

1636. 3. GUARDIANSHIP. The father is administrator-in-law for his children.

See below, of Tutors and Curators.

II.

LAWS OF SUCCESSION.

I. OF SUCCESSION IN GENERAL.

1637. No department of municipal law is more intimately connected with the state of society than that which relates to the rights of heirs, and the rules of descent; and in none perhaps are differences so essential to be found in comparing the laws and institutions of various countries. While in most European countries, and particularly in England and Scotland, the equal division of the Roman law prevails in relation to the succession in moveables; the law of primogeniture, and the preference of males, is the distinguishing character of the descent of land. But in France, in Holland, in Spain, in Normandy, and partly in Denmark, and almost universally in America, the rule of equal partition has been adopted in the descent of land.

3 Stair, tit. 4. 3 Ersk. tit. 8. 2 Blackst. Com. c. 14. Pothier, Tr. des Successions, œuv. posth. tom. 3. Code Civile, No. 718-892. Chabot, Com. sur la loi des Successions, Toulier, Dr. Civ. tom. 4. Van Leeuwin, 63. Kent, Com. on American Law, v. iv. p. 373. Story, Conf. of Laws, 403.

1638. In the law of Scotland the universitas of the estates and property of one deceased is called his HÆREDITAS; and comprehends both lands and moveables: the one descending to the heir, the other to the executor; or both to one person, if these characters be united. While it still remains untaken up by the heir, it is called HÆREDITAS JACENS. The person who takes the benefit of the hæreditas is burdened with the debts of the deceased: He is called the REPRESENTATIVE of the deceased, and considered as eadem persona cum defuncto. The act or mode of taking up the succession is either a judicial or an extrajudicial proceeding, by which the heir's right

in heritage or in moveables is recognised, and the active title, as well as the passive representation, either universally or to a limited extent, conferred and fixed on the successor.

1. *Opening of the Succession.*

1639. The natural opening of the succession is by death ; natural, not civil death. But the death of a proprietor is not necessarily accompanied by succession ; for, 1. in particular crimes (as treason), there is no succession ; the criminal's estate being forfeited from the traitor and his heirs, and his blood being corrupted (*a*). 2. Succession may open before death, under the provisions of a strict entail, declaring certain acts to infer forfeiture of the estate and devolution of the succession (*b*).

(*a*) 1 Hume, Criminal Law, 546, 550-1, 548.

(*b*) See below, of Entails, § 1761.

1640. In the proof of death, as opening the succession to a particular person difficulties may arise :—Thus, 1. It may be necessary to determine which of two persons dying on the same day, or perishing by the same accident, survived (*a*) ; or, 2. It may be necessary to ascertain, whether a person absent from the country, or missing, is still alive, or was alive at any particular time (*b*) ; or, 3. In order to ascertain whether a succession has devolved, or a bequest accrued, to a particular person, his survivance on a particular day must be established (*c*). All such cases are for a jury ; and presumptions, proofs, and inferences from the particular circumstances, rule the decision.

(*a*) Case of General Stanwix, Fearn's posth. works. See Code Civ. de France, § 761-2. Chabot, Tr. de Successions, § 722. 4 Toulier, Droit Civ. 44.

(*b*) Sommerville, May 19. 1815 ; F. C. ; reversed, June 8. 1818. Lord Ashburton, Feb. 7. 1811 ; F. C. Carstairs, July 30. 1734 ; M. 11633. Lawrie, Feb. 18. 1670 ; M. 12643. See Ruthven, Feb. 29. 1628 ; M. 11629. Erskine, June 25. 1622 ; M. 11656. French, July 25. 1667 ; M. 12644 ; and Feb. 23. 1694 ; 4 Brown's Sup. 163. Hog, June 1706 ; M. 12645. Henderson, Dec. 21. 1710 ; M. 12646. Forrester, Feb. 12. 1760 ; M. 11674. Reid, Jan. 14. 1834 ; 12 S. D. 278. Campbell, Feb. 1. 1834 ; Ib. 382. Brown, Feb. 25. 1834 ; Ib. 486.

(*c*) Hamilton, 1791.

2. *Persons Capable of Succeeding.*

1641. It is indispensable to the vesting of a succession in a

particular person, 1. that such person shall be conceived at the opening of the succession, and shall be born alive ; 2. that the person to succeed shall be legitimate ; 3. that he shall be a subject of the queen ; and, 4. that he shall be of uncorrupted blood.

1642. 1. In *intestate succession* the person who is in the right to succeed at the time of the opening of the succession is the heir. But the right of a child already conceived though not yet born, is admitted in this question, provided there is life after birth ; and, on birth, he will exclude one who may have entered as heir ; and may compel him to denude. Many difficult questions in evidence, respecting conception, birth, parentage, identity, and legitimation by subsequent marriage of parents, occur on such occasions. In *succession by deed*, the person entitled to succeed according to a particular destination, will not be deprived of it though not born or conceived at the opening of the succession.

3 Stair, 5. § 50. 3 Ersk. 8. § 6, 9, 76. Bruce, Feb. 22. and 24. 1677 ; M. 14880. Lord Mountstewart, Dec. 13. 1709 ; M. 14903. M'Kinnon, June 16. 1756 ; M. 6566. Monbodo, 5 Brown's Sup. 848. M'Kinnon, Feb. 14. 1765 ; M. 5290 ; 5 Brown's Sup. 904 ; affirmed, Feb. 25. 1771. Douglas Cause ; see arguments and speeches, and as decided in the House of Lords, Middlemore, March 5. 1811 ; F. C.

1643. 2. Legitimacy of birth is indispensable. See above, § 1624, et seq.

1644. 3. Aliens are excluded from succession to lands, but may be naturalized. See below, of the Rights of Persons, § 2130, et seq.

1645. Corruption of blood bars succession. See above, § 1638.

3. *Laws of Descent and Consanguinity, as applicable to Succession Generally.*

1646. The law of succession to land is arranged on the principle of primogeniture and the preference of males ; while moveables are disposed of nearly on the principles of the Roman jurisprudence in equal shares to all the nearest of kin.

1647. CONSANGUINITY. In both courses of succession there is perpetual reference to the lines of consanguinity ; of which there are three : descending ; collateral ; and ascending. The first and the last are called *lineal*, in contradistinction to the

second ; and in them there is *vinculum personarum ab eodem stipite descenditum*, as all descending in a direct line from one common ancestor.

1648. 1. *Lineal Descent* includes all issue immediate and remote ; each generation forming a degree of descent.

1649. 2. *Lineal Ascent* comprehends immediate parents and ancestry in the direct line, as high as evidence can reach.

1650. 3. *Collateral Kindred* also descend from one common ancestor with the deceased, but not, as in lineal succession, from each other. And here it is necessary to distinguish the full from the half blood ; and in half blood, the consanguinean from the uterine.

1651. Full Blood. Persons are thus connected (or german), who are born, or descended, of the same father and mother.

1652. Half Blood is either consanguinean or uterine.

1. Consanguinean relations are persons born or descended of the same father, but not of the same mother.

2. Uterine relations are persons born or descended of the same mother, but not of the same father.

Law recognises no relationship between the consanguinean and the uterine ; and there is no succession *ab intestato* of the one to the other.

1653. Relationship of full blood or of half blood, according to the Books of the Feus, stopt at the seventh degree (*a*) ; but it is reckoned in Scotland to extend as far as the evidence of propinquity will reach (*b*).

(*a*) Lib. Feud. l. 1. tit. 1. § 4.

(*b*) 2 Craig, 17. § 11. 3 Ersk. 10. § 2.

II.—OF THE LAW OF SUCCESSION IN LAND.

1654. This subject may be considered under these heads :—

1. Of the law of succession *ab intestato*. 2. Of the law of succession as affected by settlements and deeds of entail. And, 3. Of the mode of completing the title of the heir in both these situations.

1. LAW OF HERITABLE SUCCESSION AB INTESTATO.

1655. In heritable succession, the radical points are, 1. Primogeniture, and the succession of males, and of their issue ac-

cording to seniority. 2. Representation of parents by their children taking their place in the succession. 3. Failing males, equal partition among females; their issue taking their portions according to the same rule of representation. And, 4. A deviation in collateral succession where land has been acquired by the owner (called Conquest), from the rule of descent observed in the succession to lands coming from an ancestor, called Heritage.

1. *Law of Succession in Heritage.*

1656. The several lines already mentioned are observed in succession to heritage.

1657. 1. RULES OF LINEAL DESCENT. Referring to the explanation of consanguinity already given (§ 1647, et seq.), the following are the rules of the lineal descent of heritage:—

1658. 1. *Primogeniture and Preference of Male.* The heritable estate descends ab intestato to the lawful issue (§ 1624) of the person who died last vest and seised in the land (§ 756): first, males in their order, and next females as heirs-portioners. The eldest son, and his issue male and female in their order, take first; next the second son, with his issue male and female in their order; and so on through all the sons (with their issue) in their order. See § 1660.

2 Craig, 13. § 19; 14. § 3. and 7. 3 Stair, 4. § 33. 3 Ersk. 8. § 5.

1659. 2. *Heirs-Portioners.* Failing the male issue and their issue, the female issue inherit pro indiviso, as heirs-portioners, the issue of those who have died taking their mother's portion (*a*). And, 1. The father's daughters, of whatever marriage, succeed equally to subjects divisible (*b*). 2. The issue of each daughter take their mother's place; first sons in their order, then daughters equally. 3. The eldest heir-portioner by legal succession, not by provision (*c*), has a preferable right, or præcipuum, without compensation to her sisters, to the mansion-house of an estate in the country (*d*). But, 4. She has no such right to a house in town, or to a country villa (*e*). 5. She is also entitled as a præcipuum to such peerages, dignities, and titles of honour as are not limited otherwise. 6. She has also a preferable right to subjects indivisible; and amongst others to a superiority (*f*): But this

on another footing from the right to the præcipuum; as she must give compensation for such subjects (*g*). 7. When there are more superiorities, or rights to feu-duties, than one, they must be divided like other subjects (*h*). 8. The eldest heir-portioner has the custody of the title-deeds (*i*). 9. The subjects to which the heirs-portioners succeed pro indiviso, they may insist on having divided; and in such division the eldest has the portion next to the mansion-house; but the others cast lots for their choice (*k*).

(*a*) 1 Feud. 8. § ult. 2 Feud. 11. and 36. 2 Craig, 14. § 3. 1 Reg. Maj. 25. § 23; and 2. 28. § 1. 3; 29. § 1, 2, &c. Quon. Ath. c. 20. Balf. 221. § 1. and 4. Skene de Verb. Sig. voce *Varda*. See Hailes, Sutherland case.

(*b*) 3 Stair, 5. § 11. 3 Ersk. 8. § 13. Wallace, Jan. 20. 1758; M. 5371. Smith, June 12. 1792; M. 5381.

(*c*) Cathcart, Feb. 16. 1773; M. 5375. Wight, Dec. 12. 1798; M. *Heir Portioner*, 1. McLachlan, May 27. 1807; Ib. 3.

(*d*) 2 Craig, 14. § 7. 3 Stair, 8. § 11. 3 Ersk. 8. § 13. Hathorn, Dec. 12. 1696; M. 5361. Cowie, Feb. 20. 1737; M. 5362. Peadie, Feb. 2. 1743; M. 5367. Forbes, June 24. 1774; M. 5378. Ireland, Nov. 14. 1765; M. 5373.

(*e*) Wallace, Jan. 20. 1756; M. 5371. Smith, June 12. 1782; M. 5381. Thomson, June 24. 1786; Bar. Hume, 765. Rae, Jan. 1810; F. C. See Bar. Hume, 764.

(*f*) Lady Luss, July 30. 1678; M. 15028. See above, § 859.

(*g*) See Ireland, Forbes, Peadie, *supra* (*d*). Wight, Dec. 12. 1798; M. *Heir Por.* App. 1. McLachlan, May 27. 1807; F. C. Houston, *supra* (*e*).

(*h*) Rae, Nov. 30. 1809; Bar. Hume, 764.

(*i*) Same case (*k*).

(*k*) Dunbar, Dec. 18. 1792; M. 5367. Inglis, Nov. 20. 1781; Bar. Hume, 762.

1660. 3. *Representation*. Where, before the opening of the succession, a descendant has died, who, if alive, would have succeeded as heir, his place is supplied, and the succession taken, by his lineal descendant: This is called Representation.

2 Craig, 13. § 39. 3 Stair, 4. § 4.

1661. II. RULES OF COLLATERAL SUCCESSION. On the exhaustion of the line of descent (children, grandchildren, and their descendants), the succession, instead of ascending to the grandfather, deviates to the collateral line. The rules are these:—

1662. 1. Heritage, after descending as far as possible, ascends gradually. So, on the death of a middle brother, his younger brothers (and their issue), in their order from elder to younger, succeed before the elder: And elder brothers succeeding to younger are preferred in an inverse order, viz. from

younger to elder upwards; each as he succeeds transmitting to his issue. See as to Conquest, below, § 1670.

3 Ersk. 8. § 8. Johnson, Dec. 15. 1681; M. 14871. Grant, Nov. 29. 1757; M. 14874.

1663. 2. Where a woman dies leaving heritage, her brothers and their issue succeed before her sisters; according to the order now stated, § 1662: Her sisters, when the succession opens to them, being heirs-portioners. See below, of Conquest, § 1676.

3 Stair, 4. § 33.

1664. 3. The germain or full blood, male and female, with their issue, succeed in the first place, according to the above order.

Hope, Min. Pract. tit. 2. 3 Ersk. 8. § 8. Stenhouse, Jan. 1686; M. 14872.

1665. 4. The half blood consanguinean succeeds after the full blood; brothers first, in the above order. If they are issue of a former marriage, the youngest brother consanguinean first, and gradually upwards; if of a subsequent marriage, the eldest first, and gradually downwards (*a*): Sisters consanguinean succeed to brothers consanguinean as heirs-portioners. The half blood uterine is excluded (*b*).

(*a*) Lady Clarkington, July 20. 1664; M. 14867; 2 Craig, 15. § 19.

(*b*) Gilbert's case, in 2 Craig, 17. § 9. 3 Stair, 4. § 4. Lennox, Feb. 5. 1663; M. 14867.

1666. III. RULES OF THE ASCENDING LINE. Failing collaterals, the heritage goes to the father. And,

1667. 1. Heritage ascends to the father and his relations, to the exclusion of the maternal line.

2 Lib. Feud. 50. and 4. 84. 1 Coke on Littleton, tit. 1. § 3. Harg. and But. Notes, n. 56-7. See also 1 Howard, Anciennes Loix des Frangois, 13. 2 Black. 210. 2 Craig, 13. § 46. 3 Stair, 4. § 35. 3 Ersk. 8. § 9. See Hope, Maj. Pract. Lennox.

1668. 2. The succession never ascends to the mother and her relations. Even the mother's own estate, after vesting in her son or daughter, never ascends to the maternal line again.

2 Craig, 17. § 9. 3 Ersk. 8. § 9, 10.

1669. *Ultimus Hæres*. The Crown as ultimus hæres takes

the hæreditas, on failure of the three lines of succession now stated. This is a caduciary right ; not a right of succession.

1 Lib. Feud. 1. § 4. 2 Craig, 17. § 11. 3 Ersk. 10. § 2. 3 Stair, 3. § 47. Wallace, Nov. 1687. Tenant, July 1638 ; M. 14897.

2. *Law of Succession in Conquest.*

1670. In the rule of succession in land acquired by the deceased, and hence called Conquest (§ 1656, 1671), the law of Scotland does not accord either with the law of the Feus, or with the law of England ; but is peculiar (*a*). And, 1. The conquest of a middle brother dying without issue, or of the son of a middle brother failing issue, goes to his immediate elder brother or uncle alive ; or, if there be no elder, to the next younger alive, failing issue of intermediate brothers or uncles who have died (*b*). 2. The conquest of a sister dying without issue goes also to her next elder brother ; or, failing elder, and their issue, to the next younger brother alive, preferably to her sisters (*c*). 3. Where there are only sisters, there is equal partition in conquest, as in heritage (*d*). 4. In conquest, as in heritage, the whole blood excludes the half (*e*) ; but if there be no brothers or sisters german, or issue of them, the rule holds as to brothers consanguinean (*f*). 5. There is representation as in heritage. And, 6. If the succession come from the youngest brother dying without issue, the immediate elder brother takes both the heritage and the conquest (*g*).

(*a*) 1 Lib. Feud. 1. § 2. also tit. 20. 2 Craig, 15-§ 10 ; Ib. 77.

(*b*) 3 Ersk. 8. § 14.

(*c*) 3 Stair, 4. § 33. Robertson, July 1. 16775 ; M. 5605. A. v. B. July 21. 1670 ; M. 5608. Cunningham, Dec. 7. 1770 ; M. 14875.

(*d*) 3 Ersk. 8. § 15. Carse, Feb. 5. 1717 ; M. 14873.

(*e*) See Sir G. Lockhart's opinion in Fount. vol. i. p. 6. 3 Br. Sup. 241.

(*f*) 2 Craig, 15. § 19. Lady Clarkington, July 20. 1664 ; M. 14867. 3 Stair, 5. § 10.

(*g*) Robertson, July 7. 1675 ; M. 5605.

3. *Distinction between Heritage and Conquest.*

1671. The difference between Conquest and Heritage is this : that Conquest is what has come into the person of the deceased by purchase, gift, or other singular title, from a stranger, or from one to whom he would not by law have succeeded : Heritage is that to which one has succeeded as heir-at-law to his father, or other relation.

2 Lib. Feud. 50. 1 Craig, 10. § 26. 3 Stair, § 10. 3 Ersk. 8. § 14.

1672. The rules by which it is ascertained what subjects are comprehended in conquest are the following :—1. It must be an heritable subject or debt vested by sasine, or requiring sasine to complete the right (*a*) : And this rule comprehends adjudications (*b*) ; bonds bearing a clause of infeftment (*c*) ; subjects purchased and vested in a trustee (*d*) ; and it would seem also subjects disposed in trust to be conveyed over to the deceased. Subjects to be sold by trustees, and the produce divided, are not conquest, but moveable estate (see above, § 1482). 2. Heritable subjects which do not require sasine are not conquest, but go to the heir in heritage ;—as leases (*e*) ; personal bonds excluding executors (*f*). 3. Teinds are not conquest ; as they affect the fruit, not the land (*g*).

(*a*) 3 Stair, 5. § 10. 3 Ersk. 8. § 14, &c. Duke of Hamilton, Jan. 8. 1740 ; M. 5554, 5615 ; Monb. ; 5 Brown's Sup. 684 ; 1 Craigie and Stewart, App. Cases, 271. Robertson, July 7. 1675 ; M. 5605. Pitcairn's case, as there quoted ; M. 5607.

(*b*) A. v. B. Feb. 23. 1675 ; M. 5608. Anderson, June 28. 1677 ; M. 5609.

(*c*) A. v. B. July 1676 ; M. 5608. Creditors of Menzies, Dec. 8. 1738 ; Elch. *Her. and Con.* 2 ; M. 5614.

(*d*) Duke of Hamilton, ut supra.

(*e*) Earl of Dunbar, June 24. 1625 ; M. 5605. Fergusson, June 23. 1663 ; ib.

(*f*) Begbie, Jan. 23. 1706 ; M. 5609. Duke of Hamilton, Jan. 8. 1740 ; M. 5615. 1 Craigie and Stewart, 271.

(*g*) Greenock, Dec. 16. 1736 ; M. 5612.

1673. Subjects which were truly heritage in the person of the deceased, do not become conquest by the interposition of a conveyance in his favour.

2 Craig, 15. § 17. 3 Stair, 5. § 10. 3 Ersk. 8. § 15.

1674. Things which come by force of destination, and are taken up by service as heir of provision, are not conquest but heritage ; as an estate coming to a middle brother by deed of entail.

Boyd, June 28. 1774 ; M. 3070. 1 Hailes, 577. Mark the error in Brown's Synopsis, 85, voce *Her. and Con.*

1675. Conquest, in descending *from* the heir of conquest to his heir, becomes heritage (*a*). But it seems necessary to this effect, that it should be *vested* in the heir of conquest by titles made up in his person ; otherwise, remaining in hæreditate jacente of the acquirer, it will go to *his* heir of conquest (*b*).

(*a*) 3 Ersk. 8. § 15.

(*b*) Hope's Min. Pract. p. 170. § 47. Aitcheson, March 7. 1829 ; 7 S. D. 558.

1676. Succession to conquest, as contradistinguished from succession to heritage, takes place only where a middle brother or sister (or their issue) dies, leaving younger and elder brothers or uncles. The younger brother (or uncle) and his issue takes the heritage ; the elder and his issue the conquest.

Craig, Stair, and Ersk. *ut supra*. Cunninghame, Dec. 7. 1770 ; M. 14875.

4. *Rights of an Apparent Heir.*

1677. An apparent heir is the person who, *after the succession has opened*, is entitled to take it up as heir-at-law, but who has not yet made up his titles. Before the opening of the succession, he is only the *heir presumptive*.

3 Ersk. 8. § 54. Ragg, June 27. 1708 ; M. 5260.

1678. Some rights descend to, and are vested in, the apparent heir without any service ; and he may enter into possession of the land, and is entitled to exercise even certain rights requiring sasine before completing his title.

1679. 1. RIGHTS VESTING WITHOUT SERVICE. Titles of honour and dignities require no service, but vest ipso jure sanguinis.

3 Ersk. 8. § 77.

1680. Leases vest by mere apparency without service, to the effect not merely of possessing, but of transferring the right.

Boyd, June 17. 1671 ; M. 14375. Hume, July 9. 1675 ; *Ib.* Rattray, Feb. 14. 1623 ; M. 10366, corrected by Campbell, Feb. 16. 1739 ; M. 14375. Scott, June 26. 1754 ; 5 Brown's Sup. 814 ; and M. 14376.

1681. Rights which run a course of future time, vest without service.

3 Ersk. 8. § 77.

1682. An apparent heir may continue his ancestor's possession without a title (*a*), and cannot be disinherited of this right otherwise than by an effectual conveyance inter vivos or mortis causa (*b*). And, 1. He may enter into the actual possession of the lands, &c. 2. He may also continue the civil possession and levy rents and interests ; but not remove tenants deriving right from the deceased proprietor. To an effectual removing, whether under the old act or under the act of sederunt, infetment previous to decree is indispensable ; the dis-

inction having been little regarded in a very recent case (*c*).
 3. His right to the rents *vests* ipso jure; so that on his death his executors take the unlevied rents or interests of the price of lands sold (*d*).

(*a*) 3 Ersk. 8. § 58. Weir, Feb. 13. 1664; M. 5244.

(*b*) Ross, March 2. 1770; M. 5019. See below, § 1691. et seq.

(*c*) Ersk. ut supra. Paton, Dec. 15. 1757; M. 5273. Sutherland, Aug. 3. 1759; M. 5276. Campbell, March 2. 1808; F. C. Johnston, March 3. 1810; F. C. Scott, Feb. 2. 1832; 10 S. D. 284.

(*d*) Hamilton, Dec. 5. 1760; 5253; reversed in House of Lords. Lord Banff, July 24. 1765; 5 Brown's Sup. 912. Hamilton's case in House of Lords, April 8. 1767; M. 5257. Spalding, June 20. 1792; Bell's Cases, 244; M. 5257.

1683. 5. The apparent heir is entitled to challenge deeds done on deathbed (*a*). And it has been doubted whether he is not entitled to reduce any infeftment affecting the estate, to which as heir he has a right to succeed (*b*): The rule seems to be, that when the deed to be challenged is that of a former proprietor in the fee, and the heir challenges in his character of heir of provision under previous investitures, there must be a service;—where the challenge arises from the alleged inefficacy or illegality of the deed, as excluding the heir who would otherwise take, he may vindicate that right without service (*c*).

(*a*) Graham, Feb. 4. 1779; M. 3186; 2 Hailes, 823. see below, § 1786.

(*b*) In Cochran, March 11. 1828; see 6 S. D. 773-4.

(*c*) Rutherford, Nov. 12. 1830; 9 S. D. 3.

1684. 6. An apparent heir may bring his ancestor's estate to judicial sale for debt, although the estate is not bankrupt.

1695, 24.

1685. 2. ANNUS DELIBERANDI. The heir is entitled to decline responsibility for his ancestor's debts; and in order to deliberate whether he shall do so, he is allowed a year, computed from the ancestor's death; or from the heir's own birth if posthumous (*a*): But the term will not be prolonged on account of distance of the place in which the ancestor dies (*b*). If the apparent heir should die during the annus deliberandi, the next heir has the privilege of his own annus deliberandi from the death (*c*). During the annus deliberandi, the heir is not bound to answer in any action, in the defence whereof he must speak as heir (*d*), except in relation to the widow's jointure (*e*). But this privilege of deliberating is lost, 1. by ser-

vice as heir; 2. by passive representation (*f*); and, 3. it will not stop an action of judicial sale raised against the predecessor (*g*).

- (*a*) 3 Ersk. 8. § 54. Summers, Dec. 23. 1757; M. 6882.
- (*b*) Henderson, Nov. 14. 1783; M. 5292; 2 Hailes, 929.
- (*c*) Stevenson, Nov. 28. 1649; 1 Brown's Sup. 422. Summers, ut sup. (*a*).
- (*d*) Ersk. ut supra, § 55. Stewart, Feb. 25. 1749; M. 6881.
- (*e*) Pitcairn, Dec. 4. 1702; M. 6876.
- (*f*) Edgar, June 29. 1624; 1 Brown's Sup. 17. Hamilton, Feb. 6. 1677; M. 6873. Ferguson, March 11. 1829; F. C.; 7 S. D. 580.
- (*g*) Campbell, Nov. 19. 1708; M. 6877.

1686. The heir must deal equally with his creditors in this matter; and the law will aid the creditors in accomplishing that object.

Summers, Dec. 23. 1757; M. 6882. See Blair, July 14. 1631; M. 6870.

1687. Charges to enter heir cannot regularly proceed within the year. The charge may indeed be given during the year, and even the summons may be executed along with it; but no proceeding judicially can follow till the year has expired. See below, § 1858.

Summers, Dec. 23. 1757; M. 6882. M'Intosh, July 9. 1829; 7 S. D. 288.

1688. EXHIBITION AD DELIBERANDUM is an accessory of the right of deliberating, and entitles any apparent heir (*a*) to raise an action for exhibition of all deeds or obligations by which the state of the deceased's affairs may be explained, and so of all deeds relative to the predecessor's land or estate, or debts owing by him. This action is not, in point of time, limited to the annus deliberandi, but may be raised any time before service (*b*).

(*a*) Crawford, Feb. 10. 1714; M. 3986. Spark, June 30. 1715; M. 3988. Adair, Jan. 19. 1787; M. 3992.

(*b*) Nisbet, July 1. 1626; M. 3982. M'Farlane, Jan. 12. 1779; M. 3991; 2 Hailes, 815.

1689. The heir may thus call, 1. For deeds even in favour of strangers (*a*); 2. For deeds on which infestment has followed (*b*); but, 3. He may not call generally for all deeds, debts, &c. which may be hurtful or profitable to the heir (*c*). 4. Where the ancestor has been divested by infestment on an entail or irredeemable disposition, the dispositive is not bound to produce (*d*). 5. The ancestor is not divested by adjudica-

tion with infertment, if the legal be not expired, and decree of declarator of expiry pronounced (e).

(a) Maxwell, Dec. 22. 1675; M. 4009. Buchanan, Nov. 20. 1705; M. 4010. Spark, June 30. 1715; M. 3988.

(b) 4 Stair, 33. § 4. Spark's case, *supra*.

(c) Heron, Nov. 30. 1756; M. 4019.

(d) Duke of Hamilton, Nov. 28. 1761; M. 3966. Cathcart, Feb. 4. 1795; M. 3993; and same case, May 31. 1825. 1 W. S. App. Cases, 240, 265.

(e) McFarlane, Jan. 12. 1779; M. 3991; 2 Hailes, 815.

1690. DEBTS OF APPARENT HEIR. The heritable estate does not vest in the heir by mere survivance: But as the possession, and ostensible right of an apparent heir, when long continued, raises to him a credit as proprietor; it has, on equitable considerations, been enacted that, if such possession as apparent heir, have been continued for three years, his debts and onerous deeds shall, to the value of the estate, form a debt against the next heir who shall pass him over and make up titles to a previous ancestor.

1695, 24. See below, of Passive Titles, § 1929.

II. LAW OF HERITABLE SUCCESSION BY DEED.

1691. 1. DISPOSITIONS MORTIS CAUSA WITHOUT SUBSTITUTION. Succession by deed in Scotland depends not on the nomination of an heir, but on an effectual conveyance of the heritable intuitu mortis. Hence the rule is, that in all heritable succession the legal descent takes effect, unless it be altered by dispositive words of conveyance *de presenti*, or substitution (a). The most clearly expressed will not only is ineffectual to carry the land; but it is not held to impose an obligation on the heir to implement (b). But a marriage-contract, though containing only words of provision, and not of disposition, will, by force of the obligation, be effectual (c).

(a) 3 Ersk. 3. § 20. Henderson, Jan. 31. 1667; M. 11339. Simpson, Jan. 10. 1752; Elch. *Test* 12, and Notes, 486; Monb. 5 Brown's Sup. 794. Douglas, Dec. 9. 1762; M. 4368. Mercer, Dec. 10. 1793; M. 3336. Montgomery, June 9. 1795; Bell's fol. Cases, 203. Govan, Jan. 28. 1812; F. C. See above, § 760.

(b) Montgomery, *sup. (a)*.

(c) Reid, Jan. 25. 1838; 16 S. D. 363.

1692. A proprietor cannot effectually dispose of Scottish heritable by will or testament (a); although the deed should be framed and executed in a country by the law of which real es-

tate is disposable by will (*b*) : neither can he deprive the heir by mere words of disinherison (*c*). He must use dispositive words, either disposing the subject to himself, whom failing, to the person whom he wishes to favour ; or giving it directly to that person, reserving his own liferent ; or disposing and conveying the subject to another, reserving a power to alter (*d*).

The deed must either be delivered in evidence of final purpose ; or it may be kept secret in the granter's repository, provided it bear a clause declaring it effectual though not delivered at his death (*e*).

It will not invalidate the deed as a conveyance of heritage, if it should bear the form of a testament, provided words of conveyance *de presenti* be made use of (*f*).

An effectual conveyance *mortis causa* may be made in general terms ; as “ of all lands and heritage belonging to me.” But 1. Such general disposition will not carry a mere *spes successionis* ; or estate which has not opened to the disposer during his life ; or, at least, 2. In order to carry such right, it ought to be specially mentioned, or described and conveyed (*g*).

See below, of Settlements by Trust Deed, § 1991, et seq.

(*a*) 3 M'Kenzie, 8. 3 Stair, 4. § 31. 3 Ersk. 8. § 20. Brand, Dec. 4. 1735 ; M. 15941. Stewart, Nov. 15. 1803 ; 1 Sandford on Heritable Succession, 62.

(*b*) Henderson, Dec. 4. 1623 ; M. 4481. Melville, July 3. 1634 ; M. 4483. Burgess, Jan. 18. 1764 ; M. 4484. Crawford, Jan. 14. 1774 ; M. 4486. Robertson's Creditors, Dec. 9. 1795 ; M. 4491 ; and Henderson, June 10. 1795 ; M. 4489. Snodgrass, Dec. 16. 1806 ; F. C. Ross, July 4. 1809 ; F. C.

(*c*) Ross, sup. § 1682 (*b*). Black, Feb. 26. 1833 ; 11 S. D. 443.

(*d*) Mitchell, Nov. 21. 1759 ; M. 8092. Robertson, June 17. 1785 ; M. 15947. Ogilvy, Dec. 10. 1793 ; M. 15950.

(*e*) 3 Ersk. 2. § 43-4. See supra, § 24. See Logan, and cases in § 24.

(*f*) Douglas, July 11. 1733 ; M. 15940. Brown, Dec. 26. 1770 ; M. 5440. Welsh, June 28. 1809 ; F. C. Glover, Dec. 7. 1810 ; F. C.

(*g*) Farquharson, March 2. 1756 ; M. 2290. M'Dowal and Selkrig v. Crawford, Feb. 6. 1824 ; 2 S. D. 682. Leitch, Feb. 17. 1829 ; 4 S. D. 659 ; affirmed, 3 W. S. 366.

1693. 2. DISPOSITION WITH SUBSTITUTIONS. The first disponent is Institute ; those who are appointed to take the subject on his death are Substitutes. Substitution is commonly indicated by the words *whom failing* ; but may also be indicated by the words “ then to ;” or by the words “ and to” (*a*). The dispositive words are applied provisionally to the substitutes, and to those who come in by a power of nomination (see below, § 1706), as directly as to the institute. Those words

contained in the dispositive clause give the rule or law of succession of the subject conveyed (*b*). They do not, as in moveable succession, establish a conditional institution, to take effect only in case the institute should not take; bestowing no right on the substitute if the institute should succeed. If the institute shall take, and afterwards die, the property descends to the heirs and substitutes to whom by the deed it is destined (*c*). When ambiguous, the dispositive clause may be interpreted by the precept or procuratory of the deed, or from the whole strain and purpose of it (*d*).

