CHAPTER XV.

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373. Lease binding on reversioner. — A lease, at common law, is good against purchasers of the reversion, or of the lessor's interest in the land.\(^a\)

374. Lease, verbal or in writing. — A lease for more than three years must be in writing, but a verbal lease for three years, or for a less term, if the rent reserved is two-thirds of the full improved value of the lands, is good.\(^a\)\(^2\) The writing required in leases for more than three years must be by deed.\(^b\)

375. A verbal lease for more than three years is good as a lease from year to year on the terms of the lease, so far as applicable, if the tenant has entered, and paid rent.\(^c\)

376. If a written lease is imperfect, the mere entry of the tenant does not at law set up the lease for the whole term, but may make it bind-

\(^a\) Stat. Frauds, 29 Ch. II. c. 3, § 1, 2.  
\(^b\) 8 & 9 Vic. c. 106, § 3; Drury v. Macnamara, 5 E. & B. 612.  

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(certified copy) is given out to the party. Where the deed does not contain a clause of registration, it may, nevertheless, be registered for preservation; but in that case the original, after being copied, is returned to the party. Besides a general register in Edinburgh, there is also a particular register for like purposes in each sheriff court and in each royal burgh.

1 Contra; it required a statute, 1449, c. 17, to render a lease good against singular successors, but even then the lease must be in writing, and the tenant must be in possession. 2 Bell's Ill. 176, 183, 214; Sinclair v. Mossend Co. 17 D. B. M. 258.

2 Contra; a verbal lease is good only for one year, unless the lessor, by writ or oath, admit it. Bell's Pr. § 1187. If the verbal lease is for more than one year, it is not good even for a year (Stair 2, 9, 4; Ersk. 2, 6, 30; 2 Bell's Ill. 176-7), unless rei interventus or homologation occur. Ross v. Ross, Hume, 784; Ibid, 782; Ibid, 786.
ing on the landlord\(^1\) as a lease from year to year.\(^a\) But though part performance will not set up\(^2\) the lease in a court of law, yet a court of equity will, in many cases, grant specific performance on that ground. And entry into possession is in general deemed a part performance.\(^b\)

377. Form and clauses of lease.—A lease by deed is usually in the form of an indenture, and consists of the following clauses:—1. The date, parties, and demise; 2. The parcels, stating the exceptions; 3. The habendum; 4. The reddendum; 5. The covenants by both parties; 6. The provisos for re-entry on breach of covenants; 7. The testimonium.\(^3\)

378. Registration of leases.—Leases of lands for a longer term than twenty-one years must be registered, if the lands are in the county of Middlesex, York, and the Bedford Level, otherwise they will be void against subsequent purchasers and mortgagees. So must assignments of the leases.\(^c\) But in other counties the leases do not require to be registered, and there is no register for the purpose.

\(^a\) Ibid; Stratton v. Pettit, 16 C. B. 429.
\(^b\) Pain v. Coome, 1 De G. & J. 34; Parker v. Tavell, 4 Jur. N. S. 183.
\(^c\) See the statutes, ante, § 94 n.

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\(^1\) Contra; it will bind the landlord for the whole term, if possession followed, and if the nature of the possession implied that the whole term was in view. See Johnston v. Grant, 6 D. B. M. 881; Bell’s Pr. § 1190; Hunter, L. & T. 415; Pentland v. Murray, 5 W. S. 28. Much greater effect is given to possession of the tenant in the law of Scotland than in the law of England. Per L. Truro in Hutchinson v. Ferrier, 24 Sc. Jur. 404; 1 Maq. 196.

\(^2\) Contra. See last note. There being no division of courts into those of law and equity, rei interventus (or part performance) and homologation (or conduct amounting to an estoppel, or acquiescence, or confirmation) will at once set up the lease. See Bell’s Com. by Shaw, 60.

\(^3\) The lease consists of the following clauses:—1. The clause of description of parties; 2. The clause of destination (part of habendum); 3. The clause of possession describing the subjects (parcels); 4. Clause of duration (part of habendum); 5. Clause of reservation (exceptions); 6. Clause of warrandice (covenant for quiet enjoyment); 7. Clause of rent (reddendum and covenant to pay); 8. Clause of meliorations (covenant to repair and as to improvements); 9. Clause of removal (covenant to yield up possession and quit the premises); 10. Clause of registration; 11. Testing clause.

\(^4\) Long leases, \(i.e.,\) of thirty-one years and upwards, and assignments thereof, may, since 1857, be registered in the register of sasines, and priority of title is regulated by the date of the registration. See 20 & 21 Vic. c. 26. As regards other leases no registration is necessary.
379. Lease must be for term certain.—A lease for years must have some definite termination.\(^a\) If a lease is made for years, but not specifying how many years, the lease will be good for two years certain, because for more there is no certainty, and for less there can be no sense in the words.\(^b\)

A lease for a term, however long, if the term is certain, is as good against purchasers of the inheritance as for a short term.

Though there must be some definite termination of the lease, yet the lessor may covenant for perpetual renewal of the lease.\(^c\)

380. Entry of lessee.—In leases for years, livery of seisin was never necessary; but an actual entry by the tenant is necessary to vest the estate in the lessee, for to many purposes he is not a tenant for years till he enters.\(^3\) On entry his title is complete.

381. Lease as a mortgage.—Leases are sometimes granted by way of mortgage under a condition to be void on payment of the purchase money; and these leases are good against\(^4\) purchasers of the inheritance.

382. Underlease to mortgagee.—Leases are often mortgaged either

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\(^a\) Bac. Abr. "Leases."
\(^b\) Bishop of Bath’s case, 6 Rep. 35; Fitzmaurice v. Bayley, 6 E. & B. 868.
\(^c\) Hare v. Burgess, 4 K. & J. 45; Copper Mining Co. v. Beach, 13 Beav. 478; Smythe v. Nangle, 7 C. & F. 405.

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\(^1\) Contra; the lease, though having no ish or definite termination, as where it is expressed to be "without ish" or "for ever," will bind the landlord and his heirs; Carruthers v. Irvine, M. 15,195; Bell’s Pr. § 1194; but it will not bind singular successors (purchasers) without notice. 2 Bell’s Ill. 178-9. Where the lease has no definite termination, it is construed as a lease for one year, unless the words imply a longer period; and in the latter case it is construed as a lease for the most limited term the words admit of. But there is no clear rule on the subject. See Bell’s Com. by Shaw, 873; Bell’s Pr. § 1194; Ersk. 2, 6, 24.

\(^2\) Contra; leases of a definite term, but with a renewal from term to term, are not effectual against singular successors. See last note.

\(^3\) The stat. 1449, c. 17, treating possession as equivalent to sasine, conferred on tenants in possession a real right. Ersk. 2, 6, 25.

