

(d) Hill, May 14. 1818; Bar. Hume, 27. Stewart, Nov. 30. 1832; 11 S. D. 139.

(e) See Opinions in Coutt's case, 2 Bligh, 664. Cunningham, June 10. 1748; Elchies, *Deathbed*, 19; 5 Brown's Sup. 234. See above, § 1811. Mudie, March 1. 1824; House of Lords, 2 Sh. App. Cases 9, and cases there cited.

(f) See *Brodie v. Barry*, 2 Ves. and Beames, 130. Kerrs, ut sup. (b).

(g) See *Hearle v. Greenbank*, 3 Atk. 695. See 13 Vesey, J. 223. Montgomery, June 9. 1795; Bell's Cases, 283. Henderson, Jan. 31. 1797; reversed, March 29. 1802; M. 15444. Trotter, Dec. 5. 1826; F. C.; 5 S. D. 78. House of Lords, 3 W. S. 407. Murray, March 4. 1828; 6 S. D. 690. Dundas, Jan. 14. 1829; F. C.; 7 S. D. 241; affirmed, Dec. 22. 1830; 4 W. S. 460. Bennet, July 1. 1829; F. C.; 7 S. D. 817.

(h) *Paterson*, July 19. 1745; M. 3333. Kerrs, in House of Lords, 1 Bligh, 25.

• 6. *Last Heir*.

1940. Both in lands and moveables, the Crown is ultimus hæres, on failure of the blood of the proprietor (a). This right passes to the Crown as alone having a legal title. And,
1. The Crown or donatary may plead the law of deathbed (b).
2. The representation or liability of the Crown or donatary for the deceased's debts is limited to the amount of the estate (c).

(a) Halero, July 13. 1626; M. 1348.

(b) Begg, Feb. 1741; M. 3182. Goldie, July 31. 1753; M. 16396; Elch. voce *Ult. Heir*. 2. Brock, Feb. 2. 1809; F. C.

(c) 3 Ersk. 10. § 4. See below, of Bastardy.

IV. OF CONTRACTS OF MARRIAGE, AND FAMILY SETTLEMENTS.

1941. The patrimonial rights of the parties, as legally affected by marriage (see above, § 1546, et seq. and 1593, et seq.), may be variously modified by contract;—and two situations are distinguishable in considering this subject; one, where the parties are under no restraint or limitation; another, where the parties (or one of them), by former marriage-contract or otherwise, are under limitations.

I. MARRIAGE-CONTRACT BY PERSONS UNDER NO RESTRAINT.

1942. Marriage-contracts are Antenuptial or Postnuptial. These differ in a very important respect from each other (a).

1. The stipulations in an antenuptial marriage-contract are

conditions of the marriage, and onerous ; effectual not only to bind the parties themselves, but as against creditors, to raise a *jus crediti*, or sustain a preference : 2. As marriage without a contract has the effect of incorporating and identifying the condition and fortunes of the wife and children with those of the husband and father, no alteration to the prejudice of creditors can be made by postnuptial contract in favour of wife or children, after insolvency (*b*) ; and even the *jus crediti* arising to children in respect to legitim (*supra*, § 1582), by the unconditional marriage of their parents, is protected against such contracts.

(*a*) 4 Ersk. 1. § 33-4. 1 Bell, Com. 636, 641, and vol. ii. p. 188, 190, 1621, c. 18.

(*b*) Wood, Dec. 3. 1823 ; 2 S. D. 549. Jeffrey, May 24. 1825 ; 4 S. D. 32.

1. *Of the Effect of Marriage-contracts as directed to Particular Objects.*

1943. 1. PROVISION AGAINST THE PREMATURE DISSOLUTION OF MARRIAGE. The dissolution of marriage within the year, and without issue, defeats not only the legal provisions (above, § 1576), but also those which are settled by convention between the parties, if there be no stipulation to the contrary : nay, even settlements made by relations on the spouses in contemplation of the marriage are thus defeated (*a*). It has even been doubted, whether it does not defeat those settlements also which may have been made by a father on his own son (*b*). In order to guard against these consequences, it is competent and usual to provide by the contract, that, notwithstanding the dissolution of the marriage within year and day, the legal provisions, or the provisions in the contract, shall subsist, or take effect, and continue in force (*c*).

(*a*) 1 Stair, 4. § 19. 1 Ersk. 6. § 38, 40. King, July 13. 1627 ; M. 6169. Also Guthrie, Nov. 9. 1672 ; M. 6171. Calder, June 8. 1610 ; M. 6167. Sommerville, Feb. 22. 1751 ; M. 13045, and 6161. Cumming, Feb. 7. 1781 ; M. 6165. Hunters, July 24. 1766 ; M. 6164. See 1 Hailes, 126.

(*b*) 1 Ersk. 6. § 38. in fin. Burleigh, July 16. 1678 ; M. 6174. Hood, Nov. 6. 1739 ; M. 6178, and 6175 ; Elch. *Mut. Cont.* 17, and Notes, p. 303.

(*c*) 2 Jurid. Styles, 205, 237, 238. Garden, Feb. 9. 1743 ; M. 2271.

1944. 2. PROVISIONS AGAINST INSOLVENCY OF THE HUSBAND. One great use of a marriage-contract is to provide against the consequences of the future misconduct or misfortune of the husband ; and, 1. the rents of an heritable estate,

or moveable funds coming to the wife from a third party, or belonging to herself, may, by convention, be kept separate for the wife's use : They may be settled on her with that provision by her father or other third party (*a*) ; or they may before marriage be placed by herself, for that purpose, in trust (*b*) ; or the husband may, by antenuptial contract, effectually renounce his *jus mariti* over the tocher or other fund, if clearly distinguished and separated (*c*). (See above, § 1560, 1562.) 2. Such a separate provision may be made from the husband's funds for the wife's use during the marriage, by a deed before marriage ; or even after, if the husband be solvent at the time (*d*) : But it is inconsistent with such a purpose that the fund should be left under the husband's administration. 3. A jointure or locality, to take effect on the husband's death may be secured to the wife (*e*) : But if made payable by half-yearly terms, though said to be for all the days of the life, there will be no claim for broken terms (*f*). 4. Provision may be made for the children ; and if made payable during the father's life, the children may be effectually secured in a preference ; or entitled at least to rank with creditors for the amount (*g*). 5. In order to give effect against creditors, to provisions by marriage-contract, they must be stipulated in an antenuptial or onerous contract (§ 1942). And at all events, they must be reasonable in the circumstances of the parties (*h*).

(*a*) 1 Stair, 4. § 9. 1 Ersk. 6. § 14. Annand, March 4. 1774 ; M. 5844 ; affirmed, March 23. 1775.

(*b*) Murray's Trustees, Feb. 5. 1745 ; M. 5843.

(*c*) McDonald, Jan. 29. 1793 ; M. 5848.

(*d*) Dirleton, v. *Aliment*. Dickson, Feb. 3. 1705 ; M. 10396.

(*e*) Combe, March 2. 1826 ; F. C. ; 4 S. D. 513.

(*f*) Colebrook, May 14. 1835 ; 13 S. D. 756.

(*g*) 3 Ersk. 8. § 38, 39. Strachan, July 1. 1754 ; M. 996 ; 5 Brown's Sup. 274. Brown, Feb. 1. 1820 ; F. C.

(*h*) Lady Campbell, July 26. 1744 ; M. 988. Jeffrey, May 24. 1825 ; F. C. ; 4 S. D. 32. M'Lachlan, June 29. 1824 ; F. C. ; 3 S. D. 192.

1945. 3. MODIFICATION OF LEGAL PROVISIONS. The legal provisions are not always suited to the views of the parties or to their situation, and are occasionally enlarged or restricted.

1946. 1. Modification of *Jus Relictæ* (supra, § 1560. 1. 1591). The *jus relictæ* may be modified thus :—A certain sum or annuity on survivance is sometimes provided, conferring a preference ; or at least a *jus crediti*, which will entitle the wife to rank on the husband's insolvency, as a contingent

creditor, in case of her survivance. 2. The provision is sometimes extended to her heirs; making her claim on insolvency, not *contingent* merely, but *future*. 3. Sometimes the furniture, or a part of it, is provided to the wife; which, however, does not seem to give her any preference, as by retention. As to the construction of particular words, see above, § 1885. 4. If it be intended to give the wife a *preference*, it must be secured by infetment. 5. If the wife do not discharge her *jus relictæ* (§ 1580. 1.), she will, in the general case, be held entitled to both that and her conventional provisions; although, on summing up the conventional provisions, and comparing them with the husband's means, they may appear ample and reasonable: But where there is a plain intention by the marriage-contract to regulate the whole succession, it may be inferred, as in a *quæstio voluntatis*, that a *virtual* discharge of the *jus relictæ* was intended (*a*). The wife may be relieved against an express or implied discharge of the provisions, on shewing ignorance of her rights (*b*).

(*a*) M'Kinnon, Feb. 24. 1763; M. 6451; 5 Brown's Sup. 894. Riddel, Nov. 28. 1781; M. 6457. Tod, Dec. 12. 1770; M. 6451; 1 Hailes, 384.

(*b*) Hope, Dec. 17. 1833; 12 S. D. 222.

1947. 2. Modification of the Terce (supra, § 1596 et seq.). In the stipulations of a marriage-contract these points are important:—1. A provision by jointure, locality, &c. if accepted, discharges the claim of terce (*a*). 2. Jointure (provided instead of terce) is an annuity secured on land, or by assignment of rents; the wife's preference depending on the completion of the real right (*b*). 3. Locality is an appropriation of certain lands to the wife in liferent; her security depending on the completion of her right by infetment duly recorded (*c*). 4. If a jointure house be provided, it is by a liferent infetment, or by an obligation to pay a certain rent in place of a house (*d*). 5. If, by fault or fraud of the husband, those provisions should be left unsecured, the wife seems entitled to recur to her terce (*e*); and sometimes there is a stipulation to this effect.

(*a*) 1681, c. 10. See above, § 1597. 2.

(*b*) 1 Juridical Styles, 183.

(*c*) 1 Juridical Styles, 198.

(*d*) 1 Juridical Styles, 201.

(*e*) 2 Craig, 22. § 27. Dirleton, voce *Terce*. 2 Stair, 6. § 16. Marquis of Annandale Dec. 1. 1711; M. 15848.

1948. 3. Modification of Courtesy (*supra*, § 1605). 1. Where there is an heir of the wife by a former marriage (§ 1606. 2), a provision may be given to the husband instead of courtesy. 2. No express provision made for the husband will exclude the courtesy, unless it be specially renounced.

1949. 4. Modification of Legitim (§ 1582, *et seq.*). The legitim may be defeated, 1. By a clause in an antenuptial marriage-contract providing a sum in full of the children's claim of legitim (*a*). 2. It is not enough that the clause shall discharge all that the child may claim by the father's death; the legitim must be expressly discharged. 3. Without such a clause of discharge of the legitim, the settlement of the stock and conquest of the parties on them and the children, will not by implication discharge the legitim (*b*). 4. No provision to children in full of legitim, in a postnuptial contract or deed of settlement, will defeat that right, unless accepted by the children (*c*); and where a provision is made to a child in liferent, and his or her children in fee, the rejection of the liferent and taking of the legitim has been held not to defeat the fee in the grandchildren (*d*). 5. The father has no power to regulate the succession to the legitim of his children, even in the case of an idiot or bankrupt. See above, § 1585.

(*a*) Stirling, July 1632; Elchies, voce *Legitim*, 1.

(*b*) Burden, June 29. 1738; Elchies, voce *Mut. Cont.* 7; reversed, 1 Cr. and St. App. Cases, 215. Nisbet, Jan. 18. 1726; reversed, Rob. App. Cases, 594. But see Home, Jan. 28. 1757; Kilk. 5 Brown's Sup. 330. Marquis of Breadalbane, Jan. 20. 1836; House of Lords, Aug. 16. 1836; 2 S. and M'L. 377. Collier, July 6. 1833; 11 S. D. 912.

(*c*) 3 Ersk. 9. § 23.

(*d*) Dixons, July 1. 1833; 6 W. S. 438.

2. *General Observations as to the Settlement of Lands by Marriage-contract.*

1950. In the settlement of estates by marriage-contract, the doctrine of Fee and Liferent is of great importance. The meaning of the terms and the legal objection to a fee being in pendente, have already been explained (*supra*, § 1710, 1715).

1951. In marriage-contracts, 1. The expression "conjunct fee and liferent," imports conjugal liferent only. It bestows a more ample right than an ordinary liferent, with a right to the casualties of superiority; but leaves the fee still where the former investiture placed it (*a*). 2. The simple expression

“fee” implies always a right of property. 3. The simple expression “liferent” implies a mere usufruct, unless the fee is provided to persons nascituri, in which case a supposed necessity implies a fee in the liferenter (*b*). 4. The addition of restrictive words, as “allennarly,” confines the right to a mere usufruct; or at most to a fiduciary fee (*c*). 5. Where a power to dispoise is expressly given, it implies a fee, or inclines the bias of construction towards a fee (*d*). And yet it is not inconsistent with a mere liferent (if that be plainly indicated), that there should be conferred a power to dispoise in order to provide for particular circumstances or occasions (*e*).

(*a*) 2 Stair, 6. § 11. Muirhead, Jan. 16. 1724; 2 S. D. 617. Ferguson, June 22. 1739; M. 4202. M'Gregor, June 3. 1831: House of Lords; 1 S. and M'L. 441.