(*a*) Richardson, July 5. 1821; 2 Sh. App. Cases, 149. Lockhart, July 19. 1837; 15 S. D. 376. Lord Polworth's Case, House of Lords, June 25. 1835; 2 Illus. 332.

(*b*) Shanks, Jan. 27. 1797; M. 4295. Sutherland, Feb. 26. 1801; M. *Tailzie*, 8. Graham, June 26. 1816; F. C.; affirmed, June 14. 1825; 1. W. S. 353. Tinnoch, Nov. 26. 1817; F. C. Richardson, July 5. 1821; F. C.; 1 S. B. 105; affirmed, April 8. 1821; 2 Shaw's App. Cases, 149. Young Forrester, July 11. 1826; F. C.; 4 S. D. 824.

(*c*) 3 Ersk. 8. § 44.

(*d*) See Shanks, Sutherland, and Young Forrester (*b*). Miller, Jan. 19. 1831; 9 S. D. 295.

1694. In construing technical words used for describing the several classes of heirs, the rule is to adhere to that meaning which has been fixed on the words; and not to yield to extraneous indications of a different intention, arising either from the narrative (*a*); or from other deeds (*b*); or from parole evidence of purpose and meaning (*c*); or from the construction deducible from the operation being for election purposes, without any design of altering the succession (*d*). Nothing, in short, but an express declaration or necessary implication is admitted to alter the settled meaning of words of destination (*e*).

Where technical words are not used, the question must depend on the *voluntas testatoris* to be collected from the whole strain and purpose of the deed (*f*).

(*a*) Campbell, Nov. 28. 1770; M. 14949. Hay, July 24. 1788; M. 2315; affirmed, April 7. 1789. See Lord Eldon's remarks on that case, in the Roxburgh Cause, 6 W. S. App. 62.

(*b*) Duke of Hamilton, Jan. 8. 1740; M. 14935.

(*c*) Douglas, Dec. 9. 1762; M. 4369. Baillie, June 17. 1766; M. 14941; reversed, March 26. 1770. See 6 W. S. App. 79, for Lord Eldon's remarks on that case. Murray, June 22. 1774; M. 14952.

(*d*) Rose, March 16. 1784; M. 14955. Suttie, Jan. 19. 1809; F. C. Molle, Dec. 13. 1811; F. C.

(*e*) Kerr, &c. Roxburgh Cause, M. *Tailzie*, App. 13. Lord Chancellor Eldon, Sandford on Succession, App.

(*f*) Govan Smith, Dec. 14. 1830; 9 S. D. 180. Bryden, Feb. 17. 1831; 9 S. D. 467.

1695. 3. WORDS DESCRIPTIVE OF HEIRS. It is important to mark the proper use and meaning of the words descriptive of the several classes of Heirs: And,

1. *Heirs*, in a destination, is a technical expression including all those who are heirs by law; namely, heirs of line, heirs of conquest, and heirs of investiture.

1696. 2. *Heir of Line* may sometimes mean the heir of conquest. It is synonymous with heir at law; heir-general; heir whatsoever.

3 Stair, 5. § 10. See above, § 1670; below, § 1701.

1697. 3. *Heir-male* applies only to males connected by males; exclusive of females and also of males connected by females.

1698. 4. *Heir-male of Line*, though apparently an incongruous expression, is not so. It means the heir-male, excluding the heir of conquest.

Sir John Sinclair, June 24. 1766; M. 14944; affirmed, April 5. 1767.

1699. 5. *Heir-female* applies to the heir at law, male or female, failing heirs-male (§ 1697).

3 Ersk. 8. § 46. Bargany case, July 11. 1738; *Elch. Prov. to Heirs*, 2; reversed, March 27. 1739; 1 Cr. and St. 237. Blair, June 16. 1739; Monb. 5 Brown's Sup. 663. Ewing, July 1. 1747; M. 2308. See Lord President's remarks on Blair's case, in Ker, Nov. 13. 1810; F. C.

1700. 6. *Heir-male of the Body* is to be distinguished from heir-male (§ 1697). He is not necessarily a son born of the person named; but must be in the direct line of descent.

Young Forrester, July 11. 1826; F. C.; 4 S. D. 824. Sir J. N. Innes June 23. 1807; M. *Tailzie*, App. No. 13, p. 30; and House of Lords, June 20. 1810.

1701. 7. *Heirs whatsoever*, or *Heirs whomsoever*, seems to have been an expression first used to prevent the fee from reverting to the superior on the failure of heirs-male (a). At present, it is useful only in limited destinations. When an antecedent limitation gives the succession to a particular order of heirs, the general word "heirs" used in a subsequent deed must be understood not of the heir at law, but of the heir in the former destination: But the expression "heirs whatsoever" has a different meaning, and enlarges the destination to heirs at law (b). The expression "heirs whatsoever" is a flexible term to a certain extent, with this observance always, that it is not to give way

to any construction, arising on *supposed* intention, but is to be bent from its natural and proper signification to a more limited sense only when that is necessary in order to give a meaning to what is not otherwise intelligible, and where it can be said to be demonstrative of intention. It may take its construction from other more specific clauses of destination (c). See below, § 1724.

(a) 2 Craig, 14. § 3.

(b) 3 Ersk. 8. § 47; correct it by Douglas Marquis of Clydesdale, Tait's Cases; M. 14930; 5 Br. Sup. 467; 2 Illus. 337. Duke of Hamilton, Jan. 8. 1740; M. 5615. Brodie's case, 1749; 5 Brown's Sup. 466. Duke of Hamilton, March 4. 1777; Ib. 467. Dec. 9. 1762; M. 4369. Richardson, July 5. 1821; F. C.; 2 Shaw's App. Cases, 149.

(c) 3 Ersk. 8. § 48. Hay, Nov. 16. 1698; M. 14899. 3 Stair, 5. § 12. Greenock, Dec. 16. 1736; M. 5612. Duke of Hamilton, supra (a). McLachlan, Jan. 12. 1757; M. 2312. Richardson, July 5. 1821; 2 Shaw's App. Cases, 149. Hay, July 24. 1788; M. 2315; 2 Illus. 332, note; 6 W. S. 79.

1702. 8. Great care is necessary, 1. in distinguishing the right character of heir, where more than one character concurs in the same person (a). 2. In settling which is the governing term. 3. The effect produced, or pleadable, by the mingling of popular with technical language, as *daughter* used along with *heir-female*, is important (b).

(a) Sir J. Dalziel, May 30. 1809; F. C. Bargany Case, July 11. 1738; Elch. voce *Prov. to Heirs and Children*, 2, Notes, 370. Lyon, June 19. 1739; 5 Brown's Sup. 663. Lady Essex Kerr, Nov. 13. 1810; F. C.; affirmed, Feb. 26. 1812.

(b) See cases (a). Creditors of Redhouse, June 15. 1743; M. 2306; affirmed, Dec. 1744. See Elch. Notes, 373; Kilk. remarks on Ewing's case, M. 2308. Kerr, sup. (a). Shepherd, Dec. 1. 1836; 15 S. D. 173. Lockhart McDonald, Jan. 19. 1837; Ib. 376.

1703. Ambiguity in construction may arise in point of time; the effect, where one is mentioned out of the ordinary line of succession (as daughter or eldest daughter, or second son), being very different, according to the point of time to which the expression refers. The general rule seems to be, that the reference is not to the time of making the deed, but to the opening of the succession.

Roxburghe case, June 23. 1807; M. Tailzie, App. 30. Shepherd, Dec. 1. 1836; 15 S. D. 173; affirmed, 3 S. M'L. 255.

Destinations Simple and Limited.

1704. 1. SIMPLE DESTINATION. 1. A destination to A includes his heirs: But an immediate substitution of one person to another excludes the heirs of the institute (a), unless in

deeds by parents to children. See below, § 1776. A substitution by name after heirs of another, takes effect only when the whole line of descent of the institute is exhausted; and so a destination to one and his heirs-male, followed by a substitution, brings in all the heirs-male before the substitute, and is not confined to heirs-male of the body (*b*). Such destinations may be altered gratuitously.

(*a*) Forsyth, June 14. 1832; 10 S. D. 646.

(*b*) Baillie, June 16. 1766; M. 14941; reversed, March 26. 1770. See 6 W. S. App. Ca. 79.

1705. 2. A clause of Return provides, that the subject shall return to the granter and his heirs. In general, and in the line of succession, it has no stronger effect than a simple destination (*a*): It has in the construction of such a clause been conceived, 1. that in a gratuitous conveyance to a stranger donee, a clause of return is a condition; and the donee has no power gratuitously to disappoint the return (*b*). 2. That if the deed be onerous, or the deed to heirs alioquin successuri, the clause of return is defeasible (*c*).

(*a*) 3 Ersk. 8. § 45; D. of Hamilton, Dec. 9. 1762; M. 4358; 5 Brown's Sup. 467. Marquis of Clydesdale, Jan. 26. 1726; M. 4343; Robertson's App. Cases, 564.

(*b*) Duke of Douglas, Feb. 18. 1717; M. 4343. See Duff, June 27. 1807; M. voce *Memb. of Parl.* App. No. 13. Johnson, May 30. 1804; M. 15112.

(*c*) M'Kay, Jan. 13. 1835; 13 S. D. 246.

1706. 3. Sometimes a branch of the destination is introduced in the shape of a power to name heirs; and, if duly exercised, the nomination is effectual as part of the substitution accruing to and becoming part of the original investigation. See above, § 1693.

Stewart, May 15. 1821; F. C.; 1 S. B. 9. and 8 S. D. 17; House of Lords, 2 W. S. 369, and 5 W. S. 515.

1707. 2. LIMITED DESTINATION. Under this head are comprehended several important subjects of discussion; as, 1. Destinations in fee and liferent. 2. Substitutions, with simple prohibitions. 3. Entails. 4. Conditional settlements.

1. Of *Conjunct Fee*, and *Fee and Liferent*.

1708. The full and unlimited right of a proprietor (§ 939) is called FEE: The inferior right of usufruct during life is called LIFERENT (§ 1037). The right of fee may be held jointly by more than one pro indiviso; or the rights of fee and of liferent may co-exist in different persons at the same

time. The settling of the validity and effect of those several rights in different situations is of great practical importance.

1709. 1. CONJUNCT FEE. The doctrine of conjunct fee to husband and wife, or parent and child, will be better understood in considering contracts of marriage (see below, § 1950). With regard to conjunct fee in strangers,—1. When a subject is conveyed “in conjunct fee” to two or more strangers, they enjoy the subject in common *pro indiviso*; the heir of each succeeding him on his death, and taking up his *pro indiviso* share along with the survivor (*a*). 2. Where the right is “in conjunct fee and liferent,” the parties are joint fiars during their joint lives; but the survivor enjoys his own fee of the one-half, and a liferent of the other; the heir of the predeceasing being excluded till the death of the survivor. 3. Where the right is taken to the parties “jointly, and the survivor and their heirs,” the survivor has the fee, and it descends to *his* heir, not to the heirs of both by a renewal of the joint right. 4. Where the destination is to the parties, and “the heirs of one of them,” that person whose heirs are preferred has the fee.

(*a*) 2 Stair, 3, § 42. 3 Ersk. 8, § 35. See below, of Conjunct Fee and Liferent to Husband and Wife, § 1950. et seq. Bisset, No v. 26. 1799; *Death-bed*, Appendix.

1710. 2. FEE AND LIFERENT. These rights may subsist at one and the same time in different persons existing (§ 1037).

1711. 1. *Fee in pendente*. The law of Scotland does not recognise a fee in a pendent state, *i. e.* where there is no person alive to take it up. The principle on which this rests is, 1. that the superior on the one hand, and the vassal on the other, must have some one to fill the feudal place of superior or vassal; and, 2. that creditors shall be able to know with whom the right of property is. The fee, therefore, is not in pendent merely by the death of the proprietor; for the creditors of the ancestor can affect it as in *hereditate jacente*, and the heir can take it, or any one in his right; while in the feudal relation of superior and vassal, the remedy is open to either. It is in pendent only when there is no one in whom it can be vested. In order to avoid the difficulty arising from the fee being thus in pendent, certain rules have been settled now to be explained.

1712. 2. *Meaning of the words Fee and Liferent.* Much confusion has arisen from the loose way in which the words fee and liferent have been used by conveyancers. 1. In common language they are quite distinct: Liferent importing a life interest merely; fee a full right of property in reversion after a liferent (see § 1037). But, 2. The proper meaning of the word liferent, has sometimes been confounded by a combination with the word fee; so as in some degree to lose its appropriate sense, and occasionally to import a fee. This seems to have begun chiefly in destinations “to husband and wife in conjunct fee and liferent, and children in fee;” where the true meaning is that each spouse has a joint liferent, while both live; but that each has a *possible fee*, as it is uncertain which is to survive (*a*). 3. The same confusion of terms came to be extended to the case of a destination to parent and child,—“To A. B. in liferent, and the heirs of the marriage in fee,”—where the word liferent was held to confer a fee on the parent (*b*). 4. It gradually came to be held as the technical meaning of the words “liferent to a parent, with a fee to his children nascituri,” that the word liferent meant a fee in the father (*c*). 5. The expression came to be held as strictly limited to its proper meaning of liferent by the accompanying word “*allenary*,” or some similar expression of restriction (*d*): or where the fee was given to children nati and nominatim; there being in that case no necessity to divert the word liferent from its proper meaning: or, on a similar principle, where the settlement was by means of a trust created to take up the fee (*e*).

Such being the progress of the professional use of those words, and the gradual clearing away of the confusion arising from a vague and loose employment of them, the following seem to be the rules of legal construction of such settlements.

(*a*) Pearson, Dec. 12. 1665; M. 4249.

(*b*) Thomson, Feb. 4. 1681; M. 4258. Paterson’s Creditors, Nov. 21. 1705; M. 4259.

(*c*) Frog’s Creditors, Nov. 25. 1735; M. 4262. Lillie, Feb. 24. 1741; Kilk.; M. 4267. Douglas, July 7. 1761; M. 4269. Dewar, May 5. 1825; 1 W. S. 161.

(*d*) Gunn, June 14. 1781; M. 4402. Newlands, July 9. 1794; M. 4289; Bell’s Sig. Cases, 54; affirmed, April 26. 1798. Thomson, *ib.* 72; 1 Dow, 417. Walkerston, Nov. 25. 1801; M. 4297. Harvey, May 26. 1815; F. C. Dewar, Sup. (*c*). Allardice, March 5. 1795; Bell, fol. Cases, 156. Scott, Feb. 14. 1826; 2 W. S. 550. Dixon, July 1. 1833; 6 W. S. 431.

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

1713. 1. Under a destination “to a person named and his heirs,” or “to a husband and wife in conjunct fee and liferent, and their heirs,” or to them and “their children, to be born of the marriage,” or “to the father in liferent, and the children of his marriage in fee,” the fee is held to be in the parents, or in the father, and a spes successionis merely in the heirs, or future children.

Pearson, Dec. 12. 1665; M. 4249. Lamington, July 23. 1675; M. 4252. Paterson, Nov. 21. 1705; M. 4259. Thomson, Feb. 4. 1681; M. 4258. Angus, Dec. 6. 1733; Elchies, voce *Fiar*, 1. Frog, Nov. 25. 1735; M. 4262. Lillie, Feb. 24. 1741; M. 4267. Cuming, Feb. 10. 1756; M. 4268. Douglas, July 7. 1761; M. 4269. Cuthbertson, March 1. 1781; M. 4279. Mure, June 29. 1786; M. 4288. Lindsay, Dec. 9. 1807; M. *Fiar*, App. 1. Maxwell, June 7. 1822; 1 S. B. 509. Kennedy, Feb. 19. 1825; 3 S. D. 383. Scotts, Feb. 14. 1826; 4 S. D. 460; 2 W. S. 550. Mein, July 8. 1827; 5 S. D. 781; F. C. Williamson, June 28. 1828; 6 S. D. 1035. Miller, Nov. 14. 1833; 12 S. D. 32. Jamieson, Jan. 27. 1835; 13 S. D. 18. See Young, Dec. 2. 1835; 14 D. B. M. 85.

1714. 2. In such a destination the addition of words exclusive of a substantial fee in the liferenter, still leaves in him (to satisfy the legal maxim) a fiduciary fee: Such is the expression “for liferent use allenarly” (*a*). But the construction which has been put on the word “allenarly,” as restricting to a liferent what would otherwise be held a fee, is not so fixed that opposite indications of a fee may not prevail: Such are, a power to uplift money, a power to sell land, &c. without any obligation to reinvest (*b*).

(*a*) Gerran, June 14. 1781; M. 4402. Newlands, July 9. 1794; M. 4289; Bell, 54; House of Lords, M. 4294. Watherston, Nov. 25. 1801; M. 4297. Thomson, July 9. 1794; 1 Dow, 417. Hunter, July 9. 1794; Bell, 73. Harvey, May 26. 1815; F. C. Dewar, Feb. 5. 1821; House of Lords, May 5. 1825; 1 W. S. App. Cases, 161. Falconar, Jan. 20. 1825; 3 S. D. 455. Allardice, March 5. 1705; Bell, 156. Scotts, sup. (*a*). Rollo, Nov. 28. 1832; 11 S. D. 132.

(*b*) Lamington, July 23. 1675; M. 4252. Tulliallan, July 28. 1626; M. 4253. Drumkilbo, Feb. 20. 1629; M. 4254. Dickson, Dec. 7. 1780; M. 4269; 2 Hailes, 865. Porterfield, June 23. 1779; M. 4277; affirmed.

1715. 3. Wherever the right, though conceived as a fee, is given as a fiduciary or qualified fee, the liferent provided is not to be extended beyond its usufructuary nature, nor construed as a fee: And this also holds where a trust is constituted in another, with an interest declared of liferent to a person, and fee to his children unborn or unnamed. The trust fee satisfies the maxim, and the liferent is construed according to the true meaning of the words.

Turnbull, Nov. 12. 1822; House of Lords, April 15. 1825; 1 W. S. App. Cases, 80. Mein, July 8. 1827; F. C.; 5 S. D. 779. Seton, March 6. 1793; M. 4219. See below, of Marriage Contracts. Ewan, July 10. 1828; 6 S. D. 1125. M'Dowal (Crawfurd's case), Feb. 6. 1824; 2 S. D. 574. Leitch, June 2. 1826; 4 S. D. 665; House of Lords, Feb. 17. 1829; 3 W. S. 366. Fisher, Nov. 24. 1831; 10 S. D. 55. Thomson, August 31. 1835; affirmed, 2 S. M'L. 305.

2. Of Substitutions with Prohibition to Alter.

1716. Deeds containing substitutions, although accompanied by prohibitions to alter, are not entails, but defeasible; having effect only as personal contracts, with a condition annexed to the conveyance.

1717. Prohibitions to dispone or convey are effectual to prevent gratuitous deeds.

1621, 18. Earl of Callander, Jan. 1687; M. 15477. Ure, July 17. 1756; M. 4315.

1718. Such prohibitions are not effectual against onerous deeds, and will not authorize inhibition; or stop a sale; or defeat the diligence of creditors.

Young, Dec. 7. 1705; M. 15482. Bryson, Jan. 22. 1760; M. 15511. Monb.; 5 Brown's Sup. 873. and 940. See Lord Kames's Arg. ib. 940, 941. Young, Nov. 13. 1761; 5 Brown's Sup. 884. See the cases of Stewart, &c. below, § 1719.

1719. They were at one time held to raise a personal obligation to indemnify those concerned (*a*); and so, 1. to relieve the estate of debts (*b*); and, 2. to restore the price, and re-employ it as before (*c*). But in the House of Lords the rule has been reversed (*d*), and that decision has been followed since (*e*). The essential difference between the effect of such limited deeds inter hæredes, and against third parties, is, that third parties are not affected by them, unless the conditions of the entail act are complied with (§ 1720); while heirs are at common law bound by the deed, but only according to a strict and rigorous construction.

NOTE.—It is different when the sale is of entailed lands, under a canal act. See below, § 1774.

(*a*) Lockhart, July 11. 1811; F. C. Earl of Breadalbane, June 12. 1812; F. C. Stewart of Ascog, Feb. 22. 1827; F. C.; 5 S. D. 419. Bruce, June 21. 1827; F. C.; 5 S. D. 822. See below, (*d*).

(*b*) Douglas, Feb. 25. 1730; M. 15373; affirmed, 1 Cr. and St. 32.

(*c*) Cuming, July 29. 1761; M. 15513. Young, Nov. 13. 1761; Monb.; 5 Brown's Sup. 884. Sutherland, Feb. 26. 1801; F. C. Lockhart, July 11. 1811; F. C.; 5 S. D. 424, note. Stewart and Bruce, above (*a*).

(*d*) Stewart's and Bruce's cases; reversed, July 16. 1830; 4 W. S. 196. and 240. Queensberry case, July 16. 1830; 4 W. S. 254.

(*e*) Lord Elibank, July 2. 1833; 11 S. D. 858. Campbell, Nov. 23. 1838; 1 D. B. M. 81.

3. *Of Entails.*

2 Stair, 3. § 58. 3 Ersk. 8. § 23. Sandford on Entails. Report to the House of Commons on the Law of Entail.

1720. By the law of Scotland, a conveyance of land implies a fee. There cannot be a series of liferents (*a*); and restraints on the power of a fiar can be imposed only by prohibitions and forfeitures.

The form of an entail with such prohibitions and restrictions, is not different from that of any other settlement of land; the conditions and destination, the prohibitions and the irritancies, being clearly expressed. The effect is either against heirs, or against third parties. The former depends on the expression of the deed, and the principle, that the acceptance of a conditional gift implies an obligation: The latter depends on due compliance with the requisites of the act (*b*).

In the first attempt to make an effectual limitation on the fee, inhibition was employed; but it was found ineffectual (*c*). Next, interdiction was resorted to, but also without effect (*d*). Then Sir Thomas Hope devised two clauses; one, to annul the deed attempted to be granted; the other, to dissolve and forfeit the right of the person making the attempt (*e*). The doubts entertained of the efficacy of this device (*f*), and the peculiar circumstances of the country led to a statute giving the sanction of Parliament to entails, provided, 1. they should contain irritant and resolute clauses; 2. that they should be duly recorded by warrant of the Court of Session in a special register; and, 3. that they should be followed by sasine containing the prohibitory and irritant and resolute clauses, recorded in the register of sasines.

(*a*) Allardice, March 6. 1795; Bell's Cases, 156. See above, § 1713. Abernethie, Jan. 16. 1835; 13 S. D. 263.

(*b*) Campbell, May 17. 1836; 14 S. D. 770.

(*c*) Hope, Min. Pract. 402. § 9. Bryson, Jan. 22. 1760; 5 Brown's Sup. 940.

(*d*) Balfour, 187. Cranstoun, Nov. 1586; M. 7125.

(*e*) Hope, Min. Pract. ut supra. 2 Stair, 3. § 58, 59. 3 M'Kenzie, 8. § 17. Stormont, Feb. 26. 1662; M. 15475, and 13994. Riccarton, June 13. 1712; M. 15494; Rob. App. Cases, 110. Sharp, Jan. 14. 1631; M. 4299.

(*f*) 1685, 22. 2 Stair, 3. § 58. 3 Ersk. 8. § 23. Sandford on Entails.

1721. It is not surprising that much difference of opinion

should have taken place relative to the construction and effect of a statute which gives sanction to so extraordinary an exercise of power over the future succession and management of land property, and authorizes restraints on the successive proprietors of the land greater than are known in any other European nation of modern times. And although it is difficult to lay down any rules for reconciling these differences, the best approximation to a regular and uniform course of decision seems to be, to take the words of the statute and of the deed, according to their strict construction, as furnishing the guiding rule throughout the whole system of entails.

Speid, Feb. 21. 1837 ; 15 S. D. 618. See Rowe, Feb. 9. 1837 ; 15 S. D. 500.

1722. FORM AND STRUCTURE OF AN ENTAIL. The essential character of an entail consists in the establishment by the proprietor of land of such a destination as shall carry the land to a specified line of heirs, and guard the succession of the estate, and to a certain extent the management of it, so as to be secure not only against heirs, but also against third parties, and to defeat any attempt to dispose of it, or to carry it off for payment of debt, or from the prescribed line of succession.

For the accomplishment of these purposes, beside the external observances required by the statute (of registration of the original deed of entail in the register of entails, and completion of the real right by sasine duly registered in the record of sasines), there must be, 1. a right of property in the makers ; 2. a destination clearly expressed ; 3. such conditions as shall guard against the accidental disappointment of the entailer's intentions ; 4. prohibitions against sale and debt, and alteration of the destination ; and, 5. occasionally relaxation of those restraints by clauses of power.

1723. 1. *Title to make an Entail.* The same right as heritable proprietor which is required to enable one to dispose of land, is requisite to the efficacy of an entail. But, 1. It is not necessary that the maker of the entail shall be feudally infeft ; a personal right will enable him to make a deed which will be effectual to compel his heir to fulfil the intention, or which will be valid on the making up of the proper titles (a). 2. One who has made a trust-deed conveying his estate for the be-

hoof of creditors, has still in him a sufficient right to make valid an entail of whatever may remain, in the way of reversion (*b*).

(*a*) Livingston, March 3. 1762; affirmed, 1765; 5 Brown's Sup. 885; and Bell's Cases, p. 184. note. Renton, Dec. 5. 1837; 16 S. D. 184. Stirling, Dec. 15. 1891; M. 15455.

(*b*) Campbell of Ederline, Jan. 14. 1891; M. App. Adjud. 11. M'Millan, affirmed, Aug. 14. 1834; 7 W. S. 441.

1724. 2. *Destination*. This must be clear and intelligible, and regulated by the principles already laid down (§ 1691, et seq.). The person to whom the lands are first directly disposed is the INSTITUTE; those to whom they are destined on failure of the institute are SUBSTITUTES. The substitutes take by service, either on the death of the institute; or on contravention and irritancy established by decree of declarator (*a*); or on repudiation.

It has been held that the entailed destination terminates wherever females are introduced, or the succession comes to heirs-female, while no provision is made for excluding heirs-portioners, and securing that they shall succeed without division (*b*). And it is not allowed in such a case to infer from the intention of the entailer an exclusion of the heirs-portioners (*c*).

A destination terminating in heirs whatsoever, if not limited to those of a particular description, is held to close the entail (*d*). It has been doubted whether this is in all cases correct, or only where the destination terminates in heirs-female (*e*). But there can be no such doubt, where their right as heirs-portioners is excluded.

When in the destination particular heirs are described as the persons to take the estate, the description must be applied to those who shall answer the description at the time the succession opens (*f*).

(*a*) Simson and Home, Jan. 6. 1697; M. 15353. Irvine, Jan. 1723; M. 15369. Dundas, Nov. 29. 1774; M. 15430; 2 Hailes, 601. Gordon, Nov. 14. 1749; M. 15384; Elch. *Tailzie*, 37; 5 Br. Sup. 774; and Nov. 21. 1753; M. 10258; Elch. *Tailzie*, 51. Stewart, Feb. 1. 1726; M. 7275. Fullarton, Feb. 12. 1824; 2 S. D. 585. and 1 W. S. 410. Leslie, Dec. 15. 1710; M. 15358. Earl of March, Feb. 27. 1760; M. 15412. Harry, June 13. 1832. Hunter, Dec. 11. 1834. Mure, Feb. 16. 1837; 15 S. D. 581.

(*b*) Farquharson, Nov. 29. 1838; 1 D. B. M. 121. See also Mure's case (*d*), and Craig (*e*).

(*c*) Mure, below (*d*), 3 Ersk. 8. § 32.

(d) Mure, Feb. 16. 1837 ; 15 S. D. 581 ; affirmed, May 18. 1838 ; 3 S. M'L. 237.

(e) Craig, Feb. 21. 1839 ; 1 D. B. M. 545.

(f) See sup. § 1703, Shepherd's case.

1724. 3. *Conditions.* The statute authorizes landowners to tailzie their lands "with such provisions and conditions as they think fit," requiring, as necessary to their efficacy, that "these conditions shall be recorded in the register of tailzies," and that they "shall be repeated in all the subsequent conveyances;" omission being declared "a contravention, but so as not to militate against creditors or other singular successors contracting in bona fide." The usual conditions are,—

1725. 1. To use the Name and Arms of the Entailer. This injunction, sometimes the offspring of vanity, may be intended to prevent the accumulation of several entailed estates in one person, and the sinking of the name and family of the entailer. It is held an effectual and binding condition.

Stevenson, July 26. 1677 ; M. 15475, and 17000. Moir, Feb. 5. 1794 ; M. 15537.

1726. 2. Exclusion of the Heir on succeeding to a Peerage or other Estate. This has a similar purpose and effect with one of the purposes of the condition as to name and arms ; and is, inter hæredes, interpreted so as to give full effect to the intention of the testator. So a condition, "if he shall succeed to a Peerage or Estate," is held to comprehend the case of his so succeeding in the first place, and taking under the entail afterwards.

Simson, Jan. 6. 1697 ; M. 15353. Lockhart, Nov. 25. 1755 ; M. 15404. Leslie, 1742 ; Elch. *Tailzie*, 15 ; in House of Lords ; Craigie and Stewart's App. Cases, 324. Fleming, Jan. 19. 1804 ; M. 15559. Bruce Henderson, Jan. 20. 1790 ; M. 4215. Stirling, Jan. 16. 1834 ; 12 S. D. 296. Cunningham Bontine, Dec. 20. 1833 ; 1 D. B. M. 286.

1727. 3. To make up titles under the entail, obtain infeftment duly, record the entail, and possess under the entail only. These are the requisites of an effectual entail against third parties, and the neglect of this condition is declared to infer a forfeiture of the estate. The purpose of this precaution is, that, by completing the entail, creditors and purchasers shall be excluded, who might otherwise be enabled to affect the estate by diligence, or to complete a right to it under a voluntary conveyance. It is a condition conformable to the

statute itself, by which, “ if the provisions and irritant clauses shall not be repeated in the rights whereby any of the heirs of tailzie shall brook or enjoy the entailed estate, the said omission shall import a contravention,” &c. and “ the said estate shall ipso facto fall and devolve,” &c. (a). The substitutes are empowered to enforce this obligation (b). But it has been held that the mere act of making up titles in fee-simple, is not to be deemed an irritancy beyond remedy ; and that the making up a title under the entail, before decree of declarator, will purge the irritancy, provided ample security be given against the claim of any singular successor who may have acquired a right to affect the estate while under fee-simple titles (c).

(a) Garnock, July 28. 1725 ; M. 15596.

(b) March, March 1. 1782 ; 10963.

(c) Abernethy, June 20. 1837 ; 15 S. D. 1167.

1728. 4. To pay off the Entailer’s debts, and purge or prevent Adjudications. The heir of entail is not, as such, bound to pay the entailer’s debts, as not being his representative ; but only for the interest during his possession, as the rents are bound (a) ; and he may either neglect to pay the debt, or, paying it, he may by assignation keep it up as a debt against the estate (b). See below, § 1743. One design then of this condition is to prevent the continuance of the debts as a burden on the land ; and to compel the heir to pay what otherwise he might be entitled to leave a burden on future heirs. Another purpose is to avoid the danger of adjudications. Formerly the heir could not sell for payment of the entailer’s debt, but by a late statute, new powers are granted to sell entailed estates for payment of the entailer’s debts, so as to save the expense of going to Parliament (c).

(a) 3 Ersk. 8. § 27. Campbell, Nov. 29. 1815 ; F. C.

(b) Kerr, Feb. 15. 1758 ; M. 15551.

(c) 6 and 7 Will. IV. c. 42. § 7. et seq. Torrance, Dec. 2. 1837 ; 16 S. D. 174. See Parker’s Forms of Proceeding under the Statute.

1729. 4. *Prohibitions or Fetters*. These affect, 1. the power of transference ; 2. the power of pledging the estate for debt ; or, 3. the power of altering the succession (see below, § 1748, et seq.). The machinery by which these prohibitions are made effectual consists of two sets of clauses ; the prohibitory and the irritant and resolute clauses.

1730. 1. The *Prohibitory* Clauses must be clear and pointed, in describing the acts prohibited, and in directing the prohibition against the persons meant to be restrained. The great rule is, That restraints not expressed are not to be implied from others which are expressed ; nor from one limitation is another to be inferred (*a*). But the heir is not to deal collusively and fraudulently, so as, under any omission or defect in one prohibition to facilitate or accomplish the defeat of another ; to raise, for example, a fictitious debt under an omission in the prohibition against contracting debt, for the purpose of altering the succession (*b*). The prohibitions may, to a certain extent, be imposed by reference to other deeds (*c*).

