Policy the Voucher.

The policy is the proper evidence to be produced in support of the broker's claim for premiums: for which purpose, among others, he is entitled to retain possession of it; nor can the underwriter demand it without indemnifying him.[1]

Amount of Claim.

The premiums in the policy are the measure of the claim. But,

1. This claim will suffer diminution or extinction by the amount of return premiums, (if any be under the policy), provided the broker is intrusted with power to settle losses and returns of premium. Special powers however are required for that purpose: and the possession of the policy with a receipt, although it confers power to recover premiums, gives no power whatever to settle losses or return premiums. It will undoubtedly be a good answer by the insured to the claim of the underwriters themselves, after the broker's bankruptcy, that return premiums are due to the insured. Return premiums are due,—1. Where the contract is void; as for want of interest, or for illegality.[2] 2. Where the risk has never been begun. 3. Where an event has happened on which it was stipulated there should be a return; as sailing with convoy, arriving safe, &c.[3]

2. The claim for premiums, when made by the *underwriters* against the insured, will be met by the claim for loss, if incurred. But this will not be a good answer to the *broker's* claim: for he has no authority to settle, nor is he under any obligation to pay for loss; so as to make a concursus debiti et crediti.

3. The insured, or his creditors, will not be entitled, while the risk is undetermined, to retain the premiums, or employ them in making a second insurance;[4] and action, or a claim in bankruptcy, will be effectual for the premiums, although the loss is not adjusted, and the settlement of it the subject of litigation.[5]

There may arise a claim on the bankruptcy of the insured, for repayment of losses settled in ignorance of circumstances, which, if disclosed, would have barred the insurer from recovery under the policy. Such a claim will not be sustained,—1. If the loss was settled in the knowledge of the circumstances: Or, 2. If settled by way of transaction or compromise: Or, 3. If the facts were all known, but the law of the case mistaken.

2. CLAIMS ON THE BANKRUPTCY OF THE UNDERWRITERS.

Claims against the Underwriter.

On the failure of the underwriters, a claim arises to the insured, either as a present creditor for the amount of the loss, if the risk be determined; or as a contingent creditor, to be ranked and have a dividend set apart. In England, no claim could be made in bankruptcy where the risk was still undetermined, until 1779, when the assured in a policy for a valuable consideration was suffered to *claim*, and, after the loss, admitted to prove and draw dividends, in like manner as if the contingency had taken place before bankruptcy.[6] By the law of Scotland, a creditor under such a policy might at all times claim either as a contingent or as an actual creditor.

Proofs in support of the Claim.

The evidence to support the claim will consist,—1. Of the policy; and, 2. Of the proofs of the interest; of the loss; and of the fulfilment of all the conditions.

[1] SCOTT and GIFFORD against SEA INSURANCE COMPANY, 22d January 1825.

[2] See below, as to the Effect of Fraud. See Park, 329.

[3] See Marshall, 649. Park, 562.

[4] SELKRIG against PITCAIRN and SCOTT, 14th June 1805. See below, Of LIEN.

[5] FERRIER against SANDEMAN, 29th June 1809; Fac. Coll. 373. Here an action was in dependance for settlement and payment of the loss; but the Court, in the action for premiums, held, that though, in practice, premiums are not always paid per advance, yet, in law, it is held that they ought to be so paid; and a court of law is bound to give action for them.

[6] 19. Geo. II. c. 32. § 2.

1. *Requisites of the Policy.*

The policy is a written instrument, containing the only legitimate evidence of the contract.[1] It requires certain observances, which must be correctly complied with. The policy is preceded by a SLIP, which is merely a jotting or short memorandum of the terms, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But that slip cannot be received in evidence to contradict the policy.[2] It is nothing more than the proposal of terms preliminary to the contract; and if binding in any sense, it binds only provisionally till the subscription be full. Effect of the Slip.

1. STAMP.—The policy must be stamped in terms of law,[3] otherwise no demand can be made under it; besides a penalty of L.500 on the person procuring; the person subscribing the policy; and the broker effecting the insurance. Requisites of Policy. Stamp.

Parole evidence of the policy when lost is not admissible, if it was on unstamped paper; even though it has been destroyed wrongfully, or has fallen accidentally into the hands of the underwriters. Nor can the want be then supplied; for it is one of the risks to which the want of a stamp exposes a contract, that if it should perish before a stamp be affixed, all remedy by action is gone.[4]

When an instrument requiring a stamp has once been used, it cannot be altered to another purpose without a new stamp. But by the Act 35. Geo. III. c. 63. § 13. insurance policies may, without any additional stamp-duty, be altered, after having been underwritten, provided,—1. That it be done before notice of the determination of the risk originally insured. 2. That the premium originally exceed the rate of ten shillings per cent on the sum insured. 3. That the thing insured remain the property of the original insurers. 4. That the term of insurance shall not be prolonged beyond that permitted by the Act: And, 5. That no additional or farther sum be insured by means of such alteration. Alteration.

Under this provision an alteration of the time of sailing has been permitted without a new stamp.[5] An alteration of property is not inferred merely from the mark on the

[1] LIDDEL and BRUNTON against KERR and SPENCE, 17th December 1811, was a very strong case, where a broker having concealed the name of the insured, whereby the policy was annulled, (see below, p. 605. Note [2]), he was found liable in damages to the insured. He was then advised to bring an action against the underwriters, in which he endeavoured to turn the responsibility on them, on the ground of their having seen the original order to insure, bearing the name of the insured; their having on other occasions accepted premiums on a policy equally defective, and so raised a sort of practice as between them and the broker; and thus having homologated the insurance in this case. The Judge-Admiral held the underwriters liable on these grounds. But the Court of Session were unanimous in reversing that judgment, and holding that, as the policy was null, there was no ground of action against the underwriters, directly or indirectly.

See MILLS against ALBION COMPANY, 13th March 1826.

[2] In ROGERS *v.* M'CARTHEY, 1800; Park, 45. Lord Kenyon, in answer to a special juryman, who stated that, in practice, they considered themselves as bound by the slip, though they never signed a policy, said, that whatever obligation there might be in honour and good faith, he certainly would not be bound in law; for, in order to enforce the claims of the assured in a court of justice, he must produce a stamped policy.

In MARSDEN *v.* REID, 3. East, 572. where one was desirous of showing that another underwriter had subscribed the slip first, although the defender's name appeared first in the policy, Lord Ellenborough and the Court of King's Bench held, that the slip not being stamped, could not be received in evidence to contradict the written contract between the parties.

[3] 35. Geo. III. c. 63.; 55. Geo. III. c. 84.

[4] RIPPENER *v.* WRIGHT, 2. Barn. and Ald. 478.

[5] KENSINGTON *v.* INGLIS, 8. East, 273. Here a policy, originally on goods or specie, on board of ship or ships, sailing between 1st October and 1st June following, was, by a memorandum, *after the 1st June*, extended as to the time of sailing to 1st August. This was held good without an additional stamp, and not beyond the determination of the risk, there being no notice of loss or safe arrival, or of the final conclusion of the voyage.

goods being altered; and this, where there is substantially no change of property, requires no new stamp:[1] But an alteration from 'ship and outfit,' to 'ship and goods,' was held change of subject.[2] An alteration of the policy, by waiving the warranty of sea-worthiness, is not an alteration.[3] The correction of an innocent mistake is no alteration.[4]

An alteration made contrary to the Act annuls the policy, if made in the body of it; and the Court will not allow the policy to stand as at first.[5]

2. NAME OF THE INSURED.—This is required by statute.[6] By the 28. Geo. III. c. 56. it is enacted, 'That it shall not be lawful for any person or persons to make, or effect, or 'cause to be made or effected, any policy of insurance upon any ship, &c. without first 'inserting, or causing to be inserted, in such policy or policies of insurance, the name or 'names, or the usual style and firm of dealing, of one or more of the persons interested in 'such insurance.' An alternative is then permitted, that, 'instead thereof,' there shall be inserted the name, &c.—1. Of the consignor; or, 2. Of the consignee; or, 3. Of the person in Britain receiving the order to insure, and effecting the insurance; or, 4. Of the person who shall give the order to the agent immediately employed to negociate the policy. And 'every policy of insurance made or underwrote contrary to the true intent and 'meaning of this Act, shall be null and void to all intents and purposes.' The statutes of the 25th and of the 28th of Geo. III. have both in view a remedy for the use of policies blank in the name of the insured. This was at one time a practice very general in Europe; and in each country, as the evil was felt, it was corrected by special ordinances. In England, policies were extremely loose in their form, and generally blank in the name of the assured. The first remedy was in fire insurances, by 14. Geo. III. c. 48. But marine insurances were excepted from the operation of this Act, and continued blank till 1783, when the universal complaints of underwriters led to the statute of 25. Geo. III. c. 44. This statute contains, in the preamble, a plain statement of the evil; and this preamble is to be taken as the preamble of both Acts:—'Whereas it has been found by expe-'rience, that the making or effecting insurances on ships, &c. in blank, and without 'specifying therein the name or names of any person or persons for whose use and benefit, 'or on whose account, such insurances are made or effected, hath been in many respects 'mischievous, and productive of great inconveniences.' This statute seems to have been ill digested in many of its provisions, and to have produced so much inconvenience, especially to foreigners, by the minute observances which it required, that the remedy was as bad as the original evil. It required in particular, either,—1. That the party or parties interested should have their names in the policy; and so, unless there was an exact speci-

RIDSDALE *v.* SHEDDEN, 1814; 4. Camp. 107. Here the ship was warranted to sail on or before the 28th October; on an additional premium the warranty renounced. This being before notice of determination of risk; no new insurance, and no new subject; was held good without a new stamp.
FAIRLEY *v.* CHRISTIE, 7. Taunt. 416.

[1] HUBBARD *v.* JACKSON, 4. Taunt. 169.

[2] HILL *v.* PATTEN, 8. East, 373. The alteration having been made in the body of the policy, after the original subscription, an attempt was made to have it sustained in its original extent: But Lord Ellenborough held, that the instrument not having been restamped, it was rendered void. His opinion was confirmed by the Court on solemn argument. The contract was held to have been altered, and a new contract made; and it was not considered to be within their power, on seeing an objection of nullity to that their real contract, to resume one which had been abandoned. FRENCH *v.* PATTEN, 1. Camp. 73.; 9. East, 351.
See Park, 47. and the cases quoted.

[3] WEIR *v.* ABERDEIN, 2. Barn. and Ald. 325.

[4] ROBINSON *v.* TOURAY, 1. Maule and Sel. 217. SAWTELL *v.* LOUDON, 5. Taunt. 359.

[5] In the above case, Note [3].

[6] 25. Geo. III. c. 44. 28. Geo. III. c. 56. 35. Geo. III. c. 63. § 11.

fication of every minute division of interest and right in the ship or goods insured, the claim for a loss was met by formidable or fatal objections; or, 2. It required the name of an agent; but then it must be as agent of the several persons holding the interest, which made the difficulty as great as if the names of the owners had been inserted. It was with a view not to repeal, but to reform the law, without perplexing merchants with the objectionable provisions, that the statute of the 28th of Geo. III. was passed. The original evil of blank policies was not in any shape meant to be re-established or sanctioned; and the enactment was made as strict as ever in this respect. The difference made was this:—It was deemed not to be necessary to have the minute points of interest and ownership settled in the policy, but sufficient if the policy bore the name of one or more of the persons interested, or the name of the consignor or consignee, or of the agent receiving directions to get insurance done, or of him who, being in Britain, should give directions for an insurance. This seemed to meet all cases; no one was any longer in doubt how to fill up that clause in the policy which the Legislature saw wise reasons for ordering to be filled up. Under this statutory provision, confirmed by a clause in the stamp law of 38. Geo. III. it has been held,—1. That the word *agent* is not necessary in the policy where the insurance is effected by an agent. 2. That a policy effected by a broker, describing himself as agent, is good.[1] 3. That the name of the master in the policy, as descriptive of the ship, is not sufficient to support the policy, though the master have an interest; his name not being set down as the person insured.[2] Nor is the name of the broker sufficient, where it is merely in the statement of the office at which the policy was signed.[2]

3. The name of the SHIP and MASTER is necessary to identify the subject-matter of the policy: for whether it be on ship, or freight, or goods, the risk attaches itself to a particular bottom. A mere mistake of the ship or captain's name will not prove fatal, if the proof of identity be clear.[3] The parties, however, may agree to insure a more general risk 'by ship or ships;'[4] provided the ship be afterwards identified on which the risk attaches. It is fatal to introduce one name instead of another.[5] But the rule is not so

[1] These points fixed by the cases quoted by Mr Justice Park, p. 21.

[2] MAR and DOLBEY *v.* SPENCE and KERR, 27th February and 17th December 1811. Here a broker, who engaged to effect an insurance, neglected to fill up in the policy the name of the insured. The Judge-Admiral, on the above-mentioned statutes, annulled the policy. 10th July 1807. Judge Cay's Notes, vol. E. p. 210. In a course of proceeding already stated, p. 603. Note [1]. the Court of Session was called on to judge of the question, Whether it was not enough to support the policy that the master was the person to be insured, and that his name was in the policy as master, the ship being described as 'the Atlas, Captain Dolbey?' or whether the broker's name was not sufficient, the policy bearing, 'We, the assurers, have 'subscribed our names and sums assured in Liddel and 'Brunton's office, Leith,' they being the brokers, and the names being written in by one of themselves? But the Court was clearly of opinion, that neither of these expedients were sufficient to save the policy. Lord President Blair said, these names are no more a due compliance with the Act, than the name of the printer at the foot, who prints the form of the policy. The words of the 28. Geo. III. he held to be so clear as to admit of no argument. The name of Captain Dolbey is inserted merely as master. The name of the broker merely indicates the place where the policy was signed. As to the policy, wisdom, and expediency of the Act, he reminded the Court of the words of Lord Mansfield, as fit to be remembered in all questions on the construction of statutes, in PRAY *v.* EDIE, on the Act of 25. Geo. III.—'Whatever doubts I may have in my 'own breast with respect to the policy and expediency 'of this law, yet as long as it continues in force I am 'bound to see it executed according to its meaning; 'and however I may think that this is not a commend-'able defence in the underwriter, yet that is a matter 'for his consideration, and not for mine.' 1. Term. Rep. 314. The Court concurred with the Lord President. See above, p. 603. Note [1].

[3] HALL *v.* MOLYNEAUX, 6. East, 385. Park, 22. LE MESURIER *v.* VAUGHAN, 6. East, 382.

[4] KEWLEY *v.* RYAN, 2. Hy. Blackst. 343.

[5] WATT against RITCHIE, 23d January 1782; Fac. Coll. 43. A ship insured by the name of the Martha of Saltcoats was really called the Elizabeth and Peggy of Saltcoats. On a loss, the underwriters defended themselves on the name of the ship being different

absolute that a proof of identity, and the absence of fraud, will not support the contract; the more especially as, in order to avoid such a danger from mistake, all policies have a clause, 'or by whatever other name the said ship is or shall be called.' The name is not a warranty; but merely a mark of identity. It may be observed, then, that the above decision of the Court of Session would now probably be held too strict.'

4. SUBJECT.—The subject of the insurance is the essential part, or sine qua non, of the contract; and must be so stated as to leave no room to question the property that is put in risk, whether ship, or freight, or goods. It is not necessary otherwise to describe the goods, than to afford the means of identifying them, and to prevent the risk from being changed upon the underwriter. It is on this part of the policy, and its accompanying memorandum, that questions of average arise; the memorandum declaring generally, that the underwriters shall not be liable,—*first*, For any partial loss, on account of corn, fish, salt, fruit, flour, and seed, but only for general average or total loss on those articles: *Secondly*, For any partial loss under five per cent on sugar, tobacco, hemp, flax, hides, and skins: Or, *thirdly*, For any partial loss under three per cent on other goods, or on ship or freight, unless such small loss arise from general average or stranding of the ship.

5. PLACE AND TIME.—The commencement and termination of the risk are indispensable requisites in a policy. If the policy be for time, the commencement and termination of the time must be distinctly specified. If a blank be left for the place of departure or destination, the policy will be void for uncertainty. Care must be taken that the place of departure be not described in terms so ambiguous as to expose the contract to the same charge of uncertainty; and so a policy to any port or ports must be made certain by the addition of time.[2] But any port within a given description of coast, or of sea, is sufficient. Thus a policy to any port in the Mediterranean, or in the Baltic, extends the contemplation of the parties to every risk within the known or commonly understood limits of that description.[3]

6. PERILS OF THE VOYAGE.—These are enumerated in a clause so anxious as to include all conceivable risks. But there are some losses which are not included within these words, however comprehensive they may seem; namely, such as are imputable to the owners, master, or mariners, rather than to the perils of the sea. Such are, injuries from bad stowage, exposure to wet, theft, embezzlement, &c.[4]

7. SUBSCRIPTION.—The policy must be subscribed or underwritten with the names of the several insurers. It is not required to be subscribed according to the formalities of the statutes relative to the subscription of deeds in Scotland; but it is effectual signed with the name simply, accompanied by the addition of the sum for which the underwriter is to be liable. No witnesses are required. Very frequently policies are signed by procurators, acting either under express or tacit delegation. Doubts may be raised concerning the power of the procurator, either by denying his authority entirely, or by

from the real name. And the Court 'held, that a 'sacred strictness ought to be preserved in the inter- 'pretation of contracts relative to insurance; and, 'therefore, in respect it is acknowledged by the pur- 'suers, that their ship was registered by the name 'of the Elizabeth and Peggy of Saltcoats, the Court 'found they had no claim against the defender upon 'the insurance made by him on the ship Martha of 'Saltcoats, there being no such ship, at least the true 'name being concealed or misrepresented, by which the 'underwriter might have been deceived; and they sus- 'tained the defences.'

[1] See LE MESURIER *v.* VAUGHAN, 1805; 6. East, 382. Marshall, 313. Park, 21.

[2] See COOKEY *v.* ATKINSON, 2. Barn. and Ald. 460.

[3] UHDE *v.* WALTERS, 1811, before Lord Ellenborough. A policy to any port in the Baltic, was held, on this common understanding, to cover a port in the Gulf of Finland, although treated by geographers as a separate sea.

[4] 1. Marshall, 338.

alleging a limitation of his powers to particular acts or conditions. It is held in a claim under this, as under other mercantile contracts, that a power of procuration may be effectually conferred by sufferance; as where the same person has subscribed other policies as procurator for the bankrupt, on which he has received premiums, or under which he has settled losses.[1] It is also held, that where a special limitation in the power is alleged, the onus probandi lies on the person for whom the policy is underwritten.[2]

No proof by parole evidence will alter or control the policy, unless it establish a usage, which in mercantile affairs, and when not inconsistent with law, controls the construction of all policies. In proving such usage, *opinion* is not sufficient. It is from a Judge only, and in matter of law, that opinion can be received by a jury: other persons must speak only to facts.[3]

2. *Proof of the Interest and Loss.*

Interest.

1. INTEREST.—In claiming for the loss, the claimant is bound to prove his interest. This will be prima facie presumed; and, where denied, is to be established—as to the vessel, by the registry; as to the cargo, by bills of lading, or by invoices and correspondence.[4]

Wager Policies. Insurance of Profit.

If the policy is for a mere wager without interest, nothing can be recovered under it. But the insurance of profit on a fishing adventure is not such a policy.[5] Neither is the insurance of future freight objectionable, provided the voyage has actually begun before the loss.

Loss.

2. LOSSES.—The loss is either TOTAL or PARTIAL. The former consists not solely in the entire destruction of the subject insured, but in such damage as to render it of little or no value to the owner; or to reduce the value to less than the freight; or to frustrate the adventure, the securing of which was the object of the insurance: The latter is a loss or damage not amounting to a total loss.

Total Loss.

I. Claims for a TOTAL Loss must be accompanied by ABANDONMENT, where there is any thing remaining actually extant or in hope. Without entering into the speculative question, whether the practice of abandonment be quite consistent with the principles of

[1] NEAL *v.* ERVINE, 1. Espin. Rep. 61. See also supra, p. 478.

[2] Same case. Marshall, 716. Park, 607. Note.

[3] SYERS *v.* BRIDGE, per Lord Mansfield, Doug. 527. See Marshall, 716.

[4] Marshall, 718. Park, 608, 609.

[5] ADDISON and SONS against DUGUID, 23d May 1757. The Leviathan sailed for the whale-fishery in February; and in May, Addison and Sons, who had fitted her out, insured her on a valued policy, by which the underwriters insured that the ship should return with 90 butts of blubber, and to pay for the deficiency L.7 per butt. The ship returned with five butts; and in an action in Admiralty for the loss, the defence was rested on the 19. Geo. II. c. 37. The Judge held the underwriters liable.

The Court of Session, when the case first came before them, thought it so doubtful as to deserve very deliberate consideration, and passed the bill of suspension. On the discussion of the case they unanimously held the insurance effectual.

The opinion of Mr Bearcroft respecting the English law upon the question was laid before the Court. He said,—'It is perfectly clear to me, that this is not a 'wagering policy, within the meaning of the statute, 'but insurance of profit on a fishing adventure; in 'order to take the chance of which, the insured has 'been necessarily put to great expenses in the outfit 'of the vessel, purchasing proper tackle for whale-'fishing, manning, &c. As for the argument on the 'ground of public policy, I confess I do not feel it. 'To entitle the adventurer to the bounty, he must 'comply with the requisition of the statute giving it, 'as to fitting out, manning the vessel, &c.; and not-'withstanding any such insurance as is at all likely to 'be entered into, it will always be the interest of the 'insured to get as many fish as he can. The under-'writers know the bounties given by law, and it cannot 'be probable that they will underwrite a policy which 'will tempt the insured to neglect the adventure in 'order to come upon them; and of this they have as 'good means to judge as the insured themselves.

'Upon the whole, I am of opinion, that this contract 'of insurance is legal, and the insured entitled to re-'cover against the underwriters.'

the contract of indemnity by insurance; or the expediency of a practice which is plainly liable to great abuses; the general doctrine as to the description of loss is, that the assured may abandon whenever, by one of the perils insured against, the voyage is lost, or not worth pursuing; or where the object of the adventure is frustrated; or where the subject insured is left in a state which makes it of little value to the owner,—as goods reduced to less worth than the freight; or subjects reduced under half of their value; or so as to require an expense to reinstate them which the insurer will not undertake. But he is not entitled to harass the underwriters by giving notice to abandon in a case, which, in its own nature, is only a partial loss, so as to turn it into a total loss.[1]

The most important rules relative to abandonment are these:—

1. Capture is prima facie a total loss entitling the insured to abandon. Even arrest of princes, or mere embargo, are also held prima facie to be total losses; the owners from the moment of capture, arrest, or detention, losing their power over the ship and cargo. The owner therefore *may* instantly abandon, though he is not *bound* to do so.[2]

2. If the offer to abandon is accepted, the matter is concluded, the loss total, the abandonment absolute and complete.[3]

3. If the captured or arrested ship or cargo be restored or recaptured between the offer to abandon and the acceptance, or action, it has been determined in England, that an abandonment is only notice of an election, on the supposition of a fact; that it will depend on the truth of that fact whether it is to continue effectual; and that the underwriters are entitled to settle as for an average loss only.[4] In Scotland, a case precisely of the same kind occurred, with this difference, that the underwriters accepted the offer of abandonment. On the general question, a view opposite to that which was finally adopted in the above case was taken, and the insured were held entitled to claim the total loss from the underwriters; they taking the benefit of the recapture.[5] This case, as viewed in Scotland, presented the same question which had been decided by the Court of King's Bench; and the same opinion which seems first to have occurred to Lord Ellenborough at the trial, though afterwards abandoned, is fully and ably delivered by Lord President Blair as the principle on which the case was decided by the Court of Session. When the cause came into the House of Lords, the true point of this case was ascertained to be such as to leave that general question untouched, namely, the effect of the accepted offer of abandonment. In the course of the discussion of the cause, Lord Chancellor

[1] Marshall, 593. et seq. Park, 228–9.

[2] Marshall, 567. et seq.

[3] Robertson, Forsyth, and Company, against Stewart and Smith, 10th February 1809; 15. Fac. Coll. 165.; Buch. Rep. 73.; and in House of Lords, 2. Dow, 474.
See below, Note [5].

[4] Bainbridge *v.* Neilson, 1808; 1. Camp. 237.; 10. East. 329. The ship was captured on 21st, and on 30th September the insured gave notice of this, and of abandonment. On 2d October the insured gave intelligence of recapture, with notice that they persevered in the abandonment. The salvage was L.15 on ship, and L.13 on cargo. The case came first before Lord Ellenborough at Guildhall, where he intimated his opinion in support of the abandonment; but desired to have the point, as a new one, put into a shape for the opinion of the Court.
Afterwards it was argued accordingly on a special case in King's Bench, when all the Judges held the abandonment not to be conclusive.
See also Falkner *v.* Ritchie, 1814; 2. Maule and Sel. 290.

[5] Robertson, Forsyth and Company, against Stewart, Smith, and Others, 10th February 1809; 15. Fac. Coll. 165.; Buchanan's Rep. 73. Robertson, Forsyth and Company, insured the Ruby on a valued policy at L. 2500. The ship was captured 10th September, by a Spanish privateer; and after being plundered, was sent to France. It was afterwards recaptured, and carried into Guernsey. When the insured were informed of the loss, they gave intimation of abandonment; and the underwriters, after taking time to consider, gave notice that they were completely satisfied. On the news of the recapture, the underwriters declined to settle as for a total loss; but offered to settle as for an average loss. In an action before the Judge-Admiral for the value in the policy, judgment was pronounced in favour of the insured. The case was then brought before the Court of Session, when this judgment was affirmed.