(*b*) Supra, § 1714. and cases.

(*c*) Mein, June 8. 1827; 5 S. D. 779. See cases below.

(*d*) Cuming, Feb. 10. 1756; M. 4268. Porterfield, June 23. 1779; M. 4277. Dickson, Dec. 7. 1780; M. 4269. Baillie, Feb. 23. 1809; F. C. Falconer, Jan. 20. 1825; 3 S. D. 455.

(*e*) Wilson, Dec. 14. 1819; F. C.

1952. As general rules in construing the provisions and clauses of marriage-contracts, it may be laid down,—

1. That lands belonging to the husband, settled by marriage-contract on the heirs of the marriage, are presumed to be still with the husband in fee; so that he may dispose of them for onerous causes, though not gratuitously: And they descend to the heir in heritage, unless otherwise specially designated.

2. That the universitas of the fortunes of the parties is presumed to be with the husband in fee, descendible partly to the heir, partly to the executors; unless altered by special words of settlement: And the father has a discretionary power of distribution.

3. That conquest by the industry of the husband, belongs still more clearly to the husband in fee, and is under his uncontrolled power of distribution.

4. That sums of money are the husband's in fee, descendible to executors, unless under special destination.

5. That the husband's fee may be restricted by special stipulation, and a more effectual and active right conferred on the children.

3. *Special Marriage-settlements.*

1953. 1. RIGHT AS SETTLED ON THE HUSBAND AND WIFE. Where the husband has a large land estate, the standing investitures are commonly no otherwise changed than to give to the wife a jointure or locality ; and to settle the succession on the heirs of the marriage, so as to confer a *jus crediti effectual* against gratuitous deeds.

1954. Where the land estate is small, or the fortune of the parties in bonds, the interests of the husband and wife are commonly arranged and construed as follows :—1. If, in regard to land, or bonds (as quasi feuda), words are used plainly indicative of a *fee*, they are held to confer a fee, provided there is power to bestow it (*a*). 2. If the right be expressly restricted to a *liferent*, this never is construed as a fee, unless where it is necessary to prevent the fee being in *pendente*, and then the fee is only fiduciary (*b*). 3. Where the words are so ambiguous, or so unskillfully used, as neither distinctly to confer a fee nor to restrict to a *liferent*, the fee goes according to the former destination, or the nature of the subject (*c*). 4. Where the fee is neither clearly disposed of nor left on the former destination, it is held in *dubio* to be with the husband as head of the family ; leaving to the children *nascituri* only a *spes successionis* (*d*).

(*a*) Fergusson, June 22. 1739 ; *Kilk.* 4202 ; *Monb.* 5 *Brown's Sup.* 664. See also *Riddells*, Nov. 6. 1747 ; *M.* 4203 ; *Elchies, Fiar*, 8.

(*b*) See above, § 1951 ; below, § .

(*c*) *Livingstone*, March 3. 1762 ; *Bell's Cases*, 184 ; 5 *Brown's Sup.* 885. *Muirhead*, Jan. 16. 1824 ; *F. C.* ; 2 *S. D.* 617.

(*d*) *Gordon*, June 3. 1748 ; *M.* 4398 ; and *House of Lords*, March 7. 1751 ; 1 *Cr. and St. App. Cases*, 493.

1955. Where the property is derived from the wife, and given expressly or tacitly as *tocher*, the husband is *fiar*, if there be no clear destination to the contrary.

Elliot's Creditors, July 1720 ; *M.* 4244. *Angus*, 1733 ; *M.* 4244 ; *Elchies, Fiar*, 1. *Watson*, July 1766 ; *M.* 4288 ; 1 *Hailes*, 52. *Cameron*, Jan. 28. 1837 ; 15 *S. D.* 1205. *Bruce Henderson*, Jan. 20. 1790 ; affirmed, May 11. 1791 ; *M.* 4215.

1956. In general with regard to lands, where the words are restrictive, the rules are,—1. That if the property (though the wife's) be settled on the parties, “in conjunct fee and *liferent*, for *her* *liferent* only, and the heirs of the marriage in fee,” the

fee is with the husband (*a*). 2. That if a settlement which, conceived in simple terms, would give a fee to the husband, conveys to him the subjects “for *his* *liferent alimentary*,” or “*liferent allenarly*, the fee to the heirs or children nascituri,” there arises, by legal necessity, a fiduciary fee in the father, the real fee being in the children (*b*). 3. That if the wife’s heritable property be settled on the parties, “in conjunct fee and liferent for *their* liferent only, and the children of the marriage in fee, whom failing, the heirs whatsoever of the parties equally,” and if there are no heirs of the marriage, the fee is untransferred, and still in the wife (*c*). 4. If the subject be not one belonging to the wife, and taken to the husband and wife, and the longest liver in liferent, for their liferent use allenarly, and to their children nominatim in fee, the surviving wife is entitled to the liferent, notwithstanding any conveyance of the husband (*d*). 5. That where an estate or fund is vested in trust “for the parents in liferent, and the children in fee” (*e*), or where there is any other clear indication of the parent’s right being a *mere liferent*, the fee is in the children (*f*).

(*a*) Wilson, Dec. 14. 1819; F. C.

(*b*) Gerran, June 14. 1781; M. 4402. Newlands, July 9. 1794; M. 4289; Bell’s Cases, 54; M. 4294. Thomson, Nov. 14. 1812; 1 Dow, 417. See Bell’s Cases, 72. Harvey, May 26. 1815; F. C. Falconar, June 20. 1825; F. C.; 2 S. D. 455; and observe Dewar, Feb. 5. 1821; affirmed, 1 W. S. App. Cases, 161.

(*c*) Reid, Dec. 4. 1827; 6 S. D. 198.

(*d*) Paterson, Jan. 16. 1824; 2 S. D. 619.

(*e*) Seton, March 6. 1793; M. 4219.

(*f*) Bushby, June 23. 1825; 4 S. D. 110. Scotts, Feb. 14. 1826; 4 S. D. 454; affirmed, 2 W. S. App. Cases, 550. Cunningham, June 19. 1827; 5 S. D. 814; Ewing, July 10. 1828; 6 S. D. 1125. Contrast Williamson, June 28. 1828; 6 S. D. 1035.

1957. Where the settlement of feudal subjects or of bonds is not thus restricted, but conceived “to the husband and wife in conjunct fee and liferent; (or in “liferent,”) and the children of the marriage unnamed or unborn in fee; or “to the husband (or to the wife) in liferent, and the children unborn or unnamed in fee;” there is construed to be only a spes successionis to the children, and the fee is held to be with the parent (*a*);—a construction which, although it must now be adhered to, is so little justified by any real necessity, that it will not be extended (*b*).

(a) Watson, July 1766; M. 4288; 1 Hailes, 82. Ayton, Nov. 10. 1609; M. 4198. Johnston, June 19. 1667; M. 4199. Allardice, Feb. 12. 1721; Rob. App. Cases, 399. Neilson, March 14. 1732; 1 Cr. and St. App. Ca. 65. Fulton, Jan. 11. 1811; Bar. Hume, 533. Dewar, in House of Lords, May 5. 1825; 1 W. S. App. Cases, 161.

(b) Mein, June 8. 1827; F. C.; 5 S. D. 779. Seton, *supra*, § 1956 (d). 1 W. S. App. Cases, 169.

1958. Where the fee is not left on the former investiture, but is *nominatim* given to one or other of the parties; or to the survivor; or to a child *nominatim*; this rules the fee.

M'Intosh, Jan. 28. 1812; F. C. Cannon, Nov. 26. 1794; M. 12005. See Dykes, June 3. 1813; F. C. M'Gregor, June 3. 1831; 9 S. D. 675.

1959. Where, in absence of other indications, the right is given to the heirs of either of the parties, it is a simple settlement *in obligatione*; giving so far a fee to the person whose heirs are favoured, that *onerous* deeds will be effectual, but not *gratuitous* deeds (a). Where the settlement gives a fee to the husband and a *liferent* to the wife, but restricts that *liferent* in the event of children of the marriage; the restriction is for behoof of the children only, and does not accresce to the fee, so as to be available to the creditors of the husband (b).

(a) Craig, 22. § 6. 3 Stair, 5. § 51. Cranston, Feb. 20. 1667; M. 4227. Elliot, July 1720; M. 4244. Angus, June 1733; M. 4244. Blairs, Aug. 5. 1782; M. 2280. Fead, Feb. 4. 1709; M. 4240. See below, § 1966.

(b) Blairs, Aug. 5. 1782; M. 2280.

1960. Where the fund is *moveable* (as a legacy left to the wife), and it is settled on the spouses "in conjunct fee and *liferent*, for the *liferent* use *allenary* of the husband;" or "of the survivor," and the wife survives; the wife is entitled, in so far as the fund is extant, to exclude creditors: And if it be used and consumed, she may claim as a creditor on the husband's estate.

Rollo, Nov. 28. 1832; 11 S. D. 132.

1961. 2. RIGHT BESTOWED ON THE CHILDREN. A destination to heirs-male of the marriage, with a provision, failing them, of a sum to daughters, will be available to the daughters, though a son should exist, if he predecease the father.

3 Ersk. 8. § 38.

1962. *Moveable* funds go by law equally to all the younger children; and this rule prevails, unless the words distinctly change this disposition. Therefore, a settlement of *moveables*

on the "heirs or children of the marriage," or on the "bairns of the marriage," leaves the rule of law to operate.

M'Dowal, Feb. 27. 1727; M. 12844. See Dallas, Feb. 1. 1743; 5 Brown's Sup. 728, as qualified by Watson, June 13. 1760; M. 985. Robertson, July 1766; 1 Hailes, 87.

1963. A mixed succession of funds, both heritable and moveable, divides, according to the legal rule, between heir and executor. Therefore, 1. a settlement on "heirs," or on "heirs and children," or on "heirs and bairns," leaves that rule undisturbed; the estate going seriatim to the children, with the lawful preference of sex and age (*a*); or subject to construction as in a *quæstio voluntatis* (*b*). But, 2. The expression is very different in effect, when the flexible term heir is dropt, and the settlement is on "bairns and children of the marriage." By this destination *all* the children are included, and the preferable right of the heir, *as such*, is excluded, while he is comprehended as one of the children (*c*). 3. A settlement on "bairns or children," implies in the father a power of distribution (*d*). But he cannot, under that power, give the estate to one. 4. A distinction is to be observed between the construction of popular language in money provisions, and the same terms used in destinations of land (*e*). See § 1703.

(*a*) Wilson, Dec. 1. 1769; M. 12845; 1 Hailes, 313. Lamond, July 30. 1776; M. 12991; 2 Hailes, 710. Fairservice, June 17. 1789; M. 2317. Dollar, Dec. 4. 1792; M. 13008. Reid, Nov. 18. 1788; M. 14483. Herries, Nov. 26. 1806; Bar. Hume, 528. Bowie, Feb. 23. 1809; F. C.

(*b*) Duncan, Feb. 9. 1813; F. C. Scott, June 13. 1760; M. 985. Rankin, Feb. 17. 1736; M. 14931; Elchies, *Mut. Cont.* 4. Scott, Feb. 1684; M. 12842.

(*c*) Duncan, *supra* (*b*). Hay, Feb. 17. 1663; M. 12839. Carnegie, Feb. 13. 1677; M. 12840. Kinloch, Jan. 21. 1678; M. 12841.

(*d*) Lamont, *ut supra* (*a*). Herries, *ut supra* (*a*). See also Bar. Hume, 530, note. Wight, July 9. 1818; Bar. Hume, 539.

(*e*) Redhouse, June 15. 1743; M. 2306; affirmed, Dec. 1744; See Elchies' Notes, 373. Ewing, July 1. 1747; M. 2308.

1964. Where in land estates the previous destination is not clearly changed, or where the subject comes as a tocher, a child, though named in the destination, has not the fee; but only *spes successionis* in obligatione (*a*). But where words are used which defeat the right that, in either of these cases, is presumed to be in the father, the fee is held then to be either in children named or born, or in the father as a fiduciary holder for children unborn (*b*).

(*a*) Livingston, March 9. 1757; 5 Brown's Sup. 885; Bell's Cases, 184. Wilson, Dec. 14. 1819; F. C.

(*b*) Dykes, June 3. 1813; F. C.

1965. Where the destination of a marriage-contract is "to heirs of the marriage," or "to sons," or "to sons in their order," or to "heirs-portioners;"—or where the father is bound at a certain time to take the investitures in such terms; the right of the children is a *spes successionis* in obligatione.

See above, § 1964. 3 Stair, 5. § 19. 3 Ersk. 8. § 38. Home, June 24. 1608; M. 12886. Dykes, Feb. 9. 1811; F. C. Hyslop, June 1. 1804; quoted in Dykes' case. Cunningham, Dec. 10. 1810; F. C. Earl of Wemyss, Feb. 28. 1815.

