PART II.

OF INCORPOREAL RIGHTS, NOT CONNECTED WITH LAND, CONSIDERED AS A FUND FOR THE PAYMENT OF DEBT.

NEXT to his property in land, a man's available funds in debts and moveables are of importance in the eyes of those with whom he deals. In England, debts are called Property in ACTION, or Choses in Action; moveables, Property in POSSESSION. With us, the former is called INCORPOREAL RIGHT; the latter CORPOREAL, according with the language of the Roman law.

CORPOREAL property comprehends such subjects as are palpable to sense: INCORPOREAL, such as consist in legal right merely. Incorporeal rights may exist as connected with land: But at present the inquiry is limited to such rights not connected with land. These form often a fund of the greatest value to creditors, and to which chiefly they trust for their payment. They include, Ordinary Debts; Debts which are connected with Public Establishments and Government Funds; Rights of Privilege or Monopoly, as Patent Rights and Literary Property; Rights which have for their object the restitution of property illegally or imperfectly alienated; Rights which arise in the way of succession, testate or intestate. These are proposed to be discussed in the nine following chapters.

CHAPTER I.

OF ORDINARY DEBTS.

THIS class of incorporeal rights may be more conveniently considered afterwards, in discussing the rights of creditors as claimants against the estate of their debtor.[1]

CHAPTER II.

OF GOVERNMENT FUNDS, AND OTHER PUBLIC DEBTS.

§ 1. GOVERNMENT STOCK.

THE National Debt is either funded or unfunded.

1. FUNDED DEBT is that towards payment of the interest of which certain funds are appropriated. At first, each loan was secured by the appropriation of particular taxes;

[1] See below, Book III.

but on an extension of this enormous system, certain capital funds have been formed, the aggregate produce of which forms the general fund, out of which the interest of all the several debts of government are defrayed; a surplus being destined as a sinking fund for the gradual redemption of the principal. The right which the public creditor holds is merely to demand the interest or annuity, which is payable in the Bank of England; with a power to transfer his right with the greatest possible facility. The principal cannot be demanded; but the same effect is produced to the creditor by a sale at market: the employment of a stock-broker depending on the frequency of those sales, proceeding from the necessity or the speculation of the holders.[1] The statutes declare, that the annuitants shall be possessed thereof as of personal estate.[2] And in a question respecting legitim in the Court of Session, this right was held as moveable.[3] Nothing seems to have been appointed as to the diligence by which the right of the public creditor is to be affected. The Scottish diligence of arrestment, of course, cannot reach even the dividends due to the stockholder. And no other Scottish diligence but adjudication seems competent to carry the entire right. This is a form of diligence which appears to be competent, where there is none other provided by law: But there is great difficulty in getting a transfer made at the Bank of England; for, by law, each transfer must be entered, and the entry signed by the person making the transfer, or by his attorney. And in the Act providing that the Court of Chancery or Exchequer may order a transfer by the secretary of the Bank, there are only three cases mentioned,—absence of trustee, bankruptcy, and lunacy.[4]

2. Unfunded Debt.—This debt may be constituted in a variety of ways. But the chief documents of it are Exchequer and Navy bills, which bear interest from their dates, or from six months after they are issued. These are undoubtedly moveable funds, and the right goes with the possession of the document. These documents confer a preference by certain statutes, which will afterwards demand attention.[5]

§ 2. BANK STOCK.

The important operations of banking are carried on partly by chartered companies, partly by private adventurers. In England, the latter have till lately been under restraint by the monopoly given to the Bank of England, that not more than six persons should be allowed to join in a private banking company. The peculiar sort of property called banking stock, is to be understood only of the shares of the public chartered banks. It is alienable, and may be attached by creditors directly or indirectly.

1. The Bank of England was incorporated in the reign of William and Mary, in consideration of a loan of a million and a half to government. It is managed by a governor, deputy-governor, and twenty-four directors, elected by the general court of stockholders. By the 8. and 9. William III., the Bank was allowed considerably to augment its capital stock; and, in consequence of repeated loans to government, that stock has been allowed to be farther enlarged, till at present the value of the stock, with the increase of undivided profits, amounts to more than twenty-five millions. The shares of this immense capital held by individuals are declared to be of the nature of personal estate, and to be transferred only by contracts registered in the books of the Bank within seven days, and on which the stock shall be transferred within fourteen days. The profits are divided half-yearly, and the dividends are payable at the Bank.

[1] There are certain restraints on the traffic in this sort of property, which will require attention hereafter. See below, Book III.

[2] 25. Geo. III. c. 32. § 7. and all the other Acts.

[3] Hog against Hog, 23d December 1791; Fac. Coll.

[4] See 36. Geo. III. c. 90.

[5] 57. Geo. III. c. 34. 124.; and 1. Geo. IV. c. 60. See below, Book IV. Of Privileged Debts.

2. In SCOTLAND, there are three public or national banks:—

(1.) THE BANK OF SCOTLAND was erected into a body-corporate in 1695, by an Act of Parliament, which is among the unprinted Acts of that year, but is recited in 14. Geo. III. c. 32., and in successive Acts down to 44. Geo. III. c. 23. The fund is declared assignable, the transfers being entered in a book subscribed by the assignor and assignee: it is also disposable by will entered in the book of transfers, without confirmation. It is also declared, that the shares may be transmitted 'by adjudication, or other legal 'conveyance, in favour of one person allenarly, who, in like manner, shall succeed to 'be a partner in his predecessor's place; so that the foresaid sums of subscription may 'neither be taken out of the stock, nor parcelled among more persons by legal dili-'gence in any sort, to the diminishing or disturbing of the stock of the said company, 'and good order thereof.' It is also provided, that, on bankruptcy or forfeiture, the governor and directors may order the bankrupt or forfeited person's share to be sold by public roup, after such intimations as are prescribed for the sale of bankrupt lands.[1] The Act does not contain any declaration respecting the condition of the stock, as heritable or moveable. And in the only case in the books respecting it, the sole plea maintained was, that the holder being entitled only to dividends, the right, as having a tract of future time, was heritable. But this was not sustained.[2]

(2.) The ROYAL BANK OF SCOTLAND was established by a charter of erection, in pursuance of 5. Geo. I. c. 20. The stock was declared moveable; descendible to executors; but, at the same time, not liable to arrestment or attachment. And, by a by-law, no proprietor can transfer but in the presence of a Court of Directors, who may stop the transfer till he find surety for what he owes the Bank. The creditors of a stock-holder of this Bank may, by personal diligence, indirectly force a sale; even should the words of the charter passed in fulfilment of the statute prevent direct attachment.

(3.) The BRITISH LINEN COMPANY was erected into a body-corporate in the reign of George II. The shares of the stock are declared to be of the nature of personal estate, and to be transferable by certain forms. The charter was confirmed and enlarged in 1806, by royal charter. Nothing is said in the charter relative to the mode of attaching the stock.

[1] Doubts having been entertained respecting the proper diligence for attaching the stock, the Bank took this course to try it.—Fairholme, on his bankruptcy, was due L.3,000 to the Royal Bank; and they adjudged his bank-stock, with a view to sell it, for payment of this debt: But it was questioned, Whether this was a title so secure that purchasers would think it eligible? The Bank, therefore, called on the cautioner for Fairholme to pay up the debt; and he suspended, insisting on the benefit of the stock. The Bank stated, that they could make no transfer, but, 1. On a conveyance from the proprietor; or, 2. In favour of an executor on production of his confirmed testament; and that no instance of a transfer on adjudication had occurred. The Court held the adjudication to be a good title, on which the Bank could transfer. The judgment, therefore, ordered the cautioner to pay, 'upon the 'Bank conveying to him the bank shares which be-'longed to Fairholme, with such diligence as they 'have used for affecting the same, with warrandice 'from fact and deed: and found, that, in conse-'quence thereof, the Bank was bound to receive the 'purchaser, or his assignee, in Fairholme's place, 'with regard to the said shares, in the same manner 'as they are in use to do in other sales or transac-'tions of their stock.' 14th February 1770, BANK of SCOTLAND against FAIRHOLME; Hamilt. 46.

[2] 1st July 1735, Sir J. DALRYMPLE, 1. Dict. 368. See also, 1. As to the privilege of Naturalization, MACAO against OFFICERS of STATE, in House of Lords, 1. Shaw's Appeal Cases, 138.: And, 2. As to the designation of the stock by Sterling or Scottish money, FRASER against M'DONALD, 20th December 1821, 1. Shaw and Ballantine, 244.

CHAPTER III.

OF RIGHTS UNDER POLICIES OF INSURANCE.

THE subject of insurance shall be fully considered hereafter, in discussing the contracts out of which claims of debt arise. At present, we look only to the right of which creditors may avail themselves under the several policies of insurance, considered as a fund for the payment of debt.[1]

Policies of insurance are used not only for protecting commodities exposed to sea-risk, but for indemnifying against fire, and providing a fund in the event of death. Insurances on lives form a valuable estate, to the benefit of which creditors may be entitled. An insurance against fire or sea-risk produces no advantage, and cannot be regarded as of any value to creditors, independently of a loss covered by the policy. But an insurance on life becomes more valuable by lapse of time, the premium of an uninsured life increasing with every year that passes, while a policy opened continues at the same premium after the lapse of ever so many years.

The value of a life-policy may accrue to creditors, either, 1. On the death of the person insured: Or, 2. By the sale of the policy, while yet the risk is undetermined; the purchaser continuing to pay the premium, and being entitled, on the death of the person insured, to the sum in the policy: Or, 3. By treating with the insurance office for a renunciation of the policy.

Policies may be opened either by the person himself; or by a creditor in a lawful debt, the creditor having an interest in the life of his debtor, as affording part of his security and means of payment. After a policy has been opened by a person on his own life, it may be assigned to another for a valuable consideration, or even, as it would seem, gratuitously. But if a policy has been opened by a creditor for the interest which he has in his debtor's life, the interest expires with the payment of the debt, and the policy becomes void. This is to be attended to in constructing securities for the loan of money; as the law of usury may, perhaps, apply, where premiums are stipulated to be paid for keeping up the insurance, unless they be also useful in constituting an absolute estate, available to the debtor on payment of the debt.

CHAPTER IV.

OF PATENT RIGHTS AND LITERARY PROPERTY.

THE right of exclusive sale enjoyed under patents for useful inventions, and the property now secured by statute to authors of literary compositions, form estates available to creditors.

Of all things, the produce of a man's intellectual labour is most peculiarly distinguishable as his own; and the Patents, or the statutes on which Copyright now rests, are intended not so much to create a right, as to protect it against invasion. The right which a man has to the produce of his own mental labour, if sought to be referred to any of the ordinary sources of property, may well be grounded on occupancy and personal

[1] See below, Book III. Of Insurance.

exertion; and it deserves the support of law, as securing to the inventor the creations of his own genius, and as encouraging that most useful exertion of mind, by which manufactures are improved and enriched; or the stores of knowledge and intellectual improvement augmented. All admit the justice of thus protecting the right of an inventor or of an author, and are sensible of the public expediency of such encouragement. The only doubt which disturbs the doctrine, proceeds from the operation of the common right of property in things corporal; according to which, the purchaser of a machine or of a book may apply it to what use, or draw from it what advantage it may be calculated to afford, producing by the application of his own industry other machines or books exactly similar, and disposing of those by sale or by gift.

Confining the doctrine to the common law principles of property, those valuable interests which belong to the inventor might thus be outraged; or could be protected only by concealment of the principle on which the invention proceeds. Hence the compromise which has been made for the public benefit, by which the otherwise elusory right of the inventor is secured for a season, as effectually in relation to all *possible* exemplifications of the machine or book which he has made, as by the common law his right of property is secured in the individual machine or book which he has mechanically prepared; while, in return for this, the public receives the benefit of a full disclosure of the invention for their unrestricted use, after the term of exclusive privilege is expired.

SECTION I.

OF INVENTIONS SECURED BY PATENT.

PATENTS are granted by the King, under reserved powers conferred by the statutes abolishing the ancient and much contested practice of granting monopolies. Before the union of the crowns, this prerogative had in England been much abused, and in Scotland matters had gone much in the same course. The granting of monopolies furnished one source of power to monarchs, whose affluence and means of rewarding fidelity, or indulging favourites, were exceedingly limited.

The abuses practised by the duke of Buckingham, the favourite of James I. seem to have given the death-blow to this dangerous prerogative. After judicial proceedings against some of the creatures of Buckingham, whose oppressions were the most flagrant, an Act was prepared by a committee of the House of Commons, of which Sir Edward Coke, the great English lawyer, was chairman. This is the Act of James I. whereby, 1. All monopolies and letters-patent for sole buying, selling, making, working, &c. of any thing within the realm of England, are declared to be contrary to the laws of England, and utterly void and null: And, 2. A power is reserved to the King to grant letters-patent and grants of privilege for fourteen years or under, for 'the sole working or making of 'any new manufacture within this nation, to the true and first inventor of such manufac-'ture, which others at the time of making such letters-patent and grants shall not use; 'so as they be not contrary to the law, or mischievous to the state, by raising prices of 'commodities at home, or hurt of trade, or generally inconvenient.'[1]

The vicious practice of monopolies certainly did not cease on this Act.—It continued during the reign of Charles I., who granted many oppressive and scandalous patents.

In Scotland, during this prince's time, a statute passed in 1641, c. 76. (5. Act. Parliament. p. 496), declaring all such patents ineffectual. It proceeds on a preamble of 'the great hurt and prejudice sustained by sundry his Majesty's lieges, by the mono-

[1] 21. James I. c. 3. § 6. This Act has always been held merely declaratory of the common law prerogative of granting patents.

' polies used and exacted within this kingdom, and which have been conferred to the ' use of any particular person or persons, to the great hurt and prejudice of others ' his Majesty's lieges.' Then, after enumerating and recalling some particular patents, the law ordains the same, and all other patents of that nature, purchased or to be purchased, for the benefit of particular persons in prejudice of the public, to cease and be ineffectual.

This, with the declaratory Act of James I. settled the law as to the King's prerogative in this matter; and since the Union, the same law rules both parts of the kingdom.[1]

The principle on which the reservation of the power to grant patents proceeds, is public expediency: 1. The encouragement of invention by the prospect of reward to be derived from the profits of the exclusive privilege; and, 2. The benefit derivable by the public from the full knowledge and disclosure of the invention in its best state. And yet it is a curious circumstance, that it was not till the reign of Queen Anne that any proviso was inserted in the patent, that a specification of it should be enrolled in Chancery within a given time.

Patents for new inventions are granted for the encouragement and protection of useful discoveries, on condition of a full and fair disclosure of the nature of the invention, so that the public may profit by it after the time of the patent has expired. They may be granted either to extend over the whole of the King's dominions, or to extend to England, or Scotland, or Ireland, alone. Distinct patents must pass for each: that for Scotland, under the Scottish seals. The application is made by petition to the King through the Secretary of State, accompanied by an affidavit, that the petitioner is the true and first inventor, and that he believes the invention to be useful. This, in England, is referred to the Attorney-General; in Scotland, to the Lord Advocate; who report to the King what is fit to be done. The patent bears as a condition, 1. That the specification shall be sufficient; 2. That it shall be made by instrument under hand and seal, enrolled in Chancery within a month.[2]

The right is useful as property in these respects: 1. It secures to the patentee the profits of the sale of the thing invented; 2. The privilege may be assigned in whole or in part. The patent generally bears a restriction not to be communicated to more than five. But the whole privilege may be sold.

In distinguishing the cases in which patents are competent, I shall mark, 1. The nature of the invention that may thus be monopolized; and, 2. What sort of description is necessary in the patent.

1. Proper Subject of Patent.—It is worthy of particular observation, that the word used in the statute is *Manufacture;* ' for working or making of any new manufacture.' This has been judicially held to be a word used with great care and selection, to intimate, that the proviso was introduced for the benefit of trade, and as applicable to *a subject vendible.*[3] The great doubt which arose upon the validity of a patent under these restrictive terms, was, how far a mere principle, or even a method of operating or producing an effect, could be the subject of the patent? And, 1. It was held, that if the invention go only to the disclosure of a philosophical principle, not imbodied in any manufacture, nor reduced to any practical result, but a mere element or rudiment of science, it will not be

[1] 17th November 1813, Astley against Taylor.

[2] As to extending of the term, see Watson against Pears, 2. Camp. 294.; where a proviso, that specification should be enrolled within a month after the date, which was 10th May, was held satisfied by an enrolment on 10th June.

[3] Bolton and Watt against Bull, 2. Henry Blackstone, 463. particularly p. 482.

Hornblower against Bolton, 8th Term Rep. 95. These were both trials on the subject of Mr Watt's improvements on the steam-engine. The Court of Common Pleas was divided in opinion; but the Judges of the King's Bench were unanimous in favour of the patent.

sufficient. Such, for example, was the discovery of the *expansive force of steam*, which could not be the subject of patent; otherwise, every future invention proceeding on that principle would be comprehended. But the application of that principle to the *construction of the steam-engine*, the vendible matter or thing in which the principle is imbodied, was a fit subject of patent.[1] But, 2. If an effect be actually produced, *the thing produced by that method* is a subject for patent, although it may be erroneously described as a method of producing the effect: nor will the Courts act with so impolitic a degree of strictness as to throw impediments in the way of a patent, on account of such error in the mode of describing the invention.[2] 3. Under the description of manufacture, the King may grant a patent for any thing made by the hand of man: New articles or commodities produced; or new instruments, or machines, for producing new commodities, or commodities already known; or new applications, combinations, or compounds, of old materials, whether substances or machinery, either to produce new effects, or old effects with new advantages in economy or in time, or in correctness and superiority of manufacture. A manufacture, as well described in a recent English case, is either a thing made which is useful for its own sake,—as a medicine, a stove, a telescope, &c.; or an engine, or instrument, to be employed in making some article known, or new,—as a stocking-frame, or a steam-engine; or some new part or addition to a machine or engine, by which its operation or effect is improved.[3]

It is only for a new invention, however, and the disclosure of what the public has not hitherto used; or for the importation of an invention not before known or used in this kingdom; that a patent can be granted. So, 1. If not truly invented by the patentee, (unless imported from abroad), or, though invented by him, if not then first disclosed by him to the public, the patent is bad. The merit of invention may be great, and the patentee may have been the acknowledged inventor; yet if he has already disclosed the invention to the public;[4] or used the article though under another name, so that by that means the public have, or may have, acquired the knowledge and use of it; or if, by the accidental discovery of another from the suggestions supplied by the inventor,[5] or by having formerly been published, though neglected among other things,—the public has had the necessary knowledge or use of his invention, he can have no patent to protect it. The consideration for the grant is the disclosure, but that is not true in the case supposed.[6] 2. The articles of which a compound manufacture is composed may have been known before, without furnishing any ground of objection to the patent. A new combination of old materials, either in mechanism or in chemistry, may be protected by patent.[7] But, 3. A patent may be had for an improvement or addition, as well as for a thing entirely new. If the patent is granted for a manufacture, however, of which any part is old, the whole must not be represented as new, otherwise it is void even as to what is new. For the consideration of the grant is the whole of what is stated; and it does not appear that the King would have granted it for only a part of what is specified as the discovery.[8] What

[1] This point is well illustrated in the above-mentioned case of Bolton and Watt. See also HADDEN against PIRIE and Company, 25th June 1823; 2. Shaw and Dunlop, 423.

[2] Mr Watt had described his inventions in this way: "My *method* of lessening the consumption of steam, "consists of the following *principles*."

[3] The KING against WHEELER, 2. Barn. and Ald. 349.