(*a*) Duke of Roxburghe, Dec. 17. 1813 ; 2 Dow, 210. Rickart, April 5. 1734 ; House of Lords, Craigie and Stewart, 143.

(*b*) Cathcart, Feb. 12. 1830 ; 8 S. D. 497 ; affirmed, July 18. 1831 ; 5 W. S.

(*c*) Don, Feb. 5. 1713 ; M. 15591. Rob. App. Cases. 76. Lawrie, July 24. 1764 ; M. 15612. Broomfield, § 1741. Vere, March 5. 1833 ; 11 S. D. 520 ; affirmed, 2 S. M'L. 817. Turnbull, June 29. 1836. Bontine v. Graham, June 12. 1835 ; 13 S. D. 905.

1731. 2. The *Irritant and Resolutive* Clauses. These, in order to give effect against third parties, must be distinctly pointed or applied to the particular act in question. These terms are confounded in the writings of lawyers (*a*) ; but, correctly, the Irritant clause irritates or annuls and voids the act or deed prohibited, in so far as it may affect the estate ; and the Resolutive forfeits, dissolves, or resolves the right of him who has contravened the prohibition (*b*).

(*a*) 3 Ersk. 8. § 25.

(*b*) Ersk. ut supra, § 25. McKenzie on Tailzies, 1 Juridical Styles, 232 ; 5 Bell's Forms of Deeds, 25-7.

1732. 3. The following rules regulate these clauses :—1. That there are no voces signatæ, no formal and indispensable words requisite to their efficacy ; provided the two sanctions of nullity and forfeiture be clearly expressed (*a*). Where a clause was defective in grammatical expression, but capable of having the syntax and plain meaning restored by means of a reference to the context, the Court sustained it ; but in the House of Lords this has been admitted only where by no possibility any other meaning or words can be introduced, and where the construction is necessary and inevitable (*b*). 2. That the irritant and resolutive clauses must both be clearly directed against an act prohibited, otherwise third parties are not touched by the pro-

hibition (*c*). 3. That the application or pointing of these two clauses may either be generally to all the prohibitions, or specially to each (*d*). But great discrimination is necessary in the pointing of any general expressions, that they be not applicable to some of the prohibitions, and not to others (*e*). 4. That it is by the combination of these clauses that the effect is produced, and therefore both are necessary. The want of an irritant clause is fatal, though there should be an ample resolutive clause (*f*). The want of a resolutive clause is fatal, though there should be a clear irritant clause (*g*). 5. That these clauses must not only be pointed clearly to the several prohibitions, but distinctly directed to the persons meant to be affected (*h*). And such persons, though under the clauses of prohibition, will not be liable to any claim at the instance of the heirs of entail (*i*). But, 6. That it is not necessary that the deeds made in contravention shall be declared void as against the contravener, provided they are annulled as against the estate (*k*).

NOTE.—See on this subject below, § 1748, et seq.

(*a*) *Monro*, Feb. 15. 1826; 4 S. D. 467; 3 W. S. App. Cases, 344. See *Sharpe* (*b*).

(*b*) *Sharpe*, July 3. 1832; 10 S. D. 747; 1 S. M'L. 612.

(*c*) *Stewart of Ascog*, House of Lords, July 16. 1830; 4 W. S. 196.

(*d*) *Bruce*, Jan. 15. 1799; M. 15539; affirmed in the House of Lords. June 15. 1801. *Dick*, Jan. 14. 1812. *Lang*, Nov. 23. 1838; 1 D. B. M. 98. *Rennie*, Jan. 17. 1837; 15 S. D. 376; 3 S. M'L. 146. *Moncrieff and Cuninghame*, 3 S. M'L. 156. note, and 1 D. B. M. 600. note. *Speid*, Feb. 21. 1837; 15 S. 618. *Carriek Buchanan*, Jan. 25. 1838; 16 S. D. 358.

(*e*) *Adam of Blair-Adam*, 1821; Bar. Hume, 877.

(*f*) 3 Ersk. 8. § 25, 29. 3 M'Kenzie, 8. § 17. *Stormont*, Feb. 26. 1662; M. 15475. *Baillie*, July 11. 1734; M. 15500; *Elchies, Tailzie*, 1. *Gairdner*, Jan. 27. 1744; M. 15501. *Kempt*, Jan. 28. 1779; M. 15528; 2 *Hailes*, 819. *Barclay*, House of Lords, May 18. 1821; 1 S. Ap. Ca. 24. *Thomson*, Feb. 27. 1839; 1 D. B. M. 592.

(*g*) *Reidheugh*, March 11. 1707; M. 15489. *Craig's Creditors*, July 13. 1712; M. 15494; *Robertson's App. Cases*, 110. *Hepburn*, Feb. 8. 1758; M. 15507; 5 *Brown's Sup.* 331. and 864. *Carstairs Bruce*, House of Lords, July 16. 1830; 4 W. S. 240. *Mitchelson*, June 15. 1831; 9 S. D. 741.

(*h*) *Monro*, ut supra, (*a*). *Gordon*, Nov. 14. 1749; M. 15384; *Monb.*; 5 Br. Sup. 774. *Gilmour*, March 6. 1801; M. *Tailzie*, App. 18. *Lord Elibank*, July 2. 1833; House of Lords, 1835; 1 S. M'L. Ap. Cases, 1. *Morehead*, July 2. 1833; House of Lords, 1835; 1 S. M'L. 29. *Douglas and Co.* Nov. 14. 1823; House of Lords, 1825; 1 W. S. 323. *McGregor*, Feb. 12. 1838; affirmed, 3 S. M'L. 84. *Campbell*, Nov. 23. 1838; 1 D. B. M. 81.

(*i*) Same case of *Campbell* (*h*).

(*k*) *Monro*, ut supra (*a*).

1733. 4. *Powers*. While the entailer wishes in general

strictly to prohibit the sale or burdening of the estate, there may be particular occasions on which, for the benefit of all concerned, a relaxation of those restraints may be useful. This is the use of clauses of power, which are commonly directed to the following purposes :—1. A power to sell for satisfying the entailor's debts (*a*). 2. A power to excamb, or to sell and reinvest for the purpose of concentrating the estate; But this is much cleared by the recent statute (*b*). 3. A power to grant feus of portions of the estate; or to a certain extent; or in particular circumstances (*c*); it not being permitted, however, under such a clause substantially to defeat the entail. 4. A power to burden the estate, to a certain extent, with provisions for widows or children (*d*); and this either within prescribed limits, at a certain number of years' rent of the estate (*e*), or left discretionary (as by the term "reasonable provisions"), in which case the Court must deal with it according to equity (*f*). 5. A power to alter the destination, so as to avoid the succession of an idiot or a bankrupt (*g*). 6. A power in particular circumstances (qualifying the clause prohibiting alienations), to grant long leases (*h*). See below, § 1773.

NOTE.—Besides those conventional clauses of powers, the Legislature has interfered on several occasions with statutes of power, for which see below, § 1762, et seq.

(*a*) Kilburney, Jan. 20. 1669; M. 15347. See above, § 1728.

(*b*) 6 and 7 Will. IV. c. 42. See Earl of Breadalbane, Feb. 11. 1830; 8 S. D. 490. See below, § 1770.

(*c*) Duke of Roxburghe, March 5. 1734; 1 Cr. and St. 126. Schaw, Aug. 7. 1754; M. 15558; 5 Br. Sup. 816. Innes, Jan. 12. 1808; M. *Tailzie*, App. 60. Dec. 18. 1813; F. C.; 2 Dow, 149. Marquis of Aberdeen, Jan. 26. 1816; F. C.

(*d*) See also Lord Aberdeen's Act, below, § 1773. See Erskine, July 7. 1829; 7 S. D. 844. Earl of Rothes, Jan. 29. 1829; 7 S. D. 330. Cleghorn, Jan. 18. 1833; 11 S. D. 259.

(*e*) Douglas, May 15. 1822; 1 S. D. 408. Malcolm, Nov. 21. 1823; 2 S. D. 514. Earl of Rothes, Jan. 29. 1829; 7 S. D. 339.

(*f*) Lord Mar, Dec. 3. 1830; affirmed, Sept. 28. 1831; 5 W. S. 611. Howden, June 17. 1834; 1 S. M'L. 739.

(*g*) Halket, Feb. 16. 1762; M. 15416.

(*h*) See also 10 Geo. III. c. 51; below, § 1764, et seq.

1734. 2. COMPLETION OF THE ENTAIL BY SASINE AND RECORDING. By the statute it is required as indispensable to an entail effectual against third parties, 1. that the prohibitions, conditions, and irritancies, shall enter the registered infeft-

ment; and, 2. that the tailzie shall be recorded in the Register of Tailzies.

1685, 22.

1735. 1. *Completion by Sasine Recorded.* The statute applies only to tailzies which shall be completed by sasine, and duly registered in the record of sasines, in which the prohibitions, conditions, and irritancies, shall appear. But certain distinctions are of importance.

1736. 1. While the deed of entail is not yet completed by infeftment, the conditions and prohibitions, properly guarded by irritant and resolute clauses, will be effectual against third parties deriving right from the heir in possession, *if he has no other title but only the tailzie*. The principle of this is, that the personal right (supra, § 1719) is qualified or limited by its conditions.

Denholm, June 5. 1733; House of Lords, 1 Cr. and St. App. Cases, 113; Kilk. 546. Boyd, Jan. 22. 1766; Monb.; 5 Brown's Sup. 919. and 922. Syme, Feb. 1. 1803; M. 15619. Chisholm, Feb. 27. 1800; *Tailzie*, 10.

1737. 2. If the person in possession be also *heir at law* (*alioquin successurus*), his creditors may attach the estate by means of that right of succession, provided the tailzie shall not have been completed by sasine and registration of the entail: Or, such heir *alioquin successurus*, disregarding the tailzie, may complete his title as heir, and effectually sell or burden the estate.

Douglas, Feb. 22. 1765; M. 15616; Bell's Cases, 168, note; Monb. 5 Br. Sup. 907. Cunningham's Creditors, May 14. 1806; Bar. Hume, 872. Russell, Jan. 31. 1791; Bell's Cases, 166; M. 10300. Dickson, Feb. 24. 1801; M. *Tailzie* No. 13. Graham, May 13. 1795; M. 15439; Bell's Cases, 162. Mitchell, Feb. 4. 1809; F. C.

1738. The heir in possession may, at the suit of substitutes, be judicially compelled to complete his title under the entail, with the conditions, prohibitions, and irritant and resolute clauses; and this not only by force of a condition in the deed to that effect, but by force also of the statute (sup. § 1727).

1739. In construing the obligation to insert the restraining clauses in the procuratories of resignation, charters, precepts, and instruments of sasine, it is held,—1. That a reference in the *precept* to the prohibitions and irritant and resolute clauses in another part of the deed, will be sufficient, provided

the clauses appear in the *instrument* of sasine (a). 2. That the clauses, in order to be effectual, *must* appear in the instrument of sasine (b). 3. That the clauses must also be engrossed in the deed of tailzie itself, or at least by reference to another entail upon record (c). 4. It is not sufficient that the tailzie shall once have been thus completed by infeftment; each succeeding heir must insert the clauses in his infeftment, in order to bind third parties (d).

(a) Murray Kynynmond, Kilk.; M. 15380. Monb. 5 Brown's Sup. 738.

(b) Murray Kynynmond, ut sup. Viscount of Garnock, July 28. 1725; M. 15596.

(c) Broomfield, June 29. 1764; M. 15618. Don, July 14. 1713; Rob. App. Cases, 76. Lawrie, July 24. 1764; M. 15612. See also Vere's Case, 2 S. and M'L. 817.

(d) Viscount of Garnock, ut sup.

1740. 2. *Recording in the Register of Tailzies.* This registration is by judicial warrant of the Court of Session, and in a register appointed for tailzies (a). The writ to be recorded is the original entail—not a charter proceeding on it; and although the entailer has himself sold part of the lands, the whole entail must be recorded (b).

(a) 1685, 22. 5 Bell's Forms, 161, et seq. Irvine, June 26. 1776; 5 Br. Sup. 622; M. *Tailzie*, Appendix, 1. Hamilton, March 11. 1777; 5 Br. Sup. 624.

(b) Moore, Nov. 28. 1821; 1 S. D.

1741. Recording in the Register of Tailzies is not necessary in order to render the tailzie effectual against the heirs and substitutes themselves (a). But without such registration the tailzie has no effect against third parties. The estate may be effectually sold (b), and is at all times open to the diligence of creditors who have contracted with the heir in possession before the recording of the entail (c).

NOTE.—An entail may thus be exposed to danger during a whole vacation, when no warrant to record can be obtained.

(a) Willison, Feb. 26. 1724; M. 15369. Hall, Feb. 1726; M. 15373. McGill, June 13. 1798; M. 15451. Broomfield, June 29. 1784. Turnbull, § 1730 (c).

(b) Paterson, Feb. 23. 1787; Bar. Hume, 869. Graham, Dec. 11. 1829; 8 S. D. 231; House of Lords, 5 W. S. 759.

(c) Willison, ut sup. (a). Napier, Nov. 20. 1805; Bar. Hume, 870. Willison, May 27. 1808; Ib. 873. Smollet, May 14. 1807; M. *Tailzie*, App. 25. Ferrier, Dec. 10. 1813; F. C. Rose, June 11. 1828; F. C.; 6 S. D. 945; affirmed, Aug. 30. 1831; 5 W. S. App. Cases, 359. Same parties, Feb. 9. 1836. Cant, Dec. 27. 1726; M. 15554; Craig, Rob. App. Cases, 117, note.

Hepburn, Feb. 8. 1758; M. 15507; 5 Brown's Sup. 331; affirmed in House of Lords. Philp, Dec. 14. 1758; 5 Brown's Sup. 365, 869; M. 15609. Viscount Garnock, April 18. 1740; 1 Cr. and St. App. Cases, 281. Kinnaid, Nov. 26. 1761; M. 15611; affirmed. Earl of Roseberry, June 22. 1765; M. 15616. Irvine, July 31. 1772; Tait's Cases; 5 Brown's Sup. 622; affirmed; M. *Tailzie*, App. 1.

1742. The proper party to produce the deed and apply for the recording of it as a tailzie is the maker of the entail, or the institute or heir in possession (*a*); but it may be done after the entailer's death (*b*), and by any substitute, who has an interest, and can produce the original deed of entail; for which incident diligence will be granted (*c*). It would seem that an "heir whatsoever" is not entitled to apply for the recording of the entail (*d*). The application is by summary petition to the Court of Session (*e*).

(*a*) Nairne, March 10. 1757; M. 15605; 5 Brown's Sup. 335. Reid, Feb. 25. 1710; 4 Brown's Sup. 794.

(*b*) Napier, July 20. 1762; Monb. 5 Br. Sup. 888. See Kilk. 5 Br. Sup. 335.

(*c*) 3 Ersk. 8. § 26. Cavers, July 4. 1707; 4 Brown's Sup. 666. Spittal, Aug. 3. 1781; M. 15617. Ker, July 7. 1804; M. 14984. Drummond, Jan. 26. 1744; Elchies' Notes, 453; 2 Ersk. 8. § 26.

(*d*) Jessup, Feb. 7. 1822; 1 S. D. 273.

(*e*) More, Feb. 2. 1753; M. 15602. Houston, Jan. 25. 1715; M. 15366. Nairne, ut supra (*a*); Kilk. Notes, 5 Brown's Sup. 335. Ker, July 7. 1804; M. 14984.

1743. 3. LIABILITIES OF HEIRS OF ENTAIL. An heir of entail is personally liable for the entailer's debts only to a limited extent. This, after much diversity of opinion (*a*), has been fixed to be only to the amount of the value of the estate (*b*). 2. The entailed estate itself is liable, and may be adjudged or sold for those debts (*c*). 3. The heir of entail in possession is not bound to pay those debts, but may leave them, both principal and interest, as burdens on the estate, in the hands of subsequent heirs of entail (*d*); and it is to prevent this, that the condition compelling the heir of entail to pay off debts and purge adjudication is so frequently inserted in tailzies (see above, § 1728). Sometimes leave is given to constitute the entailer's debt a burden, or to sell part of the estate for discharging it, and such condition will be effectual (*e*); and now by statute such sale is authorized to take place (*f*). The entailer's debts will be allocated rateably on two estates left by him under entails, in a question between the respective heirs (*g*). 4. The heir of entail, although not bound to pay off

those debts, may, on paying them, take assignation and keep them up against the estate (*h*). 5. As to the debts of preceding heirs of entail, those arising on meliorations, under leases, will not bind subsequent heirs (*i*), unless made effectual under the 10 Geo. III. (see below, § 1764), and debts which may lawfully be incurred under the entail will not, unless constituted as the entail prescribes, bind succeeding heirs; as for example, aliment, mourning, &c. of the widow and family, and even funeral expenses of a preceding heir (*h*), and provisions granted in terms of the entail may be kept up against the estate (*l*).

(*a*) Maitland, Dec. 5. 1755; Monb. 5 Brown's Sup. 837. Murray Kynynmond, July 27. 1748; Elch. *Tailzie*, No. 34; Monb. 5 Brown's Sup. 764. Gordon, Dec. 1. 1659; M. 11166.

(*b*) Sutherland, Feb. 26. 1801; M. *Tailzie*, No. 8.

(*c*) Earl of Lauderdale, Feb. 1730; M. 15556.

(*d*) Campbell, Nov. 29. 1815; F. C.

(*e*) Viscount Strathallan, May 29. 1828; 6 S. D. 881.

(*f*) 6 and 7 Will. IV. c. 42. § 7.

(*g*) Lawrie, Dec. 7. 1830; 9 S. D. 147.

(*h*) Kerr, Feb. 15. 1758; M. 15551.

(*i*) Crawford, March 11. 1809; F. C. Lawrie, *ut sup.* (*f*). Frazer, May 29. 1827; 5 S. D. 722; affirmed, Feb. 25. 1831; 5 W. S. 69. See § 1256.

(*k*) Lauder, Jan. 31. 1744; M. 15378. Campbell, Dec. 16. 1818; F. C.

(*l*) Crawford, March 11. 1809; F. C.

1744. 4. PERSONS WHO MAY BE AFFECTED BY THE CONDITIONS, PROHIBITIONS, AND IRRITANCIES. Considering a tailzie in its effects against third parties, the only two descriptions of persons in relation to whom the effect of the limitations may be doubtful are, 1. the Institute; and, 2. the Maker of the entail.

1745. 1. *Institute*. The strict words of the statute do not authorize any restraint on the institute. Those words sanction "tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell," &c.: And opinions have varied as to the competency of conditions or limitations directed against the institute who is a donee, not an heir (*a*): But at last it is settled, 1. That the institute may be placed under the conditions and prohibitions of the entail (*b*); but, 2. That he must be specifically comprehended in the prohibitory clauses, and pointed out by clear indications; not being included under the expressions *heir* or *member* of tailzie (*c*). 3. That in the irritant and resolute clause the insti-

tute may be included under a general term, provided the prohibitory clauses distinctly comprehend him (*d*).

(*a*) Willison, Feb. 26. 1726; M. 15458. Erskines, Feb. 14. 1758; M. 4406. Edmonston of Duntreath, Nov. 24. 1769; M. 4409; 1 Hailes, 298; in House of Lords, April 15. 1771; M. 4411. See also Gordon, July 8. 1777; M. 15462; 2 Hailes, 761. Lord Chancellor Eldon's observations in Steel's case, below (*c*), 5 Dow, 84.

(*b*) See the cases cited above (*a*), and below (*c*), *passim*.

(*c*) Steel, May 12. 1814; F. C.; 5 Dow's App. Cases, 72. Baugh, Jan. 14. 1834; 12 S. D. 279. See Cases of Glassford and Morehead, *sup.* § 1732 (*g*). Logan Maxwell, Dec. 20. 1836; 15 S. D. 291. Brown, March 11. 1837.

(*d*) Douglas, Nov. 14. 1823; F. C.; 2 S. D. 487; 1 W. S. App. Cases, 323. See Syme, Feb. 27. 1799; M. 15473.

1746. 2. *Conditional Institute*. In distinguishing who shall be held as bound under the description of heirs of tailzie, 1. The person is institute to whom the first fee is directly given, whether he be maker of the tailzie (*a*); or another, named after a reserved liferent (*b*); or a conditional donee, to whom the estate opens by the purifying of the condition (*c*). But, 2. It does not make one an institute, that *ex eventu* he becomes the first holder of the estate in fee by the predecease of prior donees (*d*). 3. Neither is a fiduciary fee sufficient to make the person to whom it is given institute; as when a liferent *allenary* is constituted, the fee to persons unborn, the heir on his existence, is institute (*e*). But, 4. It may be doubted whether a liferent to a father unrestricted, and a fee to children *nascituri* construed as a fee in the father would be sufficient to characterize him as institute, so as to make the heir a substitute.

(*a*) Livingstone, March 3. 1762; M. 15418; Monb. 5 Brown's Sup. 885. Gordon, Feb. 23. 1791; M. 15465; Bell's Cases, 180.

(*b*) Wellwood, Feb. 23. 1791; Bell's Cases, 191; M. 15463; see also M. 15466. Marchioness of Titchfield, May 22. 1798; M. 15467; affirmed. Miller, Feb. 12. 1799; M. 15471. Glen, Feb. 15. 1821. Logan Maxwell, Dec. 20. 1836; 15 S. D. 291.

(*c*) 3 Ersk. 8. § 44. Menzies, June 25. 1785; M. 15436; 2 Hailes, 969; confirmed, on remit from the House of Lords, Jan. 18. 1803; affirmed, July 20. 1811. Stevenson, June 24. 1784; M. 14862.

(*d*) Maxwell, Jan. 15. 1817; Bar. Hume, 875. McKenzie, Nov. 24. 1818; F. C.; and in House of Lords, May 13. 1822; 1 Shaw's App. Cases, 150. Glen, *ut supra* (*b*).

(*e*) Logan, Dec. 20. 1836; 15 S. D. 291.

1747. 3. *Maker of the Tailzie*. One cannot, by a mere act of will or of settlement, remove his estate from the reach of his creditors while he retains the fee; and so, 1. the maker of a tailzie cannot gratuitously include himself within the prohi-

bitions, to the effect of prejudicing his creditors (*a*). But, 2. By an onerous or mutual tailzie such restraints may be imposed on the maker; or the estate may be withdrawn from the diligence of creditors (*b*).

(*a*) 3 Ersk. 8. § 24. Scott, June 23. 1713; M. 15569; Rob. App. Cases, 226. Lindores, Dec. 8. 1714; M. 7735. Dickson, March 10. 1786; M. 15534; House of Lords, Oct. 1. 1831; 5 W. S. 657.

(*b*) Sharp, Jan. 14. 1631; M. 15562. 4299. Schaw, July 15. 1715; M. 15572; Rob. App. Cases, 203. Sheuchan, Case, Stewart, March 3. 1784; M. 15435; remitted, June 24. 1814. Same case, June 2. 1818; F. C.; reversed, July 31. 1822; 1 Shaw's App. Cases, 320. Paul, May 20. 1828; 6 S. D. 826. Dickson, House of Lords, Oct. 1. 1831; 5 W. S. 657.

1748. 5. STATE AND MEASURE OF RESTRAINT UNDER DEEDS OF TAILZIE. The restraints imposed by deeds of entail are of three classes:—1. against alienation. 2. against the contraction of debt, so as to affect the estate. 3. against altering the order of succession. Relative to those three classes of restraint as enforced by irritant and resolute clauses comprehending all, or pointed to the act or deed in question (§ 731, et seq.), several doubts have been raised; and, 1. It has been doubted, on the words of the Act, as a permissive statute, whether entails are sanctioned which do not protect the estate against *all* these three classes of danger. But the House of Lords, affirming a decision of the Court of Session, has fixed that this is not necessary; that the entail will be effectual so far as it goes, although it do not proceed to the whole extent of the Act (*a*). 2. It has been doubted whether the life interest of the heir of entail in possession can be alienated or affected by diligence without incurring an irritancy under the clauses of prohibition: But it has been settled that a sale or adjudication of the life interest if duly guarded against any possible effect subsequent to the right of the heir in possession, is unobjectionable (*b*). 3. It has been doubted whether the substitutes of an entail are barred from objecting to a deed as falling under one of the direct prohibitions, if there is no prohibition against the contraction of debt, and the deed necessarily raises a debt against the estate: And it has been held that in such case the challenge is barred, as met by the debt being effectual (*c*).

The general rules of construction applicable to these clauses have already been stated (sup. § 1730): in addition to which, see below, § 1760.

(a) Cathcart, Feb. 12. 1830; 8 S. D. 497; affirmed, July 18. 1831; 5 W. S. 315.

(b) Scottish Union Insurance Co. Feb. 19. 1839; 1 D. B. M. 532.

(c) Oliphant, July 1. 1830; 8 S. D. 985.

1749. 1. *Prohibition to Alienate*. The words of the statute authorizing this prohibition are—"Whereby it shall not be lawful to sell, annailzie, or dispone the lands or any part thereof." Under this prohibition, 1. The prohibition to alienate must be clear and express (a). 2. It must be distinctly pointed to the person whose power of alienation is in question, or to a class of persons within which he falls (b). 3. It has been held not to prevent a conveyance to an heir presumptive, so as to propel the estate (c). See above, § 1732.

(a) Hepburn, Feb. 8. 1758; M. 15507; affirmed. See Gordon Cuming, July 29. 1761; M. 15513. Elliot, May 19. 1803; M. 15542.

(b) Lady Nairn, July 31. 1736; Elchies, voce *Tailzie*, 5. 1 Cr. and St. App. Cases, 192.

(c) Gordon, Nov. 14. 1749; M. 15385. Suttie, July 5. 1758; 5 Brown's Sup. 866. Craigie, Dec. 4. 1817; F. C. M'Leod, Nov. 17. 1827; 6 S. D. 77.

1750. 1. *Feuing*. The prohibition to alienate, when clearly expressed, strikes against the granting of feus, as well as against absolute and complete conveyances for a price.

Ker, Jan. 23. 1807; M. *Tailzie*, App. 30; Jan. 12. 1808; Ib. 60; House of Lords, Dec. 17. 1813; 2 Dow, 149. See M'Kie, Nov. 9. 1736; Elchies, *Glebe*, 2. Minister of Little Dunkeld, May 14. 1791; M. 5153; Bell's Cases, 235. See Halket Craigie, Dec. 4. 1817; F. C.

1751. 2. *Provisions to Widows*. The general prohibition to alienate is effectual to prevent the granting of a liferent or locality to the widow beyond the amount of the terce (a). This requires clauses of power usual in entails (§ 1733), and is the groundwork of Lord Aberdeen's Act (§ 1773). Even the terce may be excluded; but this requires an express provision in the entail (b).

(a) 3 Ersk. 8. § 20. See Halket Craigie, Dec. 4. 1817. Cant, Dec. 27. 1726; M. 15554. Borthwick, Feb. 1730; M. 15556.

(b) Gibson, Nov. 24. 1795; M. 15869. Macgill, June 13. 1798; M. 15451.

1752. 3. *Leases may also fall under this prohibition, whether in expressing the prohibition, the word alienate or the word dispone be used* (a); and,

1. Long leases are thus barred; under which description

(after many doubts and conflicting decisions) all leases seem to be included which exceed the ordinary term of a fair agricultural lease ; or which are not leases for the purpose of improvement (*b*). And leases granted in violation of such a prohibition are not good to any extent, nor will they be sustained even when at the time of challenge the period to run is not beyond the term permitted by the entail (*c*).

2. Leases, whether of long or of short duration, in which, instead of the full rent, a grassum is taken, are held to fall under the prohibition against alienation (*d*). And a collusive or fraudulent lease, at a low rent, granted in circumstances to gain an advantage over the next heir, is reducible (*e*).

3. Leases of coal, marble, stone, &c. are within the prohibition against alienation.

4. It has been questioned, whether sales of standing timber (not of the nature of a crop or fruit of the ground), are not comprehended under the general prohibition to alienate (*f*). See § 1754.

5. No lease of the mansion-house and policy, or fields around the house, can, in the face of a prohibition to alienate, be granted to the prejudice of the heir of entail (*g*).

6. Where there is no prohibition against alienation, there is no limitation of the power to grant leases, either as to duration, or as to grassum. Nor is the heir who takes a grassum in such case bound to invest it for the benefit of the substitutes (*h*).

7. An heir of entail may take a renunciation from a tenant and grant a new lease (*i*). But a new lease, while the old is current, will not be effectual to bind the succeeding heir of entail (*k*).

(*a*) Elliot, May 19. 1803, and March 10. 1814 ; reversed in House of Lords, March 14. 1821 ; 1 Shaw's App. Cases, 16, and 89. Stirling, Feb. 20. 1821. M'Dowall, March 3. 1815 ; reversed in Stirling, 3 W. S. 462. Montgomery, July 9. 1817 ; 5 Dow, 293. Mordaunt, March 9. 1819 ; F. C. ; House of Lords, July 5. 1822 ; 1 Sh. App. Cases, 169. Queensberry Leases, House of Lords, March 30. 1819 ; 1 Bligh, 339 ; 1 Sh. App. Cases, 169. Earl of Elgin, June 13. 1821 ; 1 Sh. App. Cases, 44.

(*b*) Leslie, March 2. 1779 ; M. 15530 ; 2 Hailes, 832 ; affirmed. See 2 Dow, 112, and 1 Bligh, 510. Malcolm, Nov. 17. 1807 ; *Taitzie*, App. 57 ; affirmed, 2 Dow, 285. Turner, Nov. 17. 1817 ; *Ib.* 16 ; affirmed, 1 Dow, 423. Queensberry Leases, Dec. 17. 1813 ; 2 Dow, 90 ; 5 Dow, 293 ; 1 Bligh, 339 ; 2 Sh. App. Cases, 54 ; 2 W. S. App. Cases, 265. Same case, 4 W. S. 254. Mordaunt, July 5. 1822 ; 1 Sh. App. Cases, 169. See Jordanhill, Feb. 13. 1752 ; Elchies, voce *Tack*, 18 ; 5 Br. Sup. 797.

(c) Gordon, Nov. 22. 1822; 1 Sh. App. Cases, 169. Malcolm, June 19. 1823.

(d) Elliot, Jan. 16. 1798; M. 15450. Queensberry Leases, Dec. 17. 1813; F. C.; 2 Dow, 90; 1 Bligh, 483, et seq. Same case, Dec. 7. 1816; F. C.; remitted, 1 Bligh, 339. Wemyss, Dec. 11. 1821; 1 S. D. 202.

(e) Elibank, Nov. 16. 1827; 6 S. D. 69. Justice, Nov. 21. 1829; 8 S. D. 108.

(f) See Gordon, Jan. 24. 1811; F. C. See cases below, § 1754.

(g) Cathcart, Jan. 31. 1755; M. 15403; 5 Br. Sup. 818. Leslie, March 2. 1779; M. 15530; 2 Hailes, 832; affirmed. See Roxburghe Case, 2 Dow, 149. Turner, Dec. 6. 1811; F. C.

(h) Welwood, Nov. 12. 1823. Denham, Jan. 15. 1761; M. 15512.

(i) Queensberry Executors, Nov. 15. 1815; F. C.

(k) Leslie, ut sup. Redhead, as reversed, Feb. 5. 1794; Bell's Cases, 202.

1753. Thirlage. The constitution of a thirlage to a mill, not part of the estate, was, under this clause, held an alienation.

Balgair, Dec. 7. 1763; 5 Br. Sup. 622.

1754. Woods. An heir of entail under prohibition to alienate may cut down wood, and cannot be stopped by the substitutes (a). It has been attempted in various circumstances to restrain operations of this kind, as the cutting of unripe wood; of ornamental timber; of wood which it is proper in the right administration of the estate to preserve, and so forth; but in all these cases the restraint is so discretionary, and so little grounded on any settled judicial principle, as to raise great doubts whether it can be enforced (b).

See as to liferenter's powers, sup. § 1046.

(a) Hamilton, Feb. 16. 1757; M. 15408.

(b) M'Kenzie, March 6. 1824; Bontine, Nov. 17. 1827; 6 S. D. 74; F. C.; and 5 S. D. 811. See Cathcart, Jan. 31. 1755; M. 15403; 5 Br. Sup. 818. Gordon, Jan. 24. 1811; F. C.

1755. General provisions against doing any deed to prejudice the succession, or infringe or innovate the entail, do not import a prohibition to sell (a). The prohibition will be effectual, if the prohibitory and irritant and resolute clauses are pointed against "disponing, or squandering, or putting away," the estate, or any part thereof. See above, § 1716, et seq. (b).

(a) Campbell, June 17. 1746; M. 15505; Elchies, *Tailzie*, 29. Sinclair, Nov. 8. 1749; affirmed, Feb. 14. 1750; M. 15382; Elchies, 36. Scott, Nov. 1763; M. 1516; affirmed.

(b) Gordon Cuming, July 29. 1761; M. 15513.