1966. 3. POWERS RESULTING FROM SUCH SETTLEMENTS. The effects of these rights are important, in conferring powers on the father; or in leaving his ordinary powers unimpaired; or in laying him under obligations, and giving action against him. And,

1967. 1. *Father's Powers*. In construing the father's powers under such settlements,—1. Where there is a fee in him, he may sell, or burden, or exhaust the subject, but under a personal obligation to indemnify at his death to the amount of the price received (*a*). 2. He cannot gratuitously alienate (*b*); and so can neither defeat the right of the heir, nor bestow the subject on a younger son (*c*); nor prefer a second son to the children of the eldest (*d*); nor cut off daughters of the marriage (or of a son of the marriage), preferring his own sons by another (*e*); nor select one out of the legal order of succession (*f*); nor sell and distribute, to the disappointment of the heir of the marriage (*g*); nor make such additions to provisions as to compel a sale (*h*). 3. Among the doubts entertained on this point, the safe rule is to hold that a father has no discretionary powers of substitution, distribution, &c. under settlements in marriage-contracts, unless specially conferred (*i*). 4. The father has no power to limit, by entail or otherwise, those heirs who have right under the contract of marriage unqualified (*k*) (see § 1970). And, 5. If there be power stipulated to entail the estate, the exercise of such power must be within the terms reserved (*l*).

(*a*) Cunningham, Jan. 17. 1804; M. 13029. Cunningham, Dec. 20. 1810; F. C. Earl of Wemyss, Feb. 28. 1815; F. C.; affirmed, May 20. 1818. See § 1719.

(*b*) Home, July 16. 1708; M. 12900.

(*c*) Riddell, Jan. 4. 1766; M. 13019. Dykes, ut supra. Miller, June 11. 1834; 12 S. D. 708.

(*d*) Douglas, July 25. 1751; Elchies, *Tailzie*, 43.

(e) Strang, July 17. 1751 ; M. 12988 ; Elchies, *Tailsie*, 42. Graham, June 9. 1743 ; M. 13010 ; See Kilk. note, 5 Brown's Sup. 222. Speirs, July 28. 1778 ; M. 13026 ; 2 Hailes, 806.

(f) Stewart, Jan. 4. 1743 ; Elchies, *Mut. Cont.* 20 ; House of Lords, Feb. 10. 1744 ; 1 Cr. and St. App. Cases, 364.

(g) Farquhar Gordon, Dec. 8. 1790 ; M. 13028. Hyslop, June 1. 1804 ; F. C. for 1810, p. 192.

(h) Campbell, Nov. 26. 1766 ; M. 4287 ; 5 Brown's Sup. 933 ; 1 Hailes, 154.

(i) 3 Ersk. 8. § 49 ; also § 39. Douglas, July 10. 1724 ; M. 13002. Stewart, March 2. 1815 ; F. C. Thomson, Feb. 11. 1762 ; M. 13018. Spiers, July 28. 1778 ; M. 13026 ; 2 Hailes, 806. Ponton, Feb. 14. 1837.

(k) Watson, Jan. 28. 1801 ; F. C. Monro, Feb. 13. 1810 ; F. C. Douglas, Dec. 1804 ; M. *Fiar Absol.* &c. App. 1. McNeil, Jan. 27. 1826 ; F. C. ; 4 S. D. 393. McPherson, June 22. 1827 ; 5 S. D. 826.

(l) McNeil, ut supra (k). McLeod, July 1. 1828 ; 6 S. D. 1043.

1968. 2. *Effect of Jus Crediti under Contracts of Marriage.*

The right in the heir, or children of a marriage, under a marriage contract so conceived as to confer a jus crediti, is not that of an heir but of a proper creditor.

1969. 1. It requires no service, therefore, in the heir of a marriage, to vest in him a right so conceived, or even to transmit it to his heir.

3 Ersk. 8. § 73. Ogilvy, Dec. 16. 1817 ; F. C. Gordon's Trustees, Dec. 4. 1821 ; F. C. ; 1 S. B. 175.

1970. 2. The concurrence of the heir of the marriage having jus crediti may render valid, deeds otherways beyond the father's power (§ 1967). For, 1. If the father should implement his obligation under the contract, the heir has then the absolute right to dispose of the subject as he chooses. 2. The father and son concurring accomplish the same purpose by a single act, which separately they may do (a). And the rule is not different, where the heir of the marriage predeceases the father (b). But although the heir is thus held entitled to discharge his right by anticipation, there is nothing in him to transmit by assignation (c).

(a) Trail, Jan. 17. 1737 ; M. 12985, to be corrected by Elch. v. *Mut. Cont.* No. 5. Fotheringham, June 2. 1797 ; M. 12991.

(b) See Moodie, 1728 ; 1 Cr. and St. App. Cases, 20. Ranken, Feb. 17. 1736 ; M. 14931. Routledge, May 19. 1812 ; F. C. ; remitted by House of Lords, 4 Dow, 392. Same case, Dec. 16. 1819 ; F. C. ; affirmed, June 5. 1820 ; 2 Bligh, 692.

(c) McConochie, Jan. 12. 1780 ; M. 13040.

1971. 3. The husband binding himself to lay out and secure money on land, &c. for the wife and children, may be compelled by action to do so ; but (in the case of tenants parti-

cularly) so as not to ruin himself; leaving the efficacy, in regard to the wife and children, for subsequent question (*a*). The effect is,—1. That, to the wife, the security will not be available against onerous, but only against gratuitous deeds (*b*). 2. That the children cannot oppose onerous creditors (*c*). 3. That, if the wife and children be disappointed by onerous deed, the father, his cautioners, and representatives, are bound to indemnify (*d*). 4. That the father has, in regard to such sums, a discretionary power of division among the children (*e*).

(*a*) See Granton, Dec. 16. 1628; M. 12974. Smith, Feb. 22. 1759; M. 6564.

(*b*) Laws, Jan. 19. 1697; M. 12899. Dalrymple, June 23. 1748; Kilk.; M. 13035.

(*c*) Grahame, Jan. 24. 1677; M. 12887. Marjoribanks, Feb. 1682; M. 12891. Murray, March 1686; M. 12895. Napier, July 24. 1696; M. 12898.

(*d*) McIntosh, Jan. 23. 1717; M. 12883. Frazer, Feb. 13. 1677; M. 12859. Fotheringham, Dec. 5. 1734; M. 12929. 41.

(*e*) Edmonston, July 19. 1706; M. 3193.

1972. 4. Where lands are settled by marriage-contract on the heir of the marriage, and afterwards much improved, the meliorations do not make a debt against the heir.

Hyslop's Trustees, Jan. 18. 1811; F. C.

1973. 5. A settlement, generally of all lands, bonds, &c. which *shall belong to the husband at his death*, refers entirely to the actual state of his property at that time, leaving him the power of rational settlement.

Dicks, Dec. 21. 1776; M. *Prov. to Heirs and Children*, 4; 5 Br. Sup. 420.

1974. 4. SETTLEMENT OF CONQUEST IN MARRIAGE-CONTRACTS. The legal effects of marriage on the future acquisitions of the parties (*supra*, § 1548. 3. 1596, 1605), are often modified by various stipulations. And,

1975. 1. *Description of Conquest*. The provisions regarding conquest exhibit considerable varieties of expression. 1. The word "conquest," used *substantively* in marriage-contracts, comprehends whatever is acquired, whether heritable or moveable, during the marriage, by industry, economy, purchase, or donation; but not what comes by succession, or legacy, or accession to a subject already acquired (*a*). 2. The word conquest is sometimes used as a *verb*, "what we shall *conquest* or acquire:" Or its meaning is qualified by descriptive words;

and the extent varies with the expression. But it may be observed, that words *generally* descriptive of conquest, are taken as extensively as if the single word conquest were employed. 3. When the clause of conquest is special, it is strictly interpreted; so that conquest of lands and annualrents will not include leases; or conquest of lands, goods, and gear, will not carry debts; and so forth (*b*). 4. The clause may be extended to what the husband may *succeed to* during the marriage; but this must be specially stipulated (*c*).

(*a*) 3 Stair, 5. § 52. 3 Ersk. 8. § 43. Stewart, Jan. 29. 1678; M. 3052. Mercer, July 1730; M. 3054. Rae, Jan. 23. 1810; F. C. Countess of Dunfermline, March 12. 1628; 1 Br. Sup. 252. See also Scheirswood, Feb. 3. 1630; M. 305. Wauchope, Feb. 6. 1683; M. 12948.

(*b*) 3 Stair, 5. § 52. Lady Dunfermline, *supra*, as reported by Durie; M. 3048. Robson, July 15. 1673; M. 3050. 1. Aiken, Feb. 1682; M. 3053. Young, Feb. 5. 1676; M. 3054. Oliphant, Feb. 10. 1629; M. 3066; contrasted with Knox, July 16. 1625; M. 3065. Young, March 1682; M. 3054. Duncan, Feb. 15. 1810; F. C.

(*c*) 1 Jurid. Styles, 202.

1976. In questions relative to conquest during the marriage, doubts may arise as to the time at which the acquisition takes place; and this in special clauses of conquest is commonly settled.

1977. 2. *Effect of Provision of Conquest.* These points seem to be fixed:—1. If provision be made in favour of the wife, of a direct liferent of the conquest; or by allotting to her a share of the conquest; the husband will have power over it or not, according to the force of the expression. But, generally, it may be observed, that unless excluded, he has an implied power (saving always a competency to the wife) of providing rationally either for children of a former marriage (*a*), or for children of a subsequent marriage (*b*). 2. A provision of conquest to the children may be variously conceived; as to heirs and bairns; to the heir of the marriage; to heirs of the marriage; to bairns or children of the marriage: And these are construed as already stated (§ 1963). 3. A provision of conquest gives no *jus crediti* during marriage, or the father's life (*c*). 4. The father has power of onerous and rational disposal, under a provision of the *universitas* of conquest (*d*). 5. To ascertain the extent of the conquest, children have no action against their father, even on dissolution of the marriage; nor are they entitled to use inhibition against him (*e*).

6. Not only has the father full power of onerous and rational disposal of the conquest ; but his obligation under such clauses is only to the family, and he has an ample power of distribution, though not of exclusion (*f*).

(a) Robson, July 15. 1673 ; M. 3050. Anderson, Dec. 1. and 21. 1680 ; M. 12890.

(b) Anderson, *ut sup*.

(c) Frazer, Feb. 13. 1677 ; M. 12859.

(d) 3 Ersk. 8. § 43. Murray, June 19. 1677 ; M. 12944. Mitchell, Dec. 14. 1676 ; M. 3192. Gibson, Jan. 3. 1679 ; M. 12946. Gordon, Jan. 19. 1693 ; 4 Br. Sup. 51. 260. Oliphant, Feb. 17. 1693 ; *Ib*. 74. Anderson, Nov. 7. 1684 ; M. 12960. Cruikshanks, Feb. 24. 1685 ; M. 12964. Mitchell, June 20. 1676 ; M. 12960. McConochie, Jan. 12. 1780 ; M. 13040. Ormiston, Jan. 24. 1809 ; Bar. Hume, 531.

(e) Lawson, Feb. 15. 1694 ; 4 Br. Sup. 154. Carnegie, July 10. 1677 ; M. 12888. Leslie, June 15. 1710 ; M. 1018 ; 3 Ersk. 8. § 38, 39.

(f) Dowie, July 9. 1728 ; M. 13004. Russell, March 9. 1779 ; M. 3072 ; 2 Hailes, 834. Campbells, Dec. 16. 1738 ; M. 6849 ; 5 Br. Sup. 214, 651, 683. Lamont, July 30. 1776 ; M. *Prov. to Heirs and Children*, App. 1 ; 2 Hailes, 710. Cuming, Jan. 20. 1699 ; M. 12959. Ormiston, *sup*. (d). Wilson, June 14. 1811 ; Bar. Hume, 534.

II. MARRIAGE-CONTRACTS, AND PROVISIONS BY PERSONS UNDER LIMITED TITLES.

1978. The rights of existing children have influence on those of the issue of a subsequent marriage : And parties about to enter into marriage, or to settle provisions on each other or on children, may be restrained by previous marriage-contracts or limitations.

1979. 1. *Rights of Children of a former Marriage*. The right of children of a former marriage may be prejudicial to that of the children of a subsequent marriage : the children of the husband by a former marriage being entitled to partake of the legitim, as it may turn out at his death : while children of the *wife* by a former marriage will partake of her *jus relictæ*. And stipulations may be required in a second marriage-contract, either to extend or to limit the right of the prior children.

Balmain, Jan. 18. 1721 ; M. 8199.

1980. 2. *Jus Crediti of Children of a former Marriage by Marriage-contract or otherwise*. By contract, the father or mother's power of settling, by subsequent contract, the heritable or moveable estate may be abridged ; and,

1981. 1. *Land*. In marriage-settlements relating to land,

it is held, 1. That notwithstanding a former contract, in which the land has been settled simply on the children nascituri, or on the heirs of the marriage; the father will still have a power of granting rational provisions to his subsequent wife or children, should he have no other fund out of which to provide them (a). But, 2. It will bar such power of subsequent provision, if, under the first marriage-contract, a real right of fee shall have been constituted; or such proper *jus crediti* created in the children as will support an inhibition (b).

(a) 3 Ersk. 8. § 40, 42. Dykes, Feb. 9. 1811; F. C. See McCulloch, June 24. 1763; 5 Br. Sup. 895. See also Bruce, Feb. 7. 1761; M. 13036.

(b) Falconar, Jan. 20. 1825; 3 S. D. 455; F. C. Erskine, Jan. 17. 1826; F. C.; 4 S. D. 357. Thomson, Dec. 15. 1826; affirmed, May 11. 1824; 2 Shaw's App. Cases, 183. See also Douglas, July 22. 1724; M. 12910. Marjoribanks, Feb. 1682; M. 12891. Wood, Dec. 3. 1823; F. C. Douglas, Dec. 5. 1804. Monro, Feb. 13. 1810.