\(^4\) Contra; leases made to depend, as regards their duration, on the payment of a debt, are not valid against singular successors, because the termination of the lease is uncertain. Bell’s Pr. § 1194; Stair 2, 9, 28; Ersk. 2, 6, 24; 2 Bell’s Ill. 179. See next note.
by the tenant granting an assignment or an underlease to the mortgagee, usually the latter.\footnote{1}

383. **Creditors taking lease in execution.**—Where there is a covenant not to let or assign, this does not prevent creditors of the lessee taking the lease in execution.\footnote{b} So it does not prevent\footnote{2} the assignees of a bankrupt lessee from taking the lease. To do these things effectually, there must be declared an express proviso of re-entry on the tenant becoming bankrupt,\footnote{c} or on the term being taken in execution.\footnote{d} But when the tenant becomes a bankrupt, and there is no such proviso of re-entry in the lease, the assignees may elect whether they will accept or decline the lease.\footnote{3}

384. **Surrender of lease.**—A surrender of the lease or term, if

\footnote{\textit{a} Williams v. Bosanquet, 1 B. & B. 288; \textit{b} Doe d. Mitchenson v. Curter, 8 T. R. 57; \textit{c} Wadham v. Marlow, 1 H. Bl. 438n; \textit{d} R. v. Topping, M'Cl and Y. 544; \textit{e} Croft v. Lamley, 6 H. L. C. 672; \textit{f} 2 Chitt. 600; \textit{g} 12 & 13 Vic. c. 106, § 14.}

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\footnote{1 It was considered difficult to do this (Hunter, L. & T. 493; Bell's Pr. § 1212), because it allowed a latent right, which is odious to the law. See \textit{Brock v. Cabell}, 3 W. S. 75; 5 W. S. 476; 2 Bell's Ill. 184. But now this may be done as to long leases above thirty-one years, by registration under the Act, 20 & 21 Vic. c. 26, § 4, 6, and if the payment of interest is six months in arrear, the creditor or mortgagee may petition the sheriff for authority to enter into possession of the lands.

\footnote{2 Contra; an express exclusion of assignees and subtenants (in agricultural leases the exclusion is implied) effectually excludes creditors from adjudging the lease. Ersk. 2, 6, 31; Eliot, M. 10,334; M. 15,307; 2 Bell's Ill. 186; \textit{Borrows v. Colquhoun}, 26 Sc. Jur. 641; 1 Macq. 691. But creditors may insist on the tenant granting an assignation or sublease, taking the chance of the landlord objecting, unless the exclusion is fortified by an irritancy of the tenant's right.

\footnote{3 If the tenant is sequestrated, his trustee takes the lease so far as the tenant could convey. 19 & 20 Vic. c. 79, § 102. But the creditors cannot force him to give up the lease where assignees and sub-tenants are excluded; they can only have execution against his person and his crops, etc. See \textit{Kirkland v. Wilson}, 6 W. S. 340; \textit{Strathmore v. Kirkaldy}, 15 D. B. M. 752. And the bankrupt-tenant, not himself in possession, cannot appoint a manager to possess and account to the creditors; for this is an implied assignation. \textit{Monro v. Miller}, 11th Dec. 1811, F. C.; \textit{Sydersef v. Todd}, 8th Mar. 1814, F. C. The lease should contain a declaration of forfeiture on such contingencies clearly expressed. \textit{Moncreiff v. Hay}, 5 D. B. M. 249; \textit{Young v. Gerrard}, 6 D. B. M. 347; Bell's Com. by Shaw, 900-1.}
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exceeding three years, must, since 1845, be made by deed; but there are acts which amount to an implied surrender, or surrender by operation of law, or by mutual consent.

385. Building leases.—In cities and large towns it is a common practice for builders and others to take building leases, which are generally for a term of ninety-nine years. At the expiration of the lease, the houses built become the absolute property of the landlord or reversioner.

386. Building on another’s ground.—Independently of the relation of landlord and tenant, if a stranger build upon another’s ground, though acting bona fide, the building becomes ipso facto the property of the owner of the land, and the stranger has no claim at law or equity either for the materials or their value. But if the owner of the land stood by and saw it done, a court of equity would give him no assistance until he did equity by paying for the materials.

387. Lease belongs to executor.—On the tenant’s death, the lease goes to the executor, and not to the heir-at-law.

388. Implied right to assign and sublet.—Where there is no covenant or agreement not to let or assign, the lessee may freely assign or sublet, whether the premises be a house in town or a farm in the country. But a lease very often contains a covenant on the part of the tenant, either not to assign, or not to assign without the

\[ a \] 8 & 9 Vic. c. 106, § 3.
\[ b \] D. Leeds v. Amherst, 2 Phill. 123; Rock.
\[ d \] Canal Co. v. King, 2 Sim. N. S. 78; 16 Beav. 632.

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1 The renunciation must generally be by writing (Bell’s Pr. § 1265; Ersk. 2, 6, 44), and after the term has ceased, it may be proved by the oath of party. 2 Bell’s Ill. 214.

2 For such purposes the builder generally takes a feu (hence often called building feus), which is an estate of inheritance; and the price, either in whole or part, assumes the shape of an annual feu-duty.

3 Contra; the owner of the ground is liable, in such a case, for the value of the materials, at least so far as he is lucratus. This is said to be on the doctrine of recompense. Ersk. 2, 1, 15; 3, 1, 11; Bell’s Pr. § 937; Innes v. D. Gordon, 4 W. S. 305. See also post, § 394 n.

4 Contra; the lease is heritable and goes to the heir, even though there is no express destination to the heir. Bell’s Pr. § 1219.

5 Contra; in agricultural leases of ordinary duration, i.e., nineteen years, there is an implied delectus persona, and the tenant cannot assign or sublet, unless there is an express power to do so. Bell’s Pr. § 1216; 2 Bell’s Ill. 186; E. Glasgow v. Hamilton, 13 D. B. M. 1290.
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consent of the lessor. A covenant against assigning does not include a covenant against subletting.\footnote{1}

389. \textit{Implied covenant to stock the farm, etc.}—There is, in the absence of express agreement, no implied obligation on the tenant to put stock on the farm, or furniture in the house;\footnote{2} but he is bound to cultivate the farm according to the custom of the country. There is also sometimes a covenant to reside on the premises.

390. \textit{Taxes, rates, or assessments.}—As a general rule, the tenant or occupier of the premises is primarily liable to bear all public impositions, whether they be parliamentary taxes or poor rates, paving, lighting, watching, water-rates, highway-rates, county and borough rates, or church-rates. The remedy of the collector is primarily against the tenant, in whose hands the land is; but as between the landlord and tenant, the latter may deduct some of these out of the rent, as, for example, the land-tax and property-tax.

There is no tax or rate in respect of parochial schools.\footnote{3}

The poor's-rate falls in general entirely on the tenant or occupier, being not a tax on land, but a personal charge in respect of the occupation of the land.\footnote{4} But questions of nicety often arise as to who is an occupier of land in this sense.

Church-rates, \textit{i.e.}, rates made for the repair of the parish church, are payable by the occupier,\footnote{5} and not by the landlord.

\footnote{1} \textit{Cruso v. Bugby}, 3 Wils. 235; 2 W. Bl. 43 Eliz. c. 2; \textit{Rowls v. Gells}, Cwmp. 452, 776.
\footnote{2} 43 Eliz. c. 2; \textit{Rowls v. Gells}, Cwmp. 452, 776.
\footnote{3} \textit{Cruso v. Bugby}, 3 Wils. 235; 2 W. Bl. 43 Eliz. c. 2; \textit{Rowls v. Gells}, Cwmp. 452, 776.
\footnote{5} \textit{Cruso v. Bugby}, 3 Wils. 235; 2 W. Bl. 43 Eliz. c. 2; \textit{Rowls v. Gells}, Cwmp. 452, 776.