1756. 2. *Prohibition to Contract Debt*. The words of the statute authorize clauses 'whereby it shall not be lawful,' 'to contract debt, or do any other deed whereby the lands, or

‘ any part thereof, may be apprized, adjudged, or evicted, from ‘ the other substitutes,’ &c. The prohibition under this clause is commonly directed against the contracting of debt so as to affect the estate, and though general against ‘ contracting ‘ debt,’ it is held to mean such debt as may affect the estate, or shall be made the ground of adjudication.

Nairn, Feb. 15. 1810. M^cKenzie, May 23. 1823; 2 S. D. 331. Denham, Dec. 15. 1737; 5 Br. Sup. 200. See Nisbet, June 10. 1823; 2 S. D. 381. Monro, Feb. 15. 1825; 4 S. D. 467, in House of Lords, affirmed, July 25. 1828; 3 W. S. 344.

1757. Under this provision and prohibition it is of course implied that the entail shall be duly completed (sup. § 1734); and in questions of competition between the heirs of entail and creditors, it is settled that where the entail is onerous, or purchased by money, or a mutual entail which cannot be recalled, the heirs of entail are to be dealt with as creditors in competition; so that the right of the proper creditors if first completed by infestment, or of the heirs of entail if first made perfect under the statute by infestment and recording in the record of tailzies, is to be preferred (*a*). But when the entail is not onerous, the estate is liable to attachment for debts contracted prior to the completion or recording of the entail; and such debts are not excluded by the completing and recording of the entail before the diligence (*b*).

(*a*) Vans Agnew, in House of Lords, July 31. 1822; 1 Sh. App. Cases, 320.

(*b*) Smollet, May 14. 1807; M. *Tailzie*, 25. Rose, June 11. 1828; F. C; 6 S. D. 945. See Agnew’s case, supra; 5 W. S. 360. Ferrier, Dec. 19. 1813. Monro, June 11. 1829; 3 W. S. 359. Grahame, Dec. 11. 1829; 5 W. S. 759.

1758. A prohibition against altering or infringing the entail is not a bar to the contracting of debt; but a prohibition to burden the lands is a bar. The debts, however, will be effectual to all intents, except as burdens on the estate.

Nisbet, June 10. 1823; F. C; 2 S. D. 381.

1759. 3. *Prohibition to alter the Order of Succession.* The words of the statute relative to this matter give sanction to provisions, &c. whereby “ the succession may be frustrat or interrupted.” This, like the others, must be a substantive prohibition, directed against the alteration of the order of the succession (*a*). 1. No particular words are necessary to make the prohibition effectual, provided it be clearly expressed that

no alteration shall be made on the line of succession;—as, that the heir shall do nothing to hurt, prejudice, or infringe, the fore-said tailzie, whereby the estate may be evicted, or the hopes of succession evaded (*b*). 2. Such words used vaguely, and in the close of any of the other prohibitions, will not be sufficient (*c*). Where there is such a prohibition, it is not competent to add to the destination; or to impose new restrictions, though fortifying rather than invalidating the entail; or to add a resolute clause; or to supply any other defect in order to make the entail more effectually binding (*d*).

(*a*) Stewart, July 8. 1789; M. 15535.

(*b*) Ker, June 23. 1807; M. *Tailzie*, App. 13; affirmed. McLaine, June 23. 1807; *Ib*. 14.

(*c*) Brown, May 25. 1808; M. *Tailzie*, App. 73. Purves, June 7. 1814; Bar. Hume, 873. Henderson, Nov. 21. 1815; F. C. Oliphant, June 7. 1816; F. C. Barclay, May 18. 1821; 1 Shaw, 24. Tytler, March 9. 1826; F. C.; 4 S. D. 541. Earl of Fife, March 7. 1828; F. C.; 6 S. D. 698. Cathcart, § 1729. Gilmour, July 5. 1838; 16 S. D. 1261. Braimer, Jan. 17. 1839; 1 D. B. M. 383.

(*d*) Menzies, June 25. 1785; M. 15436; 2 Hailes, 969. Douglas, Dec. 5. 1804; F. C. Monro, Feb. 13. 1810; F. C. M'Wharrie, June 28. 1815; and Campbell, Dec. 15. 1820, not reported, but quoted in Lord Fife's case. Meldrum, June 29. 1827; 5 S. D. 857. Earl of Fife, *ut supra*, § 1760.

1760. Finally, in relation to the several prohibitions, it is of importance to observe, 1. That it is not enough that the act or deed in question shall substantially have the effect of defeating the intention of the testator, if not clearly and substantively prohibited. 2. That the general expression subjoined to any particular prohibition, “nor to do any other deed whereby the entail may be defeated,” or the like vague terms, will be held as having reference only to an act or deed of that particular description to which the general words are subjoined. But 3. That it is not necessary on the other hand, to have the prohibition set forth in a distinct and separate clause; it having been held sufficient to distinguish it as a substantive and separate prohibition, if it be set off by such words as “nor,” or “nor yet.”

Innes, June 23. 1807; App. *Tailzie*, 3; affirmed, June 3. 1811. McLean of Lochbuy, June 23. 1807; App. *Tailzie*, 42. Brown, May 25. 1808. Henderson, Nov. 21. 1815. Grant, March 9. 1826. Rowe, Feb. 9. 1837; 15 S. D. 500. Gilmour, July 5. 1838; 16 S. D. 1261. Lang, Nov. 23. 1838; 1 D. B. M. 98.

1761. *Effect of Irritancies for enforcing these Prohibitions.* By the statute, ‘the next heir of tailzie may, immediately on ‘contravention, pursue declarator thereof, and serve heir to

‘ him who died last infeft in the fee, and did not contravene
 ‘ without necessity any way to represent the contravener.’
 The contraventions which thus open the succession to the next substitute, are, either from neglect of the conditions ; or breach of any of the prohibitions ; or some act, declared to be a contravention incurring irritancy. So, 1. The irritancy must be declared (*a*). 2. As the heir of entail in possession commits no contravention, and of course incurs no irritancy by burdening the lands only during his own incumbency (see sup. § 1748) ; when he creates such burdens, and afterwards incurs an irritancy, it has been much doubted what shall be the effect of the declarator. In one case (*b*), the irritancy was declared, but the effect against creditors holding real burdens on the contravener’s life interest, was left undecided : As to which, while, on the one hand, it is argued that what has once been done legitimately in favour of a third party, cannot be defeasible by any subsequent act of the debtor ; and that substitutes who take by contravention, can take only under the burdens lawfully constituted : On the other hand, it is contended that a creditor who takes a security on an estate liable to irritancy, must receive it only as a precarious security, dependent on the personal conduct and good faith of his debtor.

(*a*) 3 Ersk. 8. § 32. Simson, Dec. 6. 1697 ; M. 15353. Gordon, Nov. 16. 1750.

(*b*) Bontine, March 2. 1837 ; 16 S. D. 711.

1762. POWERS GIVEN BY STATUTE. Many entails contain, in clauses of power, relaxations of the general prohibitions (see above, § 1733, et seq.). But the omission of such provisions, or inadequate and imperfect expression of them, leave certain evils and inconveniences, which have induced the Legislature in several respects to relax the restraints imposed in deeds of entail. This is done either by special or by general statutes. And in all operations authorized by such statutes, the precise rules prescribed must be correctly and pointedly observed, according to the legal construction of the act. See below, § 1774.

Vans Agnew, July 31. 1832 ; 1 Sh. App. Cases, 333. Lawrie, Feb. 1. 1806 ; House of Lords, 1814 ; 2 Dow. 556. Malcolm, Dec. 4. 1821. Elliot, Feb. 9. 1826 ; 3 W. S. 61. Paget, Feb. 24. 1837 ; 15 S. D. 667.

1763. 1. *Power to sell Superiorities.* For the enfranchising of vassals holding of subject superiors, heirs of entail are allowed to sell superiorities to the vassal; the price to be laid out in lands, to be settled under the limitations of the tailzie.

20 Geo. II. c. 50. § 16, 17.

1764. 2. *Power to grant Leases.* By two several statutes, leases may be granted by heirs of entail notwithstanding prohibitions and irritancies. By the first act (*a*), leases for thirty-one years; or for fourteen years, and an existing lifetime; or for two existing lifetimes, are permitted, provided, 1. That in leases for a time certain, one-third of the land let shall be enclosed in one-third of the term; two-thirds before the expiration of two-thirds of the term; and the whole before the expiration of the term. 2. That in leases for two lifetimes a third shall be enclosed in ten years, two-thirds in twenty, and the whole in thirty. 3. That not more than forty acres shall be in one enclosure, if fit for the plough. 4. That the manor-place, offices, garden, and enclosures, usually in the owner's possession, shall not be included. 5. That the rent shall not be lower than that of the previous lease, and without any grassum. And, 6. That the former lease shall have expired, or be within a year of expiration. By the more recent act (*b*), heirs of entail in possession are empowered to grant leases not exceeding twenty-one years, but without grassum or any valuable consideration but the rent; but not to include the home-farm or mansion-house in any lease beyond the granter's life.

(*a*) 10 Geo. III. c. 51. § 1-7.

(*b*) 6 and 7 Will. IV. c. 42. § 1.

1765. 3. *Building Leases.* To encourage the building of villages and houses, leases may be granted, not exceeding ninety-nine years, 1. of five acres, and no more, to one person; not being within three hundred yards of the mansion-house. 2. To be void, if a house to the value of L.10 shall not be built on each half acre within ten years. 3. The houses to be kept in repair, and tenantable. And, 4. The rent not under the former, and without grassum.

10 Geo. III. c. 51. § 5. Duke of Buccleugh, Nov. 24. 1827.

1766. 4. *Improvements.* The heir in possession under a

strict entail cannot burden the succeeding heirs with the expense of improvements (*a*). But in order to encourage improvement, by enclosing, planting, draining, &c. it was provided by the Legislature, that any heir of entail who shall lay out money in improvements, shall be a creditor to the succeeding and subsequent heirs of entail for three-fourths of the money so expended, to the extent of four years' free rent of the entailed estate, after deducting liferents, and public burdens, and interest of debts; provided, 1. he give notice in writing to the heir of entail next after his own issue, three months before commencing his improvement, of the kind of improvement intended; 2. that he lodge a copy with the Sheriff-clerk; and, 3. that annually, within four months after Martinmas, he lodge with the Sheriff-clerk an account signed by him, with the vouchers, of the money expended that year (*b*). The forms prescribed must be very punctually observed, and are attended with so many difficulties as often to defeat the purpose (*c*).

(*a*) Dillon, Jan. 14. 1780; M. 15432; 2 Hailes, 841, and 827. Webster, Dec. 1791; M. 15439; Bell's Cases, 207. Taylor, 1791; Bell's Cases, 214. Frazer, June 7. 1825; 4 S. D. 73. See also same case, Jan. 29. 1830; 8 S. D. 409.

(*b*) 10 Geo. III. c. 51. § 9-26.

(*c*) Finlayson, Dec. 12. 1821. Thomson, Dec. 11. 1824. Campbell of Blythwood, May 15. 1822; F. C.; 1 S. B. 447. Elliot, Jan. 22. 1793; M. 15624. Torrance, Dec. 1. 1820, and House of Lords, May 26. 1826; 2 W. S. App. Cases, 429. Stirling, Dec. 14. 1814; F. C.

1767. The heir of entail succeeding may free himself from the demand for the expense of such improvements, by assigning one-third of the free rent of the estate, to be drawn by the executors of the heir who has expended the money, until they shall be indemnified; and any balance that may remain will become a debt against the next succeeding heir, preferable upon the rents; and if the next succeeding heir shall die before the expenditure shall be reimbursed, like proceedings may be taken against his successor; and so on, till the money shall be repaid.

10 Geo. III. c. 51. § 18.

1768. 5. *Building and Repairing Mansion-house.* It is provided, that for money laid out in this way, the heir of entail who shall expend it may be declared a creditor to the next

succeeding and subsequent heir of entail for three-fourths of the money, on following out proceedings similar to those relative to improvements; and if there are more estates than one, the right to build a mansion-house on one of the estates, is not barred by the existence of a mansion-house already on the other; the rent of the whole being the criterion of the expense.

10 Geo. III. c. 51. § 27, et seq. Stirling, *ut supra*.

1769. 6. *Burdening for Public Improvements in Roads, Gaols, &c.* 1. For the building of gaols, heirs of entail may be creditors of the succeeding heirs (according to the method of the above statute) for three-fourths of the money, but limited to one year's rent (*a*). 2. For the expense of making roads, they may, to the extent of a year's rent, burden the estate, but so that the estate itself shall not be adjudged, but only diligence against the rents be competent (*b*). 3. The heir of entail may grant leave to take ground or materials, and renounce all claim for indemnification, so as to bind succeeding heirs (*c*).

(*a*) 59 Geo. III. c. 61. § 15, 16, 17.

(*b*) 4 Geo. IV. c. 49. § 25.

(*c*) *Ib.* § 26.

1770. 7. *Excambion.* A power is given by the earlier statute of Geo. III. at the sight of the Sheriff, and with certain precautions, to exchange ground, to the extent of 30 acres of arable, or 100 of hill, lying in one place and together (*a*). But more ample powers are conferred by a recent act (*b*). And, 1. After three months' notice to the five next heirs of entail or their guardians, summary application may be made to the Court of Session for an excambion of any portion of the entailed estate not exceeding one-fourth part of the whole estate, and not including the mansion-house, and home-farm, or policy. 2. On proof of the relative values, and a report of skilful persons, the Court, if satisfied of the expediency of the transaction, may authorize the excambion. 3. The transaction to be settled by a contract of excambion at the sight and with the approbation of the Court, and recorded in the Sheriff-Court Books. 4. The lands exchanged to be, the one free of the entail, the other placed under it, the excess of value on either side if under L.200, to be paid to the heir in possession, or fee-simple proprietor, as the case may be (*c*).

(a) 10 Geo. III. c. 51. § 32-3. *McKechnie*, July 11. 1821 ; 1 S. D. 116. *Hamilton*. Nov. 13. 1833 ; 12 S. D. 22.

(b) 6 and 7 Will. IV. c. 42. § 3, et seq.

(c) § 3, 4, 5, 6.

1771. *Power to sell for the Entailer's Debt.* By the same statute (a) power has been given to sell part of the entailed estate for payment of the debts of the entailer ; see above, § 1728. This is authorized to be done, 1. by summary petition to the Court of Session ; 2. on this the Court directs due notice to be given, and an inquiry and account to be taken of the debts ; and in ascertaining the value it has been held that besides the real worth of the land, an additional sum as the price of the advantage of gaining a portion in the heart of the entailed estate was to be taken into view (b) ; 3. the necessity is then to be ascertained, and the portion of the estate fit to be sold ; 4. the intended sale is then to be advertised, and the sale to proceed by auction or articles of roup ; 5. the lands sold are to be adjudged to the purchaser freed from the entail ; 6. the price to be lodged in one of five banks specified in the Act at the highest interest, with an annual accumulation to be added to the principal, and be as interest ; 7. the price to be applied by order of the Court to pay off the debt ; and, 8. any balance of the price exceeding L.200, with accruing interest, to be laid out in the purchase of land to be entailed as before ; if under L.200, to be paid to the heir of entail in possession.

(a) 6 and 7 Will. IV. c. 42. § 7-19. *McMicken Torrance*, July 3. 1839 ; 16 S. D. 1258.

(b) Lord McDonald, July 5. 1838 ; 16 S. D. 1259.

1772. 8. *Provisions to Widows and Children.* Power is given, 1. To provide a liferent of one-third of the free rent to the widow of the heir in possession, deducting public burdens, liferents, and yearly interest of debts : 2. To provide the husband of an heiress of entail in a liferent of a half of the free rent ; one-third if there be already a similar liferent. 3. To provide children, if one, to the extent of a year's rent ; two years' rent, if two ; three years' rent, if three or more : such allowances, however, not being permitted to affect the fee, but only the heir in possession ; with power to him to demand a discharge on assigning to a trustee, to be named by the Court of Session, one-third of the clear rent of the estate, and so that

in no case he shall thus be deprived of more than two-thirds of the rent.

5 Geo. IV. c. 87. (Lord Aberdeen's Act.)

1773. 9. *Redemption of Land-tax.* Power is given to heirs of entail to redeem the land-tax, either by selling or by borrowing money. The Court of Session is empowered to adjudge, after intimations in the Gazette, &c. a certain part of the estate for sale, the price to be paid to a trustee, on his finding security to pay it into the Bank of England: The surplus, after reducing the land-tax to be lodged in bank, and employed in paying off debts of the entailer, but not such as do not affect the fee (*a*). But, 1. A sale for redemption of land-tax on terms different from those in the articles of sale, is null (*b*). 2. The precautions and proofs required by the statute must be carefully observed and produced, otherwise the sale will be defeated (*c*). The Court has power to judge of the fitness of the part sold for the purpose; as superiorities (*d*); 3. The minority of the next heir is no bar, provided the next succeeding heir is called (*e*); 4. An error of judgment in the Court of Session, in executing the Act, is not fatal to the sale (*f*); 5. A sale of part of an entailed estate, to redeem the land-tax of that and another entailed estate, is legal (*g*); 6. The fraud of an heir in possession, in managing such a sale, will not affect a stranger purchaser if the terms of the Act shall have been observed, but otherwise it will be fatal even to a stranger (*h*).

(*a*) Anderson, Nov. 18. 1814; F. C.

(*b*) Malcolm, Dec. 4. 1821; 1 S. D. 183.

(*c*) Wilson, Feb. 9. 1826; 4 S. D. 429; affirmed, May 2. 1828; 3 W. S. 69.

(*d*) Colquhoun, July 7. 1803; M. 15089.

(*e*) Elliot, Feb. 9. 1826; 4 S. D. 429.

(*f*) Earl of Wemyss, Feb. 25. 1824; 2 Shaw's App. Cases, 1.

(*g*) Lawrie, Feb. 11. 1806; F. C.; House of Lords, 2 Dow, 556. See June 1. 1825; 4 S. D. 56.

(*h*) Lawrie, House of Lords, 2 Dow, 559. Elliot, Feb. 9. 1826; 4 S. D. 429; affirmed, 3 W. S. App. Cases, 60. Hamilton, Dec. 10. 1830; 9 S. D. 165.

1774. *Canal and Railway Acts.* Among the numerous acts for canals and railways which have of late years been passed, questions are likely to arise relative to entailed estates. In one case where the price to be paid for opening a particular

line through an estate having been ascertained, the Canal Company proposed to give a large sum for the proprietor's consent to another line, and in the question whether this additional sum was to be invested like the rest of the price in lands to be entailed, or paid to the heir in possession, it was held to belong to all the heirs, and not to be distinguishable from the rest of the price.

Maitland, Feb. 15. 1831; 9 S. D. 443; affirmed, June 18. 1833; 6 W. S. 388.

1775. 4. OF CONDITIONAL SETTLEMENTS OF LAND. Settlements of land may be dependent on conditions; and these are either, 1. Implied Conditions; or, 2. Express Conditions.

1776. 1. IMPLIED CONDITIONS. These are to be distinguished, in their effect, from express conditions. There is a legal presumption or implied condition (especially in a settlement of one's whole estate), that the conveyance shall be effectual only *si testator sine liberis decesserit*; if the testator shall have no lawful child. And, besides the legal effect of a conveyance by a parent to a child as implying a conditional institution of that child's issue; there is, in direct substitutions after children of the testator, an implied condition that if a child should die leaving a lawful child, the substitution is not to take effect; but only if the institute should die childless (see below, § 1989). This presumption was borrowed from the Roman law, and was at first confined to moveables, but afterwards extended to heritable succession. The presumption may be defeated by opposite presumptions or by evidence.

3 Ersk. 8. § 46. Magistrates of Montrose, Nov. 21. 1738; M. 6398. Binning, Jan. 21. 1767; M. 13047. Wood, June 29. 1739; M. 13043. Roughhead, Feb. 14. 1794; M. 6403. Wallace, Jan. 28. 1807; M. *Clause*, App. 6. Neilson, June 4. 1822; 1 S. D. 427. Christie, July 5. 1822; Colquhoun, June 5. 1829; 7 S. D. 709. Booth, Feb. 8. 1831; 9 S. D. 406. Greig, March 5. 1835; 13 S. D. 607. Dixon, June 10. 1836; 14 S. D. 938. Wilkie, July 9. 1836; 14 S. D. 1121.

1777. If a lawful child who was believed to be dead shall afterwards cast up; or if an illegitimate child shall have been made legitimate by marriage with the mother; the principle of this presumption seems to apply, and the implied revocation of the deed to take place.

1778. If the child shall not have survived the granter or the institute, the presumption of revocation or substitution will

not hold. It has not the same effect with an express condition. See below, § 1782.

Watt, July 30. 1760; M. 6401.

1779. A posthumous child will have the benefit of the presumption; for it is not a presumed *power* to revoke, implying the existence of the granter at the birth of the child, but a presumed *condition* resolute of the settlement, and operating ipso jure.

Christie, July 13. 1681; M. 8197; 2 Brown's Sup. 26; 3 Ib. 444.

1780. If the settlement be only partial and the child have survived long enough to give the granter an opportunity of altering the destination without his having made any alteration, the presumption will not hold: But the force of the presumption is greater when it is a universal settlement.

Yule, Dec. 20. 1753; M. 6400. Colquhoun, July 5. 1829; 7 S. D. 709.

1781. 2. EXPRESS CONDITIONS. Conditions annexed to settlements, if clear and intelligible and lawful, will be effectual against the granter.

1782. 1. There is sometimes expressly inserted in a settlement, a condition *si sine liberis decesserit*. It has so far a different construction from the implied condition (*supra*, § 1776, *et seq.*), that the mere existence of the child will make the condition effectual (*a*); unless the survivance or the actual succession of the child be specified in the condition (*b*).

See as to conditions annexed to substitutions in entails, § 1724.

(*a*) Robertson, Jan. 22. 1833; 11 S. D. 297. Ballantyne, Dec. 1687; M. 2953. Watt, Dec. 8. 1702; M. 2954.

(*b*) Royston, Feb. 16. 1715; M. 2955.

1783. 2. Conditions may be questionable as to effect; either from defect of power; or from being impracticable; or inconsistent with law; or *contra bonos mores*.

1784. Where the granter has no power to dispose of the estate conditionally, the condition may yet have effect by being combined in the settlement with some grant or donation, the acceptance of which will infer homologation of the condition. See below, of Approbate and Reprobate, § 1937, *et seq.*

1785. Conditions physically impossible, are in settlements

held *pro non scriptis*: And if unlawful, or *contra bonos mores*, they are regarded by law as impossible. In this class it has sometimes been said that restraints on marriage are to be held as unlawful: But they are so only when absolute and total, or when imposed on persons entitled to succeed independently of the settlement (*a*). Reasonable restraints (as to marry with consent of certain persons; or to marry, or not to marry, a particular person), are effectual; but those whose consent is by the condition required to the marriage, must justify their objection on reasonable grounds (*b*).

(*a*) 1 Stair, 3. § 7. 3 Ersk. 3. § 85. Reid, March 5. 1813; F. C. Hume, Dec. 16. 1629; M. 2964; 1 Brown's Sup. 298. Hamilton, Feb. 13. 1681; M. 2970. Foord, March 1682; Ib. Grahame, Feb. 9. 1774; M. 2979; 1 Hailes, 560. Douglas, Feb. 7. 1792; reversed, M. 2985.

(*b*) Foord, *ut supra*, (*a*). Gordon, March 30. 1682; 3 Brown's Sup. 433. Dalziel, July 6. 1688; M. 2971. Pringle, July 20. 1688; M. 2972. Buntin, July 7. 1710; M. 2972.

5. LAW OF DEATHBED.

1786. By this law, if a person, while ill of the disease of which he died, has executed a deed, conveying or burdening his heritable estate, to the prejudice of his lawful heir, he is presumed to have acted under the undue influence of importunity; and the heir may have redress. And the rule is extended to guard wives and children against defeat of their legal provisions, and to protect minors in the nomination of curators or of tutors, against exemption from the usual responsibility, § 1803.

2 Reg. Maj. c. 18. § 7 and 9. 1 Stair, 12. § 34. 4 Stair, 20, 38. 3 Ersk. 8. § 95, Dirl. voce *Legit. Liber*. Maxwell, July 7. 1629; M. 3303. Lord Forbes, Feb. 11. 1755; M. 3277; 5 Brown's Sup. 288; 1 Bell, Com. 84.

1787. 1. CHARACTER OF DEATHBED. It is essential to Deathbed, as opposed to that degree of vigour which is known by the name of *liege poustie* (§ 1788), that the deceased, at the date of the deed, should have been ill of the disease of which he died (*a*). And so the presumption of weakness and yielding to importunity does not hold, if a supervening disease or accident shall have terminated his life (*b*). It is not required that the disease shall be, strictly speaking, in nosological character, a mortal disease (*c*).

(*a*) Cogan, March 18. 1834; 12 S. D. 569.

(*b*) Weir, Jan. 14. 1791; Bar. Hume, 135. Thomson, Dec. 27. 1801; Ib.

142. Brock, May 25. 1813; *Ib.* 137. Carnegie, Nov. 16. 1815; *Ib.* 151. Speirs, June 11. 1802; Bar. Hume, 144. Paterson, in Jury Court, June 24. 1816; 1 Murray, 71. Heddleston, April 12. 1819; 2 Murray, 120. M'Kay, Jan. 17. 1828; 6 S. D. 367; affirmed, March 25. 1831; 5 W. S. App. Cases, 210.

(c) 3 Stair, 4. § 28. 3 Ersk. 8. § 96. Shaw, Jan. 7. 1624; M. 3291 and 3208. Robertson, Feb. 1. 1622; M. 3290. Dun, Feb. 25. 1668; M. 3291. Scotston, Feb. 20. 1694; M. 3297. Primrose, Jan. 28. 1756; M. 3300; 5 Brown's Sup. 843. Laird, July 9. 1763; M. 3315. Crawford, July 27. 1782; 2 Hailes, 907. Black, Dec. 11. 1787; M. 3302. Robertson, Dec. 1. 1823; F. C.; 2 S. D. 544.

1788. 2. *Liege Poustie*. In opposition to the presumption of deathbed, and in support of the presumed strength to resist importunity, notwithstanding illness at the date of the deed, two tests have been selected. These are, 1. survivance during sixty days; and, 2. going to kirk or market unsupported.

1789. 1. *Surviving for sixty days*. To avoid the inconvenience of continuing the presumption of imbecility too long (*a*), it is enacted, that "it shall be a sufficient exception to exclude the reason of deathbed, as to all bonds, dispositions, contracts, or other rights that shall be made and granted by any person after the contracting of sickness, that the person live for the space of threescore days after the making and granting of the said deeds, albeit during that time they did not go to kirk and market;" reserving a right to reduce, "if it shall be alleged and proven, that the person was so afflicted by the disease at the time of the doing of the said deeds, that he was not of sound judgment and understanding" (*b*). And in construing the act, 1. The day of making the deed is not reckoned; and survivance till the morning of the sixtieth day is sufficient; according to the maxim, dies inceptus pro completo habetur (*c*); 2. The date of the deed must be proved, as well as its authenticity (*d*).

(*a*) Richardson, July 30. 1635; M. 3291. Gordon, June 11. 1696; M. 3299.

(*b*) 1696, c. 4. 10 Acta Parl. 33.

(*c*) Crawford, July 27. 1782; 2 Hailes, 907. See Ogilvie, Dec. 10. 1793; affirmed in House of Lords, Dec. 1. 1796; M. 3336. Mitchell, Feb. 3. 1801; M. *Deathbed*, App. 9.

(*d*) Merry, Feb. 6. 1801; M. *Writ*, App. 3; affirmed. See Gibson, March 2. 1813; Bar. Hume, 150.

1790. 2. *Going to Kirk or Market*. By consuetude, sanctioned by the reference to it in the Act of Parliament (§ 1789), and regulated in practice by Act of Sederunt, it is also an exception to the plea of deathbed, that the granter of the deed

has been at kirk or market between the date of the deed and his death.

Maxwell, July 7. 1629; M. 3303. Richardson, July 30. 1635; M. 3210. Act of Sederunt, Feb. 29. 1652. Lockhart, Dec. 11. 1677; M. 3297. Pergeleis, Feb. 26. 1669; M. 3304. Lord Balmerino, June 28. 1671; M. 3292. Clieland, Dec. 5. 1672; M. 3305. Crawford, Dec. 1711; M. 3315. Kyle, March 10. 1825; 3 S. D. 641. M'Cracken, Sept. 14. 1821; 2 Murr. 551.

1791. It is not necessary that the granter shall be both at kirk and market.

Balmerino, June 28. 1671; M. 3305; 2 Brown's Sup. 445. Ragg, Jan. 28. 1725; M. 3314.

1792. The granter must be at kirk or market without "supportation or straining of nature" (which is a question of evidence for a jury): And though not in perfect health, yet he must not be so enfeebled by his disease as to be unable to support himself.

Act of Sederunt, ut supra. 3 Stair, 4. § 28. 3 Ersk. 8. § 96. 3 Bankt. 4. § 41. Balmerino, Crawford, ut supra. Faichney, July 9. 1776; M. 3316; App. 1; 5 Brown's Sup. 422. Young, July 3. 1777; 5 Brown's Sup. 423; 2 Hailes, 757. Angus, July 29. 1793; Bar. Hume, 137. Harvie, Nov. 20. 1799; Ib. 139. Ormiston, May 17. 1821; F. C. Tailzeour, Dec. 11. 1787; M. 3317. Cowan, Feb. 20. 1817; Bar. Hume, 142. Rait, Nov. 27. 1818; F. C. Smith, June 9. 1812; F. C.; Bar. Hume, 148. Greig, May 17. 1821; Ib. 149.

1793. It has not been settled what shall be held a market; but it rather seems requisite that it shall be a proper market for the sale of goods, commodities, cattle, &c.

Scotstoun, Feb. 20. 1694; M. 3322. Earl of Roseberry, Nov. 24. 1763; M. 3322; Elchies, *Deathbed*, 8. Laird, July 9. 1763; M. 3315. M'Cracken, in Jury Court, 2 Murray, 251. Maitland, May 16. 1815; F. C. Rait, Nov. 27. 1818; F. C.

1794. Equivalents to going to kirk or market, even though indicating superior strength, will not overturn the presumption.

Lowrie, Feb. 7. 1671; M. 3319. Balmerino, M. 3320. Mounthonhall, Feb. 1683; M. 3320. Livingstoun, Feb. 1683; M. 3321. Keirie, Nov. 25. 1687; M. 3321. Maitland, ut supra.

1795. Fraudulent compliance with the words of the rule will not support the deed.

Ormiston, May 17. 1821; F. C. 3 Stair, 4. § 28. 3 Ersk. 8. § 96.

1796. 3. *Deeds liable to Challenge*. All deeds alienating or affecting heritage, to the prejudice of the heir, are within the

rule; and the rule extends to all heirs, heir-male or of tailzie, and heirs in personal rights to land, as well as heirs to infeftments.

1. Direct Prejudice to the Heir. This may be by alienating the land or part of it, or by creating burdens, or granting leases of extraordinary duration, or discharging debts due to the heir.

1797. Alienations without full consideration, or even for full consideration if spontaneous and prejudicial, may be challenged; and they will be held prejudicial, not only on account of pecuniary loss, but by splitting or dismembering the estate, or depriving the heir of his rightful inheritance (*a*). And this rule is not confined to land or houses, but extends to all fixtures, or what law holds to be part of the land,—as woods (*b*); and to all those things to which the heir has right, as heritable bonds, or bonds excluding executors (*c*). In reducing onerous deeds the heir must reimburse the person to whom the deed has been made. If the heir insist on having back the estate he must pay the price. If he reduce an assignation of an heritable bond, he must repay what has been paid for the assignation. And if in such case the price has gone to the executors, he will have his remedy against them (*d*).

(*a*) 3 Ersk. 8. § 92. Hepburn, Feb. 25. 1663; M. 3177. Richardson, July 30. 1635; M. 3210. Maxwell, July 15. 1724; M. 3329. Lindsay, Dec. 2. 1819. Campbell, Dec. 6. 1805; M. *Deathbed*, 5.

(*b*) Maxwell, *supra* (*a*).

(*c*) McKay, Jan. 12. 1725; M. 3224. Pringle, July 20. 1688; M. 3219. Murrays, Dec. 5. 1797; M. 3237.

(*d*) Gillespie, June 18. 1802; Bar. Hume, 145.

1798. Burdens and securities may be challenged if the heir is not already liable (*a*); the heir, where he is not liable finally, having redress against executors, &c. (*b*).

(*a*) Darling, Jan. 18. 1709; M. 3222.

(*b*) Pollocks, July 13. 1632; M. 3209. Christieson, Dec. 20. 1733; Elch. *Deathbed*, 2; M. 3226. Bogle, June 19. 1759; M. 3235. Semple, June 1. 1813; F. C.