1982. 2. *Bonds, and Money Provisions.* When bonds have been granted to children of a former marriage, or obligations undertaken to lay out money for them, these, according to the conception of them, will either confer a preference, or give a ground of action, in favour of the former children.

3 Ersk. 8. § 40. Miller, Feb. 12. 1793; Bar. Hume, 527.

1983. 3. *Universitas settled on Children,* leaves in the father the power of rational provision for subsequent children.

1984. 4. A father may be restrained from granting subsequent provisions, by becoming a party to the marriage-contract of his son; the degree of restraint depending on the stipulation undertaken.

Miller, July 30. 1822; 1 Shaw's App. Cases, 308. Grant, July 9. 1712; 5 Br. Sup. 86.

III. NATURE AND EFFECT OF MONEY PROVISIONS TO CHILDREN AND HEIRS.

1985. In the granting of such provision two objects are proposed; either, 1. Absolute security to the child or children, against the future misfortunes of the father; or, 2. A reasonable security against capricious and gratuitous alienations to their prejudice. The former requires the investment of money with special destination; or the constitution of a trust for the children; or bonds of provision conferring a *jus crediti*; or at least an obligation to invest the money. The latter requires

only a simple destination in a bond ; or the providing of a sum to the children, payable at the father's death ; or in the marriage-contract a provision of money to the heirs, or to the children or bairns of the marriage. The effects of such provisions are to be viewed either as in a question with creditors, or as in a question with the father and his representatives.

1986. 1. *Effect in a question with Creditors.* In such provisions it is material to observe whether the marriage-contract be antenuptial or postnuptial, attending to the distinction of effect already stated (§ 1942) ; and,

1. In antenuptial contracts, the effect of money provisions, as against creditors, depends mainly on their being made payable during the father's life, so as to form a debt against him : If so made payable, the *jus crediti* will either be preferable, or will rank *pari passu* with creditors ; as there is an accompanying real security, or only a personal obligation (*a*). 2. If the provision be not payable till after the father's death, it cannot compete with creditors (*b*), unless the provision has been made for an onerous consideration (*c*). 3. Where the provision is to children *nascituri*, it is effectual to confer a *jus crediti*, if a term be fixed, which although contingent *may* happen during the father's life (*d*). 4. It was in some cases held, that although the provision was secured heritably, this was not sufficient to give a *jus crediti*, effectual in competition with creditors, if the provision was payable only on the father's death ; the security, as accessory, being held to have no greater extent than the principal (*e*). But after very elaborate discussion, the judgment of the whole Court has found the *jus crediti* to be fully established by such security (*f*).

In postnuptial contracts (and in *mortis causa* settlements by a father), the provisions to the wife and children will receive effect only where the husband was solvent at the time of making the deed ; or, if payable on his death, where he has died solvent, leaving sufficient to pay both his debts and the provisions (*g*).

(*a*) 3 Ersk. 8. § 40. Strachan, and cases (*b*).

(*b*) Strachan, July 2. 1754 ; M. 13053, also 998 ; 5 Br. Sup. 814-15, and *ib.* p. 274, for Kilkerran's Report. Blackburn, May 29. 1806 ; Wilson, June 18. 1816 ; Bar. Hume, 537. Brown, Feb. 1. 1820 ; F. C. Harris, Farquhar and Co. (*f*).

(*c*) Garden, Nov. 26. 1822 ; 2 S. D. 34. See Lord Moncrieff's Note, 11 S. D. 371. Gordon, Feb. 9. 1833 ; 11 S. D. 368.

(*d*) Lyon, Jan. 24. 1724; M. 8150. Ballingall, Jan. 31. 1759; M. 12919. M'Tavish, Nov. 15. 1787; M. 12922. See 1 Bell, Com. 641, note 3. Mackenzie, Feb. 2. 1792; M. 12924; Bell's Cases, 404.

(*e*) Brown's case, ut supra (*b*).

(*f*) Harris, Farquhar and Co.; March 9. 1838; 16 S. D. 948, and cases therein cited. See 2 Illus. 530.

(*g*) Creditors of Cult, Aug. 5. 1783; M. 974. Wallace, May 16. 1821; F. C.; 1 S. B. Bruce, Dec. 13. 1826; 5 S. D. 119, and 8 S. D. 215. See 2 Bell, Com. 192.

1987. 2. *Effect in a question with the Father's Representatives.*

The effect of such provisions is very different in a question with the representatives of the father, from their effect against creditors. And, 1. Where the fee is in the father, and the right of the children a mere spes successionis, there is no action or diligence to the children against the father. 2. Where the father has a mere liferent; or is bound to infeft the children at a particular term; or is bound not to contract debt so as to defeat the provision, action and diligence are competent to the children (*a*). 3. Where the father has bound himself to the children, they are creditors, with different remedies, in different circumstances: Thus, where the obligation is to pay or invest during the marriage, the children require no service as a title to pursue, and have remedy by inhibition, or under the Act 1621 (*b*). Where the obligation is not prestable during the father's life, the children, although they have no jus crediti against onerous creditors of the father, may pursue the father's representative for implement (*c*), and challenge gratuitous deeds as contra fidem tabularum nuptialium (*d*). And even where the terms are so general as to give no jus crediti in relation to creditors, action will lie against the father's cautioner (*e*). 4. Where the father has invested the money, or settled the stipulated sum, on the heirs of the marriage, a service is necessary; for the relation is no longer as debtor and creditor, but the children have only spes successionis (*f*).

(*a*) 3 Ersk. 8. § 40.

(*b*) Wallace, Jan. 13. 1665; M. 12857. Panton, March 1684; M. 12860. Frazer, Feb. 13. 1677; M. 12859. Hay, July 21. 1676; M. 12857. Cairns, Jan. 31. 1705; M. 12862. Douglas, July 22. 1724; M. 12910. Anderson, Nov. 16. 1747; M. 12868. Monro, June 1733; M. 12886. Gibson, Feb. 4. 1726; M. 12885. Oliphant, Feb. 10. 1704; M. 12966. Moncreiff, Dec. 8. 1759; M. 12871; 3 Ersk. 8. § 38, in fin.

(*c*) Borthwick, March 19. 1731; Cr. and St. App. Cases, 53. Dundas, May 16. 1839; 1 D. B. M. 731.

(*d*) Marshall's Creditors, Dec. 23. 1709; M. 12907. Lockhart, July 31. 1741; M. 12914. Strachan, July 2. 1754; M. 13053.

(e) Dickson, Dec. 18. 1707; M. 12940-1. Fotheringham, Dec. 5. 1734; M. 12941, correcting Crawford's case, Nov. 23. 1677; M. 12934.

(f) Anderson, ut sup. (b). See Campbell, Feb. 3. 1732; M. 12885. Christie, Jan. 21. 1806; M. *Prov. to Heirs and Chil.* 5. Moncreiff, March 1. 1765; 5 Brown's Sup. 909. Cameron, Nov. 18. 1784; M. 12879.

1988. 3. *Of the Implementing of Money Obligations in Marriage-contracts.* 1. The obligation must be fulfilled according to its true import: So, an obligation to settle lands on the *heirs* of the marriage, is not implemented by a disposition to children equally (a); nor is it duly implemented by a deed, whereby part of the estate is otherwise disposed of (b); nor by a settlement in which additional provisions are given gratuitously to younger children, or so as to compel the heir to sell the estate (c); nor by a deed in which unfavourable conditions are imposed on the heir (d). But, 2. Provided the full right is given, there may be substitutions not impairing the right (e); or there may be reservations of the father's liferent (f). 3. Onerous or antenuptial provisions are not revocable; but postnuptial or gratuitous provisions may be revoked by a second marriage-contract (g). But a disposition of lands to the eldest son under the burden of debts is not held a revocation (h). 4. In exercising a reserved or implied power of division, it must appear that there was truly an intention to exercise the faculty (i).

(a) Hyslop, June 1. 1804; F. C.

(b) Watson, Jan. 20. 1801; F. C.

(c) Riddell, Jan. 4. 1766; M. 13019. Campbell, Jan. 14. 1766; 5 Br. Sup. 933; M. 4287.

(d) Douglas, Feb. 7. 1792; M. 2985.

(e) Nisbet, July 25. 1738; M. 12986; Elch. *Mut. Cont.* 9. Traill, Jan. 7. 1737; M. 12985; Elch. *Ib.* 5. Craik, Dec. 7. 1728; M. 12984. See also Bonar, Feb. 1683; M. 12976.

(f) Paton, Feb. 1698; 4 Brown's Sup. 400.

(g) Mitchelson, Nov. 15. 1820; F. C.

(h) Thom, June 28. 1779; M. 2292.

(i) Sievwright, Jan. 27. 1824; F. C.; 2 S. D. 643.

1989. 4. *Of the Vesting of Provisions.* Here the distinction between *jus crediti* and *spes successionis* is important. And, 1. If the provision be given to the children, as successors of the father, the fee being still in him, they take as heirs, and there is no transmission of the right without service (a). 2. A proper *jus crediti* vests and transmits; but the presumption is, that the father means the provision to affect his heir only, and not himself (b), and strong expressions are required to coun-

teract it (*c*). 3. Where the provision is to heirs of the marriage, and not a *jus crediti*, there must be a service to transmit to the child's heir (*d*). 4. Where the provision is to a child or children *nominatim*, no service is required. 5. Where the child or heir of the marriage dies before the term of payment, or before the father, the provision lapses (*e*). But, 6. The lawful issue of such child will succeed to the provision (*f*) (see *sup.* § 1776). 7. The father may, during the child's life, transact and obtain a discharge (*g*).

(*a*) See above, § 1987.

(*b*) 3 Ersk. 8. § 40, in fin. Wilson, July 6. 1757; M. 5184. Wilson, Jan. 13. 1825; 3 S. D. 430.

(*c*) Clerk, Feb. 1682; M. 12881. See Lord Braxfield's Argument in Cameron's case, *supra*, § 1987 (*e*). Wilson, Jan. 13. 1825; 3 S. D. 430; 3 Ersk. 8. § 40. M'Tavish, Nov. 15. 1787; 1 Bell, Com. 641, note 3.

(*d*) Anderson, Nov. 16. 1747; M. 12868.

(*e*) M'Conochie, Jan. 12. 1780; M. 13041. Ainslies, June and July 1749; M. 13044. Russell, March 10. 1769; M. 13049. M'Intosh, Dec. 27. 1716; M. 12881. Grindlay, July 1. 1814; F. C.

(*f*) Wood, June 26. 1789; M. 13043. Binning, Jan. 21. 1767; M. 13047. Magistrates of Montrose, Nov. 21. 1733; M. 4398. Rattray, Dec. 8. 1790; Bar. Hume, 526.

(*g*) Majendie, 4 Dow, 392. Traill, Jan. 7. 1737; and Monro, March 19. 1769; 5 Brown's Sup. 880.

1990. 5. *Of Conditions, Implied or Express, in Provisions.* Conditions, express or implied in settlements, have already been considered (§ 1775, et seq.). In relation to provisions in marriage-contracts,—1. Although provisions to children, which do not give a *jus crediti* prestable during the father's life, lapse by the child's predecease without lawful issue (*a*); a provision payable at a day certain does not lapse by predecease, but transmits to the representatives of the child (*b*); and the same rule applies where the payment is made to depend on any event which must arrive; as the death of any person (*c*). 2. A provision payable at a contingent term, falls by predecease (*d*), and does not vest by the father's predecease, unless the child shall survive the contingent term (*e*). 3. It signifies not whether the contingency is applied to the payment of the money or to the provision itself (*f*). 4. Where there is an inconsistency in the condition, it is a *quæstio voluntatis* with a bias in favour of the provision (*g*). 5. A provision depending on an uncertain event is suspended, and vests no right, while the event is uncertain,—as a provision to daughters on failure of heirs-male (*h*); but if the condition be annexed only to the *payment*, a trust

being created to sustain the right till payment shall be exigible, the right vests, and payment may be demanded when the condition seems to be reasonably fulfilled (*i*).

(*a*) Bell, Jan. 14. 1730; M. 6342. Gordon, Nov. 17. 1757; M. 6343. Arbuthnot, June 17. 1816; Bar. Hume, 536; and see sup. § 1989.

(*b*) Campbell, Dec. 7. 1717; M. 6342.

(*c*) Home, Jan. 28. 1807; Bar. Hume, 530.

(*d*) Edgar, Jan. 17. 1665; M. 6325. Clerk, Feb. 1682; M. 6330. Bell, Feb. 1. 1749; M. 6332; Elchies' Notes, p. 112. Omev, Nov. 19. 1788; M. 6340. Home (*c*).

(*e*) Grindlay, July 1. 1814; F. C.

(*f*) See above, § 1881-4.

(*g*) M'Kays, Feb. 18. 1690; Bell's Cases, 394.

(*h*) Carstairs, June 21. 1672; M. 2992-3, and 13049. See § 1879.

(*i*) Schenniman, June 25. 1828; 6 S. D. 1019; Shaw, 6 S. D. 1149.

V.—OF TRUST-DEEDS.

1991. Conveyancers provide for many of the difficulties which arise in the settlement of estates on marriage, by means of deeds of trust. This also is a very convenient device for securing estates to unknown, or unborn, or very numerous parties; or for distributing in shares, or dividing among creditors, the property or price of lands. The whole doctrine and practice depends on these principles: 1. That a full legal estate is created in the person of the trustee, to be held by him against all adverse parties and interests, for the accomplishment of certain ends and purposes. 2. That the uses and purposes of the trust operate as qualifications of the estate in the trustee, and as burdens on it preferable to all who may claim through him. 3. That those purposes and uses are effectually declared by directions in the deed, or by a reservation of power to declare in future, and a declaration made accordingly. And, 4. That the reversionary right, so far as the estate is not exhausted by the uses and purposes, remains with the truster, available to him, his heirs and creditors.

