

M. 14516; *Luke*, 1690, Br. Sup. iv. 258. See *Common Interest*.

ROTATION OF CROPS. See *Cropping*.

ROUP. See *Auction*.

ROYAL BURGHS. A royal burgh is an incorporation created by a royal charter, giving jurisdiction to the magistrates within certain bounds, and vesting certain privileges in the inhabitants and burgesses. See *Burgh, Royal. Burghage-Holding*.

[ROYALTY; payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised. *Wharton's Lex.*]

RUBRIC OF A STATUTE. The rubric of a statute is its title, so termed because anciently it was written in red letters. [The rubric is properly no part of the statute, and cannot be resorted to in construing it. See *Farquharson*, 3 Feb. 1886, 13 R. (J.C.) 29; also *Maxwell on Statutes*, 49; *Wilberforce on Statutes*, 272; *May's Parl. Prac.* 525, 566, 583;] *Ersk. B. i. tit. 1, § 49.* See *Statute*.

RUNNING DAYS; a term in the contract of charter-party used in contradistinction to working days, and referring to the ship's lay days, or days of demurrage. In computing by running days, they are reckoned as days in a bill of exchange;

while in computing by working days, all Sundays and Custom-house holidays are excluded. *Bell's Com. i. 623.* See *Charter-Party. Demurrage*.

RUNNING LETTERS. [See *Criminal Prosecution*, p. 264 b.]

RUNNING SHIP; a vessel which in time of war does not sail with convoy, is technically said to *run* the voyage. In an insurance on a running ship, if the underwriters are given to understand that there is even a chance of convoy, while the owners have already resolved to run, the contract is void. *Bell's Com. i. 667.* See *Convoy. Insurance*.

RUNRIG LANDS; are lands where the alternate ridges of a field belong to different proprietors. By 1695, c. 23, a division of such lands was authorised to be made between the different proprietors according to their respective interests, with the exception of lands belonging to burghs or incorporations. This division may be insisted in before the judge ordinary or justices of the peace. Under the description of runrig lands are comprehended lands where the portions consist not of ridges only, but of alternate portions of several acres each. [See *Bs. Gray*, 29 June 1877, 4 R. (H.L.) 76;] also *Ersk. B. iii. tit. 3, § 59*; *Bank. i. 220*; *Bell's Princ. § 1098*; *Kames' Stat. Law Abridg. h. t.*; [*Rankine on Land-Ownership*, 505.] See *Burgh Acre*.

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SABBATH. See *Sunday*.

SACRAMENTS. The act 1617, c. 6, lays the burden of providing necessaries for the administration of the sacraments upon the parishioners. But this has been interpreted to mean the heritors. In practice the expense of providing communion elements falls on the teinds, and the Court of Session have always been in use, in augmentations, to decern for a special sum for this purpose. When this burden is laid on the titular, he is entitled to have the amount allocated on the proprietors of the several lands over which his titularity extends. [When the population of a parish does not exceed 2000, the court will not allow more than £10 for communion elements; *Minister of Logie*, 4 Dec. 1867, 6 Macph. 82. In that case, the population being about 4000, the court awarded £12. In large city parishes the amount is increased.] See *Ersk. B. ii. tit. 10,*

§ 50; *Bank. ii. 69*; *Dunlop's Parochial Law*, 289; [*Duncan's Par. Eccl. Law*, 702; *Black's Par. Eccl. Law*, 137.]

SACREBORGH; or sickerborgh, a "sicker, sure, sufficient cautioner, a kind of caution found more especially in actions or pleyes." *Skene, h. t.*

SACRILEGE; is any violation of things dedicated to the offices of religion. Theft becomes more heinous when sacred things are its subjects; but in Scotland there is no express enactment which declares the punishment more severe. There are instances, however, of capital punishment having been formerly inflicted on persons convicted of stealing chalices, priests' ornaments, and the like; *Hume i. 110.* See *Dead Body*.

SAK; in old law language, the unlaw or americiament paid by him "who denies that thing which is proven against him to be true, or affirms that thing whereof the contrary is of verity." *Skene, h. t.*

SALARIES. The salaries of the judges of the Court of Session have been found not to be arrestable; and according to Erskine pensions from the Crown are not arrestable, because they are alimentary, and indeed all salaries annexed "to offices, in so far as they amount to no more than a reasonable allowance for the decent support of those who are named to them, though they be granted not by the King but by subjects, whether communities or private donors, ought on the same ground to be accounted alimentary." It has been found that arrears due to officers in the army (but not on half-pay), ministers' stipends, macers' fees and dues payable to the principal keepers of the Parliament House, are arrestable *quoad excessum*. [When a bankrupt holds a salaried office, the salary is attached by the sequestration, under deduction of a *beneficium competentiae*. See *Barron*, 8 July 1881, 8 R. 933, and other cases cited in *Goudy*, *infra*. As to Government salaries and pensions, see the special provision quoted under *Pension*.] See *Bell's Com.* i. 122; *Ersk. B.* iii. tit. 6, § 7; *Stair*, B. iii. tit. 1, § 37; *Bank.* i. 159; [*Goudy on Bankruptcy*, 358, 505.] See *Offices*. [*Wages*. *Sequestration*.]

SALE. In the law of Scotland, sale is a consensual contract, by which one party, called the seller or vendor, agrees to transfer the property of a subject, in consideration of a price to be paid by the other party, called the purchaser or vendee. In the law of England, sale is defined to be a contract, by which the seller at once transfers the property of a subject, in consideration of a price paid or to be paid. There is this difference, therefore, between the laws of the two countries, that, according to the English law, a thing, when sold, immediately becomes the property of the purchaser; whereas, by the law of Scotland, the seller does not, by the completion of the contract, alienate the subject—he only becomes bound to alienate it—the alienation being completed by delivery. This distinction in principle between the laws of the two countries is important; although certain peculiar provisions of the law of England render the practical differences between the two systems less prominent than might have been anticipated. Among what may be called the equalising peculiarities of the English law may be mentioned:—1. The qualified nature of the right of property in certain cases—while, in Scotland, property never signifies anything but the *jus in re*. 2. The English law doctrine, that the con-

tract is not completed without payment of the price, unless credit has been expressly given, or unless the subject has been delivered unconditionally, or unless earnest has been paid—although payment of earnest does not entitle the buyer to take away the goods without paying the price. 3. The doctrine that a sale of goods in *market overt* is good, though the goods should turn out not to have been the property of the seller; see *Market Overt*. And, 4. The doctrine of reputed ownership, which secures the creditors of those who retain the possession of goods which they have sold. See *Reputed Ownership*.

[*Statutory Modification*.—By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60), the law of Scotland on this matter was modified in the direction of assimilation to the law of England. Before that act was passed, the property of goods sold remaining with the seller until delivery, they were liable, in the event of his bankruptcy, to be attached by his creditors, even though the purchaser had paid the price. This was altered by § 1 of the statute, which enacts that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser." By § 2 of the act, it is provided that "where a purchaser of goods who has not obtained delivery thereof shall sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery, on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser: provided always, that nothing in this act contained shall

[prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser." By § 3, "any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party." And by § 4, "none of these provisions shall prejudice or affect the landlord's right of hypothec or sequestration for rent." On the construction of these enactments, and the extent to which they abrogate the common law, the following decisions may be referred to:—In *Wyper*, 27 Feb. 1861, 23 D. 606, goods were sold and paid for, but remained in the custody of the seller. They were resold; but before intimation of the second sale to the original seller, the first purchaser had become bankrupt, and the seller had arrested the goods in his own hands, in security of a general balance due by the first purchaser. It was held that the second purchaser was not entitled to delivery of the goods; the seller's arrestment in his own hands being prior, and therefore preferable, to the second purchaser's intimation. The majority of the judges held also that the statute does not interfere with the seller's right of retention for a general balance. "The principle of the common law, that the undelivered goods still remain the property of the seller, is untouched by the statute; and its practical consequences remain unimpaired, except in so far as they are expressly taken away or modified by positive enactment." In *Sim*, 3 June 1862, 24 D. 1033, it was held that the first section of the act does not apply to a contract under which the seller continues to have not only the custody, but the use and control of the subject. In *M'Meekin*, 22 Nov. 1876, 4 R. 154, the same section was held not to apply to a contract by which a shipbuilder sold the scrap iron lying in his yard, and the scrap iron which should be produced during a certain period. In that case, as well as in that of *Sim*, Lord Pres. Inglis

[held that the first section applies only to cases where "there is a present sale in the ordinary sense, whereby the seller is under an immediate and present obligation to deliver a specific *corpus*;" the article being allowed to remain with the seller for custody only. But a larger view of the scope of the enactment was taken by the House of Lords in *M'Bain*, 27 July 1881, 8 R. (H.L.) 106. In that case, the first section was held applicable where a ship was sold in the course of construction, and remained in the seller's hands till his sequestration; and the opinions expressed by the House indicate that with the single qualification mentioned below, the section is to be regarded as of universal application, wherever there is a completed personal contract of sale, and a *jus ad rem specificam* vested in the purchaser. "The statute," said Lord Watson, "was passed for the purpose of assimilating the law of Scotland to that of England. . . . In order to place a purchaser in Scotland in the same position as a purchaser in England in questions with creditors of a bankrupt, or the assignee or trustee in sequestration of a bankrupt, the legislature did not enact that in Scotland the completion of a personal contract should pass the property, or have the effect of delivery; but it did enact, by the first section of the statute of 1856, that as in a question with the creditors of the seller, or with the trustee in a sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt, had he remained solvent." It was pleaded in that case that the enactment is inapplicable to sales, the real object of which is security; but Lord Chanc. Selborne observed:—"In my opinion, whether in some sense security was the object or not, there was here a sale in fact and in intent. The statute does not say that, there being a sale, that is to be taken out of the operation of the statute because the parties may have some further contract or agreement, or understanding *inter se*, with regard to the subject of the sale." See also *Allan & Co.'s Tr.* 20 June 1883, 10 R. 997; *Darling*, 16 Dec. 1887, 15 R. 180. One limitation of the purchaser's right to demand delivery under the section was recognised by the House of Lords in *M'Bain's* case, and was thus expressed by Lord Blackburn:—"If you can show that the man who has acquired the *jus ad rem* has allowed the vendor to

[keep possession of the goods in such a way as is quite inconsistent with his *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and, that being so, the Mercantile Law Amendment Act does not take the goods out of it. It says that, without delivery, a contract of sale shall be good to pass the property as against creditors, and it does not say that, without delivery, the property shall pass, where, if there had been delivery, and the goods had been left in this particular way with the vendor afterwards, they would have been made liable to the diligence of his creditors." When a contract for the sale of a ship or machine, to be constructed, contains a stipulation that the price shall be paid by instalments on the completion of certain portions of the work, which portions shall, on said payment, belong to the purchaser, the latter, on payment of an instalment, acquires a *jus ad rem* to the part completed, which is valid under § 1 of the statute against the seller's creditors if the purchaser has accepted the completed portion as part implement of the contract of sale, but not otherwise; *Seath & Co.* 8 March 1886, 13 R. (H.L.) 57. See *Journ. of Jurisp.* xxvi. 25; *Campbell's Merc. Law*, 92-8. See *Reputed Ownership. Retention.*

[In regard to the position and rights of a sub-purchaser of goods still remaining in the seller's custody, the recent case of *Distillers Co.* 9 Feb. 1889, 16 R. 480, is instructive. In that case, A., a distiller, sold certain parcels of whisky to B., who paid the price, leaving the whisky undelivered in A.'s bonded warehouse, where none but whisky from his own distillery was kept. The whisky was sold by B. to a purchaser, and there were subsequently several other subsales, extending over a period of six years; a delivery order being in each case intimated to A., who noted the transfer in his books and intimated to the transferee that he would be charged warehouse rent. C., the last subvendee, having become bankrupt, the trustee upon his sequestrated estate demanded delivery from A. of the whisky, which had all along remained in A.'s warehouse at a specified rent. It was held by a majority of five judges that A. continued undivested owner of the whisky, and therefore had a right to retain it for a debt due to him by C. Lord Pres. Inglis said:—"The question comes to be, what is the condition and what are the rights of a subvendee in such a case.

[The original purchaser cannot sell the goods in any proper sense, because they do not belong to him. They belong to the undivested owner, and therefore the only thing which the original purchaser can give to the subvendee is a personal right to demand delivery of the goods—that is to say, a *jus ad rem*; but the original purchaser having no *jus in re*, he cannot give anything more. So that the goods still remain the property of the original seller. No doubt the subvendee, having received a delivery order from the original purchaser, intimated that delivery order to the original seller, in whose hands the goods were. What is the effect of that? Nothing but this, that it is an intimation to the original seller that the original purchaser has parted with the right he had to demand delivery. He could give no more to the subvendee than he had himself. If he himself had only a *jus ad rem*, he could not convey to the subvendee a *jus in re*."

[*Risk.*—Before delivery, the buyer has merely a *jus ad rem*; and if the subject perish undelivered, it perishes to the buyer—*Periculum rei venditæ nondum traditæ est emptoris*. See *Periculum*.] If the buyer has paid the price, he is not entitled to repetition; if he has not paid it, the seller may sue him for payment. The principle of this rule is, that by completion of the contract of sale, the obligation of each party to implement the bargain is perfected. The seller is bound to deliver the thing sold, the buyer to pay the price; and although the seller's obligation falls in consequence of the extinction of the subject of it, the buyer's still subsists. The rule may also be referred to the maxim, *Ejus est periculum, cujus est commodum*; since the buyer has the benefit of the accessions, fruits, and profits of the subject, from the moment in which the contract is completed. When a commodity is sold as a fungible, not as a *corpus*—that is, when a certain quantity, by number, weight, or measure, has been sold, and is not yet delivered—the loss falls upon the seller, since the buyer did not purchase any specific subject. Thus, when a proprietor sells so many bolls of his farm-grain, of a particular crop, without specifying any particular parcel, and a loss of that year's grain happens, the purchaser is not bound to suffer any part of the loss, as he did not purchase any precise part of the farm-grain. [If a mass of fungibles, certain and known by general description, but of unascertained extent, be

[sold at a rate of price according to measure, weight, or number, the civil law authorities are divided on the question whether the personal contract is complete, so as to transfer the risk to the buyer. In *Hansen*, 4 Feb. 1859, 21 D. 432, the opinion was expressed that in such a case the contract of sale is not complete until the mass has been measured, weighed, or counted, and the price thus ascertained (*per* Lord J. C. Inglis). In *Hansen*, the quantity of oil, which was the subject of sale, was stated according to actual weight in the contract; and though there was no statement of the *cumulo* price, the contract contained within itself particulars from which the price might be ascertained by simple arithmetical process. The contract was therefore held to be complete, and the risk to have passed to the buyer. See also *Anderson & Crompton*, 15 Nov. 1870, 9 Macph. 122; *Walker*, 16 July 1873, 11 Macph. 906.] In conditional sales, the rule of the Roman law was that, if the subject perished *pendente conditione*, it perished to the vendor; but if it was merely deteriorated, without the fault of the vendor, the loss fell upon the vendee. [A stipulation reserving right to the buyer to check the quantity of goods delivered, and claim deduction from the price in the event of its being deficient, is not such a condition as to suspend transference of the risk; *Hansen*, *supra*. If goods are sold at a price to be fixed by the buyer, the contract of sale is complete; *Lavaggi*, 11 Jan. 1872, 10 Macph. 312.] In alternative sales, if one of two subjects sold perish before the choice has been made, it perishes to the seller; because the remaining subject continues *in obligatione*, and demandable by the vendee; but if both perish, the loss falls on the buyer. When the seller has been in *mora* in making delivery, the loss falls upon him. A subject likewise perishes to the seller which is lost through his fault, or by his neglecting the obligations under which he lies to attend to the buyer's interest, by taking care of the subject until it is delivered. Where the buyer gives directions for the transmission of the goods, if these directions be not followed, the loss falls upon the seller; *Harle*, 1749, M. 10095. If the buyer orders the goods to be sent by a certain mode of conveyance, and they are sent accordingly, it would appear that the seller is freed from the risk. The loss of an undelivered subject falls upon the seller, if it perish from a vice of such a nature that the seller would have been

liable under his obligation of warrandice had the subject perished from the same cause after delivery. Where the seller expressly takes the risk upon himself, or binds himself to deliver the thing sold at a certain place, his engagement makes him liable for the loss before such delivery. [See *Walker*, *supra*.

[*Constitution of Contract. Conditions.*]

—In the law of Scotland the contract of sale is completed by simple consent. But in England, by the Statute of Frauds, no contract for the sale of goods, for the price of £10 or upwards, is good, unless the buyer accept and actually receive part of the goods; or give something as earnest; or unless some note or memorandum in writing be made, and signed by the parties to be charged by such contract, or their agents thereunto authorised; 29 Car. II. c. 3, § 17. [See *Statute of Frauds*.] The doctrine, that consent alone is sufficient to complete the contract of sale in the law of Scotland, is subject, however, to certain exceptions. Thus, writing is necessary to prove the consent, wherever the parties stipulate that writing shall intervene; and in the sale of heritable property and of ships, writing is legally indispensable. See *Sale of Land. Shipping Law. Vendition of Ship. Evidence*. The parties may make the purification of a condition essential to the completion of the contract, and such a condition is called a suspensive condition, or a condition precedent—until the fulfilment of which there is no proper sale. [See *Brandt & Co.* 18 Jan. 1876, 3 R. 375; *Hogarth*, 16 June 1882, 9 R. 964; *Clarke & Co.* 3 June 1885, 12 R. 1035; *Murdoch & Co.* 6 Feb. 1889, 16 R. 396. If the vendor has been prevented from fulfilling such condition through the fault of the vendee, the condition is held to have been satisfied; *Mackay*, 7 March 1881, 8 R. (H.L.) 37.] It has been found in England, that a condition adjected to a sale of goods, that they shall be approved of by the buyer, within a certain time, is intended for the benefit of the buyer only, and that the sale becomes absolute on the lapse of the specified time, without intimation of the buyer's approbation; *Humphries*, 6 East, 45 (cited in *Brown on Sale*, 36). It is sometimes agreed by a retailer, that if he do not sell goods within a certain time, he shall be entitled to return them to the wholesale dealer from whom he had them. See *Sale and Return*. A sale on arrival is a sale of goods coming from abroad: if the goods do not come, there is no sale. In

conditional sales, while the condition is pendent, neither party is at liberty to resile; and the accomplishment of the condition has a retrospective effect to the date of the contract, so that if either should die in the interim, his rights under the contract would pass to his heir; [*Brown on Sale*, 43.] If the seller, *pendente conditione*, sell the goods to a third party, the buyer will be entitled to damages. See *Conditional Obligation*. [The usage of trade is an implied condition in sale, as in every mercantile contract. See *Usage*. Where the sale is by weight or measure, it must be according to the statutory standard; see *Weights and Measures*. But see *Robertson*, 25 June 1858, 20 D. 1170; *Miller*, 3 Feb. 1860, 22 D. 660; *Cuthbertson*, 20 July 1870, 8 Macph. 1073. Where the contract is to be fulfilled in a foreign country, the weights or measures in use there are presumed to have been intended; *Schuurman*, 25 June 1833, 11 S. 779; *Rossetter*, 8 Ex. 261; *Ainslie*, 17 March 1881, 8 R. 636; *Guthrie's Savigny's Priv. Internat. Law*, 245.]

[*Essentialia of Contract*.]—If it be found that the subject of the sale has previously perished, there is no sale. There may, however, be the sale of something which has not yet come into existence. See *Res Futuræ*. *Spei Emptio*. And there may be a sale of what belongs to another. See *Res Aliene*. As a general rule, everything adapted to the purposes of commerce may be sold, except where the sale is prohibited by law. But there are certain things which, from their nature, are held to be placed *extra commercium*. See *Res Publicæ*. *Res Sacræ*. The contracts which are prohibited on account of their opposition to law or public morals are considered in the articles *Pactum Illicitum*. *Smuggling*. *Offices*, &c. As to the requisite qualities of the price, which is another essential of the contract of sale, see the article *Price*. The consent of the parties, which is the third essential of the contract, means the co-existence of a mutually expressed purpose to buy and to sell. If, therefore, a merchant makes an offer by letter, to buy goods, and, before the letter reaches its destination, sends another letter recalling his offer, there is no sale, even although the party to whom the offer is made, before receiving the second letter, should have sent off an acceptance; for in such a case there is no co-existence of a reciprocal wish to buy and to sell. [Such, at least, is the opinion expressed in former editions of this

[work, and still maintained by some jurists. But the contrary view has been adopted by the courts, both in Scotland and in England. See *Offer*.] The parties must also be agreed as to the subject of the sale. If they differ *in corpore*—i.e., if the seller agrees to sell one thing, and the buyer to buy another—there is no sale. By the Roman law, if they agreed *in corpore*, but differed as to something accessory to it, the sale was valid. If there be no error *in corpore*, but if there be error as to the substance of the thing, or any of its essential qualities, without which it would not be entitled to the name under which it is sold, there is no sale. See *Error in Essentialibus*. If there be error only as to some accidental quality, the sale is good. The parties must be agreed as to the price; [*Sword*, 1771, M. 14,241; *Anderson*, 13 Nov. 1856, 19 D. 39.] But if the buyer's price be larger than the seller's price, the sale is good at the seller's price, since both have consented to that price. [And when the bargain has been partially fulfilled, if the parties misunderstood each other as to price, the goods supplied must be paid for at the ordinary market price; *Wilson*, 14 June 1859, 21 D. 957; *Stuart & Co.* 20 Nov. 1885, 13 R. 221. If the price is fixed according to an illegal measure, payment is also regulated by the market price; *Cuthbertson*, *supra*, 8 Macph. 1073.] The parties must agree that the contract shall be sale, and no other contract.

[*Parties to the Contract*.]—No one can be a party to the contract of sale who is not capable of consent. See *Insanity*. *Minor*. [*Contract*.] A wife may sell any subject belonging to herself, provided her husband, as her legal curator, give his consent. [See *Marriage*.] Debts due by a constituent, purchased by his factor or agent, are held as purchased for behoof of the constituent, and no claim can be sustained but for the transacted sum. If, therefore, factors, agents, trustees, and others in similar circumstances, purchase debts due by their constituents for a sum less than they will bring, they can only claim the sum which they have actually paid, and not the full amount of the debt, or the dividend which may be paid upon it; and this, even although the factory should contain a clause expressly authorising the factor to make such acquisitions for his own behoof. A common agent in a process of ranking and sale was found disqualified from purchasing the estate exposed under his direction; *York Buildings Co.* 1793, 4 Dow, 379. [See *Pactum Illicitum*.] Factors

appointed by the court in a sequestration of a land estate are prohibited from buying in and compounding the debts affecting it; A.S. 25 Dec. 1708. [As to sales by brokers, see *Broker*. See also *Principal and Agent*. *Factor*.

[*Obligations of Seller. Delivery.*—The primary obligation which the seller incurs by the completion of the contract is the delivery of the thing sold, where it is not already in the possession of the buyer. The seller must, at his own expense, take the steps necessary for implementing this obligation, and freeing the subject, if it be in the possession of a third party. He is likewise bound to free the subject from all burdens or incumbrances. In the sale of heritage, this is a doctrine of great importance; and the records furnish the means of discovering the incumbrances which exist. See *Incumbrances. Search of Incumbrances*. In absence of express stipulation, the seller is bound to deliver the subject as soon as the buyer demands it; provided the latter has paid, or offers to pay, the price. Where nothing has been stipulated as to the place of delivery, the seller is bound to deliver the subject only in the place where it was at the time of the sale. If the sale has not been upon credit, the buyer cannot demand delivery of any part of the subject, without payment of the whole price. And even when the sale is upon credit, the seller is not bound to deliver, if, after the contract, the buyer has become insolvent, and unable to pay the price. But even in this case, if the buyer or his creditors be willing to pay the price where the sale has been for ready money, or to give security where it has been upon credit, the seller is bound to deliver in like manner as if the buyer were solvent. It has been questioned, whether the seller may be compelled to make delivery, or whether he is entitled to be relieved of his obligation on paying the *damnum et interesse*. See *Factum Prostandum*. If the seller unduly delays, or altogether fails, to make delivery, he must make up the loss thereby occasioned to the buyer; [*Webster & Co.* 4 June 1875, 2 R. 752. When goods have been placed in the hands of a warehouseman, or other neutral custodian, to be held for their owner, an order by the latter to the custodian, to deliver them to a purchaser, operates, when intimated to the custodian, constructive delivery of the goods, and transfers the property to the purchaser. But it is essential to such constructive delivery that the holder occupy

[an independent position, and be neither the owner nor in any way identified with the owner of the goods; *Pochin*, 11 March 1869, 7 Macph. 622; *Distillers Co., supra*, 16 R. 480. See *Delivery*.] *Mora. Damages*.

[*Warranty.*—It has been questioned, whether the seller's obligation is fulfilled by his merely making delivery, or whether he is also bound to make the buyer proprietor of the thing sold. By the Roman law, if the seller sold the subject believing it to be his own, the buyer could not reject it on the ground of defect in the title, or make any claim for indemnification, before he was actually disturbed in the possession. But if the seller knew it not to be his own, he might be sued even before eviction. Stair adopts this rule in its full extent; B. i. tit. 14, § 1. The question, however, does not seem ever to have been tried in the Scotch courts in the case of a sale of moveables; and, perhaps, were such a question to occur, the rule of the Roman law might be followed. But it is certain that, by the law of Scotland, the buyer, when there is no stipulation to the contrary, is entitled to reject any title to heritage which is not sufficient securely to convey the property. See *Sale of Land. Progress of Titles*. The seller is not only bound to deliver the subject, but is also bound to warrant the buyer against eviction. See *Warrantice*. [By the law of Scotland, following that of Rome, there was till recently in every contract of sale an implied warranty that the goods sold were merchantable, and of sound quality; and the buyer might reject the goods, on discovery of latent fault. See *Actio Redhibitoria*. In England, on the contrary, on the principle of *caveat emptor*, the seller is not liable for latent defects, unless there is fraud on his part, or unless he have expressly warranted the goods. And by the Mercantile Law Amendment Act of 1856, § 5, the law of Scotland was assimilated to that of England in this matter. The section enacts that "where goods shall be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency; but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to war-

[rant that the same are fit for such purpose." This enactment, however, is only applicable when the buyer has acquired a right *ad rem specificam*, not when a quantity of goods is sold by weight, or measure; *Hutchison & Co.* 26 Nov. 1867, 6 Macph. 67. It does not apply where the goods offered are of a different description from those which were the subject of contract. Hence when goods sold as flax yarns were found to contain an admixture of jute, the purchaser was held entitled to reject them and claim damages; *Jaffé*, 21 Dec. 1860, 23 D. 242. See also *Hardie*, 25 May 1870, 8 Macph. 798. To prove an express warranty, it is not enough for witnesses to say that the goods were warranted: they must specify the terms in which the warranty was granted; *per* Lord Pres. Inglis, in *Mackie*, 20 Nov. 1874, 2 R. 115. The word "goods" includes horses and other animals; *Young*, 4 Dec. 1858, 21 D. 87. See *Horses*. As to what is a "particular purpose," see *Hamilton*, 31 May 1878, 5 R. 839; *Dunlop*, 15 June 1886, 13 R. 973. Where there is a contract to supply goods of a particular description, and the buyer has not had an opportunity of inspecting the goods, they must not only, in fact, answer the description, but must also be saleable or merchantable under that description; *Jones*, L.R. 3 Q.B. 197; *Mody*, L.R. 4 Ex. 49. They must be "merchantable according to the denomination of the commodity;" *Bell's Princ.* § 98. When goods are ordered from a manufacturer, it is not necessarily implied that the goods must be made by the seller himself; *West Stockton Co.* 3 July 1880, 7 R. 1055. The vendor of an article with a trade mark is deemed to warrant the genuineness of the trade mark, unless the contrary is expressed in a signed writing delivered to and accepted by the vendee; and a similar warranty is implied as to the truth of any description or statement of the quantity, weight, &c., of the article, or of the place where it was produced, which may be attached thereto; 25 & 26 Vict. c. 88, §§ 19, 20. As to warranty, see *Chitty on Contracts*, 413; *Anson on Contract*, 145, 298. Every affirmation at the time of sale of goods is a warranty, provided it appears to have been so intended; *Bell's Com.* i. 466 (note); *Bell's Princ.* § 111.] When goods are sold by sample, there is an implied warrandice that the bulk is of equal quality with the sample, otherwise the buyer is not bound to take it. The mere circumstance of a sample having been exhibited at the time of the sale will

not make it a sale by sample; because a sample may be produced, not as a warranty that the bulk corresponds to it, but to enable the purchaser to form a reasonable judgment of the commodity. The contract, therefore, must expressly refer to the sample, in order to raise the warranty that the bulk is equal to it. [See *Van Oppen*, 28 Nov. 1855, 18 D. 113; *Chapman*, 19 July 1872, 10 Macph. (H.L.) 74.

[*Buyer's Remedies.*]—By the Roman law, if the buyer found that the subject was so deficient in either quantity or quality as that, had he known the deficiency, he would not have entered into the contract, he was entitled to sue for repetition of a part of the price corresponding to the deficiency; but this rule does not appear to have been adopted in the law of Scotland. See *Quanti Minoris Actio*. ["If a buyer finds goods not conform to sample or to contract, and declines on that ground to pay for them, he must rescind the contract and return the goods. He is not entitled to hold by the contract, and ask for other goods in place of those to which he objects; he must rescind the contract, return the goods, and claim damages. . . . It is not always necessary that the *ipsum corpus* sold be at once restored to the seller, as that might be highly inconvenient in the case of goods brought from a distance; and the arrangement generally is that the buyer intimates to the seller that the goods lie at his risk at such and such a place. He may even retain them on his own premises; but if he does not put them out of his own control, he is at least bound to take the greatest possible care that they are not touched by him in the interval. . . . If a buyer keeps goods in his possession at the risk of the seller, they ought to be as free from interference as if they were in neutral custody;" *per* Lord Pres. Inglis, in *Chapman*, *supra*, 9 Macph. 675. "If he has paid the price, his claim is for repayment of the price, tendering re-delivery of the goods. If he has granted bill for the price, his claim is for re-delivery of the bill in return for the offered re-delivery of the goods. If any portion of the goods has before their rejection been consumed or wrought up so as to be incapable of re-delivery *in forma specifica*, then the true value (not the contract price) of that portion of the goods must form a deduction from the purchaser's claim for repayment of the price;" *per eundem* in *M'Cormick*, 3 June 1869, 7 Macph. 154. See also *Padgett*, 24 Nov. 1852, 15 D. 76; *Pearce*, 15 Feb. 1869,

[7 Macph. 571; *Smith*, 17 March 1875, 2 R. 601; *McCarter*, 14 June 1877, 4 R. 890; *Grimoldsby*, 44 L.J.C.P. 202. When the buyer wrongfully repudiates the contract, the seller's claim for damages is limited to the difference between the contract price and the market price at the date of repudiation; *Warin & Craven*, 5 June 1877, 4 R. (H.L.) 75.]

[*Obligations of the Buyer.*—These are—to pay the price, and to take possession of the thing sold. Where no term is agreed upon, [and where there is no contrary usage,] the seller may demand payment of the price immediately upon offering delivery of the thing sold; [*Hall*, 19 Jan. 1860, 22 D. 413; *Linn*, 12 Nov. 1863, 2 Macph. 88.] If, after the sale, the seller, without any fault of his own, has become unable to make delivery, the price is, notwithstanding, due by the buyer; [see *supra*.] But the seller cannot demand payment of the price while he is himself in *mora* in delivering the subject. With regard to the cases in which interest is due on account of *mora* in paying the price, see the article *Interest*. When no special agreement has been made as to assuming possession or carrying away the subject, or when a certain time is not allowed by the custom of the country, or of a particular trade, the buyer may be called upon to do so immediately. If he unduly delay, he will be liable, in the case of moveables, for warehouse rent or other expenses in keeping the subject. But it has been decided [in the English courts, that the neglect of the buyer to carry away the subject does not entitle the seller, of his own authority, to annul the contract, and resell the goods; [*Jones*, 8 Ex. 920. But see *Hain*, 21 May 1853, 15 D. 667.] As soon as the subject is delivered, it becomes the property of the buyer, provided it belonged to the seller at the time of the sale. [But a special condition of ready money suspends the passing of the property, even in a question with creditors; *Bell's Princ.* § 103; *Anderson*, 16 July 1844, 6 D. 1315; *Colvin*, 26 June 1857, 19 D. 890.] The right of property is not, as it was in the Roman law, in dependence until the payment or securing of the price; the buyer being uncontrolled in the use of the subject as soon as it is delivered to him, whether the price has been paid or not; *Stair*, B. i. tit. 14, § 2.]

[*Insolvency. Seller's Remedies.*—The supervening insolvency of either party has very important effects on the contract of sale. And the law provides various reme-

dies to prevent loss to either party. [The seller's remedies are retention and stoppage *in transitu*. The property of goods sold remaining with the seller until delivery, actual or constructive, he is consequently entitled to retain them against the buyer and his assignees till every debt due to him by the buyer is satisfied. See *Retention*, and cases there cited; also *Black*, 13 Dec. 1867, 6 Macph. 136, where the distinction between the seller's right of retention in Scotland and his *lien* in England is pointed out; *Fleming*, 26 Feb. 1881, 8 R. 548, where a seller who had assented to a subsale, was held to have lost his right of retention as against the original purchaser; and *Distillers Co.*, *supra*, 16 R. 480, where the seller's right of retention was sustained against a subpurchaser who was indebted on general account to the original seller. See § 2 of the Mercantile Law Amendment Act, quoted *supra*, pp. 935–6. The right of stoppage *in transitu* enables the seller, in the event of the purchaser's insolvency, to arrest and recover possession of the goods sold, while in the hands of a carrier or other middleman, in process of conveyance to the purchaser. See *Stoppage in Transitu*.] In certain circumstances the buyer, when aware that he will not be able to pay the price, is entitled and bound, with the seller's consent, to rescind the contract and refuse to take delivery of the goods. See *Rejection in Transitu*. Where, however, the seller refuses his assent, or where there are circumstances inferring that he has made his election not to rescind the contract, he will not be entitled, on the buyer's bankruptcy, to demand the goods.]