1799. Discharge of heritable debt is good to the debtor on full payment, though on deathbed. But the heir will have his remedy against the executor; or even against the debtor, if the discharge be fraudulent or gratuitous.

3 Stair, 4. § 29. Brown, March 15. 1634; M. 3200. Gillespie, Dec. 7. 1802; 1 Bell, Com. 94; Bar. Hume, 145.

1800. Bonds of provision burdening the heir are challengeable (*a*), unless grounded on an obligation binding on the heir; the natural obligation of a parent not being sufficient (*b*).

(*a*) Logan, Feb. 25. 1757; M. 3230; 5 Brown's Sup. 338. Leslie, Dec. 17. 1747; M. 3229. Cranston Riddel, July 1. 1637; M. 3212. Fowlis, July 1721; M. 3223.

(*b*) Edmonston, July 20. 1706; M. 3219. Burden, June 4. 1709; 4 Br. Sup. 746.

1801. Leases beyond those of ordinary administration, and to the heir's prejudice, are challengeable. See above, § 1183.

1802. 2. Deeds indirectly prejudicial to the Heir are, even against third parties, reducible as far as gratuitous. So, the voluntary conversion of a subject from heritable to moveable may be challenged (*a*). Moveable bonds, legacies, or provisions, are reducible, in so far as prejudicial to the heir, either as debts, or as exhausting the fund for creditors, and exposing the heir to a demand (*b*). And if an obligation be already incurred, in liege poustie, which would bind the heir, a deed in fulfilment of it is not challengeable although made on deathbed (*c*).

(*a*) 3 Ersk. 8. § 98.

(*b*) Shaw, Jan. 7. 1624; M. 3208. Earl of Leven, Feb. 27. 1683; M. 3217. Cowie, July 22, 1707; M. 3220.

(*c*) Anderson, 1568; M. 3208. Shaw, ut supra. Heriot, July 29. 1678; M. 3217. Pollocks, July 13. 1632; M. 3209. Darling, Jan. 18. 1709; M. 3222. Edmonston, supra. Campbell, Dec. 6. 1805; affirmed.

1803. 3. Deeds not affecting the Heir. A father cannot on deathbed name tutors with an exemption from responsibility for omission (*a*), nor can he name curators at all to his children, unless in liege poustie (*b*).

(*a*) 1696, 8. 1 Ersk. 7. § 27. Watson, Jan. 28. 1714; M. 3244.

(*b*) 1696, 8. Crawford, Feb. 1751; M. 3230; Elch. Tut. 23.

1804. One cannot on deathbed defeat the legitim or jus relictæ.

Dirleton, voce *Legitima Liberorum*. 3 Ersk. 9. § 16. Henderson, Feb. 1728; M. 8199.

1805. 4. *Evasion of the Law of Deathbed*. Various devices have been employed for this purpose.

1806. It will not be effectual to evade this law, that a power has been given in a Crown-charter, or reserved in a settlement on the heir, of disposing or contracting debt on deathbed, or "at any time in life."

Hepburn, Feb. 25. 1663 ; M. 3177. Douglas, June 22. 1670 ; M. 329. Davidson, Nov. 16. 1687 ; M. 3255. Bertram, Feb. 8. 1706 ; M. 3258 ; Dirleton and Stewart, 334 and 137.

1807. It will be an effectual bar against the heir's challenge, if, in a settlement on heirs in a contract of marriage, power is reserved to make provision for younger children at any time of the father's life ; or if the heir shall have accepted of a settlement, with a reservation of powers to grant some specific deed or provision.

Forbes, Feb. 11. 1755 ; M. 3277 ; 5 Brown's Sup. 288, as in House of Lords, M. 3284. Pringle, Feb. 28. 1765 ; House of Lords, Jan. 29. 1767 ; M. 3290. Reids, Nov. 13. 1728 ; M. 3327. Inglis, Dec. 4. 1733 ; M. 3327.

1808. A deed executed blank cannot be filled up on deathbed.

Pennicuik, Jan. 18. 1687 ; M. 3243. Birnies, June 22. 1678 ; M. 3242 ; 3 Brown's Sup. 235.

1809. The total exclusion of the heir by a deed in liege poustie, with power to alter, will bar him from challenging a deed on deathbed disposing otherwise of the succession, but not revoking the former.

Duke of Roxburghe, Dec. 13. 1816 ; F. C. ; 2 Bligh, 630.

1810. If there be two deeds on deathbed, one a distinct and separate revocation of a liege poustie conveyance, the other a new conveyance prejudicial to the heir, the heir's right revives by the revocation, so as to entitle him to challenge the new conveyance.

Findlay, July 25. 1779 ; M. 3188.

1811. Even where the revocation of the liege poustie deed and the new conveyance are contained in one deed, but the revocation is not made provisional, the heir may take the benefit of the revocation, and also challenge the new conveyance.

Coutts, Nov. 17. 1796, and March 14. 1806 ; Bell's Cases, 207 ; M. 14958, and App. 3 ; 2 Bligh, App. Cases, 655. Whitelaw, Nov. 16. 1809 ; 2 Shaw's App. Cases, 13, foot note. Bately, Feb. 2. 1815 ; F. C. Mudie, March 2. 1820 ; F. C. ; March 1. 1824 ; 2 Shaw's App. Cases, 9. Anderson, May 17. 1833 ; 11 S. D. 612.

1812. Where the revocation (separate, or in the same deed) is declared to be provisional, to take effect only if the new deed shall stand, the heir is excluded (*a*). An *implied* revocation is held provisional (*b*).

(a) Countts' case, 2 Bligh, 686.

(b) Cunningham, 5 Brown's Sup. 423. Rowen, Nov. 22. 1775; Tait's Cases; 5 Brown's Sup. 423; 2 Hailes, 659; 2 Bligh, 662, 679, 680-1, 687. Duke of Roxburghe, Dec. 13. 1816; 2 Bligh, 619.

1813. A liege poustie trust-deed will not enable the granter to defeat the heir's right by a testamentary direction to trustees, or other deed on deathbed, unless, by the trust-deed, the heir shall be effectually excluded (a). But if the trust-deed shall have the effect of bringing in others than the heir at law, in case the deathbed deed should be reduced, it will bar the heir's challenge (b); and if a power to alter be in such circumstances reserved to be exercised by a deed under the granter's hand, a testamentary deed will be effectual, if executed according to the form of the country where it is made (c).

(a) Willock, Dec. 7. 1769; reversed in House of Lords; 1 Hailes, 321; Kerrs, July 8. 1806; affirmed.

(b) Brack, Nov. 23. 1827; 6 S. D. 113. Bellenden, Feb. 24. 1829; 7 S. D. 454; and March 11. 1830; 8 S. D. 694; affirmed, 5 W. S. 713.

(c) Same cases.

1814. The heir's consent to a particular deed will bar his challenge: But a general obligation by the heir not to challenge on deathbed, or a renunciation obtained fraudulently, is ineffectual to bar a challenge.

Inglis, Dec. 4. 1733; M. 3327; Elch. voce *Deathbed*, 1. Murray, Jan. 21. 1826; 4 S. D. 374; F. C.

1815. 4. *Heirs entitled to Challenge.* The following persons have a title and interest sufficient to maintain the challenge: 1. The heir at law, whether of line or conquest (a). 2. The heir of investiture; even against the heir of line (b). 3. Even where the destination is still personal, the heir of provision has the right to challenge (c); but one entitled only by contract to succeed is a creditor and not an heir, and cannot plead deathbed (d). 4. A remoter heir may challenge a deathbed deed to his prejudice, on the immediate heir's death, even where the immediate heir was not prejudiced by it, provided the immediate heir have not already homologated (e). 5. An apparent heir may challenge on deathbed (f); and even an heir of provision, whose title is not yet completed, has been held entitled to challenge (g). But, 6. Where a service is considered necessary, a general service is not held a sufficient title to reduce on deathbed (h). And, 7. Creditors of the heir

may exercise the faculty of challenging the deathbed deed (*i*).
8. In all those cases, though the title to challenge may be good, the action may be met by a plea of want of interest (*k*).

- (a) 3 Ersk. 8. § 99, 100.
- (b) *Ib.* § 100. Hepburn, Feb. 25. 1663; M. 3177. Porterfield, Feb. 24. 1672; M. 3179. Maxwell, Feb. 1722; M. 3194.
- (c) Marquis of Clydesdale, Jan. 26. 1726; M. 3180.
- (d) Campbells, Dec. 16. 1738; M. 3195; 5 Brown's Sup. 214, 651; Elch. *Mut. Cont.* 14. See Kilk. 456.
- (e) Kennedy, July 13. 1722; M. 3198. Craigs, Feb. 3. and 13. 1739; M. 3199; Elch. *Deathbed*, 11, and Notes, 11. p. 116. Irvine, June 3. 1803; M. *Deathbed*, App. 6.
- (f) Graham, Feb. 4. 1779; M. 3186; 2 Hailes, 823.
- (g) Edmonston, March 16. 1636; M. 16089. Graham's case, *supra*.
- (h) Graham's case, *supra*.
- (i) 3 Ersk. 8. § 100.
- (k) Smith, Feb. 18. 1830; 8 S. D. 553. Kerr, § 1813 (*b*).

1816. The heir's ratification or homologation (*a*) is a bar; but, 1. it will not bar his heir, if the ratification be on deathbed (*b*); nor, 2. will it bar creditors, if the heir be insolvent, and the ratification gratuitous (*c*); or if the ratification be executed in favour of a creditor within sixty days of bankruptcy (*d*); or collusively to confer a preference over other creditors (*e*).

- (a) 3 Ersk. 3. § 48. See *supra*, § 27. See Kennedy, Jan. 2. 1723; M. 9441.
- (b) Hedderwick, Nov. 18. 1740; Elch. voce *Deathbed*, 13. Cleuch, Nov. 2. 1744; M. 3182.
- (c) 1621, 18.
- (d) 1696, 5.
- (e) 2 Bell, Com. 242.

III.—OF THE ENTRY OF HEIRS, AND OF CHARGES TO ENTER HEIR.

In order to vest the succession in the heir, he must enter as such, either by service, or by precept of clare constat; the general principles of which have been already stated (§ 775, et seq.), but must now be more particularly explained.

1. ENTRY BY PRECEPT OF CLARE CONSTAT.

1817. On the opening of the succession by the death of the vassal, the superior may, by his precept of clare constat, give an effectual entry to the heir at law, or of investiture, or of provision (*supra*, § 778). If the superior be himself infest in

the superiority, his precept is a perfect warrant for infeftment; if not yet infeft, the vassal's infeftment proceeding on the precept of clare constat will become effectual, by accretion of the superior's infeftment.

See above, § 881. 1 Bell, Com. 698.

1818. In this way may be entered, 1. one who is heir at law, either immediate, or by failure of nearer heirs of the person last infeft; or, 2. the heir of investiture; or, 3. the heir of provision by a deed of settlement, conformable to, and within the terms of the standing investiture; or, 4. the superior himself; but, 5. a disponee cannot thus enter, and does not require such a precept.

Crichton, Jan. 1798; F. C.; M. 15115; 1 Bell, Com. 698, corrected in Addenda, vol. ii. p. 697. Calderwood, Durham, Jan. 31. 1798; M. 15118.

1819. A precept of clare constat is not the competent mode of entering one who is not at the time the immediate heir (*natus vel factus*) of him who died last vest and seised in the lands: And even the consent of that next heir will not make it valid.

Landale, Jan. 29. 1752; M. 14465; Elch. voce *Service*, 6; Monb. 5 Br. Sup. 794. Finlay, July 20. 1770; M. 14480; and Jan. 27. 1774; M. 6904; 1 Hailes, 357 and 555.

1820. It is not indispensable (as in a service, § 1829, 1851), that a precept of clare constat shall set forth the precise description and character of heir; provided the superior is satisfied that this is the heir of investiture, and it is substantially correct, bearing reference to the necessary documents as produced to the superior.

Reid, Nov. 18. 1788; M. 14483; overruled by Fairservice, June 17. 1789; M. 14486; and cases of Crichton and Calderwood Durham, *supra*. Ogilvie, June 5. 1817; Bar. Hume, 724.

1821. A superior is not reinvested by the death of the vassal, so as to have it in his power to give a new charter; but in his precept of clare constat he may alter the investiture, and introduce new conditions, so that if the vassal's heir accept of the precept so qualified, it will be effectual.

Magistrates of Edinburgh, June 27. 1777; Tait's Cases; 5 Br. Sup. 612.

1822. A precept of clare constat is strictly personal: It falls by the death either of the superior or of the vassal, so

that no effectual infeftment can thereafter be taken on it ; and it is incapable of assignation.

1693, 35. Ersk. 3. § 42.

1823. A precept of clare constat is a title only to the lands expressed in it ; and, 1. does not include a general title as heir ; nor, 2. imply passive representation beyond the value of the subject (see below, of Passive Titles, § 1914. et seq.). And the heir's title thus made up is not protected as a title by service is, by the vicennial prescription. See below, § 1847.

3 Ersk. 8. § 71. Farmer, March 1683 ; M. 14003 ; 5 Br. Sup. 927.

2. ENTRY OF HEIRS BY SERVICE.

1824. The general view of the law in requiring the proof of the heir's title by service, has already been explained (sup. § 779). Service is a judicial proceeding and *actus legitimus* for transmitting the succession ; and establishes, 1. the opening of the succession ; 2. the acceptance of the *hæreditas* by the heir ; 3. the special character in which he takes ; and, 4. the vesting of the succession.

1825. Service is either SPECIAL or GENERAL : the former establishing, along with the general title of Heir, his specific right to enter and be infeft in particular lands ; the latter establishing the general title of Heir, without application to any particular subject.

1826. i. SPECIAL SERVICE. This form of service is used where the purpose is to have the heir infeft in the feudal right of subjects in which the ancestor died infeft.

1827. 1. *Proceedings in Special Service.* The service is intended to establish judicially the several points on which the heir's right to demand a feudal entry from the superior depends. For establishing those several points, a brieve is issued from Chancery, directed to the Sheriff of the shire where the lands lie, or if situated in several counties (or in case of a competition of brieves), to the Sheriff of Edinburgh (*a*), requiring him to impanel a jury, and have a verdict returned on seven several points,—1. the death of the ancestor, at the faith and peace of the sovereign ; 2. the propinquity of the claimant ; 3. the claimant's lawful age (now of no use) ; 4. the extent or valuation of the land ; 5. the superior ; 6. the tenure and

reddendo; 7. the person in whose hands the lands have been by non-entry since the ancestor's death (*b*).

(*a*) 1 and 2 Geo. IV. c. 38. 1 and 2 Vict. c. 86. § 2.

(*b*) 1 Jurid. Styles, 378.

1828. The brieve is executed edictally at the market-cross of the head burgh on a market-day, and on a citation of fifteen days. The diet is peremptory, and, if deserted, the brieve falls, and cannot be executed to a new day. The service may be opposed by one having an interest, 1. on the ground of any irregularity in the brieve or executions; or, 2. by exceptions instantly verified; or, 3. by a retour of a special service as an exclusive title; or by shewing the fee to be full. See below, § 1842.

4 Stair, 3. § 17. See Sutherland, Jan. 1743; M. 16347. Innes, June 23. 1807; M. *Tailzie*, App. 13.

1829. The heir sets forth, in a Claim, the death of the ancestor, and the precise character of heir in which he desires to be served. There must be a perfect accordance between the brieve, the claim, and the proofs. And, 1. The death of the person last vest must be shewn, for there can be no service if the fee be full (*a*). 2. The particular character as heir of line, heir-male, heir of provision, in which the claimant is under the standing investitures entitled to take the fee, must be clearly made out; for a service in one character will not carry a subject descendible to an heir of another description, although the same person may have in him both characters (*b*). 3. To this rule, however, there is an exception in the case of a service in a character which necessarily involves that in which the subject is to be taken up, and where the intention of taking in both characters is obvious (*c*). 4. Every link in the chain of propinquity must be specified (*d*).

(*a*) 3 Stair, 5. § 34. 3 Ersk. 8. § 66. Mickle, Nov. 18. 1664; M. 16091. Strowan, Feb. 26. 1681; M. 16096. Cunningham, Feb. 27. 1812; F. C.

(*b*) Edgar, July 6. 1736; M. 3089. Cairns, Nov. 12. 1742; M. 14438. See the cases Forbes, Hay, Cathcart, § 1849, and Ogilvy, § 1854. Woodmass, Jan. 28. 1825.

(*c*) Livingston, Dec. 13. 1705; M. 14004. Lord Dalhousie, Nov. 12. 1712. Bell, June 21. 1749; M. 14016. Haldane, Nov. 27. 1766; M. 1443. See Rose, March 10. 1734; M. 14955. D. of Queensberry's Trustees, Jan. 21. 1819; Bar. Hume, 727.

(*d*) 3 Stair, 5. § 35. 3 Ersk. 8. § 66. Earl of Cassillis, July 22. 1629; M. 14423. How, March 9. 1822; 1 S. B. 440.

1830. The retour must contain an answer as to the "extent" of the lands (*a*). The purpose of having this returned is, to serve as the rule of payment of the casualties of non-entry and relief, and also in Crown holdings formerly, to serve as the criterion of qualification for the elective franchise. The valued rent appears in the roll of the county where the lands lie; the old extent is proved by retours. This is a matter involved in some obscurity. The contributions levied in Scotland in the 12th and 13th centuries, appear to have had reference to the value of the lands at the time, ascertained either by some general estimate, or by separate investigations, or retours of the several lands. Whether the one or the other mode of ascertaining the value was referred to, it became in process of time necessary to state the value of lands at a very different rate, in consequence of the devastation of war, which in Scotland was very great, from the prevailing policy of arresting the progress and cutting off the supplies of an invading army, by an entire and total devastation of the invaded territory. In the beginning of the 14th century, brieves were issued under the authority of Edward I., and retours made to Chancery, distinguishing the valuation, "*tempore pacis quando terræ fuerunt edificatæ et cultæ per totum;*" and the valuation, "*nunc propter destructionem guerræ.*" It appears that the new valuation was, between the middle of the 14th and the middle of the 15th century, less than the old by more than one-half. Then it appears that the old and new valuation came to be pretty much on the same level; and previous to 1643, when the valued rent was introduced, the practice was adopted of estimating the new extent, by adding a certain proportion to the old valuation, to compensate for the advanced improvement of the country, and for the difference in the value of money (*b*).

(*a*) 2 Craig, 17. § 35. et seq. 3 Stair, 5. § 38. 2 Ersk. 5. § 31. et seq.

(*b*) Cranstoun's case, May 16. 1818; F. C.

1831. The verdict is recorded and signed by the chancellor of the jury; the Sheriff interposes his authority, and signs an entry in the record to that effect. The Return, or RETOUR, containing an answer to the brieve, is made to Chancery; and an extract is given out, which is legal evidence of the heir's right in general service (*a*), and which in special service con-

tains a warrant for issuing a precept for infefting the heir, if the lands hold of the Crown ; or for making a requisition on the superior to grant his precept for infefting, if the lands hold of a subject (*b*).

(*a*) Bargeny case, Elchies, v. *Retour*, 1., and M'Intosh, Feb. 2. 1698 ; M. 14431.

(*b*) 1 Juridical Styles, 387, and 571. et seq.

1832. Not only may the service be opposed by one having interest (§ 1829) ; but where there is more than one pretender to the character of heir, each may purchase a brieve, and they are allowed to come into competition, and meet before the same inquest.

1833. In cases of competition or difficulty, the service may, on the application of the parties to the Lord Ordinary on the Bills, be advocated to the Court of Session, to proceed before the junior Judge of that Court, instead of the inferior Judge, or the Sheriff of Edinburgh.

3 Ersk. 8. § 64. 1 and 2 Geo. IV. c. 38. § 11. Anderson, June 13. 1834 ; 12 S. D. 729. Officers of State, July 4. 1835 ; 13 S. D. 1044.

1834. 2. *In what cases Special Service is required for Infeftment.* The feudal right vested in the person last infeft, can be taken out of his hæreditas jacens (§ 1637) only by means of an infeftment in the person of another. This is to be accomplished either by a conveyance containing authority to infeft the disponee, or by clare constat ; or service of the heir on the death of the person infeft. 1. A conveyance of the subject may be completed by sasine in the person of the disponee (see above, § 783. et seq.). 2. If there be no conveyance, the feudal right is to be taken up only by special service, either as heir-at-law, or as heir of provision to the person last infeft ; and a new infeftment obtained thereupon by precept from the Crown, or entry by the superior, completes the right.

1835. On these principles depend several questions as to the completing of titles under settlements and destinations. Thus, as a disposition to one in liferent and another in fee, followed by infeftment, vests the feudal right of fee in the latter as disponee ; no service is necessary on the liferenter's death : And, on the fiar's death, his heir's title is made up by special service to the fiar.

Kerr, Feb. 12. 1708 ; M. 14357.

1836. A disposition to the granter himself, whom failing to A B, followed by infeftment, vests the fee in the granter; and on his death A B must enter by special service as heir of provision to him.

Kerr's case, *supra*. 3 Ersk. 8. § 73. Cunningham, Feb. 27. 1812; F. C. See Livingstone, March 3. 1763; M. 15409; 5 Brown's Sup. 885. Gordon, Feb. 21. 1791; Bell's Cases, 180.

1837. Where, in such a case, infeftment has not followed on the disposition, service is still necessary in the person of A B: But there is no place for a special service to take up the right under the disposition: The right to the unexecuted procuratory or precept contained in the disposition, being personal, must be taken up by a general service. See below, § 1848.

In bonds the institute's right in such a case as this is construed as a mere liferent, and so the fee is held to be in the substitute; but this does not extend to lands.

3 Stair, 4. § 33. Dirleton and Stewart, voce *Heirs of Provision and Substitute*. Hamilton, June 10. 1714; M. 14360; Robertson's App. Cases, 493. Livingston, *ut supra*. See observation on the Bench in Wilson, Dec. 14. 1819; F. C.

1838. Where the nominatim substitution is not *immediate* (as in a destination to A and his heirs, whom failing to B), the necessity of service by B has never been doubted; and that service must be special if the institute have taken infeftment.

Kerr's case, *ut supra*, M'Culloch, July 10. 1731; M. 14366. Gordon, Feb. 8. 1748; M. 14368. Peacock, June 22. 1826; F. C.; 4 S. D. 742.

1839. Where the disposition is not to the granter himself, but to the heirs-male of the granter, whom failing to A nominatim, and there are no heirs-male of the granter; this is not held a conditional institution of A, and he must serve heir of provision in special to the granter.

Peacock, *ut supra*.

1840. Where one infeft in land disposes, not to himself but to A, whom failing to B, and the deed is delivered, and A *survives* the granter, but dies without taking infeftment; the personal right is in A, and B must make up his title by serving heir of provision in general to A, not in special to the granter (*a*). Where, in such a case, the deed is undelivered, and A the institute *predeceases* the granter, it was held by a

majority of the Court, that nothing had vested in the institute ; that the next heir was not to make up his title by serving heir to the institute ; that he could not serve heir to the granter ; and that the proper course was by a declarator that, as the conditional institute, he had right to the land. This was greatly doubted by the minority of the Court, on the ground chiefly that a right was vested in the institute. But there was no occasion to decide the question, and the case having gone to the House of Lords, was remitted to have the opinions of the Judges on this point (*b*) ; when the opinion of the Judges confirmed the above opinion of the majority (*c*), that the estate not having vested in the institute, a service to him was unnecessary, but still that this point was not necessary to be decided.

(*a*) 3 Ersk. 8. § 73. Denniston, Feb. 5. 1824 ; 2 S. D. 678.

(*b*) Colquhoun, 7 S. D. 94 ; in House of Lords, Feb. 17. 1831 ; 5 W. S. 32.

(*c*) Same case, July 8. 1831 ; 9 S. D. 911.

1841. When the disposition is to the granter's heirs-male, or heirs of his body, whom failing to A, whom failing to B ; and the granter survives such heirs, and A predeceases ; it has been held that the fee is still in the granter, and that B's title is to be made up by service as heir of provision to the granter.

Gordon of Carlton, Feb. 8. 1748 ; Kilk. ; M. 14368 ; Falconar's report is incorrect. Peacock, *ut supra*. See Lord Drummore's Note, 10 S. D. 701, foot note. Anderson, June 22. 1832 ; 10 S. D. 696. See Murray, May 21. 1833 ; 11 S. D. 629.

1842. 3. *Of Exclusive Titles and Competitions in Service*. A service may be opposed, 1. on some exclusive title ; 2. on objection to the process ; 3. on a preferable right to the character claimed.

3 Ersk. 8. § 60. Innes, June 23. 1807 ; M. *Tailzie*, App. 13.

1843. 1. When the land is duly taken out of the hæreditas jacens of the person last vest and seised as of fee, a special service is excluded. So, 1. If infeftment have passed on a service which is objectionable, the infeftment must be reduced before the heir can serve (*a*) ; but, 2. if the infeftment have proceeded on a precept of clare constat, without service, this, as the mere act of the superior, will not exclude the service (*b*). 3. A mere disposition, without infeftment, is not sufficient to exclude a special service (*c*).

(a) Cunningham, Feb. 27. 1812; F. C. See Lady Forbes, July 3. 1810; F. C.

(b) Opinion of the Court in McCallum, Feb. 21. 1793; M. 16135. See also Lord Moncrieff's opinion in Rutherford's case, 9 S. D. 7. note.

(c) Suttie, July 20. 1733; M. 14457. Douglas, Nov. 25. 1761; Ib.

1844. 2. Objections may be stated to the brieve; or to the executions as blotted and erased; as incorrect in date; as not on the proper number of days; or other similar objections, if obvious ex facie, not otherwise.

1503, 94. 1529, 113. 3 Stair, 5. § 33. 3 Ersk. 8. § 60. Lesly, Jan. 17. 1758; Monb.; 5 Br. Sup. 862.

1845. 3. The right of the claimant may be opposed on the merits, by exceptions instantly verified (a); as, 1. That the fee is full (see sup. § 1843). 2. That either the deceased or the claimant is bastard; the presumption being for legitimacy (b). 3. That there is a nearer heir, although in utero (c); and the renunciation of a nearer heir will not validate the service of one more remote (d).

(a) 3 Ersk. 3. § 60.

(b) 3 Ersk. 8. § 66. Crosbie, Jan. 15. 1629; M. 2747. Lindsay, May 31. 1821; 1 S. B. 47; 2 Shaw's App. Cases, 147.

(c) 3 Stair, 5. § 56. 3 Ersk. 8. § 76. Middlemore, March 5. 1811; F. C. See Lord Mountstewart, Nov. 13. 1707; M. 14903. McKinnon, June 16. 1756; 5 Br. Sup. 848; and Feb. 14. 1765; M. 5279; 5 Br. Sup. 904; affirmed. See McKenzie, Dec. 13. 1709; M. 14912.

(d) Hay, Feb. 1588; M. 14865. Dalgleish, Dec. 1. 1609; M. 14866.

1846. As to the mode of opposing,—1. One having an interest may examine witnesses, or adduce evidence of the above exceptions; or, 2. on a competing brieve, he may contend for, and prove his own preferable right; or, 3. he may reduce the service, and in such reduction the Court of Session will judge of the evidence already given, or, in their discretion, allow additional evidence.

Don, Nov. 28. 1712; M. 14425. Innes, June 1807; M. Tailzie, App. 13. See cases of Suttie and Douglas, § 1843 (b). Anderson, June 13. 1834; 12 S. D. 729. Gifford, July 4. 1835, and Feb. 17. 1837; 15 S. D. 519.

1847. 4. *Of the Retour of the Special Service.* The retour (supra, § 1831) has, of itself, no effect to vest the right to lands in which the predecessor was infeft. If the heir, though retoured, die uninfeft, the retour expires as a title to the special lands (a); and although it has been said that it will in this way vanish even as a general service, unless completed (b),

that does not seem to be law, and has not in practice been so understood (*c*) (§ 1849. 1.). The title proceeding on a retour is favoured in having a shorter prescription of twenty years (*d*).

(*a*) 3 Ersk. 8. § 78.

(*b*) More's Notes, p. cccxxvi.

(*c*) 3 Ersk. 8. § 51 and 75. Drummond, Feb. 1676; M. 14457. Duff's Feudal Conveyancing, p. 469.

(*d*) 1617, 13. See below, of Prescription, § 2024.

1848. ii. GENERAL SERVICE. The object of this form of service has already been explained, as necessary in completing the heir's title to heritable subjects not feudalized (as servitudes, bonds heritable by destination, &c.); or to personal rights in feudal subjects; or to unexecuted procuratories or precepts (§ 781).

1849. The brieve on which the general service proceeds may be directed to any Judge Ordinary; without regard to the domicile of the deceased, or of the heir, or to the local situation of the lands to which ultimately it may be intended to complete a title (*a*). 1. The brieve is published at the head burgh of the jurisdiction applied to; and the verdict, and of course the retour, contains an answer only to three of the heads of the brieve, viz. 1. whether the ancestor died at the faith and peace of the Queen (which is presumed); 2. whether the claimant is his nearest and lawful heir; and, 3. whether the claimant is of lawful age. And so a special service, which answers to these three points, necessarily includes a general in the same character. (See above, § 1847.) 2. The heir must be served correctly in that character to which the right to be vested belongs (*b*), or at least in a character which necessarily includes it (*c*). 3. The heir must be served to the person in whom the personal right was last vested (*d*). 4. If the heir's right is by deed or destination, the service must not only be in a character necessarily comprehending the description of heirs in the destination, but also as "heir of provision;" the deed containing the destination being laid before the jury (*e*). 5. It has been held, that a service as heir of provision will extend to any right to which that particular description of heir of provision applies (*f*). But, 6. If the service be as heir of provision, and a deed be specified, the retour will not serve as a general title as heir of provision under any other deed.

(a) 3 Ersk. 8. § 64, 66. 1 Juridical Styles. Caskieben, March 6. 1630; M. 14420.

(b) 3 Stair, 5. § 35. 3 Ersk. 8. § 66. Earl of Cassillis, Feb. 22. 1629; M. 14423. Edgar, July 21. 1738; Elchies, voce *Serv. and Conf.* 6; M. 14015. Coulterallers, Feb. 2. 1742; Monb. 5. Brown's Sup. 717. Cairns, Nov. 12. 1742; M. 14438.

(c) 3 Stair, 4. § 33. 3 Ersk. 8. § 75. Haldane, Nov. 27. 1766; M. 14443; 1 Hailes, 167.

(d) Livingston, Dec. 13. 1705; M. 14007. Bell, June 21. 1749; M. 14016. Spalding, Feb. 20. 1784. Gordon, March 1682; M. 15352. Campbell, Nov. 28. 1770; M. 14949.

(e) See Haldane's case, *supra* (b). Cathcart, Nov. 16. 1802; M. 14447; and Feb. 10. 1807; M. voce *Service of Heirs*, App. 2. Colvin, Dec. 14. 1796; Bar. Hume, 723. Ogilvie, June 5. 1817; *Ib.* 724.

(f) Forbes, Aug. 12. 1753; M. 14431; see Kilk. Rep.; 5 Brown's Sup. 250. Hay, June 30. 1758; M. 14369; 5 Brown's Sup. 351.

1850. 1. *Use and Competency of General Service in Particular Circumstances.* 1. Where an heir is excluded by an infetment which he deems to be challengeable, he must serve in general* (whether the ancestor was infet. or held only a personal right), in order to entitle him to maintain the challenge (a); and this service must be in the proper character in which he would, but for the opposing deed, be entitled to the succession (b); and under it the person serving will be liable to all objections which, as obligations, would be incumbent on him, if the title were completed (c).

(a) Hornes, Nov. 6. 1746; M. 16117. Carmichael, Nov. 15; 1810; F. C.

(b) M'Allum, Feb. 21. 1793; M. 16135.

(c) Carmichael's case, *supra* (a).

1851. 2. A general service has the double effect of establishing the character of heir, and so giving a title to pursue and reduce; and of vesting those rights which do not require infetment. For the former of those purposes, it was in the Court of Session held not incompetent to serve a second time in general, as heir to the deceased, although an intervening heir had already served: but this was reversed in the House of Lords. For the purpose of vesting a right to a particular subject, it has long been settled that there can be no second general service; as to which, see below, § 1853.

Carmichael, *ut supra*. Cochran, March 11. 1828; 6 S. D. 751; and in the House of Lords, April 29. 1830; 4 W. S. 128. See Rutherford, Nov. 12. 1830; 9 S. D. 3.

1852. 3. No opposition is allowed in a general service, un-

* He may also make a good tentative title by adjudication on a trust-bond, see § 835.

less, 1. by one having a competing brieve in the specific character assumed in the claim ; or, 2. on the ground of the succession not being open.

Lady Forbes, July 3. 1810 ; F. C. Cochran, June 28. 1821 ; F. C. ; 1 S. B. 94. Sommerville, May 19. 1815 ; House of Lords, June 8. 1818.