1992. 1. CONSTITUTION OF THE TRUST. In order to make an available trust, the subject of it must be legally vested in the trustee; and the purposes of the investment, and the powers necessary for accomplishing them, plainly and intelligibly declared in the deed of trust, or reserved to be declared afterwards.

1993. 1. *Nomination, Acceptance, and Failure of Trustees.*

The number of trustees differs according to the purpose of the trust. And,

1. For settling an insolvency or bankruptcy, a single trustee is most eligible; the object of the trust being the immediate recovery of the funds, and settlement of the debts.

2. In cases of continued and prospective management (as in family-settlements, or in trusts for the arrangement and extrication of the truster's affairs), it is desirable to unite the discretion and other trustworthy qualities of several trustees. And, 1. The presumption is that the trustees are meant to act jointly, and the confidence of the truster to be reposed in them only while they continue together: And so, in such a case it would seem that if one dies the nomination falls; it certainly is so if the nomination be joint. 2. Where a certain number is appointed a quorum, that number must accept, survive, act, and concur, in order to fulfil the trust (*a*). 3. Where one is named sine quo non, he must concur in all acts, and his death dissolves the nomination. 4. The nomination commonly is to the acceptors or survivors, in which case the trust subsists while any survive and have accepted. 5. Where a nomination of trustees is defeated by unlooked-for failure of some of the nominees, the Court of Session will not authorize the diminished number to proceed (*b*). But they give effect to the trust by naming a factor. Formerly they named a trustee (*c*); now they interpose by the appointment of a judicial factor responsible under the precautions of an Act of Sederunt providing for security, and the observance of certain rules in the execution of the office. See below, § 2121. But although this be the general rule, the Court has power in cases of necessity to supply a nomination of a trustee (*d*). The Court will not appoint a new trustee, or authorize one of several to act where discretionary powers are to be exercised (*e*).

3. No one can, without his consent and acceptance, be named a trustee, to the effect of compelling him to act. But if infetment should be taken in his name, without his knowledge, he may be compelled either to act, or to denude, on being relieved of all consequences; or at least he may be denuded by a declarator or reduction (*f*).

4. One accepting as trustee is not afterwards entitled to decline acting, when his concurrence is necessary for extricating

the trust (*g*), and he will be liable for the consequences of his refusal (*h*).

5. Among the various forms of nomination, the effect seems to be, that while all those who are named are alive, and accept, they act by the majority, or by a quorum if such be named (*i*): That not the presence merely, but the concurrence also, of any one named as *sine quo non*, is requisite: And that the non-acceptance, death, or incapacity of any of those named jointly, or of those necessary to form a quorum, or of the *sine quo non*, will defeat the nomination (*k*); leaving the radical right or beneficial interest in the trust-estate to be made effectual by the Court of Session (*l*). Trust is regarded in law as under the contract of mandate and gratuitous; and so it was held at one time even as to trusts for creditors (*m*); but this would probably now be held only as to family-trusts.

(*a*) Freer, June 28. 1832; 10 S. D. 727.

(*b*) Nisbet, July 31. 1835; 13 S. D. 384.

(*c*) Hepburn, July 13. 1699; M. 7428. Campbell, Dec. 1752; M. 16203. Grant, Feb. 13. 1790; M. 7454.

(*d*) Alexander, Feb. 27. 1824; 2 S. D. 745. Moir, July 6. 1826; 4 S. D. 801. Sherriff, Jan. 24. 1829; 7 S. D. 714. Smith, May 15. 1832; 10 S. D. 531. Lacy, July 7. 1836; 14 S. D. 1112. Lord Melville, Feb. 8. 1838; 16 S. D. 457.

(*e*) Ireland, May 18. 1833; 11 S. D. 626. Nisbet, sup. (*b*).

(*f*) Dallas, Nov. 21. 1710; M. 16191.

(*g*) Lord Lynedoch, Feb. 15. 1827; 5 S. D. 358. See Carstairs, Jan. 20. 1776; 2 Hailes, 678. Davidson, July 9. 1835; 13 S. D. 1082.

(*h*) Same case, Nov. 20. 1832; 11 S. D. 60.

(*i*) See Lord Lynedoch, sup. (*g*).

(*k*) Dick, Jan. 22. 1758; M. 7440. Stodart, June 30. 1812; F. C.

(*l*) Campbell, June 26. 1752. Gavin, May 30. 1826; 4 S. D. 629, affirmed, 4 W. S. 48. Hepburn, ut supra (*b*). M'Dowal, Nov. 20. 1789; M. 7453. Busby, Feb. 1. 1823; Ib. 176. Alexander, Sherriff, and Smith, ut sup. (*c*).

(*m*) Johnson, Jan. 4. 1738; Elch. Trust, 6; M. 13407.

1994. 2. *Vesting of the Estate in the Trustees.* This completes the constitution of the trust with purpose to preserve it as a separate estate in the person of the trustees for the uses and purposes intended; guarding it at once against the truster himself, and his creditors or representatives, and against the trustee and his creditors.

The estate must, in order to make the trust effectual, be vested either in all the trustees, or in some one to be held subject to the acts and directions of the others; and this vesting must be either by *sasine*, or in such other mode already pointed out as may be requisite in completing conveyances. It may

be conveyed to the trustees either *ex facie* absolutely, with an obligation or back-bond, in writing or otherwise, to fulfil the purposes of the trust; or it may be expressly conveyed in trust. It is convenient to have the estate absolute and *ex facie* unqualified in the trustees as facilitating sales and transactions with third parties: But it exposes the estate to the creditors of the trustee. Where the estate is conveyed in terms absolute, the qualification of trust must be established by writ or oath of the trustee (*a*). By the statute, ‘no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be trustee, and against whom, or his heirs or assignees, the declarator shall be intended; or unless the same be referred to the oath of party simpliciter.’ But to this rule there are exceptions; in distinguishing which two situations are to be marked: And,

1. *As between the truster and his heirs, and the trustee and his heirs*, the statute gives the rule that the only evidence to be relied on is the writ or oath of the trustee. At one time a distinction was made between the effect of a deed of trust and the trust arising from professional employment and breach of mandate (*b*). But this was afterwards rejected, and the rule of the statute applied (*c*). It is not held necessary (notwithstanding the words of the Act) that the writing shall be a probative deed, provided it be subscribed by the party (*d*). Where the trust arises by *negotiorum gestio*, or where pupils are concerned, and where there is no opportunity of requiring a backbond, other evidence will be received (*e*); or where the declaration of trust has been destroyed by fraud, or has perished by mischance (*f*). It is not indispensable that the deed or backbond shall contain a positive, clear, and simple acknowledgment of trust: It is enough if it sufficiently evince or import a trust (*g*).

2. *As between the truster's creditors and the trustee* the rule of the Act 1696 is not to be strictly applied, otherways frauds would be inscrutable by creditors (*h*).

An acknowledgment of the trust by the representatives of the trustee is effectual to establish the trust (*i*).

Where the trust is made an express condition of the con-

veyance, 1. It is an effectual qualification while the right continues personal; 2. it is only a personal obligation if not recorded in the register of sasines and reversions (*k*). If duly recorded, the trust is an inherent condition of the conveyance.

(*a*) 1696, c. 25.

(*b*) *Tweedie v. Loch, Maxwell v. Maxwell*, Tait's Cases, 5 Br. Sup. 530.

(*c*) *Alison*, July 31. 1771; M. 12760. *Duggan*, March 2. 1797; M. 12761; affirmed, Nov. 24. 1797. *M'Kay*, June 4. 1829; 7 S. D. 699. The cases of Lord Strathnaver, Dec. 1731; M. 12757, and *Jackson*, M. 16197, are not to be relied on.

(*d*) *Watson*, Dec. 9. 1708; M. 12755. *Taylor*, Nov. 14. 1833; 12 S. D. 39.

(*e*) *Spreul*, July 16. 1741; *Elch. Trust*, No. 1.

(*f*) *Kennoway*, Jan. 22. 1752; *Elch. Trust*, No. 15.

(*g*) *Ramsay*, July 30. 1748; M. 12757. *Stewart*, July 8. 1777; 5 Brown's Sup. 631. See *Watson*, Dec. 9. 1708; M. 12755. *M'Farlane*, May 23. 1837; 15 S. D. 978.

(*h*) *Lord Elibank*, Nov. 16. 1827; 6 S. D. 69.

(*i*) *Montgomery*, Feb. 7. 1811; F. C.

(*k*) 1459, c. 27. 1617, c. 16. *Keith*, July 8. 1795; *Bell's Folio Cases*.

1995. 3. *Continuance of the Trust*. The purposes of the trust may reach beyond the lifetime of the trustees; and, 1. Sometimes trustees are empowered to assume others into the trust, or to devolve it on others; and this power, if exercised in lawful form, and strictly in terms of the power, will be effectual even although executed on deathbed (*a*); or, 2. if that trust fails before the purposes are accomplished, the Court of Session, in its equitable jurisdiction, will interpose (see § 1993); or will authorize the person having the radical right to enter by a declaratory adjudication (*b*).

(*a*) *Roughhead*, March 5. 1833; 11 S. D. 516. *Ferrier*, May 31. 1824; 12 S. D. 672. *Nisbet*, sup. § 1993 (*b*).

(*b*) *Drummond*, June 30. 1758; M. 16206. *Dalziel*, March 11. 1756; M. 16204. *Sheriff*, Jan. 24. 1829; 7 S. D. 314.

1996. 2. BENEFICIAL INTEREST UNDER THE TRUST. This is in its nature a *jus crediti*, and has preference over the private creditors of the trustee; while it is effectual against the trustor's creditors by the real right vested in the trustee for behoof of those entitled to the benefit of the trust; and, 1. This *jus crediti* may be transferred to the trustee himself, in consequence of advances or engagements undertaken (*a*); or, 2. it may be in any number of persons; or, 3. in future or possible persons; or, 4. with any variety of conditions calculated to get quit of the technical difficulties of conveyancing; and it may be observed, that the limitation statute as to trusts

of accumulation applies in Scotland only to personal or moveable estate (*b*). 5. This *jus crediti* gives a personal action against the trustee. 6. It may be conveyed by settlement (*c*), or by assignation (*d*). 7. The *jus crediti* is heritable or moveable, as the obligation is to transfer subjects, or to account for funds, to the person favoured (see above, § 1482): And it may be attached accordingly by adjudication or by arrestment. 8. If the trust be for creditors enumerated in the trust-deed as recorded, the security is real. Whether a trust-deed will give preference to creditors whose names are not enumerated, and the amount of their debts recorded, is a question not yet settled (*e*).

The reversionary interest in the truster stands on the footing of his original titles; and so, 1. It is adjudgeable by his creditors (*f*); and, 2. The truster may make an effectual entail of the reversionary estate (*g*).

Where a person has the beneficial interest of an annuity, with a provision of a capital to be laid out for securing it, those having the reversionary right have been found not entitled to divide the fund on purchasing an annuity (*h*).

(*a*) Frazer, Nov. 21. 1829; 8 S. D. 104.

(*b*) Earl of Strathmore, March 23. 1831; 5 W. S. 170.

(*c*) Gordon's Trustees, Dec. 4. 1821; F. C.; 1 S. B. 221.

(*d*) McDowal, Feb. 6. 1824; 2 S. D. 682.

(*e*) Lord Elibank, Feb. 15. 1765; Monb. 5 Brown's Sup. 906. See 2 Bell, Com. 490.

(*f*) Campbell of Ederline, Jan. 14. 1801; M. App. to Adjudications, 11; 1 Bell, Com. 744. Barbour, July 7. 1826; 4 S. D. 806.

(*g*) McMillan, March 4. 1831; 9 S. D. 551. Graham Stirling, Nov. 30. 1838; 1 D. B. M. 130.

(*h*) Wilson, Jan. 31. 1833; 11 S. D. 343; affirmed, Aug. 15. 1834; 7 W. S. 457.

1997. 3. PURPOSES OF THE TRUST AND REVERSIONARY INTEREST. The purposes, if clearly expressed either in the trust-deed or in a separate lawful deed, give the law of the trust. And, 1. The declaration of uses and purposes receives interpretation and effect according to the fair meaning (*a*). 2. What is necessary to the rational interpretation and purposes of the trust is implied (see below, § 1998) (*b*). 3. The purposes may be declared in a deed or will at any time when power so to declare is reserved in the deed. The only difficulty arises from the law of deathbed: as to which the rule is, that no such declaration of purpose on deathbed will carry

land, unless the heir be effectually excluded in liege poustie (see above, § 1809). Where the declaration of purposes is not within the law of deathbed, it will prove no fatal objection to it that it is in the form of a will (*c*).

The whole estate being vested in the trustees, the residue, after the purposes are fulfilled, if not otherwise appropriated, may be adjudged or disposed of by deed of settlement or otherwise, or on the death of the truster will go to the heir at law (*d*). See sup. § 1996. See as to intermediate accumulations, § 1998.

(*a*) Sprott, May 22. 1828; 6 S. D. 833. Same case, March 11. 1830; 8 S. D. 712.

(*b*) Robertson, Glasgow's Trustee, March 7. 1832; 10 S. D. 438.