[*Dissolution of Contract.*—The contract of sale may be brought to an end without being implemented; and its dissolution is distinguished from its original nullity. Dissolution may take place either by consent, or in consequence of certain circumstances attending the formation of the contract, which may entitle one of the parties to resile. Constraint, or fraud inducing the contract, are grounds of dissolution. [As to fraud, see *Gourlay*, 10 Nov. 1870, 9 Macph. 107; also *Quanti Minoris Actio. Fraud*.] One great distinction between a contract void *ab initio* and one only voidable is, that, in the former, everything following upon the contract partakes of its nullity, and the buyer acquires no property in the thing sold; in the latter, the contract is good until challenged. The buyer, therefore, in such a case acquires a property in the thing sold, which he may transfer to

a third party, whose title, if he be in *bona fides*, will not be affected by the vices of the former contract. See *Force and Fear. Fraud. Error in Essentialibus*. When the contract is dissolved by mutual consent, things are restored to the situation in which they were previous to the sale. It is equivalent to a consensual dissolution, if the parties enter into a second contract concerning the same thing; as, for example, when it is resold for a greater or smaller price. In Scotland there can be no sale by one who has no property in the thing sold. See *Labes Realis. Market Overt*. The contract may be dissolved in consequence of the purification of a resolute condition—*i.e.*, on the arrival of an event in which it was previously agreed that the contract should determine. See *Condition. Pactum de Retrovendendo. Pactum Legis Commissoriae*. A sale on trial is an example of such a condition. By such a contract the property and the risk are transferred, but under the condition that, if the subject does not please, the buyer may return it. See *Sale and Return*.

[*Executorial Contracts*.]—Peculiar rules are sometimes brought into operation in consequence of sale being combined with other contracts; as where the thing sold is something which the seller, in the exercise of his art, agrees to manufacture for the buyer—*e.g.*, where one buys a carriage, or a ship to be built by the seller. In England, such contracts are not within the statute of frauds, and the property does not pass until the thing is finished, although the price may have been paid. In a Scotch case, however, where the price of a ship was to be paid by instalments, at laying the keel, at planking to the top of the gunwale, and at launching, there was held to be an appropriation to the buyer from the time of laying the keel; *Simpson*, 1786, M. 14,204. [See observations on that case in *M'Bain*, *supra*, 8 R. (H.L.) 106, and *Seath & Co.*, *supra*, 13 R. (H.L.) 57. See also *Wylie & Lochhead*, 17 Feb. 1870, 8 Macph. 552; *Orr's Trustee*, 2 July 1870, 8 Macph. 936; *Spencer & Co.* 17 Dec. 1879, 7 R. 396.]

On the subject of sale, see *Stair*, B. i. tit. 14; *More's Notes*, lxxxv.; *Brodie's Supp.* 849; *Ersk.* B. iii. tit. 3, § 2; *Bell's Com.* i. 176, 458; *Bank.* i. 407; *Bell's Princ.* §§ 85, 1299; *Bell on Purchaser's Title*, ii. 142; *Ross's Lect.* ii. 65; *Brown on Sale*; [*Bell on Sale*; *Blackburn on Sale*; *Benjamin on Sale*; *Story on Sale*; *Smith's Merc. Law*, 480; *Addison on Contracts*,

[915; *Chitty on Contracts*, 353; *Parsons on Contracts*, i. 519; *Ross's L.C.* vol. ii. See *Auction*.]

SALE OF LAND. In Scotland, every proprietor of heritage must have a written title; and that legal rule, combined with the peculiarities connected with the Scotch system of records, renders the doctrine as to the sale of land, in some particulars, different from that as to the sale of moveables. In so far as this subject is connected with feudal conveyancing, see *Conveyancing. Disposition. Missives. Search of Incumbrances. Warrandice*.

And, in addition, the following rules as to the contract itself are important:—In the sale of heritable property writing is absolutely required, not only as a means of proof, but also as a solemnity without which the contract is not binding, although its existence be admitted, or offered to be proved *aliunde*, or even by oath of party. Even where the contract has been reduced into writing, it is not binding, *rebus integris*, if the writing be defective in the solemnities required by law, although the subscription should be acknowledged.

Where the contract is in the form of an offer and acceptance, or of mutual missives, both writings must be probative. See *Missives*. There may, however, be an effectual bargain for the sale of heritage in the form of a unilateral obligation—*e.g.*, of a promise or obligation to sell. In such cases, it is enough that the promise be contained in a probative writing binding the seller. *Rei interventus* may also bar the right of rescinding from an informal written contract. See *Rei Interventus*. The completion of the contract raises an obligation on the seller's part to transfer the property of the subject to the purchaser, and to establish it in his person by a valid title. Until, therefore, such a title is offered to the purchaser, he is not obliged to pay the price. This right of the purchaser to object to a defective title may be renounced; and it is frequently agreed between the parties that the purchaser shall be satisfied with the title as it stands. The effect of such an agreement is to bar the purchaser from objecting to the title, or refusing to pay the price, on the ground of its being defective. See *Progress of Titles*. But it does not discharge the seller's obligation under the warrandice in case of eviction. In absence of such an agreement, where the seller's title is defective, the buyer is not entitled both to retain the price and the subject until a good title

is offered. He must make his election either to pay the price or to renounce the bargain altogether. See, as to the sale of land, and the completion of titles, *Bell on Purchaser's Title*; *Stair*, B. i. tit. 10, § 9, *Ersk.* B. iii. tit. 2, § 2; *Brown on Sale*, 54, 232; *Bell's Princ.* § 889; *Bell on Deeds*, i. 144.

SALE AND RETURN; is a contract by which goods are delivered by a wholesale dealer to a retailer, to be paid for at a certain rate, if sold again by the retailer; and if not sold, to be returned to the vendor. When no time is specified for the return, if the goods are not returned within a reasonable time, the contract becomes absolute, and the price may be recovered from the retailer as from a buyer. In a case of this kind in England, where the goods had not been returned within six months, the judge expressed his opinion that the sale had become absolute; *Bailey*, Peake, N.P.C. 56. [See also *Moss*, L.R. 16 Q.B. 493; *Beverley*, 6 A. & E. 829. In *Brown*, 8 Jan. 1880, 7 R. 427, Lord J. C. Moncreiff described this contract as follows:—"A contract of sale and return is a bargain which has for its object on the one hand to increase the market of the wholesale merchant, and on the other to enable a retail dealer to acquire a stock for the purposes of trading on his own account without being liable absolutely in the price of the goods to the merchant from whom they are acquired. It differs in its practical effect from an ordinary contract of sale in one respect, and one only, namely, that the buyer has the right of returning the goods themselves to the seller within a reasonable time, and of thereby extinguishing his liability for the price; while, on the other hand, the seller is bound to receive the goods returned in satisfaction of the buyer's obligation, and he is so reinvested in the property. In all other respects, the rights and obligations of vendor and vendee seem to be precisely those which are the result of an ordinary contract of sale. In particular, the following seem some of the characteristics of this contract: (1) The price is fixed to the buyer, and he may pay it on delivery or at any time thereafter. (2) If he sells the goods, he does so solely on his own account, and for his own benefit, and at any price he pleases. (3) The seller cannot reclaim the goods while they remain unsold, either within or beyond the period allowed for return. (4) After the expiration of that period, if the goods are not returned, the seller may sue for the price,

[which becomes absolutely due by the buyer, without any right to return." In that case, a retail jeweller systematically and fraudulently pawned watches which he had obtained from wholesale dealers on sale and return; and it was held that the pawnbrokers were entitled to retain the watches as against the wholesale dealers, mainly on the ground that the latter had voluntarily put the retailer in possession of the goods, and allowed him to deal with them as his own. Contrast *Macdonald*, 19 July 1888, 15 R. 988; where it was held that, on the bankruptcy of a retail dealer, the trustee in his sequestration had no claim to goods in his possession which had been obtained on sale and return, these remaining the property of the wholesale dealer. It is an unsettled controversy whether the condition implied in a contract of sale and return is suspensive or resolute; see authorities cited *sub fine*, and particularly as collected in *Bell's Com.* i. 289, note. Lord J. C. Moncreiff, in *Brown*, inclined to regard the condition as resolute only; but the tendency of the judgment in *Macdonald* is in the other direction. The distinction between *sale and return* and *sale on approbation* was thus explained by Lord Gifford in *Brown's* case:—"In sale and return the condition is that the consignee shall only buy what he succeeds in selling at his own hand, at his own risk, and at what price and at what credit he pleases, and reasonable time must be allowed him to do this. In sale on approbation, on the other hand, the condition is that the consignee himself shall instantly, or within reasonable time, examine the goods and declare his own approbation or disapprobation thereof, which will then fix whether there is to be sale or not." See *Brown on Sale*, 37; *Bell's Com.* i. 288; *Bell's Princ.* § 109; *More's Notes on Stair*, lxxxviii.; [*Brodie's Supp. to Stair*, 909; *Bell on Sale*, 110; *Benjamin on Sale*, 593. See *Sale*.]

SALE, POWER OF. See *Power of Sale*.

SALMON-FISHING. The right to fish for salmon is *inter regalia*, and cannot be exercised by a subject without a grant from the Crown. [In earlier editions of this work (following *Bell's Princ.* §§ 671, 1112), the above statement was limited to salmon-fishing in rivers and estuaries, within sea-mark, or where the sea ebbs and flows. But it has been decided that the right of salmon-fishing in the sea round the coast of Scotland belongs exclusively to the Crown, and forms part of its hereditary revenues, except in so

[far as it has been alienated by grant; *Gammell*, 28 March 1859, 3 Macq. 419. And by 7 & 8 Vict. c. 95, fishing for salmon in the sea within one mile of low-water mark, without permission of the owner of the fishery, is prohibited under a penalty (see *infra*). The statement of the Crown's right was further limited, in earlier editions, to fishing otherwise than with the rod; but this limitation has likewise been negatived by the judgment in *Anderson*, 7 Dec. 1867, 6 Macph. 117, 5 Irv. 499; see also *D. Sutherland*, 11 June 1836, 14 S. 960.]

[The Crown's right to the salmon-fishings in a particular locality may be made the subject of an express grant, either separately, or along with lands, by the words *cum piscatione salmonum* in the dispositive clause of the charter. Such a grant does not require to be completed by possession, and, being *res meræ facultatis*, is not lost by disuse; *Mackenzie*, 27 Feb. 1841, 3 D. 646; *Bs. Gray*, 29 June 1877, 4 R. (H.L.) 76. A Crown charter conveying lands *cum piscationibus* or *cum piscariis* is not of itself a sufficient title to salmon-fishing; but if it is followed by uninterrupted possession for the prescriptive period, the general words are held to have been explained to include salmon-fishing; *Stuart*, 21 July 1868, 6 Macph. (H.L.) 123. A clause "with pertinents" does not constitute a habile title on which to found prescriptive possession of salmon-fishing; but a conveyance with such clause may be interpreted in connection with earlier titles so as to include fishings; *Sinclair*, 7 June 1867, 5 Macph. (H.L.) 97. As to the effect of a grant of "fishings" in a conveyance by a subject superior, see the two last-mentioned cases of *Stuart* and *Sinclair*; also *M'Culloch*, 20 Oct. 1874, 2 R. 27. "It may be gathered that in no case will the Crown be excluded except by its own express grant, or by prescription following (1) on a barony title; or (2) on its own general grant of fishings; or (3) on an express grant of salmon-fishings in a base title; or (4) on a general grant of fishings in the same. But these last two points have not been fixed by decision;" *Runkine on Land-Ownership*, 261. As to the effect of a clause of "fishings" expressed only in the *tenendas* of a charter, compare *Sinclair* and *M'Culloch*, *supra*. The erection of lands into a barony does not of itself infer a grant of salmon-fishing, whether the charter of barony does, or does not, contain a clause *cum piscationibus*; *D. Richmond*, 16 Feb. 1870, 8 Macph. 530; *Northern*

[*Lights Commrs.* 27 May 1874, 1 R. 950. But in either case, a barony title, followed by prescriptive possession, is sufficient to carry the right to salmon-fishing; *Milne's Trs.* 1 July 1868, 6 Macph. 972. When a barony is split, different portions being vested in different proprietors, the salmon-fishings pass to the donee of that part of the barony to which they naturally pertain; *M'Culloch*, *supra*. A right to salmon-fishings, founded on a barony title and prescriptive possession thereon, is limited by the extent of the possession. Hence it was held that such title, followed by prescriptive possession in the rivers, gave no right to salmon-fishing in the sea *ex adverso* of a different part of the barony; *Cathcart*, 19 May 1871, 9 Macph. 744. On the other hand, in *L. Lovat*, 27 Feb. 1880, 7 R. (H.L.) 122, it was held that possession on a barony title of salmon-fishings in certain portions of a river was sufficient for prescription of a right to the fishings in the whole river as a *unum quid* so far as included within the barony. See *Barony*.]

It has been repeatedly decided that following up a conveyance *cum piscationibus* by fishing salmon with the rod or spear is not sufficient to establish a title to salmon-fishing. [The appropriate mode of possession is by net and coble; and it has been held that wherever that mode is practicable, rod-fishing is not a sufficiently clear and unequivocal assertion of right to amount to prescriptive possession; *D. Sutherland*, *Anderson*, and *D. Richmond*, *supra*. But the more recent tendency is to regard fishing with rod and line, if openly practised, as sufficient possession in places which do not admit of being fished by net and coble, and even in places which may be fished by net and coble, if rod-fishing is the more profitable mode of exercise; see Lord J. C. Moncreiff, in *D. Richmond*, *supra* (8 Macph. 541), and in *L. Lovat*, *supra* (7 R. H.L. 135); also *Stuart*, *supra*; *D. Roxburghe*, 18 Feb. 1879, 6 R. 663; *Warrand's Trs.* Feb. 1890, 17 R. (H.L.). As to the respective rights of owners of opposite banks of a river, each claiming the salmon-fishing *ex adverso* of his lands, and as to the extent to which their rights may be bounded by the *medium filum* of the river, see *Stuart* and *D. Richmond*, *supra*; also *Milne*, 23 Nov. 1850, 13 D. 112; and *E. Zetland*, 26 Feb. 1873, 11 Macph. 469. Where the whole width of the river is required for an efficient sweep of the net, the opposite owners usually arrange for alternate shots. In *Macbraire*,

[29 June 1871, 9 Macph. 913, a proprietor on the Scottish side of the lower part of the river Tweed was held entitled to interdict a proprietor on the English side from stationing a person in the water to the north of mid-channel, for the purpose of watching the ascent of salmon and signalling their approach to fishers on the English side. A proprietor is not entitled to improve his fishings by removing large boulders from the *alveus* of the river on his own side of the *medium filum*; *Robertson*, 16 July 1879, 6 R. 1290. But he is entitled to restore the *alveus* on his own side to its normal condition, after it has been disturbed by an extraordinary flood; *Mather*, 14 March 1873, 11 Macph. 522. See also *D. Roxburgh*, *supra*; contrasted with *West*, 8 Dec. 1876, 4 R. 207; and *D. Sutherland*, 15 April 1878, 5 R. (H.L.) 137.] A right of salmon-fishing may be given to one who has no right to the lands on either side of the river; and the right to the fishing necessarily implies a power of dragging the fishing-nets to the adjacent banks, [and a right of access through the lands to the bank;] but it will not confer the right of constructing towing-paths on the banks of the river, or of making any erections *in alveo fluminis*. [See *Miller*, 22 Nov. 1825, 4 S. 214; *Berry*, 1 Dec. 1841, 4 D. 139; *Sharp*, 30 Oct. 1878, 6 R. 108. In *Murray*, 25 May 1880, 7 R. 804, a "right and privilege of one tide's fishing of salmon yearly," conferred by a clause in a barony title, and kept up by usage, was sustained as a feudalised right, valid against the proprietor of the fishings. For the method of ascertaining the boundaries of salmon-fishings of adjoining proprietors, see *Keith*, 7 Nov. 1884, 12 R. 66; *Gray*, 9 Jan. 1885, 12 R. 530; *Mags. of Tain*, 23 Nov. 1887, 15 R. 83.

STATUTORY REGULATION OF SALMON-FISHINGS.

1. *Earlier Statutes. Prohibition of Fixed Machinery.*

[Numerous acts were passed by the Scottish Parliament for the protection of salmon-fishings; and the prohibitions which they enact are for the most part still in force, being confirmed by § 10 of the act of 1862, and § 36 of the act of 1868 (*infra*). These acts have been liberally interpreted by the court, in accordance with their general aim and principle. For an enumeration of the statutes, and of the explanatory decisions, see *Stewart on Fishings*,

[149; *Rankine on Land-Ownership*, 265. The general purpose of the acts was thus stated by Lord Chancellor Westbury:—"The acts are directed to three objects—the first, to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning grounds of the fish; the second, to secure the unimpeded return to the sea of the smolt or young fry of the salmon; the third, to prohibit the killing of unclean fish during the fenced months—that is, when the fish are out of season." With regard to the decisions following on the statutes, Lord Westbury said that they "have gone so far as to make it clear law at the present time, that it is illegal to fish for salmon with any net, or with any species of engine or machinery, devised or constructed for catching fish, which is a fixture, which is at all fixed or permanent even for a time in the water. And if I were asked to define the conclusion which I should derive from the statutes and the decisions, it would be this—that it was not legal to fish with a net unless where the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion, during the operation of fishing;" *Hay*, 12 May 1863, 1 Macph. (H.L.) 41, 4 Macq. 535. In that case it was held that a mode of fishing in use on the Tay, called "Bermoney boat," was a permissible variation of the ordinary mode by net and coble. See also *Masters of Allan's Mortification*, 14 Nov. 1879, 7 R. 221. The prohibition against stake-nets and other fixed machinery does not apply to salmon-fishing on the open seashore; *E. Kintore*, 11 July 1828, 3 W. & S. 261. See also *D. Athole*, 5 Dow, 282 (Buchanan's Remarkable Cases, 254); *M'Douall*, 16 April 1875, 2 R. (H.L.) 49. The ascertainment of the dividing line between an estuary and the sea, which was formerly a frequent subject of litigation, was committed by the act of 1862 to the salmon-fishery commissioners, to whose functions the Fishery Board succeeded in 1882, as mentioned *infra*. Cruive-fishing, which is an anomalous right, acquired either by express grant from the Crown, or by prescription on a grant of fishings, constitutes an exception from the general prohibition of stationary engines. This mode of fishing is subject, however, to special statutory restrictions; see *Cruives*. Cruives are now regulated by schedule F. annexed to the act of 1868 (*infra*). They may be acquired by district boards for the purpose

SALMON-FISHING

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[of removal; § 13 of same act. See *L. Lovat*, 27 Feb. 1880, 7 R. (H.L.) 122, as to express grant of cruives or yairs.

2. *Salmon-Poaching Acts.*

[Salmon-poaching is dealt with by 9 Geo. IV. c. 39, as amended by 7 & 8 Vict. c. 95. Any person fishing for salmon, grilse, sea-trout, whitling, or other fish of the salmon kind, in any river, lake, or other water, or in the sea within one mile of low-water mark, not having a legal right, nor permission from the proprietor of the salmon fishery, is liable to a penalty not less than 10s. and not more than £5 for each offence, besides forfeiture of the fish taken, and of any boat, net, &c., used in fishing. The same fine is incurred by persons trespassing with intent to kill salmon, &c. Provision is made for the apprehension of offenders, the recovery and application of penalties, &c. And, by § 25 of the act of 1868 (*infra*), water bailiffs, police officers, &c., may search all boats and receptacles which they have reason to suspect may contain salmon captured in contravention of the above provisions, and may seize all salmon found in the possession of persons not having a right to fish salmon; and the possession of such salmon is held to be *prima facie* evidence of an intention to contravene the above provisions. See *Trout-Fishing*.

3. *The Salmon Fisheries Acts of 1862 and 1868.*

(25 & 26 Vict. c. 97, and 31 & 32 Vict. c. 123.)

[*Fishery Commissioners. Bye-Laws.*—Commissioners were appointed by the Secretary of State for the purposes of the act; 1862, § 5. In virtue of powers conferred by § 6 and §§ 14–17 of the same act, the Commissioners made bye-laws, which are confirmed by § 10 of the act of 1868, and are appended as schedules to that act. By sched. A. the limits of fishery districts are defined; and a point is fixed on each river, marking the division between upper and lower proprietors. By sched. B. the limits are fixed which divide each river from the sea; and the limits of the Solway Firth are defined. By sched. C. the annual close time is fixed for every district, as well as the extended periods for rod-fishing (see *infra*). General regulations are also made—by sched. D. as to the due observance of the weekly close time; by sched. E.

[as to the meshes of nets, so that they shall not intercept smolts or salmon fry; by sched. F. as to the construction and use of cruives; and by sched. G. as to the construction and alteration of mill-dams, lades, and water-wheels, so as to afford reasonable means for the passage of salmon. But the regulations of sched. G. do not apply to streams not frequented by salmon; 1868, § 11.

[*District Board.*—The election, constitution, and powers of district boards of fishery proprietors are regulated by 1862, §§ 18–24, and 1868, §§ 3–14. District boards may impose assessments and borrow money. They may purchase, for the purpose only of removal, any dam, weir, cruives, or other fixed engines, and may remove natural obstructions in the bed of a river, attach a fish pass to any waterfall, and generally do what is expedient for the improvement of the fisheries, provided at least four-fifths (in value) of the proprietors concur. District boards may also, under certain conditions as to notice, &c., petition the Secretary for Scotland (48 & 49 Vict. c. 61) to vary the annual or weekly close time, or the regulations as to the observance thereof, or as to the construction and use of cruives, weirs, &c. They have no title to sue for penalties for offences under the acts, being merely statutory boards, with statutory remedies; *Tay District Fishery Board*, 16 Nov. 1887, 15 R. 40.

[*Fishery Board. Inspector.*—By 45 & 46 Vict. c. 78, the Fishery Board, created by that act, was appointed to have the general superintendence of the salmon fisheries of Scotland, and to have the powers and duties of commissioners under the Salmon Fishery Acts, but without prejudice to or interference with the powers of district boards; § 5 (2). As to the Fishery Board, see *Sea Fisheries*. By § 6, as altered by 48 & 49 Vict. c. 61, the Secretary for Scotland may appoint an inspector of the salmon fisheries of Scotland, who shall hold office during pleasure. The inspector shall under the directions of the Fishery Board inspect all the salmon fisheries of Scotland, and inquire into the operation of the Salmon Fishery Acts, and report thereon from time to time to the Board.

[*Close Time.*—The annual close time for every district must continue for 168 days; 1862, § 7. In the majority of rivers, the close time is from 27th August to 10th February, rod-fishing being allowed to continue till the end of October; but in several rivers these periods are varied. In

[the Tweed, under a special act (22 & 23 Vict. c. lxx. § 6), the annual close time is from 14th September to 15th February for all but rod-fishing, and for rod-fishing from 30th November to 1st February. The annual close time is applicable to every mode of fishing for salmon, excepting rod and line for the extended periods; 1862, § 8. The weekly close time (except for rod and line) is from 6 P.M. on Saturday to 6 A.M. on Monday; but power is given to the commissioners to vary the hours, provided they be not less than thirty-six; 1862, § 7.

[*Offences and Penalties.*—The following acts are offences under § 15 of the statute of 1868, viz:—(1) Fishing or assisting in fishing for salmon during the annual close time by any means other than rod and line; (2) Fishing or assisting in fishing for salmon (except during Saturday or Monday by rod and line) during the weekly close time, or contravening in any way any bye-law in force regarding the observance thereof; (3) Fishing or aiding in fishing for salmon during the annual close time by rod and line at a period not sanctioned by the bye-laws in force in the district; (4) Fishing or aiding in fishing for salmon with a net having a mesh contrary to any bye-law (see bye-laws in sched. E., and *Mackenzie*, 18 Feb. 1887, 14 R. (J.C.) 19); (5) Setting or using, or aiding in setting or using, a net or any other engine for the capture of salmon when leaping at or trying to ascend any fall or other impediment, or when falling back after leaping; (6) Doing any act for the purpose of preventing salmon from passing through any fish pass, or taking any salmon in its passage through the same; (7) Wilfully putting or causing to be put, or neglecting to take reasonable precautions to prevent the discharge of, any sawdust, or chaff, or shelling of corn, into any river; (8) Contravening any bye-law. Conviction of any of these offences infers a penalty of £5, as well as £2 for every salmon taken or killed in an illegal manner, and forfeiture thereof, in addition to the expenses of prosecution; 1868, § 15. Causing or allowing poisonous substances to flow into rivers is punishable under 1862, § 13 (amended by 1868, § 16). If three or more persons acting in concert, or being together or in company, at any time between the first hour after sunset and the last hour before sunrise, enter or are found on any ground near any river or the sea, or in or upon such river or the sea, with intent illegally to take or kill salmon, or having in their possession any instrument

[used for such purpose, they are liable to fine or imprisonment; 1862, § 27. Penalties are also enacted for the following offences, viz.:—using a light or fire of any kind, or any spear, leister, gaff, or other like instrument, or otter, for catching salmon, or any instrument for dragging for salmon (the use of a gaff as auxiliary to angling with a rod and line being excepted); using any fish roe for the purpose of fishing, or the buying, selling, or exposing for sale, or having in one's possession, any salmon roe (otherwise than for scientific purposes); wilfully taking or destroying, buying, selling, or having in one's possession, any smolt or salmon fry, obstructing their passage by any device or engine, wilfully injuring or disturbing the same or any salmon spawn or spawning bed, or impeding salmon in their passage to such bed; taking or fishing for, buying, selling, or having in one's possession, any unclean or unseasonable salmon (the accidental taking of a fish being excepted, if it be forthwith returned to the water with the least possible injury); buying, selling, or having in one's possession, salmon in close time; 1868, §§ 17–21. As to the last mentioned of these offences, see *Wilsone*, 13 Nov. 1884, 12 R. (J.C.) 12; *Chalmers*, 2 Feb. 1886, 13 R. (J.C.) 17; *Chalmers*, 4 March 1889, 16 R. (J.C.) 77. Parr come under the denomination "smolt or salmon fry," in the sense of the act; *Blair*, 2 Nov. 1870, 9 Macph. 58, 1 Coup. 462. The proprietor or occupier of any fishery must, within thirty-six hours after commencement of the annual close time, remove all boats, oars, nets, &c., and effectually secure them so as to prevent their being used until the end of the close time, with the exception of such boats and oars as may be used for angling; and a similar duty is imposed upon the proprietor or occupier of any cruive, with regard to the implements used in cruive-fishing. Neglect of this provision is punishable by a fine of £10 for every day, and forfeiture of everything that should have been removed. But the provision does not apply to any ferry boat, nor any boat kept by a proprietor for the use of himself or his family, provided his name be painted thereon, and it be secured by lock and key when not in use for lawful purposes; 1868, § 23. By § 24, penalties are enacted for the neglect of regulations as to the observance of the weekly close time. See *Cooper*, 22 April 1874, 2 Coup. 547; *Osborne*, 4 Nov. 1887, 15 R. (J.C.) 12.

[For the purposes of the acts, the word

["salmon" includes salmon, grilse, sea-trout, bull-trout, smolts, parr, and other migratory fish of the salmon kind; 1862, § 2. The exportation of salmon is regulated by 1868, § 22; see *Adams*, 28 Jan. 1889, 16 R. (J.C.) 51. Further provisions are enacted with regard to the enforcement of regulations and bye-laws, the entering and searching of lands and premises, the apprehension and prosecution of offenders, the recovery and application of penalties, seizure of forfeited articles, &c. See *Tough*, 28 April 1863, 4 Irv. 366; *Blair*, 9 July 1864, 4 Irv. 545; *Glen*, 6 Oct. 1865, 5 Irv. 203; *Blair*, 20 July 1869, 7 Macph. 1126, 1 Coup. 309; *Stevenson*, 21 Feb. 1879, 6 R. (J.C.) 33. The acts are annotated in *Rankine on Land-Ownership*, 768.

[The Tweed fisheries are not regulated by these acts, but by special statutes, viz., 20 & 21 Vict. c. cxlviii., and 22 & 23 Vict. c. lxx. See also § 34 of the act of 1862, and § 41 of the act of 1868; and 26 & 27 Vict. c. 50, § 4. As to the Solway fisheries, see 40 & 41 Vict. c. ccxl.; also *Gilbertson*, 2 Feb. 1878, 5 R. 610; *Coulthard*, 18 July 1879, 6 R. 1322; *Mackenzie*, 1 Dec. 1881, 9 R. 186.]

See on salmon-fishings, *Stair*, B. ii. tit. 3, § 61; *More's Notes*, cci.; *Ersk.* B. ii. tit. 6, § 15; *Bank.* B. ii. tit. 3, § 111; *Bell's Princ.* §§ 646, 671, 754, 1112-1121; *Ross's Lect.* ii. 173; [*Stewart on Rights of Fishing*; *Paterson on Fishery Laws*; *Rankine on Land-Ownership*, 257; *Rankine on Leases*, 27, 431; *Hunter's Landlord and Tenant*, i. 278; *Duncan's Manual of Salmon Fisheries Acts*. See *River. Sea and Seashore. Fishings. Trout-Fishing. Sea Fisheries.*]

SALTERS. See *Colliers and Salters*.

SALVAGE; is a reward or recompense given to those by whose labour or assistance a ship or goods, or any part thereof, have been saved from shipwreck, fire, or capture; being the losses to which such property is peculiarly exposed. This claim forms a burden on the property saved or recovered; and founds an action in the Court of Admiralty *in rem*, and at common law by lien; or a personal action or claim against the owner to whom the property is restored. [Salvage is also due for the saving of lives of persons belonging to a British ship; 17 & 18 Vict. c. 104, § 458; 24 Vict. c. 10, § 9; 25 & 26 Vict. c. 63, § 59.] The claim for salvage is not competent to the master or crew, however extraordinary their exertions may have been. But when their duty as seamen is over (as by capture), any successful effort thereafter made by

them to recover, recapture, or rescue the ship, entitles them to salvage. [Passengers are entitled to salvage, if they continue with the ship after they might have left it, and exert themselves for its safety. A pilot is not in general entitled to salvage; but extraordinary exertions of skill or courage may raise his professional charge to salvage. See *Robinson*, 5 Feb. 1851, 13 D. 592. Goods saved from shipwreck in the United Kingdom are to be delivered to the receiver appointed by the Board of Trade, who may detain them till satisfaction is made of the salvage, or security given for its payment; 17 & 18 Vict. c. 104, §§ 439 *et seq.*] The amount of salvage is fixed in some cases by statute, in others it is left to the discretion of the judge; and it is due by those who receive benefit by the exertions of the salvors. [The amount awarded bears no fixed proportion to the value of the property saved, but depends in each case upon the special circumstances, such as the extent of danger incurred, the expense and trouble falling on the salvors, &c. See *Davidson*, 24 Feb. 1844, 6 D. 765; *Otis*, 31 Jan. 1862, 24 D. 419. Provision is made for a summary adjudication on claims of salvage by 17 & 18 Vict. c. 104, §§ 460 *et seq.*; 25 & 26 Vict. c. 63, § 49. See *Lawson*, 14 June 1888, 15 R. 753. Salvage may be recovered by a personal action against the owners of the ship saved, as well as by an action *in rem*; *Duncan*, 8 March 1878, 5 R. 742. It has been held by the House of Lords that salvage does not come within either the words or the spirit of the suing and labouring clause of a policy of marine insurance; *Aitchison*, 4 App. Ca. 755. But see *MacLachlan*, 644.] See *Bell's Com.* i. 638; *Bank.* i. 209, 211, 235; *Bell's Princ.* §§ 443-6, 1427; *Kames' Princ. of Equity* (1825), 4, 112, 418; *Brodie's Supp. to Stair*, 1009; [*Smith's Merc. Law*, 326; *Abbott on Shipping*, 536; *MacLachlan on Shipping*, 608; *Maude & Pollock on Shipping*, i. 636; *Jones on Salvage*; *Newson on Salvage*, &c.] See *Contribution*.

SAMPLE, *Sale by*. See *Sale*, p. 941.

SANCTUARY. The Abbey of Holyrood House, as having been a royal residence, has the privilege of giving sanctuary to debtors in civil debts. To retire to the Abbey is, by 1696, c. 5, made one of the circumstances which, combined with insolvency, constitute legal bankruptcy. The precincts of the palace, to which the privilege belongs, are extensive; and the whole are placed under the direction of a

bailie, appointed by the Duke of Hamilton, as heritable keeper of Holyrood House. When a person retires to the sanctuary, he is protected against personal diligence from the instant he passes the confines, and this protection continues for 24 hours; but, in order to enjoy it longer, he must enter his name in the books kept by the bailie of the Abbey. This sanctuary affords no protection to a criminal; neither does it protect a Crown debtor, nor a fraudulent bankrupt, nor a person under an obligation to perform an act within his own power; nor does it protect the debtor against diligence for such debts as he may have contracted during his residence within the sanctuary. For personal execution on debts contracted within the sanctuary, there is a prison within the precincts. Where a person claims the benefit of the sanctuary who has no title to it, he may be taken into custody by an officer of the law, to which act the bailie of the Abbey gives his concurrence. The privilege of giving sanctuary was anciently enjoyed by many other places, as the Mint or "cunzie-house." The Castle of Edinburgh seems also to have been at one time considered as a sanctuary. The Palace of Holyrood House, however, and its precincts, are now the only sanctuary which the law of Scotland recognises, [and since the abolition of imprisonment for debt, the importance of the protection thus afforded has ceased; see *Imprisonment*.] See *Bell's Com.* ii. 461; *Bell's Princ.* § 2315; *Ersk.* B. iv. tit. 3, § 25; *Bank.* iii. 14; *Ross's Lect.* i. 331. See *Bankruptcy*.