Eldon expressed great doubt on the general doctrine, on which the judgment of the Court of King's Bench and of the Court of Session had so entirely differed.[1] But the question has been again carefully reconsidered in England, with the benefit of those doubts, and the same judgment has been given which has been already stated.[2]

4. If in consequence of the capture, detention, or arrest, the interest which it is the object of the insurance to protect perish, it is a total loss. Where, in the case of a mercantile adventure, the goods insured are, by the detention, kept from market, and the voyage is lost, this is sufficient to justify abandonment;[3] but it is more difficult to find what shall be total loss in the case of a ship insured. The loss of the voyage may be the loss of the freight, and is therefore total on a policy for freight. But if the vessel is restored, it is not a total loss.[4]

5. But the circumstances in which a ship may be placed abroad, in consequence of perils insured against, may be such that it may be necessary to dispose of it. In such case, the master has a power to act for the benefit of all concerned; and the assured may abandon, and claim as for a total loss. This power on the part of the master, however, must be exercised under very severe restraint; and it is of great importance to prevent a partial from being converted into a total loss by the unnecessary abandonment of the voyage. Lord Mansfield at one time laid down the rule too broadly in favour of the master's discretion.[5] It has been considerably narrowed down since his time;[6] and it

[1] In the House of Lords, Lord Chancellor Eldon, after stating the case, with the import of the judgment in England, said,—'On a subject of this importance, it 'was impossible to leave the law in such a state, that 'what was a good decision in the one country should 'be bad in the other, where the decisions on this ques- 'tion of mercantile law ought in both countries to be 'the same; and it was difficult to say that the same 'principle might not comprehend and determine the 'whole of the cases in which there existed these 'minute shades of difference. In deciding this case, 'their Lordships might affect the decisions of their 'own courts; and it was therefore proper that the case 'should be argued in the presence of the Judges; and 'then a question might be put, which would settle the 'principle that would decide all the cases that might 'occur with the variety of facts to which he had al- 'luded.' After the argument appointed upon this suggestion, the Chancellor said,—'That he had been 'induced to propose the adoption of this course, prin- 'cipally from having regard to a case (Bainbridge *v.* 'Neilson, 10. East, 329.) decided in the Court of 'King's Bench, and another case mentioned at the 'bar, (Falkner *v.* Ritchie), by which the doctrine in 'the case of Bainbridge *v.* Neilson, as to the effect of 'the abandonment, was confirmed.

'Since the time when this case was last mentioned 'to their Lordships, he had had an opportunity of con- 'sidering it with great attention, of consulting with 'his noble friend near him, (Lord Redesdale), and of 'discussing the question with different persons whose 'judgment was entitled to the greatest respect; and 'the conclusion to which he had come was this,—that 'without intimating in the least what, if the cases of 'Bainbridge *v.* Neilson, and Falkner *v.* Ritchie, had 'come before their Lordships, would be the judgment 'of the House of Lords, and protesting against being 'considered as giving any opinion agreeing or not 'agreeing with these decisions, it was clear that the 'present case was out of the principle of these cases. 'Here it was not made out that the underwriters had 'any right whatever to refuse to settle as for a total 'loss: they could not be allowed to say that the loss 'was not total, after they had admitted that it was, 'and acquiesced in the abandonment as for a total 'loss. It was, therefore, on the effect of the transac- 'tions in this particular case, without reference to 'others, that he thought the decision of the Court of 'Session right.' *Lord Redesdale*,—'I concur.' Judgment affirmed.

[2] PATTERSON *v.* RITCHIE, 1815; 4. Maule and Selwyn, 393. Lord Ellenborough said,—'Although 'Lord Eldon is said to have spoken with dissatisfaction 'of Bainbridge *v.* Neilson in the House of Lords, I 'confess, with all deference, I am unable to see any 'good reason for receding from that judgment. The 'principle of that and of the other decisions is a gene- 'ral one; and it is this—I have a right of action for 'non-payment of money: the party pays me before 'action is brought; that takes away my right of action.'

BROTHERSTON *v.* BARBER, 1816; 5. Maule and Selwyn, 418.

[3] See below, p. 610.

[4] FITZGERALD *v.* POLE, Willis, 641–5. Brown's Parliamentary Cases, 131.

PARSONS *v.* SCOTT, 1810; 2. Taunt. 363.

FALKNER *v.* RITCHIE, 1814; 2. Maule and Sel. 290.

[5] MILLER *v.* FLETCHER, Douglas, 231.

[6] REID *v.* DARBY, 1808; 10. East, 143.

UNDERWOOD *v.* ROBERTSON, 1815; 4. Camp. 138.

WILSON *v.* MILLAR, 1814; 2. Starkie, 1.

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is now requisite to show a case of absolute necessity in order to justify such a proceeding.[1]

Shipwreck and Stranding.

6. Shipwreck is generally a total loss; and where only the *wreck* remains, but the *ship* is gone, it is a case for settling on that footing. But stranding merely is not a total loss, if the vessel can be got off, and sent forward on her voyage. Where a ship is insured with one set of underwriters, and the freight with another, it has been held a question of great difficulty, in case of an abandonment, what shall be the effect of it as between these several sets of underwriters, if the ship should in the end earn her freight? whether the abandonment of the ship to the underwriters on the ship, carries the freight? or whether the underwriter on the freight has, by virtue of the abandonment to him, right to the freight? This was long a subject of doubt and debate; and Mr Justice Park, after stating the result of several cases, concludes with saying, that the question must still be considered as open, 'although, as far as opinions may 'be collected from observations thrown out in the course of argument, the inclina-'tion of the Court seems to be in favour of the underwriters on ships.'[2] A case fit for the trial of the question having occurred in the Court of King's Bench, Lord Ellenborough, Chief-Justice, and the present Lord Chief-Justice Abbot, and Mr Justice Holroyd, held, that the abandonment of the ship was equivalent to a sale of it, and the right to freight an incident to the ship; and so that the underwriters on the ship are, on abandonment, entitled to recover the freight, when it happens to be earned, against the pretensions of the underwriters on the freight. Mr Justice Bayley dissented from this opinion, and held, that the abandonment of the ship, from the nature of the subject-matter, implies a virtual exception of the freight, where there is a separate insurance and separate abandonment of the freight.[3]

Defeat of Voyage.

7. It is only in the case of goods or freight insured that total loss can properly be said to arise from the defeating of the object of the voyage. It is now scarcely to be admitted as a doctrine applicable to the case of a ship insured. And a voyage is not defeated by mere retardation, unless the object of the voyage, the purpose of the insurance, be utterly disappointed. Thus a ship carrying to Quebec a cargo, not of perishable commodities, or such as delay would injure, but of copper and iron, having been obliged, by disrepair and injury, to go into a port in Ireland, where no other means of forwarding the goods that season was to be had, and the delay lost the voyage for the season, it was questioned whether this amounted to a total loss, so as to give the right to abandon. It was held not to be such a loss; on the ground, that mere delay and retardation is not a good cause of abandonment.[4] This doctrine was confirmed in a case where the cargo not being of a perishable

IDLE *v.* ROYAL EXCHANGE ASSURANCE COMPANY, 1819; 8. Taunt. 755. 3. Brod. and Bing. 151.
READ *v.* BONTRAM, 1821; 3. Brod. and Bing. 147.

[1] SMITH against DREEVER, 15th November 1823; 2. Shaw and Dunlop, 494.

[2] Park, 267—276.

[3] CASE *v.* DAVIDSON, 1816; 5. Maule and Sel. 79. Brotherstown and Begg, owners of the Fanny, insured her at L. 7000; and afterwards the freight, with other underwriters, valued at L. 4000. The ship was captured by an American privateer, and thereupon notice of abandonment was given to both sets of underwriters, of the ship and of the freight. Afterwards the vessel was recaptured by a ship of war, and brought to London, and, by sentence of the Court of Admiralty, was, with the cargo, restored on payment of salvage. The ship arrived at Liverpool, and delivered her cargo, and earned her freight. The ship was, by agreement with the underwriters on the ship, sold; and Davidson was appointed to receive the proceeds, and also the freight, for the benefit of all having interest. Davidson, accordingly, paid the proceeds of sale to the underwriters on the ship, who paid the loss to the insured. The underwriters on the freight, and those on the ship, claimed the freight from Davidson as holding it for their interest. The judgment was for the underwriters on the ship. This judgment was affirmed in Exchequer Chamber. 2. Brod. and Bing. 379.

This question has not yet occurred to be tried in Scotland; but the judgment in the above case of Robertson, Forsyth and Company, goes far to determine it in the same way in which it has been adjudged in England.

[4] ANDERSON *v.* WALLIS, 1813; 2. Maule and Sel-

nature, but fairly warehoused in an undamaged state, and there being ample means of forwarding it for next season; this was held a partial, and not a total loss to authorize abandonment.[1]

Time of Abandonment.

As to the time at which notice is to be given of abandonment, it will be remembered, that this is an act which is to throw on the underwriter the whole risk; and that justice, therefore, requires that he should be apprized as early as possible, in order to take those measures which may be proper for the right administration of his property; while the insured shall not, by delay and hesitation, give himself the chance of benefit, with the power in his hand of throwing the loss on the underwriter. Within the description of a reasonable time for notice, is included the opportunity of fully understanding the condition in which the goods are;[2] but the insured has no right to wait for information as to the state of the markets; nor is he to delay the communication till the event of a final survey, when the facts are such as to show manifestly all that is necessary to determine the election.[3]

Partial Loss.

Partial Loss is, in the language of underwriters, also called Particular Average; though it be, in fact, not an average at all, but a loss which must be borne undivided by that part of the concern on which it lights. The expression, particular average, seems to have arisen among underwriters rather than among lawyers; and to owe its origin rather to the operation of adjusting the loss, than to the effect of it as interesting any one but the owner of the article injured. In this operation of adjustment, much practical difficulty occurs; and, after a few words as to the description of partial loss, it may not be out of place to discuss the principles on which both partial losses and total are settled and adjusted.

Under the description of partial loss are to be included, 1. Damage to the ship by stranding, or striking on a rock, or other obstruction. 2. Damage by collision with other ships, where it is accidental. Where occasioned by negligence, it is not a peril of the sea, to be indemnified as partial loss. But unless there be proof of such negligence, the insurer is liable, having right, of course, on paying the loss, to sue the party truly liable.[4] 3. Damage to boat, masts, sails, rigging, &c. by force of the winds or sea. Although this is often held to be the tear and wear of the voyage, the custom is to consider it as a partial loss on the ship; for the underwriters are liable if it exceed three per cent, either alone, or taken along with other damage.[5] 4. Loss by lightning, or accidental fire, which is a loss that cannot be the subject of a claim of indemnification against the shipowners.[6] 5. Losses incurred while the ship is running before the wind, or lying to

wyn, 240. Lord Ellenborough delivered the judgment of the Court. See also Park, 261.

[1] Hunt v. The Royal Exchange Assurance, 1816; 5. Maule and Selwyn, 47. This was an insurance on a cargo of pork and flour for Newfoundland. The loading was taken in at Waterford, and convoy joined at Cork; and damage having been suffered at sea, too great to proceed, the ship put back to Cork on 13th November. The ship, on survey, was found not worth repairing, and the hull and materials were sold; and no opportunity of transporting the goods being to be had before spring, the pork and flour were landed and warehoused. On 18th December the insured, residing at Waterford, wrote to the broker to give notice of abandonment, which was done 22d December. There were two questions,—1. Whether this was not a partial loss only, in which the insured were to act as if not insured, and claim for the loss? and, 2. Whether, at all events, the notice was not too late? On both points the Court of King's Bench adjudged the case for the underwriters.

[2] Compare Allwood v. Hinkell, Park, 280. with Anderson v. Royal Exchange Assurance, 7. East, 38.; and Gernon v. Royal Exchange Assurance, 2. Marsh. Rep. 89. See Park, 281.

[3] See above, Hunt v. Royal Exchange Assurance, supra, Note [1].

[4] The Thames, Drummond, 5. Rob. Adm. Rep. 345.

[5] Stevens on Average, p. 151.

[6] See supra, p. 560.

the sea, are losses by perils of the sea, because there is at such times no command over the ship. 6. Plunder or damage during capture. 7. Damage to a merchant ship by defending her against enemies: This seems to be a partial loss, whether the ship escape, or be captured and afterwards retaken.[1] 8. Damage occasioned by a press of sail to escape an enemy or a lee-shore. But, 9. The repair of a leak sprung at sea is not partial loss demandable against the insurers: The presumption is either that this is the working and straining of the ship, which is the tear and wear of the voyage; or an inherent vice. The onus probandi is laid on the insured, to show it to be the direct effect of accident. 10. It has been held, that if a ship be bilged by being laid on the shore within the tide-way to repair, it is not a loss by perils of the sea.[2] But where a ship, in the course of her voyage, is in a dry harbour, and there suffers damage by a peril within the policy, the underwriters are liable.[3]

The proofs of loss in matters of insurance are generally very unsatisfactory. Perhaps no rule can be laid down for all cases. But it may generally be observed:—

Proofs of Loss.

1. The underwriters are entitled to insist on the best proof which circumstances admit.[4]

2. The log-book, and protests taken on occasion of the loss, are documents expected to be furnished to the underwriters, as supplying the information necessary for directing their inquiries. But they are not proofs on which the loss can be rested, unless they become so by the inevitable loss of other evidence. They may be used to contradict the evidence of the master or mate, whose statements they are. The log-book is an essential document to be produced to the underwriters, as a check on the proceedings in the voyage,[5] unless there be evidence of its loss. A protest is not evidence, while the master who made it is alive; but may be read to contradict his testimony.[6] It may also be useful, in so far as bearing to be verified by the log-book shown to the judge or notary; it may supply the loss of the log-book.

3. The master, officers, and crew, are good evidence where they have no interest, and are not parties in the cause.[7]

4. In Scotland, the former practice was too loose,—to receive surveys, sentences of condemnation, &c. abroad, properly authenticated: But, if challenged, they must now be confirmed and made evidence.

[1] Yet there are some who hold that to be merely a general average.

[2] THOMSON *v.* WHITMORE, 3. Taunt. 227.

[3] FLETCHER *v.* INGLIS, 1819; 2. Barn. and Ald. 315.
PHILLIPS *v.* BARBER, 5. Barn. and Ald. 161.
NAPIER against WOOD, 18th May 1825; 4. Shaw and Dunlop, 19.

[4] FERRIER against SANDEMAN, 24th February 1809; Judge Cay's Notes, vol. E. p. 451. A vessel was insured for L.1000 in hull and materials during six months, from 1st March to 31st August 1807. Having struck on a rock, she was obliged to go into Christiansand to be repaired. While there, the king of Denmark declared war against Great Britain. This was on 16th August, about a fortnight before the expiration of the insurance. There were several points in the case; but one in particular turned on the defence, that no evidence was produced of the ship having been seized before 31st August, when the policy expired. The Judge-Admiral held the notorious fact of war having been declared, and the presumption that the order contained in that declaration, to seize all British ships, was obeyed, as good evidence of the seizure.
The case having been brought under review of the Court of Session, the Judges affirmed the Admiral's judgment, on the ground, that the best evidence had been produced which circumstances admitted. 29th June 1809; Fac. Coll. 373.

[5] The log-book used formerly to be produced as one of the proofs. It is not now, however, to be taken as evidence of the facts stated in it, but only of the fact of a log-book existing. It was admitted loosely in the Jury Court, in CARLTON against STRANG, 1. Murray, 32. But in CAIRNS against KIPPEN, 2. Murray, 248. a more correct view was taken.

[6] SENAT *v.* PORTER, 7. Term. Rep. 158. See THOMSON against BISSET, 3. Murray's Rep. 297.

[7] THOMSON against BISSET, in Jury Court, 3. Murray, 298.

Digression concerning Valuations and the Adjustment of Losses.

The adjustment of losses is, perhaps, not strictly within the province of a work which professes to discuss only the rules of law: But the information on maritime and mercantile subjects is scanty in Scotland, and it may be useful, in a digest of practical jurisprudence relative to those matters, to give a few of the fundamental maxims by which adjustments are ruled.

Average losses have already been treated of under the Contract of Affreightment; and the rules are not different where the underwriter is concerned. But a few points relative to the adjustment of the two descriptions of loss not coming under general average, viz. total and partial losses, may here be considered.

I. Adjustment of Total Loss.—A Total Loss may happen either under what is called a valued, or under an open policy.

1. Valued Policy.—In a valued policy, the value of the subject insured is by agreement of the parties stated by anticipation. This is equal to an admission by the underwriters of the amount put in hazard; which, unless challengeable as fraudulent, or exceptionable as a wager, will be held conclusive in the case of a total loss. This proceeds on the principle, that as, in the ordinary case, the loss is to be adjusted by the cost on board, and the premium and commission, excluding the mercantile profit which is the object of the expedition, but which is still to be regarded as truly a loss; it is not inequitable, nor to be regarded as a wager policy, that the insured include such profit in the valuation, paying for it an adequate premium. 1. Fraud in the valuation will vitiate the policy, so as to prevent the insured from recovering under it even the actual loss.[1] 2. To take the case out of the Act respecting wager policies, (19. Geo. II. c. 37.), it is enough to prove some interest;[2] and the inquiry will then proceed into the amount of the loss. 3. If the value has been erroneously, but honestly stated, it is said that it may be corrected on evidence by the underwriters; but that slight differences will be disregarded.[3] But the cases quoted below deserve to be attended to before adopting this conclusion; as tending to show, that where there is neither fraud, nor wager without interest, the value expressed in the policy is to be recovered in a case of total loss, and not merely a sum equal to the loss.[4]

[1] Haigh *v.* De la Cour, 1812; 3. Camp. 319. Here goods were put on board a ship for Pernambucco to the value of L.1400, and false invoices and interpolated bills of lading were produced to the underwriters, representing the goods as worth L.5000. The ship was run away with and carried to the West Indies, where the cargo was disposed of by one whom the insured had sent as supercargo. The plea urged for the plaintiffs was, that there being some goods on board belonging to them, it was a case of short interest. The jury, directed by Lord Chief-Justice Mansfield, nonsuited the plaintiff, on the ground, that if the intention from the beginning was to cheat the underwriters, the fraud vitiates the contract.

[2] Lewis *v.* Rucker, 2. Burr. 1170.
So held in House of Lords, 15th February 1773, M'Nair against Coulter, on appeal from Scotland. See below, Note [4].

[3] Marshall, 294.

[4] 1. M'Nair against Coulter, 13th February 1772. M'Nair insured a ship and cargo from Virginia to Clyde, 'valued at L.1000, without farther account.' The ship was lost off Bermuda. It afterwards appeared, that the information on which the insurance was made was false, the value being not more than a half. The insurance had been ordered by M'Nair's son, who was tried, as having wilfully sunk the ship. He was acquitted, but found guilty of having sent fraudulent advice, with a view to insurance. There were two questions:—1. Whether this was not to be held as a wager policy? This was decided in the negative by the House of Lords, there being a real interest. 2. Whether there being an over-insurance, the underwriters were liable for more than the real value? On this question the Court of Session held 'the insured 'not entitled to recover from the underwriters the 'L.1000 specified in the policy, but only a sum equal 'to the damage he sustained by the loss of the ship.' But in the House of Lords this judgment was reversed, and it was adjudged, 'that the appellant (the insured)

2. Open Policy.—Where a total loss happens under an open policy, proof must be given by the insured of the amount of the loss. The general rules are,—1. That the ship is to be valued at what she is worth at the port where the voyage commenced; including her stores, outfit, and money advanced to the seamen, together with the premium of insurance.[1] If the charges of recovery in case of loss are to be added, it must be declared in the policy. The evidence of such value, of course, must vary with the circumstances of each case: But the bills of the cost and of repairs at the time the insurance was made, with those for the furnishings, &c. are the most natural elements in adjusting the value. 2. The total loss on freight is the amount of the interest insured by the policy, in so far as still on board at the time of the loss; and, if so stipulated, the charges also of recovery. 3. Total loss on the cargo is to be adjusted at the invoice price, with the addition of all charges, and the premium of insurance, with the broker's commission, and (if inserted in the policy) the charge of recovery in case of loss. This is a matter which has been much disputed;[2] but the rule as now laid down is settled in Great Britain.[3]

II. Adjustment of Partial Loss.—Partial Losses on ships or on goods present two questions for settlement:—1. Whether they are properly losses which the underwriters are to bear? and, 2. How they are to be adjusted? On goods, the loss arising from internal decay, and the condition of the goods themselves, fall on the underwriters. On the ship, those losses which arise necessarily in the ordinary use of the articles, the wear and tear of the voyage, are not to be repaired by the underwriter.

1. Ship.—In adjusting a particular average, as it is called, or partial loss on the ship, it is usual to deduct one-third from the new materials and labour, unless the ship or the materials injured were perfectly new.

2. Cargo.—In adjusting loss on goods there are two methods followed:—One is, to take the invoice price, with premium, &c. and deduct the neat proceeds of sale of the damaged goods; another, to compare the amount of sales of the damaged goods with a pro forma account of sales of the same articles, if it had arrived in a sound state.[4] 1. The former of these modes of adjustment is technically called a salvage loss, from some supposed analogy to the sort of loss which, but for exertions made to save the goods, would have been total. The goods saved are called salvage; the difference between their amount, after deducting charges and the original value, is called salvage loss. In this sort of adjustment, the principle of a case of abandonment prevails; the goods being sold on account of the underwriters, the charges being borne by them, and the amount of the sales diminishing the total loss which would otherwise be payable by the underwriters. This

' is entitled to recover from the respondents (the under-
' writers) the sums by them severally underwritten, and
' interest thereof from the date of the decree of the
' Admiralty Court, with a discount of 2 per cent, in
' terms of the policy, and of L. 23. 7s. as the acknow-
' ledged value of what was recovered of the wreck.'
15th February 1773, Lords' Journals, vol. xxxiii. p. 515.

2. Wilson against Wordie, 2d December 1783; 7. Fac. Coll. 207. Wilson and others insured a prize which had been captured by their privateer, and which, judging from the information received, they valued at L. 20,000, including 20,700 dollars in specie. The prize was retaken, but not before 4200 dollars had been landed, which was nearly all that was found on board. In Admiralty, and afterwards in the Court of Session, the underwriters pleaded,—1. Concealment or misrepresentation sufficient to annul. 2. Wager, or, at least, the necessity of abatement to the true value. The Court of Session ' found the underwriters liable, in
' terms of the policy of insurance subscribed by them.'
Millar, in his Elements of Insurance, 261. says, that
' very eminent English counsel having been consulted
' upon the case, they advised the underwriters to ac-
' quiesce in the judgment of the Court of Session.'

[1] The premium of insurance is not allowed by the French Ordonnance de la Marine, but it is generally allowed by the practice of all commercial nations. See also Le Guid. chap. 2. art. 9.; chap. 15. art. 3. 13. 15. Marshall, 629. Stevens on Average, p. 178.

[2] Emerigon, 261.

[3] Marshall, 629. 634.

[4] Stevens' Essay, 73.

is the proper mode of adjustment, where there is a necessity for selling the goods short of the port of destination; for it is not possible to refer to the market of the port of delivery at which the goods have not arrived. 2. Where the goods arrive at their port, the other mode of adjustment, by a comparison of the market-price, of the sound merchandise with the market-price of the damaged, is the only just and proper method to be followed, and it appears to be now universally adopted. The problem is, to ascertain what is to be paid on the goods damaged, in order to indemnify the insured, as upon those damaged goods, for the loss which he has sustained; or for the deterioration which these goods have suffered below the value in the policy, or the invoice price and charges? And the mode proposed furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the effects of a rising or falling market. The merchant, by the use of this criterion, it has been said, makes the market-prices of the sound and damaged commodity serve as the scales in which to weigh the depreciation.[1] On this question these points have been judicially fixed:—*First*, That the underwriter is not to be subjected to the fluctuation of the market: *Secondly*, That the loss to be indemnified is that which arises from deterioration of the commodity by sea damage: *Thirdly*, That the underwriter is not responsible for any loss which may be the consequence of the duties or charges to be paid after the goods have arrived at their place of destination: *Fourthly*, That as in a total loss the underwriter pays the whole prime cost, with charges on the whole sum in the valued policy; so, if the thing be only a half, or third, or fourth worse by the injury, he pays a half, third, or fourth of the value in the policy; or, in an open policy, of the prime cost: And, *Fifthly*, That to ascertain this proportion of the prime cost or valuation which is to be paid, it is only necessary to ascertain in what degree the damaged goods are worse than the sound, in consequence of the injury: And this is best done by finding the difference between the gross proceeds and the neat proceeds; or the difference of the price of the sound goods at the port of delivery, as paid by the buyer or consumer, compared with the price to be paid by the buyer or consumer for the damaged goods. This difference gives the ratio or proportion of the prime cost or value in the policy, which is to be made good to the insured.[2] This seems to afford a standard of adjustment which will give the same result, whether the markets rise or fall, and whether the charges are heavy or light: And it answers every purpose required, since the object is, not to afford a mercantile indemnity, but indemnity only to the extent of the invoice price and charges.

There are two other questions which deserve attention:—

1. When part of a package is damaged, is the whole package to be sold together, or the sound and the damaged parts to be separated? It seems a safe ground for holding that the goods ought to be separated in the sale, so that each may draw its value, that although there may, on the sound goods, be a consequential loss by the breaking of the assortment, it is not for such losses, but only for the direct or actual damage, that the insurer is liable.

[1] Stevens' Essay, 84.

[2] These points are fixed by judgments pronounced in England, which deserve to be minutely studied.

1. Lewis v. Rucker, 2. Burr. 1170. in which it was first settled by Lord Mansfield and a special jury, and confirmed by the Court, that the ratio or proportion of loss was to be taken from the comparison of the market-price of sound and damaged goods at the port of delivery.

2. Johnson v. Sheddon, 2. East, 581. (which is commonly called at Lloyd's the Brimstone cause), where a judgment of Mr Justice Lawrence, in delivering the opinion of the Court, fixes the rule, that the gross, and not the neat proceeds are to be taken as the basis of calculation in this question.

3. Hurry v. R. Exchange Assurance Company, 3. Bos. and Pull. 308. confirming fully, in the Court of Common Pleas, the rule laid down by the King's Bench in Johnson and Sheddon's case.

See also Usher v. Noble, 12. East, 639. for the application and illustration of the rules.

2. How is a valued policy to be dealt with in case of partial loss? A valuation, it will be recollected, is not merely of the prime cost, but also of the mercantile or expected profits. When this is fixed by the price, yard, pound, &c. the matter is easily arranged; but when valued in the lump, or at so much per bale, chest, &c. there is considerable difficulty. Mr Justice Park says, that the value in the policy can be no guide where the loss is partial;[1] but this has not been adopted; nor has it been held as law, that a valued policy is, in case of partial loss, to be considered as open.[2] In the case of a valued policy, the valuation in the policy is the agreed standard of value by which the indemnity sought is to be ascertained, the ratio being found by a comparison of the prices of sound and of damaged goods: In the case of an open policy, the invoice price at the loading port, with premiums of insurance and commission, is the standard.