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\footnote{1} The same. 2 Bell's Ill. 186.
\footnote{2} \textit{Contra}; the tenant of a farm is impliedly bound to stock the farm properly. Bell's Pr. § 1257, 1273; 2 Bell's Ill. 191; \textit{Baxter v. Paterson}, 5 D. B. M. 1074. If the tenant do not enter on the farm and stock it, he can be removed on application to the sheriff. \textit{Tait v. Gordon}, 6 S. D. 1055; \textit{McKye v. Nabong}, M. 6214. So the tenant of a house is impliedly bound to furnish it. \textit{Thompson}, 12 S. D. 557.
\footnote{3} \textit{Contra}; the tenant pays the tax for the parochial schools in the first instance, but deducts half thereof from the rent. Act of Privy C. 10th Dec. 1616; Kames' Stat. Law, 457; 43 Geo. Ill. c. 54; 8 & 9 Vic. c. 40.
\footnote{4} \textit{Contra}; it is in the power of the parochial board to levy one half on owners, and the other half on occupiers, or, instead thereof, to tax the whole inhabitants according to their means and substance. 8 & 9 Vic. c. 83. And see \textit{post}, "Poor."
\footnote{5} \textit{Contra}; the expense of repairing the church falls on the owners or heritors. Ersk. 2, 10, 63; see \textit{post}, "Church."
391. As to repairs.—In general, the burden of ordinary repairs, except keeping the premises wind and water tight, is, at common law, thrown on the tenant. The landlord of a house does not impliedly covenant that it is reasonably fit for habitation or that it will last during the term of the lease. And if the landlord is to execute the repairs, there is no implied condition that the tenant may quit if they are not done. In husbandry repairs, in the absence of special agreement, the tenant is bound only to keep in repair the dwelling-house, and not the outbuildings, homesteads, and other erections on the farm, unless it is the custom of the district to do so.

392. Cultivation.—In the absence of special agreement, the tenant is bound only to cultivate according to the custom of the locality, which is implied in every lease.

393. Fences.—It is the duty of the occupier or tenant, and not of the landlord, to repair the fences.

394. Improvements.—Where a tenant improves or builds on the

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3 Hart v. Windsor, 12 M. & W. 63.
5 Surplice v. Farnsworth, 7 M. & Gr. 576.

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1 It seems the same. Bell’s Pr. § 1254; 2 Bell’s Ill. 202.
2 Contra; it is implied by the contract, that the subject will be made effectual to the tenant, or fit for its purpose. Ersk. 2, 6, 39; 2 Bell’s Ill. 200. The landlord is said to be bound at common law to put the houses and fences into due repair. 5 Br. Sup. 515; Hailes, 689; Harrold v. Pollexfen, 6 D. B. M. 1103.
3 Contra; the tenant may himself do the repairs and sue the landlord for the expense; Baird v. Inglis, 2 Br. Sup. 562; or the tenant may retain the rent till paid. 1 Bell’s Com. by Shaw, 878.
4 The obligation of the tenant extends to out-houses also; Ersk. 2, 6, 39; Bell’s Pr. § 1254.
6 The same, but not to repair fences erected by himself or by the landlord after the tenant’s entry. Thomson v. Oliphant, 1 S. D. 184.
leasehold premises, he has, at the termination of the lease, no claim for the value of such improvements, independently of special agreement. But anything like acquiescence of the landlord will entitle the tenant to reimbursement.\(^a\)

395. Fish, game, hares, rabbits, etc.—In the absence of stipulation, the tenant has the right to fish for all kinds of fish in the streams of his farm, in every way not prohibited by statute.\(^b\)

The right to kill game is not an implied exception in a lease, and therefore the tenant has the exclusive\(^c\) right (if there is no express stipulation) to the game, a trifling exception to this rule by statute having now expired.\(^d\) So the tenant, if otherwise entitled, may kill hares and rabbits without a license.\(^e\) A tenant cannot be convicted of poaching on his own farm by night.\(^f\) He has no right of action against his landlord for damage caused by excessive preserving of game,\(^g\) unless the latter acted for mere annoyance.

The tenant may kill rabbits, though not having the right to game, and may give leave to a stranger to do so; yet such stranger,

\(^a\) Thornton v. Ramsden, 10 L. T. N. S. 481. 
\(^b\) Paterson’s Game L. 11. 
\(^c\) 11 & 12 Vic. c. 29; 23 & 24 Vic. c. 90. 
\(^d\) Paterson’s Fish. L. 67. 
\(^e\) Paterson’s Game L. 92.

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1 Contra; if the lease has been determined prematurely and abruptly. Morton, I S. D. 322; Thomson v. Fowler, 21 D. B. M. 453.

2 Contra as regards salmon-fishing by net, and higher rights. But the tenant has the right to angle for all fish; Paterson’s Fish. L. 213, 223; though, it is said, not to fish with a net; D. Richmond, 33 Sc. Jur. 215. Sed quere.

3 Contra; there is an implied reservation in all leases of the right of sporting and hunting, and therefore a tenant has no right except by stipulation. M. 4991; Bell’s Pr. § 953; Ersk. 2, 6, 6; 2 Bell’s Ill. 116. But he has a right to recover surface damages; Graham v. Mackenzie, Hume’s Dec. 691.

4 The same, 11 & 12 Vic. c. 30; 23 & 24 Vic. c. 90.

5 Contra; he may; Smith v. Young, 28 Sc. Jur. 335.

6 Contra; a tenant can sue his landlord for damage caused by excessive preserving, and it seems even obtain an interdict; Wemyss v. Wilson; Wemyss v. Guilard, 10 D. B. M. 194, 204. But the tenant cannot use men, dogs, or apparatus, to scare the game; Ibid.
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if not bona fide employed by the tenant, seems to be liable to a penalty at the suit of the landlord, who has a right to the game.¹

396. Tenant’s right to estovers.—The tenant (except a tenant at will), has an implied right to reasonable estovers, viz., (1.) House-bote or wood to build, repair, or burn in his house; (2.) Plough-bote and cart-bote, or wood to make and repair his instruments of husbandry, as ploughs, carts, etc.; and, (3.) Hay-bote or hedge bote, wood to repair hedges or fences.² He requires no leave or assignment of the lessor to take these from the land,³ and in order to restrain him, there must be an express covenant to the contrary, as there usually is.⁴

Tenant’s right to mines.—The tenant may dig and work for his own use all mines which are open, unless restrained by express words in the lease; but it is waste, if he open mines without express power.⁵ And the landlord has no right to enter on the premises to open mines, unless he has reserved power in the lease to do so.⁶

397. Emblements, straw and dung.—If the lease is for a definite term of years, or from year to year, and there is no special agreement, and the tenant sow the ground, but the term ceases before the crop is ripe, he is not⁷ entitled to the crop, for that is part of the