[4] See WOOD against ZIMMAR, Holt, 58.

[5] It is not settled how far experiments are using. See HILL against THOMSON, 2. B. Moore, 457.

[6] TENANT'S Case, Dav. on Patents, 429. BOVIL against MOORE, ib. 399.

[7] HUDDART against GRIMSHAW, Dav. on Patents, 278.

[8] This is well illustrated in the case of BRUNTON against HAWKES, 4. Barn. and Ald. 541. with regard to a patent for improvements in ship-anchors, windlasses, and chain-cables. See also M'FARLAN against PRICE, 1. Starkie, 199. HILL against THOMSON, 2. B.

is new will not entitle the patentee to use the old still under patent; he must wait till the old patent expire. But he may have a patent for what is new, and sell it.[1] 4. The privilege is not necessarily confined to the first inventors. The first *discloser* of the invention, provided he is also a discoverer or importer of it, is the man to whom the public is truly indebted, and who on that ground is entitled to the benefit of the patent. So, 1. If one have discovered and brought into use what another has only discovered in his closet, the former is entitled to the patent without distinguishing who was the first inventor, or whether the merit of the discovery may not have been due to both.[2] 2. If one have imported a discovery from abroad, although he has no merit as a discoverer, he is, on the doctrine of the law of patent, entitled to the privilege.[3] This is grounded on the words of the statute, which gives to the King the power of granting a privilege for any new manufactures '*within the realm.*' Whether this would rule the case of a patent taken out in England for an invention disclosed in a specification then recorded, but for which no patent was taken out in Scotland, may be doubted. It would rather appear that this would be regarded as a publication within the realm, and the manufacture as therefore not new within the realm, to the effect of barring a patent for the manufacture in Scotland.[4] If so, it does not appear how either the original inventor or a stranger could, after such publication, apply for a Scottish patent. Accordingly, in practice, this danger seems to be understood, and provision made against it, by allowing a longer time for the specification where it is intended to have a patent for both countries.[5]

The article must be not only new but *useful.*[6]

2. NATURE OF THE SPECIFICATION.—The above propositions rest on the condition implied, that the patent is conceded in the way of bargain for the public, that the inventor shall disclose the nature of the invention, so as in the first place to regulate and direct the energies and further invention of others; but chiefly in order to enable the public to profit by the invention with all its advantages on the expiration of the patent right. This is an important point in the law of patent. The disclosure is made in what is called the specification. The condition of the grant (*formerly* implied, now the *express* one) is, that the application shall be accompanied with such a specification as shall put the public in full possession of the invention. This specification is enrolled in Chancery.[7] If the specification be not ready for enrolment when the application is to be made for the patent, the inventor may lodge a caveat, setting forth that he has made a certain invention, for which he wishes to obtain a patent; and praying that the ground may remain unoccupied, by withholding any patent from others until notice be given to the person lodging the caveat, calling on him for a specification of the nature of his invention. If there should, in the meanwhile, be another application for the same patent, the Officers of State will,

Moore, 424. WALLIS against SMITH, 5. Barn. and Ald. 439.

[1] Ex parte, FOX, 1. Ves. and Beames, 67.

[2] See DOLLAND'S case in 2. H. Blackst. 487. as to the object-glass of a telescope, first discovered by Hall in his closet, but not only also discovered by Dolland, but by him disclosed to practical use.

See also FORSYTH against REVIERE, Chitty, Prerog. of Crown, 182.

[3] EDGEBURY against STEPHENS, 2. Salkeld, 417. Also, WOOD against ZIMMAR, Holt, 58.

[4] See ROEBUCK and Company against STIRLING, 10th March 1774. 5. Brown, 522.

[5] See below, of Specification.

[6] See MANTON against MANTON, Davis. 348.; WALKER against CONGREVE, before Vice-Ch. Leach.; BRUNTON and HAWKES, 4. Barn. and Ald. 455.

[7] In England the specification may be inspected in the Petty Bag office; in Scotland, in the Chancery office. It is an instrument enrolled for the use of the public, and which, on occasion of a trial requiring it to be produced, the Court will order to be delivered up on due precautions for its return. BLOXAM against Earl of ROSSLYN, 15th January 1825, 3. Shaw and Dunlop, 428.

on hearing the rival pretensions, decide which of the applicants has the best right to the patent. The caveat remains on the books for a year, and may be renewed from year to year. The caveat does not serve as a patent. The inventor runs every risk of his invention being brought into use in the meanwhile; which would bar his patent or defeat it.

The proviso which, since the time of Queen Anne, has been inserted in letters-patent, is that 'the patentee shall particularly describe and ascertain the nature of his said inven-'tion, and in what manner the same is to be performed, by an instrument in writing 'under his hand and seal, and cause the same to be enrolled in the Court of Chancery 'within a specified time after the date of the patent.' The prohibition commences with the patent, and from the day of the date of the letters-patent. It must be enrolled within two months; though in particular circumstances the time is sometimes extended; especially when it is intended to apply for patents also in England and Ireland. The enrolment of the specification within the time, is a condition subsequent, the failure of which is fatal to the patent.

The patent and the specification must precisely accord with each other. The specification may be more precise and explanatory, but unless the patent describes the invention consistently with the specification, and in terms sufficiently distinct, it is bad. In the former case, the patent is challengeable as proceeding on a statement of an invention different from that which the patent is to cover; and being false, it is ineffectual:[1] In the latter case, it is too general to put the public on their guard.[2]

A specification is a description of the invention, its principles, method, and practical effect. It must be expressed in plain, unambiguous, and intelligible words; not omitting any part that is necessary or useful; containing nothing to mislead; specifying all the best modes and ingredients which are used by, or known to the inventor; and, on the whole, such as, without further instruction, or inventions of their own, will, after the patent is expired, teach mechanical men of common understanding to prepare the manufacture with a degree of certainty which shall not require experiment in following the directions,[3] and shall give the same advantage in all respects which the inventor himself enjoys.[4]

On this footing it is held, 1st, That if to the necessary ingredients, process, or method, there be added in the description others unnecessary for the purpose; or to the effect of puzzling or misleading; the patent will be bad.[5] 2d, That if the specification contain materials which are quite well suited for the purpose, but more expensive, or less beneficial than the inventor himself uses, he has not made a fair disclosure, and will lose his privilege.[6] 3d, That if any ingredient or method in the invention be omitted or concealed, the patent is bad;[7] and this even although such ingredient or method be not necessary, but only useful, in facilitating the operation; for at the expiration of the patent the inventor and the world do not start equal.[8] 4th, If there be any ambiguity in the

[1] The KING against ELSE, 11. East. 109. note. The KING against WHEELER, 2. Bar. and Alder. 345.

[2] Lord COCHRANE against SURETHURST, 1. Starkie, 208.

[3] ARKWRIGHT against NIGHTINGALE, Dav. on Pat. 56.

[4] If by subsequent discovery the patentee improve his method, his original patent will stand subject to the imputation of concealment; which, if not refuted, will prove fatal; BOVILLE against MOORE, Davis. 401.

[5] TURNER against WINTER, 1. Term. Rep. 602.

[6] BOVILLE against MOORE, Dav. 398.; and TURNER's case, supra, Note [5].

[7] WOOD against ZIMMERS, Holt's Cases, 58.

[8] LIARDES against JOHNSON, 1. Term. Rep. 608. note. The KING against ARKWRIGHT, Davis. 61.

specification, it will be fatal to the patent; for example, in the patent for making hair brushes, the patent described them as tapering; but the specification did not sufficiently explain how the brush was to be formed; having merely directed a method of manufacture by which the bristles were made of unequal lengths; and although the meaning of this might have been discovered at once by looking at the brush, yet the description was held so ambiguous, that working solely by that guide, one could not produce such a brush; and taking the specification therefore as the only rule of the privilege, the patent was held to be bad.[1] 5th, That if several methods be specified, and some of them do not work, although the others be perfect, the patent will be void. 6th, That in a patent for an improved instrument, if the specification do not distinguish what is new in the invention, and what is old, the patent will be void. The discrimination must appear on the face of the specification; but this may be by reference made to the former specifications, or by the recital of the first patent in the second.[2]

What is already before the public cannot be the subject of a patent: And if the patent be for an improvement on an old machine, for which there is an existing patent, the inventor can make his improvement, if inseparable from the original machine, only after the expiration of the old patent, or by agreement with the patentee of the original machine.

While the public is entitled to all this fair disclosure, there is a degree of painful and distressing technicality which is too often destructive of all the hopes of fair profit which an inventor is entitled to expect. For it frequently happens, that the inventive genius which discovers the nature, or the useful application, of the principles of philosophy to the arts of life, is not always the fittest to describe in plain intelligible language the mode and details of the operation. It will be the duty of Judges, therefore, so to deal between the public and the inventor, as not to encourage, on the one hand, substantially defective or fraudulent specifications; nor, on the other, to defeat the just rights of an ingenious man, and the fair returns of expensive experiments and loss of time, on account of some verbal incorrectness or technical blunder. On what is so entirely either matter of fact, or matter of technical knowledge, or of common intelligence, to practical men, though far removed from the habits of Judges, the proper criterion is the verdict of a jury.[3]

3. Period of Monopoly.—The time for which a patent may be granted is fourteen years, but in particular cases, where the inventor has been at great expense, or where the invention has peculiar merit, Parliament may interfere to prolong the time, as was done in the case of Watt and Bolton's steam-engines. Without legislative authority this cannot be done.

4. How the Benefit is communicated.—Considered as an estate in the patentee, avail-

[1] The King against Metcalf, 2. Starkie, N. P. C. 249.

[2] Harmer against Plane, 14. Ves. Jun. 130.; 11. East. 101.

[3] A very ingenious man had discovered certain improvements in the process of manufacturing sal ammoniac, and he obtained a patent for this manufacture. Another person was accused by him of having imitated or stolen his process, and he brought an action of damages. The question turned on the specification, and on the nature of the acts of the defender charged as invasions of the privilege. A most distressing succession of remits were made to professional men, chemists and others; and at last a proof after the old method of commission was taken, on which the Court pronounced judgment, finding the process not to have been duly described in the specification. When the cause came into the House of Lords, they sent it back to be remitted to the Jury Court for trial of the questions, 1. Whether the defender had made use of all, or any, and which of the alleged improvements described in the specification? 2. Whether any, and what part or parts of that which is so described was or were known or used before the date of the letters-patent? And, 3. Whether the specification contains a particular description of the nature of the invention, and in what manner the same is to be executed, according to the true intent and meaning of the letters-patent? Astley against Taylor, 3d June 1817—House of Lords 25th June 1821; 1. Shaw's Rep. House of Lords, 54.

able to creditors, the patent privilege may either be assigned or made the subject of diligence and attachment, or of sequestration.

(1.) By voluntary transference the privilege may, in whole or in part, be assigned. If the patentee do not wish to part with his right, he may grant licenses to persons to use it. The patent contains a command that none shall, without license of the patentee, in writing under his hand and seal, imitate or make addition to or subtraction from it; and such licenses give right to maintain action of damages.[1] The patentee may not only thus grant permission to others to manufacture the subject of the patent, but he may transfer by one general deed of assignment the entire right, accompanying the transfer with delivery of the patent. And so, indirectly, his creditors may take advantage of this power, by compelling the patentee to raise money for their payment. The only restraint on the alienation of a patent right is one imposed by the conditions of the grant itself, which has a proviso, that the patentee shall not make any transfer or assignment of the privilege, or of any share of the benefit or profit thereof; or declare any trust thereof to, or for, any number of persons exceeding five; or shall open books for subscriptions to be made by any number of persons exceeding five; or shall receive money from more than five persons for the privilege; or act as a body-corporate, or divide the benefit or privilege into any number of shares exceeding five; otherwise the patent to be void and ineffectual. This is a provision intended to enforce the provisions of the Act of 6. Geo. I. c. 18. which has yet been held an ambiguous and unintelligible Act. Probably some regulations touching this matter may be introduced during this session of Parliament, of which notice shall be given in the Appendix.

(2.) On bankruptcy, the privilege is a part of the estate taken under sequestration, referred to the trustee, and vendible for the benefit of the creditors, whether the bankrupt hold the entire patent; or a share; or only a license.

5. Nature of the Right.—The benefit of the exclusive privilege is of the nature of an heritable right, as bearing a tract of future time; and adjudication seems to be the only diligence by which it can be affected.

Although one cannot have a patent for an invention which he has already disclosed for public use, he may prevent any person from vending a machine or manufacture as *his*, so as to take, without authority, the advantage of his personal character and credit as an artist.[2]

SECTION II.

OF LITERARY PROPERTY.

Analogous to the subject just discussed, is Copyright, or Literary Property. Whether resting or not on any foundation of property by the law of nature, this right has been placed by express statute on a footing in which it has been attempted to reconcile the interests of the author with those of the public. And if in this the legislature has not been perfectly successful, at least there seems to have been as near an approximation to the object in view as can well be expected.

Copyright is a valuable property, from which frequently a fund may arise of great importance to creditors. It rests now exclusively on statute; the great question having been settled with respect to an author's right at common law. But at the same time we must

[1] George against Wackerbach, Godson on Patents, p. 169.

[2] Wilkie against M'Culloch and Company, 21st June 1823; 2. Shaw and Dunlop, 413.

not lose sight of the original right of an author previous to publication: For on that may arise several questions of no light importance; not only respecting the protection of an author's pecuniary rights, but in relation to the rights of his creditors to publish his manuscript productions.

1. PROPERTY IN UNPUBLISHED WORKS.

An author has an undoubted right or uncontrolled power over his unpublished compositions. The ideas of a man's mind are so identified with himself, in respect of every thing which can interest him or his friends, that whether they can be regarded as of pecuniary value in the way of property or not, he ought to be the sole arbiter of their fate; to authorize or to prevent their publication. If ever they are to be exposed to the public eye, the author ought at least to have full control over them before they are made up for publication, and actually submitted to public inspection. No man has a right to publish another's thoughts to the world, or to propagate their publication beyond the point to which he has given consent. His reputation is concerned, and he has a right to defend it by stopping the publication. Once committed to the public by printing, he is committed for ever: 'Reliqua rerum tuarum, post te alium atque 'alium dominum sortientur; hoc nunquam tuum desinet esse, si semel cœperit.' The author then ought to have reserved to him, till the moment of final and conclusive consent, the right of rejecting, the power of judging what it may be most useful, or creditable, or reputable, to publish.

The question of a right to restrain publication, may arise in several classes of cases.

1. PRIVATE LETTERS.—In relation to private correspondence, a very curious question has occurred, which has been viewed somewhat differently in this country and in England. It is not properly a question under the statute of copyright, otherwise the decisions in either country would be precedents equally in both. But it is of some importance to observe how this difference arises. In Scotland, the Court of Session is held to have jurisdiction, by interdict, to protect, not property merely, but reputation, and even private feelings, from outrage and invasion. In one respect, the publication of private letters may outrage both: And the question has been, Whether, where letters have been written and sent to a correspondent, the author, by sending them to his friend, authorizes him to disseminate them, or to publish them for gain? Now the purpose of the communication is quite different. It rather implies a veto on publication. Composition for the public and for the eye of a friend are in a different spirit. It is one of the great charms of epistolary correspondence, that one writes not under the awe of a misjudging world; but throws out unscrupulously his genuine and undisguised sentiments; utters his most secret thoughts; and, with as little reserve as in the secrecy of his own chamber, expresses his feelings of affection, or his murmurs of disapprobation and of censure, in full reliance that they are confided to a friendly ear. By the publication of such effusions, confidential, careless, unthinking of consequences, a man may be wounded in the tenderest part; his literary reputation hurt; his character traduced. It is, accordingly, the understood or implied condition of the communication, the implied limitation of the right conferred, that such communications are not to be published. With these natural feelings on the breach of epistolary confidence, the determinations of the Court of Session have accorded.[1]

[1] So it was held in DODSLEY against M'FARQUHAR, in 1775, relative to the publication of Lord Chesterfield's Letters; 3. Dict. 388.; Tait's Cases in Brown's Sup. vol. v. page 509.; Morr. Dict. *Literary Property*, App. No. I. And again, more solemnly in CADELL and DAVIES against STEWART, 1st June 1804. Here letters written by the poet Burns to a lady whom he distinguished by the name of Clarinda, had been by

In England, several cases have occurred of a similar nature.[1] But in all of them there has been an admixture of the question of property in the letters, as literary compositions under the Act; which would scarcely have entered into consideration with us; and which suggests doubts whether, independently of such idea of property, the Courts would have interfered to grant injunction. But this matter rests now on a footing which brings it, in England, nearly to the footing on which it stands with us. 1. The injunction jurisdiction of Chancery seems to require property as its groundwork, for it has been doubted, whether on any other ground, as of libel, an injunction could be granted. 2. Lord Hardwicke in Pope's case, and Lord Apsley in Chesterfield's, held that there was a species of property in letters, a joint property in the writer and receiver; a special property only in the receiver, which did not authorize the invasion of the joint right of the writer. 3. Lord Eldon, in a case decided in 1818, entertaining great doubts whether, correctly speaking, there be such property, has yet expressed his determination to adhere to the decisions which fixed that point; and has said, that although he is not 'to declare 'that I am to interfere because the letters were written in confidence, or because the 'publication of them may wound the feelings of the plaintiff,—yet if mischievous effects 'of this kind can be apprehended in cases in which this Court has been accustomed on 'the ground of property to forbid publication, it would not become me to abandon the 'jurisdiction which my predecessors have exercised, and refuse to forbid it.'[2] Where the publication of letters, however, is a breach of trust, the Courts of England restrain the publication;[3] and yet doubts seem to be entertained in England, whether letters falling into the hands of the assignees of bankrupts could be secured from publication by injunction.[4] With us, I think, there would be no such doubt.

There are exceptions, however, to the author's right of restraining publication in such cases: As, 1. Where the purposes of public justice require the disclosure; in which cases it is to be made under the order of a Court:[5] 2. There may be cases where one may be entitled to publish, as by authority of the party.[6]

2. PUBLICATION BY ACTING OR RECITING.—Where the composition has been made public, not by printing or selling, but by recitation or acting; the person who, for money, gets access to the work as thus delivered, may be said to have purchased the property of those ideas and words which he can catch and remember. It has however been held, that such communication is not to be taken as thus unreservedly given; but that only the right has been given to the pleasure derivable from hearing the composition.[7]

her given to a bookseller of the name of Stewart, who published them. The children of Burns, as interested in his literary reputation, applied for a remedy, and, after full discussion, they were found entitled to an interdict.

[1] One case of Pope and Swift's correspondence, POPE against CURL, 2. Atk. 342. THOMSON against STANHOPE, Ambler, 737. Another, of letters by an old woman under the influence of a weak attachment to a young man. EATON's case, mentioned in 2. Vesey and Beames, 27.

[2] GEE against PRITCHARD, 2. Swanst. Rep. in Chancery, 402.

[3] So, in EATON's case, supra, where a bargain was made for the delivering up of the letters.

And in the Earl of GRANARD against DUNKEN, in Ireland, 1. Ball. and Beatty, 209. where a relation living in the family had got possession of private letters, and threatened to publish them.

[4] See Sir T. Plummer's opinion in PERCEVAL against PHIPPS, 2. Vesey and Beames, 28.

[5] 'For the purposes of public justice,' (Lord Eldon, Chancellor, has said), 'publicly administered according 'to the established institutions of the country, the 'letters must always be produced. I do not say *that*, 'of justice administered by private hands.' 2. Swanst. 427.