3. *Defences against the Claim of the Insured.*

Besides the defences arising from any error or illegality in the policy, there are three classes of defences which will be found to comprehend many essential points of insurance law. These are,—1. Breach of warranty: 2. Concealment or misrepresentation on the part of the insured: and, 3. Deviation from the course of the voyage insured, or alteration of the voyage.

Doctrine of Warranty.

I. Breach of Warranty.—A warranty is an absolute condition, or, as the English lawyers call it, a condition precedent: and if not true, or not complied with, the insurance is ineffectual. It differs from a representation in this, that the breach of truth in a representation is fatal or otherwise to the insurance, as it happens to be material or immaterial to the risk undertaken. This distinction was pointedly laid down by Lord Chancellor Eldon in the House of Lords.[3]

There are not, in the Scottish books, many important illustrations of the strictness with which warranties are required to be complied with. The rule is held as fixed, and reference may be made to the English books for the doctrine.[4]

Express Warranties.

There are several warranties which thus operate as absolute conditions; of which some are express, some implied. Of the Express, the conditions are such as these,—That the

[1] Park, 103. See also Marshall, 631.

[2] See Usher *v.* Noble, 12. East, 639.

[3] M'Morran and Company against The Newcastle Fire Insurance Company, 1815; 3. Dow, 255. The question arose, in Scotland, on a policy of fire-insurance of a cotton-mill in the county of Lanark. The insurance was made with the Newcastle Fire Insurance Company. The mill was burnt; and in an action against the insurers, the question was, Whether this mill, which was warranted as in the first class of risks, was not truly of the second class? The Lord Chancellor said,—'If the mill was warranted as of the 'first class, and was really of the second class, the 'judgment of the Court of Session was erroneous. For 'it is a first principle in the law of insurance, on all 'occasions, that where a representation is material, it 'must be complied with,—if immaterial, that immate-'riality may be inquired into and shewn; but that if 'there is a warranty, it is part of the contract that the 'matter is such as it is represented to be. Therefore, 'the materiality or immateriality signifies nothing. The 'only question is as to the mere fact.'

[4] The following Scottish cases, however, may be looked into:—

1. Dunmore and Company against Allan, 27th June 1786; Fac. Coll. 432.; where a ship, warranted to sail with convoy, did not sail till several days after, but overtook the convoy, and was a few weeks afterwards separated in a gale, and taken. The policy was held bad for non-compliance. (7101.)

2. Monteith against Cross, 16th December 1788; Fac. Coll. 87.; where a ship, insured with a warranty to sail with convoy, instead of proceeding to the rendezvous, remained in a harbour at the distance of several miles, but within signal distance. The fleet sailed, and this ship was kept in harbour by a calm, but joined the fleet three days after, and continued with it for a month, when she was separated in a storm, and captured. In an action for the loss, the underwriters were freed on account of non-compliance with the warranty. (7105).

ship is to sail on a particular day;[1] that she was safe on a particular day; that she is to proceed with convoy; that she is neutral property; and other such conditions as may either be matter of representation; or such as, in order to put a stop to all suspicion of concealment, the insured may agree to make a condition of the contract. The IMPLIED warranties are such as necessarily result from the nature of the contract; as, That the ship is sea-worthy; that she shall be navigated with ordinary skill and care; that the voyage is lawful, and so forth. Implied.

The most important warranty, and one of the chief points in the law of insurance, is SEA-WORTHINESS. From the absolute nature of this condition of the insurance, there is no occasion to disclose any previous accident or disrepair as a part of the representation necessary to an effectual insurance; and it has been a great object with courts of law, both for the benefit of commerce and with a view to the preservation of human life, to enforce the necessity of having the ship sea-worthy when she sails on her voyage. Sea-worthiness.

In treating of affreightment, something has already been said of sea-worthiness, and of the difference between this question in a contract of insurance and in a charter-party. As applicable to insurance it may be laid down,—

1. That in this, as in all warranties, it signifies nothing whether the insured was himself aware of the ship's condition or not: 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.

2. That, as a part of the same doctrine, the opinion of the carpenters who repair a vessel, however much it may raise or strengthen the presumption that the ship is sea-worthy, is not conclusive of the fact of sea-worthiness.[2]

3. That the presumption, prima facie, is for sea-worthiness: But this will be removed when a ship goes down, or becomes innavigable, after sailing, without any apparent or adequate cause; especially if this happens soon after leaving the port. The onus probandi in such a case is turned against the insured,[3] who are thus held bound to shew such a case as to account for the injury independently of any unfitness in the ship.

[1] DENNISTON and Company against LILLIE, 22d May 1817; affirmed in House of Lords, 5th April 1821; 1. Shaw's App. Cases, 22.

[2] SCOUGAL and Company against DOUGLAS, 29th May 1812. The North Star was an old Dutch prize, employed as a whale ship, and bought for L.1200, including L.500 of fishing materials. She was repaired at Leith for a voyage to America: She was not stript nor opened, so as to enable the carpenters to judge of her internal state; but having received repairs to the amount of L.280, she, about a fortnight after sailing, encountered a gale, and was obliged to go into Greenock. On a survey she was proved to be materially decayed. The underwriters on this account having refused to repair her, the owners did, at the expense of L.1426, and then brought their action for this sum. There was some discrepancy of evidence, the Greenock carpenters having made two reports, the first less, the second more favourable. The insurance was held good. An appeal having been taken to the House of Lords, the judgment was reversed. Lord Eldon held,—1. That it was not necessary to inquire into the honesty of the insurance, that being of no importance to the issue. 2. That the imperfect survey at Leith left room for fatal mistakes. 3. That 'the ship having sailed, 'and appearing to have been for two or three days in 'a violent storm, if she be so damaged as that the 'damage might fairly be considered as the effect of 'the storm, that is one view of the case. But if dam-'aged in such a manner as, in common probability, 'she would not be if she had been sea-worthy when 'she sailed on the voyage, the implied warranty is not 'observed.' Then going through the evidence, his Lordship said,—'Having considered the whole of this 'evidence, I never was more clear about any thing 'than that it is proved to be perfectly manifest, to my 'entire satisfaction, that this vessel was not sea-worthy 'when she sailed, whatever might then have been the 'opinion of the owners and carpenters who repaired 'her: and if the cause could have come, and had come 'here originally, I would have recommended to give 'costs to the underwriters. But it is not customary 'to give costs where a decision of the Court below is 'reversed.' 4. Dow's Rep. 269.

[3] WATSON against CLARK, 1. Dow, 336. The Mid-summer Blossom was thirty-five years old. She sailed from England to Honduras. On sailing thence she was thought to be sea-worthy, but soon after, without adequate cause, became leaky, and returned, struck, and was lost. The risk insured was 'at and from Hon-

4. That any sort of disrepair left in a ship, by which she or the cargo may suffer, is a breach of the warranty of sea-worthiness, whether it affect the hull;[1] or the rigging, sails, &c.;[2] or the ground tackling.[3]

5. That a deficiency of force in the crew, or of skill in the master, mate, &c. is want of sea-worthiness;[4] as also is the want of a pilot in the navigation of rivers, firths, &c.; where the master is not familiar with the difficulties as in the ship's own port.[5] But if a sufficient complement of skilful officers and able seamen has once been put on board, the negligent absence of the crew at the time of the loss, provided some one was left in charge of the ship fit to be intrusted with her, was not held a breach of the warranty.[6]

6. That a vessel may be not sea-worthy from being overloaded.[7]

7. That if the want of sea-worthiness, arising from justifiable ignorance of the cause of the defect, be discovered, and the fault be remedied while yet there is no harm done, the policy is binding: As when a ship proves to be too heavily laden, and before sailing is relieved of the excess; or sailing with only one anchor, she is supplied with the other before she has occasion to use it. There may, indeed, be delay and deviation occasioned by such want of sea-worthiness, which may prove fatal to the policy: But where nothing of this kind happens, or where the underwriters, by a memorandum, give permission to deviate so far, the plea on sea-worthiness is discharged.[8]

'duras to London.' The Judge-Admiral held the ship not to be sea-worthy, and adjudged the policy to be void. The Court of Session altered this judgment. The House of Lords reversed this judgment, and returned to that of the Admiral. Lord Eldon 'held it 'to be a clear and established principle, that if a ship 'was sea-worthy at the commencement of the voyage, 'though she became otherwise only an hour after, 'still the warranty was complied with, and the under-'writer liable. But when the inability of the ship to 'perform the voyage became evident in a short time 'from the commencement of the risk, the presumption 'was, that it was from causes existing before her set-'ting sail on her intended voyage; and that the ship 'was not then sea-worthy; and the onus probandi in 'such a case rested with the assured, to shew that the 'inability arose from causes subsequent to the com-'mencement of the voyage.' With this Lord Redesdale concurred, and said, 'He had always understood 'it to be a clear and distinct rule of law, that if a 'vessel, in a short time after leaving the port where 'the voyage commenced, was obliged to return, the 'presumption was, that she had not been sea-worthy 'when the voyage began, and that the onus probandi 'was thrown on the assured.'

In Potts, Cook and Potts, against Parker, 3. Dow, 24., the judgment of the Court of Session was, on the same ground, reversed. Here the insurance had been sustained by the Court of Session. The ship was held by the House of Lords to have become innavigable without any adequate cause; and the proof to satisfy the onus probandi was held insufficient.

[1] M'Kellar against Henderson, 15th November 1810, 14. Fac. Coll. 15. An old tree-nail hole imperfectly filled up, and thereby occasioning a leak, will free the underwriters.

[2] Wedderburn *v.* Bell. See above, p. 551. Note [4].

[3] Wilkie against Geddes, in House of Lords. See above, p. 551. Note [3].

[4] See above, p. 551.

[5] Law *v.* Hollingsworth, 7. Term. Rep. 160. See also above, p. 552. et seq.
Thomson *v.* Bisset, above, p. 552. 3. Murray, 297.

[6] Busk *v.* The Royal Exchange Assurance Company, 1818; 2. Barn. and Ald. 73. Here the ship was accidentally burnt. The ship was Russian; sailed from Amsterdam with an adequate crew; was forced by weather into a Russian port, and there frozen up for the winter. The crew was then paid off, according to the established custom in those ports; and the captain leaving the ship in the charge of the mate, went to St Petersburgh to settle the ship's accounts. The mate lighted a fire in the cabin, and without having seen it properly extinguished, went on board another ship, where he remained all night. At four in the morning there was an alarm of fire, and the ship was burnt. The chief question was on the effect of the mate's negligence in freeing the underwriters. There was also a plea of breach of implied warranty, as there was no crew on board at the time of the loss. The Court held the implied warranty to have been complied with once, and that the mate himself was sufficient for the watching of the ship. The underwriters were found liable on the express stipulation in the policy against fire, and from which the negligence of the master or mate will not discharge them.

[7] See below, next Note.

[8] Weir *v.* Aberdeen, 1819; 2. Barn. and Ald.

8. That it is not necessary the ship shall be sea-worthy for the voyage from the moment the policy attaches to her. While she remains in port, it is sufficient that she is properly fitted for all the dangers of that situation.'

II. Concealment or Misrepresentation.—It is fatal to the policy if the insured, or those effecting the insurance, have misled the insurers in any fact material to the risk. The points are these:—1. Misrepresentation; 2. False insinuation; and, 3. Concealment. On the first of these, few cases are to be expected; or, at least, cases merely of proof, being of little use as precedents. Of the other two classes many illustrations are to be found. In the Scottish cases on this point, however, there is nothing very particular to be observed, either as new in doctrine, or as in any degree departing from the rules laid down by Park and Marshall, and so extensively acted on in English determinations. 1. It is fatal to mistate, though innocently, the day of sailing.[2] 2. It is a misrepresentation to say that a ship is *expected* to be ready to sail between two days named, when the insured has information that she was actually ready to sail on the first of those days;[3] or to say that a ship is *reported* to have sailed, when it is known that she positively *has* sailed.[4] 3. It has been held, (though the point has been thought to admit of considerable doubt), that the insured makes a misrepresentation fatal to the policy, if, at procuring insurance, he says, that part of the same risk has been insured already at a certain sum by underwriters likely to have the confidence of those to whom he applies, although, in truth, a higher had been paid. It was held, that although this does not touch any part of the risk, the state of the ship, or the condition or nature of the voyage, it induces false confidence.[5]

Misrepresentation and Concealment.

Misrepresentation.

320. Here, under a policy on the ship, the vessel sailed from London in an unworthy state, from being overloaded, and laboured so much that she was forced to put back to the Downs; and the captain applied to the underwriters for liberty to go into Ramsgate to unload part of the cargo, which was given. Having done so, he sailed, and a loss happened. Two questions were left to the jury:—1. Whether the ship sailed from Ramsgate sea-worthy? and, 2. Whether the subsequent loss was occasioned by the previous overloading? The jury affirmed the first, and negatived the second question. A new trial was moved, on two grounds:—1. That the ship was originally sea-worthy; and, 2. That there was a deviation into Ramsgate, the memorandum being, in fact, a new policy, and without a stamp. The Court held, that there was no voidance of the policy by non-sea-worthiness discovered and corrected before the danger; that the memorandum was therefore a mere discharge of the warranty; and the loss not occasioned by the original defect.

See Forshaw *v.* Chabert, 3. Brod. and Bing. 159. The true distinction between this and the above case is pointed out by Mr Marshall; namely, that in the former the consent to the discharging of part of the cargo at Ramsgate was a waiver of the objection to the un-sea-worthiness and to the deviation. Marsh. 159.

[1] Marshall, 147. Annan *v.* Woodsman, 3. Taunt. 299.

[2] Stirling and Robertson against Goddard, 3d February 1819, affirmed 19th July 1822; 1. Shaw's App. Cases, 238. See Denniston, supra, p. 617.

[3] Stewart against Morrison. Morrison had letters from Koningsberg, that his ship, on 13th September, 'is now quite ready to depart with first fair wind.' Morrison wrote for insurance, saying, 'the vessel was 'expected to be loaded at Koningsberg between the '13th and 20th September.' An insurance was also done on this other order:—'Said ship expected to be loaded 'at Koningsberg between the 13th and 20th Septem-'ber.' The ship sailed on 13th, and in two days after was totally lost. The Judge-Admiral dismissed the action; and his judgment was affirmed by the Court of Session. 19th January 1779, Fac. Coll. 102.

[4] Kinloch against Duguid, 22d January 1813; Fac. Coll. 108. The owners of the Kinloch had a letter from the wharfinger, with the manifest, saying, 'She sailed yesterday morning with a fair wind, and I 'hope will have a speedy passage.' This letter was written 26th February, and arrived at Dundee 1st March. On 9th March a policy was opened on a letter, saying,—'Commission L.1000 on ship Kinloch, 'valued at L.3000, from London to Dundee, *reported* 'to have sailed 25th ultimo.' The ship was captured, and, in an action for the loss, the Judge-Admiral held this to be a misrepresentation, which annulled the policy. This judgment was in the Court of Session affirmed by Lord Robertson and by the Court.

[5] Hill against Sibbald and Company, 16th June 1809; Fac. Coll. 303. Hill had insured on his South Sea whaler Redbridge L.3600, at 25 guineas, to return five guineas on arrival in company with the Britannia. Afterwards he insured L.2000 more on part of the

Conceal-ment.

4. It is not necessary to give information of an accident sustained by the ship previous to the commencement of the risk; as the ship is warranted sea-worthy.[1] But if in such a case the necessary repairs are not yet completed, and likely to affect the time of sailing, it then becomes important to disclose the state of the ship, as the ground on which the risk is to be calculated. And, in general, all concealment of positive information as to the day of sailing, or of facts which will affect the sailing, will be fatal.[2] 5. It is important to know whether a ship is to wait for convoy, or to *run* the voyage; and if, in obtaining insurance, the underwriter is misled into a belief that the ship *may* sail with convoy, when

voyage, at from 15 to 18 per cent. Two years after sailing, the owner having heard of her safety eight months before, and that she might be expected in about two months, wrote for another insurance to his broker in London, to get L. 2000 done at Leith, saying,—'I have no objection to give eight guineas, *which 'is the highest premium I have given.*' The London broker wrote to Scotland, that Hill 'had done as much 'insurance on the ship as the underwriters here are 'inclined to take at eight guineas.' Insurance was, accordingly, done at eight guineas, to the extent of L. 1750. The ship was captured. The Judge-Admiral held the insurance to have been voided, by the representation of the London premiums; and that the pursuers had no right to recover. 13th July 1804. This judgment having been appealed to the Court of Session, Lord President Hope, then Lord Justice-Clerk, held as Lord Ordinary, that 'this was not a misrepre-'sentation as to any circumstances attending the situ-'ation or condition of the ship or nature of the voy-'age, which could affect the nature of the risk;' and therefore he reversed the Judge-Admiral's sentence. The Judges were divided in reviewing this interlocutor of reversal. The majority assented to the view taken by the Lord Ordinary. The minority held it to be substantially an imposition; intended for that purpose, and having the effect of persuading the underwriters here, that the better informed underwriters of the south had run the same risk.

The case having been appealed to the House of Lords, the judgment was reversed. Lord Eldon, Chancellor, said,—'It appeared to him to be settled, that 'if one meaning to effect an insurance exhibits a policy 'underwritten by a person of skill and judgment, 'knowing that this would weigh with the other party, 'and disarm the ordinary prudence exercised in the 'common transactions of life, and it turned out that this 'person had not, in fact, underwritten the policy, or 'at least had done so on such terms as that he came 'under no obligation to pay, it appeared to him to be 'settled, that this would vitiate the policy. The courts 'in this country would say this was a fraud, not on the 'ground that the misrepresentation affected the nature 'of the risk, but because it induced a confidence with-'out which the party would not have acted.' 2. Dow's Rep. 263.

[1] SHOOLBRED *v.* NUTT, Park, 346. The insurance was from Madeira. The ship was leaky on the outward voyage, which was not disclosed. She was fully repaired at Madeira. The loss was by capture. Lord Mansfield told the jury, there was no occasion to represent what was covered by the warranty.

See also HAYWOOD *v.* ROGERS, 4. East, 590.

ADAM and MATHIE against MURRAY, and BOGLE against SMITH, 22d May 1804; Fac. Coll. 360. Marshall on Insurance, Appendix, No. 6. Here the ship Concordia received damage in going into Port Morant in Jamaica; and, by letters from the master, the owners were informed that the ship was so much damaged as to require a survey; and (4th June) on that survey considerable repairs were found necessary. The master, some days afterwards, (15th June), wrote that the repairs were finished; and that the certificate of her being fit for sea was expected; concluding with a hope that she would be ready to sail with convoy on the 25th July. From the repairs, however, which were found necessary, and some delay in loading, the ship was not ready till the 22d, when she sailed to join convoy; but, from bad weather, did not reach the rendezvous till three days after the fleet sailed. By various disasters the ship was kept in the West Indies for many months, and at last was unable to proceed without such repairs as would amount to more than her worth. The master's letter arrived on the 4th of August, when the owners insured L. 200 on the freight, giving to the underwriters this information: —'Our letter of 15th June from the master says, our 'cargo is all ready for us; and if the fleet don't sail 'till the 25th, I hope we will be able to go with them; 'but it is talked they will leave this the 20th.' The ship was abandoned to the underwriters, and an action brought, to which the pleas were,—1. Concealment: 2. Want of sea-worthiness: 3. An average, not a total loss. The Court of Session held it established, that, after the damage, the vessel had been made sea-worthy; and that the voyage having been lost, the owners were entitled to abandon; and so the question came to turn on the concealment. The Court sustained the action, and repelled the defences.

See also SMITH against BISSET, 9th March 1810; Fac. Coll. 617.

[2] GILLESPIE against DOUGLAS, 24th June 1803; Fac. Coll. 251. (7095). Gillespie and Company had a letter by the Fanny, from New York, saying, that 'the Ohio will sail about twelve hours after the Fanny.' Some days after getting this letter they insured L. 1000 on goods by the Ohio, at and from New York, but saying nothing of the day of sailing. The ship was taken, and the insurance held ineffectual, as the information withheld made this a missing ship.

the resolution has been taken to send her as a running ship, the policy will be bad.[1] 6. Where two ships are to co-operate as tenders to each other, this so far changes the risk from the ordinary one of a single ship, that it must be disclosed; unless it be so established as a custom in the line of trade insured, that it must be presumed to be known.[2] So, where the destination is expressed to a port, and the real design is to fish off that port; the insurance is bad, unless this be the customary mode of insuring a fishing voyage.[3] 7. The insured is bound, on applying for insurance, to disclose all that he knows or has heard relative to the actual state of the ship, or what leads to direct inference as to her fate.[4] And it is no justification to support the policy, that the insured did not himself believe what was reported to him. 8. Direct concealment of the actual state of the ship vacates the policy. That even doubtful rumours are to be disclosed, is laid down in the books, and illustrated by many cases.[5] 9. Although the order for insurance may have been fairly

[1] REID and Company against HARVEY, 25th June 1813; Fac. Coll. 407. Reid and Company, of Glasgow, insured a cargo of fruit expected from Lisbon, at ten guineas per cent, 'to return five for convoy or arrival.' The letters on which they applied for insurance stated the ship to be a prize going home for condemnation, and said, 'we *have determined on running the Nancy*.' The ship was taken and carried into Vigo. The underwriters defended themselves against a claim for the loss on these grounds:—1. That this was a prize; 2. That it was a running ship: both of which facts, though material, were concealed. The Court of Session first dismissed the action: They afterwards altered that judgment, as the policy itself shewed that the case of a running ship was included.

The case having been appealed to the House of Lords, it was there held, that a policy of this sort, though it comprehended the case of a running ship, contemplated that as a case of chance, the risk being taken altogether, with the chance of the vessel sailing with convoy; whereas here the alternative was entirely cut off, which made a different sort of risk. The judgment was reversed. 4. Dow's Rep. 97.

[2] HENDERSON and SELLAR against Sir W. FETTES, 20th February 1812; Fac. Coll. 518.; 1. Dow's Rep. 324.

[3] BAIN against KIPPEN, 20th November 1783; Fac. Coll. 200. (7087.)

[4] KIRBY *v.* SMITH, 1818; 1. Barn. and Ald. 672. Here Kirby, the owner of the Ocean, insured her from Elsineur to Hull. On 26th July, about six hours after the Ocean sailed, Kirby himself left Elsineur in another ship; and on his arrival (9th August) at Hull, finding the Ocean not arrived, he insured, disclosing nothing of the arrival of the other ship, or of her having sailed after the Ocean. The average voyage is from eight to ten days, though some ships make it in four or five days. The jury found a verdict for the insured. But a new trial was granted, on the ground of the concealment of a material fact. Lord Ellenborough said, that 'the fact of the Ocean having sailed six hours before 'the other ship, might have been very material, and 'might have induced the underwriter to pause before 'he took the risk.' He was therefore of opinion, that it ought to have been communicated to the underwriters. Mr Justice Bayley held, that the ship having been represented as well at Elsineur on 26th July, from whence the natural conclusion was that she was left there on that day, contrary to the fact, this was a misrepresentation not to be got the better of by the custom that ships do not stay at Elsineur; for this depends on their state and on the weather. Lord Chief-Justice Abbot held also that the concealment was material.

See LYNCH *v.* HAMILTON, 3. Taunt. 37.

[5] See Marshall, p. 466. Park, 287.

STEWART against DUNLOP, 8th April 1785. The ship Peggy, belonging to Stewart, was captured. Another ship, the Henrietta, arrived in Greenock with intelligence of the capture. Mr Boog, who came in that ship, having met an intimate friend of Stewart, the owner, asked him, in a very particular way, whether he knew of any insurance done upon the Peggy? This person immediately had a conversation with Stewart's clerk, who, after this conversation, was desired by his master to get an insurance effected, although it did not distinctly appear that he reported the conversation to Stewart. The Court of Session held the insurance bad, and the House of Lords affirmed that sentence.

KINLOCH against CAMPBELL, 14th June 1815; Fac. Coll. 421. Here the vessel sailed from London for Dundee, 25th February 1810. Another sailed the same day, and arrived 6th March. And another sailed 2d March, and arrived the 7th; by which last ship information was brought that the master of the Rose of Dundee had, off the Nore, reported that the Kinloch was spoken with on the 28th of February north of Yarmouth. The Kinloch was a schooner-rigged ship; and on 6th March it was stated in the Edinburgh newspaper, that a French privateer had, on 2d March, taken a schooner off the Tees. Three days after this information arrived at Dundee, an insurance was effected at Leith on the Kinloch, 'lost or not lost, at and from 'London to Dundee; sailed 25th ultimo from London, 'and no account of her since in any respect in Dundee 'up to 9th instant.' The Kinloch was, in fact, captured by a French privateer on the 2d March, not far from the Tees. The defence was,—1. Concealment; 2. False warranty of there being no accounts. The judgment of the Admiral was, on the whole, in favour

given, according to the circumstances as known at the time it was sent off, if information material to the risk have come to the knowledge of the insured in such time as to enable him to correct his order before the policy is underwritten, the withholding of that information will be fatal to the insurance.[1]

III. Deviation or Alteration.[2]—1. Deviation is a voluntary departure, without necessity, from the stipulated or usual course of the voyage. Strictly speaking, deviation takes place during the actual sailing of the ship; and is an alteration of the risk, discharging the subsequent responsibility of the insurers, without requiring any return of premium. Of this doctrine there never has been any doubt. The only points of difficulty are, What shall be held a deviation? and what degree of necessity shall excuse it? And, 1. It is not the less a deviation that the insured were not privy to it.[3] 2. The mere intention to deviate, or an engagement so to do, or instructions to that effect to the master, will not discharge the underwriters if the ship is previously lost, or never has deviated.[4] 3. The deviation actually committed destroys the responsibility, although the ship has returned to her course without any apparent injury or increase of risk. It is not the increase of risk, but the substitution of another risk, that determines the contract.[5] 4. Where the ship

of the insured; but the Court of Session reversed this judgment, to the effect of denying action upon the policy. There was a difference of opinion on the Bench; Lord Meadowbank holding that there was nothing here concealed, either with regard to the description of the ship, or the arrival of the other vessel, so as to make her a missing ship, of which the underwriters ought not to have been apprized. But the other Judges held, that, upon the whole, there was here a combination of circumstances kept out of view, which, if disclosed, would have altered the risk.