¹ & 2 W. IV. c. 32, § 7, 30; Spicer v. Barnard, Q. B. 4 May 1859.
² Fitz. N. B. 59 M.; 1 Inst. 41.
⁴ Co. Litt. 122 a; 2 Bl. Com. 55.
⁵ 1 Contra; the tenant himself may kill rabbits without hindrance of the landlord, Moncreiff v. Arnott, 6 S. D. 530; but it seems, a stranger with the tenant’s leave cannot do so, the privilege being personal. Porter v. Stewart, 30 Sc. Jur. 518; Kennedy v. E. Selkirk, Shaw’s Just. C. 463. But see 2 & 3 W. IV. c. 68, § 1.
⁶ 2 Contra; the presumption is the reverse. All woods are impliedly reserved (i.e., excepted) from the lease, Ersk. 2, 6, 22; Bell’s Pr. § 1226. Hence the lands must be let expressly with woods to authorise the tenant to help himself in this way; M. 15252; but he is entitled to thinnings, twigs, etc. 2 Bell’s Ill. 193.
⁷ 3 Contra; the mines are impliedly reserved (excepted), whether they have been opened or not; and the landlord is entitled to enter on the land and open mines, paying the tenant for any surface damages caused thereby. Ersk. 2, 6, 22. M. 15,253. M. 15,267.
⁸ 4 Contra; he is entitled, unless the lease expressly exclude his right; the principle being—messis sementem sequitur. Ersk. 2, 1, 26; 2 Bell’s Ill. 213; M. Tweeddale v. Murray, 6 Bell’s Ap. 125; Alexander v. Gillon, 9 D. B. M. 524.
soil, and belongs to the reversioner. But it is otherwise where the term ends on some uncertain event, and where the tenant is a tenant at will. And if there is a custom of the district, it will prevail to give the tenant the average growing crop.

So the custom of the district regulates the right of the tenant to straw, hay, or dung; and in general it requires express words to exclude the custom.  

398. Rent, at what time payable.—Rent is generally made payable by four quarterly payments on the usual quarter days, viz, Lady Day, March 25; Midsummer Day, June 24; Michaelmas Day, September 29; and Christmas Day, 25th December. In such cases the quarter’s rent is due at the end of each quarter.

399. Where nothing is said as to the time of payment, the rent is payable once a year, and nothing is due until the end of the year.

400. Rent in advance.—Rent is sometimes made payable in advance; but if not expressly so made payable, it is only payable at the

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The common law regulates the respective rights and obligations of the parties in such a case. Bell’s Com. by Shaw, 893. A special stipulation in the lease will also overrule any local custom. Gordon v. Robertson, 2 W. S. 115; Berry, 3 W. S. 417. Where a landlord agrees to stock a farm, and the tenant to give up similar stock at the end of the term, this is called steelbow, and the right to manure depends on this principle. Bell’s Pr. § 1264.

Rent is generally made payable at two terms, being the legal terms, viz., Whitsunday, 15th May, and Martinmas, 11th November; Candlemas, 2d February, and Lammas, 1st August, are conventional terms frequently agreed upon.

Contra; twice a year, viz., Whitsunday and Martinmas. But the first half year’s rent is not due till the Whitsunday after entry, i.e., at the end of one year, and the second half year’s rent not till the Martinmas following, i.e., a year and a half after entry. In the absence of express agreement, the rent is calculated from the time of entry; and the time of entry as to houses and grass is Whitsunday, and the time of entry to arable land is Martinmas.
expiration of each year, 1 half-year, or quarter-year, according to the nature of the tenancy.

401. Premium given by lessee.—A lease is often granted in consideration of an annual rent, and of a gross sum of money or premium paid in cash. 2 It is also common, in leases renewable by corporations, to stipulate for a fine or forehand rent payable on each renewal. a

402. Rent, etc., in case of fire.—In general, where the house or premises are burnt down by accidental fire, or destroyed by a storm or flood, the tenant is nevertheless bound 3 to pay rent, for the rent is said to issue out of the land, and to be due irrespective of the state of the buildings thereon. b He is bound to pay rent, if he expressly covenanted to pay rent, no exception being made as to non-liability in such an event. c And he is equally bound under a tenancy by written agreement not under seal. d The tenant can only protect himself by an express proviso for suspension of rent in case of the destruction of the premises.

A covenant on the part of the tenant to repair includes a covenant on his part to rebuild in the event of accidental fire. e 4

And where there is no contract on the part of the landlord to

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a Woodfall, L. & T. 311 (7th ed.)  
b Arden v. Pullen, 10 M. & W. 321.  
c Monk v. Cooper, 2 Str. 786; Weigall v.  
   Baker v. Holtzapfel, 4 Taunt. 45; Izon  
   v. Gorton, 7 Sc. 537.  
   Bullock v. Domatt, 6 T. R. 650; Digby v.  
   Waters, 6 T. R. 488.  
   Atkinson, 4 Camp. 275.

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1 Contra; rent, where nothing is said, is payable at Whitsunday 15th May, and Martinmas 11th November. But rent may be stipulated forehand (i.e., payable in advance); or may be postponed, called backhand rent. In leases of farms the rent is frequently postponed until after the crop is gathered.

2 The premium is called a grassum; and in deeds of entail the clause against alienation is held to strike at long leases made by the heir of entail in possession, part of the consideration for which is a grassum, as this may be made a means of prejudicing the substitute heirs of entail. See Queensberry Leases, 1 Bligh, 339; 5 Dow, 297; 2 Dow, 90; 2 Sh. Ap. 54; 2 W. S. 265; 4 W. S. 254.

3 Contra; in all cases of accidental and complete destruction to the subject, whether by fire or storm, the liability for rent is extinguished. Ersk. 2, 6, 41; Murdoch v. Fullerton, 7 S. D. 404; 2 Bell's Ill. 181. See also next two notes.

rebuild, the landlord is not bound to do so in the case of accidental fire.\textsuperscript{a} And he may recover the rent from the tenant, even though he expressly covenanted to insure the premises, and has already received the insurance money.\textsuperscript{b} In such cases it is difficult for a tenant to know how to protect himself;\textsuperscript{1} but the better opinion seems to be, that he ought to tender an abandonment of the lease, if the landlord refuse or neglect to rebuild.\textsuperscript{c}

403. Set-off against rent.—In general, no payments or damages made or sustained by the tenant can be set off against a claim of rent due to the landlord.\textsuperscript{2} Thus a tenant cannot set up as a defence to an action for rent, that the landlord has not performed his covenants, his only remedy being an action for breach of such covenant, or, in some cases, a suit in equity for specific performance. But the tenant can, in an action for rent, set off sums paid as ground-rent,\textsuperscript{d} and he is authorised by statute to set off payments for land-tax, property-tax, and when he has paid money to prevent his being ousted.\textsuperscript{e}

404. Security for future rent.—Where a year's rent is in arrear, and there is in the lease no proviso of forfeiture for non-payment, it

\textsuperscript{a} Arden v. Pullen, 10 M. & W. 321; Per L. Mansfield, Finder v. Ainslie, 1 T.R. 312.
\textsuperscript{b} Loftis v. Dennis, Q. B. 31 Jan. 1859.
\textsuperscript{c} Ibid.
\textsuperscript{d} Doe v. Hare, 2 Cr. & M. 145.
\textsuperscript{e} Woodfall, L. & T. 336 (7th ed.)