[6] As in the above case of Lord and Lady PERCEVAL against PHIPPS in 1813, where Sir T. Plummer held the lady to have given Phipps authority to publish in his own vindication. 2. Ves. and Beames, 19.

[7] So, one who took down Macklin's comedy of Love à la Mode in short hand, was prohibited by in-

3. GIFT OR SALE OF MANUSCRIPTS.—Where compositions *intended for publication*, or *fit for it*, by accident, or donation, or other title short of an authority to publish, come into the hands of another person, law protects the author in his right of reputation, as well as in his proprietary rights.[1]

Thus it is not in literary property, as in the law of patents, that the circumstance of being already known or used, gives a right to the public against the inventor. For though a book has been given out in manuscript, and extensively read and copied, still, for printing and publication, the author's right is entire.[2]

4. BOOK PRINTED, OR IN PRINTER'S HANDS.—Such a work, not yet published, and still in the hands of a printer, seems to be in the same situation with the cases already discussed; for although the printer may have a *lien* over the book, he seems to have no right to publish it.

Before leaving this subject, it may be proper to take notice of a peculiar feature in English practice, (already seen to influence some of the cases quoted), which ought to be kept in view, and contrasted with our own.

Of all the judicial remedies against the invasion of an author's right, that of interdict in Scotland, or injunction in England, is perhaps the most valuable. It is, in cases where low booksellers alone are likely to invade, easier and better to prevent than to indemnify. But this sort of jurisdiction, in England, proceeds on the sole ground of property; and will not be exercised either where that property is questionable; or where, instead of property, the right is merely to have reputation protected; or where, although the property be clear, it is not such a property as, at law, for the purpose of having damages, or a valuable pecuniary right established, could be maintained.[3]

junction from publishing it. MACKLIN against RICHARDSON, Ambler, 694. COLEMAN against WALKER, 5. Term. Rep. 245.

[1] On this ground, in various cases, Courts have interfered: So, 1. In the case of Lord Clarendon's History, one copy had been lodged by his son in the Petersham Library, and another given to a Mr Gwynne. The copy in the library was destroyed by fire, and Mr Gwynne's copy was published. The question was tried at the instance of Lord Clarendon's heirs, and the donation of this copy was found not to give a right to publish. Duke of QUEENSBERRY against SHEBBEARE, 31st July 1758. Burrow, vol. 4. p. 2330. 2. The same principle was applied where a person having obtained an *unpublished book*, translated and published it. That was held to be a breach of confidence, for although, if the original had been *published*, there could have been no objection to a *translation* of it; yet while the original remained still unpublished, the publication of the translation was held not to be justifiable. 3. Another question occurred between Mr Southey and Sherwood. Mr Southey, when a very young man, had gone to London with his poem of *Wat Tyler*, and after a negociation with a bookseller, who declined to publish it, Mr Southey left it in the bookseller's hands, where it remained forgotten (as it was said) for twenty-three years, when it was published by Sherwood; and Southey applied for an *injunction* against the publication as injurious to his reputation, and without his authority. The principles which I have stated were fully recognized in that case: but the Lord Chancellor went on this ground, that there was so great a doubt as to the property of the work, it being incredible that it should have been left so long without some intention of alienation, gift, &c. and also so much reason on another account to refuse an injunction, (in so far as the book was of a nature which a court of law would not have protected on an action for penalties under the Act), that the Court of Chancery could not interfere till the right was established at law. SOUTHEY against SHERWOOD; 2. Merivale, 435.

[2] See WHITE against GEROCH; 2. Barn. and Ald. 298.

[3] This doctrine was first introduced by Lord Chief-Justice Eyre. When Dr Priestley sought damages for the injury done by the mob at Birmingham, one article consisted of certain manuscript volumes for publication. The answer was, that the Doctor was in use to publish dangerous books; and the Chief-Justice said, that he would hold evidence to that effect good against the claim for indemnification. 2. Merivale, 437.

In a case of Dr WALCOT, (Peter Pindar), 7. Ves. 1. and in SOUTHEY's case, this doctrine was applied to injunctions.

See also MURRAY against BENBOW, as to Lord Byron's Cain; 3. Jacob and Walker.

See also the case of LAWRENCE against SMITH in 1822.

On these peculiarities of English practice, Wat Tyler and Don Juan, and every other infamous publication, seem to have free circulation, by means of the English press.

In Scotland this question is disposed of otherwise: The principle adopted in English practice is not sanctioned. Even if property in the work be the sole ground of interdict, it is the proof of property alone (undistracted by any inquiry into the nature or value or subject of it) that with us guides judicial interference. For the uses to be made, or the abuses, of that property, the law provides another remedy, in administering which that particular use forms the true point of inquiry.

From what has now been stated, it is on the whole to be concluded, 1. That the right of the author in his unpublished work, whether intended to be published for profit or otherwise, is an exclusive right, which no stranger can interfere with to disturb or invade: And, 2. That creditors seem to have no right, (except indirectly by the operation of personal execution), to insist on compromising their debtor's reputation, by the publication of manuscript compositions.

2. PUBLISHED WORKS.

Works which have already been published stand on a different footing from those which are still unpublished. The ideas which form the composition, the language in which they are clothed, are, by the act of publication, in the hands of the world. The question was difficult and interesting, whether at common law the right to multiply and make profit by the sale of works in this situation could be protected? When this question first occurred, the difficulty was of the same kind with that already taken notice of in relation to inventions. The book being published, and so by sale or gift transferred, the universal use of the contents for reading, reciting, transcribing, printing, &c. seemed to be conferred. The question admitted of many doubts, and much controversy. Both in England and in Scotland it was judicially tried. In England, the discussion was carried on in the several Courts for some years from 1768 to 1774. The question in King's-Bench was decided in favour of the author; namely, that he had a right of property at common law, and that he did not part with this right by publication. But this was reversed in the House of Lords, after the opinions of the Judges were heard, who greatly differed.[1] In Scotland, this question had been tried twenty years before, and decided against the author's right;[2] and the Scottish determination came by appeal to the House of Lords at the same time with the English question. So that the law in both ends of the island was settled on this question.

The right thus resting solely on statute is defined by the Act of Queen Anne, as qualified by subsequent statutes. The 8. Anne, c. 19. proceeds on a preamble, that printers and others had taken the liberty of printing, &c. books and other writings, without the consent of the authors or proprietors, to their great detriment; and so it is enacted, 1. That the author of any book already printed, who has not transferred to any other the copy or copies thereof, or the bookseller, &c. who has purchased or acquired the copy or copies in order to print, or reprint the same, shall have the sole right and liberty of print-

[1] A very interesting account of this great question will be found in 4. Burrow, 2303. 2417.

[2] MIDWINTER and Others against HAMILTON, 7th June 1748. Kilk. 96. Rem. Dec. 154. Falconar, 344. On appeal, the case went off upon informality in the original summons.

HINTON against DONALDSON, 28th July 1773. 3. Dict. 388. Tait in 5. Brown's Sup. 508. affirmed on appeal.

It may be added, that in CADELL & DAVIES against ROBERTSON, 18th December 1804, as determined in the House of Lords 16th July 1811, the author's right was held to depend entirely on the Act of Queen Anne.

ing such book for 21 years. 2. That the author of any book already composed, and not printed or published, or that shall hereafter be composed, and his assigns, shall have the sole liberty of printing, &c. for 14 years from the day of first publishing the same; to be, on the author's survivance, prolonged for other 14 years. 3. That any printer, &c. printing, &c. such book, without consent of the proprietors thereof in writing, signed before two credible witnesses; or any one who, knowing the same to be printed without consent of the proprietor, shall sell, publish, &c. shall forfeit the book or books, and each sheet shall be damasked and made waste paper of, and he shall forfeit one penny for each sheet found in his custody, half to the King, half to the informer. By the second part of the Act it is provided, on a preamble that many persons may offend through ignorance, unless provision be made for ascertaining the property and consent of the author, that none shall be subject to the penalties or forfeitures unless the title to the copy of the book shall, before publication, be entered in Stationers' Hall. There is also a provision that nine copies of each book shall be delivered for the use of certain libraries in England and Scotland.

To prevent the bad effect of the monopoly thus granted, provision was made, 1. as already said, That the privilege should endure only for 14, or at most 28 years; and, 2. That if the price should be exorbitant, application might be made to certain Judges to have it abated.

Under this Act it was first questioned, whether, admitting that at common law there was no exclusive right, the author's title to protection was to depend on his entry of his book in Stationers' Hall? There could be no doubt that, to recover the penalties, this was necessary, (by § 2.) But it was held in England, that the general right of property, under the protection of common law remedies, by injunction, damages, &c. was vested by the Act itself from the moment of publication.[1] And although in Scotland the question was decided differently,[2] this was reversed in the House of Lords; and it was held, 1. That no one is liable to be sued for the penalties under the Act, without an entry in Stationers' Hall; 2. That the person having the right bestowed by the Act, is entitled to maintain a suit in order to prevent the violation thereof, by interdict, for the term or terms during which the statute has given them such sole liberty, although there should not have been such entry made before the publication.

The whole of this matter is placed upon a new footing by the Act 54. Geo. III. c. 156. This Act has three objects, 1. To confer a right on certain libraries to demand copies of each book printed for sale; 2. To declare the author's right for a certain time independent of any entry in Stationers' Hall; and, 3. To extend the right conferred by the Act on authors of books already published, living at the time.

1. The first part of the Act orders, that, after the date of the Act, eleven copies of every book, and of every volume thereof printed, on the paper on which the largest number or impression shall be published, (except for the British Museum, which shall be the best), together with all maps and prints belonging thereto, shall be delivered on demand in writing to certain libraries; but not of any second or subsequent edition, unless it shall contain alterations: and if the alterations shall be published separately, a copy only of such alterations.

2. From the date of the Act, the author of any book or books composed, and not printed and published, or hereafter to be printed and published, and his assigns, shall have the sole liberty of printing, &c. for the full term of 28 years: And if the author be alive at the end of that period, for the residue of his natural life, saving to the assignees the right of selling copies printed within the 28 years, and also saving any agreement respecting

[1] TONSON against COLLINS, 1. Blackst. Rep. 330. MILLER against TAYLOR, 4. Burr. 2380. BECKFORD against HOOD, 7. Term. Rep. 620.

[2] CADELL and DAVIES against ROBERTSON, 18th December 1804. Reversed in House of Lords, 16th July 1811.

this survivance term which may have been made between the author and his assignees. And printers, who shall print without the consent of the author or proprietor in writing, or persons who, knowing it to be printed without consent, shall sell or have in possession such book, without consent in writing, shall be liable to a special action on the case, or an action of damages in Scotland. And also, the offender shall forfeit and deliver to the author such books, or sheets thereof, and threepence for each sheet printed or published and exposed to sale, half to the King, half to the informer.

3. In order to ascertain what books shall from time to time be published, the title of every book demandable under the Act, published after it, shall, within a month after publication if in London, or three months if published elsewhere, be entered in the register book of Stationers' Hall, open to inspection, under the penalty of L.5, and forfeiture of eleven times the price of the book, to be recovered by those entitled to sue, and first suing for the same.

4. Authors of books not published 14 years, and of which the authors were alive at the date of the Act, have the full benefit of it.

5. Penal actions are limited to 12 months.

The questions which arise in respect to literary property under this statute, generally turn on identity, Whether the identical work of the author has been invaded? In regard to an original work this can seldom present a question of any great difficulty; so peculiar in the conception or in the expression is every man's literary composition, and so small is the chance of similarity in any case of the kind.

1. Where, in encyclopædias or reviews, quotations have been made so extensive as to extract the whole value, or the most valuable part of the work of an author, this has been held to amount to invasion of the right, so as to entitle the author to protection.[1]

2. But it is difficult to define what is fair quotation. The best method of settling such a question conclusively is by jury trial; when the jury, with the aid of such observations as the Judge shall deliver relative to any mixture of law in the question, will declare what is fair and honest in such a case.[2]

The substance of a book may be given in other words without being held an encroachment. So also, an abridgment may be made; but in neither of these cases must the deviation or abridgment be only colourable. The substance must not be given in the author's words.[3]

4. In such questions, the great difficulty arises in regard to those works which proceed on, and profess to deliver information which is equally accessible to all; as in the case of almanacks, directories, road books. There is undoubtedly no property in the information itself; but there is in the labour of collecting and arranging it; so that if one, without surveys, or going to the original sources, publish the information collected by another, it is an encroachment. The piracy has generally been detected by the slavishness with which the very words of the original have been copied. Where there is this or any other indication that the information has been taken from the previous work, and not from the original sources, the statute will apply;[4] and although the substance of both works may

[1] So under the old Act of Queen Anne, a question arose relative to Stuart's History of the Reformation, which had been almost verbatim inserted in an Encyclopædia, and it was held an invasion of the right. MURRAY against M'FARQUHAR, 25th June 1785; Morr. 8309.

[2] See in illustration of this point, ROWARTH against WILLIS, 1. Campbell's Rep. 94.; and WILKINS against AIKIN, 17. Vesey, 422. where the Lord Chancellor sent a case to be tried at law for the purpose of settling the question by a verdict.

[3] See this subject illustrated, and the distinction between fair and colourable abridgments, in GYLES against WILCOX, 2. Atk. 143.; BELL against WALKER, 1. Brown Chan. Cases, 451.; BUTTERWORTH against ROBINSON, 5. Vesey, 709.; and WHITTINGHAM against WOOLER, 17. Vesey, 424. as to quotations.

[4] It must of course be distinguished correctly how

necessarily be the same, the subsequent work will not escape the imputation of an unfair encroachment.[1]

5. The statute of Anne, in the enacting part, speaks only of book or books, although in the preamble it speaks of books, or other writings. Under these words it was doubted whether a single sheet was a book? It was held in the affirmative.[2] So a part of a book, as a tale, printed and bound up with others.[3]

6. There may be copyright in part of a work without any right to the whole. The author of notes on a work which is itself beyond the term of monopoly, has property in those notes.[4]

7. There may be property in a title, and in the way of giving a book to the world. This is a very peculiar sort of right, not capable of being grounded on the same precise foundations with literary property under the Act, but rather on a sort of association with, or as an accessary of that right.—A periodical publication, as a magazine, review, or encyclopædia, published periodically, or in parts, is in this situation. There is no piracy of the actual composition perhaps; but, by assuming the same title, those who may be attracted by the reputation of the work which goes under that title, may be drawn off to purchase the new one; the very assumption of an appropriate title being evidence of the loss to the one party in proportion to the gain expected by the other.[5] The same title cannot therefore be taken; but a similar and distinguishable title may be assumed.[6]

8. A book published abroad seems still to continue property to the author for a reasonable time to have it published in Great Britain. But if he neglect this opportunity, the work is open to others to publish. And the person first lawfully publishing in this country, seems to have the privilege.[7]

9. The right is by the statute confirmed to the author, (or his assigns having his authority in writing), during a period of 28 years from the day of publishing; and if he shall be alive at the expiration of that term, during his natural life.[8] The right after the expiration of the 28 years is the author's alone; saving, however, to the assignee such copies as have been printed during the 28 years: Sect. 9. It is held under this Act, 1. That the author, when he sells, in *general terms*, without any limitation, has no resulting right against his own assignee by survivance.[9] 2. That if the book was published more than 28 years before the passing of the Act, the author has not the remainder copyright.[10] The transfer of the copyright is by assignation; but there seems to be no precise method whereby in a competition the transfer is to be completed. It seems to class with heritable rights, as bearing a tract of future time, and as unattachable by any diligence but adjudication.

far the proof legitimately goes; for a mistake transcribed goes only to that particular passage, and by *inference* only can be extended further. Of this the jury will judge.—Dict. of Lord ELLENBOROUGH. CARY against KEARSLY, 4. Esp. 168.

[1] The whole of this subject is fully discussed in LONGMAN against WINCHESTER, 16. Ves. 269.; and WILKINS against AIKIN, 17. Ves. 422., and the cases there referred to; and in the Scottish case of TAYLOR and SKINNER against BAYNE and WILSONS, 21st December 1776, Morr. 8308. See also an elaborate opinion of Lord Erskine, Chan. in MATHERSON against STOCKDALE, 12. Ves. 273.

[2] HUIE against DALE, 1803, 11. East. 244.

[3] WHITE against GEROCH, 2. Barnw. and Ald. 298.

[4] See CARY against LONGMAN, 1. East. 358., and the cases there referred to.

[5] So in HOG against KIRBY, a magazine publishing in numbers was thus invaded, and protected by injunction; 8. Ves. 215. So of a newspaper, KEENE against HARRIS, 17. Ves. 342. CONSTABLE and Company against BREWSTER, 6th July 1824, 3. Shaw and Dunlop, 215.

[6] See 8. Ves. 222.

[7] CLEMENTI against WALKER, 1824, 2. Barn. and Cross, 861.

[8] 54. Geo. III. c. 156. § 4.

[9] CANNAN against BOWLES, 1. Cox. 283.; RENNET against THOMSON, id.

[10] BOORK against CLARKE, 1. Barn. and Ald. 396.

A written title is required in all cases where the action is not by the author himself;[1] and acquiescence in a publication is not enough to confer the right.[2]

As a sequel to the law of literary property, it may be fit to mention some other particulars analogous in principle.

1. Engravings may be the subject of a kind of property much of the same description with literary compositions. This sort of property was first regulated by the 8. Geo. II. c. 13.; a statute of which the celebrated Hogarth was the author. He prepared it in order to protect those engravings of his, which, the instant they were published, were exposed to all sorts of piracies. This defective statute was reformed by the 7. Geo. III. c. 38., and 17. Geo. III. c. 57. These acts protect, 1. Engravings, etchings, or works in mezzotinto or chiaro-oscuro, of any historical or other print or prints, which any one shall invent or engrave; or, 2. Such as one shall, from his own works, design or invention, cause to be engraved, &c.

In these, as in the information generally contained in almanacks, &c. there is no property in the subject where it is not an original design of the engraver: The property is only in the engraving itself, from which no copy can be made without piracy.[3]

2. There is also a similar property conferred on the first maker of busts, models, casts, &c. by 38. Geo. III. c. 71.; amended by 54. Geo. III. c. 56.

3. And a similar protection is by 54. Geo. III. c. 23. given to the inventors of original patterns for printing linens, cottons, &c. But this is granted only for the brief term of three months.

4. Musical compositions fall under the Act of Queen Anne;[4] and on the same principle under the 54. Geo. III. c. 156. We have already had occasion to take notice of a case, where, as such, they were found to be protected, though consisting only of a single sheet.[5]

Effect of the Exclusive Privilege of Patent or Copyright.—For the protection of a patent privilege, or of literary property, two several remedies are provided; 1. Interdict, and, 2. An action of damages.

1. Interdict is summarily obtained by application to the Lord Ordinary on the Bills, accompanied by the proofs of a prima facie case; and, when obtained, it has the effect of preventing the encroachment threatened or commenced, till a full judicial investigation shall take place, in order to decide whether the interdict shall be confirmed and made perpetual. This is the remedy, which, in most cases, (of literary property especially), is the most useful; it being easier to prevent than to remedy the invasion and injury. But it will be remembered, that by an inconsiderate interdict, a court may occasion irreparable damage; since, in the case both of machinery and of literary publications, a great expense may have been incurred, which, if the favourable moment be not seized, is entirely lost. In such cases, it is the duty of a court of equity interposing, *first*, To require the best possible proofs which the suddenness of the occasion may allow, and to give as much opportunity of discussion and discovery as circumstances admit; and, *secondly*, If those proofs are in any danger of not standing the test ultimately, to allow the operation to

[1] Powers against Walker, 1814, 4. Camp. 8. Morris against Kelly, 1820, 1. Jacob and Walker, 481.