See also Murison against Gibbon, 18th January 1811; Fac. Coll. 148.; and Allan against Young, Ross, Richardson and Company, 24th June 1803; Fac. Coll. 248. Bowker and Company against Smith, 9th February 1810; Fac. Coll. 571.

[1] Grieve against Young, 1782; 3. Dict. 327. Here Grieve, of Eyemouth, wrote for an insurance on the Jean, which sailed that afternoon for Alloa. After having sent off the letter, the ship was on the same evening driven back by a storm, and sank about eight next morning, in sight of Grieve himself. The letter ordering the insurance was sent to a post-town, at which it was to be taken up at ten next morning by the London post for Edinburgh, where it arrived at six o'clock in the evening. The Judge-Admiral found it incumbent on Grieve to have sent an express, in order to stop the insurance; and therefore dismissed the action. This judgment was brought before the Court of Session, who held, that it was not necessary to send an express to Edinburgh; but that, there being time to countermand the insurance by the ordinary course of post, this ought to have been done; and on this ground they affirmed the Admiral's judgment.

Scougal against Young, 18th May 1798; Fac. Coll. 166. Scougal wrote on 30th October 1792 to Leith, directing a cargo to be insured from St Petersburgh to Leith. On 2d November part of the cargo was damaged; and of this information might have been sent that evening, so as to go by the very next mail to that which carried the order to insure. Scougal did not write by that post. The mails of 30th October and 2d November arrived at the same time, so that the information which ought to have been transmitted on the 2d would have corrected the order. He brought an action for the loss. But the Judge-Admiral dismissed it; and the Court of Session affirmed the judgment.

[2] See Marshall, p. 177—206.

[3] Steevens and Company against Douglas, 20th December 1774; 3. Dict. 328. Insurance from Belfast to Greenock and Port-Glasgow. *Defence*,—Goods taken in to be delivered at Stranraer, and, after deviation, wrecked near Girvan. *Answer*,—The insured ignorant of the deviation. *Court* held it not necessary to vacate a policy, that the assured should be accessary to the deviation; but enough that there was a deviation, or an intention to deviate, partly carried into execution.

This was also a point in the case of Elliot against Wilson. See below, Note [5].

N. B. It is not quite correct to speak of *vacating* the policy by deviation, for it is still a good policy though the responsibility subsequent to the deviation is discharged. See Park, 474. Marshall, 184.

[4] Park, 470. Marshall, 195. Roccus, Not. 20. to be corrected by 2. Emerigon, 56. and Casaregi, Disc. 67. No. 24.

[5] Wilson and Company against Elliot, 7th March 1776; 3. Dict. 328. An erroneous judgment on this point by the Court of Session was corrected by the House of Lords. A ship was insured from 'Carron 'to Hull, with liberty to call at Leith.' The liberty had commonly been more extensive, 'to call as usual,' which included all the ports in the Firth of Forth. The

has liberty to call at a port not named, but generally described as a port in a particular coast or country, it is a deviation if the ship go to such a port out of her usual course.[1] 5. Where the deviation is unavoidable, or necessary for the safety of the ship or cargo, or even of a part of the cargo, it will not discharge the underwriters from their responsibility,[2] provided it be pursued in the shortest and most expeditious course: But there must be no deviation from such necessary voyage.[3] 6. The onus probandi lies on the insurer alleging deviation.[4] See in Marshall a very ample discussion of the grounds on which a deviation may be justified, under the heads of—stress of weather; want of necessary repair; the joining of convoy; the succouring of ships in distress; the avoiding of capture or detention; the sickness of the captain or crew; and mutiny.[5]

2. Alteration of the voyage differs from deviation, in being a complete abandonment of the voyage insured, under a resolution to sail upon another. This properly takes place before the voyage insured begins: And the effect of the abandonment is to void the policy either with or without a return of premium. 1. If the voyage insured be abandoned before the risk have commenced, the policy is void, and, on the one hand, a return of premium may be demanded;[6] while, on the other, no claim can be maintained against the underwriter

Alteration

before risk.

insured, without having been informed by their broker of the alteration, called at Morrison's Haven; and the ship, after returning to her course, was overtaken by a storm, and lost. The Court of Session sustained action against the insurers, 'on the ground, that Morri-'son's Haven was so near, that it could scarcely be 'called a deviation; and that the vessel actually re-'turned into her proper course, where the underwriters 'had, in reality, suffered no detriment.'

In the House of Lords a different view was taken, the House being of opinion, that there was here a wilful deviation; and although ships sailing on the voyage have sometimes been allowed by the terms of a policy underwritten at the same premium, to go into Morrison's Haven, that could not avail him, since no permission was given here: that a wilful deviation from the course of the voyage insured is, in all cases, a determination of the policy, it being immaterial from what cause, or at what place, a subsequent loss happens; for, from the moment of deviation, the underwriters are discharged. ELLIOT *v.* WILSON, 7. Brown's Parl. Cases, 459.

[1] ROBERTSON against LAIRD, 16th November 1790; Fac. Coll. 295. (7099). An insurance was made from Virginia to Rotterdam, *with liberty to call at a port in England.* The owner wrote to the broker, that the ship would probably be ordered to discharge at Hull, instead of proceeding to Rotterdam; and desiring him to get the policy indorsed with such a permission, if agreed to. All the underwriters but one agreed. The ship was cleared for Hull, and in going towards that port, was lost. Laird, the non-concurring underwriter, resisted a claim for the loss. The Judge-Admiral decided against Laird. The Court of Session held him liable, on the ground, 'that the expression in the 'policy should be construed to mean any port in Eng-'land, at the discretion of the insured, or of the ship-'master, which would not occasion an unreasonable 'deviation from the plan of the voyage;' and therefore they refused the bill of suspension.

On an appeal to the House of Lords this judgment was reversed, and the case remitted for discussion. 20th April 1791.

The cause was discussed before Lord Justice Clerk M'Queen, who held, 'that a voyage insured from Vir-'ginia to Rotterdam, with liberty to call at a port in 'England, does only entitle the insured to call at such 'ports on the English coast as lie in the track of the 'voyage, but not at a port which is so much out of the 'natural course of the voyage as Hull is;' and therefore he dismissed the action. The Court, in reviewing this judgment, 'held *the voyage to be entirely altered;* 'and therefore, that the policy was *vacated.*' 25th June 1793; Fac. Coll. 142. (7100).

[2] DUNLOP against ALLAN, 24th November 1785; Fac. Coll. 371. (7097). Goods of Dunlop's were insured from Clyde to St Christophers. There were also on board goods belonging to other merchants. St Christophers was found in possession of the enemy, but under a capitulation which did not affect Mr Dunlop's goods, while the others on board would immediately have been seized. The master, therefore, carried the whole to Antigua, intending to take the earliest opportunity of sending Dunlop's to St Christophers; but, in the meanwhile, they were burned in the warehouse. The Judge-Admiral and the Court of Session held the insurance good.

[3] LAVABRE *v.* WILSON, Doug. 290. where Lord Mansfield said,—'It is incumbent on the insured to 'pursue a voyage of necessity directly, and in the 'shortest and most expeditious manner.'

[4] SHEDDAN and Company against LOGAN, GILMORE and Company, 17th July 1787; Fac. Coll. 520. (7098).

[5] Marshall, p. 198—206.

[6] See Park, in his chapter on Return of Premium, p. 562. et seq.

for loss, though happening within a course common to both voyages.[1] 2. The express determination to alter the voyage is conclusive, although it cannot strictly be said that the new voyage is begun. For there is held to be a difference of risk in time, rapidity of preparation, &c. perhaps inscrutable, but still important, attached to the specific voyage determined on.[2] 3. As it is not a deviation where the master is forced by necessity to change his course, neither is it an alteration or abandonment of the voyage insured, that a material change has, by necessity, taken place in the intermediate voyage.[3] And, 4. It is no proof of alteration that, amidst difficult circumstances, the master writes to know what the opinion of the underwriters would be, if a certain course suggested by those difficulties should be followed, and afterwards, at command of the charterers, proceeds.[4]

[1] CUNINGHAM against TASKER, 16th February 1816, and House of Lords, 7th July 1819; 1. Bligh's Cases, 87. Here Cuningham, expecting a ship from Newfoundland at Cadiz, wrote to his agents there to ballast the ship with salt, and freight her to Clyde. The French army having got possession of the salt-pans at Cadiz, this could not be done; and the agent wrote in February that he would send the ship to Liverpool, where they might get salt, which was necessary to be sent to Newfoundland early in spring. On this a policy was effected, at and from Cadiz to port of discharge in St George's Channel, including Clyde. The ship was detained long, and the danger of farther delay, with the retiring of the French from the salt-pans at Cadiz, induced the agents to alter the voyage again, and send the ship direct to Newfoundland. Notice was sent of this, and that the captain had determined to return direct to St John's. The letter conveying this intelligence arrived the same day with another, informing Cuningham that the ship had, while still at Cadiz, been driven on shore in a storm, and burnt by the French. Of the former letter no notice was taken by the insured, who applied to the underwriters for payment of the loss, and received payment accordingly. The action was for restitution of the money thus improperly obtained. In the Court of Admiralty and Court of Session it was held, that there was no abandonment of the voyage insured. In the House of Lords the case was viewed in a different light. The Lord Chancellor Eldon, on occasion of first moving the judgment, intimated his doubts of the judgment pronounced here, and said that he wished to confer with a Judge whose attention had been much occupied with these subjects. Afterwards, on delivering judgment, his Lordship stated these points:—1. That the consent of the owners at home was not necessary, the captain and agent abroad having taken the arrangement on themselves, with sanction of the owners. 2. That although the cargo was still unloaded, and there was nothing to alter the voyage but mere intention, this intention made a difference of risk, in respect to the preparation for the voyage: And, 3. That the letter intimating the *determination* to change, was an abandonment of the voyage; and that in this the highest authority in Westminster Hall concurred with him. So the judgment was reversed.

[2] See the above case. See also LAMBERT *v.* LIDDIARD, 5. Taunt. 480.

[3] DRISCOL *v.* PASSMORE, 1. Bos. and Pull. 200. Here a ship was bound on a voyage from Lisbon to Madeira, from Madeira to Saffi on the African coast, in ballast, and thence back to Lisbon with wheat. An insurance was effected on the previous parts of the voyage. The disputed insurance was on freight from Saffi to Lisbon. This had been effected with difficulty, on account of the distance of time for commencement of the risk; but on a representation of the ship being at Madeira, and about to proceed on her voyage, it was done. At Madeira all the crew deserted but two, on a report of Moorish cruisers off Saffi, and refused to rejoin the ship, unless the master would proceed to Lisbon. Compelled to do this, the charterers insisted on his going thence to Saffi, which he did, and was captured on his return from Saffi to Lisbon. A special jury gave a verdict against the underwriters. But the case being new, it underwent a great deal of discussion in the Court of Common Pleas, when the verdict was held good. The judgment proceeded on three grounds:—1. That this was a voyage from Saffi to Lisbon. 2. That the commencement was speculative, and executory, upon a representation of the intermediate course of the ship. 3. That the representation was true at the time, though the course was altered by subsequent events. And, 4. That the alteration being from necessity, and so justifiable, the voyage insured was not abandoned, but truly entered upon, in the course of which the ship was lost.

MAXWELL against BROWN, 14th May 1822; 1. Shaw, 403.; reversed, 15th June 1824.

[4] DRISCOL *v.* BOVIL, 1. Bos. and Pull. 313. This was an insurance on the round voyage mentioned in the above case, from Lisbon to Madeira, from Madeira to Saffi, from Saffi to Lisbon. The only difference except in the policy was, that, while at Lisbon, the master wrote to the broker that he was waiting the resolution of the charterers, and wishing to know if it would be agreeable to the underwriters that the ship should proceed to complete her voyage. The broker wrote that he thought the policy at an end, and had effected a new one on the voyage from Saffi to Lisbon. The Court approved of a verdict for the insured.

While this sheet is passing through the press, a case has come under my notice, which it may be important to observe as affecting the doctrine of the termination of the voyage; (see supra, p. 606.) It relates to the description of 'a port;' the Court having held a shipping place, not protected by any artificial works, to be a port within the meaning of the term.[1]

CHAPTER V.

OF CONTRACTS OF INSURANCE AGAINST FIRE, AND UPON LIVES.

THE great principles which rule maritime insurance are applicable also to insurances against fire; and on lives; intended to provide against the accidents to which property on shore, or human life, is subject. In the security against those accidents, most important interests in a pecuniary point of view may be involved.

§ 1. INSURANCE AGAINST FIRE.

This is a contract by which, in consideration of a premium, the underwriter undertakes to indemnify the insured against all losses in his house, warehouse, goods, or stock, by means of accidental fire, within a limited period.

This contract, like that of sea insurance, requires a written policy. But circumstances may occur, out of which an engagement may be inferred, sufficient to sustain an action for completing the insurance.[2]

The claims which may be grounded on this contract arise chiefly on the part of the insured against the underwriters; for the premium is commonly paid by advance, the transaction not being managed, as marine insurances, by brokers standing as middlemen between the parties, but directly between the insured and the insurance company or underwriters.

The points of importance to be discussed on occasion of a claim by the insured are, —1. The interest; 2. The nature of the loss insured against; 3. The warranties and representation; and, 4. The adjustment of the loss.

I. INTEREST.—Policies of insurance without interest, which are, in marine insurance, objectionable chiefly as a species of gaming, are, in fire insurance, extremely dangerous, and most anxiously guarded against, as holding out temptation to wilful fire-raising, which necessarily is attended with peril of the most deplorable kind to the whole neighbourhood. At common law, therefore, they are exceptionable; and they are also pro-

[1] SEA INSURANCE COMPANY against GAVIN, 3d March 1827; 5. Shaw and Dunlop, 525.

[2] CHRISTIE against NORTH BRITISH INSURANCE COMPANY, 10th February 1825; 3. Shaw and Dunlop, 519. Here an insurance of a wire-mill was proposed to the Phœnix Insurance Company. They were willing to take half the risk, but uncertain what premium to propose; and, in the meanwhile, a proposal was made to the North British to take the rest of the risk. They consented; and were to be regulated as to the premium by the Phœnix; and the insurance was in the meanwhile to be held as good. No premium was fixed by the Phœnix when the mill was burnt. The Phœnix paid their loss: The North British refused; and the Court of Session held, that there being no premium fixed, there was no contract.

hibited by the general words of the statute of the late King.[1] It is not, however, strictly necessary, in order to constitute an insurable interest, that the insured should hold the absolute property of the effects insured. A creditor may have a policy on the house or goods of his debtor, over which he holds a security: A trustee or agent having the custody of goods for sale on commission, may insure them; provided the nature of the property be distinctly specified, and that all the insurances, taken together, upon the same property, shall not exceed the full value of it.

II. Of the Risks and Losses insured against.—These are all 'losses or damage 'by fire' during the term of the policy, to the houses, buildings, furniture, or merchandise insured.

Fire. 1. There must be actual fire or ignition to entitle the insured to recover; and it is not sufficient that there has been a great and injurious increase of heat, while nothing has taken fire which ought not to be on fire.[2]

Exception. 2. In general, there is in the policy an exception of fire occasioned 'by invasion, 'foreign enemy, or any military or usurped power whatsoever;' and in some there is a farther exception of 'riot, tumult, and civil commotion.' Under these exceptions, it was decided in England,—1. That houses set on fire by a mob assembled riotously on account of the high prices of provisions, were not under the exception of usurped power, which could mean only foreign invasion or internal rebellion, when armies are drawn up against each other; when the laws are silent; and when the firing of towns becomes unavoidable.[3] 2. That under the words 'civil commotion,' such burning of houses as took place in 1780 by the Popish mob is comprehended, so as to free the underwriters.[4]

3. The loss must be a loss within the policy. These policies are on time; and it is commonly provided, that the party applying shall make a deposit for the policy, stamp-duty, and mark, and shall pay the premium to the next quarter-day, and from thence for a year more; that the future payments shall be paid annually, within fifteen days from the day limited in the policy; and that no insurance shall take place till the premiums be actually paid by the insured or his agent. These conditions are expressed in the proposals, (which are held to make part of the contract); while, in the policy, the day at which the insurance begins, and the day to which it is to continue, are set down, and so from year to year, so long as the insured shall duly pay, and the insurers shall accept the premium. It would seem,—1. That the insurance commences from the moment of depositing in terms of the articles. 2. That there would be no insurance, though an application had been made and agreed to, unless the stipulated deposit had been made.[5] 3. That the being allowed credit with the agent of the insurance company, who, again,

[1] 14. Geo. III. c. 48. by which, 1. No policy of insurance is valid, where the person for whose use it is made has no interest in the event; 2. No policy shall be valid, without inserting the name of the insured; and, 3. No greater sum shall be recovered than the amount of the interest of the insured.

[2] Austin v. Drewe, 1816; 4. Camp. 360. Here a sugarhouse was insured, in which, for the purposes of the manufacture, heat was communicated to each of the several storeys, eight in number, by a chimney, forming nearly one side of the house, at the top of which there was a register. The neglect to open this register, on one occasion, caused an excessive heat, which blackened the walls, but did no damage, except by injuring the sugar in different states of preparation. Lord Chief-Justice Gibbs directed a verdict for the defendant, which the jury, with great reluctance, found.

On a motion for a new trial, the Chief-Justice said, the damage was occasioned by the unskilful management of the machinery, and not by any of those accidents from which the defendants intended to indemnify the plaintiffs; and Lord Chief-Justice Dallas said, there was nothing on fire which ought not to have been on fire; and the loss was occasioned by carelessness of the plaintiffs. 2. Marsh. 130.

[3] Drinkwater v. The London Assurance, 2. Wils. 363. Park, 654. Marshall, 792.

[4] Langdale v. Masson, Park, 657. Marshall, 793.

[5] See above, p. 625. Christie's case, Note [2].

in his relation to the company, debits himself with the premium as if received, would be equivalent to payment of the premium, so as to make the insurance effectual. 4. That the policy remains in force during the fifteen days. But, 5. That if the fifteen days be allowed to expire without a renewal of the term, by payment of the premium, the insurers will not be liable.[1]

Articles removed.

4. The insurers are liable, not only for loss by burning, but for all damage and injury, and reasonable charges attending the removal of articles, though never touched by the fire.

Loss of Rent.

5. It is a more difficult question, whether the insurers are liable for the loss of rent, by the destruction of a house tenanted at a rent payable to the insured? or for the rent necessary to be paid for a dwelling-house to supply the place of that of which the fire has deprived the insured? I insure my house and furniture, for example, at L.2000, and perhaps no more than L.1500 has been lost by physical destruction: But I must pay L.100 for a house to live in until my house is repaired; and this is as manifestly a loss occasioned by the fire as the destruction of my furniture: Am I entitled then, in estimating my loss, to add to the L.1500 the rent of an intermediate residence? Or my house is let to a tenant who pays me L.100 of rent; am I entitled to reckon the loss of rent as a part of the amount of my claim? There seems to be reason for including these articles in either case; either by estimating the subject lost, as a subject bearing a certain rent to the insurer; or by setting a substantive value on the rent as lost.

Defence of Warranty and Representation.

III. Warranty and Representation.—It was in a case of insurance against fire that the doctrine of warranties, as contradistinguished from representation, was laid down in the House of Lords, as already referred to.[2] A warranty is part of the contract, and if not true, whether material or not, there is no insurance: a representation must be complied with, if material; if immaterial, that may be inquired into and shewn.

1. *Warranty.*—The description of different classes of property according to the risk, as contained in the proposals, form the subject of an implied warranty on the part of the insured. Where the property is given up as corresponding with the description of a particular class of property, and it truly does not so correspond, the policy is void.[3]

2. *Representation.*—In this, as in every case of insurance, there must be the most perfect fairness in disclosing every circumstance material to the risk: And even the reasonable grounds of apprehension on the part of the insured must be stated.[4]

IV. Of Settling and Adjusting Losses.—The loss by fire is scarcely ever a total loss, and the valuation in the policy is rather the fixing of a maximum, beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value to be

[1] Tarleton *v.* Staniforth, 5. Term. Rep. 695. Affirmed in Exchequer Chamber, 1. Bos. and Pull. 470. See also Selwin *v.* James, 6. East, 571.

[2] See above, p. 616.

[3] Newcastle Fire Insurance Company against MacMorran and Company, July 1815, House of Lords; 3. Dow, 255. See above, p. 616.

[4] Bufe *v.* Turner, 1815; 6. Taunt. 338. Here the plaintiff, applying for insurance, had two warehouses at Heligoland, one of them separated by another building from a boat-builder's workshop, in which fire broke out at seven in the evening of 11th July. The fire was apparently extinguished almost immediately; but, for precaution, the plaintiff, who was a magistrate, had a watch set all night. In the evening, after the fire was thought to be extinguished, the plaintiff wrote to London for a three months' insurance of L.400 on the warehouse near the boat-builder's, and L.3500 on coffee lodged there. The mail was shut; but the master of the packet took the letter to Cuxhaven, and there put it into the post-office. The insurance was effected, without any disclosure of what had happened. Early in the morning of the 13th, (the second day after), a fire again broke out in the boat-builder's. The case was tried at Guildhall, before Lord Chief-Justice Gibbs, when the jury, acquitting the plaintiff of fraud or dishonest design, held, that the circumstance of the fire on the 11th ought to have been communicated to the underwriters, who, without this information, did not engage on fair grounds with the plaintiff: and, accordingly, they gave verdict for the defendant; and the Court of Common Pleas refused a rule for a new trial.

replaced. On the occasion of every fire, accordingly, there is an inquiry into the amount of the loss, the insured being bound to give the most satisfactory proofs they can be expected to possess, of the true amount of the injury. By the printed proposals he is generally required,—1. To give immediate notice of the fire. 2. To deliver in as particular an account of his loss as the case will admit, and to make proof thereof by his oath or affirmation, by books of accounts, and such vouchers as remain. 3. To produce a certificate by ministers and church-wardens, and other respectable persons, of the character and circumstances of the sufferer, and their belief that the damage stated has been suffered by him. These precautions are all good and expedient; and it is a matter in which the public is very materially interested, to repress the temptation to this most dangerous sort of fraud. But, at the same time, it does not seem to be law in Scotland, that these are all absolute conditions precedent to the recovery of a loss by fire, so as to have the effect of enabling persons hostilely disposed towards the insured to extinguish his claim for loss. Some ministers or elders might be unwilling, for a violent Dissenter or a Jew, to give testimony to character; or to swear to their credibility respecting a matter of which personally they can know nothing. That the want of those compurgators will raise an unfavourable presumption against the insured is true; so as to require stronger proofs than might otherwise have been sufficient: And this is a legitimate extent to which to carry the condition. But it will at least require exceedingly strong words to make the want of the certificate a discharge of the claim,[1] or to entitle one who has the premium in his pocket to refuse to pay a loss which has fairly taken place.

In a total loss in marine policies, we have seen that there is an abandonment of what may chance to be saved.[2] In a loss by fire, the settlement is always on the principle of a particular average. Evidence is to be given of the amount of the loss in this case, as well as in a case of partial loss; and the amount of that loss, as nearly as it can be ascertained, is to be paid, without abandonment of what may have been saved from the fire. Thus, a house is entirely burnt down, and nothing left but the materials of the walls, and the area on which it stood; or, if it be a house of one floor, in a large tenement, nothing is left but the mere right of building a storey in any tenement to be erected on the site of that which is burnt. These do not belong to the insurer, nor is the insured bound to abandon them. The loss is estimated on the destructible parts; or the whole value of the house, as it would have sold in the market, is taken, deducting the value of the area, or of the jus quæsitum to a share in the building of a new tenement.

The loss is generally settled by arbitration, and a clause of reference is inserted in many policies. If such reference is carried into effect, the referees will proceed, on such evidence as may be laid before them, to settle the loss; including, as it would seem, such loss as directly arises from the fire, although not occasioned by the touch of fire; reckoning, for example, the loss of rents, either by estimating the destruction of the house, as the loss of a subject bearing a certain rent, or adding substantively the rent forfeited as an article of loss.[3]

[1] Yet it was so held at law, in OLDHAM *v.* BEWICK, 2. H. Black. 577. Note, where it was said, the minister of the parish resided out of the parish, and was wholly unacquainted with the character and circumstances of the insured.

Again, the same judgment was given in ROUTLEDGE *v.* BURREL, 1. H. Black. 254.

And, lastly, in a very strong case, where the minister and churchwardens improperly refused to sign the certificate, this point has been held as settled. WOOD *v.* WORSLEY, 2. H. Black. 574. 6. Term. Rep. 710. It may be observed, that the opinions of Lord Loughborough, Mr Justice Buller, and Mr Justice Rooke, were against the judgment. Lord Kenyon, and Heath, Ashhurst, Grose, and Lawrence, Justices, were in support of it.

[2] See above, p. 607.

[3] See above, p. 627.

The subject may be insured in several offices. This must be stated by indorsement on the policy, and, in case of loss, the offices pay proportionally.

Assignment of Fire Policies.

Policies of sea insurance are assignable; but the peculiarity of a fire insurance, the temptations to fraud, the reliance in some degree on the character of the insured, infuse something more of the nature of delectus personæ into this contract. In England, by the rule of the common law, strengthened by this sort of consideration, a policy of fire insurance is not assignable; and where, by the terms of the contract, it is made transferable under certain conditions, or with certain formalities, these must be strictly complied with.[1] In equity, such a policy is assignable, provided the subject-matter of the insurance be also assigned.[2]

In Scotland, every pecuniary obligation is assignable; and there is scarcely such a peculiarity in this contract of insurance against fire, as to deny to an assignee the benefit of the policy, unless by the terms of the policy, or of the proposals, (which are a part of the contract), the power of assignment is put under particular restraints. In the city of Edinburgh there was erected, about a century ago, a company for friendly insurance against fire, consisting of a number of private contributors, who agreed to insure each other. The insurance was not personal, like the modern fire insurance, but the interest, and stock, and benefit, were inseparably annexed to the houses insured as long as the contribution was continued. This sort of insurance, and the right to the share in the society, is transferred with the house; and the value of the stock at last rose so high, that it has long made a considerable addition to the right of property, and as such is paid for in bargains and sales.