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\textsuperscript{1} Contra; the tenant is not liable to pay rent if the destruction is complete; but if partial and temporary, it seems he will continue liable pro tanto, and if no deduction of rent be allowed by the landlord, he may renounce the lease. M. 15,172. See 2 Bell's Ill. 182; Sinclair v. Mossend Iron Co., 17 D. B. M. 258. If partial, but not temporary, he may renounce the lease. Boyne v. Walker, 3 Dow, 233; 6 Paton, 217. If the destruction is caused by a public calamity, it is said the landlord and tenant bear each a half of the loss, Ersk. 2, 6, 41; M. 10,120; but if caused by a change of the law, the whole risk is borne by the tenant. Holliday v. Scott, 8 S. D. 831.

\textsuperscript{2} Contra; the tenant can retain the rent, provided his claim is liquid (\textit{i.e.}, a liquidated sum), 2 Bell's Ill. 194, 204; Sprott v. Morison, 15 D. B. M. 376; Dods v. Fortune, 16 D. B. M. 478; Loundes v. Buchanan, 17 D. B. M. 63. But this right is not valid against singular successors (\textit{i.e.}, purchasers of the reversion). The tenant has also a defence in case of accidental fire. See ante, § 402 n.
is not competent for any court to compel the tenant to give security\(^1\) for five years' rent, or any rent to become due afterwards.

405. Action for rent not privileged.—Where rent is due, and the landlord brings an action to recover the same, such action is not privileged or summary,\(^2\) but proceeds by steps in the usual way from summons to judgment and execution.

406. Landlord’s power of distress.—A landlord, over and above his remedy by action against the tenant for rent, has a summary remedy by distaining the tenant’s goods.

407. When distress may be levied.—The right of distress can only be enforced after the rent is due; but where the rent is by the lease reserved payable in advance, then the rent is due at the commencement of the year or term. Thus, in a tenancy from year to year, where it is not agreed that the rent is to be paid quarterly or half-yearly, the rent is payable once a year, and the landlord cannot distress until the end of the year. The distress cannot be made the same day on which the rent becomes due, for the rent is not due till the last minute of the natural day.\(^a\) Before the distress is made, the goods of the tenant are in no way affected by the right of the landlord, and the tenant can sell or remove them without let or hindrance from the landlord any day before the last day on which the rent is due, i.e., during the currency of the year, half-year, or quarter, as the case may be.\(^3\)

\(^a\) *Dowp v. Mayo*, 1 Saund. 287; 2 Salk. 578.

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\(^1\) *Contra*; where a year's rent is due, the sheriff may compel payment, with caution, for the next five years' rent, and otherwise to remove. Act of Sed. 14th Dec. 1756; Bell's Pr. § 1250.

\(^2\) *Contra*; all leases may contain a clause of registration for execution, and usually do so, and if the lease has been registered, diligence may be had without the necessity of any action, (i.e., execution issues, as if the lease contained a warrant of attorney to confess judgment). Bell's Pr. § 1232.

\(^3\) *Contra*; the hypothec (resembling a maritime lien in E., which subsists without possession), attaches upon the tenant’s goods before the rent is due. The hypothec is made effectual by sequestration. But the goods being subject to the hypothec from the first day of the tenancy, the landlord can insist that the goods shall remain on the premises till the current rent is paid, at least enough of the goods to pay the full rent, or until security is given. Ersk. 2, 6, 56, *et seq.*; 2 Bell's Ill. 196; *Preston v. Gregor*, 7 D. B. M. 942. And in the case of corn grown on a farm, if
408. What rent may be distrained for.—The landlord may distrain the goods for rent due for any number of years not exceeding six, but he cannot distrain for the current year's rent until it has become due.a

There is not only no power of distraining for rent current, and not yet due,b but there is no mode of compelling security from the tenant for the same.

409. What goods may be distrained.—The landlord may in general distrain all the goods and chattels upon the premises, whether they are the property of the tenant or a stranger.c

In the case of farms, the growing crops could not be distrained at common law;d but they can now be so by statute.e

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a 3 & 4 W. IV. c. 27, § 42; Humphry v.  
b 2 W. III. c. 5, § 3; 11 Geo. II. c. 19; 56 Gery, 7 C. B. 567; Manning v. Phelps,  
Geo. III. c. 50, § 6.  
10 Exch. 59.

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the rent is unpaid, the landlord can follow and recover the corn, even in the hands of bona fide purchasers, unless it has been sold in bulk in public market. E. Dalhousie v. Dunlop, 4 W. S. 420.

1 Contra. Bell's Pr. § 1239. The rule is, that the hypothec extends to the crop for the rent of the year whereof it is the produce, and attaches on the crop so long as it is in the possession of the tenant. Bell's Com. by Shaw, 884; Horn v. Maclean, 8 S. D. 454; M'Claymont v. Cathcart, 10 D. B. M. 1489. And the sequestration of such crop may be obtained after the lapse of several years, seven years having been held not to be too long. Hay v. Keith, M. 6188 et seq. There is, however, no hypothec over the crop for the rent of any previous or subsequent year. Cattle, and stock, and furniture, are subject to the hypothec for each year's rent successively; but the right expires, if not made effectual by sequestration, within three months after the last term for the payment of the rent. Ibid.; Dick v. Lands, M. 6243; 2 Bell's Ill. 197; Hunter v. North of England Bank, 12 D. B. M. 65; Hunter's L. & T. 370 (2d ed.)

2 Contra; though sequestration cannot be had, so as to sell the goods, before the rent is due, yet the landlord can get sequestration in security, i.e., until the tenant find caution. Bell's Com. by Shaw, 885; 16 & 17 Vic. c. 80, § 27. And see ante, § 407 n.

3 Contra; the hypothec of the landlord does not attach upon a stranger's goods (Bell's Pr. § 1276), except they consist of furniture hired or lent in town houses. The rule is, that the landlord's hypothec extends to all goods inventa et illata, with the exceptions just stated and in the notes following.

4 This was so at common law. See Brims v. Ferrier, 31st May 1815, F. C.
In leases of land and farms, the household furniture in the tenant’s house can always be distrained, as well as anything else on the demised premises.

410. Goods in use, apparel, etc.—The property, it is said, must not be in actual use, for the distress might in that case lead to a breach of the peace. Thus a horse, on which the tenant is riding, cannot be taken, nor the clothes off the tenant’s back; but if the wearing apparel is not actually in use, it can be distrained.

So there is an exception in favour of the tools and utensils of trade, and beasts of the plough on a farm, which cannot be distrained, if there are other goods sufficient for a distress.

411. Goods of strangers.—In the case of farms, the cattle of third parties, though put there by way of agisting, i.e., to graze, or otherwise, may be distrained by the landlord. So cattle, which have strayed from other parts on to the tenant’s lands, owing to the negligence of their owner, may be distrained by the tenant’s landlord.

Hired furniture is liable to be distrained, as well as furniture lent to the tenant.

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b Bisset v. Caldwell, Peake 36; 1 Esp. 206.
c Gordon v. Falkner, 4 T. R. 565; Wood v. Clarke, 1 Cr. & J. 484; 51 Hen. III.
d Roll. Abr. 669; see 2 Wms. Saund. 7.
e Gib. Distr. 45; Perk v. Longueville, 2 Saund. 289.