SASINE. This term may signify either the act of giving legal possession of feudal property, or, colloquially, the instrument by which that fact is proved. The act of giving infeftment consisted in the granter and receiver of the right, or rather, as generally happened, the bailie of the superior, and the attorney of the vassal, appearing on the ground of the lands or other subject in which the infeftment was to be given, in presence of a notary-public and two witnesses. The attorney took with him the charter or other warrant containing the precept of sasine, which he presented to the person who was to act as bailie, and required him to exercise the powers thereby committed to him; the bailie received the deed, and delivered it to the notary-public to be published to the witnesses present, which he did by giving a short explanation of the nature of the deed, and, strictly speaking, it was his duty

to read the precept of sasine. The bailie then proceeded to the execution of his office, by delivering earth and stone of the ground [or other appropriate symbols] to the attorney in name of his constituent, on which the attorney took instruments in the hands of the notary-public. [See *Symbols*.] This ceremony proceeded in presence of at least two male witnesses, and the whole was reduced into the form of a notarial instrument, describing the subject of the infeftment, and detailing the ceremony, and thus not only defining the nature and extent of the estate, but affording evidence of all the requisite forms having been complied with. This instrument was signed [on each page] by the notary and by the two witnesses, and was the only evidence which the law recognised to prove that legal possession of feudal property had been taken. [It commenced with a solemn invocation of the Deity, and then set forth the date, stating both the year of grace and the year of the sovereign's reign. The necessity for both of these seems never to have been authoritatively determined; see *Macfarlan*, 2 June 1853, 15 D. 708. But if both are given, they must correspond; *Lindsay*, 27 Feb. 1844, 6 D. 771. Besides a full description of the ceremony, the instrument narrated the charter or conveyance on which infeftment had proceeded; and the precept of sasine and testing-clause were engrossed *verbatim*. It concluded with the Latin docquet of the notary-public. See *Docquet*.] The instrument required to be recorded within sixty days after its date, either in the General Register of Sasines at Edinburgh, or in the Particular Register of that district within which the lands were situated; and in competitions, it was by the date of the registration that its preference was regulated. Where lands were discontinuous or, though contiguous, had descended from different authors, or from the same author by different titles, or were held by different tenures, different acts of infeftment, or of delivery of sasine, required to take place on each separate or discontinuous parcel. [But see *Barony. Union, Charter of Dispensation*. An unrecorded sasine is absolutely null; *Kibbles*, 23 Sept. 1831, 5 W & S. 553; *Young*, 11 March 1847, 9 D. 932.

[By the Infeftment Act, 1845 (8 & 9 Vict. c. 35), the ceremony of giving sasine on the lands was dispensed with, and a simpler means of infeftment was provided, viz., by producing the warrants of sasine to

[a notary-public, and expeding and recording an instrument of sasine, setting forth that sasine had been given, and subscribed by the notary and witnesses, in the form prescribed by the act. Such infeftment is declared to be effectual, whether the lands lie contiguous or discontiguous, or are held by the same or different titles, or of one or more superiors. By the Titles to Land Act, 1858 (21 & 22 Vict. c. 76), the instrument of sasine was rendered wholly unnecessary, the recording of the conveyance itself, with warrant of registration thereon, being declared to confer on the grantee the same rights as if the conveyance had been followed by an instrument of sasine duly expedite and recorded.] See *Stair*, B. ii. tit. 3, § 16; *Ersk.* B. ii. tit. 3, §§ 17, 34; *Bank*, B. ii. tit. 3, § 39; *Bell's Com.* i. 20, 711, 715; [*Bell's Princ.* §§ 769, 869;] *Ross's Lect.* ii. 130, 178, 272, 352; [*Menzies' Conv.* 564; *M. Bell's Conv.* i. 649; *Duff's Feudal Conv.* 101. See *Infeftment. Registration. Notarial Instrument. Burgage.*]

SASINE OX; was a perquisite due to the sheriff when he gave infeftment to an heir holding Crown lands. It was afterwards converted into a payment in money, proportioned to the value of the estate, and is now done away with. *Ersk.* B. iii. tit. 8, § 79.

SASINE, PRECEPT OF. See *Precept of Sasine.*

SATURDAY'S SLOP. See *Cruise. Setterday's Slop.*

SAVINGS BANKS. [The existing statute regulating private or trustee savings banks is 26 & 27 Vict. c. 87, which consolidates and amends previous acts. But the earlier act 59 Geo. III. c. 62, is still in force with regard to savings banks established under it. The principal provisions of the modern act are the following:—Any institution is entitled to the benefits and privileges of the act, which is an institution in the nature of a bank established by any number of persons in the kingdom forming themselves into a society to receive deposits of money for the benefit of the depositors, to accumulate the produce of so much as is not required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of the deposit and produce to the depositors, their executors or administrators (deducting the expenses of management), but without deriving any benefit from the deposit or its produce. No savings bank is entitled to the benefits of the act, unless sanctioned by the commissioners for the reduction of

[the national debt, or by their comptroller-general or assistant-comptroller on their behalf; § 2. The rules and regulations must be entered in a book or books to be kept by an officer appointed for the purpose, and open at all seasonable times for the inspection of depositors. Alterations on the rules are not prohibited, but such alterations are not of force until entered in the aforesaid book or books; § 3. The rules must be certified at the central office constituted by the Friendly Societies Act, 1875, and are then binding on members and depositors; § 4, as amended by 38 & 39 Vict. c. 60, § 10, and 39 & 40 Vict. c. 52, § 2. It must be expressly provided in the rules that no treasurer, trustee, or manager, shall profit by any deposit beyond his actual expenses; but allowances may be made for the salaries of other officers, and the expenses of management; § 6 of the Savings Bank Act. The treasurer and other officers entrusted with the receipt or custody of money, as well as all officers receiving a salary, must give security for the faithful discharge of their office; § 8. The effects of the institution are vested in the trustees for the time being; § 10. No trustee or manager is personally liable, except (1) for monies actually received by him on account of or for the use of the savings bank, and not paid over and disposed of in the manner directed by the rules of the savings bank; (2) for neglect or omission to comply with the regulations provided by the act with regard to the maintenance of checks, the audit and examination of accounts, the holding of meetings and keeping minutes of proceedings thereat; and (3) for neglect or omission in taking security from officers, as provided by the act; § 11. All persons who have received money or effects must, on demand made, in pursuance of an order of at least two trustees and three managers, or at any general meeting of trustees or managers, account for, and deliver up, the money and effects; § 13. Money, when invested by the trustees, must be invested in the Bank of England or Ireland. Provision is made for investing money to the account of the commissioners for the reduction of the national debt, &c.; §§ 15 to 21. The managers and trustees of any savings bank may, if they think fit, direct all interest due and payable to depositors to be calculated yearly, or twice a year, and carried to the credit of the depositors, after which it becomes principal, and carries interest; § 22. Various provisions are made for the trustees of savings banks

[drawing money placed to their account in the national debt commissioners' books, for the appropriation of surplus funds, &c.; §§ 24 to 29. Minors may deposit, and their receipt is declared to be a sufficient discharge; § 31. Where deposits are made by married women, or by women who have afterwards married, money may be paid to them in respect of such deposit, unless the husband give to the trustees or managers notice in writing of his marriage with such woman, and require payment to be made to him; § 31. Provision is made by §§ 32 to 35 for the investment in a savings bank of funds belonging to charitable societies, penny savings banks, or friendly societies. No sum can be received without the name, employment, and residence of the depositor being entered in the books of the institution; § 36. Persons are empowered to deposit as trustees on behalf of others; § 37. Depositors in one savings bank cannot deposit in any other, and a declaration to this effect must be made at the time of the deposit. The penalty of contravening this provision, or making a false declaration, is forfeiture of all the deposits to the sinking-fund. A printed notice of this regulation and prohibition must be affixed in the office for receiving deposits; § 38. More than £30, exclusive of compound interest, cannot be received from depositors in one year, nor any sum or sums whatever making the sum to which the depositor is entitled exceed £150 in the whole. In such questions the year is reckoned forwards from the 20th of November; and whenever the sums standing in the name of the depositor amount in the whole to £200, principal and interest included, no interest is payable on such sum so long as it continues to amount to £200; § 39. Provision is made for the granting of certificates in case of deposits being withdrawn from one savings bank and placed in another; § 40. If a depositor die, leaving any sum in a savings bank exceeding £50, it cannot be paid but upon the probate of the will or letters of administration. No duty is paid on the probate, or legacy, or residue of a deceased depositor, where his whole estate did not amount to £50; and a certificate of his interest in the savings bank is taken as evidence thereof; § 41. Administration bonds, &c., for effects under £50, are exempted from stamp-duty; § 42. Where a depositor dies leaving funds in the savings bank not exceeding £50, exclusive of interest, if probate of the will of the deceased, or letters of administration of his estate, are not produced to the trustees

[and managers within a month from the death of the depositor (or within two months, provided notice have been given within one month of the intention to prove the will or to take out letters of administration), then the trustees and managers may pay the deposit to any person or persons appearing to be the widow, or entitled to the effects of the deceased, according to the statute of distribution, or according to the rules of the savings bank; § 43. Payment to persons appearing to be entitled to receive it as next of kin or lawful representatives, or under probates, &c., is declared to be valid as regards the liability of the savings bank; but the persons really entitled to payment have their recourse against the persons who have received the money; §§ 44 and 45. Where the act provides for payment to any of the relations of any deceased intestate depositor, such provisions apply in Scotland to persons appearing to be of kin according to the law of Scotland; and where the act refers to probate of the will of the deceased, or letters of administration of his estate, the provisions apply in Scotland to confirmation by the law of Scotland; § 47. Powers of attorney, &c., given by trustees or depositors, are not liable to stamp-duty; § 50. The trustees are required to make up annually, and to transmit to the commissioners for the reduction of the national debt, an account exhibiting the balance due to the depositors; and to affix publicly in the office of the savings bank a duplicate thereof, along with a list of the trustees and managers; §§ 55 *et seq.* With regard to investment in Government stock, see 43 & 44 Vict. c. 36; 47 & 48 Vict. c. 43, § 5. See also 50 & 51 Vict. c. 40. See *Grant on Bankers*, 262.

[*Post-Office Savings Banks*.—The act 24 Vict. c. 14, grants additional facilities for depositing small savings at interest, by making the General Post-Office available for that purpose, and giving the direct security of the Government for the repayment of all money deposited with interest. The Postmaster-General is empowered, with consent of the Commissioners of the Treasury, to direct such of his officers as he thinks fit, to receive deposits for remittance to the principal office, and to repay them under such regulations as may be prescribed; § 1. Every such deposit (which may not be of less amount than one shilling, nor of any sum not a multiple thereof), is to be entered in the depositor's book, and attested by the stamp of the

[office. The amount received is to be reported on the same day to the Postmaster-General; and an acknowledgment is to be transmitted to the depositor, which is deemed conclusive evidence of his claim to repayment, with interest. But for ten days after the deposit, the entry by the proper officer in the depositor's book is deemed conclusive evidence; and if the acknowledgment has not been received within that time, and is demanded from the Postmaster-General, then the entry in the depositor's book shall be conclusive evidence of title during another term of ten days; § 2. Depositors are entitled to repayment within ten days after making demand in a prescribed form, at any post-office where deposits are received or paid; § 3. Interest is payable to depositors at the rate of $2\frac{1}{2}$ per cent.; § 8. See also 26 Vict. c. 14; 29 Vict. c. 5; 32 & 33 Vict. c. 59; 37 & 38 Vict. c. 73; 40 & 41 Vict. c. 13, §§ 14-17; 50 & 51 Vict. c. 40. See *Forbes on Savings Banks*.]

SCACCARIUM; according to Skene, the checker, in French, "Echiquier," the place where the King's rent and patrimony, as well rents as casualties, and the profits of all lands fallen into the king's hands by reason of ward, are "inbrocht, compted, and received." *Skene, h. t.* See *Exchequer*.

SCANDAL; an injurious report circulated, or printed and published, which may be the foundation either of a criminal prosecution, or of a civil action of damages, or of a combination of both. All actions upon scandal, or verbal injuries for damages, although competent in inferior courts, may also be brought before the Court of Session. *Ersk. B. i. tit. 3, § 21; Bank. B. iv. tit. 13, § 12; Stair, B. i. tit. 9, § 3.* See *Defamation. Libel. Injuries*.

SCANDALUM MAGNATUM; words spoken in derogation of a peer, a judge, or other great officer of the realm. These words, although they would not be actionable in the case of a common person, yet when spoken in disparagement of persons of rank and station, are accounted criminal. In England, scandal of this description may be the ground of an action both for punishment and for damages. In Scotland, this offence is called *leasing-making*, the punishment of which was greatly mitigated by 6 Geo. IV. c. 47, and 7 Will. IV. c. 5. [The offence is now practically obsolete in both countries.] *Hume, i. 337; Bank. B. i. tit. 2, § 33; tit. 10, § 36; [Wharton's Lex.]* See *Leasing-Making*.

SCHAFFA SAGITTARUM; according

to Skene, is a sheaf of arrows, containing twenty-four. (See *Garba*.) A sheaf of arrows contains sixteen "gades;" a sheaf of steel contains fourteen "gades." *Skene, h. t.*

SCHEDULE OF POINDING. When a poinding is completed, the officer who executes it [leaves the poinded effects with the person in whose possession they were when poinded; and delivers to him a schedule specifying the poinded effects, and at whose instance they were poinded, and the value thereof; 1 & 2 Vict. c. 114, § 24.] See *Bell's Com. ii. 59; Ross's Lect. i. 437; Bell on Leases, ii. 313; Hunter's Landlord and Tenant, ii. 608.* [See *Poinding*.]

SCHEME OF DIVISION. [See *Division, Scheme of*.]

SCHEME OF LOCALITY. See *Locality*.

SCHOOLS. By 1696, c. 26, the heritors of parishes where no parochial school had been before established, were ordered to provide a schoolhouse, and to modify a salary to the schoolmaster, not under 100 merks Scots, [£5, 11s. 1 $\frac{1}{2}$ d.,] and not above 200 merks, to be proportioned according to the valued rent of the parish. If the heritors should neglect this duty, the presbytery were directed to apply to the commissioners of supply of the county, who had power to establish a school, and settle a salary, in terms of the statute; and by 1693, c. 22, the sufficiency and qualification of the parochial schoolmasters, as well as their conduct after their admission, were judged of by the presbytery. The schoolmaster's salary and the poor's rates were divided equally between the heritor and the tenant; 1696, c. 26; 1663, c. 16; *Kames' Abridg., voce Vagrant; Ersk. B. i. tit. 5, § 24; B. ii. tit. 6, § 42; Bank. B. i. tit. 6, § 16.*

Parochial schools, so far as regards parishes not entirely comprehended in royal burghs, were [subsequently] regulated by 43 Geo. III. c. 54, whereby, within three months after 11 June 1803, the salaries of the schoolmasters were to be fixed at from 300 to 400 merks Scots, by the minister, and by the heritors of lands in the parish of £100 Scots valued rent in the cess-books. In twenty-five years after that date, the heritors and minister were in like manner to modify a new salary according to the average price of oatmeal, to be ascertained by Exchequer, of the value of from one and a half to two chalders; and so on periodically, at intervals of twenty-five years. In case of neglect or wrong by the heritors and minister, application by the aggrieved party was made competent to the quarter sessions, within three months after such meeting

ought to have been held, or such determination had been made. In extensive districts, the heritors and minister might appoint two masters, with an increased allowance, subject to appeal to the quarter sessions as to the division of the allowance. And where there were not a proper school-house, a house for the schoolmaster, and a garden, containing at least one-fourth of a Scotch acre, the heritors of the parish were required to provide them; or, in certain cases, an equivalent for the garden, by authority of the quarter sessions. The choice of the schoolmaster was vested in the minister and heritors; the person elected being found qualified by the presbytery as to morals, religion, and literature, and signing the Confession of Faith and Formula of the Church of Scotland. The determination of the presbytery as to the qualifications of the presentee (where they had proceeded in terms of the statute) was not subject to review in any court, civil or ecclesiastical. Their determination in cases of complaint against the schoolmaster, even if it ended in his dismissal, was also final, and not subject to review in any court; and, in general, the presbytery had an absolute control over the schoolmaster, with respect to the hours of teaching, the length of the vacation, and the like. But the presbytery had no superintendence of private schools. By 19 Geo. II. c. 39, § 21, however, no person could keep a private school for teaching English, Latin, Greek, or any part of literature, until the description of the school had been registered, and the master had qualified himself by taking the oaths to Government, under the pain of transportation. See also 21 Geo. II. c. 34, § 12.

[The act 24 & 25 Vict. c. 107, provided that the salaries of schoolmasters of parochial schools should not be less than £35, not more than £70 *per annum*; or where there were two or more schools in one parish, that the total salaries payable should not be less than £50, nor more than £80; § 2. The salaries were to be fixed by the heritors and minister, and to be payable in money; § 3. Teachers were no longer to be examined by the presbyteries, but by examiners appointed by the universities; § 9. Instead of signing the Confession of Faith and Formula of the Church, parochial schoolmasters were required to sign a declaration that they would not teach any opinions opposed to the Bible or the Shorter Catechism, but faithfully conform thereto, and that they would not exercise the functions of their office to the prejudice of the

[Church of Scotland, as by law established; § 9. The jurisdiction formerly exercised by the presbytery in the case of immoral conduct or cruelty on the part of a teacher was transferred to the sheriff; § 14. In case it should be found, on a report by one of Her Majesty's Inspectors of Schools, made on application by the heritors, that a parish schoolmaster was disqualified because of infirmity or old age for the due performance of the duties of his office, or that from negligence or inattention he had failed efficiently to discharge his duties, the heritors and minister were empowered to permit or require his resignation, or in case of refusal to dismiss or suspend him; § 19. In every case of such resignation, the heritors and minister might grant a retiring allowance during the remainder of the teacher's life; and when the resignation was not occasioned by any fault on his part, the heritors were required to grant a retiring allowance of not less than two-thirds of his salary, and not exceeding the gross amount thereof; *ib.* In addition to such retiring allowance, the minister and heritors were empowered, if they saw fit, to grant a further yearly sum, in respect of the value of his dwelling-house and garden; § 20. Schoolmasters in royal burghs were not to be required to sign the Confession of Faith or Formula, nor to be subject to the judgment or censure of the presbytery for their sufficiency, qualifications, or deportment in their office; § 22.

[On the former law as to schools,] see *Bell's Princ.* §§ 41, 1133-5, 2189; *Kames' Stat. Law Abridg. h. t.*; *Watson's Stat. Law, h. t.*; *Hill's Church Prac.* 145; *Connell on Parishes*; *Dunlop's Parish Law*, 292, 321, 530; [*Duncan's Par. Eccl. Law*, 754.

EDUCATION ACTS, 1872 (35 & 36 Vict. c. 62), 1878 (41 & 42 Vict. c. 78), and 1883 (46 & 47 Vict. c. 56).

[By the Education Act, 1872, a new system of national education was established in Scotland. The main principles of the act were thus described in Parliament by Lord Advocate Young (quoted in the preface to *Sellar's Manual*, 8th edit.):— "First, that the imperial money voted in Parliament for promoting national education should be, in Scotland as it was in England, administered by the Government, and not by a statutory board, which would not be responsible to the Government, and for whose proceedings, consequently, the

[Government could not be responsible to Parliament. Second, that a popularly elected school board should be forthwith established in every parish and burgh, and that the duties of each school board should be, first, to manage all rate-supported schools within the district; next, to provide such additional school accommodation as should be necessary in the district; and thirdly, to impose and levy such local school rates as should be necessary. Third, that there should be one uniform system of management, applicable without distinction to all public rate-supported schools, whether existing before the act, or established under the act to supply the ascertained deficiency. Fourth, that the religious teaching should be given at such hours that it would not interrupt or interfere with the secular instruction, and that children should be at liberty to withdraw from it without losing any part of the secular instruction." By the acts of 1878 and 1883, the provisions of the principal act are amended in various respects, new regulations being introduced in regard to the employment of children, the enforcement of attendance at school, the management of higher class public schools, &c.

[*Act of 1872. Preamble.*—The act proceeds on the preamble that "it is desirable to amend and extend the provisions of the law of Scotland on the subject of education, in such manner that the means of procuring efficient education for their children may be furnished and made available to the whole people of Scotland;" and that "it has been the custom in the public schools of Scotland to give instruction in religion to children whose parents did not object to the instruction so given, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not receive such instruction, and it is expedient that the managers of public schools shall be at liberty to continue the said custom."

[*Scotch Education Department and Board of Education.*—The Scotch Education Department consists of the Lords of any Committee of the Privy Council appointed by Her Majesty on education in Scotland; and Her Majesty may from time to time appoint the Secretary for Scotland to be Vice-President of the Scotch Education Department; 1872, § 1; 48 & 49 Vict. c. 61, §§ 6-7. The Board of Education was a temporary institution, consisting of five members, responsible to the Education Department, and appointed mainly for the

[purpose of assisting in the organisation of schools and school boards, and regulating the amount of school accommodation; 1872, § 3. It was instituted for the term of three years, but in 1875 the period was extended for two years, and in 1877 for one year more. In 1878 the Board of Education ceased to exist, and its functions thereupon devolved on the Education Department; 1872, § 3 (6). Besides these functions, the chief duties of the Department are to regulate the distribution of the parliamentary grants, to frame the code of minutes in accordance with which grants are made, and to regulate the examination of teachers; §§ 5, 57, 67. By the Local Government Act, 1889 (52 & 53 Vict. c. 50), § 15, the Secretary for Scotland may transfer to the County Councils certain administrative powers and duties of the Department.

[*School Boards and School Districts.*—The act of 1872 directed that within twelve months after its passing a school board should be elected in every parish and burgh; § 8. The terms *parish* and *burgh*, and the areas denoted by them, are especially defined for the purposes of the act; §§ 1, 9, 10. Disputes regarding the area of a parish or burgh are settled (without appeal) by the Education Department, or by the sheriff, on an application by the school board authorised by the Department; § 9. See *Selkirk Parish S.B.* 5 June 1875, 2 R. 761; *Lochgilphead S.B.* 30 Jan. 1877, 4 R. 389; *Renfrew Burgh S.B.* 15 Nov. 1877, 5 R. 142. Power is given to the Department to create, abolish, or amalgamate school districts, according to circumstances; 1872, §§ 11, 17-19; 1878, § 29. See *Peebles S.B.* 28 Feb. 1874, 1 R. 686. The extension of the area of a burgh for municipal purposes does not alter the school board area; but the Department has power, after due inquiry, to order the added district to be annexed to the burgh for educational purposes, on such terms and subject to such arrangements as they may determine; 1878, § 30. School boards of adjoining parishes may, with consent of the sheriff, detach portions of their parishes, and unite them into a separate school district; 1872, § 17. Any two or more school boards may, with consent of the Department, combine for any purpose relating to public schools; 1872, § 42; and such combination may be required by the Department, if, on inquiry, they judge it expedient; 1883, § 13. By the Local Government Act, the Boundary Commissioners, and after expiry of their

[powers the Secretary for Scotland, are empowered, in altering the bounds in parishes and burghs, to alter also, where necessary, the area and jurisdiction of school boards; see §§ 45, 49–51.

[*Election of School Boards.*—Each school board consists of such number of members, not less than five, nor more than fifteen, as may be determined by the Department with respect to each parish and burgh. The electors consist of all persons being of lawful age, and not subject to any legal incapacity, whose names are entered on the latest valuation roll applicable to the parish or burgh for which the school board is to be elected, made up and completed at least one month prior to the election, as owners or occupiers of land or heritages of the annual value of not less than £4, situated within such parish or burgh. The chairman of the school board is returning officer, or, failing him, some person appointed by the school board; but no candidate may act as returning officer. The election is triennial, and is held at such time and in such manner as the Department may from time to time by order prescribe. The expenses of an election (but not including the expenses of any candidate) are paid by the school board out of the school fund. Every voter is entitled to a number of votes equal to the number of the members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he sees fit. No teacher of a public or state-aided school in any parish or burgh is eligible as a member of a school board; nor is any person who holds an office of profit under a school board; 1872, §§ 12, 13, and sched. B.; 1878, §§ 21, 26, and sched. In virtue of the powers conferred by the acts, the Department have issued an order previous to each triennial election, regulating the nomination and withdrawal of candidates, the arrangements for polling, the publication of the names of candidates, and of the result of the poll, &c. Should an election not take place as required by the act, the Department may issue an order for an election, or may allow the existing school board to continue in office, or may themselves nominate a school board; 1872, § 13. In case of candidates having an equal number of votes at an election, the returning officer determines which is to be elected; § 14. Any question or dispute regarding the election of a candidate is to be summarily determined by the sheriff, on the petition of any person having a legal title or interest to raise such question;

[and the sheriff's decision is final. Pending such decision, the school board is deemed to consist of the members who have been declared by the returning officer to be elected; and the validity of their acts is not affected by any subsequent finding that a member was not duly elected; *ib.* The provision that the proceedings shall be summary means that "the sheriff, without making up a record and having a proof in ordinary form, should hear parties' statements, and at once pronounce his decision;" *Bone*, 16 March 1886, 13 R. 768. Either the sheriff-substitute or the sheriff principal may determine the question, but appeal to the principal is incompetent; *ib.* If any member's election is declared to be invalid, the school board, if a quorum (*i.e.*, three members) exist, is directed to fill up the vacancy. If there is no quorum, or if the board fails for three weeks to fill up the vacancy, the Department may order a new election of as many members as are required to make up the full number; § 15. The act of 1872 has been understood and acted on as conferring the educational franchise on unmarried women and widows. Whether married women are entitled to vote is a point which has been ruled differently in different sheriffdoms. See *Sellar's Manual*, 138 (Lochwinnoch); also *Journ. of Jurisp.* xxiii. 328. Women, whether married or unmarried, are eligible as members of school boards.

[*Constitution, Powers, &c., of School Boards.*—At their first meeting the school board appoint one of their number to be chairman. He has a deliberative, and also, in cases of equality, a casting vote; 1872, § 21. Three members of a school board form a quorum; *ib.* A member may resign on giving one month's previous notice in writing; 1878, § 15. If a member absents himself during six successive months from all meetings of the board, except from temporary illness or other cause approved by the board, he ceases to be a member; 1878, § 16. A vacancy occurring in a school board during its period of office is supplied by the board itself nominating a member; 1872, § 13. If the vacancy is caused by a member's resignation, and if the board fails for eight weeks to fill up the vacancy, the Department may nominate a member, or may order the election of one; 1878, § 15. If, by the death, resignation, or disqualification of members, there shall cease to be a quorum, the Department may nominate, or order the election of, as many as are necessary to make up the full number; 1878,

[§ 17. A school board is a body corporate, with perpetual succession, and power to acquire and hold land for the purposes of the act; 1872, § 22. A board may appoint managers, not less than three in number, and may delegate to them all their powers, except that of raising money. Managers are removable at the pleasure of the board, and may resign on giving written notice; 1872, § 22. No one who holds an office of profit under a school board may be a manager; 1878, § 21.

[*Transference of previously existing Parish and Burgh Schools to School Boards.*—By the act of 1872 it was provided that the existing parish schools, with teachers' houses, &c., should be vested in and be under the management of the school board of the parish; or, if situated in a burgh, then of the school board of the burgh, unless such school was the parish school of the landward district of a parish partly landward and partly burghal, in which case it was to come under the management of the school board of such district; § 23. See *Selkirk Parish S.B.* 5 June 1875, 2 R. 761. The school board superseded and came in place of the heritors and ministers, with respect to school management and the election of teachers, and generally with respect to all powers and duties formerly belonging to the heritors and ministers; and all jurisdiction and authority formerly exercised by church courts with respect to any public schools was abolished; *ib.* Existing burgh schools were transferred to the burgh school boards; and these superseded and came in place of the town council and magistrates or other authorities, in whom the school management and election of teachers were formerly vested; § 24. As to right of school board to visit school, see *Kelso S.B.* 18 Dec. 1874, 2 R. 228; also *Morison* (Glenshiel), 28 May 1875, 2 R. 715 (Lord Young). In *Whyte*, 9 July 1874, 1 R. 1124, the teacher's house was held to be vested in a burgh school board, as well as the classrooms, the whole forming one tenement.

[*School Accommodation.*—There must be provided for every parish and burgh a sufficient amount of accommodation in public schools available for all persons resident in the parish or burgh, for whose education efficient and suitable provision is not otherwise made; and when sufficient accommodation does not exist, it is the duty of the school board to supply the deficiency; 1872, § 26. School boards

[tional requirements of the districts, and the extent and quality of the existing supply; § 27. For this purpose, they are empowered to call for information from public officers, clergymen, teachers, and managers of schools, and to inspect all schools and scholars therein. But no school subject to inspection by one of Her Majesty's inspectors may be required to have its scholars examined by any other person; § 30. If the managers or teachers of any school withhold information, or refuse to allow inspection, such school is not to be taken into consideration as giving efficient education; § 35. When additional accommodation is required, the school board determine both the extent to which, and the manner in which it may most advantageously be provided; and their determination is reported forthwith to the Department, who may approve or vary such determination, or direct a further report, or order further inquiry; and the directions of the Department are to be carried into effect by the school board; § 28. See *Stow S.B.* 19 Feb. 1876, 2 R. 469. The Department may from time to time require from any school board returns regarding the schools and the children resident in their district; §§ 31–35. School boards are required to maintain and keep efficient every school under their management. If they fail to fulfil this duty, or to provide from time to time such additional accommodation as is necessary, after receiving a requisition from the Department, they may be compelled by the Court of Session, on a petition and complaint at the instance of the Lord Advocate; § 36. With the sanction of the Department, a school board may discontinue or change the site of any school under their management, and may sell any land or buildings connected with a discontinued school; *ib.* School boards may acquire sites for schools, teachers' houses and gardens, may buy or take on lease any existing schools, &c. (provided they are not denominational or subscription schools), and may improve or enlarge any school under their management; § 37. In *M'Culloch*, 20 July 1876, 3 R. 1182, the court approved of a lease of a private trust school to a school board, who undertook to give higher education, the trustees reserving power to nominate free scholars. By § 31 of the act of 1878, the provisions of the Lands Clauses Consolidation Act (8 Vict. c. 19), as amended by 23 & 24 Vict. c. 106, authorising the compulsory purchase of lands, are incorporated with the Education Acts. But before exercising the compulsory

[powers so conferred, school boards must publish and serve notices, as prescribed, and must obtain from the Department an order authorising the purchase, which order must be confirmed by Parliament. The transference to school boards of existing denominational and subscription schools, under certain conditions, was provided for by §§ 38, 39 of the act of 1872. See also the Free Church School Properties Act (41 & 42 Vict. c. ccxx.), summarised in *Sellar's Manual*, 294. School boards may establish and maintain infant schools for children under seven, and evening schools for scholars above thirteen years of age; 1872, § 40. They may also, with consent of the Department, establish and maintain industrial schools, subject to the provisions of the Industrial Schools Act (see *infra*); § 41. A school board has a discretion to allow the use of its schools for purposes which do not interfere with proper educational purposes; *Hunter*, 1 Dec. 1886, 14 R. 135. In that case a country school board was held not to have abused its discretion by granting the school for five days in vacation to a charitable society to be used as a sleeping and cooking place for a large number of poor children brought from town for a holiday. No part of the premises of a public elementary school in receipt of an annual parliamentary grant may be used as a committee room for the promotion of a candidature at an election; 46 & 47 Vict. c. 51, § 20; see *Election Law*, p. 384 *b*. The use of public schools for parliamentary and municipal elections is sanctioned by the Ballot Act, 1872, § 6; and for county council elections (including counting of votes) by the Local Government Act, § 30 (5).

[*School Fund, Rates, &c.*—The expenses of a school board are paid out of the school fund, which includes all moneys received by parliamentary grant, or raised by way of loan, or otherwise received for the purposes of the fund; 1872, § 43. Any sum required to meet a deficiency in the school fund is raised by means of a local rate within the parish or burgh; with respect to which the following provisions are enacted by § 44:—Every school board shall before 12th June in each year certify to the parochial board of their parish or burgh the amount of the deficiency in their school fund; and the parochial board shall add the amount required as school rate to the next assessment for relief of the poor, lay on and collect it along with the poor's rate, and pay over the amount to the school

[board. Where the school district includes more than one parish, the school board, instead of certifying the deficiency, shall certify to the respective parochial boards the amount of the rate on each pound of rental which they shall lay on and collect along with the poor rate. By § 32 of the act of 1878, parochial boards are bound to pay over the school rate without deducting the cost of collection. Where there is no assessment for relief of the poor, or where such assessment is not laid one-half on owners and one-half on occupiers, the school board shall directly for themselves assess for and levy the school rate. In all cases the school rate shall be levied and collected in the same manner as if it were poor rate. See *Poor*, pp. 817–8. Parish ministers are liable to assessment for school rates in respect of the manse and glebe; *Hogg*, 22 June 1880, 7 R. 986; *Gillanders*, 11 Dec. 1884, 12 R. 309. Where a school board shall require to incur expense in providing or enlarging a schoolhouse, they may, with consent of the Department, spread the payment over several years, not exceeding fifty, and may for that purpose borrow money on the security of the school fund and the school rate, and may charge these with the payment of the principal and interest. They may repay, if they so agree with the lender, by equal annual instalments, not exceeding fifty; otherwise they shall annually set aside one-fiftieth of the sum borrowed as a sinking fund; 1872, § 45. For the purpose of such borrowing, the clauses of the Commissioners Clauses Act (10 & 11 Vict. c. 16), with respect to mortgages, are incorporated with the act; *ib.* The Public Works Loan Commissioners may lend to school boards, under this section, at such rate, not less than 3½ per cent., as may be necessary, in the judgment of the Lords Commissioners of the Treasury, in order to enable the loans to be made without loss to the Exchequer; *ib.*; 42 & 43 Vict. c. 77, § 2. When property or money is vested in trustees for behoof of a parish or burgh school, or for the promotion of any branch of education in such school, or to increase the income of any teacher thereof, the income shall be paid to the school board, and administered by them according to the trust. But power is given to the board, with consent of the Department, to vary or depart from the trusts, with a view to increase the efficiency of the school by raising the standard of education therein, or otherwise; saving always the rights of teachers under

[subsisting contracts; 1872, § 46. The town council of every burgh shall pay to the school board yearly at Martinmas such sum as it had been the previous custom of the burgh to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge, and the same shall be administered by the school board for the purpose of promoting higher instruction; *ib.* The custom need not have been invariable, nor continued for the prescriptive period: in *Perth S.B.* 19 Oct. 1878, 6 R. 45, the average annual payment for ten years prior to 1872 was held to be the sum payable. See also *Dunbar S.B.* 18 March 1876, 3 R. 631; *Dunfermline S.B.* 19 Oct. 1878, 6 R. 51. School boards may receive bequests or donations for behoof of schools under their management, either generally, or for the promotion of any particular branch of education, or for increasing the income of any teacher, and shall administer the same according to the wishes of the donors, and so as to raise the standard of education, and increase the efficiency of the school; 1872, § 47. The appointment and duties of treasurers of school boards are regulated by §§ 48, 49. Every treasurer shall, on 1st January in each year, transmit to the accountant for the Department an account, with vouchers, showing the receipts and payments of the board, and the state of the funds and property under their charge, made up to the preceding Whitsunday. The accounts, after being audited and reported on by the accountant, are retransmitted to the treasurer, and are patent to any member of the school board, and to any ratepayer who demands inspection on the written requisition of not fewer than five ratepayers. An annual abstract of the accounts of each school board is prepared by the accountant and laid before Parliament; § 51.