On bankruptcy, there can be no doubt that the creditors will be entitled to the full benefit of the policy, provided the premium has been duly paid up.

§ 2. INSURANCE ON LIFE.

The uses of a life insurance are various. They are frequently made a part of the creditors' security in loans of money; but the usual purpose is to provide a fund for creditors, or for a family, in case of death. By this contract, the insurer, for a certain premium paid in gross, or periodically, undertakes to pay a certain sum, or an annuity, upon the death of a person whose life is to be insured.

The important points are,—1. The interest; 2. The warranty; 3. The risks; and, 4. The settling of the loss.

Interest.

1. INTEREST.—A man may not only insure his own life, for the benefit of heirs or creditors, and assign the benefit of this insurance to others having thus or otherwise an interest in his life; but he may insure the life of another, in which he may be interested. By statute, no insurance on lives can be made without an interest in the life;[3] and the sum to be recovered is restrained to the amount or value of the interest. A creditor has an insurable interest in his debtor's life, not if the debt be a gaming debt,[4] but if it be a fair and legitimate debt.[5]

It has been said, that where a creditor has opened a policy on his debtor's life, the interest appears to vanish in proportion to the collateral securities by which the debt may

[1] LYNCH *v.* DALZELL, 3. Brown's Parliamentary Cases, 497. SADDLERS COMPANY *v.* BADCOCK, 2. Atk. 554.

[2] See Marshall, p. 800.

[3] 14. Geo. III. c. 48. § 1, 2, 3.

[4] DWYER *v.* EDIE, Park, 639. Marshall, 778.

[5] ANDERSON *v.* EDIE, Park, 640. Marshall, 776.

be fortified.[1] This seems very questionable. So long as a creditor has not received payment, he is entitled to hold by all his securities, each as covering the whole debt; and where an insurance forms one of those securities, he is interested to the extent of the whole debt, although he may have the means of obtaining payment by following another course of proceeding, and taking his remedy upon another security. The case which Mr Serjeant Marshall has quoted as an exemplification and proof of his doctrine, does not appear to go so far; and to be more correctly stated by Mr Justice Park, as establishing only, 'that after the death of the debtor, if his executors pay the debt, the creditor 'cannot afterwards recover upon the policy, although the debtor died insolvent, and the 'executors were furnished with the means of payment from another quarter than the 'estate of their testator.'[2] In that case, the interest had, indeed, expired by the extinction of the debt;[3] but while the debt subsists, no plea of want of interest seems pleadable; otherwise, in every case, there would be an inquiry into the amount and value of the collateral securities, or even of the dividend to be drawn from the estate of the debtor.

Assignation of Policy.

There seems never to have been any doubt that this sort of policy is assignable; and, indeed, without such power, the insurance on lives would lose half its usefulness. Where the debtor himself has opened a policy on his life, and assigned it in security, there can be no ground for pleading the extinction of the policy by the payment of the debt: For the benefit of the insurance belongs to him whose life is insured, after the burden of the security is extinguished; and he may make it the means of credit on another occasion, or dispose of it by settlement or otherwise. Insurances of this sort, differently from all other insurance, become more valuable the longer they subsist; because the life is running out, and the premium of a new insurance would, of course, be higher. The reversionary right of the policy, after it has served its purpose as a security, is therefore valuable.[4]

[1] Marshall, 777.

[2] Park, 641.

[3] GODSALL *v.* BOLDERO, 9. East, 72. This was an action by the coachmaker of the late Mr Pitt, who, in security of a debt of L.500 due by him, held a policy of insurance on his life. The material plea in defence was, that after Mr Pitt's death, and before the exhibiting of the plaintiff's bill, the debt due to the plaintiffs was paid to them by the executors of Mr Pitt's will. On the trial it appeared, that Mr Pitt died insolvent; and that the debt was afterwards paid out of the money allowed by Parliament for payment of his debts. Lord Ellenborough delivered the judgment of the Court:—'This was an action of debt on a policy 'of insurance on the life of the late Mr Pitt, effected 'by the plaintiffs, who were creditors of Mr Pitt for 'the sum of L.500. The defendants were directors of 'the Pelican Life Insurance Company, with whom 'that insurance was effected.' (His Lordship, after stating the pleadings and the case, proceeded),—'This assurance, as every other to which the law gives 'effect, (with the exceptions only contained in the 'second and third sections of the statute 19. Geo. II. 'c. 37.), is in its nature a contract of *indemnity*, as 'distinguished from a contract by way of *gaming* or '*wagering*. The interest which the plaintiffs had in 'the life of Mr Pitt, was that of creditors, and the probability of loss which resulted from his death. The 'event, against which the indemnity was sought by this 'assurance, was substantially the expected consequence 'of his death, as affecting the interest of these individuals 'assured, in the loss of their debt. This action is in 'point of law founded on a supposed damnification of 'the plaintiff, occasioned by his death, existing, and 'continuing to exist at the time of the action brought: 'and being so founded, it follows of course, that if, 'before the action was brought, the damage, which 'was at first supposed likely to result to the creditors 'from the death of Mr Pitt, were wholly obviated and 'prevented by the payment of his debt to them, the 'foundation of any action on their part, on the ground 'of such insurance, fails. And it is no objection to 'this answer, that the fund out of which their debt was 'paid, did not (as was the case in the present instance) 'originally belong to the executors, as part of the 'assets of the deceased; for though it were derived '*aliunde*, the debt of the testator was equally satisfied 'by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord Mansfield in Hamilton 'v. Mendes, 2. Burr. 1210. Upon this ground, therefore, that the plaintiffs had in this case no subsisting 'cause of action in point of law, in respect of their 'contract, regarding it as a contract of indemnity at 'the time of the action brought, we are of opinion, that 'a verdict must be entered for the defendants on the 'first and third pleas, notwithstanding the finding in 'favour of the plaintiffs on the second plea.'

[4] See above, p. 108.

The assignment in sequestration, or under a commission of bankruptcy, carries a policy of life insurance; and if the debtor has secretly disposed of it after his bankruptcy, the person to whom it has been assigned will be bound to return any money drawn under it for the use of the creditors.[1] Assignation by Bankruptcy.

In assigning a policy for the benefit of wife or children, the policy itself is comparatively nothing towards their security, without continued and regular payment of the premium. While the insured continues solvent, the premiums may lawfully be paid by him; but the benefit of the policy may be affected materially by insolvency, since the premiums paid by him subsequently may be held as alienations to the prejudice of creditors.

2. Warranty.—The insured is bound, as by a warranty, to the truth of the representation of the age and state of health contained in the declaration made previous to the policy being issued; which is always referred to in the policy, and which is to be taken as a part of it. In this declaration it is stated, that he whose life is to be insured, 'has 'no disorder tending to the shortening of life;' but this does not imply that he is free from all complaints, provided he be in a reasonably good state of health, in so far as belongs to the calculation of his probable existence, so that his life is fairly insurable on the common terms.[2] Nor does it seem to be sufficient evidence of the tendency of the disorder to shorten life, that the person had it at a former period, and afterwards died of it, if free from disease at the time of insuring.[3] Warranty.

3. The Risk.—In almost every life policy there are several exceptions, some of them applicable to all cases; others to the case of insurance of one's own life. The exceptions are,—1. Death abroad or at sea. 2. Entering into naval or military service without the previous consent of the company. 3. Death by suicide. 4. Death by duelling. 5. Death by the hand of justice. The three last are not understood to be excepted where the insurance is on another's life. Risk.

4. Adjustment.—This is always a total loss, and the full sum insured must be paid.

CHAPTER VI.

OF CLAIMS BY WIVES AND CHILDREN.

Of all the claims which arise on occasion of bankruptcy, those of the wife and children are the most distressing. Not only where those provisions are left to the disposition of the law, but even where the most anxious solicitude has been shewn, by special contract,

[1] Schondler *v.* Wace, 1. Camp. 487. Here the bankrupt held a policy on his own life, which, after bankruptcy, he sold to Wace for a lottery ticket. He died, and Wace received the sum insured. The assignees under the commission brought an action for money had and received; and Lord Ellenborough told the jury, that this was a possibility of benefit to which the assignees were entitled, as part of the effects of the bankrupt: the defendant having a right, however, to deduct so much as the plaintiffs must have laid out in the payment of arrears, &c. had the policy been regularly delivered up by the bankrupt. Verdict accordingly.

[2] Ross *v.* Bradshaw, 1. Black. 312. Sir James Ross had been wounded in the loins, which occasioned a partial palsy, and this was not mentioned. He died of a malignant fever. Medical men swore that his wound could have no sort of connexion with his death; and that his wound, and its consequences, could have no effect in shortening life. Under the direction of Lord Mansfield, a verdict was given against the insurers.

Willis *v.* Poole, Park, 650.; Marsh. 771.; where the same judgment was given in a case of spasms and cramps.

[3] Watson *v.* Mainwaring, 4. Taunt. 763. The complaint here was in the bowels. The jury found it neither organic nor excessive, and gave verdict for the insured.

to protect the wife and children from the extravagance of the husband and father, or from the risks of his trade, the law frequently refuses to recognize the claim of those persons, even so far as to acknowledge them as creditors. It is therefore an interesting inquiry, what are the circumstances under which a wife or children may claim in bankruptcy? In this inquiry, after a short introductory view of the legal rights of wives and children, it may be proper to consider,—1. How far wives or children are entitled, on the ground of those legal provisions, to claim as creditors. 2. The claims of wives and children under special contract and obligation.

MARRIAGE has in contemplation the rights of three several parties—the husband, the wife, and the children; and the first effect of it is to raise a community in all things of present use, which are formed into a common fund, under the husband's administration, for the use of the family during the marriage, and for rateable division on its dissolution. The husband's right of administration is so uncontrolled, that he may be called not improperly the dominus or proprietor of this common fund, while the marriage subsists. His acquisitions augment the fund, his debts diminish it; and the benefit which the wife and children derive from the one operation, is counterbalanced by what they suffer from the other. The communio bonorum comprehends moveables; bonds personal in particular circumstances; and, generally, the whole personal estate, with two exceptions:—*First*, Of such effects as have been given to the wife, expressly excluding the jus mariti; and, *Secondly*, Of paraphernalia, in regard to which the jus mariti is by implication excluded.

The respective shares of the common stock contributed by the husband and wife return, on the dissolution of the marriage, to them or their representatives, if the marriage has been dissolved within year and day, and without a living child.[1]

If the marriage have subsisted during year and day, or if a living child have been produced, the common fund, from whatever source derived, is divided into two or into three shares, as children exist or not at the dissolution of the marriage.

The JUS RELICTÆ is the wife's share of the goods in communion. Besides the paraphernalia, and such effects or monies as may be secured exclusively to the wife, this right extends to half of the common stock, if there be no children alive at the dissolution of the marriage; to one-third, if there be children. To this share the wife is entitled, although she should also have a conventional provision from her husband, provided she has not, in accepting such provision, bound herself to renounce her legal provision.[2]

The LEGITIM is the share which belongs to the children of the father's free moveable estate at his death; and so, although the father cannot by will divest the children of this right, in which they are quasi creditors; yet they have not a jus crediti to the effect of standing in competition with the debts of their father, which must be paid before the legitim is demandable.

The nature of the interest which the wife and children hold by operation of law in the common fund, is such, that this fund is chargeable with all the debts of the husband and father, and that both the present subsistence and the future provision of the wife and children are to come out of the fund, only after the debts are paid.

The heritable estates of the parties are respectively subject to a legal liferent for the survivor; which has already been considered.[3]

[1] 1. Stair, 4. 19. 1. Ersk. 6. 38, 39.

[2] 3. Ersk. 6. 16. RIDDELL against DALTON, 28th November 1781. TOD against WEMYSS, 12th December 1770.

[3] See above, p. 57. et seq.

SECTION I.

CLAIMS BY WIFE OR CHILDREN WHERE THERE IS NO SPECIAL CONTRACT.

THERE are two situations to be distinguished: One where the marriage has been dissolved within year and day without issue; another, where the connexion has been more permanent, or has produced children. This is a distinction which it is not very easy to justify. It seems to be peculiar to Scotland: But it has been established by long usage; and although the Court has refused to extend the principle to questions not already settled,[1] the distinction, to a certain extent, is now unquestionable.

§ 1. OF MARRIAGE DISSOLVING WITHIN YEAR AND DAY WITHOUT ISSUE.

Return of Tocher within year and day.

When it happens that the marriage has been dissolved within year and day, and without a living child, the relationship is not, by the law, regarded as of a character so permanent, that the terce or courtesy, the jus relictæ, or the jus mariti, are to have effect. All things return, in this event, as much as possible to their former state. The wife can claim neither terce nor jus relictæ. The husband yields up the possession of his wife's heritage; and is bound to restore to the representatives of the wife (and his estate, on his death or insolvency, will be liable to the claim) the tocher, and all the wife's moveable funds, which he has received on occasion of the marriage, whether by the mere operation of law, or by convention and marriage contract.[2] The general rule, even as to conventional provisions, is, that they become void on the dissolution of the marriage within the year, and without issue. But, 1. It may be effectually stipulated otherwise: 2. It is a quæstio voluntatis, whether such be truly the intention of the parties.[3]

But, in particular cases, the husband, or his estate, will, in accounting to the wife or her representatives, be entitled to deductions:—1. What has bona fide been consumed of the wife's moveable estate, will be allowed to the husband or his estate.[4] Yet it is not easy to conceive a practical example of this, if it be true that there is no deduction given for sums by which the tocher has been diminished for the wife's maintenance during the marriage.[5] 2. Deduction will be allowed of the expense of the wife's marriage clothes, or other debts of hers before marriage, paid by the husband; and of her funeral.[6]

On the other hand, the wife is entitled to claim the expense of mournings on her husband's death, as being one of the husband's family,[7] to whom, in decent respect, mournings should be furnished: and this holds not only where the husband dies solvent,

[1] LOWTHER against M'LAIN, 15th December 1786; Fac. Coll. 456. (435.); 2. Hailes, 1012. M'Lain of Lochbuy died within a year after his marriage with Miss Lowther, and without issue. There was no tocher, and no marriage contract. She claimed neither terce nor jus relictæ, but aliment against her husband's heir, a distant relation. The Court refused to extend the principle of the customary rule to a case not already subjected to it, and sustained the claim of aliment.

[2] 1. Stair, 4. § 21.

[3] HUNTER against BROWN, 5th August 1776; Fac. Coll. 270. (16,641.); 1. Hailes, 120. This was a settlement on a betrothed wife, and regarded on the whole as a quæstio voluntatis, in which the manifest intention was, that the deed should be effectual at all events.

[4] 1. Ersk. 6. § 39. Dirleton and Stewart, *voce* Jus Mariti.

[5] Ersk. ut supra.

[6] GORDON against INGLIS, 23d February 1681; 2. Stair's Dec. 867. (5924).

[7] GORDON against STEWART, 19th February 1743; Kilk. 258. (M. 6161).

but also against his creditors: For although there is in the Dictionary a short note of a case finding a claim for widow's mournings not good against the husband's creditors;[1] and Mr Erskine lays it down, that none of these articles can be claimed, if the husband have not left a fund sufficient for payment of his onerous debts; this doctrine was afterwards denied, and widow's mournings not only admitted, but held a privileged debt upon the funds of the deceased husband, in a competition with creditors.[2]

§ 2. OF MARRIAGE SUBSISTING FOR A YEAR, OR PRODUCTIVE OF A LIVING CHILD.

In this case, the law considers the connexion as having taken full effect on the status and rights of the parties. In that situation it is held, that in respect of their rights at law, (independently of marriage contract, or special contract of separation), a man's wife and children have no title to claim in competition with his creditors; that they follow his fortunes during his life, and are entitled to partake only of that fund of subsistence which his debts may have left him; and, after his death, they can demand no more than a share of what remains after satisfying his creditors.

1. As to the interest of the WIFE, it is held,—1. That, during the husband's life, she can make no claim in bankruptcy for an aliment, independently of special contract.[3] The common fund under the husband's administration being insolvent, the wife, as a partner, can claim nothing till the creditors be paid; and even where the wife has a land estate, the rents of which are taken by the husband's jus mariti as part of the goods in communion, the wife's aliment is not a burden on that common fund, to the effect of entitling her to claim exemption from the diligence of his creditors for any part of the rents of her own estate.[4] 2. That if the marriage should be dissolved by the death of the husband, or by divorce, after insolvency, the wife can no more claim her jus relictæ, than she can, in the case of his survivance, claim an aliment. In both cases, her share of the goods in communion has perished. 3. That if the husband, while solvent, shall be divorced for adultery, such dissolution of the marriage gives the wife a right to demand back her tocher; to insist for her conventional provisions, or for her jus relictæ; and to enjoy her terce, or locality, or jointure.[5] For these claims she will be entitled, on his subsequent insolvency, to rank with other creditors. On the other hand, by dissolution of the marriage in consequence of the divorce of the wife, the husband, and of course his heirs, will be entitled to retain the tocher, and the wife's share of the goods in communion, and to enjoy the benefit of the courtesy. But it may be observed, in the *first* place, That the divorce being the dissolution of the society, no right afterwards arising to the guilty party can be claimed by the innocent.[6] *Secondly*, That it may thus happen that a guilty husband, or his creditors, may be benefited by a share of moveable funds, which ought to belong solely to the innocent wife; and yet there seems no means of escaping from this unhappy consequence. And, *thirdly*, That the creditors of the husband may be exposed to injury by collusive proceedings for divorce, with a view of conferring on the wife,

[1] NEILSON, 21st November 1776; 3. Dict. 289. 6165.

[2] SHEDDAN against GIBSON, 15th May 1802; 13. Fac. Coll. 79. (11,855). In this case the marriage had subsisted beyond year and day; but that does not seem to be of importance to the question; the claim for mournings to the widow standing on the same footing, whether the marriage has subsisted for a year, or during a shorter period.

[3] See below, for the Effect of a Separation, p. 643.

[4] See above, the cases of TURNBULL; ROBB; and LISK, p. 129.

[5] 1. Ersk. 6. § 46.

[6] EARL of ELGIN against NISBET, 26th January 1827; 5. Shaw and Dunlop, 243.

during the husband's life, what she otherwise could not have insisted in against the creditors of her husband.[1] 4. That if the wife should die during the husband's solvency, her representatives, whether her children or others, will have a jus crediti, which, on his future insolvency, will entitle them to compete with his other creditors for her share in the common fund extant at her death. This stands altogether on another footing from that on which the legal claims of the existing widow and children rest. From the moment of the wife's death, the husband is a proper debtor for her share; it remains with him as debtor; so that, though not claimed by the children, or representatives of the wife, it will, on the husband becoming afterwards insolvent, entitle them to a dividend on its amount.

2. As to the interest of CHILDREN, they have no right whatever to claim as creditors of their father, on account of the legitim. This, at all events, is a provision which does not open till their father's death; and he has it fully in his power, in the meanwhile, to disappoint their spes successionis, the contraction of debt being a legitimate diminution of the fund of which the legitim forms a share. But even where he has died, and left effects to be the subject of competition among his creditors, his children are not entitled to claim. They may claim as creditors, in the case already observed, where their mother has died during the father's solvency, and left them her heirs; for, in her place, they are proper creditors of their father: But their legitim is not a jus crediti; it is nothing more than a right to share in the free fund left by the father. They cannot compete with creditors for their legitim.

In some degree, upon the same distinction, depends the difference between the claim for aliment of a lawful child, and that of an illegitimate one. The mother of a lawful child can claim nothing for its aliment; for they have both combined their fortunes with the bankrupt. But, in the case of an illegitimate child, there is a direct obligation on the part of the father towards the mother, to contribute to the support of their child. The mother must otherwise, from her own funds or earnings, maintain the fruit of their illicit intercourse, while she has not, by marriage, united her fortunes with those of the father of her child. It may be said, that the same principle might entitle the mother of a legitimate child, who, out of her own peculium, has supported that child, to claim the aliment from the husband's estate. But the difference is this, that there is no contract or obligation, as in the other case, that the father shall relieve the mother of this spontaneous or charitable aliment; and that, where she maintains the child, she does so on her own account alone, and from no hope of reimbursement out of a fund which is already dissipated.

SECTION II.

CLAIMS BY WIFE OR CHILDREN UNDER SPECIAL CONTRACT.

SUCH claims may be grounded on the following deeds:—1. A contract of marriage. 2. A contract of separation. 3. A bond of provision.

§ 1. CLAIMS UNDER CONTRACTS OF MARRIAGE, AND BONDS OF PROVISION.

The first question that naturally occurs on such a deed, relates to its effect in superseding those provisions which the law itself confers. And, *First*, As to heritage, the legal

[1] GREENHILL against FORD, 24th June 1824; 3. Shaw and Dunlop, 169. This case suggests the circumstances in which such a question may be raised.

provision of terce is superseded by a settlement made and accepted of:[1] But the same rule does not hold as to the courtesy; it must be expressly excluded.[2] *Secondly*, As to moveables, express provisions in a marriage contract do not exclude the jus relictæ.[3] Another question may arise, in respect to marriage contracts, where the parties were minors at entering into them. A minor is by the law of Scotland capable of marriage; and the marriage, with its legal consequences, will stand good against all challenge on the head of minority and lesion. Redress may on this ground be obtained against special stipulations in a marriage contract, if hurtful to the interests of the minor:[4] But this will not entitle the party to relief from the effect which would follow as the legal consequence of marriage,[5] nor against a rational and fair contract or settlement.[6]

Marriage contracts are either antenuptial or postnuptial; and the former stands on a very different footing, relatively to creditors, from the latter.

I. Antenuptial Contract of Marriage.—The great motive to the executing of a contract of marriage, in circumstances in which questions with the husband's creditors are likely to occur, is distrust of the husband, or dread of the risks to which he is exposed. The chief object is to stipulate an exception to that rule of the common law, by which the wife, for herself and her children of the marriage, adopt the fortunes of the husband; and to provide against extravagancy or insolvency, either by an absolute security, which shall exclude creditors, or by constituting a jus crediti, which shall entitle the wife or children to rank with other creditors upon the common fund in bankruptcy. The principle on which such contracts are effectual against creditors is, that they are onerous contracts, as forming essential conditions of the marriage: That the wife is held on no other terms to have conveyed, as by marriage she does, all her moveable property in possession or in possibility to the husband; nor even to have made him master of her person: And that the children would not have existed, but on the faith of the provisions made for them. But the onerosity of the consideration is not enough to give to the wife or children the character of creditors. In order that the contract may be effectual against creditors, there must be a real security constituted, or a jus crediti raised, by means of a distinct obligation. No part of conveyancing is more difficult than this. The terms are so various in which such contracts have been conceived, that to frame a marriage contract, so as to protect the wife and children against the folly, extravagance, or insolvency of the father, requires much discrimination. The several kinds of provision by which this is attempted to be accomplished, as they appear in competitions of creditors, deserve particular attention; but only a few general cases can be taken notice of in this Work.

1. Antenuptial provisions in favour of the Wife, to come in place of her legal provisions, may be either with real security, or by personal obligations merely.—1. By marriage contract, the wife's Terce and Jus relictæ may be excluded, and the husband may assign to her particular lands, either for her possession, or to afford her a certain annuity. Where the wife is infeft in lands for her liferent use and possession, her right is a proper

Locality and Jointure.

[1] 1681, 10. See above, p. 57-8.

[2] Primrose against Crawford, 10th December 1771; Fac. Coll. 345. See in Hailes, 458. the opinion of Lord Pitfour respecting the universal acquiescence in this as a point settled in practice.

[3] M'Auly against Bell, 12th December 1712; Forb. 643. (M. 3848).

[4] Carmichael against Lady Castlehill, 24th February 1698; 1. Fount. 827. (8993).

Byres against Reid, 28th July 1708; ib. 458. (6045).

Chalmers against Lyon's Creditors, 14th July 1710; (8994).

In these cases, the wife disponed her heritable estate while the husband was secretly insolvent, and unable to fulfil the counter provisions.

[5] Anderson against Abercromby, 31st January 1824; 2. Shaw and Dunlop, 662.

[6] Young against Robertson, 24th January 1769; 1. Hailes, 265.

liferent; and the lands are called her LOCALITY LANDS.[1] Where she has an annuity heritably secured, either by HERITABLE BOND and infeftment, or by infeftment on a BOND OF ANNUITY, it is called a JOINTURE. Sometimes the husband binds himself to invest, and afterwards, in implement of the contract, does invest, money in land or real security, taken to himself and his wife, in conjunct infeftment, according to the great variety of distinctions already spoken of.[2] In all those cases, the infeftment in favour of the wife, either proceeding on the contract of marriage, or on a separate deed, if not objectionable under the bankrupt statutes, confers on her a real right, which excludes creditors, and gives her a preference.[3] 2. If the husband's titles be not made up, or if any other impediment prevent the completion of the real right under the contract, the wife may, by marriage articles, be made a creditor, to the effect of ranking with the other creditors, and to the effect of sustaining any deed made in implement of the obligation, which shall not be exposed to objection on the bankrupt statutes. 3. Although it may not be intended that the wife shall have the benefit of a real security; or although the husband may not have the means of giving such security; she may still have constituted in her favour a jus crediti, so as to entitle her to rank as a creditor for her eventual liferent after her husband's death, provided the provision be precise and clear. The most usual provision is of a certain yearly sum or annuity, to be paid to the wife on her husband's death, with a renunciation of her legal provisions. This, in England, makes a contingent debt, depending on the wife's survivance, and cannot therefore be made the ground of an effectual claim in bankruptcy;[4] insomuch that even where the contingency has been purified by the death of the husband after bankruptcy, the courts have found themselves constrained to refuse the claim, as the debt did not arise till the husband's death after bankruptcy, though before distribution.[5] In Scotland, there is no obstruction to the ranking of a contingent debt; and a wife holding a provision importing a jus crediti in her favour, will be ranked along with the other personal creditors for the value of her survivance, so as to have the dividend set aside; the intermediate profits of it to be paid to her husband's creditors, and the dividend itself secured for her use in the event of her survivance. At one time it was contended, that considering the embarrassment under which a wife is placed in doing diligence to secure her jus crediti, she was entitled to a preference or privilege over other creditors; but this was solemnly argued, and a wife found to have no preference, but such as she may have established by diligence;[6] and such claim of preference was rejected, even with regard to the wife's liferent of the whole or part of the household furniture.[7]

Marriage Articles.

