*c*) Ib. § 3.

(*d*) Ib. § 10, 11.

(*e*) Ib. § 14, 15. et seq.

(*f*) Ib. § 24.

1326. CERTIFICATE OF REGISTRY. The certificate, written on parchment, and delivered to the captain, bears testimony to the ownership as proved ; the name and port of the ship ; the burden ; the master ; and the port of registry ; and is the proof of the ship being entitled to the privileges of a British

ship. On the back the shares held by different persons are specified; the owners not exceeding thirty-two in number. Corresponding with the registry is a book to be kept by the collector and comptroller at the port (*a*).

In order to prevent the certificate from being misapplied to confer the privilege on a ship not registered, security is required from the master and owners to keep it safely. High penalties are imposed on the master if he have not the certificate when called for: And a summary remedy is provided against any person wilfully detaining a registry certificate for any purpose but lawful navigation of the ship. On every change of the master, the certificate must be delivered up to the collector or comptroller of the customs at the port where the ship happens to be, that they may indorse on it the change of master, and send notice to the ship's port, and take new security for the penalties. The loss of the certificate may, under certain precautions, be repaired by registration *de novo* (*b*).

(*a*) 3 and 4 Will. IV. c. 55. § 2, 3.

(*b*) 3 and 4 Will. IV. c. 55. § 20. et seq. See *Brown v. Fox*, 10 Barn. and Cress. 41.

1327. The certificate is provided by the statute for public purposes only, and is not evidence of ownership to ground a charge against one as owner, without proof of its having been authorized by him (*a*). Neither is it held sufficient proof of title to support interest in an action on a policy of insurance (*b*).

(*a*) *Fraser v. Hoskins*, 2 Taunt. 5. *Abbot on Shipping*, 63.

(*b*) *Pirie v. Anderson*, 4 Taunt. 652.

Property in ships is acquired either, 1. by building, or causing to be built; or, 2. by purchase; or, 3. by capture and condemnation.

1328. 1. BUILDING. One who builds a ship, or causes her to be built, is owner, and entitled and bound to have the proper certificate of ownership and registry issued (*a*). And the general rule in England is, that delivery by the builder of the survey for the purpose of registration, passes the property (*b*).

(*a*) *Mucklow, Simson, Woods, Clarke*, *supra* § 1303 (*d*).

(*b*) *Woods v. Russel*, 5 Barn. and Ald. 942.

1329. 2. SALE OF SHIPS. Ships may now be purchased and owned by one or more persons, free from many of the embarrassments of the former law.

1. *Ships held in Shares.* Under the former acts, there was much difficulty in vesting the property of ships in companies consisting of many partners; and some danger in placing the property in trust, lest it might, on the bankruptcy of the trustee, be held to belong to his creditors (*a*). By the recent acts the property of every ship, of which there is more than one owner, is divided into sixty-four shares, and the proportion held by each owner is to be described in the certificate as consisting of a certain number of those shares. Not more than thirty-two persons may be owners of a ship, excepting minors, legatees, &c. or joint-stock companies (*b*). And partnerships may hold shares without distinguishing the proportionate interest of each partner.

(*a*) *Abbot on Shipping*, 32, 35. 1 *Bell, Com.* 159. *Cambden v. Anderson*, 5 *Term. Rep.* 709. *Curtis v. Perry*, 6 *Ves.* 739. *Yallop, ex parte*, 15 *Ves.* 60. *Houghton, ex parte*, 17 *Ves.* 254. *Stringer v. Murray*, 2 *Barn. and Ald.* 248. *Burn*, 1 *Jac. and Walk.* 378.

(*b*) 6 *Geo. IV. c.* 110. § 32, 33; and 3 and 4 *Will. IV. c.* 55. § 32, 33.

1330. 2. *Vendition and Registry.* Formerly it was required, that in the bill of sale, the certificate should be recited in words at length, truly and accurately; otherwise to be utterly void and null to all purposes. And under this rule very trivial errors were fatal. But now it is enough if the certificate or the principal contents thereof shall be recited, and the identity of the ship thereby effectually proved. Three things are requisite, whether the sale be of the whole ship, or of shares. 1. There must be a bill of sale; the embarrassments and nullities of the old acts being now removed (*a*). 2. The sale must be entered in the book of registry, and indorsement made on the certificate by the collector and comptroller (*b*), or a new registry obtained (*c*). 3. The date of indorsement on the certificate of registry is declared to be the criterion of preferable right (*d*). 4. These requisites seem not to be dispensed with in completing a transference to creditors on bankruptcy (*e*). And, 5. A term of thirty days from the entry in the registry, or from the ship's arrival, if abroad, is allowed for indorsing on the certificate (*f*).

(*a*) *Abbot*, 44. et seq. 1 *Bell, Com.* 160. 4 *Geo. IV. c.* 41. § 29. 6 *Geo. IV. c.* 110. § 31. 3 and 4 *Will. IV. c.* 55. § 31, 34.

(*b*) *Ib.* § 35.

(*c*) *Ib.* § 42. See also § 36. et seq.

(*d*) *Ib.* § 36.

(*e*) 1 *Bell, Com.* 164.

(*f*) § 36.

1331. 3. CAPTURE. Ships captured and condemned in any Court of Admiralty as prize of war, or ships condemned for breach of the laws for prevention of the slave trade, may be registered, and the property secured to the captor or owner.

3 and 4 Will. IV. c. 55. § 5, 9, 29.

1332. MORTGAGE OF SHIPS. This is now made very simple and effectual, without involving the mortgagee in the responsibilities of ownership, and without requiring possession. See below, § 1379.

3 and 4 Will. IV. § 42. Abbot, 49.

1333. PROPERTY IN MONEY, COIN, BANK-NOTES. Money, the circulating medium of this country, consists of coin and bank-notes.

Money is peculiar in this respect, that it cannot, like other moveables, be recognised as identified while in the possession of another than the owner, unless separated and marked for the purpose. Possession in this, as in the case of ordinary moveables, presumes property. Money in possession of an insolvent is a general fund for division among his creditors; and no sum or part of it is claimable by any one unless it be distinguished and ear-marked as specific.

Hotchkis, Jan. 18. 1797; 1 Bell, Com. 260, note 2.

1334. The Gold coin is regulated by statute, and is the only legal tender by the Bank of England. But by others, while the Bank of England continues to pay their notes in legal coin, those notes payable to the bearer on demand, are declared a legal tender above L.5.

3 and 4 Will. IV. c. 98. § 6. *N. B.*—This is an English act.

1335. *Silver Coin* is a legal tender for forty shillings.

1336. *Copper Coin* is a legal tender only under sixpence. Tokens to workmen, formerly in use as money, are not now permitted.

See 57 Geo. III. c. 46; and 57 Geo. III. c. 113.

1337. BANK-NOTES are promissory-notes (§ 307. 2.) payable to the bearer on demand; passing current as money from hand to hand; transferred by delivery; and in all questions of identity considered as money, having no ear-mark. In England, no bank-note can be issued for less than L.5: In Scotland there is no restriction.

II. OF INCORPOREAL MOVEABLE SUBJECTS.

1338. In England, Debts are called property or choses in action ; Moveables, property in possession. In Scotland, according to the language of the Roman law, the former are characterized as Incorporeal rights ; the latter as Corporeal.

Incorporeal rights comprehend all jura ad res, the jus exigendi in all obligations ; and although incapable in one sense of possession, they are vested by the completion of the jus exigendi,—and form, when so vested, a part of the moveable or personal estate. Such are, Debts ; Government Funds ; Bank Stock ; Patents ; and Copyright.

1. *Of Debts.*

1339. In estimating a man's estate and effects, his solvency or insolvency, all obligations and contracts in which he is the creditor may be regarded as property ; the jus exigendi giving him the right to the subject of the obligation, whether moveables or money. Frequent occasions arise in which it is necessary thus to contemplate jura crediti as property ; as in bankruptcy ; on marriage ; or on the death of the owner.

1340. 1. Paper money, bank-notes, negotiable bills, bank-cheques, are moveable ; some of them (as bank-notes and cheques) are transferable by delivery ; others by indorsation only. They are personal estate ; are held to be, wherever the owner is domiciled ; and are regulated in bankruptcy and in succession by the law of the domicile.

1341. 2. Ordinary debts are also part of the personal estate of the creditor, but are not transferable otherwise than by assignation. They are regulated, as the others are, by the law of the domicile.

2. *Of Government Stock.*

1342. The public debt is either funded or unfunded.

1. The funded debt yields to the creditor a certain interest or annuity, paid regularly at the Bank of England out of the aggregate produce of the taxes. The capital can be obtained only by a sale of the annuity in the Stock Exchange. The statutes declare, that the annuitants shall be possessed thereof as of personal estate ; and so it is held in questions of succession in Scotland. The transfer of the stock is made by an

entry, signed by the person holding the stock, or his attorney ; or, in the absence of a trustee in bankruptcy, and in cases of lunacy, it may be made by the secretary of the Bank of England, under an order from the Court of Chancery.

36 Geo. III. c. 90. Hog, Dec. 23. 1791 ; M. 5479.

1343. 2. The unfunded debt is constituted, either, 1. By Exchequer and Navy bills, on which money is lent to Government by the Bank of England for the service of the year. They bear interest from their dates, or from six months after they are issued. They are issued according to the regulations of an act passed in 1808 ; and by authority of particular statutes, are made either with the creditors' name, or in blank ; passing like bank-notes from hand to hand in the latter case ; by indorsation in the former. They are personal or moveable estate (a). Or, 2. There is another species of transaction (arising from loans by Government), in which Exchequer-bills are made use of. For the carrying on of certain public works, fisheries, and the employment of the poor, money is advanced by Government, on securities to be granted to the commissioners of Government, under the authority of particular statutes, extending from the 57th Geo. III. down to the present time. The debts, principal and interest, on the advances so made, are declared to be privileged, in so far as to entitle the commissioners to preference over private creditors borrower (b).

(a) 48 Geo. III. c. 1. referred to in subsequent acts, down to the last 1 and 2 Vict. c. 93. *Wookey v. Pole*, 1820 ; 4 Barn. and Ald. 1.

(b) 57 Geo. III. c. 34. § 44. 1 and 2 Vict. c. 88.

3. *Of Bank Stock.*

The shares of the stock of chartered banks are of the nature of property, and may be sold.

1344. 1. *Bank of England Stock* is declared by statute to be of the nature of personal estate : it is transferable by contract, registered in the books of the Bank within seven days of the date of the contract ; and the transfer must be made within fourteen days. The dividends are payable half-yearly at the Bank.

1345. 2. *Bank of Scotland Stock* is assignable by an entry in the books of the Bank, signed by the cedent and assignee. It is disposable by will ; is attachable by adjudication, but so

as not to divide the share ; and on the bankruptcy of a Stockholder the Bank may order his shares to be sold, after certain public notices.

1695, Act. Parl. vol. ix. p. 494. 14 Geo. III. c. 32. 44 Geo. III. c. 23.

1346. 3. *Royal Bank Stock* is declared moveable ; descendible to executors ; but not attachable. It can be transferred only in presence of the court of directors, who may stop the transfer till the stockholder's debt to the Bank shall be paid.

5 Geo. I. c. 20. Royal Bank, Feb. 14. 1770 ; F. C.

1347. 4. *British Linen Company Stock* is personal, and saleable by a signed transfer in presence of the directors, with a power of retention for the debts of the stockholder to the Bank.

4. *Of Patent Inventions, and Copyright.*

21 James I. c. 3. 1641, c. 76. 5 and 6 Will. IV. c. 83. Godson on Patents, 1823 ; Supplement, 1832. Davis's Cases on Patents. Report of the Committee of the House of Commons, June 12. 1829. 2 Kent, Com. on American Law, 366, App. to Report, ut sup. Merlin, Repert. de Jurispr. Voce Brevet d'Invention. Renouard, Tr. de Bre. d'Inv.

1348. The right of a person to enjoy the profits of his useful invention, or literary composition, seems to rest securely on the same foundation on which property depends ; namely, occupancy, with skill, labour, expense, and intellectual exertion employed in the acquisition or production. But a more narrow view has been taken of this matter, and instead of considering the invention or the composition as itself the subject of property, it has been held that, as the purchaser of the individual machine or book gives the power of imitating or of copying it, either such copy or the original may be sold, and so copies multiplied to make gain. With this view, in the case of discoveries in the useful arts, concurs the interest which the public has to prevent the undue raising of prices, and restraining of industry and improvement, according to the caprice or self-interest of monopolists. The Legislature has therefore interposed, on the one hand to secure for a certain but limited time, to the authors of useful inventions, or of literary compositions, a monopoly of sale and profit ; and on the other to protect the interests of the public.

Patents for Useful Discoveries and Inventions.

1349. The power which the Crown assumed of granting monopolies, at one time grossly abused, was taken away in England in the reign of James I. ; in Scotland in Charles I.'s time. There was, however, a reservation of power to the Crown to give letters patent " for the sole working and making of any manner of manufacture within the realm, to the first and true inventor ; so they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient" (a). The law of England and of Scotland has been the same since the Union (b).

The right to a patent monopoly of a useful invention, is granted on the principle of a compromise or bargain between the inventor and the public. If left to the common law the inventor would be deprived of the benefit of his invention : If he held a monopoly of it for ever, the public interest would suffer by high prices imposed by him wherever the use of his invention was valuable ; and so would be deprived of the advantage of the discovery by other persons. On these grounds the bargain proceeds ; by which there is given to the public the full benefit of the discovery, in a fair disclosure of it in its most beneficial shape, and in terms so plain and intelligible, that it may be used without danger of useless expense, and without the necessity of further experiment ; and the public, on the other hand, is restrained for a time from interfering with the gains. But although this be now the settled principle of the arrangement, it was not till Queen Anne's time that, by a provision introduced into the patent, a specification of the invention was made the condition of the right. The condition is, that the patentee shall, by an instrument in writing, and enrolled in the Court of Chancery within two months, particularly describe and ascertain the nature of his invention, and in what manner the same is to be performed.

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

(b) See Godson on Patents, 42. et seq. 1 Bell, Com. 108.

1350. PERSONS ENTITLED TO PATENT. The persons entitled to apply for a patent are, 1. the inventor or discoverer of a new manufacture, provided he is the first publisher of the

invention (*a*); 2. the introducer of a foreign invention into this country.

1. As to the former, a person is not the inventor who has learned the thing from another (*b*). But it will not deprive one of the title that he has employed another in the investigation (*c*), provided the invention is not distinctly the separate and independent invention of such assistant (*d*).

2. A foreign invention, by the introduction of which the country is benefited, has, by the uniform construction of the statute from its passing to the present day, been held entitled to the privilege (*e*).

(*a*) Godson, sup. 4.

(*b*) King v. Arkwright,; Dav. Cases, 129. Tenant's case; Ib. 429. Hill v. Thomson; 8 Taunt. 395.

(*c*) Bloxham v. Elsee; 1 Car. and P. 558.

(*d*) Godson, sup. 4.

(*e*) Edgeberry v. Stephens; 2 Salkeld, 477. Wood v. Zimmer; Holt, Cases, 58.