[2] Latour against Bland, 2. Starkie, 382.

[3] See De Berrenger v. Whible, 2. Starkie, 548.

[4] Bach against Longman, Cowp. 628.

[5] Huie against Dale, 2. Camp. 28.; Clementi against Golding, 2. Camp. 25., and 11. East. 248. See also White against Geroch, 2. Barnw. and Ald. 298.

proceed, in the meanwhile ordering an account to be kept, by which indemnification may be given when the matter is finally decided.

In England, when a patent is new, but objected to on the ground of imperfect specification, or as otherwise exceptionable, the practice seems to be, to require a trial at law before the Court of Chancery will interfere ;[1] and, in copyright, the same principle directs the Court :[2] But when possession has been enjoyed exclusively for any considerable time under a patent or copyright, injunction is granted in England.[3] With us, the same reluctance to interfere is not observed in this department of jurisdiction: But on evidence, prima facie satisfactory, the Court sanctions the remedy of interdict, as merely a temporary protection of the apparent right.

2. DAMAGES.—Action for damages lies; either accompanied by a declarator of the right or otherwise.

CHAPTER V.

OF HONOURS AND DIGNITIES.

IN former times, honours and dignities were annexed to land and castles rather than to the person; and when the land was alienated, the dignity passed with it. But now they are strictly personal; descendible to the heirs in the patent, but not capable of transference by alienation, nor attachable for debt. The territory of a peer, however, when unentailed, may be sold, and is open to the diligence of creditors: even that estate from which the title is assumed, may be adjudged and sold for debt.[4]

CHAPTER VI.

OF OFFICES.

AN office is a right to exercise a public or private employment, and to take the fees and emoluments which belong to it. In considering offices as responsible for debt, three questions may be raised:—1*st*, Whether the office itself may be attached, or transferred by the operation of legal diligence, or sold for the behoof of creditors? 2*d*, Whether the power of recommending or appointing a deputy, can be made a source of gain and fund of payment? And, 3*d*, Whether the wages, profits, or salary, can be taken by the creditors of him who holds the office?

1. By edicts of Justinian, venality in public offices was forbidden in the Roman law ;[5] and this continued long to be the law of all the European nations established on the ruins

[1] HILL against THOMSON, 3. Merivale, 624.

[2] 6. Ves. 707. Lord Eldon, Chanc.

[3] As to patents, 3. Meriv. 624—8.; 14. Ves. 130. As to copyright, 6. Ves. 707.

[4] Dirleton and Stewart agree, 1*st*, That personal honours are not the subject of execution and diligence: 2*d*, That even honours annexed to land do not go with the land to disponees or comprizers; and, 3*d*, Although Dirleton seems to stickle a little for a distinction between territorial and personal honours, Stewart is clear, 'that there would be no distinction made with 'us between a title of honour given by patent, and 'the same title annexed to and joined with lands, but 'the same judgment made of the title in both cases.' 314. and 315.

[5] Nov. 8. pr. and c. 1. and 11.

of the empire. It seems first to have been departed from in France, where the sale of offices became a source of public revenue.[1] In England, no public office (a few only excepted) can be sold. This law is most especially directed against venality in offices connected with the administration of justice.[2] In Scotland, all heritable offices may be voluntarily sold, or adjudged, and judicially sold for debt.[3] So all patrimonial offices, such as are descendible to heirs and assignees, may be sold or adjudged.[4] Offices which are not patrimonial, but in which there is a personal trust reposed, are not saleable, nor capable of being attached by diligence.[5] The practice in Scotland has been extremely loose; and examples have occurred of the sale even of offices connected with the administration of justice.[6] But of all offices the purity of these is to be preserved with the greatest delicacy; and the provisions of the English statute of Edward are now extended to Scotland and Ireland.[7] The prohibition to sell offices and deputations is by the same Act extended to all offices in the gift of the Crown, and in the public departments of government, in the United Kingdom, or in the colonies, or under the East India Company. But an exception is made, *first*, Of certain offices in the palace; and, *secondly*, Of sales and exchange of commissions in his Majesty's forces, for the regulation price, and under such rules and restrictions as his Majesty from time to time shall establish.

[1] The French, long wedded to the institutions of the civil law, adhered with great strictness to the laws against venality in offices, and even enforced them by very strong ordinances. But Francis I. amidst the disorder of his finances, was betrayed into the unworthy expedient of converting the sale of offices into a source of revenue. All offices might be purchased by certain payments to the royal treasury, and, when thus purchased, might be transferred for money; the king approving of the resignee. That Montesquieu should justify such venality, (Esprit des Loix, liv. v. c. 19.), is by Voltaire attributed to his holding the presidency which his uncle had purchased. Vol. lx. p. 208.

[2] By 5. & 6. Edward VI. § 16. the sale for money, directly or indirectly, is prohibited, of offices, or deputations of offices, touching or concerning, 1. The administration or execution of justice; or, 2. The receipt of the king's treasure, &c.; or, 3. The receipt of the king's customs, or any administration or attendance in the king's custom-house; or, 4. The keeping of castles, &c. for the king; or, 5. Clerkships in courts of record: and it is provided, that the prohibition shall not extend to any offices whereof a person is seized of inheritance, or to the keeping of any park, house, &c. But offices of inheritance, or for terms of years, are saleable.

2. Blackst. 36. See GARFORTH against FEARON, 1. H. Blackst. 327. where Lord Loughborough delivers an elaborate opinion on the effect of bargains for the sale of offices.

The sale of public offices to the highest bidder, leads to extortion, and some degree of corruption, in the execution of them. The person, who has the power of selling, is induced to demand as high a price as the largest calculation of the emolument will sanction; and the purchaser, when installed, makes the best advantage of the power which his office puts into his hands: Neither can any thing be a greater 'temptation to officers to abuse their power by bribery 'and extortion, and other acts of injustice, than the 'consideration of the great expense they were at in 'gaining their places, and the necessity of sometimes 'straining a point to make their bargain answer their 'expectations.' Hawkins' Pleas of Crown, 198.

See Cook's B. L. 298. SCHILINGER against BLACKERBY, 1. Ves. 347. holding the offices of the Palace and House of Lords liable to creditors.

[3] As the heritable ushership, 10th July 1747, COCKBURN. So heritable sheriffships, &c. in former times, 2. Bank. 219.

[4] As the office of king's printer, 22d July 1737, BLAIR, Home, 116. So the right of presenting a pauper to a public charity, 1st July 1796, in a question with the Town of Edinburgh.

[5] So the office of keeper of the register of sasines is not adjudgeable. 7th December 1759, Wilson.

[6] In the case of WADDEL against INGLIS, 14th February 1770, and in the case of STEWART against MILLER, determined in the House of Lords, 25th February 1802, it was clearly proved, that such offices have frequently been sold and bargained for in Scotland. But in the last of these cases, the Lord Chancellor Eldon delivered his opinion strongly against venality in all public offices; and was peculiarly anxious, (in moving the judgment of affirmance in the House of Lords, sustaining the bargain between the parties), to guard against the belief that there was any intention to decide the general question, far less to give the sanction of their high authority to the sale of offices. See a note of part of this speech in the Fac. Coll. vol. xiv. p. 197.

[7] 49. Geo. III. c. 126.

Under the exception contained in this Act, it may be questioned whether an officer in the army can be compelled to sell his commission for the benefit of his creditors. Certainly creditors may not directly attach the office by adjudication; and it would also appear that an officer, either on whole or half-pay, would not be compelled in a sequestration to assign to his trustee, or in a cessio to authorize the sale of his commission.

If a commission is to be sold voluntarily for the benefit of creditors, the officer must first, on the proper application, obtain leave to sell; and those who conduct the transaction must agree with the purchaser, and then get the sale negociated in the common way.

2. Deputations of Offices.—The doctrine relating to offices applies also to the power of deputation, on the same principle which bars the diligence of creditors in the case of the principal office. The right of appointing deputies cannot become a source of gain to the creditors of the principal; or be claimed by them as affording a fund of division, where the office is of the nature of a public trust, or relates to the administration of justice.[1]

3. Salary of Office.—The salary of an office stands on a different footing from the office itself. Although the delectus personæ, which an office implies, may effectually prevent the office itself from being exposed to sale, to be purchased, perhaps, by one who is quite unable to discharge its duties; this principle at least can never stand in the way of creditors proceeding to attach the salary, or the accruing perquisites and profits, as they arise, and converting them into a fund of payment.[2]

But any restraint on the right of attaching the salary of an office proceeds on other principles. 1. A proper salary is in its nature alimentary. In its very constitution and appropriation, the fund set apart for it is separated from common purposes, and from its destination it may fairly be regarded as under specific appropriation: And, 2. With this appropriation, the public policy concurs in requiring, that officers should at all times be ready, without interruption, to perform the duties which the public expects from them. A doubt naturally suggests itself, whether, in deciding on such cases, the former of the considerations now stated has always been sufficiently recognized, or the latter enough attended to in its remote and in its immediate consequences. It is quite true, that the law will not recognize as a sufficient characteristic of the alimentary nature of a fund, that it is necessary for the subsistence of the person favoured: But the particular appropriation

[1] See the above-quoted Act, 49. Geo. III. c. 126.

Lord Chancellor Thurlow held, that where his Majesty empowers an officer, for the benefit of the public, to recommend, and much more to appoint, a person to an office, whether in the administration of justice, or in matters of less consequence, the law supposes the Crown to repose the trust in him, that he will appoint a person worthy to fill the place; that he will not permit his judgment to be corrupted by entering into a consideration of the question, who would give most for his recommendation or appointment? and any traffic which he enters into, to make a personal benefit of his power and trust, is traffic which a court of equity will cut down. Hamington against Du Chattel, 1. Bro. Ch. Cases, 124. The report of this case, as in Brown, was said, by Lord Eldon in the House of Lords, to be very bad: 'A judgment,' said he, 'very ill reported, 'but most ably delivered.'

It was formerly a practice in Scotland, in the case of some offices, to take money for deputations; but such practices will not probably be continued, now that the opinion of the court of the last resort has so directly discountenanced them, upon the broad ground of public expediency and constitutional law. It seems, at one time, to have been the resolution of Lord Chancellor Eldon to move, in Stewart and Miller's case, for a judgment, annulling the whole bargain upon which the parties had come before the Court; and he was restrained only by the consideration, that the Court of Session had not decided the case on the general question, so that it would have been an *original* discussion in the House of Lords; and that it would have occasioned an enormous expense to the parties to return to Scotland for a trial of the point.

[2] Lord Kames, in his remarks on the case of Wilson against Falconer, delivers an opinion, that wherever there is a power of deputation, the emoluments may be adjudged, however personal the office; as the deputy there may easily account to the adjudger instead of the principal: that where there is no power of deputation, the emoluments cannot be adjudged. Select Decisions, p. 219. If this opinion is to be followed, it must be limited to offices which are mere sinecures; or to the surplus of a due subsistence.

to subsistence, is the decisive mark of an alimentary fund; and this seems to be necessarily implied in the appointment of a salary to a public office. On the other hand, it is consistent with the policy of thus securing the service and uninterrupted readiness of public officers for their duties, that their salary should not serve as a fund of credit. It is at least sometimes true that credit is pernicious. And if the speculative opinion is not to be assented to universally, that to deny action for small sums would prove salutary in stopping such debts in their origin; yet, in some cases, a policy like this is unquestionably good. So it has been found in the Liquor Acts:[1] so it probably would prove in regard to the salaries of public officers, in stopping false credit beyond the amount of the salary; in preventing an officer from thus by anticipation dissipating the public provision for his services. Nothing can be more indecent, than to see clergymen trafficking with their creditors for that stipend, which is a provision for the undisturbed performance of their sacred functions; nothing more inconsistent with the very nature of the appropriation of military or naval pay, or half-pay, than that the officer whose services are thus purchased for the public, shall, by the consequences of a credit obtained by reliance on this fund as directly attachable, or indirectly to be reached by imprisonment, be placed in a state of incapacity for the performance of his duties. Yet these are views which have not been uniformly adopted in questions of this sort. Some salaries of a public nature have been allowed to be assigned, or attached; others, though not attachable, have been ordered in cessio to be given up, or in part at least relinquished.

1. In England, a clergyman's benefice is held to be liable to sequestration, and the proceeds to distribution among creditors.[2] But neither the pay nor half-pay of an officer in the army or navy, is in England held assignable; and although at one time it was found that they might be assigned in equity,[3] this was afterwards held bad, and all assignments considered as ineffectual.[4] The pay is not taken under a commission. Arrears seem to be held attachable.[5] But that has been doubted.[6]

2. In the law of Scotland, the salary of a judge; the pay or half-pay of an officer; and the salary of other inalienable public offices; as the funds assigned by the statute for enabling those who hold them to discharge the duties of their place, have been supposed

[1] 24. Geo. II. c. 40. See Index, Liquor Acts.

[2] Ex parte MEYMOT, 1. Atk. 196. ARBUCKLE against COWTAN, 3. Bos. and Pull. 321.

[3] STEWART against TUCKER, 1777; 2. Blackst. Rep. 1137.

[4] Odlum, a half-pay lieutenant of a reduced regiment of foot, was imprisoned for debt by Flarty; and, in a question concerning his liberation, under the Lords' Act, he objected to the inclusion of his half-pay in his schedule of funds to be given up to his creditors. The prisoner was ordered to be discharged without giving up his half-pay. Lord Kenyon said,—'Emoluments 'of this sort are granted for the dignity of the state, 'and for the decent support of those persons who are 'engaged in the service of it. It would, therefore, be 'highly impolitic to permit them to be assigned; for 'persons who are liable to be called out in the service 'of their country, ought not to be taken from a state 'of poverty.' Judge Buller said,—'I know of no au-'thority by which an officer may sell his half-pay, and, 'on principles of policy, he ought not to be permitted 'to do it. If the question was, whether or not the 'pay which was actually due might be assigned, I 'should have thought it, like any other existing debt, 'assignable, but that does not extend to future ac-'cruing payments.' 10th June 1790, 3. Term. Rep. 681—3. FLARTY against ODLUM.

This decision was at the time highly approved of, as we learn from Lord Alvanly, ARBUCKLE against COWTAN, 3. Bos. and Pull. 328. And a similar judgment had been given in Chancery, in the case of Captain KENNEDY, a bankrupt, about the year 1788.

The decision in Flarty against Odlum was strongly confirmed; first in the King's Bench, the Court holding, that both on grounds of public expediency, and on account of the officers themselves, half-pay is not assignable at law: LIDDERDALE against Duke of MONTROSE, 4. Term. Rep. 248. And afterwards in Exchequer, in STONE and LIDDERDALE, 2. Anstruth. 533. where it was held not assignable in equity.

[5] BARWICK against READ, 1. Henry, Blackst. 627. An opinion the other way seems to have been delivered by Lord Hardwicke, but not relied on; Cook, 285.

[6] 1. Montagu, Bankrupt Law, 1819, 446.

to be not attachable by creditors: But this doctrine has been called in question; and, in modern practice, is not admitted without limitation.

1. Minister's stipend has been held arrestable, and to fall under sequestration;[1] while the salary of a private lecturer in a chapel has been deemed alimentary, and exempt from attachment.[2]

2. A professor's salary has been held arrestable.[3]

3. Salaries of judges, and other public officers of state, have, however, been held not to be arrestable.[4]

4. It has not been left entirely on the general principle to dispose of the pay and half-pay of the army or navy: Special statute has declared, in confirmation of the common law, that all assignments of such pay are void and null.[5]

Whether, indirectly, salaries, pensions and stipends, may become available to creditors, in so far as the relief from imprisonment, by cessio bonorum, is qualified by the necessity of giving up to creditors all that exceeds the necessary means of subsistence, will be discussed hereafter.[6]

5. Arrears have been considered as attachable, whether of pay or of salary.[7]

6. The salary of a public officer cannot lawfully be burdened with the payment of any sum as a consideration for the exertion of influence to procure the nomination.[8] Neither can those who hold the power of nomination stipulate that a part of the salary shall be paid to a candidate who retires from the contest.[9] These are pacta illicita, forbid by the clearest considerations of public good. But it is left doubtful, whether the allotment of a share of the salary by agreement between two candidates is legal.[10] An agreement by an officer in bad health to share the emoluments with an assistant, is effectual.[11]

CHAPTER VII.

OF ALIMENTARY FUNDS.

THE power to give or to withhold a fund, implies also a power to qualify the grant with such a restriction as shall exclude creditors. No one can so vest his own funds in himself,

[1] Anonymous; 3. Shaw and Dunlop, 195.

[2] See 1. Fount. 46. for the original doubts. Hall, 12th February 1736. Clerk Hume, 12. Hogg, 15th February 1743. Elchies, *Stipend*, No. 5. SMITH against Earl of MORAY, 13th December 1815, Fac. Coll.

[3] LAIDLAW against WYLDE, 9th January 1801. But this salvo beneficio competentiæ.

[4] There is an act of sederunt, 11th June 1613, declaring, that it shall not be lawful to arrest in the hands of the treasurer, or receiver's hands, any pension, fees, &c. directed to be paid to any by precept from his Majesty. Spottiswood's Prac. voce *Pension*. Sir Ilay Campbell's Acts of Sederunt, p. 9.

The salaries of *Judges* and public ministers held not to be attachable. 3. Stair, i. 37. Act of Sed. 20th November 1626, and decree in terms thereof, 27th February 1662.

The salary of a *Member to the Parliament of Scotland* not arrestable. 18th March 1707, MOLLISON against CLARK, &c.; 2. Fount. 362.

[5] 47. Geo. III. c. 25. § 4.

[6] See below of Cessio Bonorum.

[7] 26th January 1715, BRODIE against CAMPBELL, as to arrears of officer's pay.

[8] See the case of DALRYMPLE, 1st February 1786, where an *opinion* at least to this extent was delivered. See 49. Geo. III. c. 126.

[9] 16th February 1811, THOMSON against DOVE; 14. Fac. Coll. 196.

[10] In the above case of THOMSON against DOVE, Lord President Blair expressly reserved his opinion on this question as more doubtful; though I confess that I cannot see much reason to hesitate in discountenancing a transaction which substantially destroys the freedom of election.

[11] See HALDANE against DE MARIA, 6th May 1812; 14. Fac. Coll. 536. See 49. Geo. III. c. 126. § 11.

or for his own use, as to exclude his creditors. But he may, by conveying his estate or funds to another, under a condition that it shall be applied only for a particular purpose, and that no creditor shall have the power of attaching it by diligence, place it beyond the reach of creditors while it continues in its original form, unmixed with the universitas of the holder's funds.[1] And so, where an estate is created and the proceeds appropriated, or a debt is constituted, and the obligation undertaken, expressly for the purpose of alimenting and subsisting the person for whose use it is given, it is (at least so far as it exceeds not a moderate aliment) protected from creditors.[2]

Property conveyed to a wife, excluding the jus mariti, is not attachable by creditors.[3] An aliment granted to a wife does not fall under the jus mariti so as to be affectable by her husband's creditors, or liable to compensation by debts due by him.[4] But, in order to protect a fund in this way, it is necessary that it should be properly constituted as an aliment. It is not enough that it be given as an annuity or liferent; it must be declared expressly alimentary.[5]

It is not sufficient to give the character of an alimentary provision, that it is the sole fund of subsistence.[6] Thus, where a wife has an annuity secured to her by marriage contract, and on her husband's death marries again, her annuity from the first husband's estate will go to her second husband's creditors, leaving to her only the eventual survivorship. Neither is the maintenance of the wife an inherent burden on the jus mariti, so as to entitle her to claim a portion of the rents of her lands, free from the diligence of her husband's creditors.[7] It seems, on the same ground, very doubtful whether the annuity settled on a wife on separation is attachable by the husband's creditors.—See below, of Marriage Contracts and Bonds of Provision.