Jus Crediti.

Even in antenuptial contracts, if the husband is at the time insolvent, the provision to the wife will not be sustained beyond the limits of a reasonable and moderate allowance. On this ground, a husband having in his second marriage contract given an exorbitant jointure to his second wife, the Court held it to be restrictable in a question with the heir of the first marriage.[8] But it would seem that this rule must be restricted to the case of a manifestly exorbitant provision: for a man, though truly insolvent, may appear to be in

[1] See above, p. 55.

[2] See above, p. 56.

[3] BUCHANAN against FERRIER, 14th February 1822. Here a reciprocal conveyance by marriage contract of the liferent of the husband and of the wife's estates, was found on the husband dying insolvent, and on a judicial sale of his lands, to give the wife a right to the rents from the husband's death down to the sale, and to the interest of the balance of the price afterwards.

[4] Ex parte GROOME, 1. Atk. 114. Ex parte CASWELL, 2. P. Wms. 497. Ex parte BARKER, 9. Ves. 110. TULLY *v.* SPARKES, 2. Lord Raymond, 1546. 2. Strange, 867.

[5] Ex parte GREENAWAY, 1. Atk. 113. Ex parte MITCHELL, ib. 120. Ex parte GROOME, 1. Atk. 118.

[6] KEITH against KEITH, 17th February 1688, (11,533.); confirmed by ALLAN against CREDITORS, 19th February 1713, (11,835).

[7] FORBES against KNOX, 25th June 1714, (11,850).

[8] DUNCAN against SLOSS, 8th February 1785; Fac. Coll. 310. (987).

a situation where the provision made is moderate, and where on that belief the marriage has been contracted. In judging of this matter, the wife's situation and fortune are chiefly to be regarded; but they are by no means to be taken as the sole grounds on which to proceed.[1]

The greatest difficulty is to provide for the wife's subsistence during the husband's survivance in a state of bankruptcy. The only precaution absolutely to be relied on against the insolvency of a husband, and in virtue of which a wife can claim the benefit of a subsistence during the husband's life, is the appropriation of special estates or funds to the use of the wife, with an exclusion of the jus mariti in case of insolvency. Thus, 1. The wife's father may settle on her either heritable or moveable property, with an exclusion of the jus mariti; and this will effectually protect the property, and the rents of it, from the husband's creditors. 2. The father may constitute a trust, and convey to the trustee his property, heritable or moveable, with an exclusion of the jus mariti, in case of the husband's insolvency. And in such a case, even if the wife herself be named as trustee, the creditors of the husband will not be entitled to attach the property as his.[2] 3. The wife herself may, before marriage, constitute a trust, which will preserve for her use the fund so set apart.[3] 4. It seems not incompetent for the husband so to dispose of a part of his estate, as to secure to the wife and family a fund of subsistence effectual against all debts subsequent to the transaction. Thus, in implement of a stipulation in the marriage contract, (or while he is solvent), a husband may let a lease, taking the rents payable to a trustee, who shall bind himself to pay a certain sum to the wife as an alimentary provision, excluding the jus mariti. 5. By antenuptial marriage contract, the jus mariti may be excluded with regard to any particular subject belonging to the wife, although it cannot be excluded per aversionem. Thus, lands may be let, and the rents conveyed to the wife, for her and her children's aliment, excluding the jus mariti: or a sum may be set apart, and invested, or lent out on bond, &c. to the wife, excluding the jus mariti: or an annuity may be purchased to the wife for her aliment, with an exception of the jus mariti: or a sum may be secured, or a bond may be taken jointly to the husband and wife, in liferent allenarly for her alimentary use, the interest and rents not to be affectable by the husband's debts.[4] These provisions, however, cannot be effectually made by a postnuptial deed, which not having the character of an onerous contract, the provision, though made during solvency, is revocable as a donation, and is held by the contraction of debts to be revoked.[5] But, 6. It is quite incongruous to attempt to give to the husband the

[1] M'Lachlan against Campbell, 29th June 1824; 3. Shaw and Dunlop, 192.

[2] Annand against Chessels, 4th March 1774; Fac. Coll. (5844). Archibald Chessels executed a settlement after his daughter's marriage to James Scott, whereby he disponed his whole property to her, in trust, for behoof of herself, in liferent, for aliment and support of herself and her numerous family of children during her life, and after her death for behoof of her three sons, &c.; and he provided, that in case of James Scott her husband's insolvency, his jus mariti should be debarred and excluded, and his administration of the said estate, heritable and moveable, and of the rents, annualrents, and other produce and profits of the same; and that the same should neither be liable nor subjected to the payment of his debts, implement of his deeds, or affectable by the diligence of his creditors. On Scott's bankruptcy, his creditors attached some of the moveable funds which had come from the father; and the Court held, that A. Chessels's heritable subjects, and also his moveables and executry funds, were vested in Helen Chessels, his daughter, in trust, for the purposes mentioned in the deed of settlement, and were not affectable by James Scott or his creditors: and that when James Scott became bankrupt, his right of administration of the said subjects ceased; and that the rents and annualrents that fell due thereafter belonged to Helen Chessels and her children, in terms of A. Chessels's settlement, and were not affectable by James Scott's creditors. Affirmed in the House of Lords, 23d March 1775.

[3] Murray's Trustees against Dalrymple, 5th February 1745; Kilk. 260. (5843).

[4] Dickson against Braidfute, 3d February 1705; 2. Fount. 265. (10,396).

[5] See below, p. 641.

command of his funds, and, at the same time, secure the wife and children against the effect of his insolvency. It is impossible, for instance, to convey or pay over to the husband any debt or sum of money, leaving him in the full administration of it during his solvency, and at the same time effectually to provide, that, on bankruptcy, the jus mariti shall, in relation to such fund, stand excluded. At least such declaration certainly would not give preference on the general fund, or qualify the right even to the particular sum, unless by the very nature or import of the conveyance it stood limited. If, however, a bond were taken to the husband, as trustee for his wife and children, excluding his jus mariti on insolvency, there seems to be reason for holding that his right would be qualified with that condition. 7. There can be no legal objection against a provision to a wife before marriage, or in the marriage contract, by which, to the extent of a moderate and reasonable aliment, she shall be entitled to rank as a creditor on the estate, to the effect of securing a fund for her aliment. But, in order to accomplish this, it would be requisite to bind the husband either to aliment the wife; or, failing thereof, to pay to her a certain annuity, or to invest a certain sum sufficient to produce the stipulated aliment; or perhaps to declare, that, on failure to aliment the wife, she, or the trustees in the marriage contract, should be entitled to redemand payment of the tocher. 8. It may be important to secure a future provision by means of insurance, when the husband's funds are not sufficient to give direct security. It would seem that an effectual obligation may be constituted, by antenuptial contract of marriage, to pay annually the premium of a life insurance for securing such a provision to the wife; at least to the effect of making the premium during the husband's life a debt claimable on the principle of an annuity, so that a dividend may be drawn for it. But no security can be given for the regular payment of the premium, unless the obligation be fortified by heritable bond or other security. If a policy were opened in name of the wife and children, and the premium regularly paid under such antenuptial contract, the benefit of the insurance would certainly not be demandable by the creditors as part of the husband's estate; while a claim would lie for the future premiums at the instance of the wife.

2. Provisions in favour of CHILDREN, by antenuptial contract of marriage, are, on the principle already stated, onerous deeds. But it will depend entirely on the conception of the provisions, whether they shall be effectual to confer a preference, or even to entitle the children to rank as creditors. In relation to the provisions to children, the infinite variety of marriage contracts may be reduced to two classes:—One, in which the children have the character merely of heirs of the marriage, with a spes successionis defeasible by onerous deeds only; another, in which they have vested in them the character of proper creditors.—

Children as Heirs.

1. In the ordinary marriage contract, the children are heirs, not creditors. The common course is, to invest the estate or money to be settled in favour of the husband and wife in conjunct fee and liferent, and to the children to be born in fee: Or certain provisions are settled on the children, payable at the first term after the death of the father. In these cases the children are not properly creditors; *i. e.* they cannot stand in competition against the onerous debts or deeds of the father, though they may reduce gratuitous alienations to their prejudice.[1] 1. A jus crediti, in opposition to a spes successionis, requires the children to be clothed with the character and the right of creditors during the father's life, and is not conferred unless by an obligation to pay, during his life, either the principal, or at least the interest.[2] This doctrine, laid down by our older authorities, has been held as fixed in certain cases to be immediately stated; and in a very recent and very

[1] 3. Ersk. 8. § 38. and 39. See below.

[2] See particularly STRACHAN against Creditors of STRACHAN, 2d July 1754; Kilk. 5. Brown's Sup. 274.

strong case, it has been directly confirmed, and may now be held as settled law.[1] 2. It has no effect in conferring a jus crediti on the children, that instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable. 3. When he actually lends out the money, or constitutes a trust, or grants heritable security to the wife, or any other person, in the name of the children, and binds himself in absolute warrandice, he constitutes a fee in the children, which will prevail against creditors.[2]

Although such provisions are not effectual against creditors, it may sometimes be an important question, what effect they shall have against the voluntary acts of the father. And, 1. The father has no right gratuitously to disappoint the heir of the marriage, if the destination be to heirs of the marriage, and the subject be heritable.[3] 2. With consent of the heir of the marriage, the father may gratuitously alter the destination, although it may by possibility happen that the heir may predecease his father.[4] 3. If the provision be conceived in favour of the children of the marriage; or if, being a moveable estate, it is taken to the heirs of the marriage; the whole children have right, but subject to a reasonable power of distribution by the father.[5] 4. If by the marriage contract the right of the heir or children be in any point or respect free from restraint, the father cannot gratuitously burden and restrain it.[6]

2. The other class of cases is, where due care is taken to invest the children with a preferable right, or to clothe them at least with the character of creditors. This is to be done, by giving to the children a proper right of fee in the land estate,[7] or by granting to them, or some one for them, an obligation prestable during the father's life. Thus the

[1] BROWN against GOVAN, 1st February 1820; Fac. Coll. 94. Here a marriage contract was prepared, but not extended nor signed till some months after the marriage, when it was signed, and the wife's tocher paid. By the draft of the contract, the husband bound himself to pay to the child or children to be procreated, at majority or marriage, the sum of L. 1200, in certain proportions, with the lawful interest of the said sum from the time at which the same shall fall due, and thereafter during the non-payment; and in implement of this obligation, he farther conveyed certain subjects to the wife, as trustee for herself and the children, with procuratory and precept. In the testing clause of the deed, awkwardly introduced, and subscribed only by the husband and wife, is a declaration, that the L.1200 before provided shall not be payable till twelve months after the said R. Lang's decease, notwithstanding any prior declaration to the contrary, and shall only bear interest after that period till paid. Lang failed after the infeftment had been taken on the deed; and the children, who were infants, claimed on his sequestrated estate alternatively,—*First*, A preference under the infeftment; or, *Secondly*, At least to be admitted, as creditors, to draw a dividend along with the rest. The Court ordered the question to be heard in presence, and decided against the children; finding,—1. That the declaration in the testing clause was ineffectual to control the expressions in the body of the deed; 2. That the provision not being payable during the father's life, and interest being made to run only from the term subsequent to his death, the children had no jus crediti, but were merely heirs, having a spes successionis defeasible by the contraction of debt; and, 3. That the heritable security, with the warrandice, partook as an accessary of the nature of the principal right, and was not to be held as indicating a jus crediti.

[2] SETON against SETON's Creditors, 6th March 1793; Fac. Coll. 92. (4219). BUSHBY against RENNY, 23d June 1825; 4. Shaw and Dunlop, 110.

[3] HYSLOP against MAXWELL, 1st June 1804; Fac. Coll. 192.

DYKES against DYKES, 9th February 1811; ib. 187. Earl of WEMYSS against TRUSTEES, 28th February 1815; Fac. Coll. 240.

[4] MOODIE against STEWART, 6th February 1730, in House of Lords, 1. Craigie and Stewart's Appeal Cases, 20.

MAJENDIE against CARRUTHERS, 25th May 1819, Fac. Coll.; 5th June 1820, House of Lords, 2. Bligh, 692.

[5] CAMPBELL against CAMPBELLS, 15th December 1738, Kilk. 456. (6849.); and same parties, 22d December 1739, Kilk. 5. Brown's Sup. 214.

[6] M'NEIL against M'NEIL's Trustees, 27th January 1826; 4. Shaw and Dunlop, 393.

[7] FALCONER against MONCRIEFF, 20th January 1825; 3. Shaw and Dunlop, 455. Here the words were sufficient to constitute a fee in the children, but in taking infeftment on the contract of marriage, the infeftment in favour of the children was forgot. In a competition with the father's creditors, the children were held to have a personal right only, and so entitled to rank as creditors merely, without any preference.

father's right may be restricted to a mere liferent; or he may bind himself not to contract debt to the prejudice of the children's right; or to infeft them at a certain term which may happen during his life; or to pay money at a term which may exist during his life; or to pay interest from a certain term which may be during his life.[1] In several cases this doctrine has been well settled. In one case, the children were held to have a jus crediti, in circumstances where it rather appears that the debt was not due till after the father's death.[2] But, in so far as that case may be held to rest on the above ground, it was expressly disapproved of in the next case that occurred. Here the father had bound himself and his creditors 'to pay to the younger children certain sums, the whole to be 'divided, in certain events, by such proportions as he should appoint by a writing; or, 'failing such division, equally.' They were payable to the respective children 'on their 'marriage or majority, the father being bound to maintain them until one or other of 'these events should arrive;' but although some of the Judges were much influenced by the decision in the case above referred to, the children were, by a great majority, held not entitled to enter into competition with their father's creditors.[3] In a still later case, the circumstance of the father being bound to pay interest, was held to make the children creditors.[4] This question may be further illustrated by the cases cited below.[5]

The principle on which the engagements of the parties to an antenuptial contract of marriage are held onerous, extends to the case of parents providing sums or estates in the marriage contract of their sons or daughters. A provision of this kind by a father, will confer an effectual jus crediti, although made payable during the father's life.

II. Postnuptial Contracts of Marriage.—These stand in a different situation from antenuptial contracts. In the latter, the provisions to the wife make it an essential condition of the marriage, that she shall not follow entirely the fortunes of her husband, but be entitled to rely on those provisions: And the provisions to the children are the

[1] 3. Ersk. 8. 40.

[2] Henderson's Creditors against his Children, 31st January 1759. Here the decision may be reconciled with the doctrine of the other cases, by the circumstance, that the Judges seem to have held the provision as payable during the father's life. In so far as it was not so held, and yet the children considered as creditors, the decision is not to be relied on.

[3] Children of Mactavish against his Creditors, 15th November 1787. In this case, Lord President Dundas, Lord Justice-Clerk Millar, Lords Braxfield and Eskgrove, were for the judgment. The President said, that, independently of Henderson's case, there seemed to be good ground for rejecting the pretensions of the children to rank as creditors; and that this being a single case, decided by a small majority, it could not bind the Court against the true principle. The Justice-Clerk, who was a great lawyer, said, that every man being suæ rei arbiter, he may bind down his property, but he must do so in very clear terms; and where it is in favour of children nascituri, the obligation must be absolute, unconditional, and to a day; such as can be put in force against himself. But in the case under consideration, the contract was not such as could have been put in force against the father, and therefore the children cannot be held as creditors. Lord Braxfield concurred in this opinion, and, considering the object of the provisions in the contract, he did not find them such as either could or were intended to subject the father during his own life, which always requires strong words. He was clear, that it never was intended to give a claim against the father; and therefore, that the pretensions of the children to the character of creditors could not be supported. He said, he would have been against the judgment in Henderson's case. Lord Eskgrove said, that he had drawn up the report of Henderson's case, which was certainly intended to fix the law, but was decided by a small majority. He added, that he would, in that case, have voted with the minority; and that this case is not different. MS. Notes of Mr Ross, Dean of Faculty. See also Fac. Coll. 57.

See Strachan's case, supra, p. 639. Note [2].

[4] Creditors of M'Kenzie, 2d February 1792; 8. Fac. Coll. 427. Bell's Cases, 417.

[5] Creditors of Napier against his Children, 24th July 1696 and 17th June 1697, 1. Fount. 729—776.; Children of Mactavish, supra, Note [3].; Sir J. Stanfield against Brown, 19th January 1696, 2. Stair, 101.: as opposed to the cases of Sir Robert Preston's Children against his Creditors, 15th July 1691; Mrs Lyon against the Creditors of Easterogle, 24th January 1724, Lord Kames, 122.; the Creditors of M'Kenzie against his Children, 2d February 1792; Fac. Coll. 427.

conditions on which alone those interested in their future existence have consented to that contract from which they were to spring. In postnuptial contracts, the wife and children are already wedded to the condition of their husband and father, and can take nothing against his creditors, unless what he, during his solvency, can legally give away.[1]

1. As to the WIFE's provisions under a postnuptial contract, it has been held, 1. That if granted while the husband is solvent, an allowance to her will be effectual to the extent of a moderate provision.[2] 2. That even if granted after the contraction of debt, and in circumstances which would expose a merely gratuitous deed to challenge, the natural obligation to aliment a wife will sustain the provision to a moderate extent. This, perhaps, does not quite accord with the principle by which this sort of case should be ruled. 3. That where an antenuptial provision has been made, and afterwards a postnuptial, followed by insolvency, the wife may avail herself of the postnuptial provision as in implement of the first one.[3] 4. A provision to be restricted on the existence of children may occasion a competition between the creditors and the children, for the sum arising from the restriction: The rule seems to be, that where the original provision would have been effectual had there been no children, such children as hold a jus crediti are entitled to it; and that the creditors are to be preferred only where the provision is exorbitant.[4]

2. Postnuptial provisions to CHILDREN are, like those to wives, either in implement of the natural obligation of a father, or in fulfilment of a prior obligation. 1. A provision subsequent to debts, is not supported by being in implement of the natural obligation. The children can claim only according to the father's ability.[5] 2. It will depend on the

[1] WOOD against FAIRLY, 3d December 1823; Fac. Coll. 367.; 2. Shaw and Dunlop, 549. Had the second contract of marriage in this case been antenuptial, it would have been effectual, as an onerous deed, to disappoint the rights of the first wife's representatives: as it was postnuptial, it was not effectual further than (as admitted by the party) to the extent of a reasonable provision, on the principles laid down by Erskine, 3. 8. § 41.

[2] Lady CAMPBELL against Creditors of Sir JAMES CAMPBELL, 26th July 1744; Kilk. 51. Sir James Campbell, after contracting debts above the value of his estate, married, with an antenuptial contract; but some months afterwards granted to his wife a liferent heritable bond of annuity for L.100, on which she was infeft. In a question with the creditors, the Court restricted the annuity to L. 50. 'Some of the Lords 'were of opinion, that when a woman marries without 'a contract, upon the faith of the legal provision, any 'postnuptial provision is a gratuitous deed, and, as 'such, reducible at the instance of prior creditors; and 'that, were it otherwise, there were nothing to hinder 'any man, who had married without a contract, after 'he knew himself insolvent, to settle a provision on 'his wife, preferable to all his personal creditors.' But the opinion which prevailed was,—'That marriage 'itself is an onerous cause, which yet will not be sufficient to sustain the provision, any farther than what 'may be a moderate subsistence; for so far only the 'husband is under obligation. And as to the case 'supposed, of a husband's settling a provision upon his 'wife, after he knew himself to have become insolvent; 'even in that case it was thought the provision might 'be sustained, to the effect of a subsistence.'—'But, 'be that as it may, continues Lord Kilkerran in his report, 'the present case was thought different. As, 'in the supposed case, there is more an appearance of 'fraud than in the present case, where there was no 'change of the husband's circumstances between the 'marriage and the time of granting the provision; and 'as it was not controverted but at the marriage he 'might have granted a provision; it was thought to be 'straining too hard to say he could give none thereafter, 'although no change had happened in his circumstances.' Kilk. 51. See WALKER against POLWART, 19th June 1635; Durie, 767. ROBERTSON against HANDYSIDE, 11th January 1738. JEFFREY against CAMPBELLS, 24th May 1825; 4. Shaw and Dunlop, 32.

[3] Sir ROD. M'KENZIE against MONRO, 17th February 1738; 1. Dict. 71. In CAMPBELL against SOMMERVIL, 14th February 1778, the wife having claimed both provisions, the Court held the liferent right to be, in a question with creditors, a security merely for the previous provision.

[4] ERSKINE against CARNEGIE, 23d December 1679; 2. Stair, 726. REID against WHISTON and RUTHERFORD, 1st July 1703; 2. Fount. 185.

[5] FALCONER, 13–20th February 1736; Elchies, *Aliment*, No. 3. It was found, that even where a contract of marriage bore an obligation on the father to aliment his daughter till the time stipulated for the payment of her provision, this obligation being only exegetical of his natural obligation, could produce no effect against creditors.

Mr Erskine expresses the rule in this way:—'Provisions to children already existing, are, in the judg-

nature of the obligation, or its date, whether the provision in implement is onerous. As, in order to vest a child with the character of creditor, the deed must precisely bind the father himself during his life, and not merely give a hope of succession; so, unless the previous deed be of this nature, it will not be held as a just and necessary cause of a specific postnuptial provision. A father, if solvent, may, after marriage, bestow upon his wife or children the character of creditors; so as to support a conveyance made after insolvency. But the onus probandi of solvency will lie on the claimant.[1]

The aliment of a natural child is not, properly speaking, perhaps, a debt to the child; but a debt arises to the mother of the child, who must maintain it if she is able, and who is entitled to relief against the father for one-half. It would seem, therefore, that this is a debt which would, in a competition of creditors, serve as a justification of any bond or security granted for the child's aliment.[2]

§ 2. CLAIMS IN CONSEQUENCE OF CONTRACTS OR DECREES OF SEPARATION.

SEPARATION is different from divorce. The marriage subsists; and it is doubtful whether the aliment assigned to the wife be in the nature of a debt for which she can rank on the husband's estate.

Separation is either voluntary, by contract between the parties; or judicial. It may also be by decree-arbitral, partaking of both the voluntary and judicial character. Considered as a departure from the contract to consort together, and unite stocks of present use, and as a division in future of the common stock, so as to afford a separate subsistence to the wife, a judicial separation during solvency, (which is not revocable at the pleasure of the husband), or a separation by decree-arbitral, (which is on the same footing), will effectually give the wife a jus crediti, or a preference; according as her aliment may have been secured by real right, or left on the personal obligation of the husband.[3] Even a voluntary separation, or separation bona gratia, as it is called, has been held to produce the same effect; voluntary contracts of separation, though revocable, not being, like a mere donation, presumed to be revoked by the contraction of debt inconsistent with its subsistence. They can, during the marriage, be revoked only by a return to the married state: For that proper purpose the law allows either party to revoke; but not where they are still to live apart.[4]

Against creditors these contracts are effectual only if the husband be solvent, and if

'ment of law, gratuitous, and, of consequence, may be 'annulled in a competition with creditors, if the gran-'ter was not solvent.' Ersk. b. 4. tit. 1. § 34. Perhaps it would have been more correct had he said, that 'postnuptial provisions to children are, in the judgment 'of law, gratuitous,' &c.

[1] MOUSEWELL'S case, 6th January 1677; Dirl. 418.

[2] BALLANTYNE against DUNLOP, 17th February 1814; where the father seems to have been solvent.

[3] BROWN against M'GREGOR, 22d January 1820; Fac. Coll. 56. Here M'Gregor and his wife agreed to a voluntary separation for all the days of their joint lives, unless they shall afterwards agree to live together again; and to refer to arbitration the aliment to be paid for the wife, and the sum for buying furniture, &c. The arbiter, on an inquiry into the husband's circumstances, awarded L.80, under condition, that if security were given for L.50, the award for L.80 should cease. This seems to have been merely a mode of enforcing the giving of security. The L.80 were paid for several years, and then an heritable bond for L.50 was granted, on which the wife was infeft. M'Gregor failed, and a question arose with the creditors, in the shape of an action of reduction by the trustee under the sequestration. Lord Reston, and afterwards Lord Pitmilly, held the bond effectual, and the Court affirmed this judgment.

[4] See preceding Note. See the opinion of the Court in PALMER against BONNAR, 25th January 1810.

After dissolution of the marriage, the contract may, as a donation, be revoked. DICKSON against HUNTER, 1st February 1827; 5. Shaw and Dunlop, 266.

there be no fraudulent use of this power; for it is a device obvious to be followed by one about to break, in order to provide an effectual livelihood to his wife and children.

CHAPTER VII.

OF CLAIMS OF WARRANDICE.

WARRANDICE is an obligation or engagement accessory to transference, by which the person who transfers undertakes that what is conveyed shall be effectually transferred, and shall not be taken away or evicted by any one having a preferable right.