1853. 4. Retour of general service is necessary to validate any proceeding or action grounded on the service (*a*). It is sufficient to vest and transmit all personal rights to heritable subjects, and personal titles to lands (*b*) : Therefore, although it was formerly held that there was nothing to prevent a second person from serving also as heir in general, to the effect of establishing this character (see above, § 1851), the next heir, in order to carry any personal right vested by a prior general service, must serve to the person who has thus served in general ; and the record of retours in Chancery is in this way important in relation to the vesting of personal fees.

(*a*) McIntosh, Feb. 2. 1698 ; M. 14431. Bargeny Case, Elch. *Retour*, 1.

(*b*) 1693, 35.

For Service cum Beneficio Inventarii, see below, of Limited Representation.

1854. 2. *Cases in which Service is necessary, or not necessary, to Vest the Succession.* Service is necessary where one disposes to himself in liferent and another in fee, whom failing, the fiar's heirs, whom failing, the disponent ; even where infestment has not followed, and the fiar has predeceased the disponent without issue (*a*). There are certain cases, however, in which it is not necessary to have either precept of clare constat or service to vest the succession. Thus,

1. Honours and dignities vest jure sanguinis without service or possession (*b*).

2. A jus crediti, under a contract of marriage, vests in the heir of the marriage, without service (*c*).

3. Leases vest in the heir without either service or possession, not only to the effect of his continuing his ancestor's possession, but of being entitled to assign it when that is permitted (*d*).

4. Heirship moveables require no service, but are vested by possession (*e*).

5. Moveables which by settlement are made heritable, as

books, furniture, pictures, destined to pass along with an entailed estate, do not require a service to vest them, but are vested by possession: a service, however, is competent for vesting such subjects (*f*).

6. Adjudication on a trust bond is a mode of entering to land. See § 1859.

(*a*) Lord Charles Hay's case, June 30. 1758; M. 14369; 5 Br. Sup. 351.

(*b*) 3 Ersk. 8. § 77. See Cockburn, July 10. 1747; M. 150.

(*c*) Ogilvy, Dec. 16. 1817.

(*d*) Rattray, Feb. 14. 1623; M. 14374. Boyd, June 17. 1671; M. 14375. Campbell, Feb. 16. 1739; M. 14375. Scott, June 28. 1754; M. 14375; 5 Brown's Sup. 814. Rule below, § 1859 (*f*).

(*e*) Ersk. ut supra.

(*f*) Veitch, May 25. 1808; F. C.

5. *Of Charges to Enter Heir.*

1855. The debts of persons deceased become burdens on the heir who takes his property; a certain mode being appointed by which that responsibility may be limited to the amount of the estate (see § 1922). To compel the heir to accept or to renounce the succession, and so to give access to creditors, it has been enacted,—1. That, by a writ under the Signet, an heir may be charged at the instance of a creditor of the predecessor to enter heir in the lands or other heritable subjects, after the expiration of the annus deliberandi (§ 1685); otherwise the land, &c. may be apprized (now adjudged) to the creditor, as if the heir were entered (*a*). 2. That the heir's own creditors may have a similar remedy (*b*). 3. That a preference shall be given to the ancestor's creditors, if they shall complete their diligence within three years (*c*).

Under these Acts practice has improved the proceeding by the introduction of the General Charge, and by distinguishing Charges into Special and General Special (*d*).

NOTE.—See for a similar remedy in the Moveable Successions, below, § 1901.

(*a*) 1540, 106. 2 Acta Parl. 375. c. 24.

(*b*) 1621, 27. 4 Acta Parl. 627. c. 27.

(*c*) 1661, 24. 7 Acta Parl. 63. c. 88.

(*d*) Cowper, Feb. 24. 1627; M. 2700.

1856. GENERAL CHARGE is a writ issued under the signet, containing a warrant to charge the heir to enter within forty days as heir to the deceased; with certification that, if he fail, the creditor shall have such action and diligence against him

as if he had entered ; or such as he might have had against his predecessor had he been alive. The use of this charge is to fix on the heir the representation generally, or to compel him to renounce the succession ; and, 1. If he disobey the charge, action of constitution may be raised, and decree and execution proceed against him ; 2. If he has compeared in the action and refused, or failed, after reasonable time allowed, to renounce, he incurs a passive title, and will not be reponed (*a*). 3. If he renounce the succession, an action of Constitution, cognitionis causa tantum, is raised ; to the effect of enabling the creditor to proceed contra hæreditatem jacentem (*b*).

(*a*) Smith, Feb. 24. 1807 ; Bar. Hume, 439.

(*b*) 3 Jurid. Styles, 362. 2 Ersk. 12. § 12.

1857. SPECIAL CHARGE or GENERAL SPECIAL CHARGE, follow after the general charge, being writs also under the signet, containing a warrant to charge the heir to enter heir in special, under the proper character.

1. *Special Charge* calls on the heir to enter to the lands of A, wherein B died last vest and seised, with certification ; and the effect is, to enable the creditor either to adjudge the lands as if they were the heirs, or as in hæreditate jacente of the ancestor (*a*).

2. *General-special Charge* is used, where the subject to be taken up is a personal right, either in an heritable subject not feudal, or in a feudal subject in which the ancestor was not infeft. The certification and effect is the same as in a special charge (*b*).

(*a*) 3 Jurid. Styles, 369. 2 Ersk. 12. § 12.

(*b*) 3 Jurid. Styles, 373.

1858. The chief points to be observed relative to those Charges are these :—1. The special or general-special charge must be preceded by the general charge, where the debt is the ancestor's (*a*). 2. The debt must be constituted by decree, but special charge may be raised before extract (*b*). 3. In all attempts to adjudge a tailzied estate, the charge must be directed against the heir of tailzie, not the heir of law (*c*). 4. Although the heir may be charged before the expiration of the annus deliberandi, and the summons executed at the same time, the action cannot be called till after (*d*). 5. It is not

necessary to charge the heir to enter in special, if already served heir in special, although not infest (*e*). 6. It is not necessary to charge the heir in special to enter where the creditor is to proceed with diligence for attaching a lease (*f*).

(*a*) Earl of Cassillis, Feb. 15. 1627; M. 2167. Monro, July 10. 1737; M. 2173. Oliphant, Jan. 2. 1667; Ib. Brodie, Dec. 12. 1672; M. 2172.

(*b*) Catrine, Dec. 1. 1738; M. 2173.

(*c*) Gairns, March 1682; 2 Brown's Sup. 21.

(*d*) M'Intosh, July 9. 1829; F. C.; 7 S. D. 882.

(*e*) Dickson, Nov. 25. 1629; M. 2169.

(*f*) Rule, June 19. 1636; M. 14374.

1859. *Entry of Heir by Adjudication on Bond.* This mode of entry is chiefly as a tentative title, for the purpose of challenging an adverse right. It is effectual as a title: and at first was held to infer no passive representation (*a*). Afterwards, it was by Act of Sederunt, and subsequently by statute, made to infer representation, if intromission followed (*b*). It is now an established mode of entry (*c*).

(*a*) Glendonwyn, Jan. 22. 1662; M. 9738.

(*b*) Act of Sed. Feb. 28. 1662. 1695, c. 24.

(*c*) Nevoy, Dec. 1676; M. 9741. Gordon, Feb. 17. 1761; M. 14070. Hepburn, July 25. 1781; M. 14487. Craigie, Jan. 19. 1803. Bellenden, sup. §

IV. OF THE LAW OF SUCCESSION IN MOVEABLES.

3 Stair, t. 8. 3 Ersk. t. 9. Robertson on Personal Successions. 2 Blackst. Com. 489, et seq. 2 Kent. Com. on Amer. law, 408, et seq. Story's Conf. of Laws, 403, and 391.

1860. Moveable succession differs from heritable in these points:—1. That there is no preference of males (§ 1656). 2. That there is no law of primogeniture (§ 1658). 3. That there is no representation of the deceased parent by the child (§ 1660). 4. That there is no distinction of conquest (§ 1656, 1670).

NOTE.—In some of these points the English law differs materially from the Scottish; and important questions in international law arise from this difference. For these I refer to the recent work of Mr Robertson on the rules of Personal Succession.

1. *Law of Moveable Succession ab Intestato.*

1861. The whole moveable estate, if the deceased die unmarried; or the dead's part (§ 1581), if married, descends thus by law:—1. The free moveable estate divides among the near-

est in kin at the death. 2. The full blood excludes the half, and neither the mother nor maternal relations succeed in moveables. 3. The lines of succession follow the same order as in heritable succession,—first, descendants; next, collaterals; finally, ascendants with their collaterals. 4. If the deceased's heir in his heritable estate be also one of the next of kin, and do not choose to share the heritable estate with the other next of kin, he will be entitled to no share of the moveables (see below, of Collation, § 1910). 5. The succession in moveables is regulated by the law of the domicile at the time of death (*a*), and thus suggests the importance of attending to the difference in the law of Personal Succession in England and Scotland (*b*).

(*a*) 3 Ersk. 9. § 2–4. Dirlton's Doubts, 129. Stewart, 210

(*b*) Robertson on Personal Successions, 2, et seq. Story, ut supra.

2. Law of Testate Succession in Moveables.

1862. 1. LAST WILL OR TESTAMENT. The dead's part may be bequeathed by last will; to which nothing more is necessary than a clear expression of the testator's intention as to the disposal of his effects, provided it be testamentary and finally concluded.

3 Stair, 8. § 35. 3 Ersk. 9. § 5. 2 Jurid. Styles, 431. Bell's Forms. Henderson, June 10. 1795; M. 4489. Robertson, Dec. 9. 1795; M. 4491. 15950. See Robertson, Feb. 16. 1816; F. C.

1863. A will may be made (and is presumed in law to be made) in the last moment of life, and so is at all times during life revocable. There is no law of deathbed, as in heritage (§ 1786), to defeat a will made in mortal sickness. To reduce the will, proof of insanity or imbecility, or of want of a sound disposing mind, or of deception and fraud, will be required.

Towart, June 5. 1812; House of Lords, May 16. 1817; 5 Dow, 231. White, Jan. 21. 1814; House of Lords, June 20. 1823; 1 Shaw's App. Cases, 472. Gillespie, Feb. 11. 1817; F. C. Watson, Nov. 18. 1825; F. C.; 4 S. D. 200. M'Diarmid, May 17. 1826; 4 S. D. 583.

1864. A clause in a testament to declare it irrevocable, will not make it so (*a*). Various questions, difficult in point of evidence, may arise relative to revocation:—whether the will has been cancelled by accident; whether partial obliteration revokes, and to what extent; whether the revocation of a latter, gives effect to a former, will; what shall be the effect of violent or fraudulent obstruction to the revocation. These

are circumstantial questions, with regard to which no rule of law can be laid down *a priori* for ascertaining what is to be held as revocation (*b*).

(*a*) Dougal, Feb. 25. 1789; M. 15949.

(*b*) See 1 Powel on Devises, 595. et seq. Lord John Thynne's case, 1 Addam, Eccles. Rep. 52. Nasmyth, Jan. 7. 1817; reversed, July 2. 1821; 1 Shaw's App. Cases, 65. Howden, July 8. 1815; F. C. Dove, May 31. 1827; F. C.; 5 S. D. 734. Walker, Dec. 16. 1825; 4 S. D. 323. Buchanan, Nov. 4. 1704; M. 15932. Bibb v. Thomas, 2 Black. Rep. 1043.

1865. The condition *si sine liberis decesserit*, is held to qualify a will as well as a settlement of land. See above, § 1776.

3 Ersk. 8. § 46. Watt, July 30. 1760; M. 6401. Wilson, June 4. 1822; 1 S. D. 458. Colquhoun, June 5. 1829; 7 S. D. 709. See 1 Powel on Devises, 530. Booth, Feb. 8. 1831; 9 S. D. 406. Dick, June 10. 1836; 14 S. D. 938.

1866. A will does not carry heritage (*a*); but a *mortis causa* conveyance of heritage in liege poustie will not be defeated, merely because it contains clauses peculiar to a testament (*b*).

(*a*) Brand, Dec. 4. 1735; 5 Brown's Sup. 183.

(*b*) Binning, June 25. 1742; Elchies, *Testament*, 7. Brown, Jan. 26. 1770; M. 5440; 1 Hailes, 332. Robertson, June 17. 1795; M. 15947.

1867. A will must be in writing (see § 1868); a verbal will being inadmissible either as the nomination of an executor, or as the recall of former wills or bequests (*a*). If the testator cannot write, his will may be authenticated by one notary (or a clergyman) and two witnesses (*b*). It is subject to challenge, as not truly the will of the deceased, if not read over to him (*c*). A holograph will is good (*d*): But no improbable writing will have effect as a will, or as a codicil (*e*): A writing in itself improbable may acquire force and efficacy by reference in a will duly executed; as where the testator declares that such bequest as shall be made in a writing under my hand, or signed by me, or by a letter signed by me. In those cases it is necessary to distinguish: "A writing under my hand" is held to mean an authentic writing only; but a "letter" has been sustained, though not formally authenticated (*f*). The Court will not interfere, after a will is produced in judgment or recorded, to correct an error or omission in the testing clause (*g*).

(*a*) Houston. Feb. 18. 1631; M. 12307. Whiteford, Nov. 3. 1742; M. 12338. Smith, Nov. 17. 1749; M. 6594.

(*b*) 1584, 133. Bog, Jan. 18. 1623; M. 16960. Trail, Feb. 26. 1805; M. 15955.

(c) Young, Feb. 1688; M. 15929. Arbuthnot, Dec. 4. 1694; Ib. Robertson, Dec. 15. 1742; M. 15942-3. See Petrie, Nov. 15. 1735; M. 15941; Elchies, *Testament*, 3.

(d) Pennicuik, 1709; M. 16970-1.

(e) 3 Ersk. 2. § 23. Ker, Jan. 1. 1708; M. 16968. Moncreiff, July 15. 1710; M. 15936. Crichton, Jan. 12. 1802; M. 15952. Dundas, May 13. 1807; M. *Writ*, Appendix, No. 6, B.

(f) Dundas, May 13. 1807; M. App. *Writ*, No. 6. Buchan, May 3. 1828. 6 S. D. 864; reversed, 5 W. S. 785. Gillespie, Dec. 22. 1831; 10 S. D. 174.

(g) Brown, March 11. 1809; F. C.

1868. A nuncupative or verbal legacy is effectual to the extent of L.100 Scots (L.8 : 6 : 8); and several legacies may thus be bequeathed each to that extent (a). But a distinction has been admitted between a legacy and a donatio mortis causa; the latter being de presenti is effectual (b). Under the description of nuncupative will are included wills unsigned or left uncompleted at the testator's death (c); but mere directions to make a will have no effect (d). Where one is named residuary legatee, and verbal directions are given to him, which he acknowledges, they are effectual as a condition of the trust (e).

(a) Smith, Nov. 9. 1749; M. 6594. Elchies, *Testament*, 10.

(b) Mitchel, Nov. 21. 1759; M. 8082.

(c) Shaw, Jan. 19. 1665; M. 4494. Soutray, July 13. 1670; M. 15927. Stewart, Nov. 20. 1680; M. 15928. Hopkins, Dec. 1728; M. 15940. Dempster, Nov. 15. 1799; M. 16947.

(d) McFarquhar, June 15. 1779; M. 3600. Monro, July 3. 1813; 1 Dow, 437. Stainton, Jan. 17. 1828.

(e) Phin, June 15. 1738; 5 Brown's Sup. 203; Elchies, *Legacy*, 5. Same case, under name of Hannay, M. 3837.

1869. The nomination of an executor is a common, but no indispensable part of a will. It is truly the appointment of a trustee to hold the executry funds, for the benefit of himself and all concerned; see below, § 1899 (a). And if none be appointed, the law supplies an executor. The executor is entitled by law to a third of the dead's part, "all debts being first paid" (b): meaning thereby not only proper debts, but also legacies as debts under the will (c). If a legacy be left to the executor, it is imputed towards his third. If nothing be said as to the funds after paying legacies, the executor is held a trustee for the next of kin (d).

(a) 1617, 14. 3 Ersk. 9. § 5 and 26. Soutray, sup. (c). Kemps, March 2. 1802; M. 16949.

(b) 1617, c. 14. Nasmith, Feb. 17. 1819.

(c) 3 Ersk. 9. § 26. Moncreiff, Jan. 27. 1636; 1 Brown's Sup. 371.

(d) Soutar, Jan. 22. 1801; M. *Implied Will*, App. No. 2. Beizly, Feb. 1. 1739; M. 6591. Nasmith, Feb. 17. 1819.

1870. 2. LEGACIES. The chief purpose of the will is the disposal and distribution of the estate, by bequests or legacies. These may be bequeathed, 1. in the will itself; or, 2. in a codicil; or, 3. by indorsing a bill (a): But the granting of a bill or note payable after death, is not a competent mode of bestowing a legacy (b).

(a) Anonymous, Nov. 30. 1752; Monb. 5 Brown's Sup. 802. Murray v. Mather, March 6. 1818; Bar. Hume, 275.

(b) Wright, Feb. 11. 1761; M. 8088. Dowie, Feb. 2. 1786; M. 8107.

1871. A legacy is a donation or bequest, mortis causa, of a sum, or subject, or universitas, to be paid or delivered by the executor of the will, out of the free moveable estate of the deceased, after payment of debts, to a person named, or plainly designated, called legatee or legatary (a). If more than one legacy be left to the same person by different wills, they will be payable, unless a contrary intention clearly appear (b). Legacies are universal; general; or special.

(a) 3 Ersk. 9. § 6.

(b) M'Intyre, March 1. 1821; F. C. Elliot, Feb. 27. 1823; 2 S. D. 250. Hay, May 16. 1823; Ib. 313. Sutherland, Nov. 22. 1825; 4 S. D. 220. Gillespie, Dec. 22. 1831; 10 S. D. 174.

1872. 1. *Universal Legacy*. This comprehends all the testator's estate; or the reversion or residue, after satisfying expenses, debts, and other legacies. The disposal of the universitas of the succession, is to be distinguished from legacies which are not universal.

3 Ersk. 9. § 11. Cunningham, Feb. 18. 1737; M. 11660. M'Nab, May 30. 1797; M. 2303. Johnston, Nov. 17. 1758; M. 11364. Earl of Fife, May 14. 1795; M. 2325. Frazer, July 9. 1776; M. 2322; 2 Hailes, 709.

1873. 2. *General Legacy*. This, which is the legatum quantitatis, is a legacy not of a special article or debt, but indefinite, of so much money, or fungibles, or moveables of a particular description or class.

3 Ersk. 9. § 11, 12.

1874. 3. *Special Legacy* is of a particular subject; or debt; or sum distinguished and made specific (a). But it is not

enough to constitute a special legacy that the testator has directed land to be sold to pay debts and legacies, the residue to be laid out in the purchase of land. On the fund proving inadequate, the direction to purchase land was found not special to defeat the legacies, but a *residuary* provision (b). See § 1876.

(a) Ersk. ut supra. Wauchope, July 3. 1724; M. 8063. Presbytery of Kirkcudbright, Feb. 12. 1742; Elch. *Legacy*, 10. 1 Jack, July 27. 1742; M. 11357; Elch. *Legacy*, 11. Panton, Jan. 22. 1824; 2 S. D. 632. Hagart, Nov. 14. 1834; 13 S. D. 35.

(b) Hamilton, Feb. 14. 1832; 10 S. D. 330.

1875. *Effect of Legacies.* No legacy is effectual against creditors: And their true effect may thus be stated:—1. A *general* legacy confers on the legatee a personal right only of action against the executor; a *special* legacy has the effect of an assignation mortis causa to the particular thing, and is completed by the testator's death. And although legacies have no effect to exclude creditors, yet where creditors take in preference to a special legatee, they must assign their debts to him (a). 2. The efficacy of a special legacy depends on the existence of the thing bequeathed; a general legacy is effectual if there shall, after paying debts, be enough to satisfy it. 3. General legacies abate with the inadequacy of the fund (b); and this rateably or *pari passu*; not according to seniority or priority of bequest. Special legacies do not abate, if there be enough besides to pay the debts and expenses. 4. Some general legacies, to a certain extent, partake of the nature of special; as, if a sum shall be bequeathed for a special purpose, it is held that in making the abatement, as on a general legacy, what is necessary for the purpose of the bequest must be left (c). 5. A general legatee has his action against the executor; a special legatee has an action direct against the possessor of the fund or subject, the executor being called as a party (d). 6. A legacy of a discharge of every thing the legatee may owe the testator at his death, is held to include only debts properly due by the legatee in his own right, not a claim for money received on the testator's account (e).

(a) Balmerino, Dec. 18. 1746; M. 8074.

(b) Ersk. ut supra, § 11, 12. Monro, July 6. 1630; M. 8048.

(c) Caldwell, June 24. 1736; M. 8066.

(d) Forrester, March 10. 1627; M. 2194. Gray, Dec. 27. 1711; M. 8062. Ersk. ut supra, § 11.

(e) Graham, June 22. 1792. Bell's Cases, 8vo, 302; M. 8108.

1876. *Ademption of Legacies.* Points of great nicety arise on the question, whether acts of the testator relative to particular funds mentioned in his will shall extinguish bequests of those funds? Without entering into all the subtleties of this matter, it would seem that whenever a sum is bequeathed out of a particular fund; or when the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific corpus; or when the bequest plainly refers to the money, not to the security; or to a preconceived intention unconnected with the investment of the money: In such cases the legacy is general, to be made good out of the general fund although the money should have been uplifted from the investment referred to in the will (*a*). It has sometimes been held material in this question of ademption to inquire whether the change has been compulsory or voluntary, the one indicating a change of intention or destination on the part of the testator, not the other. But this circumstance seems at best no more than a mere indication to be taken with other proofs (*b*).

(*a*) See the English cases on this subject referred to in 2 Roberts on *Wills*, 111, et seq. Le Grice, 3 Merivale, 50. Pagan, Jan 26. 1838; 16 S. D. 383.

(*b*) Roberts, ut sup. 112. Pagan's case (*a*).

Legacies are simple, and without substitution; or with substitution; and to one or to more legatees.

1877. 1. *Simple Legacies without Substitution.* These are legacies bequeathed to a certain person by name or description (*a*). And a legacy by description to the lawful heirs of A has been held a legacy to those heirs of A who were alive at the testator's death (*b*). Such legacies are held to be strictly personal; and with the condition of survivance (*c*); so that they do not vest in the legatee, and are not assignable till the testator's death (*d*).

(*a*) Scott, July 10. 1777; 5 Br. Sup. 504.

(*b*) Pearson, June 28. 1825; 4 S. D. 119.

(*c*) Rutherford, May 30. 1821; 1 S. B. 35. Paterson, June 4. 1741; M. 8070. Fleming, June 6. 1798; M. 8111. Nicolson, Dec. 16. 1806; M. *Legacy*, App. 3. Maxwell, May 25. 1837.

(*d*) Bedwells, Dec. 2. 1819; F. C.

1878. 2. *Legacies with Substitutions* are bequeathed to a second or third person (by name or description), failing the first legatee. So, 1. A legacy "to A and his heirs" does not

lapse by A's predecease (*a*); though a different rule prevails in bonds of provision (*b*). 2. But where the testator plainly assumes that the legatee shall take in the first place, the legacy will lapse by the legatee's predecease (*c*). 3. A destination "to assignees" is held to infer as a condition of its vesting, the survivance of the legatee named (*d*). 4. A legacy "to one and his heirs, and any to whom he shall leave it," goes to the heirs on the legatee's predecease; but he has no power of disposal before the legacy vests in him (*e*). 5. A legacy "to A, whom failing to B," is only a conditional institution; unless it be plainly declared otherwise; and so the right of the substituted legatee becomes extinct as soon as the legacy vests in the first legatee. See below, § 1885 (*f*).

(*a*) Inglis, July 16. 1760; M. 8084. See Scott, July 10. 1777; 5 Brown's Sup. 504. Turnbull, July 28. 1778; M. 8099. Boston, Feb. 13. 1781; M. 8099. Earl of Moray, Dec. 15. 1782; M. 8103.

(*b*) Russell, March 10. 1767; M. 6372.

(*c*) Scots, Dec. 13. 1769; M. 8090. See Dunlop, June 2. 1812; F. C.

(*d*) Graham, Feb. 17. 1807; M. Leg. App. 5; see Obs. on Bench.

(*e*) Henry, Feb. 19. 1824; F. C.; 2 S. D. 725.

(*f*) 2 Illus. 448. Campbell, Nov. 1740; M. 14055; affirmed, 1 Cr. and St. 343. Brown, June 2. 1792; Bell's Cases, 310; M. 14863. Duncan and Others, June 27. 1809; F. C. See Strachan, Dec. 17. 1714; M. 4312. Craich, June 22. 1739; M. 16342; 5 Brown's Sup. 667. Johnston, June 28. 1831; 9 S. D. 806; House of Lords, 1833; 6 W. S. 406.

1879. 3. *Legacies to several Legatees.* A legacy may be given to several persons, either jointly, or severally, or successively. And, 1. A legacy "to A and B jointly," goes to them equally, or to the survivor. 2. "Jointly and severally," has the same construction. 3. In a legacy "to two persons equally," or "to be equally divided between them," the right is separately to each of one-half without any jus accrescendi, and the survivor has only his own share (*a*). 4. A legacy "to A in liferent and B in fee," seems to give a liferent, succeeded by a fee, if both survive; or a liferent, or a fee, as the liferenter or fiar shall survive. 5. A legacy to a parent in liferent and children nominatim in fee, gives a fee to the children, the father being a trustee to maintain the interest of the children (*b*). 6. A sum bequeathed to one in liferent, and on the liferenter's death to A, vests in A on his surviving the testator; but if there be a trust, and the trustees are to pay to A after the liferenter's death, there is no intermediate fee vested in A (*c*). 7. If a legacy be left to certain persons provided they shall

claim within a given time, if not, to certain other persons; the legacy will not vest in the eventual legatees till the expiration of the time limited (*d*).

(*a*) Paterson, June 4. 1741; M. 8070. Rose, Jan. 15. 1782; M. 8101.

(*b*) Turnbull, July 28. 1778; M. 4248. Gerran, June 14. 1781; M. 4402. See Williamson, June 28. 1828; 6 S. D. 1035.

(*c*) Burden, House of Lords, April 27. 1738; Cr. and St. 214. Nisbet, June 27. 1809. Glendinning, Nov. 30. 1825; F. C.; 4 S. D. 237. Moubray, July 9. 1834. Buchanan, Feb. 12. 1830. Marchbanks, Feb. 18. 1836.

(*d*) Stevenson, June 30. 1826; 4 S. D. 776.

1880. *Vesting of Legacies and Term of Payment.* A legacy does not vest during the life of the testator; but on the legatee's survivance it does vest so as to enable him to dispose of it, or his creditors to attach it, or his heirs to take it on his death. But questions of some nicety arise in legacies with a complexity of interests; and, 1. Where a legacy is bequeathed to one in liferent and another in fee, the fee vests in the fiar by his survivance of the testator, though he should die before the liferenter (*a*). 2. Where one is substituted for another in a legacy, and the institute dies before the testator, the legacy vests in the substitute by his survivance of both (*b*). 3. Where the settlement is by trust-deed, and the trustees are to hold for a liferenter, and successive persons as fiars, it has been doubted whether the effect of the trust is not to suspend the vesting of the fee till the death of the liferenter, the fee vesting in the fiar then found to survive.

As to the time of payment, the rules are, 1. That if no term be appointed, the legacy is due, and as it would seem bears interest from the testator's death; but payment cannot be enforced till after the expiration of six months (*c*). 2. That if an express term be mentioned (by date or by event that *must* happen), the legacy vests by the death of the testator; but is payable, and interest due, only from the time mentioned (*d*). 3. That if made to depend on an uncertain event, the legacy is contingent; below, § 881.

NOTE.—Lord Jeffrey proposed as a test in such cases, that when directions are given to trustees destinating the fee on expiration of the liferent to one individual, it should vest as in the common case; but that when the destination is to several persons successively, the construction must be that the fee is to remain in suspense till the event of the liferenter's death. But it was held by

the Court that the existence of the trust did not here suspend the vesting of the fee, and that no distinction is to be made between the cases.

(a) Turnbull, June 25. 1778. Fowke, March 1. 1770; affirmed, M. 8092. Wallace, Jan. 25. 1807; M. App. Clause 6. Nisbet, June 27. 1809; F. C.

(b) Nesbit, *ut supra*. Glendinning, Nov. 30. 1825; 4 S. D. 241. Marchbanks, Feb. 18. 1836; 14 S. D. 521.

(c) Act of Sederunt, Feb. 1662. M'Dowall, Feb. 26. 1779; M. 542. Arbuthnot, Jan. 4. 1758; M. 539.

(d) Fowke, March 1. 1770; M. 8092. Turnbull, July 28. 1778; M. 8099. Wallace, Jan. 28. 1807; M. Clause, Appendix, No. 6. Nesbit, June 27. 1809. Jordan, June 22. 1809; Bar. Hume, 260. Johns, Nov. 29. 1833; 12 S. D. 146.

1881. Legacies are pure or conditional. And the rules are :

1. The condition receives effect, if it be a possible condition (a); if not, it is held *pro non scripto*. In construction, a legacy to one in the event of there being two children living at any time, was not held purified by the birth of a second child which was not heard to cry (b).

2. It is not a condition rendering a legacy contingent, if it be made payable on a future event that *must* happen.

3. If the legacy depend on an event, uncertain as to *time* alone (as death), the *payment* is suspended, but the legacy vests.

4. If it be uncertain, not only in *respect* of time, but of *existence* (as majority or marriage, or attaining a certain age), it is then a condition; and the vesting of the legacy is suspended: And this is not only when the contingency is pointed to the *constitution* of the legacy, but also when annexed to the *payment* (c).

5. If a legacy be "to one, on failure of the children of another," it remains in suspense while the children *may* exist (d).

6. A legacy in consideration of future services is conditional (e).

7. A legacy, provided the legatee come home to claim it within a certain time, is conditional (f).

(a) Waddell, Dec. 1738; M. 6366. See Neilson, below (f).

(b) Robertson, Jan. 22. 1833; 11 S. D. 297.

(c) V. Oxenford, Feb. 23. 1671; 2 Br. Sup. 525. Burnet, Dec. 9. 1783; M. 8105. Omev, Nov. 19. 1788; M. 6340. Sempill, Nov. 15. 1792; M. 8108. Grindlay, July 1. 1814; F. C.

(d) Carstairs, June 21. 1672; M. 2992.

(e) Leckie, Dec. 7. 1748; M. 6347; Elchies, *Tut.* 21. Lockhart, Nov. 1729; M. 6366. Henderson, Dec. 13. 1825; 4 S. D. 306; F. C. See Bryce, June 19. 1827; 5 S. D. 817.

(f) Neilson, July 27. 1710; 4 Br. Sup. 807.

1882. *Legatum rei alienæ*. The rules relative to this kind of legacy are these :—1. If the testator erroneously supposed the thing bequeathed to be his own, it is no legacy (*a*). 2. If he knew it *not* to be his own, the legacy is to be made good by purchasing the thing, or satisfying the legatee (*b*). 3. If the legacy be of a subject not disposable by will, it may still be available on the principle of approbate and reprobate (see below, § 1937); the executor or residuary legatee being bound as by implied engagement (*c*). 4. Where the testator erroneously imagined the subject to be moveable, and the executor has it not to bestow, the legacy is unavailing (*d*).

(*a*) 3 Ersk. 9. § 10.

(*b*) Falconar, June 24. 1664; M. 13301.

(*c*) Ersk. ut supra. Drummond, Jan. 22. 1624; M. 2261. Kinloch, July 1663; M. 8052. Cranston, Dec. 2. 1674; M. 8059. Catto, June 22. 1748; M. 8077.

(*d*) Wardlaw, Feb. 21. 1663; M. 5703; 3 Ersk. 9. § 10. in fin.

1883. *Legacies in arbitrio alieni*. 1. It is at the best doubtful whether, by will, a general and unlimited power of distribution after the testator's death, can be given to another; but, 2. If distinct limits are appointed for the exercise of the power, it will be effectual.

Gellie, Dec. 24. 1709; M. 8061. Murray, Nov. 28. 1729; M. 4075. Wharrie, July 16. 1760; M. 6599. Brown's Trustees, Aug. 3. 1762; M. 2318. Hill, Dec. 14. 1824; F. C.; 3 S. D. 389; affirmed, April 14. 1826; 2 W. S. App. Cases, 80. Crichton, May 12. 1826; 4 S. D. 553; 3 W. S. App. Cases, 329.

1884. *Wills inextricable*. By uncertainty, or unintelligible complexity of purpose, the will is void. As to wills of accumulation, there is not, by the common law of Scotland, any impediment to accumulation but inextricability (*a*). By statute such wills are annulled, where the profits or produce of real or personal estate in England, or of moveable succession in Scotland, are directed to be accumulated, and the beneficial enjoyment of them postponed beyond the granter's life, and twenty-one years after his death; unless such arrangement shall be for the purpose of paying debts; or raising provisions for children; or regulating the produce of timber (*b*).