[*School Fees.*—The fees are fixed by the school boards (except in the case of higher class schools), but subject to the provisions of the Code and of any minute of the Department submitted to Parliament; 1872, § 53, as amended by § 87 of the Local Government Act, 1889 (52 & 53 Vict. c. 50). The fees are generally paid to the treasurer, who keeps a separate account thereof; but they may be paid directly to the teachers; 1872, § 53. So far, however, as the first five standards are concerned, these provisions are now of little consequence, as the Local Government Act has practically introduced free elementary

[education. By § 22 of that act it is directed that, after the financial year ending 31 March 1890, and until Parliament shall otherwise determine, an imperial grant, consisting of probate duties and excise duties, shall be applied (after deducting sums appropriated for poor-law medical relief, to road authorities, to parochial boards for pauper lunatics, and to police authorities, as well as a special grant of £10,000 for relief of local taxation in the Highlands and Islands) in relief of school fees in Scotland. The balance available for this purpose is estimated at £247,141; and it is expected that this sum will almost cover the whole fees payable in the first five standards. (The financial arrangement applicable to the period between the passing of the act and 31 March 1889 is expressed in § 19.) See *Graham's Supplement to Sellar's Manual* (1889), which contains minute and circular of the Department relative to these provisions. By the Education Act, if a parent or guardian was unable from poverty to pay the school fees, he was directed to apply to the parochial board, who were bound, on being satisfied of his inability, to pay the fees, or such part of them as he was unable to pay, out of the poor fund; 1872, § 69; and if the parochial board refused to pay reasonable fees for such parent, it was the duty of the school board to apply to the sheriff, who, after inquiry, might grant an order on the parochial board to pay the fees; 1878, § 22. But these provisions were repealed by § 88 of the Local Government Act.

[*Teachers.* 1. *Those appointed after the passing of the Education Act* (16 Aug. 1872).—Since the passing of the act, the appointment of teachers of public schools belongs to the school boards. They may give such salaries or emoluments as they think fit; and every appointment is during the pleasure of the school board; 1872, § 55. But a resolution to dismiss a certificated teacher is not valid, unless (1) it is adopted at a meeting called three weeks previously by circular sent to each member of the board, intimating that such dismissal is to be considered; nor (2) unless notice of the motion to dismiss is sent to the teacher three weeks previously; nor (3) unless it is agreed to by a majority of the full number of the members of the board; 45 & 46 Vict. c. 18, § 3. See *Hinds*, 6 June 1883, 10 R. 930; also *Morrison* (Abernethy), 3 July 1876, 3 R. 945; *Milne*, 15 Nov. 1884, 12 R. 141 (affd. H.L. 5 Feb. 1886). A school board may, however, summarily suspend a

[teacher from the exercise of his duties; but such suspension does not affect his right to salary; § 4. The teacher's office being terminable at the will of the school board, his occupancy of lands and heritages, as part of the emoluments of such office, was found to give him no claim at common law to the parliamentary franchise. But by § 24 of the act of 1878, teachers may vote as occupiers of lands, notwithstanding they are held at the pleasure of the school board. Under this provision, a teacher has been held entitled to be entered on the register of voters as liferent proprietor; *Murray*, 9 Nov. 1878, 6 R. 26. No person may be appointed as principal teacher who is not the holder of a certificate of competency; but certain classes of teachers, who were in office at the passing of the act, are deemed to be holders of such certificates; 1872, § 56. Candidates for certificates are examined by examiners appointed by the Department, and according to regulations issued by them. A university degree serves instead of examination, in subjects covered by the examination for the degree. The examiners must satisfy themselves of the candidate's skill in the theory and practice of teaching; §§ 57-59. A school board may permit any teacher to resign, on condition of receiving a retiring allowance, and may pay him out of the school fund such retiring allowance as they think fit; § 61.

[2. *Teachers in office before the passing of the Education Act.*—By § 60 the following provisions are made with regard to the removal of such teachers:—(1) When a teacher is charged with immoral conduct or cruel or improper treatment of scholars, the school board may make a complaint to the sheriff, specifying the particular acts complained of. After preliminary procedure as prescribed, evidence is led before the sheriff; and if he finds the complaint proved, he gives judgment accordingly, and pronounces sentence of deprivation; which sentence is final, and not subject to review. (2) If a school board consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector, whose duty it is to inspect the school; and after receiving such report, and furnishing a copy of it to the teacher, the school board may, if they see cause, resolve to remove him from office. But such resolution has no effect until confirmed by the Department. When teachers of parish schools are removed in

[this way, the rights of the school boards to grant, and of teachers to claim, retiring allowances, are the same as were formerly vested in heritors and ministers, and in parish schoolmasters respectively, under 24 & 25 Vict. c. 107, §§ 19, 20, when teachers were removed under that act (see *supra*). On the construction of these enactments, it has been decided that, when a teacher is dismissed, if there is fault on his part, he has no right, but if there is no fault, he has right, to a retiring allowance; *Robb* (Logiealmond), 5 Feb. 1875, 2 R. 417; 21 May 1875, 2 R. 698. When the school board refuse such allowance, they should specify the ground of refusal; *ib.* The court will not review the decision of the school board on the question of fault; *Morison* (Glenshiel), 28 May 1875, 2 R. 715. Allegations of malice against the school board are irrelevant; but the court will inquire into averments of deviation from statutory procedure; *Macfarlane* (Mochrum), 9 Nov. 1875, 3 R. 88. In *Marshall* (Ardrossan), 10 Dec. 1879, 7 R. 359, a teacher dismissed for fault without retiring allowance was held to have set forth a relevant case of oppression on the part of the school board, and was allowed a proof of his averments. Prior to 1872, the master of a burgh school was liable to be removed by the magistrates upon any reasonable ground, such as inefficiency or want of success in teaching; and the school board may now remove on similar grounds one who was formerly master of a burgh school, without the formalities required in the case of former parish schoolmasters, who held office *ad vitam aut culpam*; *Mitchell*, 15 June 1883, 10 R. 982. The discretion allowed to boards by § 61 (set forth *supra*), in regard to retiring allowances to teachers resigning, applies to teachers appointed before the act of 1872, as well as those subsequently appointed; see *Eckford S.B.*, 2 Feb. 1889, 16 R. 377. Subject to the above provisions regarding removal, teachers in office before the act are not to be prejudiced, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of the act; 1872, § 55. The school board are entitled to alter the subjects taught, and to reduce the rate of fees, subject to the teacher's claim for compensation; *Hunter*, 5 March 1875, 2 R. 520; *Doak*, 9 Feb. 1884, 11 R. 574. See also, on this section, *Fraser*, 14 June 1877, 4 R. 892; *Somers*, 31 Oct. 1879, 7 R. 121;

[*Grant*, 17 March 1886, 13 R. 783. As to teachers belonging formerly to parochial side schools, under 24 & 25 Vict. c. 107, see *Watson*, 6 Nov. 1886, 24 S.L.R. 480. A teacher appointed before 1872 may be required by the school board to collect fees; *Buchanan* (Tulliallan), 11 June 1875, 2 R. 793. Teachers' houses possessed under the former acts are to be maintained by school boards during the continuance in office of the teachers in possession at the date of the act, and thereafter so long as the boards think proper; and school boards are empowered to provide teachers' houses and gardens in such place as they judge necessary or convenient, and to exercise for this purpose all the powers conferred by the act with reference to school-houses or buildings; 1872, § 54. By the Local Government Act, 1889, § 86, if, under the provisions of that act, or by reason of anything made or done in pursuance thereof, any teacher appointed before the act of 1872 is prejudiced in any right to school fees possessed by him at the passing of the Local Government Act, he is entitled to receive from the school board compensation in respect of any loss so sustained by him; and such compensation, failing agreement, may be determined finally by the sheriff, and shall be payable out of the school fund.

[*Higher Class Public Schools*.—This designation is applied to burgh schools existing at the passing of the act, in which the education given does not consist chiefly of elementary instruction in reading, writing, and arithmetic, but of instruction in Latin, Greek, modern languages, mathematics, natural science, and generally in the higher branches of knowledge. These schools are subject to special regulations in regard to fees, examinations, and the administration of funds; 1872, §§ 62–64; 1878, §§ 18–20. They are to be managed by the school boards with a view to promote the higher education of the country. The expense of maintaining higher class school buildings, and such further expenditure as is sanctioned by the Department, may be paid out of the school fund. The school board of any burgh, by a resolution at a meeting specially called on fourteen days' notice in writing to each member, may resolve, subject to the approval of the Department, that any school under its management shall be deemed a higher class public school. The school board of any parish may come to a similar resolution, under the same conditions, with regard to any parish school under their management

[existing at the passing of the act, in which, from the existence of any endowment or foundation, or from any other cause, the higher branches are taught to such extent that it is not reasonably to be considered as chiefly an elementary school.

[*Inspection*.—Every public school, and every school subject to inspection, shall be open at all times to the inspection of any of Her Majesty's inspectors; but it is no part of the inspector's duties to inquire into any instruction in religious subjects, or to examine any scholar in religious knowledge or in any religious subject or book; 1872, § 66.

[*Parliamentary Grant*.—The rates and conditions according to which parliamentary grants may be given are determined by the Scotch Education Department, who frame and issue, from time to time, a code containing such rates and conditions; 1872, § 5. In constructing the code, the Department are directed to take due care that the existing standard of education in the public schools be not lowered, and that a uniform standard be maintained in all inspected schools; 1872, § 67. The code must lie for one month on the table of both Houses of Parliament before it is in force; *ib.* Parliamentary grants may be made to any school board in respect of the public schools under their management; and also to the managers of any other school which is, in the opinion of the Department, efficiently contributing to the secular education of the parish or burgh in which it is situated. Parliamentary grants may not be made in respect of religious instruction; nor in respect of any school established after the passing of the act of 1872, not being a public school, unless the Department, after due inquiry, are satisfied that the school is specially required in the locality, regard being had to the religious belief of the parents. Where a school rate of not less than threepence in the pound is levied, and produces less than £20, or than 7s. 6d. per child of the number of children in average attendance at the public schools in the parish or burgh, the school board is entitled to such extra grant, in addition to the parliamentary grant, as will, together with the rates, make up the sum of £20, or 7s. 6d. for each child; 1872, § 67. The annual parliamentary grant to a school is reduced to 17s. 6d. per scholar, if it exceeds the income of the school derived from local sources, *i.e.*, fees, rates, and subscriptions; but special provisions are made in favour of parishes in the counties of Inverness, Argyll,

[Ross, Orkney and Shetland, Caithness, and Sutherland; 1872, § 67; 39 & 40 Vict. c. 79, §§ 19, 20, 53; 52 & 53 Vict. c. 75.

[*Conscience Clause*.—Every public school, and every school subject to inspection and in receipt of any public money under the act, shall be open to children of all denominations, and any child may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no child in any such school shall be placed at any disadvantage with respect to the secular instruction given therein, by reason of the denomination to which the child or his parents belong, or by reason of his being withdrawn from religious instruction. The time or times during which any religious observance is practised, or instruction in religious subjects is given at any meeting of the school for elementary instruction, shall be either at the beginning or at the end, or at the beginning and at the end of the meeting, and shall be specified in a table approved of by the Department; 1872, § 68.

[*Compulsory Clauses*.—It is the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age, and who have not obtained a certificate of ability to read and write, and of a knowledge of elementary arithmetic; 1872, § 69, amended by 1883, § 4. The parent is allowed to select the school to be attended by the child, provided it be a school in receipt of the parliamentary grant. The provisions of this section apply to blind children; 1872, § 69. The word "parent" includes guardian, and any person who is liable to maintain, or has the actual custody of a child; § 1. An officer is appointed by each school board to ascertain and report as to defaulting parents, a correct list of whom must be kept by the school board. The board may summon a defaulting parent to appear before them, and explain his neglect. If he fails to appear, or to give satisfactory explanation, or a satisfactory undertaking forthwith to provide the necessary education, it is the duty of the school board to certify in writing that he has been, without reasonable excuse, failing to discharge his duty towards his children. On such certificate being sent to the procurator-fiscal, or other person appointed by the school board, he is bound to prosecute the parent before the sheriff. On conviction, the parent is liable to a fine of £1, or fourteen days' imprisonment. If the neglect is continued,

[the prosecution may be repeated, at intervals of one month; 1872, § 70, amended by 1878, § 28, and 1883, § 5. A more effective method of securing attendance, by means of an "attendance order," was provided by the act of 1883, which enacts that if a parent without reasonable excuse neglects to provide efficient elementary education for his child, or fails to secure his regular attendance at some public or inspected school, the school board may, after due warning to the parent, complain to a court of summary jurisdiction, and such court may, if satisfied of the truth of the complaint, order that the child do attend some public or inspected school, willing to receive him and named in the order, being either selected by the parent, or (failing his selection) appointed by the court; and the child shall attend that school every time it is open, and during the whole time it is open for the instruction of children of similar age, including the day fixed by her Majesty's inspector for his annual visit, or in such other regular manner as is specified in the order; § 9. Where an attendance order is not complied with, without reasonable excuse, a court of summary jurisdiction, on complaint made by the school board, may, if it think fit, impose a penalty not exceeding 20s. with expenses, or of imprisonment not exceeding fourteen days. A complaint under this section shall not be repeated at any less interval than one month; § 10. It is not necessary that the court which imposes the penalty should be the court which pronounced the order; *Lochwinnoch S.B.* 20 July 1886, 13 R. (J.C.) 102. There is "reasonable excuse" for non-attendance if the child has been prevented by sickness or other unavoidable cause; or if there is no public or inspected school which the child can attend within three miles, by the nearest road, from his residence; § 11. Where the school board are informed by any person of any child in their district who is not receiving elementary education, it is their duty to take proceedings under §§ 9 and 10 of this act, unless, for reasons set forth in their minutes, they think this inexpedient; § 12. Every prosecution for penalties, or for obtaining any order under the Education Acts, or for obtaining or enforcing an attendance order, may take place before a court of summary jurisdiction under the Summary Jurisdiction Acts; § 14. And a court of summary jurisdiction under this act may consist of a sheriff, sitting either in the ordinary sheriff court or at any

[place where circuit courts are held for the determination of small debt causes, or one or more justices of the peace sitting in open court, or the provost or bailie of any royal or parliamentary burgh, or a magistrate of police of any police burgh, or a judge of police sitting in the police court; § 3. But no one may act as member of the court who is at the same time a member of the school board; § 14. The decision of such court is final, but subject to review in point of law on a case stated in terms of the Summary Prosecutions Appeals Act, 1875 (38 & 39 Vict. c. 62); *ib.* See *Campbell*, 23 Feb. 1877, 4 R. (J.C.) 17; also *France*, 29 June 1877, 4 R. (J.C.) 42. Any person appointed by the school board, or any inspector or sub-inspector of factories, workshops or mines, may conduct the prosecution; and expenses may not be awarded against such prosecutor; § 14. The expenses of the prosecution, certified by the sheriff, are payable, so far as not recovered from the parent, out of the school fund; 1872, § 71. Where any act, neglect, or default, is punishable under more than one enactment, proceedings may be instituted in respect thereof under one enactment only; 1883, § 15. In order to a prosecution under the acts for failure to educate, there must be produced either a certificate of failure to educate under § 70 of the act of 1872, or an attendance order under §§ 9, 10 of the act of 1883; *Macaulay*, 3 June 1887, 14 R. (J.C.) 43. A school board cannot be sued for damages in respect of error in such proceedings; *Macaulay*, 26 Nov. 1887, 15 R. 99. A certificate of ability to read and write, and of a knowledge of elementary arithmetic, granted in favour of any child by one of Her Majesty's inspectors, exempts the parent and all employers from prosecution under the act; 1872, § 73. Such certificate may not be granted in favour of any child who has not passed the fifth standard prescribed by the Code; 1883, § 7. Passing a standard means passing in each of the three subjects of reading, writing, and elementary arithmetic, as required for the respective standards of examination by the Code; § 8.

[*Employment of Children.*—A person may not take into his employment any child under the age of ten years. Nor may he take into his employment any child between the ages of ten and fourteen, unless such child (1) has passed the third standard, and is attending a public or inspected school in accordance with the provisions of

[§ 23 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), or of any minute of the Department fixing the number of attendances at school to be required of such children; or (2) has obtained a certificate of ability to read and write, and of a knowledge of elementary arithmetic; 1878, § 5; 1883, § 6. Thus a child above ten who has passed the third standard may be employed half time; and a child above ten who has passed the fifth standard may, in general, be employed full time. But these provisions do not make it lawful to take into full employment any child under thirteen in a factory or workshop which is subject to the provisions of the Factory and Workshop Act, 1878; 1883, § 6. In the case of any entertainment or series of entertainments to take place in premises licensed according to law for public entertainments, or in any circus or other place of public amusement, where it is shown to the satisfaction of the school board, that proper provision has been made to secure the health and kind treatment of any children proposed to be employed thereat, the school board may grant a licence, for such time and during such hours of the day, and subject to such restrictions and conditions as it may think fit, for any child exceeding seven years of age, of whose fitness to take part in such entertainment or series of entertainments without injury the school board is satisfied, to take part therein, and such licence may at any time be varied, added to, or rescinded by the school on sufficient cause being shown; 52 & 53 Vict. c. 44, § 3. No child under ten may be employed in any casual employment (save as mentioned below); and no child between ten and fourteen, who has not a certificate as aforesaid, may be employed in any casual employment after nine o'clock at night, from 1st April to 1st October, nor after seven o'clock at night, from 1st October to 1st April. Casual employment means employment for gain in streets or other places in vending or exposing for sale any article whatsoever, and also employment of any other kind, outside the child's own home, not being employment the lawful period whereof is regulated by statute. Special exemption from the prohibitions of this section may be granted by a school board to any child for a period, specified in writing, not exceeding six weeks in any year; 1878, § 6. The prohibition of employment is relaxed (1) when there is no inspected school within three miles, by the nearest road, of

[the child's residence; (2) when the employment is during the school holidays, or during the hours when the school is not open (not being hours when casual employment is prohibited as aforesaid); and (3) when the employment of children above the age of eight years is specially permitted by the school board for the necessary operations of husbandry and the ingathering of the crops, or for assistance in the fisheries, which permission may be granted by school boards, by published notice, for a specified period not exceeding six weeks in any year; 1878, § 7. Any person taking a child into his employment in contravention of the act, is liable, on summary conviction, to a penalty of 40s.; § 8. A parent who employs his children in any labour exercised by way of trade, or for purposes of gain, or permits him to be engaged in such labour on his own behalf, is deemed for the purposes of the act to take him into his employment; § 9. These provisions are enforced by school boards in their districts, or, when this duty falls on inspectors acting under the acts regulating factories and mines, the school boards are directed to assist the inspectors; § 10. Certificates of birth may be obtained from registrars; § 11. A school board officer may enter any place of employment, on obtaining an order from the sheriff; § 12. Provision is made by § 13 for the case of children taken into employment by agents or workmen of the employer, or on forged certificates or false representations as to age.

[*Technical Schools.*—By 50 & 51 Vict. c. 64, a school board may pass a resolution that it is expedient to provide a technical school for its district; but such resolution cannot be carried into effect until it has been confirmed at a subsequent meeting of the board held after the resolution has been published in the prescribed manner, and after expiration of the prescribed time, being not earlier than one month after the first publication, nor until it has been confirmed by the Scotch Education Department; §§ 3, 4. A technical school means a school or department of a school in which technical instruction is given; and technical instruction means instruction in subjects approved by the Scotch Education Department, and in the branches of science and art with respect to which grants are for the time being made by the Department of Science and Art, or in any other subject which may for the time being be sanctioned by that Department; § 12. The school board may pay the whole expenses of pro-

viding and maintaining a technical school out of the school fund, and shall fix the fees to be paid for attendance, of which a separate account must be kept; § 3. Every technical school claiming a grant from the Science and Art Department must be conducted, with respect to the subject for which the grant is claimed, in accordance with the conditions specified in the minutes of that Department; § 5 (1). A minute of the Department does not come into force until it has lain before Parliament for one month; § 5 (3). In respect to all subjects other than those for which a grant is claimed from the Science and Art Department, a technical school must be conducted in accordance with the conditions set forth in the Code; § 6. For the purpose of providing a technical school, a school board has the same powers, but subject to the same conditions, as for providing sufficient school accommodation for the district; and for the purpose of maintaining such school, it has the same powers, but subject to the same conditions, as in regard to the maintenance of a higher class public school under § 18 of the act of 1878 (*supra*). With the consent of the Scotch Education Department, a school board may use for the purposes of a technical school any of its school buildings, or part thereof, or may use for the purposes of the Education Acts any buildings, or part thereof, authorised by this act. A board may discontinue a technical school, or change its site, on satisfying the Department of the expediency of such course. And power is given to a board, with consent of the Department, to spread the expense of providing such school over a number of years; § 7. School boards may combine to provide a technical school; § 8. The provisions of §§ 38–9 of the act of 1872, in regard to transference of schools, are made applicable to technical schools; § 9. No scholar may be admitted to a technical school until he has passed the fifth standard; § 10. A technical school under this act is deemed to be a public school; but attendance thereat is not reckoned as attendance for the purpose of any parliamentary grant under the Education Acts; § 11.

[*Educational Endowments.*—By the Educational Endowments Act, 1882 (45 & 46 Vict. c. 59), a commission was appointed with power to inquire into the administration of educational endowments in Scotland, and to prepare schemes for their future government and management, altering their

[conditions and the constitution of their governing bodies, with a special view to making provision for secondary or higher or technical education in the localities to which the endowments belong. The act has no application (unless with consent) to endowments given subsequently to the Education Act of 1872, nor to endowments belonging to, or administered by, or in the gift of a university, nor to endowments solely or mainly for theological instruction or belonging to a theological institution. The schemes prepared by the commissioners do not have the force of law until confirmed by the Scotch Education Department, and approved by the Queen in Council, opportunity being afforded for consideration thereof by Parliament in the event of opposition. The powers of making and approving schemes under the act were limited to the end of the year 1887, but were continued for two years more by the Expiring Laws Continuance Acts of 1887 and 1888. These powers have now, however, expired; the act being, by 52 & 53 Vict. c. 67, continued until 31 Dec. 1890, only as to the powers of Her Majesty in Council and the Department. The following decisions on the construction of the act, or of schemes thereunder, have been reported:—*Forrest's Trs.* 18 March 1884, 11 R. 719; *Donaldson's Hospital*, 31 Oct. 1885, 13 R. 101; *Ferguson's Bequest*, 15 March 1887, 14 R. 624; *Mags. of Greenock*, 24 Feb. 1888, 15 R. 440; *Pigott*, 11 Dec. 1888, 16 R. 199. By the Local Government Act, § 85, wherever under any scheme, provisional order, deed or instrument, funds are allocated for the payment of school fees in any state-aided school in any standard of the Code, for which no fees may hereafter be exacted, such funds shall be applied subject to regulations to be from time to time made by the governing body under such scheme, &c., with the approval of the Department. But no scholar shall be deprived by the act of any advantage under any scheme, &c., other than the payment of school fees.

[See *Sellar's Manual of the Education Acts* (8th edit. 1888, by J. E. Graham, Advocate), and *Supplement* (1889); also *Reid's Digest of Poor Law, &c., Cases*, 412; *Rankine on Land-Ownership*, 661; *Smith's Secretary for Scotland*, 96.

REFORMATORY AND INDUSTRIAL SCHOOLS.

[The law as to these schools is consolidated by 29 & 30 Vict. c. 117, and c. 118;

[reformatory being regulated by the former, and industrial schools by the latter, of these acts. One of the inspectors of prisons is specially charged with the duty of inquiring into the condition of reformatory and industrial schools. On the application of the managers of any such school, the Home Secretary may direct the inspector to examine it, and, on receiving a satisfactory report, may certify that such school is fit for the reception of such youthful offenders or children as may be sent there under the acts. Certified reformatory and industrial schools must be inspected annually. An industrial school is described as one in which industrial training is provided, and in which children are lodged, clothed, and fed, as well as taught. No school may be at the same time a certified industrial and a certified reformatory school. The class of offenders who are sent to reformatory is described by c. 117, § 14, which provides that "whenever any offender who, in the judgment of the court, justices, or magistrate before whom he is charged, is under the age of sixteen years, is convicted, on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for a term of ten days or a longer term, the court, &c., may also sentence him to be sent, at the expiration of his period of imprisonment, to a certified reformatory school, and to be there detained for a period of not less than two years, and not more than five years." See *M'Quire*, 9 Nov. 1881, 9 R. (J.C.) 4. An offender under the age of ten years may not be sent to a reformatory, unless he has been previously charged with a crime punishable with penal servitude or imprisonment, or is sentenced by a circuit court of justiciary or a sheriff. The class of children who are sent to industrial schools is described by c. 118, §§ 14–17. By § 14, "any person may bring before two justices or a magistrate any child apparently under the age of fourteen years, that comes within any one of the following descriptions, namely,—That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale any thing), or being in any street or public place, for the purpose of so begging or receiving alms; That is found wandering, and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence; That is found destitute, either being an orphan, or having a surviving parent who is undergoing penal servitude or imprisonment; That frequents

[the company of reputed thieves." And to these descriptions are added the following, by 43 & 44 Vict. c. 15, viz.:—"That is lodging, living, or residing with common or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution; That frequents the company of prostitutes." The justices or magistrate before whom a child is brought as coming within one of those descriptions, may order him to be sent to a certified industrial school, if satisfied on inquiry as to the facts, and as to the expediency of so dealing with the child. As to the jurisdiction of the Court of Justiciary to suspend orders pronounced under this provision, see *Wilson*, 9 March 1874, 1 R. (J.C.) 8. Children under twelve years, charged with an offence punishable by imprisonment or a less punishment, not previously convicted of theft; children under fourteen, whom their parents or guardians represent as refractory, and desire to be sent to an industrial school; or whom the parochial board of a parish represent as refractory, or as being the children of parents, either of whom has been convicted of a crime punishable with penal servitude or imprisonment,—may also be sent by two justices or a magistrate to a certified industrial school; 29 & 30 Vict. c. 118, §§ 15–17. And by 34 & 35 Vict. c. 112, § 14, where a woman is convicted of crime, with previous conviction, her children under fourteen, and under her care and control at the time, if they have no proper guardians, or no visible means of subsistence, may be sent to an industrial school. The time for which a child is to be detained in an industrial school may be such as seems proper to the magistrate for the teaching and training of the child. But no child who has attained the age of sixteen may be detained in an industrial school, except with his own consent in writing. In selecting a reformatory or industrial school to which a child is to be sent, the court is to have regard to the religious persuasion to which he belongs; and power is given to the parents or guardians or nearest relatives of any child sent to such school, on application at any time within thirty days after the child's arrival at the school, to have him removed to another such school conducted according to the religious persuasion to which the child belongs, provided the managers of the latter school are willing to receive him. Managers of reformatories or industrial schools may decline to receive any child; but when they have once re-

ceived him, they are deemed to have undertaken to teach, clothe, lodge, and feed him during the whole period for which he is liable to be detained, or until withdrawal or resignation of the certificate takes effect according to the provisions of the acts, or until the Government grant is discontinued. Rules for the management and discipline of such schools, when sanctioned by the Home Secretary, may be enforced by penalties provided by the acts. The managers of a reformatory or industrial school may permit any child, after eighteen months' detention, by licence under their hands, to live with some trustworthy person named in the licence. Such licence may not be for more than three months, but is renewable. It may be revoked by the managers at any time. If a child has conducted himself well during absence on licence, the managers may afterwards, with his own consent, bind him apprentice to any trade. The Commissioners of the Treasury may contribute, out of money provided by Parliament, such sums as the Secretary of State may recommend, towards the maintenance of children detained in reformatory and industrial schools. But in the case of children kept in industrial schools on the application of their parents or guardians, the Government grant may not exceed two shillings per head per week. The parent or other person legally liable to maintain a child detained in a reformatory or industrial school may be compelled, if of sufficient ability, to contribute a sum not exceeding five shillings a week for his maintenance. By § 67 of the Prisons Act, 1877 (40 & 41 Vict. c. 53), the commissioners of supply of any county, or the magistrates of any burgh, may resolve, with the approval of the Home Secretary, to contribute to any certified reformatory or industrial school, such sum as they think fit. See *Irons' Police Law*, 531.]

[**SCIENTER**; knowingly. When a person keeps an animal of a savage disposition, knowing that it is of such disposition, he is liable in damages for any injury it may do. This knowledge is technically called the *scienter*. See *Damages. Dogs*.]

[**SCIRE FACIAS**; in English law, a judicial writ, founded on some record; and requiring the person against whom it is brought to show cause why the party bringing it should not have the advantage of such record, or why the record should not be annulled and vacated; *Wharton's Lex. h. t.*]

SCOTIA; was, according to Skene, used

sometimes in ancient charters and acts to signify that part of Scotland which is on the north part of the Water of Forth, as distinguished from the part on the south, which was called *Lodoneium* or *Lothian*.
Skene, h. t.

SCOTS MONEY. When money is mentioned in the acts of the Scots Parliaments, or in public or judicial proceedings prior to the Union, and even for a considerable time thereafter, Scots money is meant, unless the contrary be expressed. Sterling money is twelve times the value of the same denomination of Scots money. The following table of the relative values of Scots and sterling money may be of service:—

Scots.	Sterling.
A doyt, or penny, is -	£0 0 0 $\frac{1}{12}$
A bodle, or twopence, -	0 0 0 $\frac{2}{12}$
A plack, groat, or fourpence, 0	0 0 $\frac{4}{12}$
A shilling, - - -	0 0 1
A merk, or 13s. 4d. (two-thirds of a pound), -	0 1 $1\frac{4}{12}$
A pound, - - -	0 1 8
[100 pounds, - - -]	8 6 8]

A table will be found at the end of the article *Money*, in the *Enc. Brit.* (8th ed.), containing the comparative value of Scotch coin, at various periods in our early history. See also *Tait's Justice, h. t.*

[**SCRIP.** A scrip certificate is an acknowledgment by a company or its projectors that the person named in the certificate (or more commonly the holder) is entitled to a certain specified number of shares in the undertaking. The certificate represents a right to acquire, but not necessarily an obligation to take a share. The certificate must have a penny stamp. In some companies nothing is required to convert scrip-holders into shareholders. But usually a person entitled to scrip does not acquire the rights of an actual shareholder until his scrip certificates have been delivered up and exchanged for share certificates, and his name inserted on the register of shareholders. The word seems to be a contraction for "subscription." *Lindley on Company Law*, 65; *Sweet's Law Dict.*]

SCULPTURE; is protected by the copyright acts. See *Copyright*.

SEA AND SEA-SHORE. [The main ocean is common to all nations, and incapable of appropriation. But the narrow seas, including all within a limit of three miles from low-water mark along the general coast line, belong to the Sovereign as *regalia majora*, and are held in trust for the community. The nature and extent of

[the Crown's right within this territorial limit was discussed in *Keyn*, 2 Ex. D. 63; in which the English judges, by a majority of seven to six, held that the Central Criminal Court had no jurisdiction over the captain of a foreign ship who sank an English vessel within three miles off the English coast. This defect was remedied by the Territorial Waters Jurisdiction Act (41 & 42 Vict. c. 73), which gave jurisdiction to the criminal courts in the case of all offences committed within the three-mile limit; a certificate, however, of the expediency of the prosecution, from a Secretary of State (or from the Governor of any of the Queen's dominions out of the United Kingdom), being required before proceedings can be instituted against any foreigner. See also *Salmon-Fishings. Sea Fisheries*. The sea-shore, or foreshore, is that strip of land which lies between high and low water-mark. In *Chambers*, 4 De G. M. & G. 206, the line of *medium* tides, between the spring and the neap, was held to be the proper water-mark. But in several Scotch cases, ordinary spring-tides have been taken as the criterion; see *Rankine on Land-Ownership*, 217; also *Bowie*, 18 March 1887, 14 R. 649 (Lord Trayner). The foreshore, being capable of beneficial enjoyment, is vested patrimonially in the Crown, or the Crown's disponees. It is not *inter regalia*, and is transferred in the same way as other lands. But besides the Crown's patrimonial interest in the foreshore, it has also a fiduciary interest, as guardian of the public uses of navigation and fishing. This fiduciary interest is one of the *regalia majora*, and is inalienable; and when the Crown conveys the foreshore to a subject, it can only be held by the grantee subject to the burden of these public uses. See *Agnew*, 21 Jan. 1873, 11 Macph. 309; in which it was decided that when a sea-board estate, whether barony or not, is held under a Crown charter which does not, by express grant or specific boundary, extend the right of the vassal beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land; but that the charter may be shown to include the foreshore by such long-continued possession as can only be ascribed to a right of property. See also *Buchanan and Geils*, 20 July 1882, 9 R. 1218; *L. Blantyre*, 19 June 1879, 6 R. (H.L.) 72. In *Offrs. of State v. Smith*, 13 July 1849, 6 Bell's App. 487, interdict was obtained, at the instance of the Crown as guardian of the public interest, against a sea-board proprietor who

[proposed to encroach upon the sea-sand within high-water mark. See also *E. Stair*, 2 Dec. 1880, 8 R. 183. In *Cameron*, 21 Jan. 1848, 10 D. 446, it was held that a member of the public has no title to sue for such interdict; but the soundness of the decision is questionable; see *Rankine*, 231. Immemorial use of the foreshore by inhabitants of a burgh entitles the magistrates to challenge an adverse disposition; *Mags. of Dundee*, 7 Dec. 1886, 14 R. 191. As to the right of the public to the use of the shore for bathing, see *Blundell*, 5 B. & Ald. 268; *Rankine*, 229. Under 11 Geo. III. c. 31, § 11, persons engaged in the herring fisheries have the free use of waste land for the space of 100 yards beyond high-water mark for landing nets, erecting huts, curing fish, &c. See *Scott*, 15 Nov. 1887, 15 R. 27. The same privilege was given to persons engaged in white fishery, by 29 Geo. II. c. 23, § 2; but this provision was repealed by 31 & 32 Vict. c. 45, § 71. See *Hoyle*, 10 Dec. 1858, 21 D. 96; *M'Callum*, 21 Nov. 1868, 7 Macph. 163. See *Sea Fisheries*. The proprietor of lands *de facto* bounded by the sea, with a clause of parts and pertinents in his Crown title, whether the sea boundary is expressed therein or not, has a title to sue for interdict against any one using the sea-shore for purposes other than those which are available to the public; *Macalister*, 7 Feb. 1837, 15 S. 490; *Paterson*, 11 March 1846, 8 D. 752; *Nicol*, 23 Dec. 1859, 22 D. 335. When the property is expressly bounded by the sea, and the sea recedes, the owner is entitled to follow it as his boundary; *Young*, 1 Aug. 1887, 14 R. (H.L.) 53. The right to take sea-weed or drift-ware from another's foreshore may be prescribed as a servitude; but not the right to cut growing tangle off the rocks to make kelp; *E. Morton*, 1760, M. 13528; *Baird*, 25 April 1861, 4 Macq. 127; *Agnew, supra*; *Pirie*, 1 Feb. 1884, 11 R. 490. With regard to the construction of grants bounded by the "sea-flood," "flood-mark," &c., contrast *Berry*, 10 Dec. 1840, 3 D. 205, with *Hunter*, 25 June 1869, 7 Macph. 899, and *Mags. of Montrose*, 11 June 1886, 13 R. 947; see also other cases in *Rankine*, 95-98. And as to the mode of ascertaining the boundaries of contentious properties across the foreshore, see *M'Taggart*, 6 March 1867, 5 Macph. 534; *Laird*, 14 March 1871, 9 Macph. 699, 1009; *Keith*, 7 Nov. 1884, 12 R. 66.] See on this subject, *Stair*, B. ii. tit. 1, § 5; *Ersk.* B. ii. tit. 1, § 6; tit. 6, § 17; *Bank*. i. 82;

Bell's Princ. § 639; [*Rankine on Land-Ownership*, 214; *M. Bell's Conv.* i. 597, 603; *Phillimore's Internat. Law*, i. 247; *Abdy's Kent's Internat. Law*, 96; *Hall on Sea-Shores*.]