(*c*) Fordyce, July 5. 1827; 5 S. D. 897. Brack, Nov. 23. 1827; 6 S. D. 113, and cases cited. Cameron, May 19. 1831; 9 S. D. 601.

(*d*) Cathcart, May 26. 1830; 8 S. D. 803.

1998. 4. ADMINISTRATION OF THE TRUST AND POWER OF THE TRUSTEES. The powers of the trustees, where not expressed, must correspond with the object of their appointment; and, 1. Whatever is essential to the accomplishment of the purposes of the trust is implied as a power in the trustees; as to sell for payment of debt (*a*); to lay out money in building a mansion-house on land which they are directed to purchase and entail (*b*). No power to sell a fee-simple estate in order to purchase land to be entailed can be implied, but requires the most clear directions (*c*). 2. Trustees to recover and distribute funds, may pursue actions, recover payment, and discharge the debtor: And when empowered to sell, may borrow money to pay debts (*d*). Under sequestration the trustee has power, with the aid of commissioners, to submit, compromise, and agree to compositions (*e*): And even in ordinary cases trustees seem to have such power when necessary in the fair and reasonable management of the affairs. 3. In selling property, they may use their discretion in disposing of it to the best advantage; and they will be bound by sales made by their factor duly authorized to sell (*f*). 4. In trusts for family purposes or economical arrangements, the trustees are, like the truster himself, entitled to pay off debts, &c. as they are demanded (*g*). 5. When judicially called upon to pay a debt, they are not safe preferably to answer a similar demand without having funds to pay both (*h*). 6. When called on by creditors, though extrajudicially, if there be a manifest shortcoming, they are not safe to pay without a multiple-

pointing. 7. When trustees are named to pay debts, and entail a certain part of the estate, they will be authorized to sell the part specified, if the rest be inadequate to the discharge of the debts (*i*). 8. Where trustees are directed to purchase land to be entailed, it is only the principal, not the interests or rents of the trust-estate, which is to be so bestowed. The heir who is to take the estate as institute, and the others in their order as they succeed, are entitled to the intermediate interest or proceeds (*k*). 9. They must be able to account strictly for their intrusions; keeping exact accounts (*l*); taking credit only for actual payments; communicating for the benefit of the trust whatever "eases" they may have had in paying; and giving up to those interested all acquisitions made by them in the course of their administration (*m*). They are not to avail themselves of any rights purchased by them, although such as might otherwise have come into competition with those concerned in the trust (*n*). 10. When a trustee has made advances, he cannot be compelled to denude till indemnified; and if he has a power of sale, and has from his own funds paid debts, he may sell, unless immediately relieved (*o*). 11. When the trustees hold mixed funds, to which several claimants make pretension, it is competent to raise a multiplepointing in their name (*p*). 12. Trustees are generally empowered to name a factor; and even when they are not, as theirs is a gratuitous office, they seem to have such power (*q*). But they cannot supersede a factor appointed by the truster (*r*). 13. Trustees cannot be purchasers at a sale of the trust-estate (*s*); and commissioners in a mercantile sequestration have not been allowed to purchase outstanding debts (*t*). 14. Trustees infeft in trust with power to sell have power to enter vassals (*u*). 15. When a trustee is empowered to sell and divide the trust-estate, no person interested is entitled to interrupt him by inhibitions; but the remedy is by bill of suspension and interdict (*x*).

(*a*) Erskine, March 13. 1829; 7 S. D. 594.

(*b*) Sprott, March 11. 1830; 8 S. D. 712. Some doubt was thrown on this case in the Second Division, in Paterson's case, Winter Session 1833.

(*c*) Robertson, March 7. 1832; 10 S. D. 438; reversed in House of Lords, 2 Illus. 553.

(*d*) Dewar, Dec. 4. 1792; Bell's Cases, 541.

(*e*) 2 and 3 Vict. c. 41. § 98.

(*f*) Thomas, July 4. 1829; 7 S. D. 828.

(*g*) Rankine, Nov. 24. 1741; M. 16201. Alison, Jan. 22. 1793; M. 16211.

(*h*) See cases (*f*).

- (i) *Erskine, Robertson, supra, and M'Kinnon, Dec. 4. 1838; 1 D. B. M. 153.*
- (k) *Templar, Feb. 14. 1826; House of Lords, April 1. 1828; 3 W. S. 47. Earl of Stair, House of Lords, June 19. 1827; 2 W. S. 414 and 614. Howal's Trustees, Feb. 7. 1838; 16 S. D. 622. Campbell, June 30. 1838; 16 S. D. 1251.*
- (l) *Gourlay, Nov. 28. 1710; M. 16192. Home, May 27. 1712; Rob. App. Cases, 47.*
- (m) *Earl of Crawford, March 6. 1767; M. 16208, and cases of Maxwell, Rae, and Sinclair there cited. Chalmers, Feb. 20. 1735; Elch. Trust, 3 and 7.*
- (n) *Wright, June 24. 1712; M. 16193. Anderson, Nov. 21. 1740; Elch. Trust, 10.*
- (o) *Elliot, July 3. 1828; 6 S. D. 1058. Sherriff, July 24. 1829; 7 S. D. 314. Innes, Dec. 18. 1829; 7 S. D. 206.*
- (p) *Dixon, March 5. 1833; 11 S. D. 517.*
- (q) *Syme, May 13. 1830; 8 S. D. 741.*
- (r) *Fulton, Feb. 15. 1831; 9 S. D. 442.*
- (s) *M'Kenzie, March 8. 1793; reversed, May 13. 1793; 8 Brown, P. C. 42. See also 4 Dow, 380. Smith, Feb. 10. 1826; 4 S. D. 442. Drew, Dec. 2. 1825; Ib. 259. Jeffrey, June 16. 1826; Ib. 722.*
- (t) *M'Kellar, March 6. 1817; F. C.; 2 and 3 Vict. c. 41. § 99.*
- (u) *Kerr v. Dickson, Dec. 7. 1838; 1 D. B. M. 179.*
- (x) *Hog, July 7. 1838; 16 S. D. 1275.*

RESPONSIBILITY. Trustees may be liable either, 1. as trustees to the amount of the estate or funds; or, 2. as Individuals.

1999. 1. *Responsibility as Trustees.* They are, as trustees, responsible to the extent of the trust funds, 1. for the faithful execution of the trust; for payment of the debts of the trust; for denuding of the trust-estates; and accounting for their intromissions (*a*); and, 2. for fulfilment of the obligations undertaken by themselves or their factor duly authorized (*b*), and for expense found due to third parties in litigation with the trust-estate (*c*); and a trustee for creditors is not entitled to enter into litigation, under a protest not to be liable for the expense (*d*). Road trust funds are not liable for injuries from negligence. See § 2031, in fin.

(*a*) *Duke of Hamilton, Nov. 19. 1740; Elch. Trust, 9. See also Nov. 24. 1747; Ib. 13; M. 16201; affirmed. Anderson, Feb. 12. 1833; 11 S. D. 382.*

(*b*) *Thomas, July 4. 1829; 7 S. D. 828.*

(*c*) *Dickson, Nov. 20. 1829; 8 S. D. 99.*

(*d*) *Buchanan, June 15. 1827; 5 S. D. 805.*

2000. 2. *Personal Responsibility.* Trustees may become responsible as individuals beyond the amount of the trust-estate, and in their own persons and fortunes, in the following cases:—1. Wherever, under cover of their character as trustees, they have occasioned damage to third parties, they must be so liable; and so for the expense of litigation conducted in mala fide, or improperly and oppressively (*a*); and a trustee for cre-

ditors will be liable even for such litigation as he has maintained in the character of trustee, where he is aware, without disclosing it, that there are no funds out of which to indemnify the antagonist for his expenses (*b*). 2. Where trustees resist the execution of their duty, or are guilty of culpa lata in neglecting their duty, they will be personally liable (*c*). 3. Where trustees have exceeded their powers, they will be personally responsible to those interested in the trust. 4. Where trustees give a bill or other liquid obligation for a trust-debt, they give assurance of funds, and pledge themselves to retain sufficient to answer the debt (*d*). 5. For their intromissions they will be answerable, in so far as they cannot discharge their responsibility, according to the principles of a trustee's accounting; as where they have paid to one not entitled to receive the payment (*e*). 6. In this responsibility they will be jointly liable, unless in so far as the truster, for himself and for those on whom he has bestowed the beneficial interest, shall have dispensed with this responsibility, and limited each trustee's obligation to the amount of his own actual intromissions (*f*). As trust is gratuitous, and too often a troublesome and a thankless office, trust-deeds generally contain, as an inducement to undertake it, a clause exempting the trustees from liability for omissions, and restricting their responsibility to their own actual intromissions (*g*). Such a clause, even where a small sum is bequeathed to the trustees, is effectual to discharge their responsibility when the expressions are clear, and the act in question distinctly falls within them. But difficulties sometimes arise in point of construction as to the distinction between intromission and mere omission; and, (1.) where trustees expressly authorize money to be drawn or received, and disposed of in such a way as to incur loss, this is held not a mere omission, but a positive act (*h*). (2.) Where there is a mere negligence of superintendence, the exemption will free the trustees (*i*). (3.) Where neglect of superintendence amounts to culpa lata, the exempting clause will be no protection (*k*). (4.) Where the neglect is a positive breach of the truster's order, the clause will not protect (*l*). (5.) A trustee ratifying the assumption of a new trustee, is exempt by the clause from liability for his acts; and trustees electing a factor reputed responsible and fit for the office under the express or implied

powers in the trust, are exempt from liability of that factor's acts or deficiencies, if merely negligent in superintending his proceedings (*m.*)

- (*a*) Dickson, Nov. 20. 1829 ; 8 S. D. 99. Fleming, Dec. 2. 1829 ; 8 S. D. 172.
- (*b*) Scott, Dec. 21. 1826 ; 5 S. D. 172.
- (*c*) Morrison, Feb. 9. 1827 ; 5 S. D. 322. Stark, June 7. 1838 ; 16 S. D. 1014.
- (*d*) Thomson, June 24. 1829 ; 7 S. D. 787.
- (*e*) Donaldson's Trustees, June 8. 1833 ; 11 S. D. 740.
- (*f*) Dalrymple, Aug. 4. 1784 ; M. 16210 ; Syme, § 1998, *supra*. Wallace, Feb. 23. 1832 ; 10 S. D. 364.
- (*g*) See Lord Traquair, below, (*i*).
- (*h*) Moffat, Jan. 31. 1834 ; 12 S. D. 869.
- (*i*) Lord Traquair, Feb. 6. 1835 ; 13 S. D. 417.
- (*k*) Home, Nov. 30. 1837 ; 16 S. D. 142. Thomson, Feb. 16. 1838 ; 16 S. D. 560.
- (*l*) Blain, Jan. 28. 1836 ; 14 S. D. 361.
- (*m*) Lord Traquair, *sup.* (*i*). Home and Thomson, (*k*).

2001. 4. EXTINCTION OF THE TRUST. Trust is at an end, 1. by the death of the trustee ; 2. by bankruptcy, in so far as it incapacitates the trustee from acting (*a*) ; 3. by recall of the trust ; which, however, must be taken under these qualifications : That if the trust be for the benefit of creditors, it cannot be so recalled but by consent of all concerned : That where the trustee has made advances or undertaken engagements under the trust, it cannot be recalled till he is reimbursed or relieved (*b*) : That the trustees, in order to be formally divested of such part of the estate as remains after accomplishing the purposes of the trust, or for finally executing those purposes, are bound to grant the proper conveyances (*c*) ; but this obligation they cannot be compelled to fulfil without full exoneration, which they may obtain judicially by an action of multiple-poining and exoneration (*d*). The trustees, when the trust is at an end, may be compelled to denude by an action of declarator of trust and adjudication ; or, if the trust-fund is personal or moveable property, an ordinary action will be sufficient. Trust-estates are generally vested either in the trustees and their heirs, or in the trustees without mention of heirs. If the trustees shall have died, the trust-estate must be restored in one or other of these methods, viz. if heirs have been mentioned in the trust-conveyance, the heir at law makes up his title, and disposes to other trustees, or to those having the radical right ; or, if he will not spontaneously do so, a declarator of trust and adjudication directed against the heir of

the trustee will accomplish the same purpose (*e*). If heirs have not been mentioned, there is greater difficulty, as the trust terminates with the trustee's death, and there is nothing in the heir: But the trust-estate is in hæreditate jacente of the deceased trustee, and his heir has an interest to prevent it from being taken out of it, without payment of advances, and indemnification for engagements undertaken, &c.; and so in this case also there is a sufficient ground for calling the heir in a declarator of trust and adjudication in implement (*f*).

(*a*) McDowal, Nov. 20. 1789; F. C. Smyth, May 15. 1832; 10 S. D. 531.

(*b*) Renton, Nov. 22. 1831; 10 S. D. 38.

(*c*) Allan, May 25. 1791; Bell's Cases, 538.

(*d*) Elliot's Trustees, July 8. 1828; 6 S. D. 1058. See Watt, Feb. 18. 1825; 3 S. D. 544. Dallas, Nov. 21. 1710; M. 16191. Shenniman, July 3. 1832; 10 S. D. 759.

(*e*) Dalziel, March 11. 1756; M. 16204.

(*f*) Drummond, June 30. 1758; M. 16206. See Gordon's Trustees, Dec. 4. 1821; 1 S. D. 199.