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1 It is said to be doubtful, whether the furniture of a tenant of a farm is subject to the hypothec. M. 6205; Goldie, 1 D. B. M. 426; Hunter, L. & T. 355; 2 Bell’s Ill. 195; M’Clymont v. Caldheart, 10 D. B. M. 1489.

2 This is said to be doubtful. More’s Stair, notes 83; M. 6243, 4.

3 This is said to be doubtful. Calend. v. Campbell, M. 6244; Hunter, L. & T., 352, 364; 2 Bell’s Ill. 195.


5 Contra; the hypothec does not extend over the cattle of others put into the fields to graze. Brown v. Sinclair, M. 6205; see ante, § 409 n.

6 Contra. See last note, and ante, § 409 n, as to the general rule.

7 The hypothec extends to hired furniture and to furniture on gratuitous loan. Stewart v. Bell, 18 F. C. Apx.; Wilson v. Spankie, 17th Dec. 1813, F. C.; Pearson v. Robertson, 6th June 1822, F. C. But it seems otherwise, if the furniture lent or deposited is detained against the owner’s will. Cowan v. Perry, 2 Bell’s Ill. 215; Jeffrey v. Carrick, 15 S. D. 43.
But though the goods of third parties in general may be distrained, there is an exception in favour of trade, as where materials have been sent for a specific temporary purpose, to be worked upon in the way of trade, as to a tailor’s, weaver’s, etc. So goods of a principal in the hands of his factor for sale, or in the hands of an auctioneer.

So the goods of a guest at an inn, provided he is a temporary guest, and not an underrenter, are privileged from a distress by the landlord of the innkeeper. And horses and carriages standing at livery may be distrained.

412. Landlord preferred to execution creditor.—Where the goods of a tenant are taken in execution by a creditor, the landlord is entitled to be first paid for one year’s rent, if already due, but no more, before the proceeds of the goods sold are paid over by the sheriff to the creditor. Hence if several years’ rent is due, the landlord must proceed for all except one year’s rent, like an ordinary creditor, and has no preference over the execution creditor, but is postponed to him quaod all the goods seized by the sheriff in execution. But where the tenancy is weekly, the landlord is only entitled to four weeks’ rent out of the proceeds of the execution; and if the tenancy is for any other term less than a year, then the landlord’s preferable claim is not to exceed the arrears for four such terms; or if the execution is from a county court, two such terms, the whole not

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a Gibson v. Iveson, 3 Q. B. 39; Parsons v. Gingall, 4 C. B. 545.
b Gilman v. Elton, 2 B. & B. 75.
c Brown v. Arundell, 10 C. B. 54; Williams v. Holmes, 8 Exch. 861.
e Francis v. Wyatt, 1 W. Bl. 483; Parsons v. Gingall, 4 C. B. 545.

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1 The same; though not as an exception to a general rule. See previous notes. Ersk. 2, 6, 64; Bell’s Com. by Shaw, 883.
2 The effects of travellers in an inn are not subject to the hypothec of the innkeeper’s landlord, whether he is a temporary guest or not. Bell’s Com. by Shaw, 883.
3 Contra. Bell’s Com. by Shaw, 166.
4 So the landlord is entitled to this preference for the time the hypothec exists, which is only for one year in general. See ante, § 408 n.
5 No such restriction exists, but see last note.
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exceeding the rent for one year.\(^a\) The landlord is also entitled to
distain on a bankrupt's estate for one year's rent.\(^b\)

413. Removal of goods to avoid distress.—The landlord's power
to distain is lost by the removal of the goods from the premises, and
the goods can always be removed before the day on which the rent
becomes due.\(^1\) But if they have been removed fraudulently to avoid
a distress for rent which has become already due, the landlord may
within thirty days follow them, and seize the same wherever found,
unless they are in the hands of a bona fide purchaser without notice
of the fraud.\(^c\) And if the goods have been so fraudulently removed
on, but not before the day, on which the rent became due, the goods
may be followed.\(^d\)

414. What debts to be first paid out of distress.—Where a land-
lord has distained the goods of a deceased tenant, he is not bound
to pay out of the proceeds the claim of the medical attendant, nor
the funeral expenses \(^3\) of such tenant.

Nor in any case is he bound to pay the wages of any servant \(^4\)
of such deceased tenant.

Nor is the landlord bound to pay out of the proceeds of the
distress any rent due to the lord of the manor or lord of the fee, if
any.\(^5\)

415. The distress, how made.—The distress is made by the

\(^a\) 7 & 8 Vic. c. 96, § 67; 9 & 10 Vic. c. 95, 11 Geo. II. c. 19, § 1, 2, 7.
\(^b\) § 107.
\(^c\) Dibble v. Bowater, 2 E. & B. 564.

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\(^1\) Contra; the crop of a farm cannot be removed, if the rent is unpaid;
if sold, the sale is void, unless the crop was sold in bulk in public market.
Bell's Pr. § 1242; Dunlop v. E. Dalhousie, 4 W. S. 420.

\(^2\) The goods can be followed not only where the rent of the current
year is due, but before it is due. See ante, § 407 n.

\(^3\) Contra. These are called death-bed and funeral expenses, and are
privileged. Bell's Pr. § 1241; Drysdale v. Kennedy, 14 S. D. 159;
Ersk. 2, 6, 60.

\(^4\) Contra; farm servants, but not other servants, have a preference for
the current term's or year's wages. Bell's Pr. § 1251; Ersk. 3, 9, 43;

\(^5\) Contra. The superior's feu-duty, being the subject of the superior's
hypothec, are preferred to the landlord's rent. Ersk. 2, 6, 63; Laurie v.
Yuille, 2 S. D. 155.
landlord in person or more usually by his bailiff, either of whom
seizes part of the goods, declaring this to be done in name of the
whole. There must be a clear intention expressed on the part of
the landlord in such cases to constitute a distress. After seizure has
been made, the landlord or his bailiff must make an inventory of as
many goods as are deemed sufficient to cover the rent in arrear, and
charges. After inventory, a notice in writing must be served on
the tenant, stating what has been done, accompanied with a copy of
the inventory. The goods are then generally removed, and the
notice must inform the tenant where the goods are removed to.
The notice also states that, if the rent in arrear is not paid in five
days, the goods will be appraised and sold. Two sworn appraisers
then value the goods, and may sell them either by private or public
sale. 1 During the five days the tenant may reprieve the goods, if
he dispute the validity of the seizure, i.e., he may bring an action of
replevin, and on giving security the goods are re-delivered to him, on
pledge to restore them if the action go against him.

When a bailiff is appointed by the landlord to effect the distress,
he is appointed by a writing, called a warrant of distress, and
though any person in general may be a bailiff 2 for that purpose,
brokers are generally employed, whose charges are restricted, in the
case of small rents not exceeding £20, by the statute 57 Geo. III. c.
93. If the goods are left on the premises, the broker leaves a man in
possession to take charge of them.

416. The landlord cannot make the distress in the night, that
is, after sunset and before sunrise. 3 Before he makes a distress,
he does not require to apply to any judge or court for a warrant

1 Contra; the sequestration is under the authority of the Sheriff, and
consists, in the first instance, in a summary application by the landlord to
the sheriff, who pronounces an interlocutor sequestrating the crop, stocking,
or effects, and grants warrant to the officer to take an inventory, which is
served on the tenant, and afterwards a warrant to sell is obtained, and a
report must be made within fourteen days as to the proceeds realized, and
giving an account of the expenses incurred. 1 Vic. c. 41; Act of Sed.
11th July 1839; 16 & 17 Vic. c. 80, § 27.