[1] 15th January 1674, BAILLIE, 2. Stair, 253.

[2] As the principles of the law of France were drawn from the same sources with those from which our law flowed, I make use, without scruple, of the admirable work of Pothier, for the illustration of our jurisprudence. According to him, the French law gives effect to the constitution of such alimentary rights. 'A debt,' says he, 'which is given or bequeathed 'to me to serve for my aliment, with a provision 'that it shall not be seized by my creditors, is a 'debt against which no compensation can be op-'posed. For, as this clause is effectual to prevent 'it from being seized by a third party, and applied 'in payment of my debt, so must it also, for the same 'reason, be effectual to prevent it from being applied, 'by means of compensation, in payment of what I 'owe to the debtor in it.' Traité des Obligations, tom. i. p. 314. This might stand as a passage in a book of Scottish law. Dirleton says, in reporting the case of Broomhall against Darsie,—'Constituto semel 'alimento, quo nihil in jure magis favorabile, aut 'magis personale, de eo nec alienatio nec transactio 'rite celebratur; datur enim ut persona exhibeatur et 'utcunque vitam tolleret.' 7th July 1678, Dirleton, voce Alimenta, p. 3.

[3] 1. Ersk. 6. § 14.

[4] 7th July 1678, BROOMHALL against DARSIE, *ut supra*. 4th July 1637, TENANT, Durie, 848. 27th March 1627, WESTNISBET against MORRISON; Durie, 295. 27th January 1709, Lady PINKELL.

[5] 8th March 1639, KILCADRON, Durie, 880. A subject, the rents of which would, in the common case, fall to the husband jure mariti, was found not attachable by the husband's creditors, in respect that he lived separate from his wife, and gave her no aliment, so that her own rents were to be regarded as alimentary: or rather, the true principle of the decision was this, that a wife is entitled to a preference by retention of her tocher, or of the rents of her own estate, for her aliment, where she and her husband do not live together and share their fortunes. 14th November 1770, JAMESON against HOUSTON; Hamilton's Decisions, p. 128. In the case of a provision left by our great lawyer Dirleton to his niece, of the liferent of 20,000 merks, (the fee to her son), 'for her better support 'and maintenance;' the Lords found it attachable by her husband's creditors, as not being declared expressly alimentary. 26th November 1697, GORDON of Pencaitland against BLACKBURN; 1. Fount. 797.

[6] See SMITH against Earl of MORAY, 13th December 1815; Fac. Coll.

[7] 25th November 1709, TURNBULL; 2. Fount. 530. Forb. 355. 8th March 1794, ROBB. An opposite decision in the case of LISK, 22d November 1785, was settled in consequence of an observation of the Lord Chancellor; 9. Fac. Coll. 253.

Pensions from the King are held as alimentary, although they do not expressly bear a declaration to that effect.[1]

The annuities due to the widows of Scottish clergymen, or of principals or professors in Scottish universities, and the provisions to their children, are not subject to arrestment,[2] nor can they be assigned.[3]

When, instead of an *yearly sum*, there is a residuary principal sum destined for aliment, and declared alimentary, it would seem, that while the fund remains as a jus incorporale, distinct and unmixed with the debtor's effects, it is exempt from diligence.[4]

Although no person can reserve to himself any part of his own property so as to withdraw it from the diligence of creditors; a fund already protected as alimentary may be converted into another shape with an effectual reservation of its privilege.[5] So, perhaps, it would be held where an office is abolished on a salary, or where the officer retires on a salary.

Persons who furnish subsistence are entitled by diligence to attach the alimentary fund of the year for which they made furnishings.[6] It has been imagined that their diligence is limited to the year's fund: But the better opinion seems to be, that the furnishers of the year have a preference on that year's fund over furnishers of former years; but that the latter are not precluded from attaching the fund.

Where the alimentary fund is exorbitant, or where several alimentary funds concur, the debtor will not be privileged to enjoy the superfluity, while his creditors are deprived of their payment. The creditors may throw the debtor into prison; from which he will not be relieved by cessio bonorum till he give up a part of his aliment to his creditors, and restrict himself to such moderate competency as becomes his condition: But even, directly, a court would probably not feel themselves authorized to stop diligence intended to attach the excess of an exorbitant aliment.

Sometimes the friends of a bankrupt appear at the sale of his property, and purchase goods or furniture, for the aliment, or personal use of him and his family. As a bankrupt may enjoy an alimentary fund acquired before bankruptcy, he may also enjoy it when bestowed upon him after bankruptcy. The only difficulty seems to be, whether he can hold moveable property under any condition that will protect it. At least it

[1] 22d December 1676, DICK against Sir A. DICK; Dirleton, 414. 202.; 2. Stair, 483.; 2. Stair's Inst. 5. 18.; 3. 1. 37.; 3. Ersk. 6. 7. A decision has been pronounced in England, which I scarcely think could have been given in this country, and which appears contrary to the very intention of the bequest out of which it arose. A person bequeathed an annuity for life to another, with a proviso, that it should he paid only into the annuitant's own hand, and that, if alienated, it should immediately cease. He became a bankrupt, and it was included by the commissioners. The question occurred in Chancery, and was sent to the King's-Bench. The creditors claimed the annuity. The heir of the testator contended that it had ceased and determined; which the bankrupt denied, as he had given no voluntary alienation. The Court of King's-Bench reported their opinion, that the annuity had determined. DOMMET against BEDFORD, &c.; 6. Term. Rep. 684. See also 3. Vesey, 149.

[2] 17. Geo. II. c. 11. § 68.; 19. Geo. III. c. 20. § 78. In establishing the Schoolmasters' Widows' Fund, this was neglected, 47. Geo. III. c. 85. § 2.

[3] 19th May 1791, M'KENZIE against MORRISON; 10. Fac. Coll. 365.

[4] 19th December 1738, URQUHART, Clerk Home, p. 171. Lord Elchies raised the doubt in this case, Whether, the fund being *assignable*, it might not be *arrested*? but the Court held the word assignees to mean 'assignees for aliment.' Elch. Notes, p. 20. No. 8. See also Kilk. 21. *Qu.* Would the Court have held an assignation bad?

[5] 3. Ersk. 6. 7. The clerk of the Canongate sold his office, taking a bond for an annuity in lieu of it, not to be arrestable. It was held to be free from diligence, so far as a moderate provision. 8th December 1738, SWINTON; Elchies, *Aliment*, No. 7. and Notes, p. 20.

[6] 1. Bank. 159. § 14. Lady CAITHNESS against SEATON; Sel. Dec. p. 187. The President held the fund not attachable for furnishings of a former year. The other Judges seem to have held otherwise, with perhaps a preference to the furnishers within the year. The case was decided by an arrangement. See Kilkerran's Note. 5. Brown, Sup. 338.

seems to be competent to settle household furniture, &c. effectually upon his wife or children, for their subsistence and aliment, so as to save it from the diligence of the creditors. Questions in such cases can arise only from the doubtful mode in which the fund is vested.—1*st*, If the fund or subject be vested strictly as alimentary, it would seem to be effectually guarded from the diligence of former creditors; for they have received the price of this fund, and are not misled into credit by the false reputation of ownership: 2*d*, Furniture, or clothes, may also be effectually bestowed upon him in the same manner: 3*d*, It would appear to be safe to vest property of any kind in him as trustee, for the use of his children or his wife: and, 4*th*, Although a bankrupt cannot, without a discharge, be enabled to carry on trade again on his own account, without subjecting to payment of his former debts all his new acquisitions, yet the friends of the bankrupt's family may safely carry on trade for their behoof. They may purchase the bankrupt's stock; and, vesting it in themselves, or in trustees, proceed with the trade, making their manager, or trustee, account to the bankrupt's family, and appropriate the profits partly to the subsistence of the bankrupt himself, and partly to that of his family. Nay, there seems to be no obstacle to their employing the bankrupt himself, if not in prison, to superintend the business.[1]

Where a bankrupt holds a lease excluding assignees and subtenants, the creditors cannot take that lease without the landlord's consent; but the stock and accruing profits may be taken. It would seem that the bankrupt's friends may supply a stock, which, if properly settled on him, may be free from the diligence of creditors. But still the profits will be attachable. Perhaps, however, they may, by means of a trust, be so fixed upon the family of the bankrupt as to save them from his creditors: To accomplish this, the only unexceptionable way seems to be to constitute a trust for the family.

The wages or fees of servants constitute a fund properly alimentary, and can be attached only so far as they exceed what is necessary for their subsistence.[2]

The salary of a comedian is held to be alimentary on a similar principle. The debtor, indeed, may be imprisoned, and thus forced to bargain with his creditors; but if the creditors should prefer the attachment of his gains, they must leave untouched a reasonable maintenance conformable to his condition.[3]

Although alimentary funds, salaries, and pensions, are not attachable for debt, it is held that the arrears of them may be attached.

[1] In Forrester's sequestration, some friends purchased the stock in hand for the benefit of his children, to be sold under their father's management, as a fund of subsistence to the family, the shop being opened in the children's name. In the course of the trade new goods were commissioned; and, after some time, certain creditors thought proper to insist in their personal diligence against the bankrupt, which forced him into the Abbey, and obliged the friends to dispose of the stock at once. They, accordingly, sold the whole to Crooks and Burns, in whose hands two creditors of the bankrupt arrested the price. The question was, Whether the arrestment was effectual? or, Whether the fund was not the property of the children and their friends, and not of the bankrupt? The Court preferred the children and their friends. 1799 or 1800, MONTGOMERY and CAMPBELL against SIBBALD, &c.

[2] 3. Stair, 1. 37. In the case of BOOG, 9th July 1668, 'the Lords found that a servant's fee, in so far 'as was necessary for the servant's aliment, conform 'to his condition of service, could not be reached by 'his creditors to whom he had made a cessio bonorum, 'except as to the surplus more than what was neces-'sary; and they found no surplus in this case.' 1. Stair's Decis. 550.

[3] In France, 'les parts revenantes aux comediens 'François, jusqu'à concurrence d'une portion seule-'ment, sont insaisibles; le surplus de ces parts peut 'être saisi.' 4. Denisart, 418.

CHAPTER VIII.

FACULTIES OR RIGHTS OF RESTITUTION AVAILABLE TO CREDITORS.

CREDITORS have the right of following out actions of restitution, arising from illegal or challengeable alienations, direct or indirect, of property belonging to their debtor, or to which he may have succeeded. Without discussing the whole doctrine of restitution in all its parts and relations, it may be sufficient to select those examples which are of chief importance. Deeds, whether of alienation or of obligation, granted by minors; by persons insane; by persons interdicted; by persons of weak capacity imposed on by fraud; are subject to restitution on certain conditions, and within certain terms; and of this right creditors may avail themselves.

§ 1. RESTITUTION AGAINST THE DEEDS OF PUPILS AND MINORS.

After a minor has arrived at majority, he may, by insolvency, open to his creditors a right to challenge alienations made in minority. But a case still more likely to arise, is where a minor is succeeded by one whose insolvency gives to his creditors the property and the rights to which he may have succeeded of challenging the reducible acts of his predecessor.

There is a remarkable difference between deeds done in pupillarity and deeds done in minority. A pupil is absolutely incapable of consent; a minor, though peculiarly subject to imposition, has legal capacity to contract, engage, or convey. This is a distinction important to be observed in considering the right of restitution in those several cases.

I. DEEDS IN PUPILLARITY.

Deeds by Pupils.

1. Deeds of conveyance, and Contracts, executed by pupils themselves, are null and void; on the ground of that absolute incapacity of legal consent which has just been stated. This, of course, holds true whether the pupil has tutors or not. And such deeds, although not challenged till after the anni utiles have expired,[1] will be ineffectual.

Deeds by Tutors.

2. Deeds which are made by the tutors of a pupil for him, stand so far in a different situation, that they are not null; the necessary consent being interposed, and the incapacity of the pupil supplied by the interposition of the tutors. But still the deed is subject to challenge, and the property alienated to restitution, if judicially questioned within four years after the pupil has attained majority.[2]

Deeds affecting Land.

3. The favour of the law towards landed proprietors goes even farther than this, in regard to deeds of alienation of the pupil's land; or deeds burdening his heritage. These are held to be beyond the tutor's power; or at least the presumption of lesion is so strong, that it is not to be refuted otherwise than by the previous sanction of the Court of Session. This necessity for judicial sanction appears to have been introduced with us after the example of the Roman law; which required the previous decree of the prætor to make valid the sale of a pupil's immoveable estate.[3] By the original rule in the

[1] RANKINE against RANKINE, 31st May 1821; 1. Shaw and Ballantine, 43.

[2] See below, p. 134.

[3] See Dig. lib. 27. tit. 9. De rebus eorum qui sub tut. l. i. et seq. and Cod. de Admin. Tut. l. 22. SANDILANDS against Laird of NIDDRY, 5th February 1692, quoted by Stair, l. 6. § 18.

Roman law, it was only for payment of debt that the pupil's land could be sold.[1] But this rule was greatly relaxed, so as to introduce a sort of discretionary power, or judicial tutory, under which the prætor authorized such sales as were for the manifest benefit of the pupil. In adopting the original rule, we at first adopted also the relaxation. But this has been reformed in our more recent practice, and judicial sanction is now refused in all cases where the sale is not necessary, *first*, For the payment of debts for which the pupil is answerable;[2] and to this extent the judicial authority may be regarded as only an anticipation of what might subsequently be accomplished by diligence at greater disadvantage: or, *secondly*, The sale must be obviously necessary for the safety of the pupil;[3] mere expediency never being admitted as a sufficient ground to justify the granting of such warrants to tutors.

Deeds of Administration.

4. Tutors may effectually grant deeds of ordinary administration of their pupil's estate. And, 1. The Court will not interfere so as in any degree to lessen the responsibility of tutors in such cases. 2. Although the act, which the tutors are called upon to perform, be one which, if done by a person in full capacity, would have the effect of altering the succession, this effect will not follow as a consequence of any change on the subject made by the tutors. The administration of tutors for the pupil's benefit is thus relieved from a restraint under which, at one time, it was supposed to labour.[4]

Extraordinary Administration.

5. Acts of extraordinary administration, however, are beyond a tutor's powers; such as engaging a pupil in a mercantile partnership, however advantageous;[5] or granting leases of extraordinary duration. Nay it has been held, that no lease by tutors is effectual beyond the duration of their office. And although there seems to be no sound principle for such a rule,[6] it has been so long adopted and relied on that the matter is now not to be held open for decision;[7] and the only corrective which the Court has held competent, (though far from being complete), is to interpose their authority in such cases as suggest a necessity for judicial aid.[8]

[1] Dig. ut sup. l. 1. § 2.

[2] The case of VERE, in which, after the discretionary power of the Court had been exercised, it was, after an interval of fifteen years, recalled, shews the principle, while it illustrates the doctrine. On the authority of our institutional writers, the Court authorized a sale by the tutors of Mr Vere, in circumstances of most decided advantage (as it speculatively appeared) to the pupil and to the estate; though there was not the least call of necessity so to interpose. Tutors of VERE, December 1787. In 1802 this was challenged by the pupil, on his attaining majority, and the Court reduced the whole proceeding, reserving the purchaser's claim for meliorations. VERE against DALE, 29th February 1804; 13. Fac. Coll. 333.

See Ross against Ross, 9th March 1820; 20. Fac. Coll. 126. FINLAYSONS against FINLAYSONS, 22d December 1810; 16. Fac. Coll. 114.

[3] The case of debt presents a necessity, accompanied with a power on the part of the creditors to compel the sale, by judicial proceedings and diligence. But there is also a necessity leading more indirectly to the same result, to which the Court has yielded. As in the case of a lease, where the obligations incumbent on the pupil, as heir of the tenant, threaten an accumulation of debt that would be ruinous to him. MEIKLE against MEIKLE, 7th March 1823; 2. Shaw and Dunlop, 274. COCKBURN's Tutors against COCKBURN, 10th March 1825; 3. Shaw and Dunlop, 642.

[4] See 1. Ersk. 7. § 18. as corrected by GRAHAM against Earl of HOPETOUN, 6th March 1798; 12. Fac. Coll. 150. Ross against Ross's Trustees, 31st January 1793; 11. Fac. Coll. 40. MORTON against YOUNG, 11th February 1813; 17. Fac. Coll. 179.

[5] See below, of Partnership.

[6] It may be observed, 1. That the principle of law on which tutors are held to supply the defect of capacity of their pupils, in all that is necessary in the proper and reasonable administration of their affairs, seems fairly to authorize the granting of agricultural leases of ordinary duration. 2. That tutory is different from negotiorum gestio, of which the acts are valid only for preservation in a case of temporary necessity by absence. And, 3. That it seems enough to protect pupils, that the tutors cannot lower the rent but by auction, and that there is restitution on lesion. See 1. Ersk. 7. § 16.

[7] Lord REAY against ANDERSON, 5th February 1800; 12. Fac. Coll. 366.

[8] HALLOWS, 1st March 1794; 11. Fac. Coll. 245. But see Ross against Ross, 9th March 1820; 20. Fac.

II. DEEDS IN MINORITY.

In regard to deeds granted in minority, the minor being by law capable of consent, the rules are these:—

Minors without Curators.

1. A minor who has no curators may effectually enter into obligations, or grant conveyances inter vivos even of his heritage, subject to restitution for 'enorm lesion.'[1]

Minors with Curators.

2. If a minor have curators, either his father as administrator-in-law, or curators appointed by testament, or on his own choice, his obligations and deeds of conveyance granted without their concurrence, though not null as those of a pupil, are challengeable at any time without the necessity of proving lesion. The presumption of law is, that they are to the minor's lesion; and so a mere exception is sufficient in pleading. But, *first*, A minor may make a will, disposing of his moveable estate, without consent of his curators, although he cannot thus settle his heritable succession.[2] *Secondly*, He may effectually marry without consent of his curators, though he cannot make a marriage contract different from the disposition of the law itself, without their concurrence.[3] And, *thirdly*, If the consideration money or effects given for the obligation or conveyance shall be proved to have been profitably applied to the minor's use, the presumption of lesion is removed, and the transaction will be held unchallengeable.[4]

Curators concurring.

3. Where the curators concur with the minor, the act is legitimate, even if it be a sale of land;[5] and accordingly the Court will not interfere in such a case.[6]

III. RESTITUTION ON LESION AGAINST DEEDS IN MINORITY.

1. Deeds which are ipso jure null, as those of pupils, do not require reduction, but may be challenged at any time as void and ineffectual, without even alleging lesion.[7]

2. Deeds of minors having curators, without their concurrence, if not null, are at least, by the absolute presumption of lesion already taken notice of,[8] exceptionable at any time, even after the anni utiles, without the necessity of a formal reduction.[9]

3. Although the deed of a pupil or minor have been made with the full advice of his tutors or curators, still it is subject to reduction, in an action in the Court of Session instituted within four years from attaining majority, either at the instance of the minor, or

Coll. 126. In this last case the Court seem to have thought, that if they should authorize such leases on views of expediency, they would become the administrators of the estates of all pupils. The true remedy would have been, to hold this a point of ordinary administration; leaving it on the responsibility of the tutors, and the remedy against lesion.