1351. SUBJECT OF PATENT. The description of the subject as contained in the statute, is 'any manner of new manufacture within this realm, to the true and first inventor and inventors of such manufacture, which others, at the time of making such letters-patent, shall not use, so as they be not contrary to law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient.' As 'Manufacture' is the word used by the Legislature in describing the subject of such patents, it must, 1. be a subject vendible, the law being made for the encouragement of trade. A mere principle or method, therefore, is no proper subject of patent, though, if embodied in a manufacture it may (*a*). But although *described* in the specification as a method, it will be good, if truly a patent for a process or thing produced (*b*). 2. Any thing made by the hand of man may be the subject of a patent (*c*). 3. It must be something material and useful (*d*). 4. It must not have been publicly used (*e*). 5. Even a new process of manufacture has been held a lawful subject of patent, though to be carried on by known implements or elements acting upon known substances, so as to produce some other known substance; provided it be in a manner cheaper, better, or more expeditious (*f*). 6. The improvement of an old commodity, or en-

gine, provided the old part be not described as new, and that the old (if protected) be not invaded, is a fair subject of patent (*g*). 7. A discovery or invention imported, may also be the subject of a patent (see § 1350 *e*). 8. It must be an invention, discovery, or first disclosure, as at the obtaining of the patent; insomuch that the improver of a machine under an existing patent cannot, without consent of the patentee, use his invention till the expiration of the first patent (*h*). 9. A patent cannot be had for the *idea* of a machine not reduced into practice at the date of the specification, though the inventor afterwards discovers a method of accomplishing it; but if he have discovered improved methods before enrolling the specification, the patent will cover them (*i*). 10. If the invention or discovery have truly been made by the patentee, it will not invalidate his patent that a model of a similar machine imported from abroad had been seen before the date of the patent, no such machine having been made and introduced into this country previously (*k*). 11. If a patent be granted for a complex invention, there must be novelty in all the parts, else the whole patent will be bad (*l*).

(*a*) Bolton and Watt *v.* Bull; 2 H. Blackst. 463. Hornblower *v.* Boulton; 8 Term. Rep. 98. The King *v.* Wheeler; 2 Barn. and Ald. 350. Hadden, June 25, 1823; 2 S. D. 423. Winter *v.* Wells; 1 Crompt. Mus. and Roscoe, 505.

(*b*) Hornblower *v.* Bolton; 8 Term. Rep. 95.

(*c*) The King *v.* Wheeler; 2 Barn. and Ald. 349.

(*d*) Hill *v.* Thomson; 3 Merivale, 629. Haddart *v.* Grimshaw; Dav. Cases, 297. Walker *v.* Congreve; Godson, 68. Manton *v.* Manton; Dav. Cases, 333, 348. Brunton *v.* Hawkes; 4 Barn. and Ald. 455.

(*e*) Lewis *v.* Marling; 10 Barn. and Cr. 22. Jones *v.* Pearce; Godson, sup. 10.

(*f*) See this doctrine laid down by Lord Tenterden as the opinion of the Court in Wheeler's case, supra (*c*). See also Lewis *v.* Marling; 10 Barn. and Cress. 22. Hullet *v.* Hague; 2 Barn. and Ad. 370. Saunders *v.* Aston; 3 Bar. and Ad. 881.

(*g*) Hill *v.* Thomson; 8 Taunt. 375. Lewis *v.* Davis; 3 Car. and Payne, 502.

(*h*) McFarlane *v.* Price; 1 Starkie, 199. Ex parte, Foxes; 1 Ves. and Beames, 67.

(*i*) Bloxham *v.* Elsee; 6 Barn. and Cress. 169. Crosley *v.* Beverly; 9 Barn. and Cress. 63.

(*k*) Lewis *v.* Marling, supra (*d*).

(*l*) Brunton *v.* Hawkes, 4 Barn. and Ald. 541.

1352. SPECIFICATION. The specification is intended at once to give to the public the full benefit of the invention; and to limit the patentee's power of restraining the invention and industry of others. It must therefore be precise, unambiguous.

and clear. It were to be wished that some previous mode of revising specifications were devised, by which inventors might be entitled to rely on the validity and effect of their patent as specified, instead of being exposed as at present to the almost certain accompaniment of a lawsuit. Until of late years the course of judicial decisions has gone on too critical a construction of the words of specifications (*a*), but now the rule is that a fair and not too astute construction shall be put on them (*b*).

These points seem to be fixed :—1. That the invention must be fully and fairly described, and the specification enrolled in Chancery. 2. That the title and general designation under which the patent has been obtained must exactly accord with the specification (*c*), and the description must detail the invention intelligibly and unambiguously (*d*), particularly the method and effect; omitting nothing useful or necessary to understand the description; containing nothing to mislead (*e*); and specifying the most advantageous mode, so as to require no further research or experience to verify or perfect the disclosure, and to occasion no useless expense (*f*). 3. That the terms made use of are to be understood according to the acceptance of practical men at the time of the enrolment (*g*). 4. That nothing shall be included in the patent which is not original (*h*). In order to give time for preparing a proper specification, the application for a patent may be preceded by a caveat to prevent surprise. But that will not prevent disclosure, nor debar other inventors; and the preference of the pretensions of rival candidates must be decided on evidence.

(*a*) *Hill v. Thomson*, 2 B. Moore, 456.

(*b*) *Russel*, June 7. 1839. *Russel v. Cowley*, 1835; 1 Crompt. Mus. and Ros. 864.

(*c*) *Bloxham v. Elsee*, 6 Barn. and Cr. 169, 178.

(*d*) *Campion v. Benyon*, 3 Brod. and Bing. 5. *Turner v. Wheeler*, 1 Term. Rep. 602.

(*e*) *Turner*, ut sup. (*b*). *Kellon v. Greaves*, 3 Car. and Payne, 611. *Savoury v. Price, Ryan and Moodie*, 1.

(*f*) *King v. Elsee*, 11 East, 109. *King v. Wheeler*, sup. *Lord Cochran v. Surethrust*, 1 Starkie, 208. *Arkwright v. Nightingale*, Dav. on Patent, 56. *Boville v. Moore*, Ib. 401. *Turner v. Winter*, 1 Term. Rep. 602. *Wood v. Zimmers*, Holt's Cases, 58. *King v. Metcalf*, 2 Starkie, 249. *Harmer v. Plane*, 14 Ves. 130; 11 East, 101. *Astley*, June 3. 1817; House of Lords, June 25. 1821; 1 Shaw's App. Cases, 54. *Crossby v. Beverley*, 1829; *Moodie*, and *Malk*. 283; 9 Barn. and Cr. 63. *Campion v. Benyon*, 3 Brod. and Bing. 5.

(*g*) *Turner v. Winter*, 1 Term. Rep. 602.

(*h*) *Haddart v. Grimshaw*, Dav. Cases, 295. *Brunton v. Hawkes*, 4 Barn. and Ald. 550. *Campion v. Benyon*, 3 Brod. and Bing. 5. *Wood v. Zimmer*, Holt, N. P. 58.

1353. NEW POWERS OF THE PRIVY COUNCIL. Amidst the evils arising from the rigid construction to which specifications and patents were exposed, new powers were bestowed on a committee of the Privy Council which greatly tend to correct the evils of the former law. These generally stated, are, 1. a power to allow the specification to be corrected if by mistake or ignorance entered erroneously; 2. a power so far to control a verdict at law opening a patent on account of others being said to have known the thing before, and to confirm the patent as effectual; 3. a power, when a patent has been held good, to grant a certificate that shall meet any future trial, and give the patentee the benefit of triple costs; and, finally, a power to renew the patent for a limited term on being satisfied that there are sufficient grounds to justify the indulgence.

5 and 6 Will. IV. c. 83. See App. to v. i. 504.

1354. PERIOD. This is, in ordinary cases, fourteen years from the date of the patent, but sometimes the term is enlarged by the Legislature in particular cases; or now by the committee of Privy Council, see § 7354.

1355. ASSIGNMENT. The patent may be assigned under certain limitations: It may also be communicated by licence.

It may be entirely assigned to another. But the benefit is not transferable to more than five; the patent becoming void if at any time vested in more; or if books be opened for the subscription of more than five; or if the benefit is divided into more than five shares; or if the patentees act as a body corporate. The benefit may be exercised on a license under the hand of the patentee, and such license will be a ground of action for damages on account of invasion. The patent is held as part of the patentee's estate on bankruptcy, and so passes to his assignees in England, his trustee in sequestration in Scotland.

Bloxham v. Elsee, 6 Barn. and Cress. 169. See also 1 Car. and Payne, 568.

Literary Property or Copyright.

Although the foundation on which a right of exclusive privilege may be argued at common law, is the same in the case of a mechanical invention and of a literary composition, there is a

remarkable difference in the considerations on which the limited monopoly of each ought to stand. In the arts the public is concerned in the invention being opened to them at no very distant period; for no use being derivable from the invention without the absolute possession of the individual machine or manufacture, the public is entirely in the power of the monopolist; and yet the invention would probably have been made by others, if not restrained. But in the case of a book, not only is it impossible that any other person could have composed the same book, but it is a kind of production of which the public has the benefit, by the knowledge diffused; and the value of which, and, consequently, the power of keeping up extravagant prices is restrained by the interest of the author himself. There are not, therefore, the same reasons for limiting the monopoly of an author, as in setting bounds to that of the inventor.

1356. UNPUBLISHED COMPOSITIONS are property at common law; and the publication of them is an invasion of the right of the owner. Under this rule are comprehended, 1. Works fit, or intended, for publication, though a gift or sale of the manuscript may have been made (*a*). 2. Works prepared for publication of a special sort; dramatic works (*b*). 3. Private letters, which, although written and sent beyond recall, are communicated with no intention of publication (*c*). The law of England and that of Scotland proceed on different grounds in denying the right to publish letters: In England, it is on the ground of property alone; in Scotland, on the ground chiefly of a just and expedient interference for the protection of reputation.

(*a*) *Duke of Queensberry, v. Shebbeare*, 4 Burr. 2330. *Southey v. Sherwood*, 2 Merivale, 435. *Burnet v. Chetwood*, 2 Merivale, 443, note. *White v. Geroch*, 2 Barn. and Ald. 298.

(*b*) *Macklin v. Richardson*, Ambler, 694. *Colman v. Walker*, 5 Term. Rep. 245.

(*c*) *Dodsley*, July 27. 1775; *M. Literary Property*, App. 1; 5 Brown's Sup. 509. *Cadell and Davies*, June 1. 1804; *M. Literary Property*, App. 4. *Pope v. Curl*, 2 Atk. 342. *Thomson v. Stanhope*, Amb. 737. *Gee v. Pritchard*, 2 Swan, 402. *Gerard v. Dunken*, 1 Ball. and Beaty, 209. *Percival v. Phipps*, 2 Ves. and Beames, 28.

1357. 2. PUBLISHED WORKS are now protected by statute alone: By the first statute on this subject, a monopoly was given for fourteen years (or in certain circumstances for twenty-eight); secured not only by the common law remedies, but

also by penalties and forfeitures, provided the work was entered in Stationers' Hall. By the later Act, the author's monopoly is declared to extend to twenty-eight years; or (if the author be alive at the end of that time) during his natural life; and to be independent of an entry in Stationers' Hall: But the entry is enforced by penalties. And by a still later act the author is relieved from the furnishing of some of the copies.

NOTE.—The further extension of the privilege has been much discussed in Parliament on the motion of Mr Sergeant Talford. The arguments used *on the occasion* are worthy of attentive perusal.

6 and 7 Will. IV. c. 110. 8 Anne, 19. 54 Geo. III. c. 156. Midwinter, June 7. 1748; M. 8295. Hinton, July 28. 1773; M. 8307. Tait, in 5 Br. Sup. 508. *Miller v. Taylor*, 1769; 4 Burr. 2303. *Donaldson v. Backet*, 1774. House of Lords, 4 Burr. 2408. *Cadell and Davies*, Dec. 18. 1804; M. *Literary Property*, 13. House of Lords, July 16. 1811.

1358. SUBJECT. 1. There is no exclusive privilege in any subject of inquiry. No one by writing on any subject can pre-occupy it to the exclusion of another, and a prior cannot obstruct a subsequent publication without proof of identity (*a*).

2. Dramatic composition is protected against *publication* by persons admitted to the representation (*b*); and, further, protected against *representation* though printed (*c*).

3. Lectures are protected against publication in certain cases (*d*).

4. The most difficult questions which have arisen on the subject of these statutes regard the evidence of identity of the publication complained of with the original publication; or, in other words, in what cases an author is entitled to vindicate as his own exclusive right what has been published by another. This difficulty exists only when the publication is of the nature of a review, or when it is derived from sources of information open to all. And, 1. As to quotations in Encyclopædias, Reviews, &c. it is for a jury to say, whether an unfair advantage has been taken to pilfer part of the work, so as under pretence of reviewing to give the substance, and so to reduce the value of the work itself (*e*). 2. In works professing to give accurate information of facts accessible to all, it is often difficult to prove the piracy; as in Almanacks, Road-books, Directories: and here also the matter is fit to go to the jury (*f*).

5. Abridgments, translations, and notes, are allowable and

protected (*g*). An abridgment must be fair; not a colourable shortening of the work; but the expression of its substance in the abridger's own language.

6. In England a composition, whether published, or unpublished, if so objectionable as not to be fit for publication, will not be protected at the suit of the author against publication by another (*i*).

(*a*) *Mathieson v. Stockdale*, 12 Ves. 274.

(*b*) *Macklin v. Richardson*, Ambler, 694. *Coleman v. Walthen*, 5 Term. Rep. 245.

(*c*) *Morris v. Harris*, and *Same v. Kelly*, 1 Jacob and W. 481. *Murray v. Elliston*, 5 Barn. and Ald. 657; 3 and 4 Will. IV. c. 15.

(*d*) See cases of *Abernethy and Lawrence* 1 Illus. p. 434, No. 4; 5 and 6 Will. IV. c. 65.

(*e*) *Rowarth v. Willis*, 1 Camp. 94. *Wilkins v. Aitken*, 17 Ves. 422.

(*f*) *Murray*, June 25. 1765; M. 8309. *Taylor and Skinner*, Dec. 21. 1776; M. 8308. *Constable and Co.* July 6. 1824; 3 S. D. 216. *Annan v. Boule*, 2 Br. Ch. Cases, 80. *Cary v. Faden*, 5 Ves. J. 24. *Cary v. Kearsley*, 4 Esp. 168. *Templer v. Murray*, 1 East, 362. *Butterworth v. Robinson*, 5 Ves. J. 709. *Longman v. Winchester*, 16 Ves. J. 269. *Mathieson v. Stockdale*, 12 Ves. J. 273. *Cary v. Longman*, 1 East, 358. *Hogg v. Kirby*, 8 Ves. J. 215.

(*g*) *Burnet v. Chetwood*, 2 Meriv. 441, note. *Wyatt v. Barnard*, 3 Ves. and Beames, 77. *Cary v. Longman*, 1 East, 358.

(*h*) *Newbury v. Lloft*, 775. *Giles v. Wilcox*, Alk. 143. *Butterworth v. Robinson*, 5 Ves. 709. *Bell v. Walke*, 1 Br. Ch. c. 451.

(*i*) *Walcot v. Walker*, 7 Ves. 1. *Southey v. Sherwood*, 2 Meriv. 438. *Lawrence v. Smith*, 1 Jac. 471; 1 Illus. 435.

1359. BOOK. This word in the Act has been held to comprehend and protect a work consisting of a single sheet printed separately; a part of a book, as a tale or song in a book; and notes on a book (*a*).

The TITLE of a book or other publication is protected; as the title of a periodical work, review, magazine, or newspaper. A title is held to be property, as well as the work itself, and is often very valuable (*b*).

(*a*) *Hime v. Dale*, 11 East, 244. *Clementi v. Golding*, 11 East, 244. *White v. Geroch*, 2 Barn. and Ald. 298.

(*b*) *Hogg v. Kirby*, 8 Ves. 215. *Constable and Co.* July 6. 1824; 3 S. D. 215. *Edinburgh Correspondent*, 1 Illus. 439.

1360. ASSIGNMENT. Literary property may be assigned either before or after publication, provided it be done in writing. In all actions in which another than the author is prosecutor, a written title is necessary under the statute.