[**SEA FISHERIES.** "Beyond all doubt, the law of Scotland is that white-fishing in the sea round the whole coast of Scotland is perfectly free; and not only is it perfectly free, but there is a title on the part of the subjects to use the shore for the purpose of conducting white-fishing in a proper mode;" *per* Lord Chanc. Cairns, in *M'Douall*, 16 April 1875, 2 R. (H.L.) 49. See also 1705, c. 2; 29 Geo. II. c. 23, § 1. As to the use of the shore, see preceding article. The right of fishing applies only to the coasts, not to the banks of a river, even where it is subject to tidal influence; *Bowie*, 18 March 1887, 14 R. 649. The right to take limpets and other small shell-fish seems also to be common to the public, and incapable of appropriation; *Hall*, 14 Jan. 1852, 14 D. 324. But the right to take oysters and mussels, whether from their being *partes soli*, or from the greater value of the right to fish for them, and the importance of protecting them from indiscriminate dredging, is vested radically in the Crown as a patrimonial right; and may be acquired by a subject either by express grant, or by prescription on a barony title, or a general grant *cum piscationibus*. See *Ds. Sutherland*, 10 Jan. 1868, 7 Macph. 198; also *D. Argyll*, 17 Dec. 1859, 22 D. 261; *Lindsay*, 11 Dec. 1868, 7 Macph. 239; *Mags. of St Andrews*, 20 July 1869, 7 Macph. 1105. As to lobsters, see *D. Portland*, 15 Nov. 1832, 11 S. 14.

[**Fishery Board.**—A Fishery Board for Scotland was established by 45 & 46 Vict. c. 78. It consists of three sheriffs and six other members appointed by the Crown, the latter holding office for five years, and being eligible for reappointment. The Board "shall take cognisance of everything relating to the coast and deep sea fisheries of Scotland, and take such measures for their improvement as the funds under their administration and not otherwise appropriated may admit of, but without interfering with any existing public authority or private right." The Board have the general superintendence of the salmon fisheries, and the inspector of these fisheries acts under the Board's directions, and reports to them from time to time. See *Salmon-Fishings*. The Board shall comply with any instructions which may be issued by the Secretary for Scotland (48 & 49 Vict. c. 61); and

[shall make an annual report to him containing a statistical account of the fisheries, and suggestions for their regulation and improvement, which report shall be presented to Parliament. The act does not apply to the Tweed. By 48 & 49 Vict. c. 70, § 4, when the Board are satisfied that any mode of fishing in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands, is injurious to any kind of sea fishing within that part, or where it appears to them desirable to make experiments with the view of ascertaining whether any particular mode of fishing is injurious, or for the purpose of fish culture or experiments in fish culture, they make bye-laws for restricting, prohibiting, or regulating such mode of fishing. Such bye-laws require to be confirmed by the Secretary for Scotland, and notice must have been given by advertisement at least one month before such confirmation. When confirmed, every bye-law shall be published in the Edinburgh Gazette. The Board enforce the provisions of the Sea Fisheries Acts and of Orders in Council, as to numbering and lettering of fishing boats; and they have power to require statistics from fishermen and fish-curers; §§ 5, 6. The same act transfers to the Fishery Board (so far as Scotland is concerned) the powers and duties of the Board of Trade with respect to oyster, mussel, crab and lobster fisheries, and clam and bait beds.

[With regard to the statutory regulation of sea fisheries, see the Sea Fisheries Acts of 1868 (31 & 32 Vict. c. 45), 1875 (38 Vict. c. 15), 1883 (46 & 47 Vict. c. 22), 1885 (48 & 49 Vict. c. 70). In regard to alleged violation of provisions of the act of 1883 in regard to steam-trawling, see *Combe*, 5 June 1886, 13 R. (J.C.) 67, and *Leslie*, 18 Dec. 1886, 14 R. 288. See also 40 & 41 Vict. c. 42, and 47 & 48 Vict. c. 26 (oysters, crabs, and lobsters); 47 & 48 Vict. c. 27 (cockles); and 44 Vict. c. 11 (protection of clam and other bait beds). As to herring fishery, see acts enumerated in sched. I to 45 & 46 Vict. c. 78, also 52 & 53 Vict. c. 23. As to fishing boats, see 49 & 50 Vict. c. 53. The use of dynamite or other explosives for the destruction of fish is prohibited by 40 & 41 Vict. c. 65. See on this subject, *Stair*, B. ii. tit. 1, § 5; *Ersk.* B. ii. tit. 6, § 6; *Balfour's Prac.* 626; *Bell's Princ.* § 646; *Rankine on Land-Ownership*, 224; *Guthrie Smith on Damages*, 176; *Stewart on Fishings*, 17; *Paterson on Fishery Laws*, 165. See *Salmon-Fishing. Lobsters.*]

SEA-GREENS; are those grounds which are overflowed in spring-tides. These, on the assumption that the sea-shore comprehends that over which the tide flows, have been supposed to be *inter regalia*. But, by the custom of Scotland, the shore is not held to extend further than to that point which the sea reaches in common tides; and therefore sea-greens are held to be private property. See *Ersk.* B. ii. tit. 6, § 17; *Bank.* B. i. tit. 3, § 4; *Bell's Princ.* § 644; *Bell on Leases*, i. 357; [*Rankine on Land-Ownership*, 235. See *Sea and Sea-Shore.*]

SEAL OF CAUSE. Most royal burghs, and many superiors of burghs of barony, have conferred upon them in their charters the power of constituting subordinate corporations or crafts. The grant or charter by which such a constitution is given, and which defines the privileges and powers to be possessed by the subordinate corporation, is called the *seal of cause*. A seal of cause cannot be rescinded or infringed by the corporation in whose favour it was granted, without consent of the magistrates and council who granted it; *Crooks*, 1776, M. 2007. If a seal of cause granted to the corporation B. refer to and bestow the exclusive privileges contained in the seal of cause granted to the corporation A., it has been decided, where one of the seals of cause had been lost, that the seal of cause of A. forms a good title for B. enjoying these privileges; *Mowat*, 1 June 1825, 4 S. 52. In the report of this case, a verbatim copy of the seal of cause is given. See *Ersk.* B. i. tit. 7, § 64; *Bell's Princ.* § 2183; *Brown's Synop.* 315, 404. See *Corporation. Burgh, Royal.*

SEALS. Anciently, when writing was not a common accomplishment, deeds were executed by sealing, which, however, came to be superseded by subscriptions. See *Deed. Testing Clause*. Royal grants are now the only deeds which, in Scotland, are authenticated by means of seals. [And the sealing of Crown writs was dispensed with by the Consolidation Act of 1868 (§ 78), unless the receiver of the writ require the appropriate seal to be affixed.] There are different seals, which, in practice, are applied to different purposes. 1. *The Great Seal.* Upon the Union of Scotland and England, a Great Seal for the United Kingdom became necessary for public acts and instruments. But this Great Seal not being appropriate for those private grants which had formerly passed the Great Seal of Scotland, by Article 24 of the Treaty of Union, a Great Seal, for the purpose of

sealing private grants in Scotland, was ordered to be made, and declared to have the same effect with the ancient Great Seal of Scotland. Under the Great Seal are authenticated charters and grants of lands, and gifts when the lands hold of the Crown, commissions to the principal officers of the Crown, as to the Lord Justice-Clerk, King's Advocate, Solicitor, &c.; [as also patents of invention, and charters erecting societies into corporate bodies, or increasing the capital of corporate bodies already existing. An extract of a charter from the Register of the Great Seal is a valid warrant for infeftment; *Mackenzie*, 17 March 1869, 7 Macph. 676. The Secretary for Scotland is Keeper of the Great Seal; 48 & 49 Vict. c. 61, § 8.] 2. *The Privy Seal*. This seal is used in authenticating royal grants of assignable or personal rights. The rights which a subject transmits by assignation, the Sovereign transmits by the Privy Seal. But moveables may be conveyed under the Great Seal, if conveyed along with some feudal subject. The Privy Seal is used also for all gifts of pensions, presentations to churches and professorships of which the Crown is patron, commissions to inferior officers, and the like. [But see *Muirhead*, 18 May 1809, F.C.] 3. *The Quarter Seal*. This is so called from its having been originally the quarter, and merely the testimonial of the Great Seal. Under this seal commissions of tutory, gifts of bastardy, forfeiture, or of *ultimus hæres*, where the lands hold of a subject superior, are passed; for where the lands hold of the Crown, these gifts pass the Great Seal. 4. *The Signet*. Erskine (B. i. tit. 3, § 39) considers the Signet as the seal of the Court of Session; yet this is obviously a mistake. The Signet existed before the Court of Session was established; the writs which passed under it were the private letters or orders of the King, directed "*to sheriffs in that part*," authorising them to summon parties before the King's Court, or to execute the diligence of the law. It is more than probable that, when the briefs and forms of the old law came to be disused, Signet Letters, as they are termed, succeeded them; and that the orders of the King were given to the sheriffs in that part (that is, to messengers-at-arms, who were, for the special purpose mentioned in the letters, invested with the powers of the judge ordinary), so as to supply all that was requisite for calling parties before the King's Court, or for carrying its sentences into execution. In

this way the Letters passing the Signet, for the purpose of judicial procedure, received the warrant of the King's Court; and it has been inferred that the Court of Session, on its institution, continued the practice which had been previously established. Hence the Signet is not properly the seal of a court, though it answers the purposes of one; but a seal originally intended to authenticate the King's warrants connected with the administration of justice. [See *Bill. Writer to the Signet*.] See, on the whole subject, *Ersk.* B. ii. tit. 5, § 82; B. iii. tit. 2, § 7; *Bank.* B. iii. tit. 3, § 39; *Stair*, B. iv. tit. 42, § 5; *Hope's Minor Practicks*, 86-9; *Ross's Lect.* i. 109, 123-30; *Jurid. Styles*, i. 341; [*Mackay's Prac.* i. 159. See *Signatures. Charters from the Crown. Lord Clerk Register*.]

SEAMEN. [Careful provisions are made by the Merchant Shipping Acts for the protection of seamen, and for securing their efficiency and discipline. See Part III. of the act of 1854 (17 & 18 Vict. c. 104); by which local marine boards and mercantile marine offices are established (§§ 110-131); and regulations are made as to the hiring of seamen (§§ 146-167); payment of their wages (which may be by allotment during absence), savings banks, &c. (§§ 168-204); provisions, health, and accommodation (§§ 221-230); discipline, crimes, &c. (§§ 239-270). Further provisions as to the payment of wages and rating of seamen are made by 43 & 44 Vict. c. 16. For the recent enactments protecting seamen from being sent to sea in unseaworthy ships, see *Shipping Law. Seaworthiness*. See also *Bell's Com.* i. 557; *Bell's Princ.* § 451; *Fraser on Master and Servant*, 465; *Smith's Merc. Law*, 425; *Abbott on Shipping*, 451; *Maclachlan on Shipping*, 212; *Kay's Shipmasters and Seamen*. See *Desertion*.]

SEARCH OF INCUMBRANCES. It is of importance for a lender or a purchaser to discover the burdens which affect the borrower's or seller's estate. The system of records in Scotland furnishes the most advantageous means for this purpose, which is affected by what is technically called a *Search*. A search of the records comprehending a period of forty years is supposed to give sufficient security; [and though the prescriptive period is now only twenty years, a forty years' search will probably continue to be required.] To render the search complete, it ought to be continued down to the date of the recording of the purchaser's title, for without this the pur-

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chaser is exposed to the risk of a new deed being recorded between the date of signing the disposition and the registration thereof. In practice, however, purchasers generally trust to the execution of the disposition, and pay the price on the delivery of that deed; and there is no known instance of the seller taking advantage of this opportunity to defraud the purchaser. A search embraces the following particulars: 1st, A search of the General Register of Sasines—[*i.e.*, of that division thereof which is applicable to the county in which the subjects are situated (31 & 32 Vict. c. 64, § 3);] 2dly, A search of the Record of Abbreviations of Adjudications; and 3dly, A search of the General Register of Inhibitions. [The two last are now, however, practically one register. Inhibitions, by 37 & 38 Vict. c. 94, § 42, prescribe in five years, so that a search of inhibitions need not now extend beyond that period.] If the property consist of burgage subjects, a search of the Record of Sasines kept in the burgh must be produced; and a search of the Dean of Guild Record of Jedges and Warrants is sometimes demanded; for by these a preferable security over burgage subjects may be created, discoverable from no other record. [If there is reason to suspect that the lands may have been included in any entail, or if they are held under an entail said to be unrecorded, a search in the Register of Entails is necessary, and must go back to the date of the entail.] But there are certain dangers against which a search, even for the whole period of the long prescription, affords no protection, and others against which it affords only a partial protection. The plea of death-bed, [with regard to deeds executed before 16 August 1871,] and the fraud or forgery of the author, are each a ground of reduction of a deed, and constitute a *labes realis* even in the hands of an onerous holder. The act 1661, c. 24, declares that no right or disposition granted by the apparent heir of a deceased proprietor shall be valid, in so far as it prejudices the creditors of the deceased, unless granted a full year after the defunct's death. A purchaser, therefore, from the heir within the year, is exposed to this risk. The granting of a deed gratuitously in favour of conjunct and confident persons, is a ground of reduction which follows the subject into a purchaser's hands. (See *Conjunct and Confident*.) Servitudes enter no record, and are yet effectual against a purchaser. The legal liferents of terce and courtesy are burdens

affecting heritage in the hands of a purchaser, wherever the marriage has been dissolved before the purchaser has been infeft. Such are the burdens which do not enter the records, and against which a search is no protection. To ascertain them, therefore, inquiries must be made in other quarters. [Formerly, litigiosity constituted a risk, against which a search furnished no protection; but since the Consolidation Act, 1868, lands cannot be rendered litigious until notice appears on the records of the diligence or other proceeding, whereby the lands are to be affected; see *Litigiosity*. *Inhibition*. *Adjudication*.] The minority of the parties entitled to challenge the right of the party in possession was [formerly] deducted in reckoning the years of the long prescription; [but now, since 1 Jan. 1879, when there has been continuous possession on a prescriptive title for thirty years, no deduction is made on account of minority or incapacity; see *Prescription*.] Prescription may be interrupted by the raising of an action, and citations for interrupting prescription [were formerly recorded in a separate register; but they are now, by the Consolidation Act, 1868, recorded in the Register of Sasines.] Prescription begins to run against heritable securities, not from the date of the security, or its entering the record, but from the time that no demand has been made by the creditor, or no interest paid; so that the fact that no sasine on an heritable bond appears on record for forty years back, is not sufficient evidence that the land is unaffected by heritable debts. Prescription on an infeftment in real warrandice does not begin to run until eviction has actually taken place. These burdens, like the former, are here adverted to, in order that conveyancers, in conducting a search, may have in view the dangers against which the usual search of the records is no guarantee, and, according to circumstances, direct such further inquiries as prudence may suggest. [Searches in the registers may be made by any one, on payment of a small fee; but purchasers are not bound to accept of searches made by one not officially authorised as a searcher. See 31 & 32 Vict. c. 64, § 19.] See *Ross's Lect.* ii. 384; *Bell on Purchaser's Title*, 365; [*Menzies' Conv.* 885; *M. Bell's Conv.* ii. 713.] See *Burdens*. *Incumbrances*. *Records*. [*Progress*.]

[**SEARCH WARRANT**; is a warrant to search for stolen goods, or other articles or documents tending to instruct a criminal

[charge. Such warrant is granted either on the general application for warrant of apprehension, or on a special signed application. The application should specify the things to be seized and the places to be searched. See *Webster*, 7 Feb. 1857, 2 *Irv.* 596; *Bell*, 30 Jan. 1865, 5 *Irv.* 57; *Porteous*, 2 July 1867, 5 *Irv.* 456. See *Hume*, ii. 77; *Alison's Prac.* 145; *Macdonald*, 280; *Moncreiff on Review in Crim. Cases*, 132, 186. See *Criminal Prosecution. Prevention of Crimes Act.*]

SEATS IN CHURCHES. In landward parishes in Scotland, the area of the church is divided among the heritors according to their valued rents. In a parish partly landward and partly within a town, the area ought to be apportioned, like the expense of building the church, according to the real rents of the owners of lands and houses. Where part of the parish is within a burgh, if the burgh, as a community, bear the expense of building in proportion to the rent of the property within the burgh, it would seem that they are entitled to a share of the area in the same proportion, which they may let or dispose of to the inhabitants. The court, in one or two cases, have recognised a species of right to church-seats, of the nature of private property, in parties neither heritors nor inhabitants of the parish. The minister is entitled to a seat for his family; and seats are generally set apart for the poor. Each heritor is entitled to have a seat for his family, which is taken into account in making up his share of the area. The right of priority of choice is determined by the amount of valuation of the several heritors. After all the heritors have selected their family seats, they choose, in the same order, each as much of the area as will make up the share to which he is entitled; and it would appear, that what he chooses ought to be all in one place. A heritor not satisfied with the division made by the other heritors may challenge it, and insist in a process of division before the sheriff. The sheriff's judgment is subject to the review of the Court of Session. The area assigned to each landward heritor does not become his private property; it is merely an inseparable pertinent of the lands, for the accommodation of his family, and of his tenants, and others dwelling on his property. [See *Stephen*, 18 Nov. 1887, 15 *R.* 72; see also *Church.*] A heritor may sell the materials of a seat which he has erected upon his area at his own expense. Although there does not seem to be any restriction of the

heritor's right to dispose of his title to sit in his family seat, he cannot exclude his tenants and others dwelling on the property from occupying his portion of the area; and suitable accommodation in that part of the area of the parish church which belongs to the landlord is held to be included in a lease of lands. In town churches, or in that part of a church in a parish partly landward and partly in a town which has been assigned to the community generally, the magistrates may let the seats. [But see *Clapperton*, 14 July 1840, 2 *D.* 1385; *Edinr. Eccles. Commrs.* 18 July 1888, 15 *R.* 952.] Where a parish is partly within burgh and partly landward, and the community has a share assigned to them, they would appear to be entitled to a seat for their magistrates. [See *Ersk.* B. i. tit. 5, § 13; B. ii. tit. 2, § 5; tit. 6, § 11;] *More's Notes on Stair*, cc.; *Bell's Princ.* §§ 744, 836; *Hunter's Landlord and Tenant*, i. 345; ii. 189; *Dunlop's Par. Law*, 30; [*Duncan's Par. Eccl. Law*, 222; *Black's Par. Eccl. Law*, 60; *Rankine on Land-Ownership*, 160, 631.]

SEAWORTHINESS. Questions frequently arise relative to the implied condition of seaworthiness, both in the contract of affreightment and of insurance. The obligation is, "that the ship shall be tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage." A distinction, however, must be taken between the condition of seaworthiness in insurance and in affreightment. In the former, it is a warranty, the breach of which voids the contract; in the latter, it is only part of the contract of the shipowners, and the want of it gives relief from the hire, or grounds a claim of damages. In affreightment, ignorance of the defect does not avail the owners; nor will the most regular and formal survey at setting out on the voyage have any other effect than to strengthen the evidence in their favour, should the vessel be wrecked in questionable circumstances. In insurance, in like manner, no ignorance or innocence on the part of the insured will be an answer to the fact that the ship was unfit for the voyage. Seaworthiness is presumed; and it is not sufficient for the underwriter to prove that the ship became unseaworthy after the risk began. But if the ship spring a leak or go down, or become unnavigable without adequate cause, unseaworthiness will be inferred. The opinion of the carpenters who repaired a vessel, although it strengthens the presumption, is not conclusive proof of sea-

worthiness. Disrepair of any kind left in the hull, rigging, sails, ground-tackling, &c., of a vessel, is a breach of this warranty. [See *Steel & Craig*, 20 July 1877, 4 R. (H.L.) 103; *Seville Sulphur & Copper Co.* 20 March 1888, 15 R. 616; *Cunningham*, 21 Dec. 1888, 16 R. 295.] Overloading may make a vessel unseaworthy. The policy is binding if the defect have been discovered and remedied before any harm is done, provided this occasions no delay or deviation not authorised by the underwriters. See *Brodie's Supp. to Stair*, 950, 981; *Bell's Com.* i. 581, 663; *Bell's Princ.* §§ 165, 408, 477; [*Abbott on Shipping*, 281.] See *Insurance*, p. 559. *Charter-Party*. [Under 39 & 40 Vict. c. 80, sending an unseaworthy ship to sea is a criminal offence; and such ships may be detained in port by the Board of Trade. See *Shipping Law*, p. 1014.]

SECEDERS. See *Church Judicatories*.

SECONDARY CREDITOR; is an expression used in contradistinction to *catholic creditor*. Thus, a creditor who has an heritable security over two estates, for the same debt, is a catholic creditor; and a creditor who has a postponed heritable security over one of those estates, is technically called a secondary creditor. *Bell's Com.* ii. 417. See *Catholic Creditor*.

[SECRETARY FOR SCOTLAND. This office was created (or, more properly, was revived, having been in abeyance since 1745) by 48 & 49 Vict. c. 61. It is tenable during Her Majesty's pleasure, with a salary of £2000 a year; § 2. The Secretary, if not a peer, is eligible as member of the House of Commons; § 3. By § 5, the following powers and duties were transferred to the Secretary for Scotland: (1) All powers and duties pertaining to the Home Secretary under enactments specified in Part I. of the schedule to the act; which enactments relate to the following matters:—poor law, lunacy (except in regard to criminal lunatics and insane prisoners), public health, wild birds protection, public works loans, Fishery Board, General Register House, registration of births, deaths, and marriages, vaccination, marriage notices, general police, burgh police and improvement, division of burghs into wards, markets and fairs, prisons, public parks, county general assessment, turnpikes accounts, roads and bridges, locomotives regulation, sheriff court houses, rivers pollution, burial grounds, food and drugs, artisans' and labourers' dwellings, local taxation returns, alkali, salmon fisheries,

[school sites, parliamentary divisions, assessor of railways and canals; (2) all powers and duties pertaining to the Home Secretary in relation to the universities of Scotland; (3) all powers and duties pertaining to the Privy Council under enactments specified in Part II. of the schedule, relating to the Board of Manufactures and to public health; (4) all powers and duties pertaining to the Commissioners of the Treasury under enactments specified in Part III., or to the Local Government Board for England under enactments specified in Part IV. (so far as these apply to Scotland), which enactments relate to the following matters:—Assessor of railways and canals, Board of Manufactures, General Register House (except power to fix salaries and emoluments), loans by public works loan commissioners, alkali. By 50 & 51 Vict. c. 52, §§ 2, 3, the following were also transferred to the Secretary for Scotland: (5) all powers and duties pertaining to the Home Secretary under any act of Parliament, law or custom, so far as not already transferred, except the powers and duties of the Home Secretary under or in pursuance of the following acts, or any acts amending the same, viz.:—the Factory and Workshop Act, 1878, the Coal Mines Regulation Act, 1872, the Metalliferous Mines Regulation Act, 1872, the Explosives Act, 1875, the Cruelty to Animals Act, 1876, the Reformatory and Industrial Schools Acts, 1866–1879; (6) all powers and duties pertaining to the Commissioners of the Treasury, under the Valuation of Lands Act, 1854; (7) all powers and duties pertaining to the Board of Trade relating to provisional orders dealing with any of the subjects transferred to the Fishery Board by 48 & 49 Vict. c. 70, § 11 (see *Sea Fisheries*). Her Majesty may appoint the Secretary for Scotland to be Vice-President of the Scotch Education Department; 48 & 49 Vict. c. 61, § 6 (see *Schools*). He is also Keeper of the Great Seal; § 8 (see *Seals*). Nothing in the act shall prejudice or interfere with any rights, powers, privileges, or duties vested in or imposed on the Lord Advocate by virtue of any act of Parliament or custom; § 9 (see *Advocate, Lord*). Nor are any powers, duties, or functions of the Secretary for War affected by these acts; 52 & 53 Vict. c. 16. See *Smith's Secretary for Scotland*.]

SECTATOR; “a seytor in court.” *Shene, h. t.* See *Sok*.

SECURITIES, HERITABLE. See *Heritable Securities. Burdens*.

[SECURITIES OVER MOVEABLES. See *Pledge. Reputed Ownership. Retention. Furniture. Bill of Lading.*]

SEDERUNT, ACTS OF. See *Acts of Sederunt.*

SEDITION; consists in attempts made, by meetings, or by deed, word, or writing, of whatever kind, to disturb the tranquillity of the State, to produce public trouble or commotion, and to excite the subjects to the dislike, resistance, or subversion of the established government. Sedition is distinguished from *leasing-making* in this respect, that the object of leasing-making is to disparage or prejudice the private character of the Sovereign, whereas sedition is directed against the order and tranquillity of the State; and although the two offences may be combined, yet the great distinction seems to be, that the offence against the Sovereign, in the former case, is of an individual nature, extending no farther than to the person of the King; whereas sedition, by whatever means it may attain its object, is an attack upon Government and the constitution of the State. Where this offence is carried the length of tumultuous meetings for the professed purpose of altering the constitution, it assumes a different character, and becomes treason. The punishment of sedition was formerly arbitrary; but by 6 Geo. IV. c. 67, it was restricted to fine and imprisonment, with an alternative of banishment on a second offence. This alternative, however, was taken away by 7 Will. IV. c. 5. See *Hume*, i. 553; *Ersk. B. iv. tit. 4, § 29*; *Alison's Princ.* 581; [*Macdonald*, 229.] See *Treason. Debating Societies. Drilling.*

SEDUCTION. An action of damages is competent at the instance of a husband against the seducer of his wife; and that although the husband have not previously raised an action of divorce against his wife. [Condonation of his wife's adultery does not bar the husband from suing the paramour for *solatium* and damages; *Macdonald*, 16 July 1885, 12 R. 1327.] In like manner, the seduction of an unmarried woman may be the foundation of a similar claim of damages at her own instance against her seducer; [*Gray*, 19 June 1878, 5 R. 971.] See *Ersk. B. iii. tit. 1, § 13*; *Bell's Princ.* § 2033; [*Fraser on Husband and Wife*, 500, 1203; *Guthrie Smith on Damages*, 127.]

SEIGNORY; in English law, a manor or lordship. *Tomlins' Dict. h. t.*

[SEISIN. See *Sasine.*]

SEK. See *Serplath.*

SELF-DEFENCE. Homicide in self-defence is justifiable. *Hume*, i. 212. See *Justifiable Homicide.*

SEMIPLENA PROBATIO; has been defined, "something less than proof, and more than suspicion;" *per* Lord Gillies, in *M'Crone*, 9 June 1831, 9 S. 692. It has also been said, "that a *semplena probatio* does not mean merely a suspicion: that suspicion depends merely on the turn of mind of the person who suspects; some persons suspecting merely where there is possibility; but that a *semplena probatio* must amount to such evidence as induces a reasonable belief, though not complete evidence;" *per* Lord Pres. Blair, in *Craig*, 14 June 1809, F.C. Whenever *semplena probatio* is made out (which is in all cases a question of evidence), the pursuer is entitled to the oath in supplement. When a merchant's books are regularly kept, there is *semplena probatio* that they are correct, and his oath in supplement is competent to prove the truth of what is contained in them; *Ivory*, 21 Feb. 1816, 4 Dow, 467. But the most frequent cases in which questions of *semplena probatio* occur are actions of filiation, or for the aliment of bastard children. Whenever the pursuer is able to make out acts of indecent or suspicious familiarity on the part of the putative father, or other the like circumstances, inducing a reasonable belief that he is the father of her child, she is entitled to her oath in supplement to that effect. Such cases necessarily depend entirely upon specialties; but the inclination of the court may be gathered from such as have been decided, several of which are noted in *M'Glashan on Aliment*, 80, [and in *Fraser on Parent and Child*, 131. Since the admission of parties as witnesses, by 16 Vict. c. 20, the oath in supplement has fallen into disuse; *M'Bayne*, 10 Feb. 1860, 22 D. 738.] See *Stair*, B. iv. tit. 44, § 9; tit. 45, § 17 (2); *Ersk. B. i. tit. 6, § 50*; B. iv. tit. 2, § 14; *Bank. ii. 630*; *Bell's Princ.* § 2061; [*Fraser on Parent and Child*, 132; *Dickson on Evidence* (2nd ed.), § 1515. See *Evidence.*]

SENATORS OF THE COLLEGE OF JUSTICE. By 1540, c. 93, the judges of the Court of Session are so styled. See *Session, Court of. College of Justice. Council and Session.*

SENTENCE. See *Decree. Criminal Prosecution. Execution of Sentences.*

SEPARATION OF MARRIED PERSONS; may be either the act of the law, or it may proceed on a voluntary contract.

[1. *Judicial Separation*.—An action for separation (or divorce *a mensa et toro*, as it is called in England) is competent to either spouse, on the ground either of adultery or of cruelty. It is impossible to define precisely what amount of maltreatment amounts to cruelty justifying a judicial separation. The statement of Lord Brougham, in *Paterson*, 9 Aug. 1850, 7 Bell's App. 337, is generally accepted as authoritative:—"Personal violence, as assault upon the woman; threats of violence, which induce the fear of immediate danger to her person; maltreatment of her person, so as to injure her health; these are, both by the law of Scotland and the law of England, a sufficient ground of divorce *a mensa et toro*." See also *Macfarlane*, 7 Feb. 1849, 11 D. 533; *Steuart*, 3 June 1870, 8 Macph. 821. On the question what kind of conduct short of actual violence or threats will justify separation, Lord Brougham said, in the same case of *Paterson*—"If the husband, without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world and of her own domestics; calling upon them to join in those insults, and to treat her with contumely and scorn; if such a case were to be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable," the remedy of separation might be extended to such a case. But austerity of temper, petulance of manner, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, although productive of great misery, do not amount to legal cruelty; *Evans*, 1 Hag. C.R. 38; *Paterson*, *supra*. Habitual intoxication is not of itself sufficient ground for separation; but if it be coupled with such conduct as induces reasonable fear of personal injury, it may be sufficient; *Fulton*, 28 June 1850, 12 D. 1104; *McGaan*, 14 Dec. 1880, 8 R. 279. See also *Strain*, 4 Nov. 1885, 13 R. 132 (communication of venereal disease). Reconciliation after acts of cruelty has not the effect which condonation of adultery has of extinguishing prior offences as grounds of action; see *Remissio Injurie*.

[Decree of separation cannot be pronounced merely upon the admission of the defender: the acts libelled must be proved; *Muirhead*, 28 May 1846, 8 D. 786. A defence of cruelty, established by a wife in answer to an action for divorce on the ground of desertion, is not *res judicata* in an action by her for separation and aliment; *Stevens*, 15 March 1882, 9 R. 730. When the action is at the instance of the wife there is usually a conclusion for aliment; see *Aliment*. In actions for separation, as in those for divorce, the husband must provide the wife with the means of carrying on the action; see *Divorce*. The effect of decree of separation is to suspend the marital power over the wife's person. With regard to the wife's property, it is provided by the Conjugal Rights Act (24 & 25 Vict. c. 86, § 6) that "after a decree of separation *a mensa et toro* obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried, and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband; and the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation, and during the subsistence thereof; provided that where upon any such separation aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use." As to the custody of children, see *Parent and Child*. Judicial separation may be

[recalled by the court, on cause shown, or by mutual consent.]

2. *Voluntary Separation*.—An agreement to live separate may be entered into extrajudicially between husband and wife. [By the earlier law such contracts were null as being inconsistent with the duty of adherence and *contra bonos mores*. They are now held to regulate the rights of parties with regard to the past; but they cannot be enforced with regard to future time.] If the husband express his readiness to receive his wife again into his family, or if the wife consent to return to it, the contract of separation is at an end; although a judicial separation may notwithstanding be applied for by either party. The wife cannot sue her husband for aliment during voluntary separation; and although, at the time of entering into the contract of separation, the husband may have assigned her an aliment, he is entitled to recall it at any time, if he, at the same time, offer to receive her back. The wife's only remedy is to return to his house, or to obtain a judicial separation, which, if there be good grounds for it, is competent, notwithstanding the voluntary separation. [See *A.B.* 5 Feb. 1853, 15 D. 372, 16 D. 111.] See *Bank. B. i. tit. 5*, § 136; *Ersk. B. i. tit. 6*, §§ 19, 30; *Lothian's Consistorial Prac.* 194; *More's Notes on Stair*, xxvii.; *Bell's Com.* i. 688; *Bell's Princ.* § 1539; [*Fraser on Husband and Wife*, ii. 877; *Mackay's Prac.* ii. 286.] See *Marriage. Desertion. Divorce. [Aliment.]*

[**SEPARATION OF TRIALS.** See *Criminal Prosecution*, p. 262.]

SEPTENNIAL PRESCRIPTION.

See *Prescription*.

SEPULCHRES, VIOLATING. See *Dead Body*.