[1] THOMSON against STEVENSON, 13th December 1666; 1. Stair, 411. and Dirl. 26. Creditors of CLERK against GORDON, 6th December 1699; 2. Fount. 71.

[2] CUNINGHAM against WHITEFORD, 8th March 1797; 12. Fac. Coll. 50. In WAUCHOPE against WAUCHOPE, 10th December 1738, Elchies, *Minor*, No. 6. and Notes, p. 291. the change, of bonds moveable, to bonds secluding executors, was held ineffectual, unless with the minor's consent, and this proved by parole. Affirmed in House of Lords; 1. Craigie and Stewart's Appeal Cases, 200.

[3] ANDERSON against ABERCROMBY'S Trustees, 31st January 1824; 2. Shaw and Dunlop, 662.

[4] GORDON against Earl of GALLOWAY, 11th December 1629; Durie, 473.

[5] THOMSON against STEVENSON, 13th December 1666; 1. Stair, 411.; Dirl. 30.

[6] WALLACE against WALLACE, 8th March 1817; Fac. Coll. A lease, on the same principle, is good not only during the curatory, but during its whole term, subject to restitution on lesion.

[7] BRUCE, 24th January 1577; Colvil. Morr. 3979.

[8] See above, p. 132.

[9] KINCAID, 20th May 1561; Maitland, Morr. 3979. ROBERTSON against OSWALD, January 1584, Colvil. Morr. 8980, where there was silence for 20 years. BELL against SUTHERLAND, January 1728; 1. Dict. 579.

of his heir, or of his creditors. The summons must be raised and executed against the person who received the conveyance within the four years. It is therefore a fatal objection to the action if the quadriennium utile has expired; and it is presumed (presumptione juris et de jure) that the minor has not been hurt by the deed.[1] It is also a good defence against the action, that the minor has ratified or even homologated the act.[2] But the oath of the minor never to call the deed in question will not ground a good defence.[3]

If the reduction have been once properly raised, it may be prosecuted after the quadriennium utile; or creditors may bring a reduction, adopting the original reduction properly raised within the term, although in the interval, before their own action has begun, the term should have expired.[4] When creditors thus adopt the challenge, it is either in the room of the minor himself, their debtor; or in the room of one entitled to succeed to the minor. In the former case, they of course must take the privilege as it stands in the minor, and bring the challenge within the term. In the latter case, these distinctions are observable: 1. That if the ancestor died in minority, they have four years from the time of his death during which to bring their action. 2. That if part of the quadriennium utile had expired at the predecessor's death, they can have only what remains, counting from that point of time. 3. That if the case should happen, that a minor having creditors should succeed to the minor whose deed is to be challenged, the creditors would seem to have the full extent of their debtor's minority, as well as what remains of the quadriennium unexpired, according to the common rule of minor succeeding minor.[5]

The two points of the pursuer's case in the action, are, 1. Minority; 2. Lesion.

1. Minority is fact, and may partake of all the difficulty of proving a point of chronology. It will be a good answer to this point of the pursuer's case, 1. That the minor was in trade, the transaction being mercantile; or in the exercise of an employment by which he gained his livelihood, the act being in the common course of that employment.[6] 2. That he represented himself as major, and thereby deceived the party, ignorant of his true age, to contract with him.[7]

2. Lesion.—This point of the case is made out, 1. By presumption: For example, in deeds without onerous consideration on the minor's part, as cautionary engagements; or in loans of money contracted by the minor, where misapplication is presumed, and the

[1] 1. Ersk. 7. § 35. It is not enough to have executed a deed of revocation, Ramsay against Maxwell, 25th January 1672; Gosford, Morr. 9043.

It was held, that reduction raised and executed against the original disponee within the quadriennium utile, was effectual, although the possessor of the lands acquiring from him was not called till after the expiration of the term; Belches against Calderwood, 8th November 1687; Harcarse, 203. This is not, however, to be relied on in practice.

[2] Melvil against Arnot, 5th July 1782; 9. Fac. Coll. 80.

[3] 1. Ersk. 7. 39.

[4] 1. Stair, 6. § 44. Hamilton against Sharp, 2d February 1630; Durie, 488.

[5] M'Math against Baron of Broughton, 14th March 1628; Durie, 361.

[6] This is partly grounded on the consideration of the interest of minors themselves in this situation, as giving them admission to the exercise of such lucrative occupations. See Galbraith against Lesly, 20th June 1676; Dirl. 175; 2. Stair, 428; Gosf. Morr. 9027. Heddel against Duncan, 5th June 1810; 15. F. C. 681. See also Craig against Grant, 5th July 1732; 1. Dict. 585.

But see Dick against Cuming and Smith, 8th July 1824; 3. Shaw and Dunlop, 231., where a bill in a Company name was suspended, on the ground of minority, and the unauthorized act of the minor's father including his name in the firm.

[7] 1. Ersk. 7. § 36. Kennedy against Weir, 23d February 1665; 1. Stair, 274. The bond in this case bore majority, which was held a good objection, unless the minor could prove the creditor's knowledge of his minority; or that he was fraudulently induced to assert majority in the bond. In a case where a minor became cautioner, he was held not barred from pleading minority, by having received the degree of Doctor of Medicine on falsely swearing to his majority, a year before the contract. Sutherland against Morrison, 19th January 1825; 3. Shaw and Dunlop, 449.

money must be proved to have been profitably applied.[1] Or, 2. By proof: As to which, lesion less flagrant, and more slender evidence of it, will be received, where a minor has no curators; or where the transaction relates to land; or where ready money is put into the power of a youth under age. But there will be much greater difficulty in the reduction, where tutors or curators have authorized the transaction, or where previous judicial sanction has been given.[2]

It is necessary to the reduction, that the lesion shall have proceeded directly from the transaction. Where a house has been advantageously purchased, and afterwards by accident has been burnt, the lesion is not thus direct. But it may be sufficient if greater hazard has been thrown on the minor, or greater temptation to imprudence and loss occasioned by the fault of the party; an illustration of which is found in the case of voluntary, as contrasted with necessary payments.[3]

The condition on which restitution is granted, is, That the restitution shall be reciprocal,—the price with interest repaid, meliorations indemnified,[4] &c. But if the transaction has been voluntary, and the interest of the minor has suffered by the extravagance or waste proceeding as the direct consequence of the dealing,—as in voluntary loans of money, or even in voluntary purchases of the property of a minor without curators,—in such cases, the reciprocal restitution will not be extended beyond the fund profitably employed for the minor.[5]

The extent of restitution is only so far as the minor's estate is lesed, or injury sustained. This will not, however, where restitutio in integrum can be given, entitle a purchaser to keep the subject, offering the balance of the value of the land, or other property; but only to demand mutual restitution or indemnification.

§ 2. RESTITUTION AGAINST DEEDS BY PERSONS INSANE OR FATUOUS.

The interests of creditors may be deeply concerned in questions of insanity; not only by the circumstance of their debtor's succeeding to a person in that unhappy state, but by the supervening insanity of their debtor himself, or by the circumstance of the debtor's property consisting partly of estates purchased from an insane person. The legal effect of insanity attaching to any deed or contract is to give restitution in integrum to the person injured, whether the insane person himself, or his heir, or his creditors; and this without any other limitation of time for the challenge than the years of the long prescription.

For the purpose of establishing a similar guardianship over persons incapable by disease, with that which is provided for persons under lawful age, the incapacity is to be ascertained by the verdict of a jury, under a brieve of IDIOTRY or of FURIOSITY.

This is a very old proceeding in the law of Scotland; and at first the question for the jury was confined to the present state of the person. In 1475, (by c. 67. of that year), the jury were directed further to ascertain the time to which the malady had retrospect, 'How lang tyme he was of thay conditions;'—'and fra it be knawin be the inquest that 'the persone be fule or furious, and the time thereof, the alienation maid by him after 'the time that the inquest finds that he was either fule or furious, sall be of na vail, bot

[1] See Viscount of ARBUTHNOT against MORRISON, 22d November 1716. 2. Dict. 22. 1. Craigie and Stewart, App. Cases, 7.

[2] This previous sanction does not preclude a challenge on lesion; but the proof of lesion must be very decisive. VERE against DALE, supra.

[3] 1. Ersk. 7. § 36. and § 41.

[4] This rule applied where the transaction with the minor was necessary. Earl of ABERDEEN against GORDON, 1st December 1708; 2. Fount. 468.

[5] THOMSON against STEVENSON, 13th December 1666; Dirl. 30.

'retretit and broucht again to him, as weil as the alienation made after the pursuing 'of the brieve.' The effect, however, of such a verdict is not conclusive either way. The object of the inquisition, properly speaking, is to authorize the guardianship of the law; and to give to the guardian, as the rule and also as the aid of his interference, the presumption arising from this inquiry.

The effect of the verdict may be questioned in various circumstances:—1. A deed granted *before* the time so fixed, is not by the verdict excluded from reduction, if competent evidence should be brought to establish insanity as in relation to that deed.[1] 2. A deed may be effectual, although made *after* the period fixed in the verdict as the commencement of the insanity. The trial on the brieve is ex parte, and that evidence which the holder of the deed may possess of a lucid interval during which the deed was made, may still be produced.[2] 3. A deed may be challenged on the ground of insanity, although the brieve of furiosity or idiocy has not been followed by a verdict of insanity. There may be insanity sufficient to reduce a particular transaction, though not enough for making out a case of status.

In the action of reduction, the rules of law are, 1. That a person of mature age is presumed to be in full capacity; and, 2. That a verdict of idiocy or of furiosity inverts this presumption; and from its date, or from the point of time specified in the verdict, raises the opposite presumption of incapacity.[3] The action of restitution then, on the ground of insanity, commencing with a presumption in the one way or the other, resolves into a proof on the one hand of idiocy or furiosity at the time of making the deed; or on the other, of lucid interval at the time the transaction was entered into. It is an inquiry which now, by the Judicature Act,[4] must proceed in the Jury Court. And in the issue of capacity or incapacity, the onus probandi will be laid on the reducer or on the maintainer of the deed, as there is a previous verdict of furiosity or idiocy, or as the inquiry into the state of mind first begins in the action of reduction.

1. The proof of insanity is chiefly matter of fact for a Jury, and commonly disposed of under the brieve of idiocy or furiosity. The point is, Whether the person is of mind and capacity fit to understand and transact the business in question?—Each case must depend upon its own circumstances: In some, the most common observer may distinguish the incapacity; in others, there is so much method in the madness, that to perceive the doubtful and uncertain point at which reason disappears, and lurking incapacity manifests itself, often requires the most skilful development and experienced observation.[5] The degrees of capacity required by law for different acts are various; and may so far be generally discriminated, that less capacity is required to make a will or settlement than

[1] HAY against KIELL, July 1810. Here a verdict found that the person was incompos mentis, or of insane mind, in the end of 1804: That he was of insane mind on 7th January 1807; and that he has been in that state of insanity ever since the last mentioned period, and continues so at present. This person, after public advertisement, sold an estate in 1805, to a stranger, for a full price. The cognition and verdict was in 1807, and then a reduction was raised. The question was of the state of mind during the period excluded from the verdict. The Court, according to the mode then in practice, allowed a proof, and two questions were raised: 1. Whether the verdict was not equal to a verdict of sanity during the interval omitted: It was held otherwise. 2. Whether there was insanity at the time of bargain; which made a very curious case of evidence.

[2] In several early cases it was found, that a deed within the term in the verdict is not null by exception, but only reducible by action; and this in order to give room for the requisite inquiry relative to the particular deed, as perhaps made in lucid interval. CRAWFORD, June 1583. Spottiswood, 162. Colvill, 369. Morr. 6276. See also LOCH against DICK, 26th July 1638. Durie, 861.

[3] This is law in England also. See 1. Collinson on Idiocy and Lunacy, 396.

[4] 6. Geo. IV. c. 120. § 28.

[5] See observations of Lord Stowel, TURNER against MEYERS, 1808; 1. Haggart's Consist. Cases, 417.

to transact a bargain. Little more is required for the former, than that one should be able to understand the effect of so far yielding to his affection or aversion as to alter the disposition of the law of succession; while, in bargains, though greater capacity is required to chaffer and avoid deception, there is a natural and just limitation, that where the transaction is in the course of the person's trade, courts of law must be more averse to give relief.

Physicians have distinguished, both by their symptoms and effects, many classes of this unhappy malady: But in law these are all reduced to two—IDIOCY and FURIOSITY.

The idiot is described in our brieve as 'Incompos mentis, fatuus, et naturalitur idiota:' and this consisting chiefly in absolute imbecility of mind, seems to be incapacity of a more incurable kind; more permanent; more exclusive of those intervals of intelligence, by which the violence of the lunatic is occasionally relieved.[1]

Furiosity comprehends all those more violent species of the disease, which are designated in common speech as madness, lunacy, or mania. We have not in the language of the law of Scotland the word Lunacy, by which the law of England so unphilosophically distinguishes the state of insanity.[2] The term with us is more correct, Furiosity; the person being described in the brieve as 'Incompos mentis, prodigus, et furiosus, qui nec 'tempus, nec modum impensarum habet, sed bona dilacerando profundit.' In this class of the maladies which affect human capacity, there is greater violence, but there is also occasional relief by lucid interval; during which legal capacity returns, and deeds of conveyance and engagement may effectually be made.

In the trial of both sorts of insanity, it is an essential point that the Jury should themselves see and examine the person, if still alive.

2. Against the presumption induced by a verdict of insanity, or in the proper discrimination which belongs to the original inquiry, the most difficult question relates to LUCID INTERVAL. It has been well said, that it is scarcely possible to be too strongly impressed with the great degree of caution necessary in examining the proof of lucid interval. But the law does recognize as valid, acts done during such an interval;[3] and this rule of law must not be defeated by overstrained demands of the proof of the fact. It may be observed in general, that the lucid interval may be either in relation to time, or to subject. 1. If in point of time there is proof of remission, or of intermission, either periodical or at a particular date, including the interval during which the deed was made, it is enough to sustain the deed. There is no rule in law fixing any precise duration for a lucid interval—a week, a day, an hour: The point truly for inquiry is, Whether there was time sufficient for the rational doing of the act in question? 2. If the description of the malady be such that the person is insane on particular topics only, and the act done, with all its associations, form no insane topic; this will be enough. 3. In either inquiry, the act itself, and the manner of performing it, are of the first importance. If it be a rational act, rationally done,[4] without the guidance and control of another; if there be no delusion, no insane irritation, or hallucination, inducing it; if from the deed, or the manner, no indication of frenzy or of folly can be gathered; it will be sustained. 4. It is very important that facts, not opinions, shall be relied on in matters of this sort. The opinions of calm and skilful observers may be useful to guide the Jury; but even from such persons, no opinion is of weight independently of the fact on which it rests: And to the evidence of keepers, and

[1] In the class of Idiocy, are ranked those who are deaf, dumb, and blind.

[2] See 1. Blackst. 304. Ex parte BARNSBY, 3. Atk. 174.

[3] 'Furiosi autem si per id tempus fecerint testamen-'tum quo furor eorum intermissus est, jure testati 'esse videntur.' 2. Inst. 12. § 2.

[4] Not merely 'actus sapienti conveniens, sed actus 'sapientis.'

of nurses, and of the vulgar, who, with a carelessness, or a prejudice, which overlooks all the necessary discriminations, and misinterprets every action of a person pronounced to be insane; this observation requires to be very vigilantly applied.[1] 5. Some difference of opinion has arisen as to the strength of proof necessary in a case of lucid interval, considered relatively to the proof of the insanity to which it forms an exception. Two great masters in jurisprudence have expressed opposite opinions on this question. Lord Thurlow seems in both cases to have deemed it necessary to have a proof as demonstrative of the lucid interval as of the insanity, and of a restored strength of mind not inferior to the original state of intellect of the person in question. But Lord Eldon has well limited the doctrine; since neither the same demonstration can be expected in acts of rational calmness, as in the striking symptoms of insanity; nor does the law require, in order to validate many acts, the same perfect tone of intellect as while untouched by disease; but is satisfied with a much less degree of capacity.[2]

§ 3. OF RESTITUTION AGAINST THE DEEDS OF PERSONS INTERDICTED.

Inequality alone, or lesion, affords no ground of challenge of the deeds of a person of full age, whose capacity is unimpeached. There must be combined with it evidence of fraud and circumvention. But there may be, in one of perfect age, a degree of weakness, facility, or prodigality, which, although not such as to justify a verdict of insanity, and place him under guardianship as insane, may yet demand some protection for him against unequal or gratuitous alienations: and this is attained by a proceeding which gives warning to all who may enter into contracts with him, that he is under trust, and not free to exercise the power of alienation, directly or indirectly, without consent of his interdictors. It is this warning or notice which gives effect to the interdiction.

Heritage only.

This remedy, called INTERDICTION, seems originally to have reached all the transactions of the person interdicted: It extends now only to the alienation of his heritable property, and to his other transactions only in so far as they are made the ground of proceedings against his heritage.[3]

Available to Creditors.

The effects of this protection, and the right of challenge arising from it, may materially interest creditors—either those to whom the interdicted person stands indebted; or those whose debtor has succeeded to the property of him who stands interdicted. The challenge is competent to creditors adjudging the estate which has been conveyed; or against which diligence is attempted on bonds liable to challenge on interdiction.[4]

Judicial Interdiction.

Interdiction properly is a judicial proceeding, grounded on an inquiry into the state of mind of the person whose property is to be protected; and denouncing, at the suit of those interested in him, the necessity and the fact of his being placed under the care of certain persons, without whose consent his deeds will be subject to challenge, on a proof of lesion alone.[5] The summons and decree of interdiction include, 1. A declarator of the facility of the person in question; 2. An interdiction or prohibition against selling

[1] Among the cases reported on this question, perhaps the most interesting and instructive is that of CARTWRIGHT in the Prerogative Court, before Sir William Wynne, in 1793. It is reported by Dr Phillimore, vol. 1. p. 90. See also WHITE v. DRIVER, 1809; ib. p. 84.; and the Scottish case of TOWART against SELLARS in House of Lords, 16th May 1817; 5. Dow, 231.

[2] ATTORNEY GENERAL against PARNTHER, 3. Brown's Chan. Cases, 443. Ex parte Holyland, 11. Ves. 11.

[3] 1. Stair, 6. § 41.; 1. Ersk. 7. § 57.

[4] Lord SALTON against PARK, 20th February 1666; 1. Stair, 359.

[5] Sometimes, in the course of an action, interdiction proceeds ex parte judicis in the Court of Session.

his lands, wadsetting, &c.; or contracting debt whereby his lands may be affected; and, 3. A declarator, by anticipation, of the nullity of all acts and deeds contrary to the interdiction.

For attaining the great object of notice, it is requisite, 1. That the person to be interdicted shall be cited; 2. That the interdiction shall be published at the market-cross of the head burgh of the person's residence; and, 3. That it shall be duly registered in the general or particular register of inhibitions,[1] within forty days; and till registration it has no effect whatever, 1581, c. 119. If registered in the general register, the interdiction will reach all the interdicted person's lands in Scotland. If not so registered, and omitted also in the particular register of the county in which the lands lie, the interdiction will not affect those lands. Registration in the record of inhibitions is effectual for all heritable property, whether in shire or burgh, within the district.

The effect of interdiction is in two respects different from that of minority:—1. It inverts so far the common rule of law, as to make lesion by itself a competent ground of reduction of the deeds of the person interdicted, when granted without the consent of the interdictors; but such deeds are not null, they are only reducible on proof of lesion.[2] 2. If the deed be granted with consent of the interdictors, no challenge will be competent; unless the deed be to the benefit of the interdictors themselves. Lesion alone, which in deeds of minors, even with consent of curators, is a good ground of reduction, is not sufficient, where interdictors consent.