54 Geo. III. c. 156. *Powers v. Walker*, 4 Camp. 8; 3 Maule and Sel. 7. *Morris v. Kelly*, 1 Jacob and Walker, 481.

1361. The Legislature has extended the same protection to property in engravings; busts; music; patterns of linens, &c. (a). But, in regard to engravings, it is no piracy to make a second engraving from the same picture (b).

(a) 7 Geo. III. c. 38. 17 Geo. III. c. 57. 54 Geo. III. c. 56. 54 Geo. III. c. 23; Ib. c. 156.

(b) *De Berenger v. Whibble*, 2 Starkie, 548. *Bach v. Longman*, Cowp. 628. *Clementi v. Golding*, supra, § 1359 (a).

III. RIGHTS IN MOVEABLES INFERIOR TO PROPERTY.

1362. There are rights inferior to property in moveables, which are of great importance in the intercourse of a commercial country, namely, Pledge; Hypothec; and Retention. They are useful to the owner of the thing, as enabling him to supply himself with money or credit, without parting with the ownership: They are useful to creditors, as affording the means of security for debt.

1. THE REAL RIGHT OF PLEDGE.

1363. PLEDGE has already been viewed as a contract imposing reciprocal obligations on the parties (§ 203–208). The real right, or *jus in re*, thereby conferred, vests in the holder a power over the subject, to retain it in security of the debt for which it is pledged; and, if necessary, to have it sold judicially for payment. And this real right in the pledgee qualifies so far, and retains the right of property in the pledger or owner.

1 Stair, 13. § 11. 3 Ersk. 1. § 33.

1364. 1. *Of Pledge in General.* Pledge is different from property. It gives no power to sell without the warrant of a Judge; nor to make use of the subject; and the fruits, if reaped, go to the extinction of the debt. The right conferred, is merely to retain in security, and to resist all attempts by the owner, or those in his right, to recover the possession till the debt be satisfied: But it is a real right completed by delivery and possession (a), which delivery can be given effectually only by one having the ownership or disposal. This with continued possession of the thing impledged, are necessary to the creation and continuance of the real right in the pledgee.

A factor who has the goods of his principal in his hand, can effectually pledge them, or take advances on their consignment. A different rule prevailed in England till the late statute for regulating the powers of factors (*b*). See above, § 224, and below, § 1417.

But the pledge or mortgage of ships, is effectual in the mode pointed out in the statute, without any possession on the part of the mortgagee (*c*).

The *property* in pledge is still with the owner; continued in him by the civil possession of the pledgee: But the real right of pledge cannot be held by the pledgee by mere civil possession through the owner (*d*).

(*a*) Stair and Ersk. ut supra. Johnston, Dec. 8. 1814; Bar. Hume, 448.

(*b*) 6 Geo. IV. c. 94.

(*c*) 3 and 4 Will. IV. c. 55. § 42. See § 1379.

(*d*) Dig. lib. 20. tit. 1. De Pign. Act. l. 37. Voet ad Pandect. p. t. § 12.

1365. Pledge operates as a security for the whole debt: And is not weakened by payment of a part of the debt, but remains as complete for the last shilling as for the whole.

2 Ersk. 12. § 67. in fin.

1366. The right of ownership presumed from the possession of moveables is qualified or limited by the condition of the contract under which, or in reference to which, that possession is held; but the limitation goes no farther. Thus, a moveable in possession of a workman, is his only to the effect of a lien for the price of his labour; or if pledged, it is the pledgee's only to the extent of the debt for which it is pledged. So if one claims right to goods in the possession of another, he must prove the conditions and purpose of the possession, in order to make out his right to the recovery of the thing. If there be no proof but the admission of the possessor, that admission must be taken, with the condition annexed to it, and this will sufficiently prove a right of pledge.

Murray, Dec. 13. 1668. Gosford, 1 Br. Sup. 575. Heriot, May 21. 1791; M. 12405. See Johnston, Dec. 8. 1814; Baron Hume, 448.

1367. TACIT EXTENSION OF PLEDGE. It is an important question whether a pledge is maintainable against third parties for more than the original advance, where additional advances have been made to the creditor? And, 1. when an ab-

solute conveyance is made, though only intended as a security, and a new loan takes place during its subsistence, the restitution is not demandable without payment of the whole debt. This is peculiarly applicable to heritable securities by absolute disposition with an unrecorded back-bond. (See above, § 912.) (*a*). So also in the case of a ship mortgaged under the old law, where the conveyance was strictly analogous to absolute disposition and back-bond (*b*). So in creating a security for a loan by assignation of a debt, it has been held tacitly extended to subsequent advances (*c*). All these cases proceed on the ground of a right ostensibly universal and absolute requiring to be resolved—not being mere securities *ex facie*. 2. Where a jewel or other moveable has been given in pledge, without limitation of the security, it may seem that, on the principle which regulated the above cases, the universal right presumed from possession will effectually cover further advances; which cannot be supposed to be made but on that footing. But if there be proof to limit the pledge to the specific advance made at the time of its constitution, there does not appear to be any ground on which, as against purchasers or creditors, the original security by pledge can be held as extended (*d*). 3. The security may be expressly extended to cover a further advance, but not after diligence by third parties to attach the subject, or after sequestration.

(*a*) See 1 Illus. 448. Pringle's Creditors, Nov. 26. 1793.

(*b*) Balleny, June 7. 1808.

(*c*) Ib. Dougal's Creditors, June 11. 1794.

(*d*) Demaindry v. Metcalf, Precedents in Chanc. 412. See 1 Illus. 441.

2. Of Bonding and Warehousing of Goods for the Duties.

1368. On the principle of pledge, the warehousing system has been introduced. It is connected immediately with the system of the navigation laws and shipping, and is intended to promote two great objects of national policy, the encouragement of importation for the home market, by the storing of goods without advancing the duties; and the promotion of the carrying trade of the country, by the storing of goods for foreign markets on the same terms. A collateral effect is introduced on the doctrines of common law in the peculiarity introduced in certain operations of transference and security over moveables.

The warehousing system originally suggested by Sir Robert Walpole, proposed as a general measure of revenue by Dean Tucker, and revised and reduced to practice during Mr Pitt's administration, has been improved by successive statutes. These were consolidated by an Act in 1823, afterwards in 1825, and finally in 1833. This system is intended, 1. to secure the duties payable to Government on certain enumerated goods lawfully imported for sale and use in the country; 2. to continue the privilege of stowing in British warehouses, for foreign markets, goods of which the use and sale in Britain is prohibited, so as to guard against the evasion of the prohibitory laws; and, 3. to permit the transfer of goods in the warehouse without the necessity of paying the duties (*a*). The system has, to a certain extent, been also extended to spirits under the Excise laws (*b*).

(*a*) 43 Geo. III. c. 132. 4 Geo. IV. c. 24. 6 Geo. IV. c. 105, and c. 112. 3 and 4 Will. IV. c. 57. 1 Bell, Com. 186. et seq.

(*b*) 4 Geo. IV. c. 94. § 66. et seq.

1369. WAREHOUSING PORTS. The Commissioners of the Treasury are from time to time to appoint what ports are to be warehousing ports; and in what warehouses of special, or of ordinary security in those ports, goods may be secured.

3 and 4 Will. IV. c. 57. § 2.

1370. Warehouses are by the more recent statutes accommodated to the two several occasions of goods prohibited to be used or sold in this country, and of goods which may be so used or sold. For the former, warehouses of special security are provided, to prevent evasion of the prohibitory laws; and these are either to be specially appointed, or warehouses connected with wharfs and within walls; and published in the London and Dublin Gazettes. For the other case, warehouses of ordinary security are held sufficient; the goods being bonded only for duties, but allowed to be sold in the country.

3 and 4 Will. IV. c. 57. § 3, 7.

1371. The duties are secured by bond and pledge.

1372. 1. The BOND is either a *general* bond by the proprietor of the warehouse, with two sureties, "for the payment of the full duties of importation, on all such goods as shall at any time be warehoused therein, or for the due exportation there-

of" (a); or, 2. a *special* bond "by the importers of the separate quantities of goods upon each importation, in respect of the particular goods imported by them respectively." And such special bond may, on a sale of the goods without being removed, be superseded by the bond of the buyer of those goods (b).

(a) 3 and 4 Will. IV. c. 57. § 8.

(b) *Ib.* § 8.

1373. 2. The PLEDGE of the goods subsists while they remain in the warehouse. They may be sold by the owner while in the warehouse, and a fresh security given by the buyer, and the former released. The goods must be removed from the warehouse within three years. After that time the Commissioners are entitled to sell them for the duties; three months' further indulgence being given to the purchasers for taking them away.

§ 29, 30.

1374. For recovering payment of the duties, the Crown may proceed upon the personal bond of the warehouse keeper or importer; or the sureties may be called upon, and on payment they get assignment to the lien over the goods; or the goods may, at the appointed time, be sold by order of the Commissioners of the Customs.

1375. In clearing goods from the warehouse, 1. if lawful to be sold, payment of the duties is the sole condition on which they can be removed; 2. if prohibited, it is necessary to give security for exportation.

3 and 4 Will. IV. c. 57. § 16.

1376. In the case of goods imported and warehoused, facilities are provided for examining them, sorting, separating, re-packing, and selling them in whole or in part, without removal or payment of the duties (a).

Spirits warehoused under the 4 Geo. IV. may be viewed, shewn, and examined for sale, under certain precautions (b).

(a) *Ib.* § 9, 10, 31.

(b) 4 Geo. IV. c. 94. § 77.

1377. Provision is made for preserving the rights of parties, both owners of imported goods, and shipmasters having lien

for freight on all goods and merchandize landed in docks, and lodged in the custody of the proprietors of the said docks.

3 and 4 Will. IV. c. 57. § 14.

1378. In transferring goods bonded (whether on importation or under the Excise laws), it is of importance to fix the mode of completing the transference. And, 1. as to goods imported and warehoused, which belong to the occupier of the warehouse, they may be effectually sold either by a verbal contract of sale, with delivery of the key of the warehouse (*a*): or by a written contract of sale, accompanied by an entry thereof in the book of the officer having care of the warehouse, and who is charged with the duty of keeping such a book (*b*).

2. As to spirits under the Excise Acts (in whose warehouse soever they may be bonded), and imported goods bonded in warehouses not in the occupation of the importer; they may be effectually sold, either, if in dock warehouses, by due notice to the warehouse keeper, with indorsement of the dock warrant, which by usage is negotiable (*c*); or, if in ordinary bond warehouses, by due notice given to the keeper of the warehouse, or by transference of such receipt or certificate as by usage corresponds with the English dock warrants (*d*); or by payment of the duties in the case of spirits warehoused (*e*).

(*a*) Knowles v. Horsfal, 5 Barn. and Ald. 134. Maxwell and Co. supra, § 1306 (*b*), March 2. 1830; 8 S. D. 618; reversed, April 4. 1831; 5 W. S. 269.

(*b*) 6 Geo. IV. c. 112. § 9. See Auld against Hall and Company, July 12. 1811; F. C. See above, § 1306. 3 and 4 Will. IV. c. 57. § 9.

(*c*) 1 Bell, Com. 191. et seq. Lucas v. Dorrien, 1817; 7 Taunt. 278. Zwinger v. Samuda, 1817; 7 Taunt. 265.

(*d*) Campbell, Ruthven, and Co. 1803. Robertson, Harvey, and Co. Nov. 24. 1803. Auchie, Ure, and Co. Dec. 18. 1804; and in House of Lords, March 16. 1810; 1 Bell, Com. 195, note 2. Tod and Co. Feb. 1. 1809; F. C. McEachern, Feb. 19. 1824; 2 S. D. 724.

(*e*) 4 Geo. IV. c. 94. § 77, 85, 87. See above, § 1306, note.

3. *Pledge or Mortgaging of Ships.*

1379. By the Act which now regulates the sale of ships (supra, § 1330), the mortgaging or granting of securities over that valuable species of property is also regulated. There are two methods of giving security over such property—by mortgage and by assignment.

3 and 4 Will. IV. c. 55. § 42.

1380. 1. Mortgage is a transfer of the whole ship, or of a share, for security of debt. The transfer is entered in the book of registry, and indorsed on the certificate; and the entry must bear that the transfer is "only as a security for the payment of a debt or debts by way of mortgage, or to that effect."

1381. 2. Another method of giving security over a ship, is by assignment to a trustee for selling the ship or share in satisfaction of debt. To be effectual, it must be entered in the same way.

3 and 4 Will. IV. ut supra.

1382. It is provided, that the creditor is to be held no further as an owner of the ship than may be necessary for selling in order to satisfy the debt; that the owner shall not thereby cease to be owner, except in the same respect; and that a subsequent act of bankruptcy, or assignment under a commission, shall not affect the interest of the creditor under his mortgage.

Statutes, ut supra, § 42, 43.

4. *Pledge of Debts and Title-Deeds.*

1383. The pledge of debts cannot be fully accomplished except in those cases in which the debt or *jus exigendi* goes with the document. See above, § 205.

1384. The pledge of title-deeds has not, according to the law of Scotland, the effect of burdening the estate or subject; but confers merely a right of retention of the *ipsa corpora* of the title-deeds (*a*). In England, the original rule was the same with the Scottish. But gradually there came to be admitted, as a consequence of the pledge, an equitable right to a conveyance of the estate itself. This has been admitted, much to the regret of the highest authorities in English jurisprudence (*b*).

(*a*) 2 Bell, Com. 24.

(*b*) *Ex parte Hooper*, 1 Meriv. 7.

2. OF HYPOTHEC.

1385. Hypothec differs from pledge, in giving security to the creditor without possession; and is admitted in cases in which it is expedient to raise such security, without impeding

the ordinary use of the thing. Hypothecs were numerous in the Roman law, and are still largely admitted on the Continent ; but it is against the principle and spirit of the law of Scotland to admit a real right or security which is not attended with some badge manifest and palpable. Hypothecs, therefore, on account of the false credit which may be induced by the owner's possession, are limited to a very few cases.

1 Stair, 13, 14. 3 Ersk. 1. 34. 2 Bell, Com. 25. 2 Pothier, 945. Chev. dal Pozzo, Obs. sur. le Régime Hypothécaire.

1. *Conventional Hypothecs.*

1386. Conventional hypothecs in the law of Scotland are bottomry and respondentia. See above, § 452.

2. *Tacit and Statutory Hypothecs.*

The only tacit hypothecs admitted in the law of Scotland are, 1. those introduced by consuetude ; of which every one is aware, and in which it is held to be for the common advantage of the parties to give a security thus extensive, so far as it can be done, without interrupting the ordinary use or employment of the subject of security ; and, 2. those introduced by statute for the protection of the public revenue.

1387. 2. The hypothecs introduced by consuetude are those in favour of landlords and of law agents ; in a few maritime cases ; and in privileged debts. Of these the landlord's hypothec, favourable to tenants, as saving them from personal and sudden diligence for their rent, has been already considered (1236. et seq.).

1 Stair, 13. § 14. 2 Bell, Com. 26. et seq.

1388. LAW-AGENT'S HYPOTHEC. This hypothec has been encouraged as tending to keep open the Courts of Justice to poor men. Under it the agent is entitled to have decree in his own name, for the expense found due to his client by the adverse party. There is an implied agreement that the agent shall, in security of his professional remuneration, have this right. In England the right goes much further, extending over the subject of the lawsuit itself.

See below, of Retention, § 1437.

2 Bell, Com. 35. et seq. 2 Pothier, 703. et seq. Mill, Jan. 12. 1802. Bell, Com. 37, note 3. Alison's Trustees, Nov. 29. 1808 ; F. C. M'Ken-

zie, Jan. 13. 1823; 2 S. D. 401. Mactavish, see below, § 1389 (c). Clapper-ton, June 8. 1802. Ellis, May 12. 1831; 9 S. D. 585.