SEQUELS; in thirlage, are the small allowances of meal, or of manufactured victual, or of money composition, made to the servants at the dominant mill for their real or implied trouble in grinding the victual of the servient lands. *Stair*, B. ii. tit. 7, § 21; *Ersk. B. ii. tit. 9*, § 19; *Bank. i.* 684; *Bell's Princ.* § 1018. See *Thirlage*.

[**SEQUESTRATION.** Sequestration means the judicial withdrawal of property, whether heritable or moveable, from the possession of competing claimants, and entrusting it to the custody of a neutral party, generally a judicial factor. The two following articles deal with the subjects of *sequestration in bankruptcy* (pp. 976–97), and the landlord's *sequestration for rent* (p. 997). But there

[are sequestrations which do not come under either of these heads.] Thus, where a dispute arises as to the succession to lands, the court sometimes puts the estate under a judicial factor until the succession is determined. But the court will not do so if one of the parties has been in unequivocal and peaceable possession; *Campbell*, 27 May 1864, 2 Macph. (H.L.) 41. Nor will the court act upon mere allegation of conflicting interest; *Munro*, 28 June 1849, 11 D. 1202. See *Bell's Princ.* § 2338; *Thoms on Judicial Factors*, 14, 385. In *Orr Ewing's Trs.* 29 Feb. 1884, 11 R. 600 (affd. on this point 13 R. (H.L.) 1), the Court of Session sequestered a trust-estate on the ground that the trustees were in danger of being interfered with by the English court. As to sequestration of the person of a minor, with a view to his choice of curators, see *Wilson*, 10 March 1819, F.C.; and other cases in *Fraser on Parent and Child*, 360. As to sequestration of partnership estates, see *Partnership*, p. 776.]

[**SEQUESTRATION**, in *Bankruptcy*; as a status or condition, is bankruptcy or public insolvency, with divestiture of the bankrupt in favour of a judicial administrator for creditors. See *Insolvency. Bankruptcy*. As a diligence, resulting from a process or action (*Kinnes*, 8 March 1882, 9 R. 698), it is the attachment of a debtor's estate, and the vesting thereof in a trustee, for realisation and distribution among creditors according to their rights. In the latter aspect—sequestration is “the most comprehensive and stringent of all diligences;” *Joel*, 10 June 1859, 21 D. 937, per Lord J. C. Inglis; see also *Kinnes*, p. 702. The same authority terms it “a standing diligence for an undefined body—the creditors of the bankrupt;” *Stewart*, 14 June 1864, 2 Macph. 1219. This diligence contemplates the winding-up of the debtor's business or affairs (*Anderson*, 22 Jan. 1875, 2 R. p. 367); and is an improved method of distribution, for the interest of debtor and creditors (*Wotherspoon*, 19 Dec. 1863, 2 Macph. p. 351; *Scott's Tr.* 17 Jan. 1885, 12 R. p. 543). Equality among creditors, and the exclusion of fresh preference, is the rule of its operation (*Crichton's Tr.* 31 March 1866, 4 Macph. p. 691). The process is throughout judicial (*Barr*, 18 Nov. 1879, 7 R. p. 249; *Kinnes, supra*), and purely statutory (*M'Laren*, 29 June 1869, 7 Macph. p. 927; *Robertson*, 19 Dec. 1885, 13 R. 424); and is economical and expeditious (*Phosphate Co.* 18 March 1874, 1 R. p. 846). The seques-

[tration statutes are based on the common law principles of equity which underlie the Scotch law of bankruptcy (*Mitchell*, 29 June 1881, 8 R. p. 879; *Royal Bank*, 15 June 1881, *ib.* p. 815; *Taylor*, 1 Nov. 1879, 7 R. p. 131)—the fundamental principle being that upon insolvency the debtor's inadequate fund becomes the property of his creditors (see *Insolvency. Bankruptcy*).

The Sequestration Acts date from a period three-quarters of a century later than the institution of statutory bankruptcy (1696). The name sequestration was previously in use, as applicable to a stage in the process of judicial sale of a debtor's landed estate at the instance of competing heritable creditors—being the *setting aside* of the actual possessor of the particular land and rents, and the assumption of possession by the court. See *Bankruptcy*, p. 96; *Hawarden*, 31 May 1861, 23 D. 923. Sequestration, as a process for attaching the whole personal estate of a debtor, was introduced by the act 12 Geo. III. c. 72 (1772). Subsequent statutes have made the process apply to the whole estate, heritable and moveable, of debtors of every class. (For this course of legislation, see *Bell's Com.* ii. 281–283, and *Goudy's Law of Bankruptcy*, p. 3, &c.) The previous statute law was consolidated by the act 19 & 20 Vict. c. 79, passed 29 July 1856; and that act, as amended or affected, in certain points, by 20 & 21 Vict. c. 19; 23 & 24 Vict. c. 33; 32 & 33 Vict. c. 71; 38 & 39 Vict. c. 26; 42 & 43 Vict. c. 40; 43 & 44 Vict. c. 34; 44 & 45 Vict. c. 22; 52 & 53 Vict. c. 39, forms the present sequestration code. See also 45 & 46 Vict. c. 42; and 47 & 48 Vict. c. 16 (as to disability of bankrupt for public offices). The decisions in interpretation of the act of 1856, and of certain portions of 2 & 3 Vict. c. 41 there repeated, are very numerous; see *Goudy*, and *Murdoch's Manual of Insolvency and Bankruptcy*, 5th ed.

In commenting, here, on the provisions of the Bankruptcy Act 1856, &c., the order of the sections of that act, for convenience of reference, is mostly followed. An attempt is made to group the sections—in their order—according to the various stages in the process, and the commencement and close of each. The cases referred to are generally chosen from those of more recent date.

§§ 1–12.

Under section 1, the act came into operation on 1 Nov. 1856: section 2 repealed the three prior sequestration statutes. In sec-

[tion 3 provision is made for bringing the existing sequestrations under the new act; see *Young*, 13 Nov. 1888, 16 R. 92, where this was done after the lapse of eighty years. Sections 5 and 6, following on the interpretation clause (§ 4; see *Kirkland*, 18 March 1886, 13 R. p. 802), respectively define the method of reckoning periods of time in the act, viz., with exclusion of the day from which a period runs, and fix the date of a deed under the act as the date of registration, delivery, or other requisite for making the deed completely effectual. Under section 10, deeds made void by the act (see §§ 111 and 150, *infra*), and voidable alienations by an insolvent or notour bankrupt, may be set aside by way of exception as well as by action; and, under § 11, the trustee on a sequestrated estate can so set aside such deeds or alienations—having the benefit of presumptions competent to any creditor—for behoof of the whole creditors, “according to their just rights, interests, and preferences;” see *Bell*, 19 Dec. 1862, 1 Macph. 187, *per* Lord Cowan; and *Shepherd*, 4 March 1887, 14 R. 565, where Lord Pres. Inglis says, “the proper office of a trustee is to cut down preferences as far as possible.” Sections 6, 10, and 11, are treated in their relation to frauds under the acts 1621, c. 18, and 1696, c. 5, and at common law, in articles *Insolvency, Bankruptcy*; and sections 7, 8, 9, and 12, which refer to the constitution and duration of notour bankruptcy, and to *pari passu* ranking of diligence, in *Bankruptcy*.

§§ 13–30.

These sections define the cases where sequestration is competent, and appoint the procedure—up to the award of sequestration.

Section 13 is as follows:—“Sequestration may be awarded of the estate of any person in the following cases:—

1. In the case of a living debtor subject to the jurisdiction of the supreme courts of Scotland:

A. On his own petition, with the concurrence of a creditor or creditors, qualified as hereinafter mentioned” (see §§ 14, 21, *infra*):

“B. On the petition of a creditor or creditors, qualified as hereinafter mentioned, provided the debtor be notour bankrupt, and have within a year before the date of the presentation of the petition resided or had a dwelling-house or place of business in Scotland; or otherwise, in the case of a company being notour bankrupt, as hereinbe-

[fore provided, if it have within such time carried on business in Scotland, and any partner have so resided or had a dwelling-house, or if the company have had a place of business in Scotland :

2. In the case of a deceased debtor who at the date of his death was subject to the jurisdiction of the supreme courts of Scotland :

- A. On the petition of a mandatory to whom he had granted a mandate to apply for sequestration :
- B. On the petition of a creditor or creditors qualified as hereinafter mentioned" (see § 14, &c., *infra*).

By this leading enactment sequestration is made available for the case of all classes of debtors, and is no longer confined, as formerly, to traders and trading companies; and the term mercantile sequestration thus drops out of use. See *per* Lord J. C. Inglis, in *Joel*, 10 June 1859, 21 D. 937-938; *Smith*, 6 Nov. 1869, 8 Macph. 103. Where the debtor is the petitioner, there does not require even to be insolvency; see *Bell*, 13 Dec. 1882, 10 R. 370; *Joel*, p. 938. Under the first part of the enactment, sequestration of the estates of a royal burgh was sustained, as of a "person;" *Wotherspoon*, *supra*, 2 Macph. 348. As Lord J. C. Inglis observes, in *Joel*, p. 937, "the term 'living debtor' is obviously intended to be used in the most literal and comprehensive sense, for the interpretation clause enacts that the word 'debtor' shall include aliens." In *Joel* it was held that the jurisdiction to which the debtor must be subject was general jurisdiction *ratione domicilii*, and that by Scotch law and practice 40 days' constant residence sufficed to constitute such domicile. To obviate—within the United Kingdom—the "inconvenience and scandal" thus arising, the act 23 & 24 Vict. c. 33 was passed, which gives (by § 2) the Court of Session power to recall a sequestration awarded in Scotland, where a majority of the creditors are in England or Ireland, and the situation of the bankrupt's property or other causes make it seem fitting that the distribution of the estate should be in England or Ireland; see *Brandon*, 9 Jan. 1862, 24 D. 268, *per* Lord J. C. Inglis; *Smith*, *supra*, 8 Macph. 100; *Cooper*, 23 Jan. 1878, 5 R. 564; §§ 31-34, *infra*. In *Croil*, 3 March 1863, 1 Macph. 509, Lord Barcaple, Ordinary (founding on *Joel*), held that arrestment *jurisdictionis fundandæ causa* did not found jurisdiction for

[sequestration, on the ground that jurisdiction is thus constituted only in favour of the individual arrester. Where the petition is at the instance, or with the concurrence, of a creditor or creditors, notour bankruptcy of the debtor is a necessary condition, and the creditors must first render the debtor notour bankrupt by the use of competent diligence. See *Bankruptcy*, p. 89. Under § 15, a creditor's petition must follow within four months of the notour bankruptcy; see *Blair*, 10 July 1889, 16 R. 947. The term "company," in the same subsection, covers "bodies corporate, politic, or collegiate, or partnerships" (§ 4; see *Wotherspoon*, *supra*, 2 Macph. 348). Companies registered under the Companies Acts 1862 and 1867 are wound up by liquidation, not by sequestration; *Standard Property Investment Co.* 12 Dec. 1884, 12 R. 328. Sections 8, 21, 25, 27, also 44, 61, 66, 68, 78, 94, 138, 139, contain provisions applicable to the sequestration of ordinary partnership companies. The second portion of the section (§ 13), with regard to sequestration of a deceased debtor's estate, was first introduced by 2 & 3 Vict. c. 41. See *Wryghte*, 16 Feb. 1860, 3 Macq. 772—where it was held that the necessary relation of debtor and creditor had not existed. Sections 15, 24, 26, 29, 30, and § 2 of the Bankruptcy Act of 1857, appoint special procedure for these sequestrations—guarding, for the most part, the interests of successors. Under § 15, there can be no award within six months of the debtor's death, unless the deceased was notour bankrupt, or his successors concur, or renounce the succession. See *Simpson*, 8 Nov. 1881, 9 R. 104. See also §§ 31, 87, 96, 106, 110.

Section 14 appoints that the qualification of petitioning or concurring creditors (under § 13) shall be, in the case of a single creditor, a debt of not less than £50, and for two creditors, or three or more, debts amounting together respectively to not less than £70 or £100: the debts may be liquid, *i.e.*, constituted by decree, bill, or the like, or illiquid, but may not be contingent. The amount of these sums tends to limit the remedy of sequestration to the larger bankruptcies; but debts acquired by assignment qualify equally with original debts.

The forum for awarding sequestration is the Court of Session, or, since the passing of this act (see *Marr*, 7 June 1881, 8 R. p. 785), the sheriff court of any county where the debtor has resided or carried on business for the year (contrast § 13) pre-

SEQUESTRATION

979.

[ceding the date of the petition; but no award is to be made after proof of sequestration in another court, still undischarged (§ 18). When there are awards, of different dates, in two or more sheriff courts, the later sequestration or sequestrations must be remitted to the sheriff who first sequestrated; and the Court of Session or Lord Ordinary is directed to remit sequestrations coming before them on appeal or otherwise to such sheriff court as in the whole circumstances shall seem most expedient (§ 19). See *Kellock*, 14 Dec. 1875, 3 R. 239; also *Jarvie*, 25 Nov. 1865, 4 Macph. 79—a case which was held not to fall under this section, the two petitions there being both in the Bill-Chamber. When a sheriff refuses to sequestrate, a petition for sequestration may be presented to the Court of Session (§ 19); or the sheriff's judgment may be appealed, *Marr*, *supra*, 8 R. 784, where it was held that the section contains no express words excluding the previously existing jurisdiction of the Court of Session, which therefore continues. In sequestration processes the Lord Ordinary is the Lord Ordinary on the Bills, in session as well as in vacation; and Bill-Chamber procedure is followed, *e.g.*, the claimer chooses the Division of the Inner House to which he shall go, except where the act expressly provides otherwise. See §§ 4, 21, 43; *Gow*, 14 Nov. 1862, 1 Macph. 25; *Cooper*, 8 Jan. 1878, 5 R. 414; *Mackay's Prac.* i. 75-80. The Inner House exercises a *nobile officium* in cases otherwise unprovided for.

Sections 16, 17, and 20 make provision for *interim* preservation of the debtor's estate, and custody of his books, &c., on the special application of a creditor, or at the instance of the court in which the petition is pending. See also § 12 of Debtors Act, 1880. Under § 16, a judicial factor may be appointed (but not as a matter of course, see *Cuthbertson*, 31 May 1887, 14 R. 736, *M'Creadie*, 4 Nov. 1882, 10 R. 108), or other requisite proceedings taken, "whether sequestration can forthwith be awarded or not"—terms held not to confine the remedy to the period before the award, but to leave it available until the appointment of a trustee; *Partridge*, 9 Dec. 1873, 1 R. 253. See *Fraser's Thoms on Judicial Factors*, 410; *Urquhart*, 16 June 1883, 10 R. 991.

Petitions for sequestration must be authenticated by the signature of the petitioner, or of his counsel or agent—acting, in the case of petitions at the instance of

[the debtor, on written mandate (see *Orr*, 19 Oct. 1882, 10 R. 53), and must be supported, on the part of the petitioning or concurring creditor, or of his agent or mandatory, by an oath or affirmation (often called after the English practice an affidavit) taken before a justice of the peace or other similar official, and the account and vouchers of the debt (§§ 21-25, 49). The oath taken by a creditor is an oath of verity—that the debt is truly due (*Blair*, 10 July 1889, 16 R. 947): that by a representative is an oath of credulity—that he believes the debt is due. The oath, in either case, states what co-obligants there are with the bankrupt, or what securities for the debt, and that there are no others, or none (§§ 22, 23; see *Mitchell*, 22 Nov. 1888, 16 R. 122; and recall of sequestration, under § 31, *infra*, and cases there cited; *cf.* § 59, &c., *infra*). The vouchers "necessary to prove the debt" (see § 49, *infra*) are such as are *ex facie* regular and appropriate to the particular account; *Cumming*, 30 Nov. 1866, 5 Macph. 81; *Simpson*, 8 Nov. 1881, 9 R. 105, *per* Lord Ordinary Fraser. The oath and affidavit must not be inconsistent or ambiguous; *Clark*, 26 Jan. 1884, 11 R. 469. "In all petitions by a creditor, whether for sequestration, or for recall of sequestration" (§ 31, *infra*), "or for appointment of a judicial factor" (§ 16, *supra*), "the proper evidence at this stage of his being a creditor is an affidavit;" *per* Lord Cowan, in *Partridge*, *supra*, 1 R. 254.

When the petition is without consent of the debtor, citation "to show cause why sequestration should not be awarded" is required, either personal or edictal, according as the debtor is within or furth of Scotland, upon corresponding *inducio* of 6 to 14, or 21 days (§§ 26, 28). Companies are cited in manner fixed by § 27; and that section allows the alternatives of sequestration of the estates of the company and partners jointly, or of their respective estates separately; see Lord Pres. M'Neill's remarks on the section, and the relation of the latter part to § 13, in *Wotherspoon*, *supra*, 2 Macph. 352. Where the debtor himself presents (with concurrence) or concurs in the petition, there is no citation, and sequestration is awarded forthwith (§ 29), *i.e.*, usually, as matter of course; *Tennent*, 6 March 1879, 6 R. 786; *Kellock*, *supra*, 3 R. 239. After citation, in petitions by creditors, and upon production of the oath and vouchers, the award is, similarly, made at once, unless the debtor appear and "show cause why the seques-

[tration cannot be competently awarded," or instantly pay or prove payment of his debts (§ 30). In *Campbell*, 11 June 1862, 24 D. 1103, a case of the latter class, Lord Pres. McNeill claimed for the court, on the ground of their equitable jurisdiction in bankruptcy, the power to refuse sequestration, although "competent," if it should involve injustice; see also *Ballantyne*, *supra*, 5 Macph. 330, especially *per* Lord Neaves. See *Goudy*, 140. The award, in either case (§§ 29 and 30), sequesters "the estates which then or shall thereafter belong to the debtor before the date of the discharge," and declares "the estates to belong to the creditors for the purposes of this act." This divestiture operates not merely on the debtor himself, but upon persons holding in his right, *e.g.*, a trustee for creditors in a private trust (*M'Alister*, 3 June 1874, 1 R. 958), and a judicial factor *loco absentis* (*Mitchell*, 29 June 1881, 8 R. 875). The vesting in the creditors leaves nothing in the bankrupt that can compete with their rights. Satisfaction of these claims, and—thereafter—payment of any surplus to the debtor, are "the purposes of this act;" see *Kirkland*, 18 March 1886, 13 R. p. 802, and §§ 121, 155. A radical interest, title, or right, remains in the bankrupt, resembling that of a truster, which entitles him to any surplus, and enables him to take up rights abandoned by the creditors, including power to sue actions (to which the trustee may or may not sist himself as a party); *Graham*, 3 June 1871, 9 Macph. 798; *Fleming*, 16 Nov. 1876, 4 R. 112; *Air*, 9 March 1886, 13 R. 734; see § 155. See, farther, as to divestiture, § 48, *infra*; and as to vesting in the trustee for creditors, § 102, &c., *infra*. The case of *Assets Co.* 27 Nov. 1885, 13 R. 281, shows how a constituted sequestration ceased to be a going sequestration, and merged by assignation in a winding-up process.

The award of sequestration completes the first act in sequestration proceedings, the election of a trustee being the second (§ 67). The first important event and date is the "first deliverance" on the petition; see *infra*, § 42, and cases there cited.

§§ 31–40.

After award of sequestration, the process may be interrupted and ended, within or at certain specified times, by one or other of two statutory proceedings, recall of the sequestration, or winding-up under a deed of arrangement.

Section 31 declares that the deliverance

[awarding sequestration is not subject to review; and the words follow "but any debtor whose estate has been sequestered without his consent or any creditor may, within forty days of the date of such deliverance, present a petition to the Lord Ordinary, setting forth the grounds for recall, and praying for recall." The concluding clauses provide for citation of parties, and registration of the recall if granted. After the forty days, recall is competent only on the application of nine-tenths in number and value of the ranked creditors—with due notice to all concerned to show cause to the contrary (§ 32). The proper grounds of judgment are not fixed by the statute, but are well defined by institutional writers and decisions, *viz.*, incompetency in the proceedings, which (would have been a ground for dismissing the petition and) makes recall imperative, and, in the case of latent defects, considerations of equity and expediency, especially the title of other parties to rely on a process *ex facie* regular, where the court exercises a discretion; *Bell's Com.* ii. 294; *Ballantyne*, 29 Jan. 1867, 5 Macph. 330; *Mitchell*, *supra*, 16 R. 122; and cases *infra*. Absence of the proper vouchers of a concurring creditor's debt is an objection of the former class; *Ballantyne*, and *cf.* *Gillon*, 1 Nov. 1882, 10 R. 59; see *Kinnes*, *supra*, 9 R. 698, where the objection, though entirely "technical," was fatal. The discretionary grounds cover, *e.g.*, delay, or expense, or inconvenience, as reasons for refusing recall (see *Tennent*, 6 March 1879, 6 R. 786, where the recall craved was of a second sequestration, in which considerable procedure had taken place, on the thirty-sixth day after its award; also *Fletcher*, 20 March 1883, 10 R. 835, and *cf.* *Simpson*, 8 Nov. 1881, 9 R. 104); and, for granting recall, such a result as the obtaining of advantage or preference (see *Jarvie*, 25 Nov. 1865, 4 Macph. 79; *Kellock*, 14 Dec. 1875, 3 R. 239; *Tennent*; *Fletcher*; *Gillon*, *supra*; *Blair*, 8 Jan. 1889, 16 R. 325). Actings in the sequestration, by a creditor, do not bar his right to recall an incompetent sequestration (*Ballantyne*); but a creditor may be barred, by acquiescence, from seeking recall on discretionary grounds not appearing *ex facie* of the sequestration process (*Ure*, 28 May 1857, 19 D. 758). In *Anderson*, 13 March 1866, 4 Macph. 577, where the circumstances made §§ 31 and 32 inapplicable for recall, the Inner House, in exercise of their remedial jurisdiction, declared the sequestration at an

[end. Pending a petition for recall, the sequestration proceeds as if no petition had been presented (§ 33; *Ballantyne, per Lord Neaves*, p. 335). Section 34 provides for sisting one creditor in room of another in these processes; see *Forsyth*, 29 June 1883, 10 R. 1061. For recall in order to distribution in England or Ireland, see *supra*, § 13.

A resolution to wind-up, *i.e.*, to realise and divide, the estate, under a deed of arrangement, may, by § 35, be come to at the meeting for electing a trustee, or at any subsequent meeting called for the special purpose, on a vote of the majority in number and four-fifths in value of the creditors present or represented. The resolution provides for an application to the Lord Ordinary or sheriff to sist procedure for a period not exceeding two months. If carried, a trustee need not be elected. On the sist being duly granted (under § 36), the creditors may, at any time during its term, produce to the court a deed of arrangement subscribed by four-fifths in number and value of the creditors; and the court, after intimation, hearing of parties, and inquiry, and if satisfied that the deed is duly executed and is reasonable, shall approve the deed, and declare the sequestration at an end—with the effect of binding the whole creditors as if all had acceded, but leaving the sequestration effectual with regard to preferences (§ 38). In *Smith*, 5 Feb. 1889, 16 R. 392, it was held that there is no presumption that under such a deed a right to challenge preferences passes to an assignee of the estate. Where the various conditions of §§ 36, 38 are not fulfilled, the sequestration proceeds (§ 39). By the Bankruptcy Amendment Act of 1860, § 5, these provisions (§§ 35–40) “extend to and include settlements or arrangements by way of composition,” a method implying mutual consent of debtor and creditors, and generally reinvestiture of the bankrupt and conclusion of the sequestration. In 1859 a majority of the whole Inner House had held that the act of 1856 contemplated here only realisation and distribution, and that a composition settlement could only take place under § 137, &c., and the different conditions there appointed; *Douglas & Co.* 14 July 1859, 21 D. 1302. It has been ruled, in *Alexander*, 15 Nov. 1873, 1 R. 185, that these latter provisions do not govern composition under the act of 1860, and that deeds of arrangement by composition, while judicial (under § 38 of the act of 1856), fall to be construed

[according to their particular terms, *e.g.*, even as to revival of the debt if the instalments are not paid. The nature of the deed of arrangement cannot be determined by the first meeting, under § 35; *Dixon*, 13 July 1867, 5 Macph. 1033. The deed may be signed either at a voluntary meeting of creditors, or, as is the more usual practice, by them separately; *Dixon, per Lord Deas*; *N. of Scotland Bank*, 20 Nov. 1880, 8 R. 119, *per Lord Shand*. Production of vouchers along with the affidavit, if demanded, is necessary, under §§ 35 and 38; *N. of Scotland Bank*.

§§ 41–66.

These sections, for the most part, refer forward to the second great step in the process—the election of a trustee (§ 67), or backward to the award of sequestration.

By § 41 a petitioning or concurring creditor is entitled to payment of his expenses by the trustee, when appointed, out of the first of the funds. Section 42 fixes the commencement and effect of sequestrations as “on and from the date of the first deliverance on any petition for sequestration,” though the award be of later date (see *supra*, §§ 13–30, *ad fin*). The first deliverance is generally the citation of the debtor under § 26, or the award—where the debtor himself petitions or concurs—under § 28. The retroactive effects are, principally, (as set forth by the first Lord Curriehill, in *Jarvie, supra*, 4 Macph. 81,) those of inhibition against contracting farther debts, or doing anything to the prejudice of existing creditors (see § 48), accumulation of interest on debts (§§ 52, 107), and vesting in the trustee (§§ 102, 103); also the cutting down of arrestments or poindings executed within the previous sixty days (under § 108). See also *Marr, supra*, 8 R. p. 786; *Simpson, supra*, 9 R. 106, where Lord Pres. Inglis reserved opinion on the competency of conjoining two petitions, in order to give the benefit derived from a first deliverance.

The regulations in §§ 44–47, 77, for the protection or liberation of the debtor, are practically superseded, since the abolition of imprisonment for debt, in the general case, by the acts of 1880 and 1882. Under § 47 they did not affect warrants of apprehension or imprisonment *in meditatione fugæ* or *ad factum præstandum*, or for any criminal act. See *Macgregor*, 12 April 1879, 6 R. 895; *Bruce*, 20 Sept. 1878, 6 R. 894; *Foulds*, 22 Nov. 1873, 1 R. 201; *Inglis*, 13 July 1859, 21 D. 1290.

Section 48 directs that sequestrations

[shall be registered, in the Register of Inhibitions in Edinburgh, upon due transmission of an abbreviate of the petition and first deliverance; and enacts that "the abbreviate so recorded shall from the date of the said deliverance have the effect of an inhibition and of a citation in an adjudication of the estate of the debtor at the instance of the creditors afterwards ranked on the estate;" see *supra*, § 42. The estate is thus rendered litigious, and no act of the bankrupt's can affect it (see *Bell's Com.* ii. 144, 152; *Jarvie, supra*, 4 Macph. p. 82); and, as the section farther provides, the inhibition, &c., and the sequestration after it is awarded, cannot be stopped by payment of the debts in respect of which the award was made. Where this statutory duty has been neglected, or its fulfilment in terms has become impossible, the Court of Session (Inner House) may intervene, in exercise of their *nobile officium*. In *Harrison*, 11 Dec. 1880, 18 S.L.R. 187, the court allowed an abbreviate to be recorded after the proper time, "reserving all objections;" see *Morrison*, 21 Jan. 1874, 1 R. 392. This section also obliges the party applying for sequestration to advertise the fact and date of the sequestration and first deliverance, &c., in the Edinburgh and London Gazettes; see *Morrison*; *Robertson*, 4 July 1885, 12 R. 1361.

Rules for ranking of claims are given in §§ 49–66:—General rules as to voting and ranking for payment of dividends (§§ 49–58); special rules as to voting (§§ 59–64); special rules as to ranking for payment of dividends (§§ 65–66). See *Commercial Bank*, 27 Nov. 1885, 13 R. pp. 260–261.

The leading general rule (§ 49), which expressly refers to the previous regulations as to oaths in petitions for sequestration (§§ 21–25), as the leading rule there does with regard to vouching to the present provision, is as follows:—"To entitle a creditor to vote or draw a dividend he shall be bound to produce at the meeting, or in the hands of the trustee, an oath to the effect and taken in the manner hereinbefore appointed in the case of creditors petitioning for sequestration, and the accounts and vouchers necessary to prove the debt referred to in such oaths." See § 101. Under the last clause, a creditor must produce such documents of debt as may be reasonably supposed to be in his possession. A merchant or tradesman, claiming for goods, &c., delivered, need only produce an "account," or record of a series of transactions: this is proper

[vouching of his debt, as he generally has no farther voucher to produce; *Wiseman*, 5 March 1870, 8 Macph. p. 665. Money transactions imply receipts or bills or other separate documents of debt, and these documents, and not mere business-books or an account, constitute the appropriate vouching of such claims; see *Stewart*, 29 June 1865, 3 Macph. 1031; *N. of Scotland Bank*, 20 Nov. 1880, 8 R. 117, and *supra*, §§ 21–25, and cases there cited. Unconnected claims, figuring as items in an account, require farther vouching; *Wiseman*; see *Ballantyne, supra*, 5 Macph. 330. What is required, throughout, is *prima facie* evidence (*Wiseman*); and similar evidence that the productions are not true vouchers excludes a claim; see *Anderson*, 13 June 1852, 14 D. 866; *Dow*, 23 Feb. 1875, 2 R. 459; *Mitchell*, 22 Nov. 1888, 16 R. 122. That the pretending creditors are conjunct and confident with the bankrupt is not *per se* a ground for rejection; *Bell's Com.* 5th ed. ii. 443, 7th ed. 314; see *Tennent*, 12 Jan. 1878, 5 R. 433; *Dow*; *Ritchie*, 14 Jan. 1875, 2 R. 297; but it is an adverse circumstance; *Witham*, 20 March 1884, 11 R. 776; *Tytler*, 28 Feb. 1883, 10 R. 699; *Laidlaw*, 16 Dec. 1882, 10 R. 374. For the case of petitioning, where the statutory procedure is obviously summary, and for both petitioning and voting, where despatch is necessary and the validity of the debt is not primarily the issue, parole proof is incompetent on either side; *Furlong*, 1 Feb. 1809, F.C.; and recovery of documents by diligence *hinc inde*, which is competent (as is implied in § 50), is restricted by specification; *Tennent*; *Reid*, 15 Nov. 1879, 7 R. 235. In questions of ranking, the proof is *prout de jure*; see *Clavering*, 26 Nov. 1881, 19 S.L.R. 139; *Williamson*, 29 May 1882, 9 R. 859; see *Tytler, supra, per Lord Shand*; see § 126 *infra*. In terms of the interpretation clause (§ 4), voting includes consent to or dissent from any offer of composition, or discharge of the debtor. Under § 50, if the account and vouchers are not in the possession of the creditor, he states in his oath the cause of non-production, and in whose hands he believes them to be; and this entitles him to have a dividend set apart "till a reasonable time be afforded for production, or for otherwise establishing his debt according to law," but meantime he cannot act or vote in the sequestration. The section concludes with a direction that the trustee shall mark and enter the productions—

[failure in which duty on the part of the trustee does not exclude the creditor from his rights; *Stewart, supra*, 3 Macph. 1031. It is a question whether this direction applies where the vouchers are produced at first; *Stewart* (see Lord Pres. McNeill on inartistic form of the section). Rectification of oaths or claims "not framed in the manner required by this act," *i.e.*, with formal errors or omissions, is competent, at the instance of the sheriff or trustee, when there is no fraudulent intention, nor injury to the other creditors (§ 51; see also *Dow, supra*, 2 R. 459). Failure to deduct a security, under § 60, was held to be thus rectifiable; *Latta*, 28 Nov. 1865, 4 Macph. 100; see Lord J. C. Inglis on history of this provision. Under § 52, creditors vote and rank for the accumulated sum of the principal debt and interest to the date of the sequestration (see § 42), and, where the debt is not yet due, for the principal sum, less interest and trade discount (see *Duncan*, 28 Jan. 1879, 6 R. 582), without separate specification, as formerly, of principal, interest, and discount, so that technical objections on the ground of arithmetical blunders are avoided. In *Duncan*, it was pointed out that deduction of trade discount was the rule at common law, the real debt being the gross debt less discount. Contingent claims, and claims in respect of annuities granted by the bankrupt, are not titles for voting or drawing dividend till they have been valued by the trustee or sheriff (§§ 53, 54). A mother's claim for aliment of an illegitimate child is such a contingent claim; *Downs*, 7 July 1886, 13 R. 1101. The right of future and contingent creditors to a ranking is sustained by the fundamental rules of equity which underlie the system of bankruptcy in Scotland, and the statute allows them to claim just as much and no more than justice requires; see *per* Lord Pres. Inglis, in *Mitchell*, 29 June 1881, 8 R. 879. Section 56, in contrast with the common law rule, enables creditors to affect the position of a co-obligant with the bankrupt, by voting, or drawing dividends, or assenting to discharge or composition, without thus freeing the co-obligant. The latter, however, on full payment (*Ewart*, 5 May 1865, 3 Macph. H.L. 36), obtains right to an assignment of the debt. Creditors lodging claims, or voting, or ranking, are not thereby rendered liable for expenses, &c., due to agents or others employed by the trustee (§ 57).

All securities and co-obligations, principal or cautionary, must, whether for vot-

ing or ranking, be specified in the affidavit (§§ 49, 21, 22). For voting (§ 59), and ranking (§ 65), the creditor in his oath has, farther, to put a value on securities "over any part of the estate of the bankrupt" (see *Univ. of Glasgow*, 10 Feb. 1882, 9 R. 643, also *Morton*, 19 May 1882, 19 S. L.R. 611, and *Royal Bank*, 28 Feb. 1882, 9 R. 679), and to deduct the value from the debt and specify the balance; and he votes in the sequestration generally, including, *e.g.*, questions of compositions (*Macbride*, 14 March 1884, 11 R. 702), upon the balance, while in the disposal or management of the particular estate subject to his security he votes upon the whole debt (§ 59). In voting, the creditor has also to value and deduct the obligations of obligants bound with the bankrupt, but liable in relief to him, *e.g.*, of principal debtors in the case of the sequestration of cautioners; and of securities held from such co-obligants, and of securities from which the bankrupt has right of relief (§ 60; see *Latta, supra*, § 51; *Univ. of Glasgow; Goudy*, 192). Where it is the principal debtor who is sequestered, there is no deduction of a cautioner's obligation, in voting or ranking, the debtor having no claim upon his estate. There is no deduction in ranking, even in the sequestration of a cautioner, the question at issue there being the final question of payment, not preliminary questions of procedure or administration. To entitle a creditor to vote (§ 61), and rank (§ 66), upon the estate of a partner of a company for a company debt, the creditor's claims against the company are first valued and deducted, and, in voting, also claims against any partner bound in relief to the bankrupt; but, in voting, as well as in ranking, a creditor of the company is not bound to deduct the value of claims against any partner. To prevent the voting creditor undervaluing these securities, co-obligations, or claims, the trustee with consent of the commissioners may, within two months after the oath, require from him a conveyance or assignation of the security, &c., on payment of the specified value and 20 per cent. in addition—subject to a right in the creditor to correct his valuation; and a majority of the other creditors at any meeting have the like power (§ 62): for the motive of this provision, see *Russell*, 19 March 1868, 6 Macph. 650, *per* Lord J. C. Patton. By § 63 the vote of the mandatory of a creditor, on exhibition of his mandate, is equivalent to a vote of the creditor himself. In prac-

[tice, creditors usually appear by mandatory—as a rule, by a law agent. The trustee, being in a judicial position, ought never to act as mandatory; see *Witham*, 20 March 1884, 11 R. 776. For observations on the form of mandates, see *Buchanan*, 3 Feb. 1882, 9 R. 621.