There are two points in the reduction on interdiction, 1. That the interdiction has been regularly obtained and duly published; 2. That there is lesion by the deed. It has been laid down by Erskine, but on no sufficient authority, that an interdicted person can make no effectual settlement of his lands, however rational, without consent of his interdictors; nor even with it.[3] The case to which he refers as reported, does not sustain his doctrine, being a settlement in favour of the interdictor himself.[4] No other lawyer has delivered the same law, and the doctrine goes much beyond the legal effect of such imbecility as will authorize interdiction; especially if it can be held as meant to be applied to voluntary as well as judicial interdiction. If the proper effect of interdiction be to indicate such imbecility only as exposes the person to imposition and lesion, the consequence, in relation to a deed of succession, should be no other than to facilitate a reduction where the settlement is irrational; or where it has been induced by circumvention and undue influence.[5]

Voluntary Interdiction.

But although interdiction is a judicial proceeding, and to its efficacy formerly it was necessary that inquiry should be made into the state of mind, and that, by declarator, an imbecility should be judicially declared analogous to that of minority;[6] yet considering this as a remedy which proceeds no further than to protect against lesion and gross inequality, it has not been rigidly required that there shall be a previous decree of declarator. The increasing delicacy of modern manners has gradually led to the introduction

[1] See 1. Ersk. 7. § 56.; 2. Ersk. 11. § 4, 5.

[2] The distinction between deeds of minors and of interdicted persons in this respect, was first established in a case reported by Gosford, ANONYMOUS, 27th February 1672, 1. Brown, Sup. 655.; afterwards it was confirmed in STEWART against HAY, 10th November 1676, Dirl. 186. See Annot. on Stair, p. 34.

[3] 1. Ersk. 7. § 58. In the PRINCIPLES, he states the inability as applicable to the case of a settlement *without consent of interdictors*, 1. Ersk. Pr. 7. § 34.

[4] TENANT against SPRUEL, December 1725; 1. Dict. 479.

[5] See above of INSANITY, p. 138.

[6] AUCHENBOWIE against INTERDICTORS, 2d July 1607, Had. MS. Morr. 7157. ANONYMOUS, 30th January 1618, Kerse, Morr. 7158. Is this the case relied on by Erskine, 1. 7. § 53.?

of voluntary interdiction, as almost superseding the judicial, since the distinction was fairly established between minority and interdiction. But the combination of voluntary interdiction with deeds of entail, and the use of it as a separate protection, were not unknown in practice towards the beginning of the 17th century.[1] The great point is the notice of interdiction—the warning against relying on the acts of a man who has placed himself under trust. In voluntary, no less than in judicial interdiction, registration is necessary.

§ 4. RESTITUTION ON THE GROUND OF FACILITY, CIRCUMVENTION, AND LESION.

The deeds of persons of full age, not cognosced, nor interdicted, may yet be reduced on showing evidence of weakness of mind, combined with fraud, (or circumvention, as it is called in this instance), and lesion. Fraud alone may indeed ground reduction where it is such as to give occasion to the contract. But facility alone, where the person has understanding enough to save himself from a sentence of idiotry,[2] is not a sufficient ground of challenge: And still less is lesion by itself, or gross inequality. But where lesion and facility concur; or where facility and circumvention appear; or even where there is lesion so gross as to indicate the other two qualities, a deed of conveyance or contract will be reducible.

Such cases must, of course, depend on their own circumstances; and scarcely can be brought under any general rule of law.

CHAPTER IX.

OF RIGHTS OF SUCCESSION IN MOVEABLES.

As, in relation to the heritable estate, creditors are entitled to adopt and make effectual their debtor's rights of succession, so in moveable succession, testate or intestate, the right of the debtor may be made available for the payment of the debt. But there is not much to be delivered on this subject, that may not find a better place in a subsequent part of this Work. Thus the necessary points in the law of succession and confirmation of moveables, will be fully explained in commenting on the diligence for attaching moveable succession after death.[3] So the interest of creditors in the effect of marriage contracts and bonds of provision, as augmenting or diminishing the funds for their payment, will be taken into view in a full commentary afterwards to be given on marriage contracts and bonds of provision, in treating of the claims of wives and children.

But one or two observations may be worthy of attention here, in relation to the vesting of rights in moveable succession.

Executry vests ipso jure.

1. VESTING OF EXECUTRY WITHOUT CONFIRMATION.—Formerly it was of no avail to creditors that there should have opened to their debtor a lucrative succession in moveables, unless the right was vested by confirmation during their debtor's life. His death without confirmation carried the whole executry, of which he had not actually attained possession, away from his representatives and creditors, to the next of kin of the deceased. By

[1] See SETON against ACHESON'S Creditors, 11th December 1622, Durie, 38.; ROW against MONRO, 23d December 1703, 2. Fount. 205.

[2] 4. Ersk. 1. § 27.

[3] See below, Book III.

the recent Act[1] this is altered, and the succession is made to vest ipso jure without confirmation. The language of the statute is not, perhaps, very happily conceived for bringing out the principle which it was intended to sanction. But it will, no doubt, receive the most liberal construction, in order to give efficacy to this most just and expedient rule.

Special Assignations and Legacies.

2. SPECIAL ASSIGNATIONS AND LEGACIES.—Debts or effects specially assigned or bequeathed, effectually vest without confirmation,[2] and may be attached by creditors as a fund for their payment; and so legacies vest ipso jure by mere survivance of the legatee.[3]

Legitim.

3. LEGITIM is the part which belongs to the children of the communio bonorum of their parents. On their father's death they have immediate right to it without confirmation,—and this right their creditors may attach.

4. JUS RELICTÆ.—On the same principle the widow's share of the goods in communion requires no form to vest it. She is ipso jure entitled to demand it, and her representatives or creditors, or those of a succeeding husband, are entitled to the benefit of the fund.

CONCLUSION OF PARTS I. AND II.

RATIFICATION OF EXCEPTIONABLE DEEDS—HOMOLOGATION—APPROBATE AND REPROBATE.

MANY of those rights which have already been the subject of consideration in this part of the Work, may be renounced or departed from, either by express agreement and renunciation; or by implied assent and sanction. Under the former may be comprehended those deeds of ratification, by which, in the case of a married woman, a minor, or an heir, an exceptionable conveyance or settlement may acquire the full effect of the most legitimate: Under implied consent may be included the two important doctrines of homologation, and approbate and reprobate. The principle which regulates the effect of such approbation is the same, whether it be express or implied, if the approbation be once clearly ascertained.

§ 1. EXPRESS RATIFICATION OF EXCEPTIONABLE CONTRACTS, CONVEYANCES, OR SETTLEMENTS.

Contracts, or deeds of conveyance or of settlement, may be saved from fatal objections, by the express approval of those who would otherwise be entitled to challenge them; and this may operate as a bar, not merely against the approver, but against his heirs and others coming into his place.

Ratification of Wife.

1. RATIFICATION BY MARRIED WOMAN.—Deeds by a wife, conveying to a stranger any heritable property to which she has right, either her own, or the subject of her liferent or other provisions, may be challenged by her, on the ground of having been granted through the just fear of her husband, or compelled by his violence.[4] But against a challenge on that

[1] By 4. Geo. IV. c. 98. it is enacted, that from and after 19th July 1823, 'in all cases of intestate succession, where any person or persons, who, at the period 'of the death of the intestate, being next of kin, shall 'die before confirmation be expede, the right of such 'next of kin shall transmit to his or her representative, 'so that confirmation may and shall be granted to such 'representatives, in the same manner as confirmations 'might have been granted to such next of kin, immediately upon the death of such intestate.'

[2] 1690, c. 26.

[3] 3. Ersk. 9. § 30.

[4] See JOHNSTON against NAPIER, 29th June 1708, 2. Fount. 445. for illustration of this ground of challenge.

ground, a ratification made by the wife judicially, 'outwith the presence of the husband,' affords a complete defence, even if proof of force and fear be offered in impeachment of the deed.[1]

It has been said, that the ratification, if truly, though secretly, made under the same compulsion with the deed itself, ought to be reducible, as the deed unratified would have been.[2] This doctrine, however, is against a determination which, so early as 1481, was made on this question, and which is entered in the Rolls of Parliament, c. 84. as fixing the law at that time. And although there is a decision in the beginning of the seventeenth century to the contrary,[3] the question has subsequently been determined conformably to the rule in the statute-book.[4] There seems to be no doubt that this would now be held the rule of law, unless the party taking benefit by the deed should be proved to have been participant in the violence, or at least to have had notice of the compulsion under which the deed was granted and the ratification made.

2. Ratifications by Minors, made after majority, have the effect of discharging all claim of restitution on lesion.[5] But where the ratification is made in minority, either at the time of the original contract, or subsequently, it has no effect as a defence against the minor's reduction.[6] Even where made in majority, immediately after attaining the legal age, and without due opportunity of learning the state of his affairs, the Court will give great effect, in a reduction of the ratification, to any circumstances of deception under which it may have been executed; and in particular, to proof of a continuation of the influence or deception which may have operated during minority.[7]

3. Ratification by an Heir will be effectual to bar him from challenging the settlement of his ancestor, as made on deathbed; or as not duly authenticated; or as contra fidem tabularum nuptialium, &c.; provided the heir be of age, and in such circumstances that the ratification cannot be ascribed to his peculiar situation.[8] Such ratification is ineffectual, for example, where an heir is required by his dying ancestor to ratify a deed made on deathbed, and he complies, out of regard to the peace of the dying man.[9] But some care must be taken in discriminating the cases fit for the application of this principle. The expression of Mr Erskine is not happy; and if extended to other cases than this of deathbed, (to which alone the precedent quoted applies), it might sanction a very erroneous principle.'[10]

[1] 1. Ersk. 6. § 32. 36. Without such ratification the deed is good, if not liable to a challenge ex vi aut metu. Hay against Cuming, 28th June 1706; 2. Fount. 338.

[2] 1. Ersk. 6. § 34.

[3] Anonymous, 17th June 1612; Hadding. Morr. 16481.

[4] Grant, 8th July 1642; Durie, 898.

[5] See above, p. 134.; 1. Ersk. 7. § 39.

[6] It was formerly held, that if such ratification was made by an oath, though in minority, 'never to call 'the deed in question,' it was effectual. But a statute was made in 1681, 19. for the purpose of preventing such oaths; declaring them to be null and void; punishing the obtainers of them; and making a challenge competent to the relations of the minors. See also 1. Ersk. 7. § 39.

[7] Murray against Murray, 21st January 1826; 4. Shaw and Dunlop, 374. 1. Fac. Coll. New Series, 222.

Lochiel's Trustees against Cameron, 8th July 1795, where a minor having been secretly supplied with money on an engagement to sell two farms, and, immediately on reaching majority, while ignorant of the state of his affairs, made a conveyance accordingly, without any advice or the aid of a man of business, the transaction was reduced on circumvention and lesion; cited 1. Fac. Coll. New Series, p. 230.

[8] See Murray against Murray, 21st January 1826; 4. Shaw and Dunlop, 374.

[9] Dallas against Paul, 13th January 1704; Dalr. p. 59. See also 3. Ersk. 8. § 99.

[10] Mr Erskine places it on the ground, that the ratification has proceeded merely 'from the fear of

It may be observed with regard to all these several cases, 1. That the ratification is ineffectual wherever it is liable to the same exception with the deed ratified; as a wife's ratification in the presence of her husband; or a minor's, while yet in minority. And, 2. That it can operate as a renunciation only of those rights which are vested in the person ratifying, and which that person is in circumstances to alienate. So the ratification of an heir-presumptive, though binding on him and his heirs, will not affect the heir-apparent, should the ratifier not survive to succeed to the right: Neither will a ratification, which is merely personal, be effectual in competition to divest creditors of a real right which requires a conveyance. See below, p. 146.

§ 2. IMPLIED ASSENT, OR CONFIRMATION, OF PREVIOUS DEEDS OR CONTRACTS.

By implied assent, as well as by express ratification, a right or ground of challenge may be effectually renounced; and the doctrines which are comprehended under this head present little difficulty, except that of applying the rules of evidence by which it is to be determined, Whether the person entitled to the right or challenge in question can fairly be held to have abandoned or renounced it, to the effect of establishing the deed against which it might have been pleaded? On this principle of implied assent, the two doctrines of Homologation and Approbate and Reprobate depend.

1. OF HOMOLOGATION.

Homologation is a word used with us in a sense somewhat different from that in which it is understood in other systems of jurisprudence. In the Continental law, homologation is an express act of judicial sanction or approbation, confirming and enforcing a private contract or transaction which would otherwise be exposed to objection.[1] In this sense, there are few examples of judicial homologation in Scottish law: Perhaps as such may be reckoned, 1. The act by which the Court of Session confirms a contract of composition among creditors in a sequestration, which without this sanction would not bind any but those who consented to it;[2] 2. The judicial sanction of a trustee elected in sequestration, who, in the same way, might be objected to by the minority who voted against him; 3. The decree confirming the sale of a pupil's land, on the ground of necessity; 4. The decree which, on occasion of a judicial reference, is pronounced in terms of the award of the referee; 5. The judicial ratification by a married woman, is also an example of this sort of homologation.

But homologation, as commonly used in the language of the law of Scotland, corresponds more with the doctrine of Implied Confirmation in other systems of law. It is that assent or approbation of a deed, conveyance, settlement, or contract, which is inferred from circumstances; supplying, in the case of the obliger or granter, the want of legal evidence of consent, and establishing as a recognized engagement a contract defectively

'incurring the ancestor's displeasure;' and 'few 'heirs,' he adds, 'for fear of being disinherited, 'would dare to refuse to sign such renunciations;' 3. Ersk. 8. 99. But it would rather seem, that if the ancestor *could* effectually disinherit, and is prevented from doing so only by the heir's consent, it would be an act which the heir would not afterwards be entitled to retract. This fear of disinheriting is not the species of fear which the law regards as sufficient to annul consent.

[1] It proceeds upon an application to the proper Judge; who, on due inquiry made, and the assent of all concerned, or the rejection of frivolous objections, ratifies and confirms the act.

[2] See below, Book VI.

entered into: Or giving sanction and effect to a conveyance or settlement against which exception might be taken.[1]

Homologation is a generic term, comprehending all confirmations by implied assent; and so includes Approbate and Reprobate; which, however, as a separate doctrine, admits of some modification, to be afterwards explained.

Homologation may be either, by the subsequent approbation of the granter or maker of the obligation, deed, or settlement; or by the acquiescence of one who, having an interest adverse to it, confirms what has been done. Homologation of the former kind, bars locus pœnitentiæ: Homologation of the latter, bars all exception otherwise competent.[2]

When the original party homologates, he either ratifies a deed or obligation already executed, but imperfectly; or he adopts and gives effect to what would otherwise be null. When there is already an obligation existing, though imperfect or subject to exception, homologation may have the effect of confirming it as good from the first: Where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect.

When the homologation is by one not an original party to the deed, it is only where the deed is objectionable, but not absolutely null, that this implied assent is available. Homologation is here merely a bar to the exception.

In order to give the same effect to the approbatory act as to the full original consent, it is necessary, 1. That the assent be clear and indisputable, applying directly and unequivocally to the contract, conveyance, or settlement said to be homologated; 2. Such contract, conveyance, or settlement, must be fully known to the person homologating, together with the state of matters as affected by that deed;[3] and, 3. It must be an act that can be fairly ascribed to no other purpose than that of giving sanction to the deed or contract in question. The class of cases in which questions have most frequently arisen on these points, are those in which a person having an adverse interest has subscribed the deed as witness. The proper and only legitimate purpose of this act is to attest the authenticity of the subscription of the granter of the deed; and, therefore, it infers not, in the common case, homologation of the deed.[4] But where, in addition to this, either the connexion of parties and nature of the transaction is such as to afford real evidence of knowledge of the deed; or where there is evidence of its having been read to the person so subscribing; the subscription as witness has been held as homologation.[5] The peculiarity, however, of an heir's condition, called on to witness the execution of a death-bed deed, has been held a sufficient ground for raising, in that particular case, an exception to this last rule.[6]

[1] It has thus had the same effect with perfect consent, or concurrence, at the first formation of the contract, or granting of the conveyance, or making of the settlement.

[2] Erskine seems in his large Institute almost to narrow the doctrine to the former of these cases, 3. Ersk. 3. § 47. But this inaccuracy of language is only in his Posthumous Work: In the Principles it is stated correctly, 3. Prin. 3. § 15.

[3] See JOHNSTON against PATERSON, 29th November 1825; 4. Shaw and Dunlop, 234.

[4] POURIE against JOHNSTON, 8th June 1613; Hadding. Morr. 5629. WALWOOD against TAYLOR, 28th July 1625; Durie, 183. VEITCH against PALLAT, 1st February 1676; 2. Stair 408.; 3. Ersk. 3. § 48.

[5] DAVIDSON against DAVIDSON, 13th July 1714; Bruce, 86. JOHNSTON against BERRY, 7th July 1725; Edgar, 185. See a distinction in BOTHWELLS against Earl of HOME, 11th February 1748; Kilk. 611.

[6] See above, p. 143. See the cases of STEWART against STEWART, 25th Jan. 1663, 1. Stair, 195.; and HALYBURTON against HALYBURTON, 4th July 1666, 1. Stair, 388.; as corrected by DALLAS against PAUL, 13th January 1704; Dalrymple, 59.

Homologation being an implied confirmation of a previous obligation, contract, or deed, a protest against the inference which might otherwise collaterally arise from the act to be done, will exclude homologation. But where the person so protesting is not entitled to do the act, or take the benefit which he contemplates, without undertaking as a condition of it the obligations imposed by the deed, the protest will have no effect in discharging such obligations. This, however, belongs to the doctrine of approbate and reprobate; which will be considered immediately.

The effect of homologation, when clearly established as an implied assent to the deed or contract, is similar to that of express ratification. Therefore, 1. It sanctions the whole deed, if it be one which is indivisible:[1] But if divisible into parts, the homologation of one of the separate parts will not confirm the whole:[2] 2. Where the matter homologated is a deed or written instrument, and there is a verbal error in it, the homologation will be held to sanction the deed or instrument in its true meaning, but not the error:[3] 3. Homologation will bar him who so confirms the deed, and his representatives; but not third parties entitled to rely on a real right; and so homologation of an heritable bond, in which one of the witnesses was not designed, and on which infeftment followed, was held ineffectual to support it as a real right in competition, although good to support the bond as a personal debt.[4]

2. OF THE DOCTRINE OF APPROBATE AND REPROBATE.

This is a part of the general doctrine of homologation. While acts of approbation, from which no benefit arises to the approver, are disposed of under the doctrine of homologation; those acts from which benefit arises, although strictly speaking also acts of homologation, are considered by lawyers under the head of Approbate and reprobate. This doctrine is expressed in the maxim, 'Quod approbo non reprobo;' and it has been stated from the highest judicial authority in the following manner:—'It is equally settled 'in the law of Scotland as of England, that no person can accept and reject the same 'instrument. If a testator give his estate to A, and give A's estate to B, courts of equity 'hold it to be against conscience that A should take the estate bequeathed to him, and 'at the same time refuse to give effect to the implied condition contained in the will of 'the testator. The Court will not permit him to take that which cannot be his but by 'virtue of the disposition of the will, and at the same time to keep what, by the same 'will, is given, or intended to be given, to another person. It is contrary to the established 'principles of equity, that he should enjoy the benefit, while he rejects the condition of 'the gift.'[5]

There is, in such cases, strictly speaking, an alternative offered to the party; and a necessity raised for making an election either to accept and comply with the condition, or to forego the intended benefit. In this respect, the Scottish doctrine of Approbate and reprobate approaches nearly to that of Election in English jurisprudence. The great

[1] STEEL against STEELS, 13th January 1774, 6. Fac. Coll. 255.; Tait, voce Homologation, 5. Brown, Sup. 471. See also the previous case of ERSKINE against ERSKINE, January 1682; Sir P. Home, MS. Morr. 5703.