1. Although there be no express stipulation of warrandice, there is an implied convention, which varies in its force and extent with the nature of the conveyance to which it is accessory. 1. Where a full onerous consideration is given for the conveyance, the granter of the conveyance by implication undertakes absolutely, that the transference shall be effectual; and this not merely to the effect of restoring the consideration given, but of indemnifying the granter in all respects for the loss, who, in reliance on the efficacy of the conveyance, has employed in the purchase of it money which might profitably have been bestowed elsewhere.[1] 2. Where the right has been bestowed gratuitously in donation, or otherwise, the implied obligation is no more than that the granter shall do nothing inconsistent with the grant. 3. There is a middle case, in which the consideration given is not the full and adequate equivalent for an absolute transference, but still is onerous; and here the implied convention is, that whatever may be the uncertainty of the conveyance in other respects, at least no impediment or disappointment shall proceed from any past or future act of the granter. The subject of transference being conveyed, as it truly is at the time, with all its risks and benefits,[2] it follows,—*First*, That loss arising from legislative acts, or legal responsibilities, fall not within the implied engagement.[3] *Secondly*, That a debt is not warranted by implication against the debtor's solvency, the implied warrandice here being debitum subesse.[4] *Thirdly*, That against rights affecting the subject, arising from vicinity, &c. there is no warrandice without special stipulation.[5]

2. Implied warrandice is superseded by express: which may be varied infinitely, according to the agreement of the parties. Occasionally questions arise relative to the

[1] So strong has this obligation been held, that where one had granted a disposition with conveyance to a procuratory and precept, as contained in a disposition to himself; and the disponee had for ten years neglected to take infeftment, which would have given him absolute security; eviction having taken place by the completing of an heritable bond of the first seller, who had remained all this time unknown; the disponer was found liable. 31st January 1815; DOWNIE, Fac. Coll.

[2] See, above, certain limitations to this rule, p. 349.

[3] 2. Ersk. 3. 29. PLENDERLEATH against Earl of TWEDDALE, 31st January 1800. ALEXANDER against DUNDAS, 9th June 1812; and Earl of HOPETOUN'S Trustees against COPLANDS, 8th December 1819, denying the authority of Earl of HOPETOUN against JARDEN, 3d July 1811; HAMILTON against CALDER, 13th June 1823. Rule settled, that augmentations must be specified in the warrandice to give any relief. In the note to the late edition of Erskine, p. 274. the case of Elphinston in 1663 is stated as contrary to Auchintoul's, on which Erskine relies. But on the effect of a subsisting law it is conformable, although on the effect of a subsequent law a hearing was ordered. WATSON'S case in 1667 is also said to be opposite, but erroneously; for that merely decided, that against a supervenient law warrandice gives no relief, for which Erskine correctly quotes it. BONAR'S case in 1683 was a case of special warrandice against all evictions, dangers, perils, and inconveniencies whatsoever. Pres. Falconer, p. 28.

[4] 2. Ersk. 3. 27. and cases there quoted.

[5] REID against SHAW, 21st February 1822; 1. Shaw and Dunlop, 334.

deeds to be granted in fulfilment of articles of roup, or other contracts of sale, as to what warrandice shall be specified. This must depend either on the implied warrandice, or on the express stipulations of the contract which is to be implemented by the conveyance; and in order to avoid future disputes, the Court will interfere to direct the express clause which is to be granted.[1] It may in particular be a warrandice merely personal; or it may be real.[2]

The right of action on warrandice arises only on eviction. This, however, admits of exceptions:—1. Where the granter has made a second conveyance, which manifestly will be entitled to a preference, an action of warrandice will lie before eviction.[3] 2. Where the person bound in warrandice is vergens ad inopiam, or real security has become unavailing, action seems to lie to corroborate the warrandice. 3. Where the eviction is saved by the expiration of the right warranted, but a claim still remains for damage or violent profits, action lies on the warrandice.[4]

The claim on eviction extends not merely to the restitution of the price or consideration paid, but to all loss sustained by the grantee, from a defect in his right, to the effect of making good the value of the right at the time of eviction, and repairing the injury suffered by want of it subsequently.[5]

When the claim of eviction is made, the granter ought to give notice. If he do so, he is not bound judicially to defend the right.[6] If he do not give notice, he takes the risk of the omission of any relevant defence.[7]

CHAPTER VIII.

OF INTEREST OF MONEY, OF DAMAGES, AND OF PENALTIES.

In closing this inquiry concerning the nature of personal debts, there are certain claims that may be considered of an accessory nature, the foundation and effect of which it may be proper to explain.

Under this head may be considered,—1. Interest; 2. Damages; and, 3. Penalties.

SECTION I.

OF CLAIMS FOR INTEREST, SIMPLE AND ACCUMULATED.

The most obvious ground of a claim for interest is breach of engagement, in consequence of which the person who is to receive money suffers a loss, or fails to procure an expected and possible gain. Other grounds of a claim for interest arise from positive statute, or from contract, express or implied.

[1] Forbes's Trustees against M'Intosh, 15th June 1822; 1. Shaw and Dunlop, 497.; where absolute warrandice by the truster and his heirs, and from fact and deed by trustees, directed to be inserted.

[2] See the doctrine of Real Warrandice, in treating of Voluntary Securities, below.

[3] Smith against Ross, 17th February 1672; Gosford. (M. 16,597).

[4] Bell against Duke of Queensberry's Executors, 18th December 1824; 3. Shaw and Dunlop, 616.: affirmed, 10th March 1824. See also Hyslop against the Duke's Executors, 13th November 1822.

[5] 2. Ersk. 3. 30.

[6] Downie against Campbell, 31st January 1815.

[7] Clerk against Gordon, 23d June 1681; 2. Stair, 882.

I. Of Interest, nomine damni.—In observing the difference between a claim for damage on breach of a pecuniary obligation, and a claim for damage on breach of an ordinary contract, it is obvious that the general principle upon which both depend is the same. Wherever one suffers loss by breach of contract, he, by whose failure in his engagement the loss comes, is bound to indemnify the suffering party; and the difference between Damage in ordinary contracts, and Interest in pecuniary obligations, arises from the nature of the injury which the party in those several contracts may be supposed to have in contemplation at entering into the contract, as the inevitable consequence of failure. In contracts of Sale, Hire, Mandate, and others of that class, there are certain immediate consequences of breach of the engagement, which present themselves to the party as inevitably following such breach of contract. If a man engage to furnish to another, as purchaser, an hundred quarters of wheat, and fail in performance, he knows that the difference between the price at which the buyer was to be supplied by the contract, and the price at which he can purchase the corn elsewhere at market, is a direct damage or injury which the seller must repair; and therefore, in all such contracts, the damage forms a jury question, according to the circumstances necessarily incident to the contract. In pecuniary obligations there is not necessarily any particular injury or damage presented to the debtor, which he is to lay his account with as the inevitable consequence of breach of contract; but the evil suffered is the extent of the loss sustained, by not gaining the ordinary legal profits of money, or what is necessary to be paid in order to replace it from another source. This claim for interest on account of damage suffered, is not repugnant even to the Canon law; and where damage could be shewn actually to have arisen from breach of engagement, a claim for it seems to have been allowed under that system. But according to the juster principles of Roman jurisprudence, not only an express breach of contract, but also an inconvenient delay in payment, gave a claim for interest.—Minus solvit qui tardius solvit nam et tempore minus solvitur. Since the prejudice against the taking of interest expired on the Reformation, the law of Scotland has been settled, that breach of contract, or mora in payment, raises this claim without any inquiry into actual damage, and estimating all losses arising from this cause by the same rule, viz. according to the legal rate of interest.

Interest as Damage.

1. Interest, on this ground, is due, 1. On all bonds and obligations for the payment of money on a precise day, if that day should pass without payment. 2. Where no precise term is fixed, and the day of payment is optional, a judicial or notarial demand raises thenceforward a claim for interest. 3. In debts not of precise obligation, but which are still illiquid, or on which interest is not originally due, the claim to interest lies as from the date of citation,[1] or of decree establishing the debt.[2] But an exception has been admitted in the case of the aliment of a bastard child defrayed by the mother while the father was abroad.[3] 4. Where there is, by mercantile usage, a particular term of credit fixed, as in the sale of commodities, interest is held to be due from the expiration of the credit. And, on the same principle, an underwriter has been held liable for interest on the amount of loss, which, by usage, ought to be settled within four months of the loss.[4]

[1] Gillons against Burgess, 21st May 1824; 3. Shaw and Dunlop, 45.

[2] Wallace against Geddes, House of Lords, 13th June 1821; 1. Shaw's App. Cases, 42. Claim for salary disputed, and found due. Interest given in the Court of Session. Reversed, and allowed only from the constitution of the claim by judgment.

[3] Hill against Gilroy, 25th May 1821; 1. Shaw and Ballantine, 33.

[4] Crawford and Stark against Bertram, 15th May 1812; 16. Fac. Coll. 558. This was an insurance of a ship on the North Highland fishery. She was lost in the Pentland Firth; and, on 30th April, a requisition was made for settlement of the loss, by a bill at four months, as usual. There followed a litigation of nine years; and when the underwriters were at last adjudged to pay the loss, the question arose, whether they were bound to pay interest? The Court held interest due from the time when the loss should have been paid.

A different rule has been adopted in England.[1] 5. Where the raiser of a multiplepoinding has improperly delayed to condescend on the fund, he has been held liable for interest.[2] 6. Where interest is due abroad, it is given here, and at the same rate.[3] 7. No interest is allowed on expenses of process, unless in very special circumstances.[4]

2. Before the spirit of the canon law had entirely ceased to influence our civil jurisprudence, there were some cases in which it seemed to the Legislature necessary to interpose, and expressly to declare, that breach of engagement, or mora in payment, should ground a claim for interest. These are the chief cases in which our institutional authors say that interest is due ex lege. 1. By several statutes, interest is declared to be due on bills of exchange, inland bills, and promissory-notes, from their date, in case of not-acceptance, or from the day of falling due, if accepted.[5] 2. Interest is also declared by statute to be due on debts for which the debtor has been denounced rebel, on letters of horning.[6] And, 3. Interest is exacted on cess, after six months from the term of payment.[7]

II. Of Claims for Interest on Convention, express or implied.—In cases where there has been no breach of contract, and no damage thence arising, interest is sometimes, from the nature of the transaction, and the express or implied agreement of the parties, held to be a part of the bargain. When the taking of interest by contract, reprobated by the canon law, came to be sanctioned, the general rule was hostile to the claim, unless the paction was express. But, in later times, the exceptions introduced have been so numerous, that were a rule now to be laid down, it would be more correct, reversing the proposition of the ancient law, to say, that interest is due in all cases where money is lent, or where the use of it is taken or retained; unless, from the circumstances of the case, there is ground in equity to hold that interest was not meant to be demanded.

1. Express Stipulation of Interest.—This is effectual, provided the rate of interest be restrained within the bounds prescribed by law. It must not in rate exceed five per centum per annum; nor must it be taken by anticipation, except in discounting bills under the custom of trade.[8]

2. Implied Contract.—By implied contract interest is due, 1. Where one has levied monies belonging to another, which bore interest in the hands of the former debtor: As, for example, if one who is due L.100 assign to his creditor a bond for L.200, and the creditor uplift the whole sum, he is held bound, without any express stipulation, to pay interest for what he shall so have received.[9] So an executor levying debts due to the deceased, which bore interest in the hands of the original debtor,[10] is held liable for interest

[1] In De Haviland v. Bowerbank, 1. Camp. 51. Lord Ellenborough said,—'Mr Justice Buller, in one 'instance, allowed interest on policies of insurance; 'but I believe that he was there thought to have done 'wrong.'

[2] Graham against M'Nab's Trustees, 18th November 1822; 2. Shaw and Dunlop, 22.

[3] Wilkinson against Monies, 28th June 1821; 1. Shaw and Ballantine, 89.

[4] Dunlop against Spier, 15th November 1825; 4. Shaw and Dunlop, 179.
Pearce against M'Donell, 2d March 1825; 3. Shaw and Dunlop, 603. M'Dowal against M'Dowal, 8th December 1821; 1. Shaw and Ballantine, 200.
Earl of Fife against Duff, 3d March 1827; 5. Shaw and Dunlop, 524.

[5] 1681, c. 20.; 1696, c. 36.; 12. Geo. III. c. 72.

[6] 1621, c. 20.

[7] 1686, c. 2. 'His Majesty, and the estates of 'Parliament, statutes and ordains, in time coming, that 'all cess which shall not be paid within six months 'after the same falls due, shall bear annualrent after 'elapsing of the said six months, albeit horning or 'other diligence be not used for the same.'

[8] See above, p. 308. et seq. See also as to the Effect of a Collateral Obligation for Interest, p. 347.

[9] Irving against Gordon, 22d December 1710; Forb. 465. See also Erskine against Lord Lauderdale, 18th February 1736; 1. Dict. 42.

[10] Arbuthnot against Arbuthnot, 4th January 1758. Here the case related to money unnecessarily uplifted from the funds; and, on that ground chiefly,

if he have taken up the money without necessity; or at all events, from the time at which he ought to have distributed the fund. 2. Interest is, by implied contract, due on a marriage portion; for it is intended to contribute forthwith to the wife's subsistence, or the expense of the marriage. 3. On the ground also of implied contract, one who pays money for another, in consequence of his mandate, or as his factor or agent, is held entitled to full reimbursement of interest, as well as of the principal sum advanced.[1] 4. The doctrine is gradually extending, so as to recognize a claim of interest in all cases of loan and debt in which one enjoys the use of money belonging to another.[2] 5. An agreement to pay the past interest, is also held to imply an obligation for future interests;[3] and where it has been the course of dealing between the parties to pay interest, an adherence to that course is implied. 6. By implied contract, interest is due on the price or value of any property, to the use and benefit of which the buyer enters, to the deprivation of the seller; and this without any regard to breach of contract or mora, but as the counterpart or consideration for the enjoyment of the fruits and profits.[4] 7. On the same principle, where money has been used, and interest saved, or profit made by the use, the person reaping the benefit is presumed to have agreed to pay interest for the use. 8. A trustee or factor, who has money belonging to his principal in his hand, is liable either for full interest, or, at least, for bank interest, partly from implied contract, partly on the ground of neglect.[5] And judicial factors are liable for interest upon such rents as they shall recover, or ought to have recovered.[6] 9. All money obligations, taken to one in liferent and another in fee, imply interest as the sole liferent profit derivable from money so lent. 3. Ersk. 3. § 79.

the claim of interest seems to have been pressed: but the Court appears to have taken the question more broadly; and gave interest from the time when the legatees should have received their shares. 2. Fac. Coll. 147.

[1] Ersk. 3. § 80.

[2] GARTHLAND'S Trustees against M'DOWAL, 26th May 1820; Fac. Coll. 140.

[3] HUME against SEATON, 13th January 1669; 1. Stair's Dec. 580.; and Gosford, p. 29. See also CARNEGIE against DURHAM, 20th December 1676; Dirl. 200.

[4] Lord DURIE against Lord RAMSAY, 17th February 1624; Durie, 110.; where the buyer was not in fault, the price having been arrested in his hands, interest was found due, 'as it is against reason and 'conscience both to retain the money without paying 'annualrent thereof, and to bruik also the whole profits 'of the lands.'

CLUNIE and STIRLING against OGILVIE, 20th July 1626; Durie, 223.

STIRLING against PANTER, 8th March 1627; Durie, 286.; where an option was allowed to pay interest, or account for the rents.

Lord BALNAGOWN against M'KENZIE, 28th January 1663; 1. Stair's Dec. 164.; where the same alternative was given, although the seller had not furnished a proper progress.

WALLACE against OSWALD, 11th February 1825; 3. Shaw and Dunlop, 525.

HARDIE against CANNIN, 12th February 1823; 2. Shaw and Dunlop, 213. This was a claim for interest on the unseparated share of goods in communion falling to the wife's relations on her death, but not claimed till the husband's death. Interest was allowed.

[5] Lord ELPHINSTON against KEITHS, May 15. 1790; 8. Fac. Coll. 246. Here the defenders were confidential agents of Earl Marischal, having considerable sums in their hands, for which they were never required to pay interest; while, on the other hand, they made no demand for personal labour. Some years after the Earl's death, monies lodged in their hand by him were claimed by his heirs; and they refused to pay interest. The Court held, that a factor was not obliged to pay interest instantly from the principal's death; but as soon as he knew how the money was to be disposed of, he was bound to lodge it in a bank. Judgment was given for bank interest from a year after the Earl's death.

N. B.—There seems no equitable ground for such indulgence; for the factor ought to have the money in bank, as the money of the principal, or to pay interest for it at the full rate.

CAMPBELL against ROSE, 6th December 1752; 1. Fac. Coll. 61. Here a sub-factor found liable for interest on rents levied, from the term his accounts were required, which was the year after levying them. The analogy seems to hold as to the time when the accounts should regularly have been rendered, or the rents accounted for. In short, interest is due for mora. 3. Ersk. 3. § 80.

See cases below, TAIT, &c. p. 652. Notes [1]. and [2].

[6] 31st July 1690, Acts of Sed. p. 186. CRANSTOUN against SCOTT, Dec. 1. 1826; 5. Shaw and Dunlop, 62.

Expenses of process do not bear interest till constituted by decree. But where expense has been unjustly occasioned, the person immediately disbursing that expense may fairly be considered as in the condition of a cautioner for him who in the end is found truly to be debtor for that expense; and whatever he is under the necessity of paying before the close of the litigation, he ought in equity to be entitled to recover with interest. On this principle, interest was found due after a year from the date of the interlocutors finding expenses due.[1] Interest has also been given on any considerable sum of expense necessarily advanced years before the date of the judgment, as being truly a part of the actual expense.[2] And where the expense of extracting a decree of the Court of Admiralty had been paid several years before by the party found entitled to expenses, interest was allowed on the sum so paid.[3]

Rules for Commencement of Interest.

III. Of the Commencement and Termination of Interest.—1. The rules for the Commencement of Interest are these:—1. Where there is an express agreement concerning the commencement of interest, it rules the case. 2. Otherwise, in the general case, interest runs from the stipulated day of payment. 3. Where the day of payment is optional, interest runs only from the day ascertained by the act declaring the option. So in bills payable at sight, or so many days after it, the presentment regulates the running of interest: and this is fixed either by a date adjected to the acceptance, or by a protest. Or where there is no evidence of the date of presentment, but only of the presentment having taken place, it will be held as of a date as early[4] as circumstances render probable. So a bill payable on demand will bear interest only from the protest,[5] or citation in an action.[6] 4. Interest runs upon arrears of cess, from the expiration of six months after the term of payment.[7] 5. Interest runs on money advanced by mandatories, &c. from the date of advance. The Court, by one decision, refused to extend this rule to law agents;[8] and, by a later decision, found a law agent entitled to interest after a year from the date of the last article.[9] 6. The price of property bears interest from the time the benefit of possession accrues to the purchaser, the price being a surrogatum for the subject; and while the rents are accruing to the purchaser, the running of interest is not stopped by any attachment, or by want of sufficient titles; it can be stopped only by consignation. 7. It is a frequent stipulation in contracts of partnership, that, on the death or bankruptcy of a partner, his interest in the stock shall be ascertained as at the date of the last balance; but for the conveniency of the company, and to prevent confusion from a sudden demand, the sum due is made payable at a future term, or sometimes by instalments; and it has been doubted, whether interest

[1] Warner against Cuningham, 29th May 1813; Fac. Coll. This case is not correctly reported. The Court allowed interest on the expense found due by interlocutor in February 1802, and on the expense found due by interlocutor in February 1809, from and after the elapse of a year from the dates of those interlocutors.

[2] Groat against Sinclair, 15th May 1819; Fac. Coll. Here also the party held liable in expense had derived, during the course of a most tedious litigation, advantage by dead interest on the price of the lands in question.

[3] M'Dowall against M'Dowall, 8th December 1821; 1. Shaw and Ballantine, 200.

[4] Kinloch against Mercer's Representatives, 12th November 1746; Kilk. 83. On this principle, in the case of a bill between two persons living *in the same place*, the acceptance, not dated, was held as evidence of a presentment of the date of the bill itself.

If the parties are *at a distance*, the course of post would probably be taken as the date of the acceptance.

[5] 3. Ersk. 3. § 77.

[6] Moncreiff against Sir W. Moncreiff, 17th January 1752; Kilk. 91. (M. 481).

[7] 1686, c. 2. See above, p. 647. Note [7].

[8] Muirhead against Town of Haddington, 22d June 1750; Kilk. 30. (M. 532).

[9] Henry against Sutherland, 13th February 1801. A law agent found entitled to charge interest on the balance due to him, after a year from the date of the last article in the account.

runs during the time between the date of the balance and the stipulated term of payment. According to the general rule, by which the money becomes the surrogatum of the share of company stock, which is a fund bearing profit, it would appear, that, unless where the usage of trade, or practice of the parties, has made an exception, interest would be due. 8. Interest on merchants' accounts of furnishings begins on the expiration of the accustomed credit; or if there be no special custom to regulate it, from the date of citation, when the money should have been paid. 9. Interest, at the legal rate, begins to run on sums lent on bottomry, from the termination of the voyage. 10. Sums due by underwriters on policies of insurance, have been found to bear interest from the time when the loss should have been settled.[1]

Termination.

Limitation against Cautioners.

Against Sequestrated Estate only till date of Sequestration.

2. TERMINATION OF INTEREST.—As to the termination of the period during which interest is to be calculated on the claims of creditors, the natural rule is, that interest shall continue to run till the day of payment. But, 1. There is a limitation established by statute, where the claim is made against a cautioner: The claim of interest in such a case is restricted to the period of seven years. 2. The rule suffers also a limitation on the peculiar principles of bankrupt law. On bankruptcy, so far as the common fund is concerned, it lies dead in the hands of trustees, or at best bearing bank interest from the moment when the debtor's transactions are stopped, and from the same point of time the currency of interest should stop on the claims of the creditors. But, *First*, It is only in the law relative to mercantile bankruptcy that this rule has been followed in Scotland: It is enacted, that the trustee, in making up a state of the debts in sequestration, shall 'calculate interest on each, up to 'the date of the first deliverance on the petition for sequestration.'[2] *Secondly*, The rule is confined, even in mercantile bankruptcy, to the claim as made against the divisible fund: As against the bankrupt himself, in using diligence against his person, as well as against any reversion which may be left of the sequestrated estate after paying the principal sums, with interest to the date of the first deliverance, interest is demandable according to the common rule.[3] And, *Thirdly*, No provision restraining interest having been made for cases where there is no sequestration, they must be regulated by the rules of common law; in which there is no principle acknowledged that can bar the running of interest down to the very day of payment. It has been understood, indeed, that, in judicial sales and ranking, not only are creditors entitled to interest after the bankruptcy, but to interest on the accumulated sum of principal and interest, down to the period when the price of the lands is payable. In distributing moveable funds under actions of multiplepoinding, there is no stop to the currency of interest.

While the claims of all the creditors continue unaccumulated, it can very seldom be a matter of any consequence at what period the interest ceases to run against the inadequate

[1] See CRAWFORD and STARK against BERTRAM; supra, p. 646. Note [4]; and Lord Ellenborough's opinion in DE HAVILAND *v.* BOWERBANK, there quoted.

[2] 54. Geo. III. c. 137. § 45.; also § 49.

[3] By 33. Geo. III. § 46. a provision was introduced respecting the surplus of the estate, the justice of which, and the soundness of principle on which it proceeds, were very questionable. Where there is a surplus, the case is no longer under the peculiar principles of bankrupt law. There is no ground for stopping the currency of the interest as against the bankrupt's reversion: it is as if there never had been a bankruptcy. But, by the 46th section of the Act, it was provided,—'That the surplus of the bankrupt's estate and effects 'that may remain after payment of his debts, *computing* '*interest as aforesaid*, (i. e. "up to the date of the 'first deliverance,") and the charges of recovering the 'estate, and distributing the same, shall be paid or 'made over to him, or to his assignees or successor.' The English law had adopted the true principle: the creditors entitled to interest having right to it out of the reversion, not merely up to the date of the commission, but also to the day of payment. Cullen's Principles of Bankrupt Law, 410. and cases there quoted. In the Act of Sederunt passed 14th December 1805, relative to the Act 33. Geo. III., this matter was regulated correctly; and now by the 49th section of the statute of 54. Geo. III. c. 137. § 49. the matter is placed upon that footing.

fund, since examples are now so exceedingly rare of creditors who are not entitled to interest. There is, however, an advantage to be gained by those who have got their debts accumulated; for the increase by the currency of interest is in a greater ratio than the legal interest.

No Accumulation ipso jure.

IV. ACCUMULATION OF PRINCIPAL AND INTEREST.—Although the general rule of law be, that interest shall not be allowed upon interest, there are occasions on which accumulation is lawful. The principles of the doctrine of accumulation seem to be these:—

Arrears.

1. Interest does not, in the general case, ipso jure bear interest: Therefore, however long arrears of interest may have continued unpaid, they cannot, without some voluntary or judicial operation, be converted into a principal bearing interest. It is not even lawful in a loan to stipulate, that if the interest be not paid, it shall bear interest.[1] It may appear in some degree inconsistent with the rule, that interest bears no interest, that in judicial sales, and ranking, the debts have been held as accumulated at the date of the payment of the price. This is not merely by the force of the decree of sale considered as a general adjudication: and yet it seems to be in some degree a mistake in principle to call this an accumulation. The true principle seems to be, that at the term of payment of the price, the dividends proportioned to the claims of each creditor are held as set apart for him, with all their accruing interests.[2] A proper accumulation produces the effect of a new currency of interest on interest, to all intents and purposes, so as even to affect personal funds and postponed creditors; but such accumulation cannot possibly be produced by a sale, which converts the subject into a price. The sole effect of this must be to change the claim and security of the creditor into a right to payment of the dividend corresponding with the full extent of debt then due; so that it operates as an accumulation only relatively to that particular subject.[3]

Of Accumulation in Judicial Sale.

Duty to invest Interests.

2. There is an exception to the above rule wherever the holder of the fund is under an obligation of duty to lay out and accumulate the interests. 1. A trustee is bound thus to lay out and accumulate funds as they arise or come into his hands, and is therefore chargeable with interest on interest periodically, from the time at which interests so arising ought to have been laid out.[4] 2. A law agent, acting as a money factor, is bound

[1] Where money is deposited in a bank, bearing interest according to the rule of indefinite payment, a draft generally made on the bank ought to be paid out of the interests that may have grown on the sum deposited; exhausting the deposit only in so far as there is no interest lying in the banker's hand. But bankers give deposit receipts to their customers, and when a sum is wanted, they require the receipt to be produced, and mark the draft on the back of it as a sum paid to account of the principal; by which means they keep in their hand the interest, as a dead fund on which no interest runs. Where, instead of such a receipt, the sum is entered in account, and a mere receipt to account is given, that account must be settled, as it would seem, on the principle of indefinite payments.