In ranking for dividends, the value of securities over the bankrupt's estate is deducted (§ 65), the trustee, with consent of the commissioners, being entitled, as a check upon under-valuation, to a conveyance or assignation of the securities at the expense of the estate, upon payment of the specified value, or to reserve to the creditor the full benefit of the security. See *British Linen Bank*, 13 March 1887, 4 R. 651; *Univ. of Glasgow*, *supra*, 9 R. 643, especially *per* Lord Pres. Inglis, who states the settled common law rules of ranking, with the statutory changes. For § 66, see § 61, *supra*. In *Myles*, 6 July 1872, 10 Macph. 946, it was laid down by Lord Pres. Inglis that the common law right of the creditor to realise his security was unaffected by this power of the trustee, and that notice need not be given by the creditor, but that the trustee, especially in the case of fluctuating securities, such as stocks, is bound to decide at once, and give notice if he requires an assignation. A creditor ranks for his whole debt, up to 20s. in the £, upon the estates of co-obligants, principal or cautionary; see *Goudy*, 548. (For the common law rule, with regard both to securities and co-obligations, see *Bankruptcy*, p. 97; *Insolvency*, pp. 547, 550–551). See *infra*, §§ 107–120. In ranking for a second dividend, a second creditor may revoke his security; *Commercial Bank*, 27 Nov. 1885, 13 R. 257.

“Security” is defined (§ 4) to include “securities, heritable or moveable, and rights of lien, retention, or preference, and conveyances thereof and any part thereof.” Arrestment is security in questions of ranking under the Sequestration Acts; see *Gibson*, 17 Dec. 1853, 16 D. 233. In *Mitchell*, 29 June 1881, 8 R. 875, it was held that a valid arrestment on the dependence, if followed up without undue delay, entitles the creditor to a preferable ranking, although sequestration be awarded before decree in the action. A creditor's right of retention, or compensation, or balancing of accounts in bankruptcy, enables him to set off a debt due by him to the bankrupt against an equivalent amount due to him; see *Bertram*, 9 July 1880, 7 R. 1127, *per* Lord Pres. Inglis; *Hannay*, 22 March

[1877, 4 R. (H.L.) 45, *per* Lord Blackburn; *Bell's Com.* ii. 118, &c. This common law security or preference falls to be deducted in ranking; see *Borthwick*, 4 Feb. 1864, 2 Macph. 595. Retention is incompetent where another creditor has been ranked for the debt in question, double ranking for the same debt in no case being admitted; see *Anderson*, 17 March 1876, 3 R. 608; *Mackinnon*, 24 Dec. 1881, 9 R. 393.

§§ 67–86.

The election of a trustee, and of commissioners, by the creditors, is the *second* great step in the process of sequestration. What is termed in practice “the first statutory meeting,” *i.e.*, the first public meeting of creditors, has this for its object; and precedence is given to it “because,” as Lord J. C. Inglis observed in *M'Kellar*, 12 July 1861, 23 D. 1273, “till the trustee is elected, nobody is vested with a title to the estate, and no proceedings can be conveniently taken.” The leading enactment, § 67, runs thus:—“The Lord Ordinary or the sheriff, by the deliverance which awards the sequestration, shall appoint a meeting of the creditors, to be held at a specified hour, on a specified day, being not earlier than six nor later than twelve days from the date of the Gazette notice” (*i.e.*, *Edinburgh Gazette*; Amendment Act, 1860, § 5) “of sequestration having been awarded, at a convenient place, within the county of the sheriff awarding sequestration, or to whom the sequestration is remitted, to elect a trustee or trustees in succession, and do the other acts hereinafter provided.” In *M'Donald*, 9 March 1861, 23 D. 719, the Inner House, on petition, in exercise of their *nobile officium*, extended the period here fixed, where, from difficulty of communication, extension was necessary. The meetings are held in such public hall or room as may be available. Section 68 appoints the procedure at the meeting, *viz.*, adjournment, if desired, within the twelve days' limit; the attendance of the sheriff, on notice from two or more creditors, or the appointment of a creditor as preses; the marking of documents and writing of minutes (see *Brown*, 2 March 1869, 7 Macph. 595); the vote itself, on production of oaths and documents of debt (see §§ 49, 21, &c.), and election of a trustee or trustees in succession, and in the case of a bankrupt company and bankrupt partners, the election of one trustee for all the estates, or separate trustees for each; and, finally, the section prohibits the electing of the bankrupt himself, or any person con-

[junct or confident with him, or any person holding an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session. As Lord Kinloch, Ordinary, remarked in *Buchan*, 13 June 1863, 1 Macph. 924, "the court has, in various cases, held that, independently of all statutes, a person who had gained, or endeavoured to gain, his election as trustee by irregular practices, could not be confirmed as such"—e.g., in *Mann*, 1 July 1857, 19 D. 942. If there be no competition for the office or objection taken, the sheriff appoints the sole candidate trustee, and, on competition or objection, decides after hearing parties—in either case on the report of the presiding creditor, when he does not himself preside (§§ 69, 70): and the sheriff's judgment declaring the election falls to be given "with the least possible delay," and is "final, and in no case subject to review in any court or in any manner whatever" (§ 71). In *Galt*, 9 June 1880, 7 R. 888, and *Tennent*, 12 Jan. 1878, 5 R. 433, the Second Division and the majority of the First Division of the court expressed opposite opinions with regard to the finality of interlocutory judgments of the sheriff prior to his judgment on the vote itself. The First Division held an interlocutor allowing claimants to stamp documents, amend claims, and produce books, &c., was not expressly covered by this enactment, and was subject to appeal under § 170, Lord Pres. Inglis founding on *Latta*, 28 Nov. 1865, 4 Macph. 100, and *Wiseman*, 5 March 1870, 8 Macph. 661, and Lord Shand concurring only on the authority of *Wiseman*, and maintaining that by necessary implication the sheriff was made the sole judge in matters of procedure leading to the appointment, and as to claims, &c., on which the appointment depended. In *Galt*, the Second Division held this latter view. Lord J. C. Moncreiff said (p. 891): "The construction that has been put upon the statute leads to a very strange result. . . . I think that where a judge is made final in a certain matter, all the judgments he delivers in arriving at a final result should be final also." See also *Brown*, *Buchan*, *supra*; *Foulis*, 27 Oct. 1871, 10 Macph. 20; *Rankine*, 19 July 1871, 9 Macph. 1053. In more recent cases the First Division has sustained appeals against procedure *ultra vires* of the sheriff, such as allowing proof at large, the policy of the statute being held to be expedition at this stage (*Wylie*, 21 June 1884, 11 R.

[968], or failure to ascertain the valid votes (*Farquharson*, 16 June 1888, 15 R. 759, *Reid*, 29 June 1887, 14 R. 847), but, while sustaining the competency of appeal in matters within the sheriff's powers, such as allowing instant verification or limited diligence, has refused to interfere with his discretion. See *Moncur*, 8 Jan. 1887, 14 R. 305. In *Reid*, the decision in *Tennent* hardly seems to be supported. See also under § 49, *supra*. Section 72 regulates the matter of caution for the trustee's intromissions, &c. (see *Rankine*), the creditors being the judges of the amount; and, under § 73, on the bond of caution being lodged, the sheriff finally confirms the election (see *Brown*, *Moncur*, *supra*), and an act and warrant of confirmation issued by the sheriff-clerk becomes, after registration by the accountant (see § 157, *infra*), an effectual title to the trustee for his statutory duties, and evidence of his right and title to the estate (see § 102, &c.). Removal of the trustee, or acceptance of his resignation, is competent, under § 74, to a majority in number and value of the creditors present at a meeting called for the purpose, or to a fourth of the creditors in value, on petition to the Lord Ordinary and cause shown; and, on the death, resignation, or removal of a trustee, or his absence from Scotland for three consecutive months, any commissioner, or creditor ranked, or claiming and entitled to be ranked, may apply to the sheriff for devolution of the estate upon the trustee next in succession, or election of a new trustee. The court are slow to interfere in the election or removal of a trustee, which are matters "left entirely in the hands" of the creditors (*Robertson*, 17 May 1871, 9 Macph. p. 743); but an adverse report from the accountant (§ 159) may compel action—as in *Lang*, 19 March 1870, 8 Macph. 753. Proceedings under § 74 are not available, where, after a trustee's discharge, funds emerge to the undischarged bankrupt: the course there is to apply to the court (not the sheriff) to appoint a meeting of the creditors for the election of a new trustee; *Hutton*, 13 March 1872, 10 Macph. 620; see *Young*, 13 Nov. 1888, 16 R. 92, where the Inner House thus exercised their *nobile officium* eighty years after the sequestration; *Northern Herit. Securities Co.* 21 Nov. 1888, 16 R. 100. The removal, by a single vote, of one trustee acting on the estate of a bankrupt company and also of the two partners of the company, was held to be irregular and incompetent, in *Stephen*, 4 June 1863,

[1 Macph. 866. The election of commissioners (under § 75) is similar to that of the trustee, with regard to procedure, qualifications for the office, &c. The commissioners are creditors or mandatories of creditors, three in number—if so many creditors claim. Caution is not required; and they receive no remuneration. A majority in value (§ 101) of the creditors may remove a commissioner, and elect another in his place (§ 76). The appointment of commissioners is an independent statutory requisite: and they are independent statutory officers; *Russell*, 26 Nov. 1869, 8 Macph. 220, *per* Lord J. C. Moncreiff. At this stage, or later, the creditors may allow aliment to the bankrupt, under § 78.

The trustee's first duty is, within twenty-one days of the confirmation of his election, to present for registration an abbreviate declaring the transference of the bankrupt's whole estate to him (§ 79); and as soon as may be after his appointment he must take possession of the estate, with titles, vouchers, &c., and make up and transmit to the accountant an inventory and estimated valuation (§ 80); *Adam*, 30 May 1884, 11 R. 863; *Acct. in Bankruptcy*, 8 June 1859, 21 D. 928. By § 81 the bankrupt has to deliver at the meeting for electing the trustee a complete state of his affairs, including any expectancy, with a list of creditors and debtors, &c.; and at all times to give every information and assistance to the trustee, under penalty of imprisonment and loss of the benefit of the statute, *i.e.*, discharge; see *Kirkland*, 18 March 1886, 13 R. 798. The trustee's main duty is, as set forth in § 82, to "manage, realise, and recover," and "convert into money," with the view of distribution among the creditors, the whole bankrupt estate, as directed by the creditors (see *Marshall*, 2 July 1889, 16 R. 895), or, failing such directions, with the advice of the commissioners; and to lodge the money in bank, subject to penalty or—in the absence of "innocent causes"—dismissal (under § 83; *Acct. in Bankruptcy*, 17 Dec. 1867, 6 Macph. 158), if he keeps in his own hands over ten days more than £50 of the estate. These latter provisions apply to money withdrawn from bank for the payment of dividend; *Acct. in Bankruptcy*, 29 June 1864, 2 Macph. 1293. Under § 84 the trustee has to keep a sederunt book, for recording meetings of creditors, &c., and regular accounts of the affairs of the estate. The trustee represents both the creditors and the debtor; *Roy*, 26 Nov. 1884, 12 R. p. 184. His office being to maintain the interests of

[the general body of creditors, he has no duty, if he sustains a preference, to defend his deliverance on appeal: the preferred creditor is the party to do so; *Shepherd*, 4 March 1887, 14 R. 563. The functions of the commissioners are chiefly those of superintendence and advice, with right jointly or individually to report to any general meeting of creditors (§ 85). They declare or postpone dividends, audit the trustee's accounts, and fix his commission (§§ 85, 134, 125). It is thought commissioners do not, in practice, take as much work and responsibility upon themselves as the act directs. The trustee, commissioners, and judicial factor appointed under § 16, are liable to account for their "intromissions and management" (§ 86). The accounting is not on the merits of creditors' claims, but as to misconduct; *M'Adam*, 18 Dec. 1884, 12 R. 358; *Henderson*, 22 Nov. 1882, 10 R. 188. In *White*, 19 March 1879, 6 R. 854, a trustee's refusal to deliver a report on the bankrupt's conduct except on payment of a fee was held an act of "management"—a term taken to be of wider scope than "intromissions;" see also *Burt*, 3 Feb. 1863, 1 Macph. 382; *Assets Co.* 27 Nov. 1885, 13 R. 281. See §§ 159, 169. A trustee, or a trustee and commissioners together, "are not entitled at their own discretion, or because they think compliance with the statutory provisions will not benefit the estate, to neglect those statutory provisions;" *per* Lord J. C. Inglis, for the court, in *Acct. in Bankruptcy*, 5 Dec. 1862, 1 Macph. 126.

§§ 87–95.

The public examination of the bankrupt forms the *third* leading stage in the proceedings. On application by the trustee, within eight days of confirmation, the sheriff issues warrant for the bankrupt's attendance on a day not less than seven nor more than fourteen from date: the trustee then makes advertisement, and sends notice to creditors, of (his own election, and) the time and place of the examination, and also of a second meeting of creditors to be held within a like time from the date of the first meeting, and intimates a period for the lodging of claims (§ 87). See under § 96, *infra*. In *M'Kellar*, 12 July 1861, 23 D. 1274, Lord J. C. Inglis was of opinion that the section was not so inflexible as to prevent the second meeting being adjourned or another called, should the examination not be then completed; see *Walker*, 16 Nov. 1861, 24

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[D. 155. The sheriff has power to secure the attendance of the bankrupt though in prison, or sanctuary (*M'Kellar*), or to examine him by commission; and he may, if he see cause, adjourn the diet to an early day, or, on the application of the trustee, re-examine as often as he (the sheriff) sees fit (§ 88; see *Somerville*, 10 Feb. 1859, 21 D. 471, *per* Lord J. C. Inglis). The Lord Ordinary has similar powers of enforcing attendance, where the bankrupt is furth of Scotland but within the United Kingdom (§ 89). Indefinite adjournment, *e.g.*, till a certain criminal trial should take place, is incompetent; *Wright*, 7 Dec. 1878, 6 R. 289. On the application of the trustee, the sheriff may at any time order the examination, and procure the attendance, of the bankrupt's wife, family, clerks, and others who can "give information relative to his estate" (§ 90; see *Sawers*, 17 Dec. 1858, 21 D. 153); and the bankrupt himself and these others must answer all questions "relating to his affairs," and if ordered, produce all accounts, documents, &c., relative thereto (§ 91). For the latter purpose an action of exhibition and transumpt was found unnecessary, in *Selkirk*, 22 Oct. 1880, 8 R. 29. Examination, under §§ 90, 91, "is not the taking of evidence; it is the procuring of information for the use of the trustee in the administration of the estate;" *per* Lord Pres. Inglis, in *Park*, 21 Oct. 1871, 10 Macph. 14; see also *M'Kay*, 24 Feb. 1863, 1 Macph. p. 442. Where a person whose examination is desired under § 90 is outwith the jurisdiction but within the kingdom, the English or other court conducts the examination, on request made, in terms of the English Bankruptcy Act of 1883, § 118 (following the act of 1867, § 74), which so enacts, after a general provision that all British Courts of Bankruptcy "shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy." The proper object of examination is "to ascertain what the bankrupt's estate consists of, where it is, what he has done with it or to affect it," not such matters as the validity of claims or the whereabouts of the bankrupt himself; *Delvoitte*, 16 Nov. 1877, 5 R. 144, *per* Lord Pres. Inglis; *Brash*, 13 March 1888, 15 R. 586, *per eundem*; *Lindsay*, 17 July 1872, 10 Macph. 980; *Sawers*, *supra*, 21 D. 153. The examination is on oath, and—if not on commission—before the sheriff (see *M'Kay*, as to the sheriff's duty to be present), and, at the discretion of the trustee, in open court (§ 92).

[In *Wright*, *supra*, 6 R. 289, it was held that the sheriff had no power to control this statutory discretion of the trustee. Lord Deas observed that the sheriff could not with safety do so, as the trustee had means of information not accessible to him, adding "we have always jurisdiction to prevent oppression." The interest of the estate and the creditors ought to be the motive guiding the trustee in the exercise of his discretion, not favour to the bankrupt. Under § 93, if the bankrupt or other person refuses to answer or to produce documents, he may be imprisoned. Before the close of his examination, the bankrupt may correct his state of affairs (see § 81); and he then takes an oath, in the form in § 95, that he has given a full account of his debts, effects, &c., and delivered up his whole books, &c., and made full discovery of everything relating to his affairs, and that he promises similar disclosure thereafter (see *M'Kellar*, *supra*, 23 D. p. 1273).

§§ 96–101.

The second meeting of creditors, called in practice "the second statutory meeting," is the *fourth* and "one of the most important steps" in the process; see *Kerr*, 30 June 1865, 3 Macph. p. 1047. This meeting is called in § 96 "the meeting of creditors after the examination of the bankrupt," words which refer back to § 57; see *M'Kellar*. The bankrupt has now given all the information to the trustee he can give, and the creditors are to consider the state of affairs in relation to their own interests as the "absolute masters and owners of the bankrupt's estate" (*per* Lord Pres. Inglis, in *Robertson*, 17 May 1871, 9 Macph. 743). In terms of § 96, the trustee prepares and exhibits at the meeting a report and estimate, and gives explanations: and the creditors may receive an offer of composition (see § 139), or they may then, or at any other meeting, "give directions" to the trustee and commissioners "for the recovery, management, and disposal of the estate" heritable and moveable (see §§ 82, 133)—with power, under § 97, to a majority in number and value to proceed against the bankrupt, if he shall seem to have concealed his funds or otherwise acted fraudulently (see §§ 178, 162).

By § 98 power is given to the trustee, any commissioner—with notice to the trustee, one-fourth (in value) of the creditors, or the accountant, at any time, to call or have a meeting of the creditors called. Notice of all creditors' meetings and of their purpose

[see *Fleming*, 16 Nov. 1876, 4 R. p. 113] must be advertised in the Gazette at least seven days beforehand, in terms of § 99. The court, on petition, can rectify mistakes; *Watt*, 10 March 1877, 4 R. 641. Special notice by post or otherwise is required in certain cases (*e.g.*, §§ 87, 136, 137), except to creditors with debts under £20 (§ 100), but not for meetings under § 98; *Cookson*, 11 Dec. 1863, 2 Macph. 268. Section 101 fixes as the general rule for computing majorities at meetings of creditors the majority in value of those present and entitled to vote, and appoints that for voting a creditor for less than £20 shall not be reckoned in number though his debt shall be computed in value; see *N. of Scotland Bank*, 20 Nov. 1880, 8 R. 117. In *Cookson* it was observed that a single qualified creditor present at a duly summoned meeting would be a majority.

§§ 102–120.

Section 102, with its subsections, and 103, together form a leading provision of the statute. By § 102 the act and warrant of confirmation in favour of the trustee, which completes the second stage of the sequestration process, viz., the trustee's election (§§ 67–73), *ipso jure* transfers to and vests in him or a successor, for the creditors, absolutely and irredeemably, as at the date of the sequestration, the whole property and rights of the debtor (see § 73), (1) his moveable estate so far as attachable for debt; (2) his heritable estate in Scotland; (3) his other real estate within Her Majesty's dominions; to the effect, and subject to the conditions, set forth in the subsections, viz., reservation of prior valid preferable securities, and rights of superiors, and of creditors of the ancestor (see *Millar*, 5 Feb. 1886, 13 R. 543), &c. By § 103, acquisitions, successions, &c., obtained after sequestration but before discharge, also fall under the sequestration; and the bankrupt's rights therein vest similarly in the trustee from their date—the rights of creditors of persons from whom the estate may come being reserved entire. This vesting in the trustee, and the adjudication, &c., thereby effected (§§ 107, 108, *infra*), distinguish, so far, sequestration from liquidation under the Companies Acts (1862 and 1867), in which there is no similar divesting of a bankrupt company and investing of the liquidator; see *Ronaldson*, 2 Dec. 1881, 9 R. 225; *Clark*, 30 June 1882, 9 R. 1017. The commentary, by way of decision, on these enactments is very extensive.

The language of § 102 imports the rule

[of international law that personal property wherever situated is subject to the law of the owner's domicile (see *Bankruptcy*, p. 98, and cases there cited), and seems to accept the rule that real estate is governed by the *lex loci rei sitæ*. Section 103 (see also §§ 29, 105) vests the trustee in, *inter alia*, the bankrupt's acquired heritable property (see § 4) “wherever situated,” but this cannot avail against the *lex rei sitæ* acting in the interest of foreign creditors. See *infra*, p. 997.

It was held, in *Trappes*, 3 Nov. 1871, 10 Macph. 38, that an estate in expectancy or *spes successionis*, which did not become a vested right or *jus crediti* till after the bankrupt's discharge, although saleable, did not fall to the trustee under § 102, because not attachable for debt by the expectant's creditors; but see *M'Inroy*, 10 March 1874, 1 R. 817; see *Kirkland*, 18 March 1886, 13 R. 798—where Lord Pres. Inglis made important observations on the scope of the vesting under § 102. The question has been raised whether so personal a claim as damages for slander passes to a trustee and creditors; *Jackson*, 13 Nov. 1875, 3 R. 130, where the slander was subsequent to the sequestration. The trustee's title is a new, independent, one, not merely one of administration like that of a liquidator or private trustee; *Ronaldson*, 2 Dec. 1881, 9 R. 225; *Clark*, 30 June 1882, 9 R. 1017. A private trustee is divested, by operation of this section; *M'Alister*, 3 June 1874, 1 R. 958; and vesting in a trustee under a subsequent cessio is excluded; *Huyssens*, 29 Jan. 1884, 11 R. 471. The right of the trustee, in terms of §§ 102, 103, and by the principles of equity upon which the rules of bankrupt law are founded (Lord Pres. Inglis, in *Taylor*, 1 Nov. 1879, 7 R. 131), is, in the words of Lord Westbury, in *Fleming*, 16 July 1868, 6 Macph. (H.L.) 121, “subject to all the rights and equities that affected it at the time of the bankruptcy,” or—it may be added with regard to § 103—at the time of the acquisition or succession. This position is commonly expressed, in relation to moveable and personal rights, by the doctrine that the trustee takes the estate *tantum et tale* as it stood in the bankrupt; *Gordon*, 5 Feb. 1824, 2 S. (N.E.) 566; *Edmond*, 26 Feb. 1858, 20 D. (H.L.) 5; *Davidson*, 5 Nov. 1868, 7 Macph. 77; *Duncanson*, 4 March 1881, 8 R. p. 572; *Lindsay*, 21 June 1883, 10 R. 1028; *More*, 1 June 1888, 15 R. 691; see *Scott's Tr.* 19 July 1887, 14 R. p. 1055. Preferable securities subsisting at

[the date of the sequestration, and not null or reducible, are expressly saved—*i.e.*, securities duly completed by possession, registration, &c., and not conceived in contemplation of bankruptcy and for defraud of creditors; see *Insolvency, Bankruptcy*, and §§ 10, 11, *supra*. Similarly the position of the trustee, generally considered, as acting for the whole body of creditors, has been distinguished from that of a singular successor, who acts solely in his own interest, and is not therefore bound by any trust or duty of which he has not notice; Lord Westbury, in *Fleeming*, p. 121; *Davidson*, *supra*. In *More*, *supra*, Lord Pres. Inglis and Lord Shand disapproved Lord Westbury's remark in *Fleeming* that a trustee under sequestration was in the same position as a gratuitous alienee, and the former defined the position as "no better than that of an onerous assignee who has bought a debt." On these principles, trust estate in the hands of a bankrupt's trustee or factor, &c., is free from the sequestration, *Fleeming*, *M'Adam*, 5 Nov. 1872, 11 Macph. 33; also property possessed on a limited title, under any fair and ordinary contract, such as lease, *Robertsons*, 17 March 1882, 9 R. 772, *Marston*, 13 May 1879, 6 R. 898, *Duncanson*, *supra* (*contra*, where there is reputed ownership, *Edmond*, 4 Nov. 1868, 7 Macph. 59); and property obtained through fraud, *Molleson*, 11 March 1873, 11 Macph. 510. The trustee, even where entitled, is not bound to take up such rights as current contracts of lease, delivery, &c.; and, if he does so, he makes himself personally liable for the obligations; see *Anderson*, 22 Jan. 1875, 2 R. 355. See *Mackessack*, 15 Jan. 1886, 13 R. 445; *Edin. Her. Sec. Co.* 7 Jan. 1886, 13 R. 427. The trustee and creditors may waive or abandon their rights as to any particular asset or business in favour of the bankrupt (*Fleming*, 16 Nov. 1876, 4 R. 112, and see *Air*, 9 March 1886, 13 R. 734), to the effect that exclusive rights may arise in a subsequent set of creditors; see *Taylor*, 1 Nov. 1879, 7 R. p. 131. The application of these equitable principles, with regard to the relation of the trustee to particular rights held by the bankrupt, is not infrequently dubious, especially in questions of completed heritable right; see *Ewart*, 5 May 1865, 3 Macph. (H.L.) 36, 42; *Fleming*, 12 June 1867, 5 Macph. 856; *Abbot*, 25 May 1870, 8 Macph. 791; *Budge*, 12 July 1872, 10 Macph. 958. For the exclusion of a trustee's right, as representing a bankrupt seller of goods not delivered, by the Mercantile

[Law Amendment Act, 1856, see *Miller*, 20 June 1883, 10 R. 997, and *cf.* *M'Caul*, 30 June 1883, 10 R. 1064; *Seath*, 8 March 1886, 13 R. (H.L.) 57. See *Sale*. Under § 103 (see *supra*, p. 988), if the trustee has been discharged, he may be reappointed, or a new trustee elected, to reduce *acquisita* into possession; *Taylor*, *supra* (see Lord Shand as to "no cause being shown to the contrary"); *Abel*, 21 Nov. 1883, 11 R. 149; *Shaw*, 14 May 1884, 11 R. 814; *Gentles*, 22 Nov. 1870, 9 Macph. 176. In *Thom*, 11 March 1857, 19 D. 721, damages for previous imprisonment recovered by the bankrupt after sequestration passed to the trustee under this section. The salary of a schoolmaster sequestrated after appointment was held not to fall to his trustee, under a petition presented in terms of this section; *Barron*, 8 July 1881, 8 R. 933. Under § 104, estate improperly included may be taken out of the sequestration, on petition to the Lord Ordinary; *M'Adam*, *supra*, 11 Macph. 33. Section 105 obliges the bankrupt to co-operate with the trustee toward the completion of the trustee's title to the estate, and enables the latter, without concurrence of the former, to grant all such conveyances as the bankrupt could grant. Section 106 provides for completion of title where sequestration has followed decease of the debtor; *Fleeming*, *supra*, 6 Macph. (H.L.) 113; see § 110.

The effect of sequestration on the ranking of creditors, by the trustee, in the sequestration, and the conditions under which heritable securities over the bankrupt estate may be realised, are defined in §§ 107–120. By §§ 107 and 108 sequestration is declared equivalent to an adjudication of the heritable estates, under which, if within year and day of any effectual adjudication, the estate shall be disposed of, and to an arrestment in execution and decree of forthcoming, and to a completed poiding, rendering ineffectual arrestments and poidings executed within sixty days of its date (see *Bankruptcy*, pp. 96–97; see § 110 as to the case of a deceased debtor's sequestration). The effect of inhibition in the ranking is reserved, under §§ 102 (2), 105; and, by common law, the inhibitor is preferred over creditors with debts incurred after publication of the inhibition; see *Ewing*, 29 June 1860, 22 D. 1347; *Baird*, 26 Jan. 1872, 10 Macph. 414. Petitioning for sequestration, or lodging a claim, interrupts prescription, and its counterpart in other portions of Her Majesty's dominions (§ 109). Section 111

[renders null and void payments, preferences, or securities to prior creditors, and acts done or deeds granted by the bankrupt, after the first deliverance and before his discharge, unless with the trustee's consent, and vests the trustee in these monies, &c., with express exception of the case of *bona fide* onerous purchasers ignorant of the sequestration, and of debtors who have similarly paid, or creditors who have similarly received payment and given up their document of debt or security; see *Pearson*, 9 June 1876, 3 R. 800. Section 1 of the Mercantile Law Amend. Act so far overrides this provision.

The power of a prior heritable creditor with a power to sell, to realise his security, notwithstanding the sequestration, reserved under §§ 102, 107, is expressly declared in § 112; and it is there made competent to the trustee to fortify the title given to the purchaser. The creditor with power to sell may, under § 113, and in practice often does, concur in the sale being carried through by the trustee, with himself as consenter—payment or consignment of the price discharging his security and all postponed to his. Under § 114 the sale may be by the trustee alone, on due resolution to that effect by the creditors, before any heritable creditor having a power of sale has begun proceedings, or, where he has unduly delayed, in the course of proceedings, provided an upset price be fixed covering the creditor's debt, interest, and expenses. It is competent to the trustee, with concurrence of the majority of the creditors in number and value, and of heritable creditors, and the accountant, to sell the heritable estate by private bargain, on such terms and conditions as they may fix (§ 115). An arrangement between a landlord and the trustee of a tenant, whose lease excluded assignees, whereby, *inter alia*, the landlord allowed assignation of the lease, and obtained renunciation for a payment of £10, was sustained under this section, though there was and could be but a single offer; *Dobie*, 2 March 1864, 2 Macph. 788, Lord Deas dissenting. When the heritable estate is sold by the trustee (under §§ 113–115), he makes up and reports to the court a scheme of ranking and division of the claims of the heritable creditors and other creditors (*e.g.*, inhibitors, §§ 102, 105), on the price, for judgment thereon by the court (§ 116). A scheme of ranking, &c., is not necessary before payment under § 114; *Callum*, 19 June 1885, 12 R. 1141. Section 118, by which

[poining of the ground and decree of mails and duties availed to the security-holder only for the current half-year's interest and the previous year's arrears (see *Budge*, 12 July 1872, 10 Macph. p. 964), was repealed by § 55 of the Conveyancing (Scotland) Act, 1874; and the right to poind the ground, thus reserved simply as among "such preferable securities as existed at the date of the sequestration" under § 102, was held to be ruled by the common law of ranking, and to be available in competition to the full extent according to priority of the security; *Royal Bank*, 6 July 1877, 4 R. 985, especially *per* Lord Deas; *Dick*, 28 Jan. 1879, 6 R. 586—where the execution was subsequent to the trustee's confirmation, but the moveables were still on the ground; see also *Thomson*, 18 Jan. 1882, 9 R. 430; *Urquhart*, 16 June 1883, 10 R. 991. The act 42 & 43 Vict. c. 40 re-enacts § 118, as to poindings, after 1 Dec. 1882, and so far restores the former more equitable state of the law. See *Poining of the Ground*. Section 119 provides: "Nothing in this act contained shall affect the landlord's right of hypothec;" but this right has been largely restricted, in the interest of other creditors, by the subsequent statute 43 Vict. c. 12. See *Hypothec*. At a public sale, by virtue of the act, any creditor may purchase, but not the trustee or commissioners (§ 120).

The rules of ranking under these, and other sections of the act (48, 52–56, 65, 66, 102, 121), fall to be supplemented, wherever the act is silent, by the common law principles and canons of ranking in bankruptcy. Preference, where there is equitable title to preference, which is only when the creditor has "either a privileged debt or a security" (*i.e.*, voluntary or by diligence; Lord Pres. Inglis, in *Bertram*, 9 July 1880, 7 R. 1127), and elsewhere equality, is the fundamental principle. For detailed statement of order of ranking, see *Bell's Com.* ii. 401–428; *Goudy*, chs. 39–46; see *Hunter*, 23 Dec. 1859, 22 D. 1166; *Baird*, 26 Jan. 1872, 10 Macph. 414; *Morton*, 23 Dec. 1871, 10 Macph. 292; *Univ. of Glasgow*, 10 Feb. 1882, 9 R. 643; *Wiseman*, 19 July 1887, 14 R. 1043; *Caird*, 24 Jan. 1888, 15 R. 313; *Nicol's Tr.* 8 Feb. 1889, 16 R. p. 419.

§§ 121–136.