VI. DOCTRINE OF POSITIVE PRESCRIPTION.

2002. Referring to what has been already explained (§ 606), of the distinction between NEGATIVE PRESCRIPTION, as a discharge and abandonment of an obligation, and POSITIVE PRESCRIPTION, as a method of confirming and consolidating defective titles to property; the more particular consideration of the latter now demands attention. By one statute, the possession of lands or annualrents for forty years on charter and sasine, freed the possessor from the necessity of shewing his procuratories and instruments of resignation, precepts of clare constat, or precepts of sasine; provided the charter bore resignation to have been made, and that the instrument of sasine made mention of the precept. By a subsequent statute a more perfect remedy was given against insecurity in the enjoyment of property in land: It was enacted, that persons "having brooked (or possessed) their baronies and annualrents, lands and other heritages, by virtue of their heritable infeftments made to them by his Majesty, or others their superiors and authors, for the space of forty years continually and together following and ensuing the date of their said infeftments, by themselves, their tenants, or others having their rights, and that peaceably,

without any lawful interruption made to them therein during the said space of forty years ; that such persons, their heirs and successors, shall never be troubled, pursued, nor inquieted in the heritable right and property of their said lands and heritages, by his Majesty or others their superiors and authors, their heirs and successors, nor by any other person pretending right to the same by virtue of prior infeftments, public or private, nor upon no other ground, reason, or argument competent of law, except for falsehood ; provided they be able to shew and produce a charter of the said lands and others foresaid, granted to them or their predecessors by their said superiors and authors, preceding the entry of the said forty years' possession, with the instrument of sasine following thereon ; or, where there is no charter extant, that they shew and produce instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours or upon precept of clare constat." But a provision was added, that "in the course of the said forty years' prescription, the years of minority and lessage shall noways be counted, but only the years during which the parties against whom the prescription is used and objected were majors, and past twenty-one years of age."

1594, c. 214. 4 Acta Parl. 68. c. 24. 1617, c. 12. Ib. p. 543. c. 12. 2 Stair, 12. 3 Ersk. 7. Kames' Elucid. art. 33.

1. *Subjects of Positive Prescription.*

2003. The proper subjects of the positive prescription are the following :—1. Feudal subjects vested by infeftment (*a*). 2. Subjects which do not admit of sasine, or which may be transmitted without it (*b*) : So tacks (*c*), teinds (*d*), tacks of teinds (*e*), patronages (*f*), servitudes (*g*), are comprehended under the word heritage in the statute. See § 2009. 2014.

(*a*) 2 Stair, 12. § 22, 23. 3 Ersk. 7. § 3.

(*b*) See Stair and Ersk. ut supra.

(*c*) Maule, March 4. 1829 ; 7 S. D. 527. and App. for opinions.

(*d*) Ferguson, Feb. 1. 1671 ; M. 10775 ; 1 Brown's Sup. 624. Maxwell, Nov. 21. 1699 ; 4 Brown's Sup. 462. Budge, May 4. 1797 ; Bar. Hume, 455.

(*e*) Muir, July 2. 1746 ; M. 10820.

(*f*) Earl of Home, July 28. 1758 ; M. 10777 ; 5 Brown's Sup. 365-7 ; reversed on appeal. Magistrates of Peebles, Nov. 25. 1800 ; Bar. Hume, 457.

(*g*) Earl of Breadalbane, July 16. 1740 ; Elchies, *Preser.* 21 ; 5 Brown's Sup. 700. Muir, July 2. 1746 ; M. 10820. Porteous, June 17. 1773 ; M. 14512. See Earl of Haddington's case, May 26. 1826 ; 2 W. S. App. Cases, 468.

2. *Possession requisite by the Statute.*

2004. Possession is required by the statute to give effect to the prescription (*a*). It implies the detention or occupation of the subject by an owner, or one having reasonable grounds to believe himself owner, with the purpose of holding the subject as his own. This includes, 1. right, or the rational belief of it ; in other words, *bona fides* ; and, 2. the fact of continued possession (*b*).

(*a*) M'Kerral, June 21. 1801 ; Bar. Hume, 453.

(*b*) Younger, June 30. 1665 ; M. 10924. Thomson, Nov. 28. 1665 ; M. 10928. See Murray, June 19. 1713 ; M. 10934. Wilson, Dec. 1765 ; 5 Brown's Sup. 543, 916, 930, and Appeals, Feb. 16. 1770. M'Lean, July 3. 1777 ; Ib. 544.

2005. The possession may be either natural or civil ; in which sense the liferenter's possession has been admitted as the fiar's (*a*) ; and the possession of a disponee as that of his author (*b*). But it must be of a description clearly indicative of the right ; so, fishing of salmon by angle, spear, and wand, was not held sufficient for salmon fishing (*c*).

(*a*) Thomson, Nov. 28. 1665 ; M. 10924, 25, 28. Neilson, Feb. 26. 1823 ; 2 S. D. 247.

(*b*) Miller, Feb. 7. 1766 ; M. 10937 ; 5 Brown's Sup. 919 ; Hailes, 1.

(*c*) Forbes, Dec. 3. 1701 ; M. 10929.

2006. The possession must be " continually and together for forty years : " And so, if abandoned, the possession is interrupted and the term of prescription broken (*a*).

Peculiarities occur in the possession of coal and of patronage.

1. As to COAL, the rule seems to be, that slight acts of working at intervals will not be enough ; but that it must be reasonably continuous and adverse, allowing for inundations, troubles, &c. : And that the working of one of several fields, all in the same charter and under one reddendo, will be sufficient for the whole (*b*).

2. As to PATRONAGE, in which the acts of possession are necessarily at intervals, continuous possession seems to require at least two acts without intermediate interruption (*c*) ; after which possession is presumed till interrupted. The incumbent's possession, after one exercise of the right, is not enough for the patron ; as being held entirely independent of the patron (*d*).

(a) 3 Ersk. 7. § 42.

(b) Forbes, Jan. 31. 1822; 1 S. B. 282; 1 W. S. App. Cases, 657; and Nov. 29. 1827; 6 S. D. 167; see also Crawford, June 2. 1826; 4 S. D. 665.

(c) 4 Stair, 40. § 20. and 4, 45. § 17. Duke of Gordon, Feb. 26. 1828; 6 S. D. 600; F. C.

(d) Same case.

2007. 3. Interruption of possession may be either, 1. Extra-judicial, *via facti* (a); by demanding and obtaining, or effectually assuming possession (b); or by notarial protest. But protest is an interruption only *to* the protester and *against* the possessor; not affecting, or available to, singular successors; unless an instrument shall be extended and recorded in a particular register (c). Or, 2. Judicial, and that either *first*, by Citation by a messenger-at-arms, on a summons under the signet, containing the grounds of interruption, and recorded within sixty days, in order to have effect against singular successors (d); the Citation being either personal, or at the dwelling-place, or at the record of Citations, if the party is abroad (e): Interruption by Citation, not followed by an action, requires to be renewed every seven years. *Secondly*, If, after Citation, the summons is called, and the action brought into Court, the interruption no longer rests on mere Citation, but endures as an interruption for forty years (f).

(a) 3 Ersk. 7. § 39, 42.

(b) Brown, Jan. 13. 1690; M. 11294. Home, Nov. 1684; M. 11253.

(c) 1696, c. 19. 10 Acta Parl. p. 60. c. 19.

(d) *Ib.*

(e) 1669, 10. 7 Acta Parl. p. 561. c. 15. 6 Geo. IV. c. 120.

(f) 3 Ersk. 7. § 43. Wilson, Feb. 2. 1705; M. 10974. Wallace, July 7. 1830; 8 S. D. 1018.

3. *Title to ground Prescription.*

2008. In order to ground prescription, there must be a title, and such as to imply *bona fides*. The words of the Act describing the title (§ 2002, in fin.) are confined to the case of subjects with feudal titles; but practice having extended the construction to all heritage (§ 2003), distinctions must be made as to title. And,

2009. 1. FEUDAL SUBJECTS. It is requisite as a title to such subjects, that there shall be produced an infetment proceeding on a regular charter or disposition; or, alternatively, on a retour, or precept of *clare constat*, one or more, for forty years (a). But it is not necessary in prescribing a right to the lands by a feudal superior, that he should have a title flowing

from the vassal; his own title to the superiority being *ex facie* a title to the land, is sufficient (*b*), see above, § 689. The question of title may arise in relation to a purchaser; an heir; or a creditor.

(*a*) Duke of Buccleugh, Nov. 30. 1826; F. C.; 5 S. D. 57. Walker, Feb. 27. 1827; 5 S. D. 469. Bruce Arnot, Dec. 6. 1770; M. 10805. Hailes, 378. Harvey, Jan. 29. 1822; 1 S. D. 366.

(*b*) Campbell, Dec. 19. 1765; 5 Brown's Sup. 915, 30, 34. Middleton, Dec. 22. 1774; M. 10944; 5 Brown's Sup. 614; Hailes, 587. Robertson, Feb. 16. 1808; Bar. Hume, 463.

2010. *Purchaser's Title*. In questions of prescriptive titles these points are fixed,—

1. The infeftment is an indispensable point of the prescriptive title in feudal subjects (*a*). It has been held in one case, that an extract from the register is not sufficient to supply the place of the sasine (*b*): But this has been doubted. The law of prescription looks to the title as the ground of bona fides, and although under the statute, reduction improbatum is competent when the sasine itself must be produced, the extract is, on a fair construction of the statute, said to be effectual for all other purposes.

2. An infeftment with its warrant (a charter, disposition, or procuratory of resignation), is a perfect title of prescription, although proceeding a non domino, and although the title be subject to a latent nullity (*c*); nay, it has been held good even where the title bore evidence in græmio of the objection, but the ground of that charge was to be collected extraneously (*d*). But where a mediate title only is shewn (as an obligation to infeft), with sasine following, it is doubtful whether, in a question with singular successors, that be sufficient (*e*). In sasine propriis manibus, no precept is necessary (*f*). This is the rule also in burgage holdings, where the warrant and the act of taking infeftment are recited in one instrument (*g*).

(*a*) Fraser, Jan. 21. 1679; M. 10784; 3 Br. Sup. 533. Officers of State, June 27. 1823; 2 S. D. 437; affirmed, Jan. 21. 1825; 1 W. S. 533.

(*b*) Cumming, Nov. 19. 1680; M. 10785.

(*c*) 2 Stair, 12. § 20. 3 Ersk. 7. § 4. Scott, July 1. 1779; M. 13519.

(*d*) Duke of Buccleugh, Nov. 30. 1826; F. C.; 5 S. D. 57.

(*e*) 2 Stair, 3. § 19. and ut supra. 2 Bank. 160. § 20. Ersk. ut supra. Cumming, Nov. 19. 1680; M. 10785.

(*f*) See above, § 765.

(*g*) Heriot's Hospital, Dec. 17. 1695; M. 10787. Kerr, Nov. 28. 1705; M. 10813.

2011. *Heir's Title*. A sasine grounded on a retour, or proceeding on a precept of clare constat (*a*), or on entry by hasp and staple (*b*) with possession for forty years, or a series of sasines grounded on retours successively following each other, (*c*), or connected by the uninterrupted possession of apparent heirs (*d*), will form a good title of prescription without production of the original charter.

(*a*) Bruce, 6. 1770; M. 10805.

(*b*) Ker, Nov. 28. 1705; M. 10813.

(*c*) 2 Stair, 12. § 15. 3 Ersk. 7. § 5. to be corrected. Monro, May 19. 1812; F. C. Purdie, Nov. 9. 1739; M. 10797.

(*d*) Earl of Marchmont, July 28. 1724; M. 10797. Caitcheon, Jan. 22. 1791; M. 10810. Neilson, ut supra, § 2005. Waddel, June 19. 1828; 6 S. D. 999.

2012. *Creditor's Title*. An adjudication with sasine is a good title to ground prescription, and if followed by forty years' possession, it confers an effectual and irredeemable right; see supra, § 831: But the terminus a quo is the expiry of the legal.

Caitcheon, ut supra. Robertson, 3 Dow, 114.

2013. *Connexion of Sasine*. In relation to feudal subjects, prescription requires the possessor to connect himself with a sasine.

Crawford, Dec. 20. 1822; F. C.; June 2. 1826; F. C.; 4 S. D. 665. See also Neilson, Feb. 26. 1823; F. C.; 2 S. D. 247.

2014. 2. SUBJECTS NOT FEUDAL. To such subjects the words of the act cannot be applied, but the analogy may. And, 1. In teinds a tack is a good title of prescription (*a*), or an adjudication or disposition without infestment (*b*). 2. A grant of patronage is a good title of prescription, but not if there be a reservation of the right to present (*c*). 3. A lease or tack is a good title of prescription to a tenant (*d*); and, of course, the connexion with the original lease may be continued without any retour, as no service is required in a lease. 4. In servitudes, a right to lands, houses, or other dominant tenement, is a good title (*e*). 5. Commonty requires a clause, "cum communitio," or "with commonty," or "with pertinents" (*f*).

(*a*) Earl of Leven, June 27. 1696; M. 10818. Muir, July 2. 1746.

(*b*) Gordon, July 11. 1758; M. 10825; 5 Brown's Sup. 358. Irvine, Nov. 1764; M. 10830.

(*c*) See § 2003 (*f*). King's Advocate, May 18. 1830; 8 S. D. 765.

- (d) See Maule's case, *supra*, § 2003 (c).
 (e) 2 Ersk. 9. § 3. See § 2003 (g); also Servitude, § 993; Thirlage, § 1022; Pasturage, § 1013.
 (f) See above, § 1089.