[2] 3. Ersk. 3. 81.; and this is confirmed by the statute 1621, c. 28., which authorizes the creditor to include the interest to the day of payment in the bond as a principal, provided payment be not demanded before the stipulated term.

[3] Before 1693, the sale of a bankrupt's lands preceded the ranking. By the regulations 1695, art. 26. the ranking is ordered to precede the sale. In sales by apparent heirs, the sale has always preceded the ranking: and now, by the late sequestration statutes, the sale has been ordered to proceed with all possible expedition, whether the ranking be finished or not. Amid those changes, disputes arose relative to the period of accumulation; sometimes the date of the decree of sale was contended for; sometimes that of the payment of the price; and sometimes, again, that of the decree of ranking. But it may be considered now as settled, that the debts are converted into dividends at the term of payment of the price, the interest accruing on the dividend belonging, of course, to the creditor entitled to such dividend. See BROWN against the YORK BUILDING COMPANY, 17th January 1792. And this seems to proceed, not on the principle of an actual judicial accumulation, as at the payment of the principal, but simply as a necesary consequence of the right of the creditor attaching to the price, and cutting off a proportional part as belonging to him.

[4] GRAHAM against FRIER, 14th January 1824; 2. Shaw and Dunlop, 606. LADY MONTGOMERIE against

to the same duty of annual accumulation, in respect to funds intrusted to his management.[1] 3. One who insists on retaining in his hands a sum placed with him, either as agent, or even as debtor, is bound to the same duty of laying out and accumulating the interest annually, having no right to gain by what he retains in mere security.[2] 4. One who by any fraudulent or illegal act, or breach of duty, withholds money, is bound to account for it with accumulated interest. So a tutor is liable for interest on interest.[3] So a person who, by a fraudulent transaction, had obtained a discharge of a debt, on that transaction being reduced was held liable for compound interest, by an accumulation every two years.[4]

Cautioner Paying a Debt with Interest.

3. Where a cautioner has been forced to pay a debt, consisting of principal and interest, the whole bears interest to him as a debt against the principal. But this is not properly an accumulation, or an exception to the general rule already laid down. It is in consequence only of the payment by the cautioner that he becomes a proper creditor of the principal debtor; and the amount of his debt is the sum of his advance. This rule was introduced by Act of Sederunt, in cases where the cautioner held a bond for relief of the principal, and all damage, &c.; and it was required as a condition, that the payment should be made on distress.[5] The modern practice has been, to allow cautioners, in all cases, to adjudge for principal and interest, as accumulated, and bearing interest from the day of payment, even where the cautioner has paid without distress;[6] and this rule is consistent with the true principle, and there seems so little danger of abuse or collusion, (which alone could be the reason of annexing the condition of distress), that no good objection occurs to this relaxation. Where the debt is secured by heritable bond, a cautioner for the regular payment of the interest, paying, and taking an assignation to the security, is entitled, under the penalty, to rank for interest on the interest paid.[7]

Accumulation by voluntary Corroboration,

4. By bond of corroboration, or other form of voluntary innovation, the accumulation may be made. This is equivalent to a payment and new loan of the whole sum. This cannot be done, as we have seen, by anticipation; nor can it be effectually accomplished after bankruptcy, under 1696, c. 5. or the late Acts.

by Judicial Proceedings.

5. By judicial proceedings the debt may be accumulated.—1. A decree for debt, however, does not accumulate the principal and interest: It is necessary to proceed to diligence in execution before that can be accomplished.[8] 2. Denunciation and horning is,

Denunciation.

WAUCHOPE, 4th January 1822; Fac. Coll.; and 1. Shaw and Dunlop, 453.

[1] Duke of QUEENSBERRY's Executors against TAIT, 21st December 1826; 5. Shaw and Dunlop, 180. CRANSTOUN against SCOTT, 1st Dec. 1826; ib. 62.

[2] Duke of QUEENSBERRY's Executors against TAIT, 23d May 1822; Fac. Coll. Same case, 21st December 1826; 5. Shaw and Dunlop, 180.
M'NEILL against M'NEILL, 26th May 1826; Fac. Coll. 4. Shaw and Dunlop, 620.

[3] HAMILTON against MARSHALL, 25th February 1813; Fac. Coll. The accumulation was triennial.

[4] M'NEILL against M'NEILL, 26th May 1826; Fac. Coll. 4. Shaw and Dunlop, 620.

[5] 1st February 1610. This Act is quoted at length by Spottiswood, p. 34. See Sir Ilay Campbell's Acts of Sederunt, p. 66.

[6] Erskine, b. 3. tit. 3. § 78.

[7] INGLIS against RENNY, 23d June 1825; 4. Shaw and Dunlop, 113.

[8] CAMPBELL against the Earl of GALLOWAY, 3d March 1802. In this case there were circumstances which brought it rather under the rule above laid down, justifying a stricter rule of accounting. There was something of a trustee's duty incumbent on the debtor, and something also of an unjust opposition to a demand, suspending the operation of a judgment. Judgment had been given, in December 1789, for payment of a debt, with interest. The case was kept depending in the Court of Session and House of Peers till 1794, when the judgment was affirmed. Having returned to the Court of Session on some undecided points, a demand was made to have the principal and interest accumulated: And the question arose,—From what period interest should be given by accumulation? The Court was much divided: some Judges being inclined to accumulate as at the date of the first decree; others, to hold that no accumulation should be authorized.

by 1621, c. 20. declared to have the effect of entitling the creditor to claim interest on the sums in the horning;[1] and although interest on interest is not expressly mentioned, this is obviously implied, and so the statute has always been understood. The principle is well indicated in the preamble, that the creditor has done all in his power to recover his money; and that if the debtor still evades payment, he keeps the money as a principal sum, and cannot, in justice, clear himself by afterwards paying no more than he should have paid at first. 3. Adjudication, as an action of execution, terminates in a decree, either adjudging as much of the debtor's estate as should be equivalent to the principal sum, interest, and a fifth part more; or adjudging the debtor's estate, in general, redeemable on payment of the accumulated sum of principal, interest, and expenses: and therefore an adjudication has strictly and properly the effect of an accumulation. 4. The decree of judicial sale, at the instance of an apparent heir, has always been regarded as a general decree of adjudication for the behoof of all the creditors; and the same rule is now extended to the common decree of sale at the instance of creditors;[2] but it has not yet been settled by Act of Sederunt, as the Court is empowered to do, at what period, and in what manner, the principal sums and bygone interest of the debts shall be accumulated. Certainly the general adjudication, thus implied in the decree of sale, is not, in strictness, a decree of adjudication to the effect of accumulating the debt; for the debt is not mentioned in it, nor the accumulated sum specified. It is only by inference, and fictione juris, that a decree of sale is regarded as a general adjudication, and this merely for the beneficial purpose of preventing the acquisition of preferences by new diligence, on the part of individual creditors, after the estate has come into a course of liquidation and division.[3] 5. None of the diligences against moveables produce an accumulation; and, in multiplepoindings, the creditors are ranked for the principal, simple interest, and expense.

Adjudication.

Decree of Judicial Sale.

Diligence against Moveables.

SECTION II.

OF CLAIMS FOR DAMAGES.

Claims of damage may arise either from injuries inflicted, as by personal assault, libel, seduction, adultery, &c.; or from breach of contract; or from neglect of the due diligence which law requires in particular situations and contracts. In treating of particular contracts, something has already been said of claims of damage arising from breach of contract and from negligence.[4]

In questions of damage, the fact forms the chief point of inquiry, whether the injury was committed, or the covenant broken? whether, in consequence, a loss or injury has been occasioned? and what the amount of that loss is? But sometimes the case depends on questions of law of extreme nicety, both where the action is grounded on injury committed, and where it rests on breach of contract. In the latter class of questions particularly, it may be necessary to distinguish between the direct and the remote effects of

A middle course was taken, and the debt accumulated as at the time when the demand for accumulation was made, and when an interim decree for the principal and past interest might have been given.

[1] This denunciation must be made at the head burgh of the creditor's residence. It is not enough that it be at the cross of Edinburgh, if the debtor reside beyond the county. Kames' Rem. Dec. 43.

[2] 54. Geo. III. c. 187. § 10.

[3] It was accordingly agreed by the Judges, in the case of Brown against the York Building Company, 17th January 1792, that the decree of sale was not to be held as an accumulation of the debts of the several creditors.

[4] See above, of Contracts of Sale, p. 448–9. Of Diligence Prestable, p. 453, &c.

the disappointment; or between the actual and positive and the negative loss. Without entering upon these distinctions farther than already touched upon, one or two observations may here be sufficient.

1. Questions of damages are now, by the recent statutes for regulating the Jury Court, to be sent to that Court for determination, when the damage arises from injuries to the person, real or verbal; or from injury to moveables; or to lands where the title is not in question; or from breach of promise of marriage; or on account of seduction or adultery; or on account of delinquency, or quasi delinquency of any kind.[1]

2. A claim for damages may be made effectual in bankruptcy. Even in England, if the demand in the nature of damages be capable of being liquidated and ascertained at the time of the bankruptcy taking place, so that a creditor can swear to the amount, he may prove it as a debt under the commission. But in many respects the law of England, in respect to claims of damages in bankruptcy, is so peculiar, and rests on grounds so artificial, that they are not to be resorted to in illustration of the rules of Scottish jurisprudence on this point. The object of the proceedings in bankruptcy with us, is to give to every creditor payment of his debt, and, on the distribution of the estate fairly disclosed, to discharge the debtor of every possible claim existing at the time of the bankruptcy, whether liquid or unliquidated,—whether presently due or only in future,—whether pure or merely contingent. According to this simple and natural view, all claims of damages seem as competent in bankruptcy as ordinary claims of debts are; provided the damage has arisen previous to or in consequence of the bankruptcy. There may, undoubtedly, be a difficulty in so adjusting the claim as that the creditor shall be able to swear to a precise debt, until by judicial proceedings, compromise, or arbitration, the amount of the damage shall be ascertained: But although this may deprive the creditor of a vote in the deliberations of the creditors, or prevent him from grounding on his unliquidated claim an application for sequestration, it will not, according to the course of Scottish jurisprudence, or the tenor of the sequestration law, deprive him of his right to have his claim liquidated, and proved, and ranked, to the effect of receiving a dividend.

3. However hard the situation may be out of which a claim of damages arises, the bankruptcy itself is not one of the elements to be taken by a jury in assessing a higher sum of damages. The debt due is properly the amount of the loss suffered; and although, in some cases of damages, the person responsible will be adjudged to pay for the injury according to the measure of his fortune, the mere circumstance of unexpected insolvency ought not, on the one hand, to mitigate the damages; and the consideration of his paying only a dividend, ought not, on the other, to be suffered to enlarge the verdict as against the other creditors.[2]

SECTION III.

OF PENALTIES.

PENALTIES are annexed, *First*, To obligations to perform, or not to perform, a particular act; or, *Secondly*, To money obligations. They are intended, in the former case, either to enforce, by more than the usual consequences, what the party is anxious to secure; or

[1] 59. Geo. III. c. 35. § 1.; 6. Geo. IV. c. 120. § 28.

[2] In the case of MACKNIGHT against BERTRAM, GARDNER and Company, (supra, p. 278. Note [1]), an attempt was made to have the sum of damages enlarged, to the effect of giving a larger dividend, and more adequate compensation. But the Court held the amount of the damage estimated, without regard to the dividend, to form the true debt for which the creditor was to be ranked.

to stand as liquidated damage where the event anticipated has taken place, and to save the delay and vexation of a judicial inquiry into the amount of loss. In the latter case, they are intended to cover interest or expenses in making the debt effectual to confer on the creditor, for this purpose, the benefit of the security, or of the rapid execution which is stipulated for the principal debt itself.

Liquidate Damages.

1. PENALTIES IN CONTRACTS AND OBLIGATIONS AD FACTUM PRÆSTANDUM.—1. Where such penalties are intended as liquidated damages, and especially where there appears to be nothing exorbitant in the stipulation, but a reasonable and fair proportion between the loss and the penalty, a court of justice will not interfere. Thus, where in a lease an additional rent is stipulated on particular modes of cultivation being adopted, and where no doubt occurs as to the bona fides of the tenant in altering the original mode of cultivation prescribed, the penalty is held an additional rent conventionally proportioned to the different use to be taken of the land.[1] So in the case of a judicial sale, where the loss arising from failure of an offerer to fulfil his engagement cannot easily be ascertained, a court will not disturb the liquidated damage.[2] 2. But where the penalty is manifestly exorbitant, and a penal forfeiture rather than estimated damage, a court of equity does interfere: the exorbitancy being taken in some sort as a criterion, whether it be properly a penalty or conventional damage that has been stipulated. In such cases, especially, where deviation is accidental or necessary, an inquiry has been admitted into the actual loss as all that can be demanded in equity.[3] 3. Where the penalty is plainly intended to secure against some possible invasion, although it may be conceived in the shape of an increased rent, the party against whom it is pointed is not entitled to insist on taking the enlarged use, paying the penal sum. It is held necessary, in order to his exercising such power, that a jus quæsitum be plainly stipulated; as for example, that a tenant shall have it in his power to follow a particular course, on paying a certain rent. Unless there be such stipulation, the penalty, though in one sense, and in the case of necessary or actual deviation, a conventional damage, is to be held as truly an instrument of restraint,[4] and the payment of the penalty does not liberate from the performance of the engagement.[5]

2. PENALTIES IN MONEY OBLIGATIONS.—These are meant to cover interest or expenses, and to give all the security and execution which is competent in relation to the principal debt, for the recovery of those which are future and contingent claims. In bonds and transactions for the loan of money, the borrower has often so much confidence in his prospect of repaying the sum against the day fixed, and so much anxiety to obtain the accommodation, that he is regardless of consequences in fixing the amount of the penalty. He trusts that the event which is to entitle the lender to the penalty will never happen.

[1] POLLOCK against PATON, 24th February 1777; Fac. Coll. HENDERSON against MAXWELL, 24th February 1802; Fac. Coll. (10,054). GRAHAM against STRAITON, House of Lords, 11th May 1789; 16. Fac. Coll. 423. Note. FRAZER against EWART, 25th February 1813; Fac. Coll. MILLER against Lord and Lady GWYDIR, 26th May 1824; 3. Shaw and Dunlop, 65.

[2] CURRIE's Creditors against HANNAY, 13th December 1791; Fac. Coll. JOHNSTON's Trustees against JOHNSTON, 19th January 1819; Fac. Coll.

[3] See the doctrine of the Court in M'INTOSH against M'DONELL, 1st February 1798; Fac. Coll. (M. *Tack*, App. 4). See also opinion of Court in WRIGHT against M'GREGOR, 9th February 1826; Fac. Coll.

[4] MUIR M'KENZIE against CRAIGIES, 18th June 1811; Fac. Coll.

WORTLY M'KENZIE against GILCHRIST, 13th December 1811; Fac. Coll. In these two cases, a similar decision was pronounced in the two Divisions of the Court.

See some very useful remarks on this subject, in Mr William Bell's note to Bell on Leases, vol. i. 253. et seq. In that note, the cases on the point are very judiciously collected and arranged.

[5] 3. Ersk. 3. § 86. AYTON against PATERSON, 28th March 1627. (M. 1034). CRICHTON against PERIE, 19th March 1630. (10,035). BEATTIE against LAMBIE, 26th December 1695. (10,039).

On the other hand, a lender, anxious to have back his money at the appointed term, thinks that the dread of a demand for the whole penalty will, when the term begins to approach, make his debtor exert himself. But when that failure does come, it would be unjust to permit the creditor to reap so exorbitant an advantage as the recovery of the whole penalty: And it is an important object to take care that no undue advantage be taken of the necessities of debtors. Accordingly, in all countries, a power is vested somewhere for mitigating such penalties, and reducing them to the actual or probable amount of the damage. In France, the doctrine of mitigation was admitted:[1] In England, a remedy is to be had in Equity: And, with us, the Court of Session, as the supreme court of law and equity, has the power of mitigation. On this principle, the laws against usury rest; and those laws also which discourage and annul unconscionable bargains for advancing money to heirs in expectancy. On the same principle the restraining of penalties in bonds is to be justified. The earliest case we have, in Scotland, on this subject, was determined on sound principles. It occurred so far back as the middle of the sixteenth century; and conventional penalties were held to be no farther exigible, by the practice of Scotland, than to the amount of the real damage and interest, because they approach too near to usury, and would elude the law.[2] A penalty in a bond, which bore no interest, was, on this principle, restricted to the interest.[3] By the old form of the heritable bond, where the debtor was infeft only in security of an annualrent, redeemable by payment of the principal sum, interest, and penalty; the penalty was held, in one sense at least, not to be really secured; for although the debtor could not, in competition with other creditors, redeem his land without paying the penalty, (or such part of it at least as could legally be claimed), the annualrenter had no preference for his penalty.[4] But, by the present form of the heritable bond, all those difficulties are removed. The infeftment which is given to the creditor in the lands, is 'for further security of the pay-'ment of the sums of money, principal, annualrents, and liquidate penalty, and termly 'failures above mentioned.' So that the real right, by infeftment, as effectually covers the penalty as it does the principal.[5] In the same way, summary diligence proceeds for

Power of mitigating Penalties.

[1] Pothier, Tr. des Oblig. No. 345.

[2] HOME against HEPBURN, 22d March 1550; Sinclair.

[3] SEMPLE against SEMPLE, 29th November 1622; Haddington.

[4] The whole of this doctrine, as applicable to the old heritable bond, will be found in two cases;—the Ranking of COCKBURN, and MENZIES against DENHAM.

1. As to creditors by real rights it was, in the latter of these cases, found,—'that the creditor in an herit-'able bond for security of his annualrents, was only 'preferable for his principal sum and annualrents, but 'not for his penalty or termly failzie.' 2d February 1739, Kilk. 375. But,

2. As to the effect of the clause of reversion (which clearly barred the debtor himself from redeeming without paying the penalties) upon the purchaser of the estate at a judicial sale, the Court found, 1. That the creditor had no action against the buyer, to force him to pay the penalty; and, 2. That the buyer had no direct means of forcing the creditor to denude, or convey his right, till his penalty, or at least expenses, were paid; and this seeming to some of the Court to endanger the efficacy of the laws relating to judicial sales, it was observed, that, by 1695, c. 6. the buyer might consign the price, which liberates him, and disburdens the land. Ranking of COCKBURN's Creditors, 4th July 1700; 2. Fount. 101.

[5] DUFF against CHAPMAN, 19th February 1755; Fac. Coll. (10,046.); and see 5. Brown's Sup. 292. for Lord Kilkerran's note. This point was first tried in the ranking of Jarvieston, where it was objected to a creditor by heritable bond, claiming to be ranked for the expenses incurred, that he had no preference for the penalty to any farther extent than the mere expense of the infeftment; all other claims for expense, however good against the debtor, being, in competition, to be considered as claims for future debts not secured by the infeftment; and it was strongly affirmed to be the universal understanding in practice, that such was the law. The Court at first dismissed the claim, 'moved chiefly by the practice alleged by the 'objector;' but 'finding, upon investigation into rank-'ings, that the practice was not uniform, they decided, 'that the heritable creditors are preferable upon their 'heritable bonds, to the extent of their necessary ex-'penses, alongst with their principal sums and interests.' Ranking of JARVIESTON, 24th June 1782. This is now held as settled.

the penalty to the effect of authorizing a demand for the actual expense: The creditor not being entitled to refuse the principal, interest, and actual expense; the debtor not being entitled to suspension, unless this has been tendered.[1]

As to the amount of the expense and damage allowed to be claimed under cover of the penalty, these points seem to be fixed:—1. As the legal interest is the proper damage arising from a failure to discharge a pecuniary obligation; where interest was not stipulated, and while yet it was not held to be due without a special contract, the penalty, in the first place, went to cover the interest.[2] 2. All the expense of making the debt effectual is recoverable under the penalty.[3] So the expense of diligence is clearly included. Even the expense of a litigation, collaterally arising in making effectual the claims, has been admitted.[4] The expense also of proceedings against a co-obligant has been allowed.[5] As to the expense of litigation, which has not been allowed in the action itself, there seems to be ground for distinguishing; and, *first*, If the litigation has been between the creditor and debtor themselves, the refusal of expenses to the creditor in that action seems to exclude his claim under the penalty.[6] As to the expense of litigation in proceedings where third parties have been concerned, the refusal of expenses in the action is not conclusive against the claim for expense under the penalty.[7] But although collateral expense has been allowed, it has been refused where the proceeding is not directly under the bond.[8] 3. Lord Stair, in speaking of the power of the Court of Session to modify and restrict penalties, says,—'These clauses have this effect, that the Lords take slender pro-'bation of the true expenses, and do not consider whether they were unnecessary or not, 'so that they exceed not the sum agreed upon; whereas, in other cases, they allow no 'expense but what is necessary and profitable.'[9] 4. Doubts were formerly entertained, whether an adjudication on a bond bearing a penalty, did not deprive the Court of all power of mitigation. Those doubts were grounded on the principle, that an adjudication is, in truth, a sale under reversion. But this opinion of the nature of an adjudication has been given up.[10] And, accordingly, it has been found, that the Court has the power of mitigating penalties in adjudications, as completely as in bonds.[11] 5. Although it may be said, in one sense, that a creditor by heritable bond is infeft, and

[1] HYND against SCOTT, 30th May 1826; 4. Shaw and Dunlop, 628. COWPER against STEWART, 4th January 1746; Kilk. 375.

[2] SEMPLE against SEMPLE, 29th November 1622; Haddington.

[3] Ranking of JARVIESTON, 24th June 1782, (14,132).

[4] RAMSAY against GOLDIE, 22d June 1826; 4. Shaw and Dunlop, 737.

[5] DUFF's case, supra, p. 656. Note [5].

[6] ALLAN against YOUNG, 23d December 1757; Fac. Coll. 132. (10,047). 5. Brown's Sup. 340.
GORDON against MAITLAND, 27th November 1761; Fac. Coll. 150. (10,050).

[7] DUFF's case, supra, p. 656. Note [5].
ALLARDES against MORISON, 19th June 1788; Fac. Coll. (10,052). See RAMSAY, supra, Note [4].

[8] In the Ranking of JARVIESTON it was found, that a creditor by heritable bond, receiving a collateral assignation to certain debts, and being put to considerable expense in prosecuting for them, could not include this expense under his penalty. 24th June 1782. In the case of Kildonan's creditors it was found, that an heritable creditor having entered into possession, by appointing a factor under the usual clause empowering him so to do, and declaring him liable only for his intromissions, deducting the expenses of levying the rents, and for omissions; he was not entitled, in accounting with the debtor's creditors, to charge a salary to his factor. Creditors of KILDONAN against DOUGLAS, HERON and Company, 16th June 1785.

[9] 4. Stair, 3. 2.

[10] CAMPBELL against SCOTLAND and JACK, 7th March 1794. There will be occasion afterwards to investigate this more particularly, in treating of the Effects of Payment.

[11] PURDON GRAY against BUCHANAN. The case occurred in a ranking, but the objection was moved by the heir of the debtor; and, in this way, it may almost be said, that the question was viewed in both lights, as between the debtor himself and the adjudger, and as in a competition. The Lord Ordinary first 'ranked and preferred the adjudger for payment of

holds a real right over the lands in security of the debt, with interest, and the whole of the penalty, and therefore ought to be so *ranked*, whatever he may be allowed to *draw;* yet the matter has been otherwise decided. Like an obligation and security in relief, the right of the heritable creditor, under the penalty, is never held to attach, except so far as expenses are actually incurred.[1]

PART II.

THE DOCTRINE OF PASSIVE TITLES, OR THE EFFECT OF DEBT AGAINST REPRESENTATIVES.

We have hitherto considered debts as operating against the original obligant; but they are available also against heirs representing such original debtor; taking his estate, and becoming in consequence liable for his debts, either universally or to a limited extent.

The estate of the debtor, as well as his person, is liable for the performance of his engagements; and may be attached not only during his life, but after his death. The transference of the estate to his heir does not extinguish this liability; but on the contrary, according to the law of Scotland, his heir taking up the universal right and character of heir, is held, in assuming the benefit, to undertake also the burden, and to become liable for every debt of the proprietor deceased. The extent of this liability should naturally be measured by the value of the estate; but the law of Scotland has carried it to an unlimited extent, discharging the creditors from any necessity of making inquiry into the exact amount of what the heir has so taken, and by a presumption of law holding the estate to be fully adequate to the payment of any debts. An undertaking, accordingly, to this extent, is inferred from the service of the heir; and is called the passive title of an heir, as the right which gives him access to the estate is called his active title. It is on account of this liability that the doctrine which prevails in the laws of other countries is not admitted in

' the accumulated sum contained in his decree of adju-
' dication, and interest thereof from the date of the
' said decree, till payment;' and to this, by their first judgment, the Court adhered. But afterwards, upon considering the important change produced on the common opinion respecting the nature of a general adjudication, by the decision in Campbell and Scotland's case, they ' altered and restricted the adjudica-
' tion to a security for principal sum, interest, and
' necessary expenses of adjudication.' 10th July 1800. It is true that, afterwards, this judgment was altered, but upon a ground quite foreign from the point now under discussion, viz. the effect of certain objections to the adjudication.

It was understood upon the Bench, when this decision was pronounced, that the decision was in no shape to affect the method of adjudging, or to prevent a creditor from adjudging for his full penalties, reserving for future consideration to what extent the claim should be mitigated. On the other hand, he may be a loser by dead interest, which the Court will, as in the case of Murray of Stanhope against the Earl of March in 1772, think themselves bound in equity to recompense out of the penalty; and, on the other hand, while he regularly receives his interest, or holds possession, he may, by repeated adjudications, give ground for condemning his conduct as oppressive, and so authorize the Court to refuse all claim under the penalty.

[1] In the Ranking of Jarvieston, already quoted, an inquiry was ordered into the practice of accountants in ranking creditors by heritable bonds upon the penalties; and the Court, upon considering the result, found,—' That penalties, to the extent of the necessary
' expenses, have the benefit of the real security upon
' infeftments, such as those founded on; therefore
' found the creditors in this case preferable for their
' penalties, to the extent of the necessary expense;
' but found, that the expense laid out in recovering
' the contents of a collateral security, could not be
' understood as a part of the penalty in the heritable
' bond.'