The *fifth* principal stage in sequestrations is the payment of dividends—provided for in these sections. This part of the statute, Lord Pres. Inglis observes in *Lindsay*, 15 June 1880, 7 R. 918, "is a

[very carefully considered and well-digested scheme of procedure for the realisation and division of the estate." The leading section (121) enacts that the whole estate, when reduced into money, shall, after payment of all necessary charges and a commission to the trustee, be divided among those who were creditors at the date of the sequestration, ranked according to their rights and interests. By the Bankruptcy Amendment Act, 1875, which repeals § 122 of this act, the wages of clerks, &c., and of workmen, obtain the same (common law) privilege as those of domestic servants, to the extent therein specified. The act 51 & 52 Vict. c. 62 seems not to apply to Scotch sequestration. To be entitled to payment of dividend the creditor, if resident in Great Britain or Ireland (see § 124), must produce his oath and grounds of debt (see § 49) at least two months before the time fixed for the first dividend, or any subsequent dividend (Bankruptcy Act, 1857, § 5): if production is made too late for any particular dividend, the creditor's claim is equalised at the next payment (§ 123). In *Scobie*, 23 Nov. 1869, 8 Macph. 161, failure to lodge a claim, through fault of the trustee, did not bar the creditor from sharing in the first dividend; see *Phosphate Co.* 20 July 1878, 5 R. p. 1140, for the general rule. On the expiry of four months from award of sequestration, the trustee proceeds to make up a detailed state of the bankrupt's property and funds, with an account of his own intrusions and management: and within fourteen days the commissioners examine and audit the same, imposing a penalty or allowing the trustee a commission; and declare what part of the net produce shall be divided among creditors (§ 125). The rate of commission thus fixed was formerly final, unless an appeal was taken within fourteen days under § 169; *Lindsay, supra*; but, by § 15 of the Judicial Factors (Scotland) Act, 1889, 52 & 53 Vict. c. 39, provision is made for appeal to the accountant of court, and for report by him to the Lord Ordinary or sheriff. The rate varies with circumstances, but seldom exceeds 5 per cent., except in very small sequestrations: clerk's work is in all cases covered by the commission; *Lindsay*. In *Assets Co.* 27 Nov. 1885, 13 R. 281, the accountant reported that, since 1857, on estates averaging £168,000, the rate had been rather under 2½ per cent. Within the same fourteen days, the trustee, after examination of the claims, by written deliverance rejects or admits them, or re-

quires further evidence, which may be on oath; and he completes the list of creditors entitled to a dividend, stating their various rights, and specifies those whose claims he has rejected (§ 126). The trustee has here only the three courses specified open to him: he cannot reject a claim as insufficiently vouched and allow the claimant to produce further evidence, but ought himself to require further evidence, and then admit or reject the claim; *Ritchie*, 14 Jan. 1875, 2 R. 299, *per* Lord Pres. Inglis. The same judge remarked, in *A. v. B.*, 25 Nov. 1865, 4 Macph. 85, "I cannot but think that it is the policy of this 126th section to encourage trustees and creditors to resort to extrajudicial investigation wherever amplification is required, and is likely to lead to a settlement of the claim;" and, in *Phosphate Co.* 18 March 1874, 1 R. 846, where the debt had to be constituted in the sequestration, "it is extremely expedient that these powers should be conferred on the trustee, as . . . aiding to produce economy and despatch." The trustee's proceedings "are not, strictly speaking, judicial:" on appeal, if the case is one worthy of solemn litigation, a condescendence and answers are required, and proof may be ordered in common form; *per eundem*, 1 R. 846, 847, and Lord Chanc. Cairns, 3 R. (H.L.) 89. As to expenses in these appeals, see *Adam*, 17 Nov. 1866, 5 Macph. 40. Within eight days after the expiring of the fourteen days, the trustee publishes in the Gazette, and notifies by letters to the creditors, the payments of dividends proposed; and any creditor (see *Robertson*, 19 Dec. 1885, 13 R. 424) may appeal to the Lord Ordinary or the sheriff within fifteen days from the Gazette notice, failing which appeal the decision is final as to the first dividend (§ 127: for effect of leading provision of 52 & 53 Vict. c. 39, on procedure under this section and 125, 130-132, see that section). In *Monkhouse*, 28 Jan. 1881, 8 R. 454, it was held, taking §§ 126 and 127 together, that a trustee ought not to proceed under § 126 till he is in a position to declare a dividend under § 127, although the language of the sections is somewhat loose (p. 457). It is sufficient that a claimant appeal on his own claim, even although another claim which exhausts the whole fund may have been admitted as preferable; *Marshall*, 14 Feb. 1867, 5 Macph. 377; *Baird, supra*, 10 Macph. 414. Before six months from the award of sequestration, the trustee makes up a scheme of division (§ 128), and on the first lawful day after the six months, the divi-

[dend is paid or consigned (§ 129). Sections 130 and 131 similarly provide for a second dividend, payable ten months from the award; and section 132 (see act of 1857, § 6) for subsequent dividends, at intervals of three months, till the funds be exhausted. Under § 133, a majority (in value) of the creditors may, after the second dividend, accelerate the future dividends; and a majority, of three-fourths in number and value, present at the second statutory meeting or a special meeting, may even procure, through the court, payment of the first dividend before the usual six months have expired. The commissioners have a discretion to postpone payment of any dividend to the next statutory period (§ 134). Where a first dividend is thus postponed beyond the six months, the court's power to authorise acceleration under § 133 expires with the statutory period; *Dall*, 20 Dec. 1865, 4 Macph. 261. Section 135 gives a general power to the court, on special application by the trustee and commissioners, to alter the periods of the dividends, where the estate is chiefly land, or "where it may be necessary." A year after the sequestration, three-fourths in value of the creditors present at a special meeting, called at the instance of the trustee and commissioners, may resolve to sell by auction the remainder of the bankrupt estate (§ 136).

§§ 137-155.

Discharge of the bankrupt is the *sixth* of the leading stages in a sequestration. It is not, by itself, apart from distribution, the proper object of the process; see *Bain*, 21 May 1870, 8 Macph. 784. Discharge takes place in two ways—"on composition" (§§ 137-145), and "without composition" (§§ 146-155); and the methods and results differ materially. In the former case the bankrupt undertakes to pay a certain proportion of his debts, arranged between him, the creditors, and the court, as the price of immediate discharge from all previous obligations and of the terminating of the sequestration, *i.e.*, of his reinvestiture in the estate as though there had not been insolvency (see *Macbride*, 14 March 1884, 11 R. 702): in the latter the bankrupt estate is left to meet the debts, so far as it will avail, and when that is exhausted, the bankrupt, on application to the court, is or may be freed from all past liability; but unless the dividends amount to 20s. in the £, he is not retrocessed in any rights held before sequestration, and the sequestration continues to subsist. See *infra*, p. 993, as

[to act of 1860. The offer of composition, with security, may be made, first, at the meeting for the election of the trustee. If a majority in number and nine-tenths in value of the creditors present resolve to consider the offer then, after advertisement and notice to the whole creditors and transmission of an abstract state of affairs and valuation, a like majority present at the meeting after the examination of the bankrupt ("the second statutory meeting") may accept the offer, and, on approval by the court, bind the whole creditors (§§ 137, 138). Again, at the meeting after the examination, or at a subsequent special meeting, a majority in number and four-fifths in value of the creditors present, may, similarly, bring about a composition settlement (§ 139). Express provision is made for the hearing of objections by opposing creditors; see *Taylor*, 12 Dec. 1856, 19 D. 147, where Lord J. C. Hope said (of 2 & 3 Vict. c. 41) "sequestration is essentially the creditor's process I know of no steps the bankrupt can take in it, whether to obtain his discharge or otherwise, in which they are not entitled to appear." This remedy is alternative with appeal under § 169; *McGeorge*, 25 June 1887, 14 R. p. 845. When an offer has been rejected, another offer can be entertained only if nine-tenths in number and value of all the creditors ranked or entitled to be ranked assent, and if at a special meeting a majority in number and nine-tenths in value of those present accept, and nine-tenths in value of all the creditors assent (§ 145). The contract cannot be resiled from, even before the court's approval, without cause shown; *Lee*, 23 Oct. 1883, 11 R. 26. After the approval of an offer by the court, the bankrupt makes declaration on oath that he has fully and fairly surrendered his estates, without preference, or security, or payment, present or prospective, to any creditor as the price of his concurrence, and then the court pronounces a second deliverance, discharging and reinvesting the bankrupt, and declaring the sequestration at an end, save as to the composition; and the deliverance is officially recorded (§ 140). See §§ 81, 151, 178; *City of Glasgow Bank*, 24 June 1882, 19 S.L.R. 809. The connection between composition and retrocession, under these sections, is brought out in *Douglas & Co.* 14 July 1859, 21 D. 1302, especially *per* Lord J. C. Inglis, in distinguishing composition from a deed of arrangement under § 35, &c.; see also

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[*Buchanan*, 2 Dec. 1865, 4 Macph. 135; and *Yuille*, *ib.* 136. Mere abandonment or waiver by the creditors of their rights is not retrocession, but is sufficient to revive the bankrupt's radical right and title; *Fleming*, 16 Nov. 1876, 4 R. 112; *Douglas*, 4 Feb. 1881, 8 R. 476; *Air*, 9 March 1886, 13 R. 734. In *Northern Herit. Securities Co.* 21 Nov. 1888, 16 R. 103, it was observed by Lord Pres. Inglis that there cannot be abandonment without consideration of the claim at a meeting. The difference between the statutory requirements, especially as to consent of commissioners and majorities of creditors, at the earlier and the later opportunities for composition, is illustrated by *Weldon*, 15 Nov. 1879, 7 R. 235; see also *Latta*, 4 July 1862, 24 D. 1251, *per* Lord J. C. Inglis, who points out the policy of the act in these provisions to give the creditors all possible light upon the bankrupt's affairs before they judge of the offer (p. 1255). In computing a majority (under § 139), a creditor who was present at the meeting, but did not vote, was counted; *M'Kay*, 19 Nov. 1864, 3 Macph. 74. In contrast to the ordinary case of extrajudicial composition (see *Insolvency*, p. 548), failure to pay the composition does not revive the original debt, the sequestration being to all intents other than the payment of the composition expressly at an end. Similarly the value of securities is deducted; *Macbride*, *supra*, 11 R. 702. Section 141 enacts that, before the composition is finally approved, the balance due to or by the trustee shall be ascertained, and his remuneration and expenses paid or provided for. See *Lee*, *supra*, 11 R. 26. This enactment was held to apply to a trustee who had resigned as well as to his successor; *Miller*, 30 Nov. 1872, 11 Macph. 164. The progress of the sequestration is not interrupted by an offer of composition and consequent procedure, until the deliverance under § 140; see *Latta*, *supra*, *per* Lord J. C. Inglis, who held that a condition in an offer, which implied that the sequestration should not proceed with the same vigour and rapidity as if the offer had not been made, was altogether illegal. Even after the deliverance, the trustee remains liable, on petition, to account for his intromissions; see *Burns*, 4 Feb. 1869, 7 Macph. 476. By § 143, if the bankrupt has given up or admitted any particular debt or security without objection stated, he and his cautioner afterwards cannot object to it. By § 144 a creditor

[who has not produced an oath before the final deliverance cannot proceed against the cautioner after two years.

Discharge without composition (§§ 146–148), which frees from obligations contracted before sequestration, but infers no reinvestiture (*Taylor*, *supra*, 7 R. 128), is, under §§ 146, 147, available to a bankrupt, on petition, after his examination, or at six, twelve, or eighteen months from sequestration, with certain consents of creditors, and on the expiry of two years without any consents, provided in all cases, *inter alia*, the trustee first reports “with regard to the conduct of the bankrupt, and as to how far he has complied with the provisions of this act, and, in particular, whether the bankrupt has made a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortunes, or losses in business, or from culpable or undue conduct” (see *infra*, as to act of 1860), and that the bankrupt makes declaration or oath that he has fully and fairly surrendered his estate and has not by preference or promise obtained any creditor's concurrence to the discharge. The number of consents required diminishes, from the whole creditors producing oaths, at first, to a majority in number and value at eighteen months, and none at two years: in all cases alike oaths must be produced by consenting creditors; *Buchanan*, 3 Feb. 1882, 9 R. 621. Under these enactments, if opposition is offered, the judge has power to delay (see *Buchanan*; *Neil*, 20 Dec. 1873, 1 R. 320), or annex conditions to, the discharge; but if not—the other conditions being fulfilled—he had no discretion, however unfavourable the trustee's report might be, to refuse or delay discharge; *Millar*, 16 Nov. 1877, 5 R. 146. By the Amendment Act of 1860, § 3, the Court of Session or the sheriff may refuse the application, although the two years have elapsed, and though no opposition be made, “if it shall appear that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions” of the act of 1856. This was done in *Millar*, ten years after the date of the sequestration. While, under §§ 146, 147 of the act of 1856, the sequestration subsists in spite of the discharge, the creditors may bar their own title by allowing the bankrupt to keep possession of his acquisitions,

[and may give new creditors rights by acquiescence in his embarking afresh in trade; *Taylor, supra*, 7 R. p. 131; *Abel*, 21 Nov. 1883, 11 R. 149. With regard to the concluding clauses of § 146, as to the trustee's report, it has been held, in *Mather*, 14 July 1881, 8 R. 952, that the trustee cannot withhold it from the bankrupt after five months from the sequestration, though he may oppose the discharge; and, in *Scott*, 16 March 1872, 10 Macph. 626, that reference to the report in consents to discharge is imperative, not merely directory, Lord Pres. Inglis remarking "it is the policy of the statute—and it is a sound policy—that the bankrupt shall not be allowed to deal or transact with his creditors, with a view to his discharge, until the report of the trustee has been read to a meeting of them." A part of the pay or pension of civil servants is available to creditors, with consent of the respective public departments (§ 149). Intimation to the bankrupt is necessary; *Roy*, 26 Nov. 1884, 12 R. 182.

The Bankruptcy and Cessio Act, 1881, § 6 (1), restricts the right to discharge to cases where the judge is satisfied (a) that a dividend of not less than 5s. in the £ has been paid or secured, or (b) that the failure to do so has "arisen from circumstances for which the bankrupt cannot justly be held responsible." See *Phillips*, 29 Oct. 1885, 13 R. 91; *Boyle*, 20 June 1885, 12 R. 1147; *Clarke*, 8 Dec. 1883, 11 R. 246; *Shand*, 14 April 1882, 19 S.L.R. 562. Under subsection (2) the judge is entitled to require evidence on either point, in addition to that provided for by §§ 140, 146, 147, of the act of 1856. If discharge is refused, and additional sums are afterwards paid, making up the 5s., the bankrupt may then apply again for his discharge (subsection 4).

Sections 150, 151, contain very stringent provisions against preferences and secret agreements for procuring discharge—with or without composition. The bargain is null and void, whether the composition be agreed to or not, or the discharge granted or not. The penalty which may be imposed upon the preferred creditor is that, unless cause is shown to the contrary, his debt is forfeited, or repaid, along with double the amount of the preference, &c., for behoof of the creditors (§ 150). The bankrupt himself, if cognisant of the transaction, forfeits all right to a discharge and all benefits under the act, and if he is discharged the discharge is annulled on

[petition (§ 151). In *Thomas*, 22 Nov. 1872, 11 Macph. 81, the penalties under § 150 were enforced (Lord Deas dissenting), although payment of the preference had been successfully resisted, and the creditor had supposed he was transacting for the preference with the knowledge of the trustee and creditors. In *Murdoch*, 29 Jan. 1864, 2 Macph. 515, the alleged preference had no ascertainable money value, and therefore was not within the provision, which fell to be strictly construed. The case of *Pendreighs' Trustee*, as decided in the House of Lords, 9 May 1871, 9 Macph. (H.L.) 49, rules that notwithstanding the proviso "if no cause be shown to the contrary," mere *bona fides* of the creditor is no defence. Under the "absolute and imperative terms" of § 151, the bankrupt, in this sequestration, was refused discharge, though there was *bona fides*, and no opposition; 5 June 1875, 2 R. 769. In *Rae*, 2 Nov. 1877, 5 R. 34, it was held that proceedings under this section after the death of a discharged bankrupt were incompetent, the proceedings being in their nature penal—in no part for the enrichment of the creditors, as in § 150—and therefore not availing against heirs; see Lord Shand, p. 36, as to reduction of the mere discharge at common law. See *infra*, § 178, for punishment of fraudulent debtors under Debtors Act, 1880, §§ 13–16.

The trustee's discharge may, or may not, conclude the sequestration. Where there is a composition settlement, it does (§ 142): where there is no composition, the sequestration subsists; and, even though the bankrupt himself have been discharged after the trustee, the sequestration may be revived, the trustee being reappointed or another elected to take possession of new acquisitions for the creditors; *Buchanan, supra*, 4 Macph. 135; *Taylor, supra*, 7 R. 128; *Northern Herit. Securities Co., supra*, 16 R. 100. Where there is no composition, but discharge of the trustee, the bankrupt in virtue of his radical right has a title to sue; *Whyte*, 16 Nov. 1888, 16 R. 95. The trustee's application for discharge is by petition to the Lord Ordinary or sheriff, after a special meeting of the creditors "to consider as to an application for his discharge" (§ 152). Practice has ruled that the petition must be intimated to the accountant, and to the creditors—if any creditor objected at the previous special meeting, and that an absent creditor may be reponed; *Milne*, 22 Jan. 1878, 5 R. 546; *Lindsay*, 11 July

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[1879, 6 R. 1246. Before discharge the trustee has to transmit the sederunt book to the accountant, and lodge in bank all unclaimed dividends (see also § 142, *supra*); and, after his discharge, the Lord Ordinary, on petition, grants warrant for payment of those dividends within twenty-five years, after which time they are at the disposal of Parliament (§ 153; see *Air*, 9 March 1886, 13 R. 734). The trustee's law expenses are taxed before payment (§ 154). In *Lindsay*, 15 June 1880, 7 R. p. 913, it appears that $3\frac{1}{4}$ per cent. of the gross receipts was found to be an average amount for law expenses. The agent employed by the trustee is simply his agent; and he is under no statutory disqualification from purchasing the bankrupt estate: the term "agent in a sequestration" is a misnomer; *Noble*, 4 Nov. 1876, 4 R. 77. If any surplus remains after payment of all debts with interest and expenses, it is payable to the bankrupt or his representatives (§ 155), in virtue of the bankrupt's radical right (*supra*, § 29, and cases cited; see also *Fleming*, *Douglas*, &c., cited on p. 993).

§§ 156-163.

These sections provide for the appointment, and fix the duties of, the accountant in bankruptcy—now the accountant of court, through union of the two offices, by 52 & 53 Vict. c. 39, §§ 1, 2, 5—"a person versant in law and accounts." His principal duties are:—1. To keep a "Register of Sequestrations," and to enter therein the court where each sequestration is depending, and the leading facts and events in the process, from the first deliverance down to the trustee's discharge (§ 157); also a volume containing the return of the trusteeships in the several counties (§ 158). 2. To take cognisance of the conduct of trustees and commissioners, and on their failure in any duty, or on complaint by any creditor, to make inquiry, and if not satisfied to report to the Court of Session, who have power to censure or remove or otherwise deal with the delinquents (§ 159; see *Bell*, 28 Nov. 1862, 1 Macph. 84; *Esson*, 17 June 1884, 11 R. 1013). In *Swan's* case, 17 Dec. 1867, 6 Macph. 158, Lord Pres. Inglis observed, "the accountant's report in a case of this kind brings before the court for its disposal the whole matters embraced by the report," where, otherwise, a petition by the creditors or other procedure would have been required. 3. The accountant preserves and superintends annual returns from trustees, and reports to the court, with power to require exhibition of

[the sederunt book, &c. (§§ 158, 160). 4. He reports any disobedience of the trustee or commissioners; or any matter affecting the due discharge of his own office (§ 161). 5. He gives information to the Lord Advocate, if he has reason to suspect fraudulent bankruptcy or any criminal action by the bankrupt, trustee, or commissioners (§ 162; see § 178). 6. Under § 15 of 52 & 53 Vict. c. 39, he prepares an annual report of his fees, which he is authorised to charge under the same section.

§§ 164-166.

These sections confer "extensive but little known powers for winding-up the estates of persons deceased, who may not have been insolvent" (*Campbell's Merc. Law*, 26). The result is similar to sequestration, but bankruptcy is not a necessary element; *Alexander*, 15 July 1862, 24 D. p. 1339; see *Simpson*, 8 Nov. 1881, 9 R. 104; *Masterton*, 14 May 1887, 14 R. 712. On petition by one or more creditors with debts amounting to £100, or of persons interested in the succession, where trustees, &c., have not been appointed or do not accept or act, the Inner House may (see *Masterton*), after intimation and hearing of parties, appoint a judicial factor to manage, realise, and distribute the estate, subject to supervision by the accountant and the court, on the same general lines as in a sequestration (§ 164); see *Macfarlane*, 6 March 1857, 19 D. 656—where the question was raised, *obiter*, whether the terms of the section would be applicable if the heir or executor were willing to make up titles (Lord Deas, 659); see also A.S. 25 Nov. 1857; and *Alexander*, *supra*, where it appears that this provision was at that date found very useful in practice. By § 166 trustees of parties deceased might obtain the superintendence of the accountant, "with the like powers and duties," but this provision remained a dead letter; see *Shepherd*, 20 March 1888, 15 R. 740. Under § 18 of 52 & 53 Vict. c. 39, which repeals this provision, testamentary trustees, &c., may, on application to the court, obtain the accountant's superintendence of their investment and distribution of the estate, and his annual audit of their accounts—with power to him also to ask the direction of the court in any of these matters.

§§ 167, 168 (see *Cessio Bonorum*).

By the Bankruptcy and Cessio Act, 1881, § 5 (see § 7), discharge is available to a debtor, in a cessio, after six months from the decree, under the same conditions

[as in a sequestration (see §§ 168, 146); and the trustee has a discretion to award sequestration (in place of cessio), where the liabilities exceed £200.

§§ 169–177.

Appeal to the Lord Ordinary or the sheriff is competent against resolutions of the creditors, within fourteen days of the meeting at which the resolution was passed; and, within a like period, against the deliverances of the trustee or commissioners: and the Lord Ordinary or the sheriff may, in the former class of appeals, instead of disposing of the cause on appeal, order a new meeting of the creditors, to reconsider the resolution (§ 169). The procedure is summary. In *Hall*, 24 Nov. 1866, 5 Macph. 59, Lord J. C. Inglis observed, “whenever a bankrupt thinks himself injured by a resolution of his creditors, he can bring that resolution under review, provided the resolution is revisable on its own merits, or has been carried by undue means.” In *Lindsay*, 15 June 1880, 7 R. 911, it was held that an incompetent deliverance of the trustee could be appealed against six years after its date (see opinion of Lord Pres. Inglis, 919, 920, and of Lord Deas, *contra*, 920). See *Robertson*, 19 Dec. 1885, 13 R. 424; *Marr*, 4 June 1881, 8 R. 784. This section gives the alternative of a petition or complaint, in place of an appeal; see § 159. In *Witham*, 20 March 1884, 11 R. 776, it was thought that a trustee might himself be appellant. In *M’George*, 25 June 1887, 14 R. p. 845, Lord Pres. Inglis observed, “the words of the 169th section are very broad and general.” It was there decided that the Court of Session Act, 1868, did not affect this right of appeal. See under § 82, *supra*. Section 170 makes competent review by the Inner House, or the Lord Ordinary on the Bills during vacation, of any deliverance of the sheriff, after the award of sequestration, “except where the same is declared not to be subject to review,” on appeal within eight days. See *supra*, under § 71. The exercise by the sheriff of his discretionary powers, *e.g.*, to delay discharge, will not be readily interfered with on review; *Buchanan*, 3 Feb. 1882, 9 R. 621. The Lord Ordinary’s judgment is similarly subject to review, on reclaiming note, within fourteen days, (§§ 170, 171; see *Roy*, 17 Jan. 1885, 12 R. 540). During the dependence of appeals, or complaints, from the sheriff, the sheriff may regulate the interim possession (§ 172); and during appeals to the House of Lords, the Lord Ordinary has the same power—the

[sequestration proceeding otherwise without interruption (§ 173). See Bankruptcy and Cessio Act, 1881, § 6 (3). Under § 176 the trustee, with consent of the commissioners, may settle by compromise or arbitration, questions or claims with regard to the estate under sequestration; see *Dalzell*, 12 Dec. 1876, 4 R. 222.

§§ 178–185.

These sections contain “miscellaneous provisions.” Section 178 renders liable to prosecution at the instance of the Lord Advocate, or of the trustee—with his consent and upon the authority of a majority of the creditors present at a special meeting, any person guilty of wilful falsehood in any oath made in pursuance of this act (*e.g.*, a creditor, § 21, the bankrupt, §§ 140, 147); and, further, on conviction, forfeits to the trustee, for behoof of the creditors, the delinquent’s whole interest in the estate. For “crimes and offences” under the Debtors Act, 1880, §§ 13–16, which is, *inter alia*, an act “to provide for the better punishment of fraudulent debtors in Scotland,” and for fraudulent bankruptcy as at common law, see *Fraudulent Bankruptcy*. The remaining sections, which, *inter alia*, enable the trustee, under certain regulations, to open letters addressed to the bankrupt (§ 179); fix and apply fees of process (§§ 180, 181); require exhibition of the Gazette in the Bill-Chamber and other offices (§ 182); exempt from stamp-duty conveyances, &c., relating solely to the estate of the bankrupt (§ 184); and empower the Court of Session by Acts of Sederunt to appoint duties of court officials and regulate procedure under the act (§ 185; also § 21 of 52 & 53 Vict. c. 39), require no comment. No general rules of procedure in sequestration have been framed by Act of Sederunt. “Notes” by the accountant, “for the guidance of trustees,” and “of commissioners,” will be found in *Murdoch*, p. 384, or *Goudy*, p. 691.

International Effects of Sequestration (see § 102, *supra*).—Two well-fixed general rules of international law apply in bankruptcy and sequestration, viz., that “a conveyance of moveables, and also a discharge, *secundum legem loci actus*, have effect over all the world;” Lord J. C. Inglis, in *Thomas*, 19 July 1861, 23 D. 1352. From the principle on which the former canon is based—*mobilia sequuntur personam*—four leading rules are derived, by the same judge, in *Phosphate Co.* 20 July 1878, 5 R. 1138:—(1.) With regard to moveable property vested by the court

[of the bankrupt's domicile in a trustee or assignee, the jurisdiction of that court is exclusive; (2.) where there are two or more domiciles—in the case of a bankrupt trading company—the jurisdiction of the court which first invests a trustee prevails; (3.) real estate is not thus affected; (4.) the trustee or assignee, as such, is subject only to the court of the bankruptcy proceedings; and so also the bankrupt himself, in all questions of ranking, though not of constitution of debt—where a foreign decree may be recognised *ex comitate gentium*. The same authority points out, in *Goetze*, 27 Nov. 1874, 2 R. 153, that while the title of the trustee is thus rendered effectual everywhere from its date, "there may be regulations in different countries necessary for giving preference among creditors which can receive no effect *extra territorium*;" see *Hunter*, 25 Feb. 1825, 3 S. (N.E.) 402; *White*, 8 June 1843, 5 D. 1148; *Bankruptcy*, p. 98. With regard to questions of discharge and the general rule above-mentioned—protection of the bankrupt from personal diligence, as distinguished from extinction of debt, was held "mere matter of remedy, which depended not upon the *lex loci* but upon the *lex fori*," and therefore did not receive effect *extra territorium*; *Thomas*, *supra*, p. 1353, *per* Lord J. C. Inglis. See *Bell's Com.* ii. 375–381, 568–578; *Young*, 17 May 1864, 2 Macph. 1077; *Barr*, 18 Nov. 1879, 7 R. 247; *Wilson*, 5 June 1884, 11 R. 893; *Okell*, 11 June 1884, 11 R. 906; *Scot. Union & National Ins. Co.* 5 June 1886, 13 R. 928. See *supra*, under § 13. See *Bankruptcy*, p. 98.

On the subject generally, see *Bell's Com.* 5th ed. ii. 302–486 (2 & 3 Vict. c. 41), 7th ed. ii. 281–381; *Bell's Princ.* §§ 2341–2351; Note in *Ersk. Inst.* ii. 1096–1100; Note by Prof. Moir, *Ersk. Princ.* 17th ed. 597; *Murdoch's Bankruptcy*, 5th ed.; *Goudy's Bankruptcy*, pp. 1–12, 117–436, 490–493; the treatises of *Alexander*, *Hill Burton*, and *Boyd Kinnear*, on Bankruptcy; *Mackay's Prac.* i. 317; ii. 424; *Campbell's Merc. Law*, 22–45. See *Insolvency. Bankruptcy. Sale. Ranking and Sale. Cessio Bonorum*.]

SEQUESTRATION FOR RENT. Sequestration is the judicial means by which the landlord makes his right of hypothec effectual. Sequestration is obtained on a summary petition to the sheriff, setting forth the arrears, and praying for a warrant to sequester the crop and other articles subject to the hypothec, and for warrant

to sell to the extent of the arrears. [The petition may also contain a conclusion for payment of the rent; A.S. 10 July 1839, § 151; 16 & 17 Vict. c. 80, § 27.] The first deliverance on this petition is a warrant to sequester as prayed, and an appointment on the tenant to answer the petition. [Under this warrant an inventory is made of the whole effects secured by the hypothec, which inventory measures the extent of the sequestration; *Horsburgh*, 26 Feb. 1825, 3 S. 596.] Sequestration may be applied for both where there are arrears due, and where the landlord has reason to apprehend that the tenant is endeavouring to deprive him of his hypothec, by displacing the farm or removing his effects, or where the credit of the tenant is suspected. The sequestration renders special the landlord's right, which was before general, and makes it attach to each individual article sequestered, so as to entitle the landlord to recover the property or the value of the cattle, &c., into whose hands soever they may have gone. The regular issue of the application for a sequestration is a roup and sale of the goods for payment of the rent. [See A.S. 10 July 1839, §§ 150–152; and as to sequestration in the Small Debt Court, when the rent does not exceed £12, see 1 Vict. c. 41, § 5; 16 & 17 Vict. c. 80, § 28. By 30 & 31 Vict. c. 42, § 4, the hypothec ceases, if it is not made effectual by sequestration, within three months after the last legal or conventional term of payment of rent. But this provision only applies to leases of farms or lands current at the date of the act. The same limit of time, however, exists under the common law in regard to the hypothec over *invecta et illata* in urban leases. When agricultural produce or stock is sequestered, it is incompetent to include in the sequestration any household furniture, agricultural implements, imported manures, &c., not incorporated with the land; but manures, &c., brought to the land under an obligation in the lease may be included; 30 & 31 Vict. c. 42, § 6. The clerk of each sheriff court keeps a register of all sequestrations for rent; § 7. When goods are included which do not belong to the tenant, the true owner's remedy is to appear before the sheriff, and claim to have the goods withdrawn from the sequestration; *Lindsay*, 18 May 1872, 10 Macph. 708. See also *M'Kechnie*, 29 March 1853, 15 D. 623. For a case of competition between a sequestering landlord and a pouncing creditor, see *Jack*, 16 Jan. 1880,

[7 R. 465. If the tenant removes or sells the sequestered effects, he is liable to imprisonment on a summary petition for breach of sequestration. See *Kippen*, 30 June 1846, 8 D. 957.] See *Bell on Leases*, i. 369, 389; ii. 30, 318; *Hunter's Landlord and Tenant*, ii. 415; [*Ersk. B.* ii. tit. 6, § 60; *Bell's Princ.* § 1244; *Rankine on Leases*, 352; *M'Glushan's Sher. Court Prac.* § 2184; *Dove Wilson's Sher. Court Prac.* 492; *Lees' Small Debt Handbook*, 36.] See *Hypothec.*

SERANTERIE; was, according to Skene, a tenure common in England. "Grande seriantye" was where a man held his lands of the King, with the *reddendo* of passing with him in his host, or bearing his banner with him in his wars, or leading his host or army. "Petit seriantye" was when one held his lands of the King, paying a knife or buckler, a sheaf of arrows, or the like service; 18 Edw. I.; *Skene, h. t.*

SERIAN; according to Skene, serjeant is he who, at the command of the magistrate, encloses or locks in prison guilty persons delated, or suspected of any crime. *Serianus curia*, the serjeant of the court, the officer or executor of letters or summonses; *Skene, h. t.* See *Recordum*.

SERJEANTS-AT-LAW; in England, [barristers of a superior degree, to which they are called by writ under the Great Seal. Formerly they were supposed to serve the Crown; hence their name, serjeants or *servientes ad legem*. Until the act 9 & 10 Vict. c. 54, the serjeants-at-law enjoyed the exclusive privilege of practising in the Court of Common Pleas; and until the Judicature Act of 1873 (§ 8), every judge of a common law court required to have the degree of serjeant-at-law. Of late years this degree has been gradually supplanted by that of Queen's Counsel, and the extinction of the order of serjeants is merely a question of time. *Sweet's Law Dict.*]

SERPLATH; in the old Scottish computation of weights and measures, contained fourscore stones, a term chiefly used in the accounts of merchants and shipmasters (skippers). A "sek" (sack) of wool contained 24 stones, and by the daily calculation of merchants, 40 stones Troy, although this was not invariable. Each stone Troy contained 16 pounds Troy, and each pound 16 ounces. Each "tunne" contained 6 cwt. Troy, and each cwt. fivescore pounds, or $6\frac{1}{4}$ stones Troy. "A last of gudes fured hame" (imported), commonly con-

tained 12 barrels, or half a serplath. A last was two packs, and each pack was as great as half a sack of wool-skins, and contained in weight 36 "Sprusse" stones. A Sprusse stone contained 28 pounds Troy. For every last of wax imported by strangers there were 14 ship pounds, and imported by Scotch shipmasters, 12 ship pounds. There were 12 great or 13 small barrels for the last of tar, pitch, and such like wares. By strangers 24, and by Scotch "skippers," 18 barrels of rye-meal were imported for the last; and a last of rye was sometimes 18 and sometimes 19 bolls in measure. Ten packs of wool made a last of wool. Ten hides made a daiker, and 20 daikers made a last; 12 dozen of gloves or "ledder poyntes" made a gross, and a great gross contained 12 single gross. Ten stones of brass made a barrel. Six barrels of English drinking beer made a tun. Twelve barrels of salmon were bought for the last; but in "furing" them over the sea, skippers counted only 9 barrels for the last. The fiddler of lead contained nearly 6 score and 8 stones. A "schip pound" contained $16\frac{1}{2}$ stones of Scotch Troy weight. Six-score skins or ells of woollen cloth were counted to the hundred. *Skene, h. t.* See *Weights and Measures*.

SERVANT; is one who hires his service at a certain rate. See *Location. Master and Servant.* [*Workman.*]

SERVANTS' WAGES. See *Wages*.

SERVICE OF AN HEIR. Before an heir can regularly acquire a right to the estate of his ancestor, he ought to be served heir. Such service is one of the old forms of the law of Scotland, which proceeded, [until recently,] upon a brieve, and included in it the verdict of a jury, fixing the right and character of the heir to succeed to the estate of the ancestor. An heir before his entry is termed apparent heir, and as such possesses certain rights; [but see] *Apparent Heir*. The heir, who desires to complete his title, may either proceed by a service, or he may, on satisfying the superior of his propinquity, and of his right to receive an entry, obtain from him a writ of *clare constat*, infetment on which will complete the heir's title. See *Clare Constat*. Or the heir may grant a trust-bond to a confidential friend, who, having charged him, as his debtor, to enter, may adjudge, and in that way acquire a title by an adjudication, which will enable the heir, by means of his trustee, and without incurring a representation, to try the effect of any right the ancestor may have given. And if the