(*a*) McNair, May 18. 1791; M. 16210; Bell's Cases, 546. McCulloch, Nov. 28. 1752; 5 W. S. 180, foot note.

(*b*) 39 and 40 Geo. III. c. 98. Thellusson's case, 4 Vesey, J. 227; affirmed, 11 Vesey, J. 112. Strathmore, March 23. 1831; in House of Lords, 5 W. S. 170.

1885. CONSTRUCTION OF WILLS. 1. "All debts, goods, gear, and sums of money," will not carry debts secured by infertment or adjudication (*a*). 2. "Goods and gear" will carry corporeal moveables only, not debts (*b*). 3. "All goods and gear, whether heritable or moveable," will not carry a lease (*c*). 4. "All my plate, and horses, and moveables whatsoever, and pay and arrears of pay due to me," does not include a bond for borrowed money (*d*). 5. A legacy of moveables includes "heirship" moveables (*e*). 6. Vague and general terms receive their construction from the words with which they stand connected (*f*). 7. "Furniture" seems to comprehend only articles for domestic use, not books nor wine: And a bequest of "all the testator's furniture and moveables lying in his house," has been held not to include gold, money, bank-notes, or moveable bonds, lying in his house at his death (*g*). 8. Entails of moveables are regulated on the principle of implied obligation and engagement, being effectual against the heir who takes the subject with the condition annexed (*h*). 9. A legacy "to poorest friends and relations," is held to include relations both on the father's and mother's side (*i*). 10. A legacy to children of a person named, has been held to mean immediate children only (*k*). 11. A legacy "to the personal representatives" of the testator, has been extended to all his next of kin (*l*). 12. Heir is a flexible term to be construed according to the subject. 13. Ambiguities in wills are frequent, and are of two kinds: either such as arise on the face of the contract, and from the uncertain meaning of the words used: or such as arise from the uncertain application of the words to external circumstances. The former Lord Bacon called *ambiguitas patens*; the latter, *ambiguitas latens*; and they are to be dealt with differently. (See above, § 524.) The general rule resulting from all the cases is, that a patent ambiguity can be cleared only from the context or rest of the will; and that a latent ambiguity, as it arises from outward circumstances, may be resolved by extrinsic and parole evidence (*m*).

(*a*) Mochrie, Jan. 6. 1736; M. 5018; Elch. *Implied Will*, No. 1. Galloway, Jan. 12. 1802; M. 15950. Brown, Dec. 3. 1805; M. *Clause*, App. 5. Ross, March 2. 1770; M. 5019; affirmed, April 11. 1771; 1 Hailes, 346. Waddel, Feb. 13. 1789; M. 5022.

(*b*) Frazer, July 9. 1776; M. 2322; 2 Hailes, 709. Earl Fife, May 14. 1795; M. 2325; affirmed.

- (c) Paterson, Feb. 9. 1800 ; Bar. Hume, 128.
- (d) Dunbar's Trustees, Jan. 15. 1808 ; Bar. Hume, 267.
- (e) Ferguson, Nov. 8. 1682 ; 1 Fount. 193.
- (f) Ross, ut supra (a).
- (g) Cunningham, Feb. 18. 1737 ; 11660 ; 5 Brown's Sup. 195. Ker, Feb. 19. 1745 ; 2274. McNab, May 30. 1797 ; 2303. See Rankellor, July 1709 ; 5759.
- (h) Earl of Leven, Feb. 27. 1683 ; M. 5803.
- (i) Brown, Aug. 3. 1762 ; M. 2318.
- (k) Wishart, June 16. 1763 ; M. 2310. See § 1865, and Booth's case, ib.
- (l) Stewart, May 21. 1802 ; M. *Clause*, No. 4.
- (m) See for the leading cases on this subject in England, 1 Powl, on Devises, 465 ; 1 Roberts, on Wills, 547.

1886. *Legacy Duty*. Not only is there a tax on moveable succession (see below, § 1898), but duties are also imposed on legacies payable by the legatee, and rising (according to the remoteness of the relationship) from one to ten per cent. on the sum bequeathed. The rules, generally, are,—1. That all legacies of L.20 and upwards, out of estates above L.100, shall pay duty. 2. That in joint legacies, parties differently rateable shall be chargeable according to their interest ; and, 3. That any gift by will, or testamentary instrument, to be satisfied out of the personal estate of the deceased ; or out of an estate which the deceased had power to dispose of, not being his own real estate ; and every gift having effect as a donation mortis causa ; is to be held a legacy, and liable to duty.

36 Geo. III. c. 52. 44 Geo. III. c. 98. 45 Geo. III. c. 28. 48 Geo. III. c. 149. 55 Geo. III. c. 184. See for a full explanation of all the cases and details under these Acts, Gwynne's law of Duties on Legacies, 1834.

1887. It is held, in the construction of these Acts, 1. That a sum given while the testator is still in life, in order to save the duty, is not an illegal evasion of the duty. 2. That the duty is payable by the legatee (a), unless the will shall otherwise direct ; in which case, the exemption in dubio is extended to a substitute (b). 3. That the rule of different rates according to relationship, is to be applied to the case of husband and wife named as joint legatees, as to a mixed case ; one-half to each (c).

- (a) 36 Geo. III. c. 52. Fischer, Nov. 18. 1825 ; F. C. ; 4 S. D. 192.
- (b) Charteris v. Young, 2 Russell's Chancery Cases, 183.
- (c) Attorney-General v. Bachers, 1823 ; 11 Price's Reports in Exchequer, 547.

3. Confirmation of Moveables.

1888. The administration of the moveable estate of deceased

persons having fallen into the hands of the Church ; there gradually arose a jurisdiction in relation to it in the Bishops' Court. A certain share of the estate was allotted to the bishop for his faithful administration ; and this was first converted into a composition to the Commissary clerk, and at last abolished (*a*). The Bishops' Court was, in Queen Mary's time, succeeded by the Commissary Court ; consisting of the Head Court at Edinburgh, having a universal as well as diocesan jurisdiction ; with twenty-three provincial Commissaries. The latter are now superseded, and the duty devolved on the Sheriffs of counties (*b*). And the Commissary Court of Edinburgh has now also been abolished, and its duties and powers transferred to the Sheriffs of Edinburgh (*c*).

(*a*) Scottish Prov. Councils at Perth, July 16. 1420 ; 3 Hailes's Annals, 22. 1540, c. 120. 1701, c. 14. 4 Geo. IV. c. 97. § 1.

(*b*) Balfour, Pract. 665, 677. 1689, c. 26. Dirleton, voce *Consistorius*, and Stewart's Ans. 4 Geo. IV. c. 97.

(*c*) 1 Will. IV. c. 69. § 31. 6 and 7 Will. IV. c. 41. and 4 Geo. IV. c. 97.

1889. Confirmation is a sentence of a Sheriff as Commissary, giving authority to an executor (or more than one), to administer, " intromit with, uplift, receive, discharge, and, if needful, to pursue ;" in short, to recover and distribute, as trustee for all concerned, the moveable estate belonging to a person deceased.

3 Ersk. 9. § 27. Statute above referred to, § 1888.

1890. USE AND EFFECT OF CONFIRMATION. Confirmation was formerly required for two purposes ; to vest the succession, and give an active title.

1891. 1. Confirmation was, till recently, necessary to vest the succession in the next of kin, at least where the ancestor died intestate : So that if one succeeding to the moveables of a person deceased did not confirm, or died before confirmation was completed, the right to the succession went from his children or heirs in moveables to the next in kin of the person to whom he had succeeded (*a*). But by a late statute this is not now required in the case of intestate succession ; it being declared to vest by the mere survivance of the next of kin (*b*).

In the case of testate succession, there is not by the common law (as held to be confirmed by the statute), any necessity for confirmation to take the moveables out of the *hæreditas jacens* of the deceased (*c*).

(a) 3 Ersk. 9. § 30. Stewart, March 7. 1799; M. 14407. See Lennox, Nov. 26. 1784; M. 15381. Grant, Jan. 1. 1791; Bell's Cases, 319. Smith, May 27. 1801; M. *Substitute*, App. 1.

(b) 4 Geo. IV. c. 98. 1 Bell, Com. 142. Ivory's Ersk. p. 894. note 611. Robertson, Jan. 25. 1828; F. C.; 6 S. D. 446. Smith, May 7. 1801; M. *Substitute*, App. 1. Milligan, Feb. 9. 1826; 4 S. D. 432. Mein, Feb. 9. 1830; 5 S. D. 468. Frith, March 3. 1837; 15 S. D. 729.

(c) Robertson's case, *ut supra*.

1892. 2. Confirmation is still necessary, in general, as an active title (a). No debtor is bound to pay without it; and the general rule is, that no diligence is effectual in competition where confirmation has not preceded it. But to this last rule there are some exceptions. And, 1. If the testator have conveyed by his will the thing or debt in question specially, or by general disposition referring to an inventory signed by him, and containing it, the title is good without confirmation (b). 2. If the debtor to the deceased have renewed or corroborated his debt by bond, &c. to the executor, no confirmation is necessary (c). 3. If the executor have obtained actual possession, he will require no confirmation, nor can be deprived of such possession on pretence of want of title (d). But doubts may arise as to what is to be held possession; whether constructive possession of moveables, for example, be sufficient (§ 1303); or, still more, in regard to debts, payment of the interest of which, though sufficient to vest the succession (e), may not be safely relied on as a title for competing diligence.

(a) Atkinson, Jan. 14. 1808; M. *Serv. and Confirm.* App. 3. Park's Creditors, Jan. 28. 1785; M. 14382. Lennox and Grant's cases, *supra*, § 1891 (a).

(b) 1690, c. 26.

(c) Watson, June 19. 1782; M. 7009.

(d) Dobie, July 8. 1707; M. 14390.

(e) See above, Robertson's case, § 1891 (b).

1893. PROCEEDINGS IN CONFIRMATION. Confirmation (§ 1889) may be applied for in several situations. But before stating them, it is proper to take notice of an erroneous conception which had arisen in practice, that no pupil or minor can be confirmed or decerned executor. This has been authoritatively denied (a).

1. Executor-nominate. An executor appointed by will, grounds his application on the testament which contains the nomination. It is produced, with a full inventory, seen and confirmed; and the authority is granted by decree of Confirmation. This is called Confirmation of a Testament-testamentar (b).

(a) Johnston, Feb. 15. 1838; 1 D. B. M. 540.

(b) 48 Geo. III. c. 49. § 38. 55 Geo. III. c. 184. 4 Geo. IV. c. 98. 2 Juridical Styles, 601.

1894. 2. Executor-dative. Where there is no nomination by will, the Commissaries, on application from any one interested, issue an edict for citing those concerned; and if, on the expiration of the days of citation, there be a competition for the office, it is conferred according to the following order:—
1. a universal donee is preferred; 2. the next of kin; 3. the widow; 4. a creditor (see below, § 1896); 5. a legatee; 6. the Procurator-Fiscal of Court. The person preferred must lodge a full inventory on oath; and must find caution to an amount to be fixed by the Court.

4 Geo. IV. c. 98. § 2. 1695, 41. 2 Juridical Styles, 88.

1895. 3. Executor-creditor. Creditors may apply for confirmation, where no one appears to undertake the administration. 1. A creditor of the deceased may apply for a warrant to administer to the extent of his debt. If he hold a liquid document of debt, bond, bill, &c. by the deceased, he may proceed at once to apply for an edict. If his debt be not liquid, he must proceed to constitute it by charging the nearest of kin (see § 1901) to confirm as executor to the deceased within twenty days; after the expiration of which time, he may have action and decree, either against the executor; or contra hæreditatem jacentem, if the executor should renounce (a); and upon this he may apply for an edict. 2. A creditor of the next of kin (see § 1901) may proceed by charge, in like manner, to compel his debtor to confirm; and under the certification of the charge he may apply for an edict, as if he were creditor to the deceased—a preference being reserved to the creditors of the deceased doing diligence within year and day of the death (b). 3. The creditor who applies must swear to the verity of his debt;—and the edict must be not only executed in the usual form, but advertised in the Edinburgh Gazette; and the administration is restricted to the amount of the debt (c). 4. Other creditors may insist on being conjoined (d).

(a) 1695, c. 41.

(b) 1695, c. 41. See below, § 1934.

(c) 4 Geo. IV. c. 98.

(d) 3 Ersk. 9. § 34.

1896. 4. Where one is to confirm to a person who has died

unconfirmed, a double confirmation is necessary. And, 1. As to testate succession, the executor or (assignee) of an executor-nominate, who has died without confirming, confirms first to the executor-nominate deceased, from whom he derives his title to take up the executry of the first defunct; giving up in his inventory the right and benefit which the deceased executor-nominate had in the first defunct's estate, and which he is to take as being in his place: And then, in the second place, he confirms to the original defunct as disponent or executor-creditor, giving up in inventory the debts or effects to which he means to make up a title. 2. As to intestate succession, it is now in this respect on the same footing with the testate; but as the words of the late statute give to such second executor or representative a right to confirm "in the same manner as the next of kin are entitled to be confirmed immediately on the institute's death," it is, on this footing, the practice to confirm at once.

1897. 5. *Confirmation ad omissa et male appretiata*. If the whole succession be not given up in the inventory, the executor may have the omission corrected (§ 1898. 4): Or any one interested may apply, either to have the executor compelled to confirm the omission, or himself to have an edict to confirm it.

3 Ersk. 9. § 36, 37.

1898. DUTIES ON SUCCESSION. These are regulated by the several Stamp Acts, aided by the statute relative to confirmations (*a*); and payment of them is secured by penalties, and by declarations of the inefficacy of the executor's title, if not duly paid. These are duties necessarily levied in a manner exceedingly inconvenient. 1. The duty is paid in the first place on the whole succession, without deduction of debts; a return being given, on proof of *all* the debt being paid, but not for funeral expenses (*b*). 2. The true value only is required to be stated; and there are provisions for relief or addition, if the estimate shall have been made too high or too low (§ 1897). 3. With certain precautions, power may be given to proceed in recovering the funds (§ 1899). 4. If there should be any innocent omission, an additional inventory may be lodged; but it must specify the amount of the whole succession, and must be written on a stamp corresponding to the whole amount; the Solicitor of Stamps being bound to repay the original duty

thus twice paid (*c*). 5. In the case above stated of a double confirmation (§ 1896), duties are paid on the two inventories as on two confirmations. This is the settled rule in testate succession; and it would seem also the correct rule in intestate under the statute.

See above for Legacy Duties, § 1886.

(*a*) 48 Geo. III. c. 149. 55 Geo. III. c. 184. 4 Geo. IV. c. 98.

(*b*) 55 Geo. III. c. 184. § 51. See Regulations of Stamp Commissioners, art. 2 and 3; 2 Juridical Styles, 605.

(*c*) 48 Geo. III. c. 149. § 40. See 2 Juridical Styles, 602.

1899. EXECUTRY A TRUST. Every executor is a trustee, though the executor-creditor, who restricts his confirmation to the amount of the debt due to him, is so only in so far as he shall be wanting in due diligence (*a*), or shall have intermitted with more than the amount of his debt. The liability of a cautioner for an executor-dative is limited to the sum in the inventory (*b*); and he cannot, in order to relieve himself of his obligation, interrupt the administration, unless by shewing mal-administration, or that the executor is *vergens ad inopiam* (*c*). The executor is the person entitled to sue the debtors of the estate; and although the right of the wife and of the children vests *ipso jure* (§ 1582 and 1591), they have no direct action against the debtors to the deceased, but only against the executor (*d*).

(*a*) Thomson, Dec. 8. 1675; M. 5939. Spalding, May 15. 1811; F. C. Pearson, Feb. 7. 1679; M. 3497. A. S. Nov. 14. 1679. Pearson, Nov. 19. 1825; 4 S. D. 205.

(*b*) Napier, Dec. 19. 1740; M. 3849. Murdoch, Feb. 17. 1826; 4 S. D. 479.

(*c*) Simpson and Morrison, Feb. 23. 1826; 4 S. D. 487.

(*d*) M'Kie, Dec. 9. 1628; M. 1788.

1900. The executor as trustee is liable, 1. For his actual intromissions. 2. For the amount of the funds in the inventory; discharging himself by shewing due diligence, *viz.* denouncing the debtor; or taking decree, and shewing reasonable evidence of insolvency. 3. For the due and safe investment of the funds; but he is not liable for money lost by having been left in the Bank where the deceased had placed it. 4. For interest on sums bearing interest at the death; on moveables from the expiration of six months after the death; and on debts from a year after the death. 5. The executry fund is a trust

fund, which may be vindicated by those having interest against the private creditors of the executor, if it be distinguishable.

The rules by which payment of debts by the executor is regulated, are these :—1. The executor is bound to pay to the creditors on decree only (*a*). 2. He cannot be compelled to pay to any one, till the expiration of six months from the death (*b*). 3. He is liable to personal action if he has recovered funds; and must pay to all personal creditors of the deceased equally, who have cited him while the funds are still undistributed (*c*). 4. He may be compelled by personal action to pay, and is safe in paying, *primo venienti*, after the six months. 5. Creditors of the deceased may proceed directly with diligence against the funds, and by their diligence may acquire preferences (*d*). 6. The executor's confirmation, if he be also a creditor, is a diligence under which he may pay himself by retention (*e*). 7. There are certain debts preferable, as being privileged (*f*). 8. The creditors of the deceased have a preference over those of the next of kin, provided they do diligence within a year (see below, § 1934). 9. The creditors of the next of kin may claim or do diligence, and after a year will be entitled to rank on the funds *pari passu* with the creditors of the deceased (see next section).

(*a*) Johnson, Nov. 11. 1664; M. 3853.

(*b*) A. S. Feb. 28. 1662. See 1654, c. 16 and 18.

(*c*) Russell, 1791; Bell's Cases, 217. See Gray, July 1723; M. 3140. Græme, Feb. 15. 1738; M. 3141. M'Dowal, Feb. 19. 1742; Elch. voce *Executor*, 9. Johnson, July 21. 1742; Elch. *Executor*, 10.

(*d*) Atkenson, Jan. 14. 1808; M. *Service and Confirmation*, App. 3. Crawford, Feb. 16. 1833. Swayne, June 8. 1822; F. C.; 1 S. B. 517.

(*e*) Lord Napier, Dec. 19. 1740; M. 2099. M'Dowal, Dec. 21. 1744; M. 19008. Murdoch, Feb. 17. 1826; 4 S. D. 479. M'Leod, May 30. 1837.

(*f*) 2 Bell, Com. 158. See above, § 1405.

1901. CHARGE TO CONFIRM. Analogous to the charge to enter heir in heritage (§ 1855), there has been introduced a mode of reaching the *hæreditas jacens* in moveables by a similar charge with certification. This remedy is competent, 1. to the creditors of the defunct; and, 2. to the creditors of the next of kin. If the person charged neither renounce nor confirm within twenty days, he will incur a passive title. If he renounce, the creditors may have decree *cognitionis causa*, and proceed against the *hæreditas jacens*. See § 1925.

1695, c. 41. 3 Ersk. 9. § 35.

V. DOCTRINES BEARING RELATION BOTH TO HERITABLE AND
TO MOVEABLE SUCCESSION.

1902. There are several doctrines of great practical importance, which bear relation to both kinds of succession; heritage and moveables. These are, 1. The right to heirship moveables; 2. The doctrine of collation; 3. The doctrine of passive representation; 4. The order of responsibility among heirs; 5. The doctrine of approbate and reprobate; and, 6. The doctrine of last heir.

1. *Heirship Moveables.*

1903. The heir of a baron or burgess, though excluded from the moveable succession where there are relations of the same degree who have right as executors, has right to the best of certain moveables; that he may not enter to his predecessor's dwelling-house quite dismantled by the executors.

Leg. Burg. c. 126. 1474, c. 54. 2 Acta Parl. 107. c. 8. Balfour, Pract. 234. Hope, Min. Pract. App. 3. Stair, 5. § 7, 9, et seq. and 3, 6. § 8, 9. 3 Ersk. 8. § 17.

1904. 1. A BARON, in this question, is any feudal proprietor who at his death is vest and seised in lands, houses (whether burgage or not), or annualrents forth of land (*a*). But, 1. if divested (*b*); or, 2. if he hold a mere liferent (*c*), or conjunct fee (*d*); or, 3. if he hold only a personal right to land, he is not held to be a baron in this sense (*e*).

(*a*) Scrymgeour, July 19. 1664; M. 5396. Jameson, Nov. 21. 1678; M. 5398. Arbuthnot, July 4. 1758; 5 Brown's Sup. 356. Todrig, Jan. 21. 1615; M. 5390. Irvine, Dec. 15. 1744; M. 2304.

(*b*) Straton, Jan. 27. 1636; M. 5395. See Arbuthnot, *supra*

(*c*) Scott, Feb. 1. 1668; M. 5396.

(*d*) Monro, Feb. 1730; M. 5400.

(*e*) Montgomery, Jan. 27. 1666; M. 5396. Seyton, Dec. 22. 1674; M. 5397. Cochran, Dec. 25. 1695; M. 5398. Cumming, Nov. 22. 1698; M. 5399.

1905. 2. A BURGESS must be either infest in a burgage tenement (*a*), or a trading burgess, in order to entitle his heir to heirship moveables (*b*).

(*a*) Arbuthnot, *ut supra*.

(*b*) Dunbar, July 8. 1628; M. 5392. Cumming, Nov. 22. 1698; M. 5399.

1906. Heirship moveables may be claimed by the heir, although the land is settled on another (*a*). Heirs-portioners (contrary to Erskine's opinion) divide the heirship move-

ables (b). If the heir renounce heirship moveables, they go to the executor (c).

(a) Crawford, July 2. 1543; M. 5389.

(b) Cruickshanks, May 27. 1801; M. *Heir-portioner*, App. 2. 3 Ersk. 8. § 17.

(c) Pollock, Nov. 2. 1667; M. 5403.

1907. *Subjects of Heirship* are moveables appropriated to the person, and insight and oversight plenishing (a); for which see the lists in the authorities cited supra, § 1903. It is held, 1. That heirship is not limited to the moveables left upon the lands in which the deceased was infeft (b). 2. That the heir is entitled, not to the furniture of the *best* house; but to the *best* articles of furniture in *every* house belonging to the deceased (c). 3. That farm stock, raised or fed for sale, is not heirship (d). 4. That in fixing the *jus relictæ*, the heirship moveables are not to be deducted from the goods in communion (e).

(a) Knolls, Feb. 27. 1489; M. 5385. Brown, March 27. 1527; M. 5386; Reid, Jan. 19. 1611; M. 5387. A. v. B. Dec. 22. 1630; M. 14386. Kincaid, Jan. 9. 1650; 1 Brown's Sup. 458. Earl of Leven, Feb. 21. 1683; M. 5806. Hepburn, June 19. 1793; M. 5387.

(b) Darg, Dec. 23. 1808; F. C.

(c) Drummond, Nov. 10. 1575; M. 5386.

(d) Darg, ut supra.

(e) Lindsay, Jan. 1727; M. 5406; correcting Goodlet, Dec. 8. 1668; M. 5404; and Stevenson, Nov. 12. 1680; M. 5405. See also Kinfauns, July 12. 1734; M. 11356.

1908. The heir's right to heirship moveables is protected by the law of deathbed.

1909. Heirship moveables vest in the heir by mere possession, without the necessity of service. If not taken possession of, they go to the heir of the person first deceasing.

3 Ersk. 8. § 77.

2. Collation.

1910. Although heritage goes to the heir, and moveables to the next of kin, the heir (provided he is also one of the next of kin) may throw that heritage, to which he succeeds as heir, into the common stock, and insist for an equal share of the aggregate, with the other next of kin: This is called *COLLATION*. The heir is, in some cases, entitled to claim a share without collation.

3 Stair, 4. 24. and 5. § 9. 3 Ersk. 9. § 3. Murray, July 16. 1678; M. 2372.

1911. 1. PERSONS ENTITLED TO COLLATE. This right belongs to the heir *ab intestato*, only as he is one of the next of kin, where there is both an heritable and a moveable estate. And, 1. If the heir be sole executor he is not bound to collate with the widow (*a*). 2. A collateral heir as well as a direct descendant, is entitled to collate (*b*). 3. The heir of conquest is entitled to collate. 4. If the heir be not one of the next of kin (as where a grandson is heir, and the executors are his uncles and aunts), he is not entitled to collate (*c*). 5. There is no collation in heritage amongst heirs-portioners, so that one heir-portioner getting by settlement or marriage-contract a particular subject, is held as a singular successor, and is entitled also to her full share of the rest of the succession, whether heritable or moveable, without collation (*d*). 6. The privilege of collation may be excluded by the will of the deceased. And, 7. If the privilege of collation be renounced by the heir, his representative cannot demand it in the face of such repudiation (*e*).

(*a*) Trotter, Jan. 12. 1681; M. 2375.

(*b*) Chancellor, Dec. 2. 1742; M. 2379; Elchies, *Succ.* 8.

(*c*) Macaw, Nov. 28. 1787 (correcting 3 Ersk. 9. § 3); M. 2383.

(*d*) Jack, Dec. 20. 1673; M. 2368. Ricart, Nov. 19. 1720; M. 2378.

(*e*) Dick, Feb. 16. 1698; M. 10326.

1912. 2. PROPERTY TO BE COLLATED. The heir, as one of the next of kin, is not obliged to collate heritage not his by disposition of the law. Thus, 1. Where he takes as heir of provision, not being heir *alioquin successurus*, he is entitled to his share of moveables without collation (*a*). 2. He is not obliged to collate heritage which comes to him from a stranger; not from the deceased, whose moveable succession is in question (*b*). 3. He must collate land descendible to him as heir *alioquin successurus*, although directly he takes it by deed of settlement: And so an heir of entail, if heir *alioquin successurus*, cannot share without collating (*c*). 4. He must collate heritable estate in another country, in claiming a share of moveables in Scotland (*d*); but he is not bound to collate in order to claim his share of moveables under the English statute of distributions; or where the moveable succession is regulated by the law of a country which does not require collation (*e*). 5. Where the heir cannot collate, it has been ques-

tioned whether this inability deprives him of his share of the moveables. Thus, where an heir succeeds to a lease which excludes assignees and sub-tenants, or takes the land as heir of entail, he cannot give to the executors a right so exclusively his (*f*). But it is held that he must either communicate to the utmost of his power (his liferent interest, for example, in an entailed estate, the profits of his farm, &c.), or want the benefit of his share of the moveables (*g*). And, 6. It is now finally settled that an heir succeeding under an old entail as one of a special class of heirs (ex. gr. as heir-male), and under the limitation of a strict tailzie, is bound to collate (*h*).

(*a*) Ricart, *ut supra*. Rae Crawford, Dec. 3. 1794; M. 2384. Duke of Buccleugh, Feb. 14. 1677; M. 2369.

(*b*) Spalding, Dec. 11. 1812. Russell, June 1822; 1 Bell, Com. 102, note 1.

(*c*) Baillie, Feb. 23. 1809; F. C. Murray, July 23. 1678; M. 2372-4. Little Gilmour, Dec. 13. 1809; F. C. Ricart, Nov. 19. 1720; M. 2378. See observations on this case in Little Gilmour's case, *supra*. Hay Balfour, Nov. 15. 1789; M. 2379; 2 Hailes, 1032. House of Lords, April 11. 1793; 6 Brown's Parl. Cases, 550. See 1 Bell, Com. 103, note 6.

(*d*) Robertson, Feb. 16. 1816; F. C. Robertson, Feb. 18. 1817; F. C. See Trotter, Dec. 5. 1826; 5 S. D. 78.

(*e*) Hay Balfour, *ut supra*.

(*f*) Stewart, Dec. 2. 1824; 3 S. D. 351.

(*g*) Little Gilmour, *supra*.

(*h*) Little Gilmour's case. Anstruther, Nov. 28. 1833; House of Lords, 1835; 1 S. and M'L. 463; and on remit, Jan. 20. 1836; 14 S. D. 272; affirmed, 2 S. and M'L. 369. M. of Breadalbane, Jan. 20. 1836; 14 S. D. 309; House of Lords, Aug. 10. 1836; 2 S. and M'L. 377.

1913. 3. MODE OF GIVING EFFECT TO COLLATION.—1. Where the heir is one of the next of kin, but not bound to collate, he is entitled to be confirmed as an executor; either alone if he is the sole next of kin, or along with the others. 2. Where the heir must collate, he is entitled on making up his titles to the heritage and disposing to the other next of kin, to assume the character of executor. 3. The transaction is commonly settled by private contract; the heir and executors completing their respective titles, and dividing the funds. 4. If judicial proceedings be necessary, the heir raises his action against the executors, concluding for declarator of his right; for an order on the executors to account; and (on his completing his title and disposing) for an order to deliver or pay over his share.

3. *Passive Representation.*

1914. It is a ruling principle in the law of Scotland, that the heir to whom the estate and funds of a deceased person go by succession, is subject to his obligations or debts; and although the extent of the obligation ought naturally to be commensurate with the amount of the benefit, it is held to be universal, unless certain precautions shall be used, within a limited time, to shew the true amount of the estate taken up by the heir. This doctrine may be taken under four heads:—
1. Universal passive representation; 2. Limited representation; 3. Representation of apparent heirs; and, 4. The preference given to the creditors of the ancestor during a certain term.

1915. 1. UNIVERSAL PASSIVE REPRESENTATION. One who takes the hæreditas of a person deceased is liable for payment of his debts: And the responsibility is extended universally to the full amount of the debt, for the benefit of creditors, not of heirs, in the following situations:—

1916. 1. *By Entry as Heir.* The entry of an heir in heritage by service, special or general, whether as heir of line or of conquest, or heir-male generally, infers (if benefit shall be derived from it) a universal responsibility for all the debts of the deceased, the heir being held as eadem persona cum defuncto (*a*). And refusal or omission to remove when charged to enter heir, will have the same effect. See above, § 1856.

1. Heirs-portioners are liable each for their rateable share only; or, in so far as the co-heirs are insolvent, in quantum lucratae (*b*), the rest being called into the field (*c*).

2. A limited title infers only a limited responsibility; and so an entry by precept of clare constat does not infer responsibility, where the estate is carried off by reduction (*d*).

3. Entry more burgi is limited to the estate so carried (*e*).

4. An heir of provision taking by a particular deed or destination, is not universally liable (*f*).

5. An heir to a lease excluding assignees and sub-tenants, would seem not to be liable on the passive titles, both as he is in the condition of an heir of provision, and as he takes what the predecessor's creditors could not avail themselves of (*g*).

6. An executor does not, by confirming, incur a responsibility beyond the estate; his title being strictly limited (*h*).

7. Entry by a stranger as heir, who is not entitled to the character, does not infer passive title; and intromission in such a case makes the person only liable to account (*i*).

(*a*) 3 Ersk. 8. § 50. Aytoun, July 7. 1784; M. 9732. Lord Fife, March 7. 1828; F. C.; 6 S. D. 698. M'Kay, Jan. 13. 1835; 13 S. D. 246. Nisbet's Trustees, Feb. 20. 1835; Ib. 497.

(*b*) 3 Ersk. 8. § 51 and 53. Home, Feb. 7. 1632; M. 14678. Jordanhill, July 1687; M. 14682. Burnet, Dec. 23. 1665; M. 5863. White, June 21. 1698; M. 14683.

(*c*) McMillan, Aug. 4. 1775; M. 14683.

(*d*) Farmer, March 1683; M. 14003.

(*e*) Blount, Feb. 26. 1783; M. 9731; above, § 845.

(*f*) Dirleton, *Heirs of Tailzie*, p. 150. 3 Ersk. 8. § 51. Baird, July 16. 1766; M. 14019; affirmed, April 3. 1767; 5 Brown's Sup. 926. Maitland, Nov. 30. 1757; 5 Brown's Sup. 860.

(*g*) See Campbell, July 11. 1806; 1 Bell, Com. 62.

(*h*) 3 Stair, 9. § 64. 3 Ersk. 9. § 41.

(*i*) Mercer, June 6. 1745; M. 9786; Elchies, *Provisions*, No. 8.

1917. 2. *Passive Titles by Evasion of the Regular Entry*. The heir will be responsible though he evade the *form*, if he enjoy the *benefit* of an entry as heir; and such evasion is called (in a more restricted sense) a *Passive title*. Of these there are two in Heritage; Præceptio hæreditatis, and Gestio pro hærede; and one in moveables, Vitious Intromission.

1918. 1. Præceptio Hæreditatis. If the heir shall take gratuitously a right to an heritable estate, to which he would otherwise have succeeded, it is called Præceptio hæreditatis, and infers responsibility (*a*): But it is doubtful whether this be a universal responsibility (*b*). To this passive title it is necessary, 1. That the person called on as liable shall be heir alioquin successurus (*c*). 2. The responsibility is continued to the heir's representatives, if, after taking possession, he die before the ancestor (*d*). 3. The conveyance must be gratuitous, the proof of onerosity being laid on the heir (*e*). 4. The responsibility is only for debts contracted before the sasine on the conveyance (*f*); and those which are declared burdens on the conveyance (*g*). 5. In circumstances which would have subjected the heir if the father had died, the creditors may have recourse to reduction on the act 1621, c. 18, during the father's life (*h*).