1389. Against the right of the agent to a decree in his own name for the expense of the action which he conducts, it will not avail as a defence that his own client is solvent, and able to pay his full demand (a). Even where he has allowed decree to go out in the name of the client, he is entitled, if the decree should be suspended, to appear in the suspension, and still have the decree for the original expenses in his own name (b).

(a) Russel, Jan. 28. 1826; 4 S. D. 403.

(b) M'Tavish, June 13. 1826; 4 S. D. 704.

1390. Compensation on a debt due by the client is not pleadable by the party against whom the agent requires decree, so as to defeat the agent's claim for expenses (a). But, 1. if decree has been pronounced in the client's name and on a demand or charge for payment, the adversary has pleaded compensation, the agent cannot afterwards come forward to defeat that plea by a demand for the expenses in his own name: for to that effect compensation is payment. 2. If expenses have been found against the client in another part of the litigation, that the amount may be set off in compensation (b).

(a) Smyth, July 9. 1802; M. 6257.

(b) Warburton, May 30. 1826; 4 S. D. 631. Graham, Nov. 28. 1826; 2 S. D. 49.

1391. The parties cannot, by a collusive settlement, fraudulently deprive the agent of his right to a decree for costs. In England it is deemed indispensable to an attorney in challenging a compromise, to shew a clear case of collusion (a). In Scotland this distinction has not yet been clearly established: But it is countenanced in two cases (b), and rests upon plain principles of equity and expediency. Wherever expenses have been found due, or damages have been awarded; or where otherwise expenses must necessarily follow on the decree, it has not been permitted to the principal, without consent or acquiescence of the agent, to settle extrajudicially, or by compromise, so as to defeat the agent's claim (c). Where the success of the client and his title to expenses is not thus demonstrated, or where the compromise is previous to the cause having been called in Court, the agent cannot prevent or challenge it, or insist on proceeding for his costs (d).

(a) *Chapman v. Hare*, 1 Taunt. 341. *Nelson v. Wilson*, 6 Bing. 568. *Hart v. Payne*, 1 Bar. and Ad. 660.

(b) Lord Justice-Clerk in *Sloss*, 2S. D. 303. *M'Lean*, June 29. 1824; 3 S. D. 129.

(c) *Hamilton*, June 17. 1813; F. C. *Rox*, July 3. 1818; F. C. *Sloss and Gemmil*, May 28. 1823; 2 S. D. 302. *Tod and Wright*, March 7. 1822; 1 S. D. 381. *M'Kenzie*, June 13. 1823; 2 S. D. 401. *Hamilton*, July 9. 1824; 3 S. D. 242.

(d) *Anderson*, Jan. 3. 1830; 8 S. D. 299.

1392. The agent may even proceed with the action when his client has withdrawn, to the effect of having expenses awarded or modified, that he may have decree for them.

Hamilton's case, supra. *Rox*, July 8. 1813; F. C. *Mactavish*, June 13. 1826; 4 S. D. 104.

1393. Even without decree in his own name, the agent may by formal notice (but for which there does not seem to be any prescribed form) stop the party from paying the expenses awarded to his adversary; and such notice will have the effect of making the party hold the fund for the agent (a). An arrestment, if previous to such notice, will prevail against the agent; if subsequent, it will not avail (b).

(a) *M'Kenzie*, June 13. 1823; 2 S. D. 401. 2 Bell, Com. 37. supra, § 1391.

(b) *Stephens*, June 1. 1830; 8 S. D. 847.

1394. An agent superseding another, and paying his account, is entitled to the benefit of his hypothec.

1395. It has been doubted whether a friend of the client, advancing money to the agent, has the benefit of the hypothec. In England this is discountenanced as "maintenance." It was denied in the Court of Session in one case, but collusion was suspected (a). It was admitted in an earlier case (b), and in a late case allowed to a cautioner in a suspension (c).

(a) *Rennie and Playfair*, June 8. 1811; F. C.

(b) *Campbell v. Montgomery*; M. 6259.

(c) *Henderson*, Dec. 5. 1828; 7 S. D. 142.

1396. The same rule appears to be held applicable to expenses in a submission as to those in an action.

See *Stephens' case*, supra, § 1393.

1397. MARITIME HYPOTHECS. These are admitted for the purpose of giving security in certain cases, without compelling the workman or furnisher to stop and impede the use of the ship. They are recognised only in certain definite and known cases of necessity, viz. for foreign repairs; for damage done to the goods of freighters by delay, &c.; and for the wages of

the seamen employed in navigating the ship. The effect of the hypothec is to give preference over the price of the ship when sold. And,

1398. 1. *Hypothec on Ship for Repairs* is strictly confined to repairs made abroad, and does not cover such repairs as are made in this country. See below, as to Lien, § 1436.

Abbot, 108. et seq. 3 Ersk. 1. § 34. 1 Bell, Com. 527. Hamilton, July 29. 1788; M. 6269; House of Lords, June 15. 1789; 2 Hailes, 1039. and 1052. Wood and Co. Jan. 31. 1810; F. C. See Stewart, Nov. 10. 1813; House of Lords, 2 Dow, 29.

1399. 2. *Hypothec to Freighters*. This gives security over the ship to the owners of the goods, for loss by improper interruption of the voyage; or for damage done by improper stowage, &c.

1 Bell, Com. 39.

1400. 3. *Hypothec for Seamen's Wages*. Strictly speaking, this is properly no hypothec, but a *jus retinendi et insistendi*. But it is effectual against the ship to her last plank. See above, § 451.

3 Ersk. 2. § 34. 1 Bell, Com. 513. Seamen of the Golden Star, Jan. 4. March 1682; M. 6259. Sands, June 1708; M. 6261. Madonna d'Idra and Neptune, supra, § 452 (b).

1401. 4. *Hypothec for Average Loss*. This, although established in the early maritime codes, and recognised on the Continent, seems scarcely to exist in the law of Scotland. See below, of Retention.

1402. HYPOTHEC FOR PRIVILEGED DEBTS. Certain debts are privileged, and although not strictly referable to the principle of hypothec, they produce as to moveables the same effect as a universal hypothec over the whole property of the debtor. They are called PRIVILEGED DEBTS, and this privilege rests on various grounds; sometimes of humanity and charity, and sometimes of expediency in encouraging useful institutions. These are,

1403. 1. *Funeral Expenses and Medical Attendance on Deathbed*. This privilege is grounded on considerations of humanity and decency (a). It includes the medical expense of the last sickness (without any absolute connexion with the sixty days of deathbed) (b), and the expense of interment. These are held equal in privilege, and come in *pari passu* (c). The ex-

pense of moderate and suitable mournings for the family is also included (*d*). The funeral expense of a tenant is preferable to the landlord's hypothec (*e*). There is no preference, however, over the husband's estate for his wife's funeral expense, but only a preference on her own funds (*f*).

(*a*) 3 Ersk. 9. § 43.

(*b*) Douglas, Dec. 16. 1674; M. 11826. Kirkland, Nov. 2. 1682; 2 Br. Sup. 25, and 3, 440. Auchinleck, Feb. 19. 1697; M. 11834. Russel, Feb. 7. 1717; M. 11419. Peter, July 6. 1749; M. 11852; Elch. *Fun. Charges*, 3. Rowan, June, 29. 1742; M. 11852; Elch. *Fun. Charges*, 2. Parks, Feb. 7. 1755; M. 11421. Lawson, Feb. 12. 1784; M. 4473; 1 Hailes, 493. Sanders, Feb. 19. 1822; 1 S. B. 333.

(*c*) Monro, *supra* (*b*).

(*d*) 2 Bell, Com. 157. Kirkland, *supra* (*b*). Dunipace, July 6. 1750; M. 11452. Hall, Jan. 19. 1753; M. 4855; Elch. *Fun.* 5. Rowan, *supra* (*b*). Sheddan, May 15. 1802; M. 11855.

(*e*) Rowan, *supra* (*b*).

(*f*) Auchinleck, *ut supra* (*b*).

1404. 2. *Servants' Wages*. This is only for the term current at the death, or bankruptcy; whether a year, half-year, or month (*a*). The servants privileged are, domestic servants, farm servants, reapers, and other occasional servants for agricultural labour (*b*). It has been doubted whether a gardener is within the privilege: but certain combinations of outdoor labour and domestic service have been admitted as sufficient (*c*). In Scotland, neither artificers, clerks, nor overseers, are entitled to the privilege (*d*): in England, the commissioners in bankruptcy may order six months' wages or salary of any clerk or servant to be paid (*e*). The privilege to farm servants has been found to prevail over the landlord's hypothec (*f*).

(*a*) 2 Ersk. 9. § 43. 2 Bell, Com. 157. Crawford, Nov. 25. 1680; M. 11832.

(*b*) M'Lean, Jan. 21. 1832; 10 S. D. 217.

(*c*) Ersk. *ut supra*. Melvil, Jan. 23. 1779; M. 11853. Act of Sed. Jan. 23. 1779. Lockhart, Nov. 14. 1804; M. *Priv. Debt*, 2. See White, *infra* (*d*).

(*d*) White, Jan. 31. 1781; M. 11853. Ridley, Feb. 3. 1789; M. 11854; 2 Hailes, 1061. Marshal, Feb. 12. 1828; 6 S. D. 515.

(*e*) 6 Geo. IV. c. 16. § 49.

(*f*) M'Glashan, June 29. 1819; F. C.

1405. 3. *Current Rent of the Dwelling-house*. A privilege is given to the landlord for a year's rent of the house in which the tenant dies.

3 Ersk. 9. § 43. Lady Dunipace, July 5. 1750; M. 11852.

1406. 4. *Ministers' Widows' Fund*. This fund enjoys a pri-

vilege or universal hypothec; preferable even to funeral expenses.

19 Geo. III. c. 20; 1 Bell, Com. 159.

1407. 5. *Friendly Societies*. The debts due to the society by office-bearers dying or becoming bankrupt, from sums coming into their hands in the course of their office, is directed to be paid before any of the other debts are paid or satisfied.

33 Geo. III. c. 54. § 10. 49 Geo. III. c. 125. 10 Geo. IV. c. 56. § 20. 4 and 5 Will. IV. c. 40.

1408. STATUTORY HYPOTHECS. Besides the privilege by writ of extent, for the recovery and preservation of the public revenue (see below, § 2370), there is in certain cases a preference by hypothec which cannot be defeated.

1. There is a Universal hypothec for Exchequer bills granted in loans by Government (§ 1343. 2.)

57 Geo. III. c. 34. § 44. 1 Geo. IV. c. 60. 1 Holden, June 9. 1821; 1 S. B. 62. 1 and 2 Vict. c. 88, 93.

1409. 2. Special hypothecs have been established by the Legislature for the securing of particular taxes, the arrears being made a charge on the manufactures and materials (*a*); and there is a General Post Office hypothec, which operates as a privilege for all debts and arrears of postage (*b*).

(*a*) 28 Geo. III. c. 37. § 21. 43 Geo. III. c. 150. See also 6 Geo. IV. c. 107.

(*b*) 9 Anne, c. 10. § 30.

3. OF RETENTION OR LIEN.

1410. GENERAL DOCTRINE OF RETENTION. This right results from possession, and so far is different from hypothec, and analogous to pledge. Strictly speaking, it is applicable to corporeal subjects only; depends on possession; and expires with the loss of it. But it is not in every case that the mere circumstance of possession confers a right of retention. It is a right which arises only, 1. as the counterpart of a mutual contract; or, 2. by usage and common understanding in certain known cases, in which for the convenience of commerce it is held to be acquiesced in and implied between the parties. Within these limits, Retention may be described as a right to retain a subject legitimately in one's possession,

until a debt shall be paid, or an engagement performed, the *jus exigendi* of which is in the possessor.

1411. Retention is special or general: Special retention arising in the course of a particular contract, and operating as a security for fulfilment of the counterpart: General retention extending in certain cases beyond the immediate transactions out of which the possession has arisen, and operating as a security for the general balance of account between the parties (*a*).

Retention is extended to debts as well as corporeal subjects: But in this shape it is carefully to be distinguished from compensation (see § 572, *et seq.*). Compensation is payment and extinction of mutual debts; whereas retention of a debt is nothing more than an implied security for performance; a power of suspension, or right to withhold payment or performance till satisfied of some counter demand. Compensation, therefore, can be pleaded only where the debt in extinction of which it is meant to be applied is due and liquid (§ 573): Retention may be pleaded in security of debts, future, contingent, or illiquid (*b*).

(*a*) 1 Stair, 18. § 7. 3 Ersk. 4. § 20. *et seq.* 2 Bell, Com. 91.

(*b*) Ersk. *ut supra*.

1412. *Nature of Requisite Possession.* In order to confer the right of retention of corporeal moveables, there must be possession: And, 1. It is not such possession as a workman has who is employed to build a house, or repair a ship in a roadstead, or to cut down timber (*a*). 2. It must be actual possession; not merely civil, and by fiction or construction of the law. So goods in a carrier's hand though constructively delivered, so as to pass the property if the price be paid (§ 1304,) are not, in respect to a question of retention, in the possession of the consignee (*b*). But, 3. It will be enough if they are in the hands of clerks or servants, or any one intrusted (as manufacturer, wharfinger, or warehouse-keeper) to prepare, or carry, or keep the goods subject to the employer's order. So, again, it will not be sufficient to constitute Retention, that there has been an intention of delivering possession, nor even that this intention has been partially executed, if legitimate possession has not been actually completed (*c*).

(*a*) Callum, Dec. 20. 1822; 2 S. D. 102; affirmed, June 17. 1825; 1 Wilson and Shaw, 399. Haywood v Waring. 4 Camp. 291.

(b) *Kinloch v. Craig*, 3 Term. Rep. 119; affirmed in House of Lords, *ib.* 783. *Young*, July 23. 1789; M. 14218. *Sweet v. Pym*, 1 East, 5. *Harvey v. Lidyard*, 1 Starkie, 123. *Nichols v. Clent*, 3 Price, 547. 2 Bell, Com. 91.

(c) *Wilson v. Balfour*, 2 Camp. 579.

1413. The possession must be lawful; not acquired by fraud; nor by a void contract; nor by informal diligence (a); nor by mere accident (b).

(a) *Glendinning's Creditors*, June 8. 1745; Elch. *Arrest*. 24. and Notes, 40. See 2 Bell, Com. 93. note 3. *Harper*, Jan. 27. 1791; M. 2666; Bell's Cases, 440. *Rolleston v. Hibbert*, 3 Term. Rep. 406; 3 Brown's Chancery Cases, 571. *Madden v. Kempster*, 1 Camp. 12.

(b) *M'Kenzie*, July 2. 1824; 3 S. D. 206.

1414. Possession of a confidential nature, as in deposit (a); or with a specific appropriation inconsistent with the retention claimed (b), will not ground retention.

(a) 1 Stair, 13. § 9. *Appin's Creditor's Dec.* 10. 1760; M. 749.

(b) *Stewart*, Feb. 16. 1770; M. *Compensation*, App. 2; 1 Hailes, 342. *Harper*, Jan. 27. 1791; M. 2666; Bell's Cases, 440. *M'Kenzie*, July 2. 1824; 3 S. D. 206. *Walker v. Birch*, 6 Term. Rep. 258. *Lucas v. Dorrien*, 7 Taunt. 278; 1 Moore, 29. See *Burn v. Brown*, 2 Starkie, 272. See also *Chisholm*, March 8. 1825; 3 S. D. 630. *M'Kie*, June 6. 1822; 1 S. D. 503. *Borthwick*, Nov. 22. 1833; 12 S. D. 121.