2015. *Tenor of the Title.* 1. It is not requisite to a prescriptive title that it should be a disposition in chief; a clause of part and pertinent is sufficient (a); So a title to a barony will serve to prescribe a subject as part and pertinent (b); So a consuetudinary right may be acquired by prescription (c). 2. It is necessary, however, that the right shall be conferred absolutely in the dispositive clause (d); any limitation imposed, and appearing in the sasine or record, being perpetuated (e).

- (a) 3 Ersk. 7. § 4. Earl of Fife's Trustees, Jan. 6. 1830; 8 S. D. 326. and Jan. 25. 1831; 9 S. D. 336.
 (b) Magistrates of Perth, Nov. 19. 1829; 8 S. D. 82.
 (c) Earl of Haddington's case, June 24. 1823; 2 S. D. 420; 1 W. S. App. Cases, 468.
 (d) Agnew, Nov. 27. 1822; 2 S. D. 42.
 (e) Elliot, Jan. 1727; M. 10977. Monroe, May 19. 1812; F. C. Geddes, May 28. 1819; F. C. Chambers, June 6. 1823; F. C.; 2 S. D. 366.

4. *Objections cut off by Prescription.*

2016. Prescription is a good defence against objections to the titles, grounded either, 1. on nullities in those titles which are not required to be produced (a); or, 2. on latent nullities, or extrinsic objections,—as an error in the ceremony of sasine (b); but, 3. it is no defence against intrinsic nullities (c).

- (a) 3 Ersk. 7. § 9. 3 Ersk. 7. § 4. Purdie, Feb. 9. 1739; M. 10796. Ged., Dec. 5. 1740; M. 10789.
 (b) Scott, July 1. 1779; M. 13519; 2 Hailes, 811. also, p. 731.
 (c) 3 Ersk. 7. § 9. Stewart, May 14. 1823; 2 S. D. 300.

5. *Negative Prescription as connected with Positive.*

2017. Negative prescription extinguishes debts (*supra*, § 606), and is established by one clause in the act of 1617, as applicable to heritable bonds, reversions, &c. as well as to personal debts; but there is no law introducing negative prescription, or any length of abandonment, as an extinction of property. It is by positive prescription alone that a right of property can be established, however long the true proprietor may have neglected his right. And so the negative prescription is insufficient to extinguish any right or claim of property, unless

there be an opposite right in the course of being confirmed at the same time (*a*). But negative prescription is not without effect in fortifying a title, for it extinguishes and gets rid of various objections otherwise competent, which do not appear *ex facie* of the titles. It will extinguish, 1. an original tenure (*b*); 2. a base right in favour of the superior possessing on his title of superiority (*c*); 3. the limitations of an entail (*d*); 4. an adjudication not followed by possession (*e*); 5. a *jus crediti* in land rights,—as an obligation to entail lands (*f*); or to lay out certain funds in purchasing lands to be entailed (*g*); or a destination in a marriage-contract (*h*); or, 6. an objection grounded on latent defects in titles, as in a *sasine* (*i*); 7. a power of redemption not repeated in the title (*k*): But, 8. it will not extinguish a right *meræ facultatis* (*l*).

(*a*) 3 Ersk. 7, § 8. Paton, July 20. 1725; M. 10709. Presbytery of Perth, Dec. 24. 1728; M. 10723; 1 Craigie and Stewart, 39. Paul, Feb. 8. 1814; F. C. Shaw Stewart, May 14. 1823; 2 S. D. 300. M'Donell, Feb. 26. 1828; 6 S. D. 601. Cubbison, Nov. 29. 1837; 16 S. D. 112.

(*b*) Duke of Buccleugh, Aug. 5. 1768; M. 10711; 1 Hailes, 237, 303, 333. Walker, Feb. 27. 1827; 5 S. D. 569. Bruce, Arnot, Dec. 6. 1770; M. 10805; 1 Hailes, 378. Harvey, Jan. 29. 1832; 1 S. D. 306.

(*d*) Lord Belhaven, June 13. 1761; M. 10681. Douglas, Feb. 2. 1753; M. 10955; affirmed. Scott, Dec. 1776; 5 Br. Sup. 542. Paterson, March 27. 1819; affirmed, March 10. 1823; 1 Shaw's App. Cases, 401. Duke of Buccleugh, Nov. 30. 1826; 5 S. D. 57. Hamilton, Nov. 14. 1827; 6 S. D. 44.

(*e*) Anderson, March 3. 1758; M. 10676. Robertson, Aug. 2. 1770; M. 10694; 1 Hailes, 362; 2 Ib. 707. Ross, 1776; M. 5176; 5 Br. Sup. 543.

(*f*) Porterfield, Dec. 6. 1771; M. 10698. Paul, Feb. 8. 1814; F. C.

(*g*) Kinloch, May 27. 1800; M. *Prescription*, App. 8 and 18.

(*h*) Majendie, Dec. 16. 1819; F. C.

(*i*) Scott, July 1. 1779; M. 13519; 5 Br. Sup. 542. 88; 2 Hailes, 811. 3 Ersk. 7, § 10. See Crawford, July 10. 1821; 1 S. B. 115. Agnew, Nov. 27. 1822; 2 S. D. 42.

(*k*) Monro, May 19. 1812; F. C. Chambers, June 6. 1823; 2 S. D. 366.

(*l*) Lady Mary Crawford, July 10. 1821; 1 S. D. 111.

2018. In order to be entitled to plead the negative prescription, it is necessary either to have a right of property, or such a right, at least, as shall give the direct benefit of the extinction.

Stewart, May 14. 1823; 2 S. D. 300. Paul, *ut sup.* § 2017; F. C. Earl of Dundonald, May 12. 1836; 14 S. D. 737.

6. *Prescription on Double Titles.*

2019. One may have in his person various titles; namely, as disponent, as heir at law, as heir of a marriage, as heir of tailzie; some limited, others unlimited. And two questions

may arise,—1. The effect of possessing on one title in extinguishing the others; and, 2. The effect to third parties interested in any of those titles, of a possession on the other.

2020. The rules on this subject are,—1. That a person having different titles in his person, is to be held as possessing on them all, to the effect of preserving his own right in each. 2. That where the titles are equally beneficial, the law presumes the possession to proceed on that which he is under an obligation to adopt (*a*). 3. That where one title is more beneficial than another, possession in dubio is to be ascribed to the more beneficial title (*b*). 4. That in order to prescribe on an unlimited against a limited title, there must be a choice made of the former, by an indication so clear as to create an independent and separate title capable of being fortified by possession (*c*). 5. Where such choice is made, and a title is made up on an unlimited, adversely to a limited title; and possession for forty years uninterruptedly has taken place on it; the limited title will be extinguished, and the fee disburdened, although the heir so possessing should have both titles in his person (*d*). 6. That where the possession is on apparenecy, by one having the character both of heir at law and heir of a limited title (as an entail), it must be ascribed to the limited title, if it ever have been completed, so as to form the standing investiture; and even where it has not been feudalized, the entail will be held the governing title, and the possession ascribed to the personal right under it, as well as to the other (*e*). 7. That not only where there are two titles (one as heir at law, the other by destination, but not entailed nor guarded by prohibitions against altering), the heir possessing on apparenecy does not prescribe against the destination; but this holds good even where he makes up a title as heir at law: for there being no prohibition to alter, those interested to challenge are non valentes agere cum effectu (*f*). But, 8. Where, instead of merely possessing, the heir grants a conveyance altering the destination, prescription will run against the deserted title (*g*). 9. That there can be no prescription inconsistent with the terms of the title (*h*). 10. That where the subject is not feudal, but a personal though heritable right, as a lease, there is no room for this prescription on double titles (*i*).

(a) Smith, Nov. 8. 1751; June 30. 1752; Kilk.; M. 10803; Elch. *Prov. to Heirs*, 14; 5 Br. Sup. 790. Durham, Nov. 24. 1802; M. 11220.

(b) M'Dougal, July 10. 1739; M. 10947; Elch. *Prescription*, 20. 5 Br. Sup. 674. Lord Reay, Nov. 25. 1823; 2 S. D. 520; affirmed, Jan. 7. 1825; 1 W. S. 306. Duke of Hamilton, Dec. 14. 1827; 6 S. D. 44.

(c) Welsh Maxwell, June 21. 1808; M. *Prescription*, App. 8; affirmed, July 29. 1814. Lumsdaine, June 13. 1811; F. C.; affirmed, March 14. 1816. Duke of Hamilton, May 18. 1824; 3 S. D. 24. Ib. May 14. 1827; 5 S. D. 44. See Maule's case, below.

(d) 3 Ersk. 7. § 6. M'Dougal, ut sup. (b). Douglas, Feb. 2. 1753; M. 10955; Elchies, *Prov. to Heirs*, 19. Ayton, July 31. 1756; M. 10956. Duke of Hamilton, Dec. 9. 1762; M. 10962. Bruce Carstairs, Dec. 6. 1770; M. 10805; 1 Hailes, 378. Earl of Dalhousie, March 1. 1782; M. 10963; 2 Hailes, 899. Scott, Dec. 1776; M. 13519; 5 Brown's Sup. 542. Auchindachy, Jan. 3. 1792; Bell's Cases. Majendie, Dec. 16. 1819; F. C.

(e) Welsh Maxwell, and Lumsdaine, ut sup. Maule, March 4. 1829; F. C.; 7 S. D. 527.

(f) Smith and Durham, supra.

(g) Zuille, March 4. 1813; F. C.

(h) Dalzel, Jan. 17. 1810; F. C. Murray, Jan. 17. 1811; F. C.

(i) See Maule, supra, § 2003 (c).

7. *Exceptions to Prescription.*

2021. There are two cases in which prescription does not take place; one statutory, the other by common law.

2022. 1. *Minority*.—1. This exception declared by the statute applies to the positive as well as to the negative prescription (a). But it extends no further than to the person who is in the actual right (b).

(a) Kames's *Elucidations*, art. 33. 3 Ersk. 7. § 35. Blair, Dec. 6. 1754; M. 11156; 5 Br. Sup. 825. Fullarton, Nov. 23. 1798; 1 W. S. App. Cases, Appendix.

(b) M'Dougal, July 16. 1739; M. 10947; Elch. *Prescription*, 20; 5 Br. Sup. 674. Ayton, July 31. 1756; M. 10956; reversed. Gordon, Dec. 1. 1757; M. 11161. Gordon, Dec. 21. 1784; M. 10968; 2 Hailes, 960. Auchindachy, Jan. 31. 1792; M. 10971; affirmed, Bell's Cases, 199. Fullarton, ut supra. Duke of Buccleugh, Nov. 20. 1826; 5 S. D. 57. Maule, ut supra, § 2003 (c).

2023. 2. *Non Valens Agere*. It is a rule, not of statute but of common law, that prescription does not operate against one who cannot effectually resist it. So it will not be pleadable in the following cases:—1. If one is barred from prosecuting his right, or incapable (a). Or, 2. If he be hindered vi majori (b). Or, 3. If a woman have the right, and her husband is the party liable (c). Or, 4. If the person who pleads prescription could derive no benefit from the challenge (d). But, 5. In a land estate, the fiar cannot plead non valens agere merely because a liferenter is in possession (e), though it is different as to a bond (f).

(a) Dirlton and Stewart, 374. Duke of Lauderdale, Jan. 25. 1678; M. 11193.

(b) Duke of Lauderdale, ut supra. Robertson, July 7. 1758; M. 11280; 5 Brown's Sup. 357.

(c) Hamilton, Feb. 26. 1622; M. 10717. M'Kie, July 5. 1665; M. 11205.

(d) Innes, Dec. 31. 1695; M. 11212. Elliot, Feb. 18. 1724; M. 11209.

See M'Dougal, ut supra, § 2022 (b).

(e) Neilson, ut supra, § 2005.

(f) See 5 Brown's Sup. 915.

8. *Prescription of Retours.*

2024. There is a special prescription established by the act of 1617, in the case of services, by which a retour is not subject to challenge after twenty years. See above, § 1847 (a). In the construction of this act, it has been doubted whether it is necessary to the heir who pleads it to shew possession, as under the act 1617, c. 12. But although, in one case, possession was held requisite (b), this does not seem to be law. It rather appears that the expiration of the twenty years will be an absolute protection to the retour against all challenge (c), which does not appear ex facie of the retour (d). The protection afforded by this act, however, is only to the title as a retour, without interfering with the rest of the act 1617, c. 12, further than an unexceptionable retour has effect in the circumstances.

(a) 1617, 13. M'Kenzie's Observations.

(b) Wrights of Elgin, May 15. 1794; Bell's Cases, 7. Drummond, May 17. 1793; M. 6936.

(c) Neilson, Jan. 17. 1837; 15 S. D. 365.

(d) Fullarton, June 20. 1825; 1 W. S. 410.

9. *Effect of Prescription against the Crown, &c.*

2025. 1. The positive prescription is effectual against the Crown, by the express words of the act (a). And,

2. With regard to the Church, Communities, and Hospitals, there is no exception to the rule of the act (b).

(a) 1617, 13. 2 Stair, 3. § 33. 3 Ersk. 7. § 31. Earl of Leven, Dec. 26. 1711; M. 10930.

(b) 2 Stair, 8. § 29. 3 Ersk. 7. § 32. Crawford, June 10. 1724; M. 10819. Magdalene Chapel, June 30. 1671; M. 11148. College of Aberdeen, July 14. 1675; M. 7230.