(*a*) 3 Stair, 7. § 1-5. 3 Ersk. 8. § 88. 1 Bell, Com. 660.

(*b*) See Burnet, Jan. 23. 1693; M. 3040. Henderson, Jan. 24. 1717; M. 9784.

(*c*) Forbes, March 23. 1636; M. 9771. Smeaton, Jan. 29. 1639; M. 9774.

Scot, Nov. 1665; M. 9775. Spencerfield, Dec. 17. 1672; M. 9779. Hamilton, Feb. 28. 1662; M. 9775. Harper, Jan. 14. 1662; M. 9774. See 3 Ersk. 8. § 90.

(d) 3 Ersk. 8. § 87. Henderson, Jan. 24. 1717; M. 9784.

(e) Hadden, Feb. 15. 1676; M. 9794. Higgins, Nov. 29. 1678; M. 9795.

(f) 3 Stair, 7. § 6. 3 Ersk. 8. § 88. Bell, Com. ut supra. Smith, July 21. 1780; M. 2322.

(g) Smith, July 21. 1780; M. 2322. Bruce, Dec. 13. 1826; 5 S. D. 119.

(h) Lamb, Dec. 12. 1793; Bar. Hume, 428.

1919. 2. Gestio pro Hærede. Where the heir enters to, or possesses, after the predecessor's death, an heritable estate, or any part of an estate, to which he would otherwise have succeeded; or buys such estate, or any right thereto, otherwise than at public lawful sale, or intromits with papers, as a charter chest, he is held thereby to incur a universal responsibility as heir (a). But this is saved, 1. by any right in a third party taking the estate out of the ancestor's person; 2. by any singular title in the heir (b), or by adjudication during the ancestor's life (c); 3. by the insignificance of the intromission, and absence of fraud (d); 4. by service cum beneficio inventarii (e); or, 5. by a title made up at desire of creditors to save expense (f).

(a) 3 Stair, 6. § 6. 13. 3 Ersk. 8. § 92. 1695, 24. See Act of Sed. Feb. 7. 1662. McNeil, July 20. 1759; M. 9752. Ellis, June 25. 1670; M. 9663. Scott, § 1921.

(b) Grant, Feb. 10. 1676; M. 9763.

(c) McNeil, ut sup. (a).

(d) Ersk. ut supra, § 83-86. Jeffrey, May 13. 1791. Bell's Cases, 482. Penman, Dec. 15. 1775; M. 9836.

(e) 3 Stair, 6. § 10, 11.

(f) Hall, Dec. 19. 1760; M. 9730. Blount, Feb. 26. 1783; M. 9731. Gordon, Jan. 27. 1789; M. 9733. Blair, see Jeffrey, supra (d). See below, § 1922.

1920. In the following cases there is no passive representation by Gestio:—1. Where the succession is not open, or the intromitter is not apparent heir, there is no passive title on intromission (a). 2. Where the apparent heir does any ineffectual act, although in the character of apparent heir, it is not held as gestio (b). 3. Intromission makes no passive title, if the property did not truly belong to the predecessor (c). 4. Where the intromission may fairly be ascribed to another title than the assumption of the succession, it will not infer gestio (d). 5. The assuming of a predecessor's title of honour is not gestio (e); nor the taking of an hereditary office (f). 6. Making up a title erroneously, for the mere purpose of re-

disposing a trust-estate, has been held not to infer representation (*g*). 7. Making up a title by general service, but taking nothing by it, does not infer a passive title (*h*).

(*a*) Irvine, Dec. 21. 1626 ; M. 9649. Cunningham, July 2. 1629 ; M. 9664 ; 2 Brown's Sup. 75.

(*b*) Jamieson, July 13. 1670 ; 1 Brown's Sup. 620. Middleton, Nov. 28. 1682 ; M. 9651.

(*c*) Farquhar, March 22. 1628 ; M. 9654. Gordon, June 10. 1663 ; M. 9667.

(*d*) Reid, Jan. 16. 1667 ; M. 9656. Dunbar, July 8. 1628 ; M. 9681.

(*e*) Lord Sempill, March 25. 1622 ; M. 9706.

(*f*) Bower, Feb. 2. 1682 ; 2 Brown's Sup. 18.

(*g*) Ayton, July 7. 1784 ; M. 9732.

(*h*) Earl of Fife, March 7. 1828 ; 6 S. D. 698.

1921. 3. Vitious Intromission. The proper mode of entry, and the only effectual check on dishonesty in intromission with the moveable funds of a person deceased, is Confirmation (§ 1838) ; and wherever one having an opportunity of intromitting, does so without confirmation, a universal responsibility is raised against him (*a*). Intromission with writings and title-deeds in a charter-chest infers responsibility, unless where the deeds have been received on inventory or under a special deed of assignment (*b*). And, 1. This passive title is not confined to those who have a right to succeed, but extends to all intromitters. 2. Any bona fide title of intromission, or circumstances removing the suspicion of fraud, and affording a check on the intromission, will relieve against the penal consequence (*c*) ; so, if the creditors shall have approved of the proceedings, and taken a dividend, it discharges vitious intromissions (*d*). 3. Vitious intromission is purged by confirmation before the action, or within year and day, as executor (*e*), not as executor-creditor merely (*f*). 4. Action grounded on vitious intromission is not relevant after the death of the party, nor effectual against the heirs of the intromitter further than in so far as lucrati (*g*).

(*a*) 3 Stair, 9. § 9. 3 Ersk. 9. § 49. See a series of cases in the Dictionary, and in Elch. *Vitious Intromission*, chiefly during the 17th century ; and 4 Br. Sup. 374, 416, 424, 813 ; 5 Ib. 838. Ritchie, March 7. 1795 ; M. 9838. Campbell, Nov. 4. 1714 ; M. 3156. Scott, May 25. 1821 ; 1 S. B. 33 ; Bar. Hume, 438. Forbes, June 12. 1823 ; 2 S. D. 395. Cunningham, Feb. 8. 1827 ; 5 S. D. 315. McEachran, Feb. 26. 1833 ; 11 S. D. 441.

(*b*) Ellis, June 21. 1670 ; 2 Br. Sup. 476. Diggles, June 15. 1706 ; M. 9676. Crawford, Feb. 16. 1833 ; 11 S. D. 441.

(*c*) 3 Ersk. 9. § 52. Wilson, July 7. 1772 ; M. 9833 ; 1 Hailes, 482.

Tawse, July 10. 1783 ; M. 9837. Webster, Dec. 9. 1832 ; Bar. Hume, 436.

Gardner, Dec. 9. 1802 ; M. 9840. Rae, Jan. 2. 1803 ; Bar. Hume, 437.

Brown, Feb. 25. 1824; 2 S. D. 739. Johnson, Feb. 26. 1830; 8 S. D. 600. Young, Feb. 27. 1831; 9 S. D. 638. Thomson, Dec. 9. 1834; 13 S. D. 143.

(d) French, Nov. 23. 1747; Bar. Hume, 435.

(e) 3 Ersk. 9. § 52. Stevenson, Jan. 28. 1663; M. 9873. Moor, June 18. 1712; 5 Br. Sup. 85. Cochran, March 20. 1624; M. 9825. Bog, July 22. 1630; 1 Br. Sup. 311. Barber, Nov. 19. 1824.

(f) Watson, Jan. 4. 1650; 1 Br. Sup. 453.

(g) Cranston, July 14. 1666; M. 10340. Home, 1678; 3 Br. Sup. 224. Couper, July 24. 1694; 4 Br. Sup. 200. Penman, Dec. 15. 1775; M. 9836; 2 Hailes, 667.

1922. II. LIMITED REPRESENTATION. There are some titles, which do not infer a universal, but only a limited responsibility.

1923. 1. *Trust for Creditors*. Where an heir has intermitted at the request of creditors, and as trustee for their benefit, and with notice that no use is to be made of it but for them, he has been held not liable on the passive titles (§ 1919. 5. and also § 1921. 2).

Walker, Dec. 4. 1827; 6 S. D. 204.

1924. 2. *Judicial Proceedings*. The pleading of a defence in an action brought as against an heir, imports a passive title; but only as to that debt.

3 Ersk. 8. § 93. Lundie, Feb. 11. 1713; M. 12064. Gilmour, Dec. 14. 1821; 1 S. D. 216. Smith, June 25. 1829; 7 S. D. 792.

1925. 3. *Charge to enter Heir or to Confirm*. The representation inferred from a charge to enter heir unanswered, is limited to that particular occasion.

3 Ersk. 8. § 93. See supra, § 1855, et seq. § 1856. and § 1901.

1926. 4. *Service cum Beneficio Inventarii*. The heir entering to the universitas of the heritage may limit his responsibility by serving heir cum beneficio inventarii, *i. e.* with reference to an inventory of the amount and value of the estate, lodged with the Sheriff-clerk of the shire where the lands lie. But the inventory must for this purpose be lodged with the Sheriff-clerk, and recorded within a year from the ancestor's death, or from the birth of a posthumous child (*a*); or if the first heir has died in apparencey, the next heir may claim the benefit, provided he give in the inventory, within a year after the succession opens to him (*b*). The form is in no respect different from an ordinary service, except in being qualified by the words cum beneficio inventarii; and in there being a particular inventory given up, on oath, and recorded, of all the

predecessor's lands, houses, and heritable rights of all kinds, which the heir means to take up (c).

(a) 1695, c. 22. See Cod. lib. 6. tit. 30. l. 22. § 2, 3, 4, de Jure Deliberat. Baillie, Aug. 5. 1789; Bar. Hume, 427.

(b) Bruce, Feb. 1. 1704; M. 5329.

(c) See 5 Bell's Forms, p. 557. 1 Juridical Styles, 401.

1927. 1. Proceedings. The requisites of this form of service are,—1. That a full and particular inventory of the heritable estate, signed by the heir before witnesses, and sworn to as correct, shall, before the service proceeds, be lodged with the Sheriff-clerk of every shire in which the lands lie; or of the shire where the deceased died, if the subjects do not require sasine (a). 2. That this must be done, and before the service the inventory must be signed by the Sheriff, and recorded in his books, within the annus deliberandi; or at least within a year after the succession opens to the heir serving (see above, § 1926); yet the Court has allowed the inventory to be recorded after the year, where, from the heir having been abroad, or some other inevitable impediment, the registration has been too late; but this always “reserving all objections” (b). 3. That, within forty days after the expiration of the year, the inventory shall be recorded in the Books of Session, in a particular record kept for the purpose. 4. That the lodging of this inventory infers, of itself, no passive title, provided it be not followed up by service. 5. Service may proceed at any time after the inventory is recorded.

(a) 1695, 24. Juridical Styles and Bell's Forms, ut supra. 1 Bell, Com. 662. M'Kay, Feb. 11. 1708; M. 5331. Campbell, Feb. 19. 1709; M. 5333. Codrington, Feb. 11. 1818; affirmed, March 31. 1824; 2 Shaw's App. Cases, 118.

(b) M'Kenzie, July 12. 1749; Elch. *Heir cum Ben.* 5; M. 5353. Bell, Nov. 17. 1818; F. C. Bell, May 28. 1830; 8 S. D. 839. Finlayson, July 5. 1838; 16 S. D. 1270. Anderson, Dec. 20. 1838; 1 D. B. M. 268.

1928. 2. Effect of service cum beneficio inventarii. The effects of this proceeding are,—1. To make the heir personally liable for debts of the deceased, to the extent of the inventory; but not to make those debts burdens on the lands, as on a trust estate; or to bring in the creditors *pari passu* (a). 2. To entitle the heir to satisfy any creditor on demand. 3. To limit the demands of creditors against the heir to the amount of the inventory. 4. To entitle the heir to dispose of the estate as he pleases, if not prevented by diligence. 5. To

impose on the heir the duty of a trustee, to account for the estates in the inventory : and, *first*, the creditors may insist on having the estate itself given up to them ; and the heir may prevent an adjudication by offering to convey the lands to the adjudger (*b*) ; *secondly*, they are entitled to have the estate with any improvements which the heir may have made (*c*).

(a) Gordon, July 22. 1741 ; M. 5352. Scott, July 4. 1724 ; M. 5336.

(b) Lord Ormiston, Jan. 11. 1711 ; M. 5334.

(c) Lawson, Nov. 28. 1738 ; M. 5348 ; Elch. *Heir own Ben.* 2. Scott, ut sup. (a). Johnston, Feb. 12. 1731 ; M. 5345. Veitch, June 1733 ; M. 5345. Aikenhead, Dec. 1725 ; M. 5342 ; and July 6. 1727 ; M. 5344. Douglas, Feb. 5. 1724 ; M. 5335. Gray, July 6. 1733 ; M. 5345. Murray, Feb. 17. 1736 ; M. 5346. Strachan's Heirs, July 12. 1738 ; M. 5348. See 3 Ersk. 8. § 70.

1929. III. REPRESENTATION OF APPARENT HEIR THREE YEARS IN POSSESSION. The possession of an estate as apparent heir and proprietor, naturally raises a credit with the public which it is hard and unjust to disappoint. And the Legislature, in 1695, so far sanctioned this credit as to enact, ' that if any man shall serve himself heir, &c. not to his immediate predecessor, but to one remote, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in the possession of the lands and estate to which he is served for the space of three years, and that, in so far as may extend to the value of the said lands and estate, and no farther, deducting the debts already paid.'

1695, 24. 9 Acta Parl. 427. c. 9. 3 Ersk. 8. § 93, 94. 1 Bell, Com. 664.

1930. In the construction of this statute it is held, 1. That it applies to titles made up to a former, although not the next immediate predecessor (*a*) ; and although his right was only personal, he not having been infeft (*b*). 2. That the interjected apparent heir must have *actually* possessed, naturally or civilly ; possession being not animi, but facti, and it not being enough that the heir has done all he could to obtain possession, and found it impossible (*c*). 3. That possession by a tutor for a pupil, is the possession of the heir (*d*). 4. That a life-renter's possession is to be held the fiar's only where it proceeds from him (*e*). 5. That, on the other hand, actual possession is enough, although another might have excluded the apparent heir if he had chosen (*f*). 6. That possession by a

judicial factor in a Ranking at the apparent heir's instance, is not the apparent heir's possession (*g*). 7. And so of the possession of a trustee for paying off debt and settling the reversion (*h*). 8. That a second apparent heir may enter as such to possession of the estate, and if he do not make up his titles, he will not be passively liable; the statute attaching the responsibility only to the making up of the title (*i*). 9. That inhibition used against the apparent heir will not avail the inhibitor in competition with a subsequent creditor of the apparent heir, after the entry of the next heir passing by has opened the estate to their diligence (*k*). 10. That it will not relieve from responsibility, to shew that another had a preferable right to the apparent heir in possession; the statute requiring only possession, but not that there should be no preferable title. 11. That if the possession has been otherwise than as apparent heir, it will not avail creditors. 12. That the liability is only for onerous debts and deeds, and with relief against the apparent heir's representatives (*l*), unless the obligation has relation to a particular estate, in which case the relief is only against those taking that estate (*m*). 13. That it is only a personal responsibility, not making the apparent heir's debts burdens on the estate (*n*). 14. That the common rule by which a lease granted by one not infeft is ineffectual, seems to admit of an exception under this act, in so far as the heir passing by is concerned; but the lease will not be effectual against creditors (*o*). 15. That although the creditors of the interjected apparent heir have no real security or preference on the subjects, it would appear that the preference provided for ancestor's creditors (see § 1931) will be available to them. 16. That the personal responsibility is subsidiary to the obligation of the apparent heir's representatives, so that the heir making up titles has the benefit of discussion (*p*). And if he should pay without pleading such benefit, he has relief against those properly liable (*q*). 17. There is no responsibility by this act, where the estate is entailed, and the debts are under the prohibitions of the entail; unless the requisites of the Entail Act have been neglected; and even then the recording of the entail will exclude the creditors of the apparent heir (*r*); or, unless the debt of the apparent heir is permitted by the entail (*s*).

The debts and deeds to which the responsibility extends are such only as are onerous. But it has been held that a debt grounded on a natural obligation is to be regarded as onerous (t).

- (a) Hay, Jan. 17. 1775; M. 9755; 2 Hailes, 607.
- (b) See and correct 1 Prin. of Equity, 124.
- (c) Yule, Feb. 10. 1758; M. 5299. Buchan, Dec. 7. 1796; M. 9822; Bar. Hume, 432. M'Caul's Creditors, June 26. 1745; M. 9748. M'Brair, June 1736; Elch. *Passive Title*, 4. See Donald, (h).
- (d) M'Brair, ut sup. (c).
- (e) Johnson, Dec. 19. 1733, and Feb. 24. 1736; M. 9809. Pitcairn, June 24. 1752; M. 9749. Grant, May 11. 1749; Craigie and Stewart, 416. See Knox, Nov. 21. 1759; M. 5276.
- (f) Kinminity, July 16. 1756; Monb.; 5 Br. Sup. 853. Knox, Nov. 25. 1759; M. 5276.
- (g) Buchan, Dec. 7. 1796; M. 9822.
- (h) Donald, Feb. 27. 1835; 13 S. D. 574.
- (i) Sinclair, Jan. 8. 1736; M. 9810; Elchies, *Passive Title*, 2. Notes, 317, 318. Leith, Dec. 9. 1741; Ib. 5. Notes, 318. Kinminity, May 11. 1749; Elchies, voce *Minor*, 12; M. 5265; Elch. voce *Minor*, No. 12; Craigie and Stewart, 416. Grant, Dec. 12. 1754; M. 9819; affirmed, April 15. 1755. Burns, July 4. 1758; 5 Br. Sup. 361.
- (k) Sutherland, Aug. 14. 1786; M. 5294.
- (l) Muirhead, Jan. 17. 1724; M. 9807. Gordon, Feb. 20. 1742; Elchies, *Passive Title*, 7. Coulterallers, Feb. 2. 1742; 5 Br. Sup. 717. Marquis of Clydesdale, Jan. 26. 1726; M. 1262; Rob. App. Cases, 564. Countess of Glencairn, May 23. 1800; M. voce *Heir Apparent*, App. 1; affirmed in House of Lords. Kennedy, Feb. 11. 1829; 7 S. D. 397. Adamson, Nov. 16. 1832; 11 S. D. 40.
- (m) Ogilvy, Dec. 16. 1817; F. C. Smyth, Dec. 9. 1814; F. C. M. Annandale, Feb. 1732; Elch. *Mut. Cont.* 12. Craigie and Stewart, 225.
- (n) 3 Ersk. 8. § 94. Simson, July 1. 1707; M. 9807.
- (o) Lowdon, June 13. 1752; M. 5270. Killilung, July 22. 1760; Monb.; 5 Br. Sup. 877. Gordon, Feb. 29. 1780; M. 10309.
- (p) Vint, Nov. 13. 1712; M. 3562; 3 Ersk. 8. § 94.
- (q) Marquis of Clydesdale, &c. supra (l) (m).
- (r) Graham, May 13. 1795; M. 15439; 1 Bell, Com. 667. Dickson, Feb. 24. 1801; M. *Tailzie*, App. No. 7.
- (s) Kennedy, Feb. 11. 1829; 7 S. D. 397. See Glencairn, May 23. 1800; M. 5328.
- (t) Kennedy, Feb. 11. 1829; 7 S. D. 397.

1931. IV. PREFERENCE TO THE CREDITORS OF THE ANCESTOR. By two several statutes a preference is secured to the creditors of the ancestor upon his estate, heritable or moveable, over those of his successor entering as heir to that estate. But this preference is provisional; a term being fixed within which the ancestor's creditor must complete his diligence for attaching the estate, otherwise he has no preference.

1932. 1. *Preference to Ancestor's Creditors on the Heritable Estate.* The creditors of the ancestor are, during certain

terms, protected, 1. against voluntary deeds of the heir, and, 2. against the diligence of the heir's creditors.

1. Voluntary Deeds. It is enacted, that "no right or disposition made by the apparent heir, so far as may prejudice his predecessor's creditors, shall be valid, unless made and granted a full year after the defunct's death" (*a*). In the construction of this statute it is held, 1. That it comprehends all conveyances made by the heir, whether entered as heir or not (*b*). 2. Not only conveyances to creditors of the heir, but onerous deeds to third parties, are forbidden by this statute (*c*). 3. A conveyance to the ancestor's creditors generally, will be good (*d*), but not to one in preference over others of that class (*e*). 4. The ancestor's creditors are those whom the law is intended to protect, and they have the right to challenge, while the creditors of the heir can claim no participation. And, 5. It is thus not necessary that the ancestor's creditors should do diligence within the three years, in order to exclude the creditors of the heir (*f*).

(*a*) 1661, c. 24.

(*b*) Magistrates of Ayr, June 14. 1730; M. 3135.

(*c*) Taylor, Nov. 26. 1747; M. Kilk. 3133. Magistrates of Ayr, ut supra (*b*).

(*d*) 3 Ersk. 8. § 102.

(*e*) Ersk. ut sup. 1 Bell, Com. 736. Ballenden, March 1685; M. 3127. Christie, May 17. 1839; 1 D. B. M. 745.

(*f*) Bell, Feb. 25. 1773; M. 3134. Taylor, ut sup. especially Kilkerran's Report.

1933. 2. Diligence of Creditors. It is enacted, that "the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate, providing that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death" (*a*). In the construction of this part of the Act it is held,—1. That it does not apply to moveables (*b*). 2. That the rule holds good although the ancestor's creditor is non valens agere during the whole or part of the three years (*c*). 3. That under the term apparent heir, a nominatim substitute in a bond is comprehended, to the effect of giving to the creditors of the institute the statutory preference over those of the substitute (*d*). 4. That the rule applies to all heritage descending to the heir, whether sua natura or by destination (*e*). 5. That the expression

“appearand heir” does not confine the remedy to cases where the heir has not made up his titles (*f*). 6. That “doing diligence” means *completing* the diligence (*g*), and a judicial sale, at the instance of the apparent heir, will secure the preference to the creditors of the ancestor (*h*). Sequestration also is held sufficient, if the ancestor’s creditors have proved their debts under it within the three years (*i*). 7. If the creditor should be delayed in proceeding with his diligence by litigation with the heir or other creditors, his preference would not be forfeited (*k*).

(*a*) 1661, c. 24. 1 Bell, Com. 729.

(*b*) Kerr, Jan. 17. 1712; M. 690.

(*c*) Paterson, Dec. 19. 1678; M. 3126.

(*d*) Graham, Feb. 9. 1711; M. 3128.

(*e*) M’Kay, Feb. 5. 1783; M. 3137.

(*f*) 3 Ersk. 8. § 102. Magistrates of Ayr, § 1932 (*b*).

(*g*) 2 Stair, 12. § 29. 3 Ersk. 8. § 101. Lord Ballenden, March 1685; M. 3127. Taylor, ut sup. § 1932 (*c*).

(*h*) Russel, Feb. 20. 1760; M. 3134; 5 Br. Sup. 814. Irvine, Jan. 29. 1748; M. 5264. M’Lachlan, June 15. 1826; F. C.; 4 S. D. 712; affirmed, June 15. 1829; 3 W. S. 449.

(*i*) M’Lachlan, ut supra.

(*k*) Lord Ballenden, March 1685; M. 3127.

1934. 2. *Preference to Ancestor’s Creditors on the Moveable Estate.* By the statute, “The creditors of the defunct doing diligence to affect the moveable estate within year and day of the debtor’s decease, shall always be preferred to the diligence of the creditors of the nearest of kin” (*a*). This is grounded on the common law (*b*): and, 1. Diligence in the sense of this act must be complete: poinding, arrestment and forthcoming, confirmation as executor’s creditor. 2. Where the executor has confirmed, he is held, in that act, as trustee for the creditors of the deceased, so as to give them their preference on the funds so long as distinguishable (*c*).

(*a*) 1695, c. 41.

(*b*) 3 Stair, 8. § 71. 3 Ersk. 9. § 43–6. 1 Bell, Com. 727. 2 Ib. 89.

(*c*) Bell, Nov. 28. 1781; 2 Hailes, 893. Tait, Feb. 12. 1779; M. 3142. Murray, Jan. 13. 1744; Elchies, *Executor*, No. 13. Russel, supra, § 1901.

4. *Order of Responsibility among Heirs.*

Heirs, although liable universally to creditors, are yet responsible only in a particular order; and hence the doctrines of Discussion and Relief.

1935. 1. *Discussion of Heirs.* The benefit of discussion pleadable by heirs is regulated thus:—1. Where, in the obli-

gation, particular heirs are bound, these are first to be called upon (*a*). 2. Where the debt is made a burden on a particular subject, the heir taking that subject is liable in the obligation (*b*), and a special and precise appointment will be required to entitle such heir to relief against executors. 3. If the debt be secured on two heritable subjects destined to different heirs, they are liable pro rata of the value of the subjects (*c*). 4. Where the obligation is general, not distinctly heritable or moveable, and not directed against any particular heir, the creditor may call either the heir or the executor as he thinks fit (*d*). But where the debt is properly heritable, the heir of line is primarily liable, and is bound totally to relieve the heir of provision or of conquest (*e*). 5. In his action against heirs the creditor must follow a certain order (*f*); taking first the heir of line (*g*), next the heir of conquest (*h*), then the heirs of provision (*i*); and of them, the heir-male, or heir by any general character first (*k*); the heir of marriage (having right rather obligatione than destinatione) being taken last. 6. By discussion is meant, not merely calling the heir in an action, and even obtaining decree against him; but also proceeding either to personal diligence or to the adjudging of any heritable estate that can be pointed out as belonging to him (*l*).

(*a*) 3 Ersk. 8. § 52. Blair, Feb. 18. 1663; M. 3571.

(*b*) 3 Stair, 5. § 17. 3 Ersk. 8. § 52. Earl of Kinghorn, June 18. 1607; M. 3574. Fairlie, Feb. 19. 1611; M. 3575. Gordon, June 23. 1615; Ib. Robertson's Creditors, Dec. 13. 1803; M. voce *Competition*, App. 2. Ogilvie, in House of Lords, May 22. 1826; 2 W. S. 214.

(*c*) Sinclair, Feb. 14. 1798; Bar. Hume, 176.

(*d*) Baillie, July 1. 1662; M. 3564. Adam, Nov. 18. 1626; Ib. Carnegie, Feb. 24. 1627; Ib.

(*e*) Walls, Feb. 10. 1700; M. 3561. Vint, Nov. 13. 1712; M. 3562. Innes, Jan. 13. 1773; M. 3567.

(*f*) 3 Ersk. Pr. 8. § 24. 3 Ersk. Inst. 8. § 52. 3 Stair, 5. § 17. 3 Bank. 5. § 69.

(*g*) Fairlie, Feb. 12. 1630; M. 3559.

(*h*) Brown, Nov. 19. 1782; M. 5228.

(*i*) Forrester, Dec. 8. 1649; 1 Brown's Sup. 429.

(*k*) Innes, ut sup. (*d*).

(*l*) 3 Ersk. 8. § 53. Straiton, July 23. 1708; M. 3579. Innes, ut sup. (*d*).

1936. 2. *Relief among Heirs.* Heirs who are liable only subsidiarié, but choose to pay the debt, are creditors of those primarily liable; and have action against them for indemnification or relief. So, 1. The heir paying a moveable, or the executor an heritable debt, has action against the person who is primarily liable (*a*). 2. The heir, or executor paying a debt

secured on a particular estate, or laid on a particular heir, is entitled to relief. 3. A catholic security over all the predecessor's estates, divides among the heirs taking those estates when the succession splits; and one of them paying, has proportional relief (*b*).

(*a*) Carnousie, July 22. 1630; M. 5204. Robertson, June 13. 1705; M. 5473. Home, July 18. 1740; M. 5211. Mullo, Dec. 20. 1758; M. 5221. Denham, March 8. 1765; M. 5224. Forbes, Nov. 14. 1766; 1 Hailes, 138. Arbuthnot, June 23. 1773; M. 5225; 1 Hailes, 528. Frazer, Nov. 13. 1804; M. *Heir and Executor*, App. 3. McNicol, Jan. 16. 1814; and same parties, Jan. 31. 1816. Clayton, March 3. 1826; House of Lords, 2 W. S. App. Cases, 40.

(*b*) Rose, Jan. 17. 1786; M. 5229; 2 Hailes, 1011; reversed in House of Lords, April 2. 1787.

5. *Doctrine of Approbate and Reprobate.*

1937. It is a rule of law, that no person can at once accept and reject the same deed; and on this ground, an heir or executor, by accepting under a settlement a benefit which otherwise he would not have enjoyed, may be bound by a deed which of itself would not have been effectual to bind him. The whole doctrine depends on the effect of acceptance and consequent engagement. In English law, a similar doctrine is called Election; with us it is called Approbate and Reprobate. The alternative which compels the party to make an election is raised, either by an express, or by an implied condition.

3 Ersk. 3. § 49. Roxburgh Case, Kerr, in House of Lords, 1 Bligh, 21; 1 Bell, Com. 146.

1938. 1. *Express Conditions.* Where the condition is expressly imposed in case of acceptance, the maxim "quod approbo non reprobo" directly applies (*a*). But, 1. The person imposing the condition must have power to make the settlement stated in the condition; or, at least, uncontrolled power to confer or withhold the benefit conditionally bestowed (*b*). 2. The condition must be possible and lawful (*c*).

(*a*) Turnbull, Dec. 29. 1711; M. 15364. Cunningham, Jan. 17. 1758; M. 617. See 1 Bligh, App. Cases, 27. See Douglas, July 1763; 5 Brown's Sup. 896. Gibson, June 20. 1786; M. 620. Brodie v. Barry, by Sir W. Grant, 2 Ves. and Beames, 127. See Kerrs, in House of Lords, 1 Bligh. App. Cases, 1. Dundas, Jan. 14. 1829; F. C.; 7 S. D. 241; House of Lords, 4 W. S. 460. Bennet, July 1. 1829; F. C.; 7 S. D. 817.

(*b*) Kerrs, in House of Lords, 1 Bligh, 1. Brodie v. Barry, 2 Ves. and Beames, 127. Welby v. Welby, ib. 187.

(c) *Arbuthnot*, July 4. 1792; M. 620; *Bell's Cases*, 161. *Stewart*, March 10. 1810; F. C.

1939. 2. *Implied Condition.* To raise an implied condition and put the party to his election, the intention to make a condition of the acceptance must be clear beyond all doubt. And, 1. There seems to be a fair inference to that effect, from a deed or deeds of settlement framed to regulate the deceased's whole succession, and of which the parts are plainly meant to stand or fall together (a); and an heir can neither take under such a deed and free himself from the counterpart, nor can he on deathbed challenge the deed and under it claim a legacy or provision (b). But, 2. It must be on the face of the deed clearly the intention of the maker to put the party to his election: and so it was held not applicable to a case where the testator had acquired property after the date of the will, and the words did not affect that property (c). 3. It must plainly appear, that where two or more deeds are executed, they are intended to be so combined as in the mind of the testator to form a united settlement of which the parts are conditional (d). 4. Where there is a revocation of a former conveyance unfavourable to the heir, and the declaration of a new disposition also adverse to his interest, the heir is so far favoured by the law, that his right of succession, and so of challenge or deathbed, is held to revive if the revocation be not made provisionally (e); and in such a case the new disposition will be considered as an independent substantive deed, and liable to the same objections as if it were so (f). 5. If the disposition of the heritage is not made in such a form as to be effectual without the heir's consent, an *implied* condition of the heir's assent by acceptance will not be of force sufficient to put him to his election (g). But if the deed be only subject to challenge for the benefit of the heir, and not in itself null, good evidence of intention that it shall be conditional will be sufficient to compel the heir to make his choice (h).

(a) *Countess of Strathmore*, Feb. 20. 1729; M. 6377. *Turnbull*, Feb. 21. 1776; 5 *Brown's Sup.* 380. *Loudon*, Nov. 23. 1811; *Bar. Hume*, 23. *Campbell*, Dec. 23. 1836; 15 S. D. 310. *Alexander*, July 1. 1829; 7 S. D. 817.

(b) *Ladies Kerrs*, Nov. 23. 1815; *Bar. Hume*, 25; affirmed, 1 *Bligh, App. Cases*, 1.

(c) *Wightman*, June 16. 1802; M. 4479; *Bar. Hume*, 24, note. *Hislop*, Dec. 13. 1808; 1b. 25.

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

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

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

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

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

• 6. *Last Heir*.

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

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

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

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

IV. OF CONTRACTS OF MARRIAGE, AND FAMILY SETTLEMENTS.

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

I. MARRIAGE-CONTRACT BY PERSONS UNDER NO RESTRAINT.

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

1. The stipulations in an antenuptial marriage-contract are