2 This duty is done by the officer of the Sheriff Court. See last note.

a 2 W. III. sess. 1, c. 5, § 2; 11 Geo. II. c. 19, § 9.

b Gilb. Distr. 56.
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to enable him to seize and sell the goods; but can seize them or appoint a bailiff to seize them *brevi manu*. 1

The landlord or his bailiff cannot break open the outer door of the tenant’s house in order to make the distress; and no court has power to authorize him to break the outer door. 2 But he may turn the key or lift the latch of the door as other persons do on entering. a

And a stratagem to procure peaceable admission is quite legal and common.

417. *Distress of cattle.*—Where a distress was made upon cattle, they used to be put in a pound overt, to which the owner, at whose risk they were, might go and feed them; but if they were put in a pound covert, i.e. private, the distrainer was bound to feed them. Now in all cases the distrainer is bound to provide the cattle with food and water, or any person may do so at the expense of the owner. b c And the distrainer must put the cattle in a pound within the county, not more than three miles distant, or he may impound them on the premises. d

418. *Distrainting on sub-lessee.*—Where the tenant or lessee has sub-let the premises, the paramount landlord has the same power to restrain all goods on the premises, whether belonging to his own tenant or the sub-tenant, as if there had been no sub-lease made: and though there was power in the tenant to sub-let, and though the sub-lessee has paid all his rent to the mesne landlord, this is no protection 4 against the distress of the paramount landlord, unless the latter agreed not to restrain the goods. e

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a Ryan v. Shilcock, 7 Exch. 73. c 1 & 2 Ph. & M. c. 12; 11 Geo. II. c. 19.
b 12 & 13 Vic. c. 92, § 5. d Welsh v. Rose, 6 Bing. 638.

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1 *Contra*; the landlord cannot seize the goods *brevi manu*, but the Sheriff, who is the judge ordinary, must grant warrant of sequestration, after due application by petition. Bell’s Pr. § 1245; Miller v. Paterson, 9 S. D. 792; 16 & 17 Vic. c. 80, § 27; see ante, § 415 n.

2 The officer of the court executes the warrant, and the court has power to authorize the outer door and lockfast places to be broken open if necessary. See Scott v. Letham, 5 Bell’s Ap. 126.

3 The practice of impounding is unnecessary and incompetent. See ante, § 415 n.

4 *Contra*; the landlord’s hypothece only extends to the sub-tenant’s goods, where there is no power to sub-let, and the landlord has not acknowledged the sub-tenant; L. Saltoun v. Club, M. 1821; but in other
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So the sub-lessee of part of the premises may be distrained upon for the entire ground rent, unless the rent has been apportioned; and he may often have no remedy against the co-sub-lessees of the other parts, though he has paid off the distress and thereby the whole of the ground rent.\textsuperscript{1}

Where a tenant is entitled to sub-let, he has the same powers of distress over his sub-tenant as his own landlord has over himself.\textsuperscript{2}

419. Liability of sub-lessees and assignees.—An assignment as contra-distinguished from an under-lease parts with the whole term.\textsuperscript{3} Hence if the lessee of a term, say of twenty-one years, lets the land for the whole term, though expressly reserving rent, and a power of re-entry for non-payment, to himself and not to the original lessor, this being, it seems, substantially an assignment, the assignee can sue the original lessor on the covenants of the lease.\textsuperscript{b} In such circumstances, however, if the land had been let to the sub-lessee for twenty-one years wanting one day, it would have been a sub-lease.

There is a privity of estate between the lessor and the sub-lessee, but no privity of contract, unless the covenant is such as to run with the land. Where the lessee assigns his estate, then there is a privity of estate between the lessor and the assignee, but no privity of contract, except as regards covenants running with the land.

The lessee always\textsuperscript{4} continues liable on his express covenants,

\textsuperscript{a} Hunter v. Hunt, 1 C. B. 330.

\textsuperscript{b} Palmer v. Edwards, 1 Doug. 187; but see Pollock v. Stacey, 9 Q. B. 1033.

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Cases the hypothec does not affect the sub-tenant's goods, provided the sub-tenant has paid his rent to the tenant, his own immediate landlord. Blane v. Morrison, M. 6232; Bell's Pr. § 1237; Bannatyne v. Findlay, 2 S. D. 62.

\textsuperscript{1} This is doubtful. Hunter, I. & T. 399; M. 1821; Bell's Com. by Shaw, 881.

\textsuperscript{2} It seems the same. 2 Bell's Ill. 196; Bannatyne v. Findlay, 2 S. D. 62; Stevenson v. Cooper, 1 S. D. 288.

\textsuperscript{3} Contra; the lessee may, if otherwise entitled, sub-let the land for the entire term, without making the sub-lessee an assignee.

\textsuperscript{4} It is said the landlord accepts the assignee and passes from all claim against the cedenet or lessee. Bell's Com. by Shaw, 897. But as a vassal or ground annualler is bound for ever by his express covenant though he has parted with the property (Miller v. Small, 25 Sc. Jur. 334; 1 Macq.
though he has long ceased to hold possession, and has parted with
his whole estate to an assignee who is in possession.\(^a\)

The assignee is bound, only from the date of the assignment, by
the covenants which run with the land, such as the covenant to pay
rent, to repair, etc., and ceases to be bound as to acts arising after
he has assigned to another party.\(^b\) Hence the assignee often re-
assigns the premises to a beggar or a man of straw, to get quit of his
liability on the covenants; and this conduct is, in the absence of
fraud, quite justifiable.\(^c\)

420. **Notice to quit.**—In order to put an end to a lease which
was granted or made for a determinate number of years, it is not\(^1\)
necessary for the landlord to give any notice to quit. The landlord
is entitled to full and complete possession immediately upon the
determination of such tenancy.

421. **Tenant holding over.**—If the tenant hold over, he may be
 treated by the landlord as a tenant from year to year on the terms
of the lease so far as applicable; but no implied new yearly tenancy
is created\(^2\) by the mere fact of the landlord not bringing an eject-
ment. Where it was the tenant who gave a valid notice to quit, and
does not quit, but holds over, he becomes liable for double rent.\(^d,e\)

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\(^a\) Platt on Leases, 352; but it is other-
wise as to an implied covenant to pay
rent, Ibid, 355.

\(^b\) Woodfall, L. & T. 216.

\(^c\) Rowley v. Adams, 4 My. & Cr. 534.

\(^d\) 11 Geo. II. c. 19, § 18.

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345; **Elmslie v. Brown,** 27 Sc. Jur. 346; 2 Macq. 40), there seems to be
no reason, why a lessee should not also be bound on his express obligation,
though he has assigned the premises and ceased to be in possession. This
was the doctrine of Ersk. 2, 6, 34, and Bank. 2, 9, 14, though the court has
departed from it. **Skene v. Greenhill,** 4 S. D. 26; **Laing v. Duff,** 7 D. B.
M. 556.