1415. 2. *Loss of Possession.* The right of retention terminates with the loss of possession (a); unless the possession is taken by undue means (b). But, 1. The possession of goods by a factor who sells and delivers them, is transferred to the price unpaid, so as to extend his lien over it (c). 2. If a ship-master is compelled to place goods in the King's warehouse, or in dock warehouses, under the Dock Acts, the possession is not lost, nor the lien discharged (d); but if he voluntarily place them in a private bond warehouse, he loses his lien (e). 3. If he has quitted possession by error or mistake, the lien will subsist (f). 4. The lien may be reserved by agreement.

(a) *Krutzer v. Wilcox*, Amb. 252; 1 Burr. 494. *Sweet v. Pym*, *supra*.

(b) *Wallace v. Woodgate*, 1 Car. and Payne, 575.

(c) *Drinkwater v. Godwin*, Cowp. 251. *Houghton v. Matthews*, 3 Bos. and Pull. 485.

(d) 4 Geo. IV. c. 24. § 83; re-enacted, 6 Geo. IV. c. 112. § 45. *Ward v. Felton*, 1 East, 507. *Wilson v. Kymer*, 1 Maule and Selw. 157. See *Johnson*, May 16. 1827; F. C.; 5 S. D. 660; 3 and 4 Will. IV. c. 57. § 47.

(e) *Johnson's case*, *supra* (d).

(f) *Ex parte Morgan*, 12 Ves. 6. *Ex parte Doughty*, Montagu on Lien, 11.

1416. The right does not revive on recovering possession, if it have once effectually ceased (a): and there is no stopping in

transitu to preserve a lien ; that being a right only as between vendor and vendee (*b*).

(*a*) 2 Bell, Com. 95. *Whitehead v. Vaughan*, Cook's B. L. 579. *Jones v. Pearl*, 1 Strange, 556. *Hartlay v. Hitchcock*, 1 Starkie, 408.

(*b*) *Kinloch v. Craig*, 3 Term. Rep. 783. See above, § 1308-10.

1417. 3. *Effect of Retention.* The effect of retention of corporeal subjects, is to deprive the owner of the use and benefit of the thing retained till the counterpart be performed or the debt satisfied : The effect of retention of a debt is to deprive the creditor of his money retained till satisfaction be given (*a*). Whether it entitles the creditor who claims retention to take active steps for making effectual his debt, as in pledge, by sale of the thing retained, admits of distinctions. And, 1. A factor having power to sell may, by means of sale, make effectual the sums which he has advanced on the goods in his hand (*b*). 2. He may transfer the lien, and on such transference raise money ; the assignee having the same right to retain which his cedent had. And although when a factor sends goods to a consignee or sub-factor, without giving notice of his representative character, such consignee or sub-factor will have an effectual right of retention against the principal for money advanced on the goods (see above, § 1365), he can have no lien for his general balance against the primary factor, beyond the amount of the primary factor's right to retain against his principal. 3. In the common case of goods prepared for the market, and useful only as commodities in trade, a Court of law will authorize a sale, as in pledge : but it seems very doubtful whether such authority can be granted for disposing of a thing not of that description, to the effect of conferring on the purchaser the full property. In lien over an author's unpublished compositions, for example, it does not seem competent for a court to order publication and sale without the author's consent.

(*a*) 3 Ersk. 4. § 20.

(*b*) *Broughton*, Dec. 17. 1814 ; F. C.

1418. 4. *Discharge, and Waiving of Retention.* This may be either, 1. before possession begins (*a*) ; or, 2. by custom of trade (*b*) ; or, 3. by contract ; or, 4. by document restrictive of the claim to personal credit (*c*).

(a) *Davis v. Boucher*, 5 Term. Rep. 488. *Walker v. Birch*. 6 Term. Rep. 258.

(b) *Green v. Farmer*, 1 Blackst. 651.

(c) *Johnston*, May 16. 1827; F. C.; 5 S. D. 660. *Ayton*, Nov. 22, 1705; M. 6710. *Horncastle v. Farren*, 3 Barn. and Ald. 497.

1419. OF SPECIAL RETENTION. This is part of the law of mutual contract (§ 71), entitling one to withhold performance, or retain possession of that which forms the subject of the contract, till the counter obligation be performed.

1 *Stair*, 18. § 7. 3 *Ersk.* 4. § 20. 2 *Bell*, Com. 97. *Harper*, Jan. 27. 1791; *Bell's Cases*, 440.

1420. 1. *Retention of Ship*. Retention of a ship is competent for repairs, but not for furnishings of necessities and outfit. This right of retention depends on possession; and is not like hypothec confined to the case of repairs made abroad (§ 1398): It is effectual for repairs made on the vessel in a home port. But ship carpenters, repairing a ship in an open harbour or roadstead, have not the possession necessary to sustain the right.

Abbot, 109. *Blande*, ex parte, 2 *Rose*, 91. *Watkinson v. Bernadiston*, 2 *P. Williams*, 367. *Franklin v. Hosier*, 4 *Barn. and Ald.* 341, and cases there cited.

1421. The right may be excluded by a special contract to make the repairs on credit; and even an implied contract by the usage of trade will discharge the lien; unless where the debtor is *vergens ad inopiam*.

Rait v. Mitchell, 4 *Camp.* 146; 2 *Bell*, Com. 98.

1422. 2. *Retention for Carriage*. This lien is admitted both in water and in land carriage.

1423. Retention is admitted wherever the possession is clearly with the shipowners (a). In water carriage difficulties have occurred from the nature of the contract, as having the effect of placing the freighter in possession, or leaving the possession with the owners. The distinction seems to rest on the question whether it be a contract of *locatio operis* for carriage, or a contract of *locatio rei*. In the former case there is lien for freight (§ 421) (b), for average (§ 437), and for passage money (c); but not for dead freight without a special bargain (§ 430); nor for wharfage dues (d). Retention would seem not competent where a ship is hired on time, and at the disposal of the freighter. This case does not appear to have

been decided; but the principles recognised in the cases already referred to may sanction that opinion (e).

(a) *Hutton v. Brag*, 2 Marsh. 339; 7 Taunt. 14. *Master of Trinity House v. Clerk*, 4 Maule and Sel. 288.

(b) *Saville v. Campion*, 2 Barn. and Ald. 503. *Tait v. Meek*, 8 Taunt. 280. *Yates v. Railton*, 8 Taunt. 280 and 302. *Christie v. Lewis*, 2 Brod. and Bing. 410.

(c) *Wolfe v. Summers*, 2 Esp. 631; 2 Camp. 201.

(d) *Bishop v. Ward*, 3 Camp. 360.

(e) See cases above (b), and § 1301. Cases under (c).

1424. The right extends over every part of the goods consigned to the same person, for the freight of the whole goods consigned to him (a), entitling the shipmaster to payment before delivering the goods. The shipmaster is not entitled to detain them on board; but he may place them with a wharfinger, or in bond, reserving the lien (b). But there is no lien for a general balance. (c).

(a) *Malcolm*, Nov. 15. 1814; F.C. *Sodergreen v. Flight*, cited in *Hanson v. Meyer*, 6 East, 622; *Abbot*, 247.

(b) *Tait v. Meek*, ut supra, § 1423, 302; *Abbot*, 247, 276.

(c) *Stevenson*, Nov. 18. 1824; 3 S. D. 291.

1425. There is a lien for land carriage (a), similar to that for freight; but not for booking (b).

(a) *Skinner v. Upshaw*, Lord Raymond, 752.

(b) *Lambert v. Robinson*, 1 Esp. Cases, 119.

1426. 3. *Retention for Average Loss* is accomplished by the interference of the shipmaster, who is entitled to detain the cargo for the respective shares.

Abbot, 247. 1 Bell, Com. 103.

1427. 4. *Retention for Salvage* is a most natural and equitable right to those who, having saved the ship, cannot be compelled to deliver it up till salvage be paid.

Hartford v. Jones, 1 Lord Raymond, 393. *The Two Friends*, 1 Rob. Adm. 277. See 12 Anne, st. 2. c. 18. § 2. 4 Geo. I. c. 12. 1 and 2 Geo. IV. c. 76. § 19.

1428. 5. *Retention to Innkeepers and Stablers*. This extends over the goods, horses, and carriage of travellers, for the expense of keep, or of entertainment, while in his stable or inn upon that journey (a). But it has been held, that a livery stablekeeper, who is not bound to take in horses, has not in England a lien for the keep of them without an express agreement (b).

(a) *Johnson v. Hill*, 3 Starkie, 172. *Thomson v. Lacey*, 3 Barn. and Ald. 283. *Nayler v. Mangles*, 1 Esp. 109. *York v. Greenaugh*, 2 Lord Raymond, 866.

(b) *Wallace v. Woodgate, Ryan and Mood*, 193. *Johnson v. Ellerridge*, 1 C. and M. 743.

1429. 6. *Retention of Cattle for Grass-mail*. This arises as the counterpart of the contract for depasturing cattle.

1430. 7. *Retention to Persons bestowing Labour and Skill*. Retention is given to workmen, on the contract of *locatio operarum*, for the price of their labour on goods in their possession, where there is no special agreement for payment at a future time (a). And a trainer of race horses has been held to have a lien, though a livery stabler has not. See § 1428, *supra* (b).

(a) *Green*, 4 Burr. 2214. *Ockenden*, 1 Atk. 233. *Chase v. Westmore*, 5 Maule and Sel. 180. *Blake v. Nicholson*, 3 Maule and Sel. 167. *Brook v. Wentworth*, 3 Aust. 881. See *Harper's case*, Jan. 27. 1791; *Bell's Cases*, 440, et seq.

(b) *Bevan v. Waters*, 1 Mood. and Mal. 285.

1431. OF GENERAL RETENTION OR LIEN. This proceeds not on the reciprocal rights of the particular contract out of which the possession arises, but on the footing of an agreement, express or implied, in certain cases, for the continuing of possession already begun, in security of debts unconnected with the original contract. It has sometimes been contended, that in Scotland the right of retention goes farther than the English lien; so as to comprehend all cases where there is legitimate possession and a debt due to the possessor; and that retention is in such case a necessary substitute for the diligence of arrestment, which a creditor possessed of his debtor's effects cannot use in his own hand. But there is no ground for this distinction.

2 Bell, Com. 107. *More's Notes on Stair*, note 2. p. cxxxi. *Harper*, Jan. 27. 1791; F. C.; *Bell's Cases*, 440. *M'Kenzie*, July 2. 1824; 3 S. D. 206. *Stuarts and Fletcher*, May 19. 1829; F. C.; 7 S. D. 622.

1432. 1. *General Retention by Contract*. A right of general retention is sometimes raised by express contract. Where the agreement is clear and explicit, it is effectual; and it is the only way of establishing a general lien, where there is no such lien recognised at common law, or established by usage.

See the doctrine delivered by Sir W. Grant in *Gladstone v. Birly*, 2 Merivale, 401, and Lord Chief Justice Tindal's remarks on *Bleadon v. Hancock*, *Moodie and Malk*. 467.

1433. Lien has in England been allowed to be raised by implied contract, inferred from advertisement, in the case of manufacturers not bound to work otherwise than on their own conditions (a): But it is requisite that the advertisement shall be clear and specific, and known to the party, so as to be equal to a contract, and that the goods proceed from the owner as under such implied agreement (b). Such contract by advertisement, however, is with great difficulty admitted in the case of common carriers to raise a lien (c). There is no example of retention in Scotland by advertisement; but the principle on which it may be justified as implying a contract, is clear.

(a) *Kirkman v. Shawcross*, 6 Term. Rep. 14.

(b) *Wright v. Snell*, 5 Barn. and Ald. 350.

(c) *Openheim v. Russell*, 3 Bos. and Pull. 42. *Rushforth, v. Hadfield*, 6 East, 519.

1434. 2. *Retention by Usage of Trade.* Usage of trade, when general and known, has been admitted as a good ground of general retention in several branches of manufacture in England;—as calico-printers; dyers; wharfingers; and packers (a). But this requires a long course of dealing in old established trades, and is not easily admitted in new branches of manufacture (b).

(a) 2 Bell, Com. 105.

(b) *Bleaden v. Hancock*, 1829; Mood. and Malk. 465. See *Rushforth*, supra, § 1433.

1435. The course of dealing between the parties has also been held a good ground of lien; as in bleaching, where one piece of goods is sent in after another, and the parties settle periodically, delivering the several pieces as they are ready.

Hunter, Feb. 25. 1794. *McCulloch*, March 4. 1794. *Aberdeen and Smith*, Nov. 20. 1812; 2 Bell, 109; Bar. Hume, 127.

1436. There is no lien to a shipmaster for repairs for the price of which he has bound himself personally; for though he may hypothecate the ship for repairs abroad, he cannot convert the hypothec into a right to retain possession.

Hussey v. Christie, 9 East, 432.

1437. 3. *Recognised Classes of General Retention.* There are certain well established and known rights of retention, introduced from considerations of expediency or of justice, in particular departments, of which the details are important.

Retention by Law Agent.

1438. This entitles a law agent to retain the papers of his client ; title-deeds, securities, documents of debt, and others, which come lawfully into his possession in the course of his employment, until he shall receive satisfaction for the amount of his business or professional account (*a*). (See above, of Hypothec, § 1388.) It does not cover, 1. the balance on the cash-account between the parties ; nor, 2. advances of money, even in situations where the law agent is the natural channel of communication in the transaction ; nor, 3. a yearly salary as agent (*b*). But an agent employed to borrow money, has been found entitled to retain his client's title-deeds, till the account of expenses paid by him to the lender's agent shall be repaid (*c*).

(*a*) 3 Ersk. 4. § 21. 2 Bell, Com. 111.

(*b*) Cuthberts, July 1. 1697 ; 4 Brown's Sup. 374. York Buildings Co. Dec. 22. 1738 ; Elch. *Hypothec*, 9. Lidderdale's Creditors, July 5. 1749 ; M. 6248. Moncreiff, Dec. 1. 1799 ; 2 Bell, Com. 112. note 1. Grant, Feb. 28. 1801 ; M. *Hypothec*, App. 1. Skinner, May 31. 1823 ; F. C. ; 2 S. D. 354.

(*c*) Inglis, June 23. 1825 ; F. C. ; 4 S. D. 113.

1439. 2. Comprehensive as the right of retention of title-deeds, securities, and documents of debt is, there is a clear exception of all papers which have been put into the agent's hands for a special purpose, inconsistent with the claim of retention (*a*) : And the agent has no right to retain the proceedings in a process which he has been employed to conduct (*b*).

(*a*) Chisholm, March 8. 1825 ; 3 S. D. 630.

(*b*) Callman, Nov. 28. 1793 ; M. 6255. Forsyth, Feb. 18. 1791, referred to in Callman's case.

1440. 3. This expires like all other liens with the loss of possession ; but it is not loss of possession, 1. if the title-deeds, &c. are lodged by the agent in process (*a*) ; nor, 2. where the country agent sends papers to town (*b*) ; nor, 3. where the town agent has sent the papers to the country : And when the country agent has papers to retain, he may retain both for his own and for the Edinburgh agent's account (*c*).

(*a*) Callman, Nov. 28. 1793 ; M. 6255 ; and Forsyth's case, there referred to.

(*b*) 2 Bell, Com. 112.

(*c*) Walker, June 8. 1831 ; 9 S. D. 691.

1441. 4. It confers no active right, but merely entitles the agent to retain the papers, until either his account shall be paid ; or a preference admitted in bankruptcy, if his account be unexceptionable ; or security found, if his accounts be disputed.

Johnson, Jan. 23. 1823 ; 2 S. D. 144. Paul, Feb. 2. 1826 ; 4 S. D. 420. Gilfillan, May 29. 1828 ; 6 S. D. 880. Dobie, May 19. 1831 ; 9 S. D. 609.