[2] PRIMROSE against DUIE, 22d November 1662; 1. Stair, 144. This case, however, is not a good illustration; for the acceptance which was pleaded as homologation did not necessarily confirm the decree-arbitral.

[3] WAUCHOPE against HAMILTON, 1st December 1711; Forb. 551.

[4] LIDDEL against Creditors of DICK, 20th July 1744; Kilk. 255. Elchies, *Homologation*, and Notes, p. 185.: Perhaps Lord Kilkerran's expression is a little too broad, 'that it was never found in any case 'that homologation was good in a competition.'

[5] KERR against WAUCHOPE, in the House of Lords, 1. Bligh, 21.

question to be determined is, In what cases the necessity of an election arises? or when a person can take benefit by a deed, without the necessity of complying with the indication of intention, as a condition under which that benefit is conferred, or intended to be conferred? In clearing this doctrine, not only do the same difficulties occur which have already been considered in treating of Homologation; namely, whether the act in question truly is such as to infer a sanction to the imperfect deed, contract, or settlement, in its full extent and effect; but, superadded to these, there is another set of difficulties, relating to the power of the party who makes the deed to impose, as a condition of it, that alternative which requires a choice to be made; the benefit to be accepted along with its burden, or the proffered advantage forfeited.

The alternative is raised, and the necessity of making choice between the benefit and the burden imposed, either by force of an express or of an implied condition; such as one person has the power to impose, and the other is bound to submit to. The point may occur in one of two situations: either where no step has yet been taken to declare the choice; or after the benefit conditionally given has been already accepted, and a desire is manifested to avoid the fulfilment of the condition. The same principle will, of course, regulate both cases.

Express condition.

I. Where the condition is express, and clearly stated as such, the doctrine is settled, that a person cannot accept and reject, approbate and reprobate, the same deed.[1] Where, for example, one having a land estate of small value, and a large personal estate, bequeaths by his will the personal estate to his heir, not otherwise entitled to it, under the condition that he shall give the land to another; the heir must either comply with the condition, or forego the benefit intended for him.[2] A difficulty may, in such cases, indeed arise, with regard to the power of imposing the conditions, or with regard to the validity of the mode in which that power has been exercised. And,

1. As to the power: Although the person imposing the condition may not have legitimate power substantively to make such a disposition, (as a minor to make a settlement of his land); yet if imposed expressly as a condition in the bequest of personal estate which the person can make, it has been held in England (though with much doubt) that it is operative. On the same principle, a question has been raised respecting deeds made on deathbed, in which conditions affecting heritage, and the heir's right of succession, have been intro-

[1] See above, p. 146.

[2] On this principle the case of CUNYNGHAM against GAINER was decided, 17th January 1758; 2. Fac. Coll. 155. And the question had been viewed in the same light in England, where Lord Hardwicke, in Chancery, had some time before decided in the same way upon the same will. See 1. Bligh's Rep. in House of Lords, 27.

The doctrine was again applied in England, in BRODIE against BARRY, 1813, where one, by his will, devised and bequeathed to trustees all his estates, both in England and Scotland, on trusts for certain purposes, and, among others, to form a distributable fund to be divided among his nephews and nieces. On his death, his heir-at-law in Scotland was a niece included in the distribution; and against her a bill was filed by those interested in the distributable fund, in order to have her put to her election, either to forego the Scottish estate, which the will was ineffectual to carry, although intended to go with the other trust-estate; or to stand excluded from the benefit of the distribution. Sir William Grant, Master of the Rolls, decided, 'that the heir must make election.' 2. Ves. and Beames, 127.

GIBSON against M'BAIN, 20th June 1786; 9. Fac. Coll. 421. Here, by will, two estates were settled; an estate in India on J. C. M'Bain; and an estate in Scotland on Janet Gibson, with an express exclusion of the person succeeding to the Indian estate from partaking of the Scottish. The question arose in relation to an heritable bond to which the testator had not made up titles, and which J. C. M'Bain claimed as not falling under the devise. The Court held, that as he had taken the estate in India, with the condition annexed, 'that he should stand excluded from any 'dividend of the effects or estate which was, or might 'become the property of the testator in Scotland,' he was debarred from claiming any part of the sum in question.

See also Lady E. and M. KERR against WAUCHOPE, in House of Lords; 1. Bligh, 1.

duced: But although the deed on deathbed, if it stood by itself, might be ineffectual to carry land, yet where such conveyance is made an express condition of a will of personal estate, the benefit of that will cannot be assumed without undertaking the condition.

Where the condition is such that the person on whom it is imposed is naturally, or by law or contract, disabled from fulfilling it, he will not be placed under the necessity of making his election. So if an illegal condition be imposed, or one which is impossible, it will be held pro non scripto.[1] So also, although one may effectually impose it as a condition of his gift, that his disponee shall purchase and entail certain lands, or shall entail his own lands: Yet if he shall include under such express condition lands belonging to another, but which, being already entailed, cannot be purchased; or lands belonging to the disponee, but already under an entailed destination, which cannot be altered; this is not a settlement which can legitimately raise the alternative, requiring election to be made; but the disposition will be effectual although the condition should not be complied with.[2] In such cases, however, a question arises whether compensation may not be demanded.[3]

2. As to the mode of imposing the conditions, there are certain forms settled by law as necessary, in point of solemnity and proof, to evince intention on particular occasions: As, in Scotland, a deed must be authenticated according to the Act 1681, c. 5. in order to convey land: In England, by the statute of frauds, a devise of freehold must be executed with certain ceremonies; and till lately, (55. Geo. III. c. 192.) wills of copyhold property, without surrender, were ineffectual.[4] But although, as substantive acts, such imperfect wills and settlements are ineffectual; yet, where they are made expressly conditions of a will sufficient to convey the personal estate, the alternative to the benefit intended by that will to be conferred, will be effectually raised; and the relinquishment or conveyance of the heritage will be required as the condition of the acceptance of the benefit.[5]

Implied condition.

II. Where the condition is only implied, the question presents greater difficulty.

1. Where there is no doubt of the power to declare, or of the validity of the mode taken for declaring, the purpose; the case will depend on the construction or evidence of an intention to make the bequest conditional. The principle which rules cases of this kind is, that the design must be manifest and unquestionable; and especially, that no mere conjecture is admissible against the favour which the law entertains for the heir. His right is not to yield to a mere inference; nor is he to be held bound to convey on a supposition merely conjectural of what the testator would have intended, had he known or marked accurately the state of the property or parties. In applying this general principle, 1. A single deed of settlement, framed manifestly for the arrangement of the whole succession, and of which the parts are dependant on each other, and meant to stand or fall together, gives the proper case for the application of the maxim, Approbo non reprobo. And even

[1] 3. Ersk. 3. § 85.

[2] In the case of ARBUTHNOT against ARBUTHNOT, 4th July 1792, the Court distinguished between the case of approbate and reprobate, and 'the cutting down 'of part of a deed where that part was null from want 'of power in the granter:' As if a person were to entail his estate, and in the same deed to include an estate belonging to another, it was said, that the entail would be void, in so far as it related to the estate which did not belong to the granter; but there was no reason why that deed should not have effect in so far as it related to the estate over which the granter had the entire disposal; Bell's Cases, 195. STUART against LESLIE, 10th March 1810, Fac. Coll., is a strong case to the same purpose.

[3] See below, p. 150.

[4] English rule, BOUGHTON against BOUGHTON, 2. Ves. sen. 12.; SHEDDON against GOODRICH, 8. Ves. jun. 481. Scottish rule, 3. Ersk. 9. § 5.

[5] This is fixed both in England and in Scotland.

1. See for English law, BRODIE against BARRY, 2. Ves. and Beames, 127.; and WELBY against WELBY, ib. 137.—both cases having been decided by Sir W. Grant.

2. For Scottish law, see KERR against WAUCHOPE, in House of Lords, 1. Bligh, 1.

where the settlement is in separate deeds, but executed with the declared and manifest purpose of forming one consistent plan of settlement, the same rule is applied.[1] 2. But this general doctrine is so far qualified, that, in the *first* place, A mere narrative or assumption will not impose it as a condition on the heir or person favoured, to realize that assumption as a condition of any bequest in his favour; and, *secondly*, Where a settlement consists of a revocation of an old, and the declaration of a new disposition, the favour which the law entertains for the heir leads to a separation of the parts of such a settlement, to the effect of admitting the heir to enjoy his legal right, as revived by the revocation, without being held bound by the new disposition as a condition; provided he takes nothing by the conveyance. This is a point which derives more than usual importance from the operation of the law of deathbed: the question being, whether the heir, strictly speaking, takes benefit by the ***deed***, so as to give to the disposition contained in it the force of a condition? This point has been decided in the negative, by great authorities.[2]

2. Although there may be no doubt in point of construction that a condition is intended, which, if *expressly* declared, would be imperative to raise the alternative, and compel an election; it may notwithstanding be ineffectual for want of power, or for defect of solemnity, where the condition is merely by *implication*. The exercise of the power is in that case taken as subject to the same exceptions to which, as a substantive act, it would be exposed. This distinction has been much questioned, but having once been established, it seems now to be settled as a rule not to be shaken.[3]

[1] Countess of STRATHMORE against Marquis of CLYDESDALE, 20th February 1729; 1. Dict. 427. Here a tailzie and bonds of provision, made at the distance of two days from each other, were held as one settlement, so as to raise the alternative for election. TURNBULL against TURNBULL, 21st February 1776. Tait's Rep. 5. Brown, Sup. 380. Here there were two deeds executed unico contextu, which were 'held 'to make one settlement of the defunct's whole 'estate.'

GORDON's case, not reported, but referred to in the Duke of Roxburgh's case, 1. Bligh, 9. seems adverse. But WILSON against HENDERSON, also referred to in that case, 1. Bligh, 4. seems to have been decided conformably to the above cases.

[2] Lord Rosslyn, in the House of Lords, in COUTTS' case, said, 'The respondent founded part of his ar-'gument upon what is termed, in Scottish law, the 'maxim of approbate and reprobate. Says Mr Coutts, '"If you approbate the revocation of the deed to Sir 'Hugh, contained in the posterior deed in my favour, 'then you cannot reprobate the other clause of that 'deed." But this is false reasoning. The Court can-'not say to the heir-at-law, "Under what deed do 'you claim?" It is enough for him to say, "God and 'nature have made me heir-at-law, show me by what 'deed my right is cut off?"' 3. Bligh, 664. Lord Chancellor Eldon, in a later stage of the proceedings, said, with regard to the argument of approbate and reprobate, 'I have made a good deal of inquiry into the 'grounds of the decision, to see whether it went 'upon that ground; and if so, how it could be main-'tained. I think that this is not a case where the 'doctrine of approbate and reprobate will apply. 'The heir says, "Your deed does not give you a title, 'unless you can shew me a deed executed in liege 'poustie, existing at the death of the granter; and if 'there be no such deed executed, the deed executed 'on deathbed is gone."' 3. Bligh, 684.

See also CUNNINGHAM against WHITEFORD, 10th June, 1748; Elchies, Deathbed, No. 19; Kilk.; 5. Brown, Sup. 234.

[3] 'I do not understand' (says Sir William Grant, in a case relative to a will comprehending both an English and a Scottish land estate) 'why a will, 'though not executed so as to pass real estate, should 'not be read for the purpose of discovering in it an '*implied* condition concerning real estate, annexed to 'a gift of personal property, as it is admitted it must 'be read when such condition is *expressly* annexed to 'such gift. For if by a sound construction such con-'dition is rightly inferred from the whole instrument, 'the effect seems to be the same as if it were expressed 'in words.' But he adds, 'whatever may be the foun-'dation of the distinction, it is established.' BRODIE against BARRY, 2. Ves. and Beames, 130.

Lord Chancellor Eldon, in the Scottish case of KERR against WAUCHOPE, says, 'The distinctions 'upon this head of law appear to be rather unsubstan-'tial. It has been held, that although a will contain-'ing dispositions of land be not duly executed accord-'ing to the statute, yet if, in the same will, personalty 'is given, upon condition that the legatee convey the 'land, in such case, inasmuch as the disposition of 'the personalty cannot be read without reading at the 'same time the condition upon which it is given, the 'gift and the condition are inseparable; and the case 'of election is raised, because the testator in the dis-'position, not of land, but of personalty, expresses 'and directs what is to be done. These are undoubt-

In applying this rule it would appear,—1. That where the testator has no power to execute a settlement of the land, (as a minor to make a settlement of heritage), the condition or alternative is not raised by implication: the will being void, it is not to be held as evidence of an intention to impose this as a condition.[1] 2. That where the deed is a testament, which, though made by a person having power to settle land, is unavailing in point of form and solemnity to carry land, or give evidence of an intention to dispose of it,[2] the alternative will not be raised.[3] 3. That where the deed is done on deathbed, it is not void, and therefore the same reasoning does not apply. It is only reducible, not null. It is evidence of intention, though subject to challenge as influenced by importunity, and therefore a deathbed deed will raise the alternative, and require election.[4]

In closing this doctrine of Approbate and reprobate, there remains one important question, which has been settled by a long series of determinations in England, but in relation to which there has been no decision in a Scottish case. Where an alternative is effectually raised, and the person sees it good to repudiate the proffered benefit, rather than embrace the proposed condition, what shall be the effect of this to the person favoured by the condition? Shall he thus be entirely deprived of the benefit intended for him?

'In England, (as Lord Chancellor Eldon said in the House of Lords), there has 'been engrafted upon the primary doctrine of election, the equity, as it may be termed, of 'compensation. Suppose a testator gives his estate to A, and directs that the estate of 'A, or any part of it, should be given to B; if the deviser will not comply with the pro- 'vision of the will, the courts of equity hold, that another condition is to be implied, as 'arising out of the will and the conduct of the devisee; that, in as much as the testator 'meant that his heir-at-law should not take the estate which he gives to A, in considera- 'tion of his giving his estate to B, if A refuses to comply with the will, B shall be 'compensated by taking the property, or the value of the property, which the testator 'meant for him, out of the estate devised, though he cannot have it out of the estate 'intended for him.'[5]

'edly thin distinctions; and a Judge having to deal 'with them, finds a difficulty in stating to his own mind 'satisfactory principles on which they may be ground- 'ed.' Then, after referring to Sir William Grant's having stated the same doubts, but concluded with adhering to the rule, he says, 'In such conclusion, 'and upon similar grounds, I acquiesce; for long pro- 'fessional experience has convinced me, that it is more 'beneficial to the community to adhere to imperfect 'or ineligible rules of law, which have been long esta- 'blished, than that each succeeding Judge should be 'at liberty, upon his own notions of expediency, to 'improve and unsettle the law; the traditional expe- 'rience of the Court does not furnish a wiser maxim 'than that which is contained in the short precept, 'Stare decisis.' 1. Bligh, 23.

[1] This held in England on a principle equally applicable in Scottish jurisprudence, HEARLE against GREENBANK, 3. Atk. 695. See 13. Ves. 223.

[2] MONTGOMERY against FOULIS, 9th June 1795; Bell's Cases, p. 203.

[3] WILSON against HENDERSON, 29th March 1802; reversed in House of Lords.

[4] PATERSON against SPREUL, 19th July 1745; Kilk. 153. It was contended, that, by the law of deathbed, the defunct is presumed *non sanæ mentis*, so far as concerns the disposal of heritable subjects: and so the question was not, whether, by the disposition as comprehending both heritage and moveables, the heir was prejudiced, but whether the disposition, so far as it conveyed a faculty to dispose of heritage, was not void as granted by a person who, *presumptione juris*, was incapable *quoad* that subject. Which the Lords had no regard to, as an improper conception of the law of deathbed; which, though it may proceed on the presumption of incapacity, only restrains deeds in prejudice of the heir, who therefore cannot take by a deed, and at the same time reprobate a part of the same deed.

See also KERRS against WAUCHOPE, in House of Lords, 1. Bligh, 25.

[5] KERRS against WAUCHOPE, House of Lords, 1. Bligh, 25, 26. The Ladies Mary and Essex Kerr had, by the settlement of their brother, the Duke of Roxburgh, the life-interest of a trust-estate; the residue, after the death of the survivor, being devised to Sir John Scott and others. Those Ladies were also their brother's next of kin. They reduced ex capite lecti the settlement so far as it conveyed land; and were in

In the case which gave rise to these observations, this point had not been decided in the Court of Session: It was therefore remitted for judgment by that Court; with certain observations from the Lord Chancellor, which plainly indicated his opinion that the doctrine of compensation would apply to the case.[1] But it was not decided on the remit.

It will, however, require great consideration before this doctrine in its full extent be judicially admitted in Scotland. It will be found opposed by the necessity of holding the heir-at-law disinherited by mere implication; which the law of Scotland does not recognize. And practical difficulties of no mean importance must be encountered in the making up of titles, and in giving effect to the implied will.

PART III.

OF PROPERTY IN MOVEABLES CORPOREAL.

THE class of subjects which next demand attention as a fund of credit, or of payment of debt, comprehends the property of Moveables. And, *First*, Of property in ships, as a peculiar subject ruled by special statute: *Next*, Of property in goods and merchandise.

CHAPTER I.

OF PROPERTY IN SHIPS.

PROPERTY in ships may be either of BRITISH or of FOREIGN vessels. The difference between them may be generally stated thus:—1. FOREIGN or ALIEN SHIPS are liable to alien duties when engaged in neutral trade; and to forfeitures and penalties when engaged in the trade, of which, by statute, a monopoly is secured to British vessels; and, 2. BRITISH SHIPS enjoy commercial privileges and immunities which greatly augment the value of that sort of property.

consequence held to have made their election to reprobate the deed, so that they could not under it claim the liferent interest. And thence a question arose, whether the residuary legatees, by way of compensation for what they lost by the reduction of the deed, could claim compensation out of the profits during the lives of the Ladies Kerr? or whether the Ladies Kerr were not, as next of kin, entitled to those profits as not disposed of by the will?

[1] 'The Court has not yet determined whether 'the respondents are, or are not, entitled to take 'their compensation, until the death of the survivor 'of the appellants;—the Court below having given 'no opinion, it is impossible that we should give 'any opinion upon that point. It is for their de- 'termination in the first instance. The cause must, 'in point of form, be remitted, with a view to have 'that question decided. It appears to me very easy 'of solution. There are certain persons who, ac- 'cording to the expression and principles of our law, 'have a vested remainder in the capital. They have 'also, by way of compensation, a title to the life- 'interest, preceding that remainder in the fund. Hav- 'ing, therefore, the whole interest, I do not understand 'upon what ground it can be argued, that there ought 'to be an accumulation of the profits, until the decease 'of the survivor of the appellants. If the appellants 'have no right, and the respondents have all the right, 'in the subject of litigation, why is it not to be ap- 'plied immediately by way of compensation, upon the 'ground, that, the condition of the gift being rejected, 'the life-estate did not form a part of the disposition?' 1. Bligh, 26.