1442. 5. The effect of this right against third parties is the most extraordinary of the consequences of the principle once admitted. And, 1. Against personal creditors in bankruptcy, this right is equally effectual as against the client himself (*a*). 2. Against singular successors and heritable creditors, an agent may retain the title-deeds of his client, to the effect frequently of defeating their real security (*b*) ; and in this respect it may be doubted whether the right, admitted at first with great reluctance, has not been carried too far (*c*). 3. It has even been held effectual to an agent employed by an apparent heir three years in possession of the estate, but who afterwards renounced, against the heritable and personal creditors of the defunct (*d*). 4. It is not effectual by an agent of an heir of entail against a creditor of the entailer adjudging (*e*).

(*a*) Newlands, Feb. 9. 1793 ; M. 6254. Hotchkis, Jan. 16. 1794 ; M. 6256 ; Bell's Cases, 1.

(*b*) M'Vicar, Feb. 17. 1736 ; Elch. *Hypothec*, 3. Lidderdale, ut supra, § 1438. Hotchkis, Jan. 16. 1794 ; Bell's Cases, 1. Newlands, Feb. 9. 1793 ; M. 6254. Finlay, Jan. 23. 1773 ; M. 6250 ; 1 Hailes, 516. Hamilton, Aug. 9. 1781 ; M. 6253 ; 2 Hailes, 876. Campbell, Feb. 1. 1817 ; F. C. Campbell and Clason, Nov. 15. 1822 ; 2 S. D. 16. Cameron, June 25. 1824 ; F. C. ; 3 S. D. 176. Dobie, 19. 1831 ; 9 S. D. 609.

(*c*) See Rattray, Feb. 19. 1828 ; 6 S. D. 568. Scott, Cameron, &c. ut supra (*b*).

(*d*) Cameron, ut supra (*b*).

(*e*) Callander, Feb. 11. 1834 ; 12 S. D. 417.

1443. It has been much questioned, whether the agent is bound to allow inspection of the deeds, or entitled absolutely, to withhold them. The rules seem to be these :—1. That a third party is entitled to have the retained deeds exhibited in evidence of a fact, or in support of a right adverse to the client ; but not to have them produced to be used as a title in any right derived from the client (*a*). 2. That the client himself is not entitled to have them produced even in modum probationis (*b*). 3. That although creditors and others deriving right through the client, cannot insist on ha-

ving possession of title-deeds which the client himself cannot insist for, a substitute heir of entail is not precluded from inspection of the title-deeds by the right of retention pleadable against the heir in possession (c).

(a) Dalrymple, July 18. 1751; Elch. *Hypothee*, 17.

(b) Finlay, Jan. 23. 1773; M. 6250; Hailes, 516.

(c) Murray, Dec. 2. 1829; 8 S. D. 161.

1444. 6. The agent's right of retention may be waived: But this must be done expressly; it is not to be presumed that it is the intention of the parties to waive it; nor inferred from the agent taking a bond, bill, or other security, for the amount of his account (a), unless a long term of payment has been fixed, in which case it is not to be supposed that the parties intended the titles to be confined during so long a time (b).

(a) Ayton, Nov. 23. 1705; M. 6247, 6710. Linning, June 27. 1821; F. C.; 1 S. B. 90. Skinner, ut supra, § 1438. M'Creadie, Feb. 16. 1822; 1 S. D. 367.

(b) See English case of Cowie, 1 Illus. 466.

Factor's Retention.

1445. Much of the foreign trade of the country is carried on by means of factors; and is greatly promoted by the factor having a general lien entitling him, without insisting on payment or retention for each transaction, to rely on a right of retention in the end for the general balance that may be due to him. This right might almost be ranked among the special liens, from the peculiar nature of the contract of factory; as a right resulting out of the *actio contraria* of the contract by which the principal engages to indemnify the factor. Both in England and in Scotland an implied agreement is held to subsist, that for the balance which shall arise on his general account (whether consisting of advances on the particular goods, or of money paid for the principal, or of duties on other goods, or in whatever way arising), the factor shall have security by retention or lien over all the goods and effects of the principal which, coming into his possession as factor, may be in his actual or civil possession at the time the demand for the balance is made.

1 Stair, 18. § 7. 3 Ersk. 4. § 21. 2 Bell, Com. 114. Chalmers, June 13. 1666; M. 9137. Stephens, Feb. 14. 1735; M. 9140. *Krutzer v. Wilcox*, before Sir J. Strange, cited in *Godin v. London Assurance Company*, 1 Burr. 494. *Walker v. Birch*, 6 Term. Rep. 258.

1446. CHARACTER OF FACTOR. This general lien is given only to factors—not to a wharfinger (*a*), nor to a broker (*b*), nor even to a broker who also acts as factor (*c*); the combination of the two characters in the same person not entitling him to extend the lien from dealings in the one character to dealings in the other. And although a factor may assign over his lien to another, or may, by consigning to a sub-factor, without notice of his being himself a factor, and taking advances from such sub-factor on the credit of the goods, raise a lien for those advances, which will be effectual against his principal; there is no resulting lien to such sub-factor for the general balance due to him by the primary factor (*d*).

(*a*) *Monk v. Whittenbury*, 2 Bar. and Ad. 484. *Richardson v. Goss*, 3 Bos. and Pull. 119.

(*b*) *M'Call and Co. in House of Lords*, March 18. 1824; 2 Shaw's App. Cases, 188.

(*c*) Same case.

(*d*) *Colquhoun*, Nov. 15. 1816; F. C. *Ede and Bond*, May 15. 1818; F. C. *Johnson*, Nov. 14. 1818; F. C.; and *Johnson and Manly*, April 8. 1818; noted in 1 Bell, Com. 484. *M'Call and Co. supra*, as decided in the Court of Session, and not invalidated by the decision in the House of Lords, 1 Bell, Com. 485. note 1.

1447. SUBJECTS. The factor's lien extends over goods and property sent to him by the principal; goods bought for the principal; bills, policies of insurance, &c. of the principal, which have come into the factor's hands as factor, and are still in his actual possession, or in the hands of others under his orders; and the price of goods sold and demandable by him as factor (*a*). But things under special appropriation are excepted (*b*): So are goods which the factor has sold, and which he cannot be allowed to retain against the purchaser, for any balance due by the principal (*c*). If, indeed, he have sold them while under a *del credere* commission, he may be entitled to retain, or to stop in transitu, against the purchaser, the price being unpaid. But if the bill for the price has been paid, or has been indorsed to the principal, and settled by him with the purchaser, by composition or otherwise, the factor cannot retain against the purchaser on pretence of the guarantee to cover his general balance (*d*).

(*a*) *Stephens*, Feb. 14. 1735; M. 9140. *Drinkwater v. Godwin*, Cowp. 251. *Jourdain v. Lefevre*, 1 Esp. Cases, 66. See 1 Burr. 493, 494. *Hudson v. Grainger*, 5 Barn. and Ald. 27.

(*b*) See above, § 1414. 1 Bell, Com. 262; 2 Ib. 12. &c. *Davis v. Boucher*, 5 Term. Rep. 588. 2 Bell, Com. 119. note 4.

(c) *Stirling and Sons*, March 5. 1823; House of Lords, 1 Shaw's App. Cases, 389.

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

1448. EXTENT OF THE LIEN. It covers all salary; commission; expenses; advances of cash; engagements and guarantees which the principal is aware of, or has authorized. But it will not cover debts due previous to the factory; nor debts afterwards assigned to the factor by creditors of the principal, unless where he has, at the principal's desire, interposed to pay the debts.

Pearson, Nov. 9. 1672; M. 2625. *Hammond v. Barclay*, 2 East, 227. *Marsh v. Chambers*, 2 Strange, 1234. *Houghton v. Mathews*, 3 Bos. and Pull. 485. *Gurney v. Sharp*, 4 Taunt. 242.

1449. POSSESSION. The lien depends on possession; but the regaining of possession by fair means, in the course of the factory, will restore the lien; differently from the rule in the common case of retention (§ 1416). This is a consequence of the broader right on which a factor's lien rests. See § 1445.

Whitehead v. Vaughan, Cook's B. L. 547. This decision may be questionable, in so far as the possession was not recovered fairly.

1450. FACTOR'S POWERS. The power which a factor has now by statute in England, he has always had at common law in Scotland. He may pledge as well as sell (a). A factor sells either as factor (as when his invoice bears, "A, debtor to B, as factor for C D," or "C D, debtor to A by B"), or in his own name, without mention of the factory. And, 1. In both cases he has lien over the price not to be defeated by the principal. 2. Where no balance is due to the factor for which a lien can be claimed, the principal has action for the price in preference to the factor's creditors. 3. When the factor has sold in his own name, concealing the principal, the buyer may set off a debt due to him by the factor, against the principal's demand for the price (b).

(a) See above, § 1364, 6 Geo. IV. c. 94.

(b) *Warner v. McKay*, 2 Gale, 86; 1 Mees. and Wils. 591.

Banker's Retention.

1451. A banker is a money factor, and in all cases where he acts as agent, he has a right of retention, extending over all unappropriated paper in his hands belonging to customers, for security of his balance on the general account (a); but

not including bills discounted (*b*), or bills appropriated (*c*). The practice in Scotland is to indorse bills sent to a banker ; and, 1. if taken to account, or credit be given, it is held a discount, and the bill belongs to the banker, and on his bankruptcy goes to his creditors ; 2. if not taken to account or credit, but intended to lie for recovery as agent, the banker has a lien for his balance, but on his bankruptcy his creditors have no right to take the bills as his (*d*).

(*a*) 2 Bell, Com. 118. Jourdain, supra, § 1447 (*a*) ; Davis, ib. (*b*).

(*b*) Carstairs v. Bates, 3 Camp. 301. Giles v. Perkins, 9 East, 12.

(*c*) Haig, June 20. 1823 ; 2 S. D. 412. Matheson, June 12. 1822 ; 1 S. B. 524. Borthwick, Nov. 22. 1833 ; 12 S. D. 121.

(*d*) Ex parte Sarjeant, 1 Rose, 153. Carstairs, ut sup. (*a*).

Policy-Broker's Retention.

1452. This also is a factor's lien. It entitles the broker on the principal's bankruptcy to retain the policy, and also to retain sums paid to him for a loss ; but not to recover under the policy, unless he hold a special power so to do (*a*) ; nor to retain the premium, or apply it in double insurances to indemnify the assured (*b*).

(*a*) 2 Bell, Com. 120. Marshall, 203. Whitehead v. Vaughan, Cook's B. L. 579. Levy v. Barnard, 8 Taunt. 149. Grove v. Dubois, 1 Term. Rep. 112. Parker v. Carter, Cook's B. L. p. 548. Leslie and Thomson, July 4. 1783 ; M. 2627.

(*b*) Selkrig, June 14. 1805 ; M. Insur. App. 10.

Trustee's Retention.

1453. This rests on the presumed agreement to make advances, or undertake responsibility, on the security of the trust-estate.

Earl of Bedford, Feb. 18. 1662 ; M. 9135. Dougal, Nov. 17. 1794 ; Bell's Cases, 41. Wight, Nov. 27. 1828 ; 7 S. D. 70.

Cautioners' Retention.

1454. This is a general lien, which originally was admitted on the footing of a presumed agreement, to one who, having goods in his hand belonging to another, or being due money to him, engaged as cautioner for him. Afterwards, it was extended even to goods or money coming into the cautioner's hand after having engaged as cautioner.

Town of Aberdeen, July 1709 ; M. 2570. Innes, Feb. 3. 1635 ; M. 2620. Marquis of Clydesdale, June 1729 ; M. 2689. Balfour, Dec. 24. 1746 ; M. 2575. Murray's Creditors, June 19. 1744 ; M. 2626. Brough, Nov. 26. 1793 ; and June 5. 1795 ; M. 2585. Bell's Cases, 191.

4. WRITTEN TRANSFERENCE OF MOVEABLES.

All that is necessary respecting the simple transference of moveables by tradition, has already been explained. The transference of moveables by written deed of conveyance, relates either to corporeal or incorporeal rights.

1. *Written Transference of Corporeal Moveables.*

1455. It is sometimes necessary from circumstances to employ writing in the transference of moveables. On some occasions it is requisite in law : And in others it is usual, but not essential.

1456. 1. CONSIGNMENT. Writing is necessary in consignments from a distance. By means of correspondence, bill of lading, written mandate to a factor, &c. goods consigned to a distant place are appropriated to certain persons. The property is thus effectually vested in those who are declared to have the beneficial interest, and who have notice of it. On the bankruptcy of the consignor after notice, his creditors cannot take the consigned goods, nor can the consignee claim lien over them to the prejudice of the person receiving the notice. The consignee becomes, on notice, the custodian of the person for whom the goods are sent.

2 Bell, Com. 12. Stonehewer, July 21. 1697 ; M. 7724. Gray, Jan. 16. 1706 ; M. 7724. Auchterlony, May 1732 ; M. 7737. Arthur, Dec. 12. 1770. Hunter and Company, May 27. 1791 ; Bell's Cases, 385. Fisher v. Miller, 1 Bing. 150. Hodgson v. Anderson, 3 Barn. and Cress. 842.

1457. 2. WRITING REQUIRED BY STATUTE. 1. Writing is by statute requisite, in order to pass the property completely of goods in a bond warehouse in the actual possession of the owner of the goods (*a*).

2. It is required in conveying a patent, or the property of a book or copyright (*b*) ; and,

3. In transferring ships, writing is requisite in the vendition or mortgage (*c*).

(*a*) See above, § 1306, 1378. 6 Geo. IV. c. 112. § 9.

(*b*) See above, § 1360. 54 Geo. III. c. 156. § 4.

(*c*) See above, § 1330.

1458. 3. USAGE. Writing is commonly used in complicated transactions, involving a transfer of moveables ; or where the conveyance is of a universitas ; or where the intention is to

create a security. But such conveyance is not held effectual without delivery to exclude purchasers or creditors pouncing. And momentary delivery of possession, together with an instrument of possession, will not be sufficient if the actual possession be returned to and left with the owner.

Thomson, March 1. 1558 ; M. 827. Corbet, July 6. 1666 ; M. 10602.

2. *Assignment of Debts.*

1459. The *jus crediti* in debts being such as cannot be transferred by delivery, the principle on which this transference is accomplished is that of the conversion of the engagement to pay to the original creditor, into an obligation to pay to the assignee : It most resembles the change of custody in the transferring of corporeal moveables (§ 1305) (*a*). There was at first no power implied in debts, to substitute another creditor for the original one. To evade which, in practice, it was usual, 1. to take bonds in blank ; but this was afterwards prohibited (*b*) : or, 2. to take a mandate from the original creditor, empowering the assignee to demand and discharge the debt ; such mandate (as “*in rem suam*”), being held, contrary to the ordinary case of mandates, to be irrevocable (*c*), and such is the form of assignment at present ; a mandate with cession and surrogation into the cedent’s place. The assignee’s right is completed by notice or intimation to the debtor (*d*).

Debts which are extinguished cannot be assigned. See above, § 555, et seq.

(*a*) 3 Stair, 1. § 2, 3, &c. 3 Ersk. 5. § 2. 2 Bell, Com. 16.

(*b*) 1696, 25.

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

(*d*) 3 Ersk. 5. § 3. Buchan, May 24. 1797 ; F. C. ; 1 Bell, Com. 289.

1460. Debts are either, 1. Such as are incorporated with the document, as in the case of bills and notes ; or, 2. Such as are independent of the document by which they may be proved. The former pass by indorsation ; the latter require a written assignment and notice.

1461. ASSIGNATION. The deed of assignment contains words of transference and cession of the bond or other document, and of the debt therein contained ; with a surrogation of the assignee into the creditor’s place, and power to uplift and discharge (*a*). Assignment is completed by intimation, even

though the deed of assignation should not itself be delivered (*b*).

(*a*) Farquhar, June 11. 1715; M. 16467. 3 Stair, 1. § 4. 4 Bell's Deeds, 177.

(*b*) M'Lurg, Feb. 24. 1680; M. 845.

1462. INTIMATION. There are two points in the doctrine of intimation; the interruption of bona fides on the part of the debtor, and the completion of the transference. Intimation is necessary for both purposes, not merely to give preference in competition, but as a step of diligence to complete the assignee's right.

Drummond, June 22. 1492; M. 843. Meldrum, Dec. 17. 1622; M. 844. Wallace, Jan. 22. 1663; M. 837. Fraser, Feb. 12. 1678; M. 844. Thom, Dec. 1683; 2 Brown's Sup. 49. M'Dowal, June 8. 1714; M. 840.

1463. Regular intimation is made by the assignee giving notice, in presence of a notary and witnesses, to the debtor personally, or at his dwelling-house (or to the treasurer of an incorporation); the procurator of the assignee reading the deed of assignment of the special debt, or leaving a written schedule or copy of it: the date of such intimation being the criterion of preference in all competitions and questions on bankruptcy (*a*). If the debtor be out of Scotland, the intimation must be at the Record Office of citations (*b*).

(*a*) 3 Ersk. 5. § 3, 5. Scott, July 3. 1628; M. 846. Lawrie, July 17. 1696; M. 849. Menzies' Creditors, Jan. 1739; M. 850; 5 Br. Sup. 656. Watson, Nov. 19. 1755; M. 850. 54 Geo. III. c. 137. § 13.

(*b*) 6 Geo. IV. c. 120. § 51.

1464. The legitimate and regular proof of intimation is by a notarial instrument, duly authenticated, bearing the fact of notice to the debtor. It is an actus legitimus, and must be correct in form and authentication.

1465. But notarial interposition is not in all cases necessary; and, 1. Judicial notice is sufficient (*a*). 2. If the debtor be a party to the assignation, it is enough (*b*). 3. Acknowledgment of notice in writing on the back of the assignation, or by letter, is sufficient (*c*): but a letter written to the debtor is not sufficient (*d*). 4. A promise to pay, if proved by writing, is sufficient (*e*). 5. A draft accepted, or presented and protested, is equivalent to an assignation duly intimated when the drawee is debtor in a money debt (*f*), not so when he has only effects in his hand; though it would seem that such draft

would, as an assignment, affect the proceeds, when realized, of goods in the drawee's hands at the presentment, if there be no mid impediment (*g*). See above, § 311, 315, and 339. 6. Partial payment, or payment of interest, is notice (*h*); but mere private knowledge is not (*i*); though such knowledge legitimately proved is a sufficient bar to the debtor's paying to the cedent (*k*).

(*a*) White, March 22. 1622; M. 854. Elphinston, Jan. 21. 1624; M. 858. Ogilvie, Dec. 1681; M. 863. Dougal's case, Nov. 17. 1795; M. 851.

(*b*) Turnbull, June 12. 1751; M. 868.

(*c*) Bayne, Nov. 29. 1679; M. 863.

(*d*) M'Gill, Jan. 22. 1630; M. 860. See Gray, March 16. 1708; House of Lords, Rob. App. Cases, p. 1. Earl of Aberdeen, April 9. 1730; 1 Rob. App. Cases, 44. Newton, Nov. 23. 1785; M. 850.

(*e*) Home, Dec. 12. 1674; M. 863.

(*f*) Mitchel, Nov. 27. 1734; M. 1464. Gavin, Nov. 17. 1768; M. 1495. Spottiswood, March 4. 1778; M. 1495. Falconar, Jan. 22. 1824; 2 S. D. 630. Bell and Company, June 18. 1833; 11 S. D.

(*g*) Stewart, June 15. 1744; M. 1493.

(*h*) Livingston, Nov. 16. 1626; M. 860.

(*i*) Rollo, Feb. 4. 1665; 1 Brown's Sup. 510. Dickson, Jan. 18. 1778; M. 873; 2 Hailes, 675.

(*k*) Leith, Feb. 16. 1703; M. 865. See also Dickson's case, *supra*.

1466. Some assignations require no intimation. As, 1. The conveyance to a trustee in sequestration (*a*); or assignment under an English commission of bankruptcy (*b*). 2. Judicial assignations (*c*). 3. Marriage, as an assignation to the husband of rights falling under the *jus mariti*. But the husband being liable to a personal exception, as bound by his wife's warrandice, this can be effectual only to his creditors (*d*). 4. An assignation in England of a debt due in England; but it seems to be different where the assignation, though in England, is of a Scottish debt.

(*a*) 54 Geo. III. c. 137. § 30. 2 Vict. c.

(*b*) 3 Ersk. 5. § 7. Selkrig, March 23. 1814; 2 Dow, 230.

(*c*) 3 Stair, 1. § 13. 3 Ersk. 5. § 7. See Robertson, Dec. 6. 1673; M. 5776. Stracey, July 27. 1763; M. 2858; 2 Bell, Com. 18.

(*d*) Gray, *supra* (*c*); 2 Bell, Com. 18, 19.

1467. EFFECT OF ASSIGNATION. 1. The assignation substitutes the assignee in the cedent's place: And he may proceed in the cedent's name (*a*). If he is to proceed in his own name, he must have judicial authority so to do. The messenger employed to execute diligence is not judge of the validity of conveyances; and he is not entitled, where diligence has been issued in the cedent's name, to execute it in the name of the

assignee. The Court has held, on a report of the Writers to the Signet on the practice, that no diligence, either by arrestment, horning, or poinding, issued in the name of the cedent, can be executed in the name of the assignee (*b*). 2. Assignment is necessary to convey diligence (*c*), and also dividends (*d*). Indorsation of a bill on which diligence has been done or dividends declared will not give right to them.

(*a*) Grier, Nov. 20. 1621; M. 828.

(*b*) 2 Stair, 1. § 17. 3 Ersk. 5. § 8. Stewart, June 11. 1745; M. 834; Elch. *Assignment*, No. 6. Notes, 43. Fogo, Dec. 7. 1769; F. C.; and 1 Hailes, 319. Young, June 24. 1799; F. C.

(*c*) Gordon, Feb. 19. 1806; F. C. 2 Bell, Com. 19, note 3. Frier, June 18. 1806; M. *Bill*, App. 24.

(*d*) Wallace, Hamilton, and Co. June 8. 1821; 1 S. B. 53; affirmed, June 23. 1824; 2 Shaw's App. Cases, 467.

1468. RIGHT OF THE ASSIGNEE. The general rule is Assignatus utitur jure auctoris (*a*). And, 1. All defences competent to the debtor against the original creditor, existing at the date when the assignment is completed, and constituted otherwise than by the debtor's oath, will be effectual against the assignee; as a claim on a backbond (*b*), a claim of compensation, &c. It is otherwise as to an indorsee. But, 2. Exceptions grounded on latent trusts, though pleadable against the cedent and against his creditors (*c*), will not be effectual against onerous assignees (*d*).

(*a*) 3 Ersk. 5. § 8, 9.

(*b*) Scott, Jan. 14. 1663; M. 10187.

(*c*) Dingwall, June 6. 1822; F. C.; 1 S. D. 501. Gordon, Feb. 5. 1824; 2 S. D. 675.

(*d*) Redfearn, June 1. 1813; 1 Dow, 50.

1469. WARRANTICE. Assignment, as a sale of the debt, implies warrantice. The *implied* warrantice is, that the debt is due; and the title to assign good. The cedent is not, without special stipulation, held to warrant the solvency of the debtor (*a*) differently from indorsation, which, being a new bill, is of course a warrantice of solvency. *Express* warrantice is either absolute; or from fact and deed; or a special warrantice of solvency. Warrantice from fact and deed is that commonly stipulated; and secures only against such acts or deeds of the cedent as may hurt the right of the assignee. Warrantice absolute, is debitum subesse. Warrantice, specially of solvency, will protect the assignee both against the insol-

veny of the debtor, and, in case of the debt being questionable, against the loss of the money in that way (*b*). In practice and in style-books it is usual to express only warrandice from fact and deed; and in the common case, warrandice is required only to this extent, there being in assignments no implied warrandice of solvency; but, in an onerous transaction, the warrandice truly ought to extend at least to warrandice of the truth of the debt.

NOTE.—The judicial modes of transferring moveables will be explained in treating of Execution or Diligence. They are, 1. Arrestment and forthcoming; 2. Poining; 3. Sequestration in bankruptcy; and, 4. Writ of extent, and venditioni exponas for Crown debts.

(*a*) 2 Ersk. 3. § 25. See Fountainhall, 2 Brown's Sup. 519.

(*b*) Riddel, March 4. 1707; M. 16616. Barclay, Nov. 24. 1671; M. 16593-4.

III. DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY.

1470. In many general arrangements of one's affairs, on the occasion of marriage, of death, of bankruptcy; in questions also relating to diligence for the recovery of debt; it is necessary to distinguish precisely the lines which separate property into heritable and moveable. MOVEABLES are assigned by marriage, and become common between the spouses; they fall to the executor in succession; they remain with the seller of land or of houses; they are removeable by a tenant on leaving his farm; they are attached by arrestment, and carried by poining; and in bankruptcy and succession they are regulated by the law of the owner's domicile. Things which are deemed HERITABLE go by succession to the heir; they are not assigned by marriage; they go with land to the buyer; they remain for the landlord at the end of a lease; they are affected by inhibition, and attached and carried by adjudication; and they are regulated by the territorial law, not by that of the owner's domicile.

The character of any subject or fund, as, in these important respects, heritable or moveable, may be either, 1. by its *nature*, as being *immoveable*, like lands or houses; or as *moveable*, like furniture or cattle; or, 2. by *connexion or accession* to some subject which has by nature the character of moveable or im-

moveable ; or, 3. by *destination* of the owner, either as in connexion with something else, or in regard to succession. But in some respects a distinction is to be observed between the character of heritable or moveable, considered as in a question of succession, or as in a question of the competency of diligence. See § 1475. 5.

2 Stair, 1. § 2. 2 Ersk. 2. 2 Bell, Com. 1, et seq.

1. *Corporeal Subjects considered as Heritable or Moveable.*

1471. Corporeal subjects are distinguished as heritable or moveable, according to their Nature, their Connexion with others, or the Destination impressed on them.

1472. 1. NATURAL CHARACTER. Things are heritable or moveable by nature, as they are capable or incapable of being moved. 1. Land, and parts of land, as minerals, lime, coal, or stone, in mines and quarries ; and generally things which are naturally immoveable, are in law heritable. 2. Whatever moves, or is capable of being moved from place to place, without injury or change of nature in itself, or in the subject with which it is connected, is moveable.

2 Stair, 1. § 2. 2 Ersk. 2. § 4. 7.

1473. 2. *Accessory Character.* Things, though in themselves by nature moveable, may become heritable by accession. So, 1. What has been by art so annexed to land (although not built in, or fixed to it), that it cannot be removed without destruction, or change of nature, or of use, in the one or in the other subject, is heritable by accession : Buildings ; fixtures in houses ; mills ; machines, or vessels, erected on a spot to which by their own weight they are, while entire, immoveably fixed (*a*). 2. What is by growth connected with the soil is heritable ; as trees, and natural fruits not requiring seed and cultivation (*b*). There is, however, a general exception of industrial fruits. These go with the property of the seed and labour (*c*) as manufactures, in which the productive powers of the soil are employed. Hay of the second crop, from grass seeds sown with white crops, has been held heritable in a question of succession ; but considered as an industrial crop in a question between landlord and tenant (*d*).

(a) 2 Stair, 2. § 4. 2 Ersk. 2. § 4 and 5, with Ivory's Note, p. 241. 1 Bell, Com. 752. Hyslop, Jan. 18. 1811; F. C. Arkwright, Dec. 3. 1819; F. C. Niven, March 6. 1823; F. C.; 2 S. D. 270.

(b) Stewart, June 24. 1761; M. 5436.

(c) Stair and Ersk. ut supra.

(d) Sinclair, Dec. 7. 1744; M. 5422. Wight, Feb. 10. 1796; M. 5446. Marquis of Tweeddale, Nov. 19. 1816; F. C. Keith, Dec. 3. 1825; 4 S. D. 267. Lyal, Jan. 25. 1832; 11 S. D. 96.

1474. Things in their nature heritable may become moveable, as part of an universitas or mass which is regarded as moveable. So a share of heritable subjects forming part of the stock of a trading company is a trust-estate in the partners, and moveable; the subjects themselves becoming part of the universitas, and merging in the general fund of the company for the benefit of the creditors, and ultimately of the partners. See below, of Trust Funds, § 1996.

Corse, Dec. 16. 1802; M. *Her. and Mov. App.* 2. Sime, March 1. 1804; 1b. 3; House of Lords, F. C., for 1812, 1814, p. 684. Murrays, Feb. 5. 1805; M. *Her. and Mov. App.* 4. Minto, May 23. 1833; 11 S. D. 632.

1475. 3. DESTINATION. This may operate either where there is a manifest purpose of such an annexation or connexion as would by accession characterize the thing as heritable; or where there is a destination in point of succession to the heir or the executor. So, 1. Materials prepared for completing the wainscoating or windows of a house are held heritable (a). It is doubtful whether the same principle applies to dunghills, or manure prepared to be spread upon the land in agriculture (b): But it seemed to be the opinion of the Court, that in distinguishing between plants in a nursery for sale and those in a nursery for the use of an estate, this principle operates (c). 2. Heirship moveables are by destination heritable (d). 3. Books and furniture may by destination be made heritable in succession (e). But, 4. The character thus accidentally impressed on subjects by destination, although it has ruled questions of succession, is not admitted to change them in respect to diligence (f).

(a) Johnson, Feb. 25. 1783; M. 5443; 2 Hailes, 919; 2 Bell, Com. 2. See Gordon, below (c).

(b) See 2 Bell, Com. 3. Lees, Feb. 17. 1808; Bar. Hume, 191.

(c) Gordon, Dec. 2. 1806; Bar. Hume, 188.

(d) 3 Stair, 5. § 9. 3 Ersk. 8. § 17. 1474, c. 53.

(e) Veitch, May 25. 1808; M. *Serv. and Conf. App.* 4.

(f) Forbes, 1772; Tait, 5 Brown's Sup. 583.

2. *Incorporeal Subjects Heritable or Moveable.*

1476. Incorporeal subjects follow the same order and analogy with corporeal subjects.

1477. 1. NATURAL CHARACTER. Incorporeal rights are heritable or moveable, according to the subject-matter.

1478. Rights to land, whether of property, or of liferent, made real by infeftment; and debts secured upon land; are heritable.

2 Ersk. 2. § 5. Drysdale, July 24. 1627; 1 Brown's Sup. 236.

1479. Simple personal debts and engagements, whether presently due or payable at a future term, with interest from that term, are moveable (*a*); also shares of companies, public or private (*b*); bank stock (*c*); and government stock (*d*). Arrears of the annual returns of debts and funds, themselves heritable (§ 1484), are held to be moveable, though secured on land: So arrears of rents and of feu-duties, and arrears and savings of interest of heritable bonds, or of reversions of the price of lands, sold judicially, are moveable. These are all considered as cash in bonis of the person in right of them (*e*). See § 1499. The price of lands sold is moveable, where the sale is by the owner; not where the sale is by an apparent heir,—the price in this last case coming in place of the lands as a surrogatum (*f*).

(*a*) 2 Ersk. 2. § 7. Tuffie, Jan. 14. 1808; Hog, May 15. 1807; Bar. Hume, 189.

(*b*) Corse, and Murrays, and Sime, *supra*, § 1474.

(*c*) Bruce, Nov. 23. 1683; 3 Brown's Sup. 478. Murrays, July 25. 1710; M. 5478. Sir J. Dalrymple, July 1. 1735; M. 5478.

(*d*) Hogg, Dec. 23. 1791; *Ib*.

(*e*) 2 Ersk. 9. § 64. Martin, June 26. 1755; M. 5457; 5 Brown's Sup. 830. Spalding, June 8. 1792; M. 5257; Bell's Cases, 244. Innes, Nov. 13. 1822; 2 S. D. 3.

(*f*) Emslie, Feb. 25. 1817; Bar. Hume, 197. See below, § 1493.

1480. Rights having a tract of future time are heritable: Such are liferents; also debts giving a periodical right without having relation to a capital sum or principal, as an annuity (*a*). It has been suggested, that patent rights and copyright, as having a tract of future time, seem to be heritable (*b*). But this has never been decided.

(*a*) 2 Stair, 1. § 4. 2 Ersk. 2. § 6. 2 Bell, Com. 4. Ewing, Nov. 29. 1752; M. 5476; Elch. *Her. and Mor.* 16.

(*b*) More's Notes on Stair, cxli.

1481. Titles of honour, and offices to continue after the patentee or officer's life, are heritable.

2 Ersk. 2. § 6.

1482. The *jus crediti* under a trust admits of distinctions, not according to the subjects vested in the trustees, but according to the nature of the subject demandable. If the trust be for vesting heritable subjects in the trustees, with a right in others to demand delivery or conveyance of the specific subjects; the *jus crediti* is heritable, descending to the heirs of the persons favoured (*a*). If the *jus crediti* under the trust be merely to demand a sum of money, or share of the general trust fund (which is the ordinary case), it is moveable, descending to executors (*b*).

(*a*) Durie, Nov. 30. 1791; M. 4624.

(*b*) Grierson, Feb. 25. 1780; M. 759. See also Wilson, May 31. 1809; F. C. Angus, Dec. 6. 1825; F. C.; 4 S. D. 279. Burrel, Dec. 14. 1825; F. C.; 4 S. D. 314.

1483. 2. ACCESSORY CHARACTER. Incorporeal are, like corporeal subjects, characterized as heritable by accession, or connexion with immoveable subjects.

1484. On this principle, Feu-duties and Casualties of superiority, Rents of land, Interest of heritable bonds, and Annuities, are heritable; though the arrears be moveable. See § 1479.

Poldean, June 27. 1738; Elch. *Her. and Mov.* 8; and Notes, p. 134.

1485. Rights connected with, or affecting lands, though not feudalized, are heritable; as servitudes, teinds, patronage, reversions, faculties and rights to challenge deeds relating to heritage (*a*). Heritable securities, whether by heritable bond or disposition in security, or by real burden, or by adjudication, are heritable; even although in these cases infertment shall not yet have been taken (*b*). Bonds also having a clause of infertment, though not completed by sasine, are heritable. But if, by the conception of the bond, the infertment is suspended till a subsequent day, or till a condition shall be fulfilled, the debt will be moveable (*c*).

(*a*) 2 Ersk. 2. § 5.

(*b*) Drysdale, July 12. 1627; 1 Brown's Sup. 236. Reid, Nov. 12. 1728; M. 5538. Cleland, May 21. 1734; M. 5554. Monro, May 21. 1794; M. 5548. M'Nicol, Jan. 31. 1816; F. C. Mead, June 27. 1828; 6 S. D. 1034; affirmed, Nov. 16. 1830; 4 W. S. 328. Baillie, June 2. 1832; 10 S. D. 617.

(c) 2 Ersk. 2. § 5. Nasmith, Feb. 7. 1615; M. 5513. Anderson, July 15. 1623; M. 5513. Gordon, Nov. 1683; M. 5514. Stewart, June 26. 1705; M. 2767. Fisher, Feb. 1718; M. 5516. Menzies, Dec. 8. 1738; M. 5519. Gray, Jan. 16. 1711; M. 5462. Hadaway, May 25. 1830; 8 S. D. 800.

1486. The above rule does not hold as to the constructive security of a ranking and sale; or a disposition in a cessio, or in sequestration (a); nor as to securities taken by a tutor, or by a factor loco tutoris (b). But if a tutor be compelled, or in the fair course of administration called on, to pay an heritable debt, his application of moveable funds to that purpose cannot be challenged by the executors (c).

(a) Henderson, Dec. 19. 1796; M. 5534. Ross, Jan. 16. 1806; Bar. Hume, 187.

(b) Ross, Jan. 31. 1793; M. 5545. Lady C. Graham, March 6. 1798; M. 5599.

(c) Lady C. Graham, supra (b).

1487. Where one abroad has empowered a person at home to act for him in investing money remitted, the accessory character of an heritable bond or other real security will be impressed upon the fund, so as to regulate his succession, although the principal may be ignorant of what has been done (a). But any will which he may make is construed according to the law of his domicile (b). If the investment have been made known to him and approved of, the succession will be regulated accordingly (c).

(a) Davidson, Dec. 20. 1797; M. 5597. McMillan, Nov. 23. 1834; 3 S. D. 308.

(b) Trotter, Dec. 5. 1826; 5 S. D. 78; F. C.; affirmed, June 10. 1829; 3 W. S. App. Cases, 407.

(c) Lady Ramsay, July 11. 1835; 11 S. D. 967.

1488. The effect of accessory heritable security, superadded to debts, admits of distinctions. And, I. Where lands, or voluntary securities on land, or adjudications, are conveyed to creditors in security of personal debts, those debts are made heritable, and so continue while the security is in force (a). 2. The same effect follows where a trust is granted for the security of creditors, and the trustee is infert, and the creditors have acceded; it is the same as if granted to themselves (b). 3. Where a trust has been granted for the sole and immediate purpose of paying the debts by a sale, the succession of the creditors is not changed. The jus crediti against the trustee (see above, § 1482), rather than the heritable security, is re-

garded in this question (*c*). Formerly it seems to have been held, that the effect of the trust (especially where the creditors adjudged in corroboration of it) was to make the debt heritable; and that it became moveable only when the subject was sold (*d*).

(*a*) Trents, Dec. 17. 1740; 5 Brown's Sup. 217. Frazer, July 12. 1749; M. 5491. Watson, Dec. 5. 1794; M. 5497.

(*b*) 2 Ersk. 2. § 15.

(*c*) Cave, Jan. 21. 1736; Elch. *Her. and Mov.* 4. Ramsay against Grier-son, Feb. 25. 1780; M. 759; 2 Hailes, 855. M'Ewan, June 18. 1793; M. 5596. Kyle's Trustees, Nov. 14. 1827; 6 S. D. 40.

(*d*) Smith, Nov. 11. 1737; Elch. *Her. and Mov.* 6. Murray Kynynmond, Nov. 6. 1739; M. 5590; Elch. 10. Dunbar, July 13. 1748; M. 5591; Elch. 14.

1489. 6. Accessory moveable security does not change the succession of an heritable debt.

2 Ersk. 2. § 16. Craw, March 12. 1628; M. 5550. Earl of Mar, June 15. 1664; *Ib.* Wishart, Jan. 17. 1683; M. 5552. Duke of Hamilton, Jan. 8. 1740; M. 5554, and 5615; affirmed, 1 Craigie and Stewart, 271.

1490. 3. DESTINATION. An incorporeal right may be altered from its natural character of heritable or moveable by destination, express or implied.

2 Ersk. 2. § 14. Waugh, Feb. 18. 1676; M. 5526. Yates, May 24. 1832; 10 S. D. 565.

1491. Express destination, by the exclusion of executors in a personal bond, makes the bond heritable (*a*). The assignation of a bond containing such an exclusion will, without repeating the exclusion, or being conceived to heirs or assignees, continue the original condition of the debt (*b*).

(*a*) 2 Ersk. § 11, 12. 1661, c. 32. Ross, July 4. 1809; F. C. Muir, July 1687; M. 5524. Crawford, Dec. 20. 1692; M. 5525.

(*b*) Sandilands, June 17. 1680; M. 5498. Lockhart, Jan. 28. 1708; M. 5498. Kennedy, Dec. 3. 1747; M. 5499; Elch. *Her. and Mov.* 13. notes, 182; 5 Brown's Sup. 749.

1492. Sums directed to be laid out by trustees on heritable securities, are heritable.

Dick, July 4. 1828; 6 S. D. 1065. Burrell, *ut sup.* § 1482.

1493. Destination to the effect of altering an heritable debt to moveable, is inferred from a direct trust and instruction to sell heritable subjects, and convert them into money (*a*). *Multo magis*, when the land is actually sold. (See *sup.* § 1479.) It is not implied from a mere power to sell, or a process having been raised for payment, for this is not conclusive of intention

as to succession (*b*). Even a process of adjudication was held not to alter the character of the debt, the creditor having died before decree (*c*).

(*a*) Dick, *supra*, § 1492. Angus, Dec. 6. 1825; 4 S. D. 279.

(*b*) 2 Ersk. 2. § 16. Reid, Nov. 12. 1728; M. 5584. Munro, July 3. and 20. 1735; Elch. *Her. and Mov.* 2. M'Kenzie, Dec. 2. 1772; M. 5778. 1 Hailes, 505.

(*c*) Carnegie, Jan. 16. 1700; M. 5537.

1494. A charge of horning on an heritable debt makes it moveable (*a*); but registration of a bond in order to a charge has not that effect (*b*).

(*a*) Donaldson, Feb. 24. 1624; M. 5571. Montgomery, Jan. 24. 1666; M. 5584. Seaton, June 25. 1672; M. 5572. Bannatyne, Jan. 17. 1683; M. 5581. Gray, July 24. 1705; M. 5581; and Douglas, Nov. 26. 1751; M. 5576; 5 Brown's Sup. 793.

(*b*) Yeaman, Feb. 1687; M. 5484.

1495. Formerly, bonds bearing interest were held to be quasi feuda, as having by the fixed yearly profit some resemblance to permanent rights (*a*). But still the natural character of the obligation prevailed wherever the presumption could fairly be entertained against permanency: And so the debt was held moveable, 1. before the term of payment (*b*); and, 2. where interest was stipulated from the date, but not payable till the arrival of the term of payment of the bond, and no stipulation of interest afterwards (*c*): But wherever interest was stipulated to be paid before the term of payment; or where the term of payment was very distant, or already passed, and the bond stipulated for interest; the debt was held heritable (*d*). By statute, an alteration was made in order to enlarge the fund for younger children, by declaring bonds of this description moveable as to succession, though still heritable as to the fisk and *jus relictæ* (*e*).

(*a*) 2 Ersk. 2. § 9, 10.

(*b*) Smith, June 29. 1624; M. 5503. Douglas, Feb. 26. 1629; M. 5504. Carnousie, July 30. 1630; M. 5505. Meuse, Nov. 22. 1748; M. 5506.

(*c*) Porteous, Dec. 7. 1627; M. 5463.

(*d*) 2 Ersk. 2. § 9.

(*e*) 1641, 57. 1661, 32. 2 Ersk. 2. § 9, 10. Hughson, Nov. 22. 1822; F. C.

1496. 4. Rents—Interests—Annuities. Although, by connexion with heritage, the *jus crediti* both of rents, and of principal and annual payments in heritable bonds, is heritable (§ 1483), yet the accruing payments, as they arise, become moveable as soon as they vest in bonis of the creditors. As to which the following rules are observed:—

1497. 1. Where the payment is not connected with the produce of land, the right vests *de die in diem* ; as the interest of bonds, though the bonds themselves be heritable destinationê.

1498. 2. Under a right having *tractum futuri temporis* (§ 1480), as in the case of annuities, if the periodical payment be termly, the right to the payments does not vest *de die in diem*, but at the specified term ; a special stipulation to pay daily and continually, having the effect, however, of changing it into a right vesting *de die in diem*. See above, § 1049.

Earl of Dalhousie, June 19. 1789 ; M. 15915.

1499. 3. Rents of lands vest and become moveable at the legal terms of Whitsunday and Martinmas. *Postponing* the term does not alter this (a) ; but *anticipation* does ; for at the actual term *dies et cedit et venit*, and the rent due is in bonis of the landlord (b). See on this the cases below, § 1500.

(a) Carnegie, July 24. 1668 ; M. 15887. Innes, Nov. 13. 1822 ; F. C. ; 2 S. D. 3.

(b) Marquis of Queensberry, Feb. 18. 1814 ; F. C. See Swinton, *infra*, 1501.

1500. 4. Payments connected with the rents of lands, or payable in victual (land's produce), fall under the same rule.

2 Ersk. 9. § 66. Carruthers, Jan. 11. 1738 ; M. 5413. Baillie, Feb. 14. 1684 ; M. 15900. Murray Kynynmond, Nov. 6. 1739 ; M. 5415 ; Elch. *Her. and Mov.* 10, and 11. Lord Daer, Feb. 27. 1740 ; Elch. *Her. and Mov.* 11 ; 5 Brown's Sup. 695.

1501. 5. The rents of grass farms follow the same rule as those of corn farms : The rent is for the crop, not for the possession. And whether the rent be made payable at Martinmas after entry and the following Whitsunday, or as a slump rent at the Martinmas after entry, if the landlord survives Martinmas, the whole goes to his executor ; if he dies before Martinmas, his executor gets only the half.

Pringle, June 4. 1741 ; M. 5419 ; Elch. *Heir and Ex.* 1. Sinclair, 1644 ; M. 5421. Turnbull, July 12. 1760 ; M. 5430 ; 5 Brown's Sup. 876. Swinton, June 20 ; 1809. Johnston, Feb. 1727 ; M. 15913. Elliot, Nov. 28. 1792 ; M. 15917. Campbell, June 11. 1745 ; Kilk. Pitley, Nov. 31. 1805 ; Bar. Hume, 186.

1502. 6. The rents of houses are regulated by the legal terms of Whitsunday and Martinmas ; the rent of the first half-year vesting the moment the possession begins.

Binny, Jan. 28. 1820. See Lord Monboddos note on Lord Daer's case, *supra*. King, Jan. 24. 1828 ; 6 S. D. 422.

1503. 7. Interest stipulated at the legal terms, is as rent at those terms: But if conventional terms be stipulated, the question is ruled by the stipulations.

Murray Kynynmond, Nov. 6. 1739; M. 15976, 5415. Elch. *Her. and Mov.* 10. Lord Daer, Feb. 27. 1740; 5 Brown's Sup. 695; Elch. *Her. and Mov.* 11.

1504. 8. In all cases in which payments are regulated by terms, an adjudication before the legal term will carry the right which vests at the term; an arrestment after the term will carry the rent due at that term; and an adjudger after arrestment, will be postponed on the rent due at the term previous. But a distinction has been introduced between interest due on an heritable bond, and interest falling due under an adjudication: In the former case, an adjudication of the bond and debt is held to carry the bond and future interests, but not the arrears; in the latter, the adjudication of the debt and diligence carries the adjudication, with the whole accumulated sum and interest, including arrears. And although the ground on which this distinction was first established may seem now to be subverted by the opposite view more recently taken of an adjudication, as being a mere *pignus prætorium*, it seems to be settled, as above, by the latest cases on the subject.

Ramsay, Dec. 1. 1738; M. 5538; Elch. *Adjud.* 20. Bakie, Jan. 16. 1786; M. 5545. Ryder, July 1. 1794; M. 5549. See 2 Bell, Com. 10.

1505. 9. Arrears of feu-duty, rent, and interest, are moveable.

Keirie, Jan. 28. 1671; M. 5448. Lord Elibank, Jan. 26. 1711; M. 5462. Campbell, July 1743; M. 5247. Martin, June 26. 1755; M. 5457; 5 Br. Sup. 830. Johnston, Jan. 13. 1829; 7 S. D. 226.