\(^1\) Contra; one or other party must give warning (Bell’s Pr. § 1265;
Ersk. 2, 6, 35; 2 Bell’s Ill. 211), unless there is a clause dispensing with
warning. **Mackintyre v. Macnab,** 8 S. D. 237; 5 W. S. 299; Hunter,
L. & T. 30. See next note, as to the effect of not giving warning.

\(^2\) This is the common law, the doctrine of tacit relocation being that
the parties impliedly renew their agreement for another year, and so on from
year to year till notice should be duly given. This is the rule, whether the
lease was for a term certain or not. Ersk. 2, 6, 35; Bell’s Pr. § 1265;
Hunter, L. & T. 523; 2 Bell’s Ill. 211; **Mackintyre v. Macnab,** 5 W. S. 299.
But there is no tacit relocation in a lease of pasture fields. **Chirnside v.
Park,** 5 D. B. M. 864.

\(^3\) Contra. See last note.
So where, after due notice given by the landlord, the tenant or any one colluding with him wilfully holds over after the determination of the tenancy, the landlord may at any time afterwards, a demand in writing for possession having been previously served, render the tenant liable for double the yearly value of the lands till delivered.\footnote{4 Geo. H. c. 28, § 1.}

423. **Notice to quit in yearly tenancies.**—A notice to quit is unnecessary, where the tenancy is for a term certain; but is always necessary in a tenancy from year to year, and it seems also in a tenancy from quarter to quarter, month to month, week to week, etc.\footnote{Towne v. Campbell, 3 C. B. 921.}
And even in tenancies for a term certain, where a landlord is bound to repair and refuses to do so, the tenant can only get quit of his tenancy by giving a notice to quit.\footnote{Arden v. Pullen, 10 M. & W. 321; Hart v. Windsor, 12 M. & W. 68.}
Where a tenant takes a farm or house as yearly tenant, and no day is fixed at which the tenancy commences, the year is counted from the day on which he enters; and if he enters on different parts of the premises at different times, the time is calculated from the entry to the principal subject of the demise.\footnote{Doe v. Howard, 11 East, 498; Doe v.}

424. Either party, unless it is expressly agreed to the contrary, must give the other half a year’s notice to quit, such notice expiring at the same day of the year as that on which the tenancy commenced.\footnote{Hughes, 7 M. & W. 139; Doe v. Rhodes, 11 M. & W. 600.}
But it is usual in agreements to reckon the time of

\footnote{Contra. There is no such rule.}

\footnote{Contra; the time of entry, in the absence of special agreement, is counted from next Whitsunday, 15th May, as regards grass and houses; and from Martinmas, 11th November, as regards arable land. Bett v. Murray, 7 D. B. M. 447.}

\footnote{Contra; the warning is forty days before Whitsunday or Martinmas as to grass or arable farms respectively; as to houses in towns and cities, forty days before the time for removal; or it is regulated by local custom. In Edinburgh the custom is to give warning at Candlemas, \textit{i.e.} a three months’ notice; yet, it seems, a shorter warning would suffice. Bell's Pr. § 1278; 2 Bell's Ill. 218; Bell's Com. by Shaw, 890. But now, in all cases where a protracted lease specifies a term of endurance, forty days’ notice before the expiration of such term will authorise a removing, provided the removal or ejection is effected within six weeks after the term has expired. 16 & 17 Vic. c. 80, § 29.}

\footnote{Doe v. Grafton, 18 Q. B. 496.}

\footnote{Right v. Darby, 1 T. R. 169; Gulliver v. Burr, 1 W. Bl. 596; Doe v.}

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entry from one or other of the usual quarter days, viz., Lady Day, Midsummer Day, Michaelmas Day, or Christmas Day. Notice to quit may be waived by the landlord accepting rent afterwards, or giving a second notice, etc.

425. *Action of ejectment.*—In cases where the rent does not exceed £50, the action of ejectment may be brought in the County Court; but in all other cases in the Superior Courts of Law.\(^1\) The action cannot be commenced before the term has expired.\(^2\) The services of John Doe and Richard Roe are not now necessary in this form of action.\(^a\) It is distinguished from other actions by having no pleadings, the service of the writ, calling on the defendant to appear and defend, being sufficient. The appropriate writ of execution, under which the sheriff gives entry to the plaintiff after judgment, is a writ of *habere facias.*

426. *Proviso for re-entry.*—Non-payment of rent is not an implied forfeiture\(^3\) of the lease, nor is it a ground for bringing an ejectment, unless there is an express proviso to that effect, usually called a proviso for re-entry. Where there is such a proviso, whether for non-payment of rent, breach of covenant, or other matter, the lessor has the option of determining the lease or not; and he may waive the forfeiture by receiving rent after the breach, etc.\(^b\)

\(^a\) 15 & 16 Vic. c. 75. \(^b\) Reid v. Parsons, 2 Chit. 247; Doe d. Lumley, 6 H. L. Cas. 672.

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**IN SCOTLAND.**

\(^1\) *Contra*; the action of removing may be, in all cases, in the sheriff, or local court. Bell’s Pr. § 1268. It is competent to raise the summons of removing at any time not exceeding forty days before the term of removal. 16 & 17 Vic. c. 80, § 29. The removal is effected under a precept of ejection from the sheriff, or warrant to remove.

\(^2\) *Contra.* Bell’s Pr. § 1267, 1268. See last note.

\(^3\) Where one year’s rent is in arrear, if no caution be given for future rent, an action of removing is competent. Ersk. 2, 6, 44; Act of Sederunt, 14th Dec. 1756; Bell’s Pr. § 1251.
PART II.

PERSONAL PROPERTY.

Chapter I. Contracts generally.
II. Torts.
III. Sale of Goods.
IV. Bills of Exchange.
V. Shipping—Insurance—Copyright.
VI. Lien—Pledge—Deposit—Bailment.
VII. Principal and Agent.
VIII. Guarantee.
IX. Joint Estates and Debts—Partnership—Corporations—Joint Stock Companies.
CHAPTER I.

CONTRACTS GENERALLY.

431. Meaning of terms.—A contract is the most extensive term used to denote every kind of agreement, obligation, or legal tie whereby one party voluntarily binds himself to another, expressly or impliedly, to pay money, or to do or abstain from doing anything. "Obligation" is a word used by the older writers as synonymous with bond. "Promise" is generally used to import an engagement, express or implied, to do something, without respect to its consideration. The word "agreement" has no definite meaning, except as synonymous with contract, but it is frequently used to mean a simple contract as distinguished from a contract under seal, or a covenant. "Express contract" means a contract of which the terms are expressly stated and agreed upon, as distinguished from "implied contract," where the terms are implied at common law. Duties of imperfect obligation, such as the obligation of a parent to maintain a child, are those which cannot be enforced by a court, either of law or equity.

432. Division of contracts.—The leading division of contracts is

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1 The corresponding term is obligation, which, however, is a wider term, and comprehends more than a contract. Thus the obligation of parents to support children does not arise from any implied contract, but is said to be ex lege. Contract is generally used to denote mutual obligations. Obligations are generally divided into express or conventional and implied or obediential. Express obligations are said to be those which may be judicially enforced. Implied obligations may or may not be capable of being enforced.

2 Stipulations correspond generally to covenants or special agreements, but the term is often used vaguely.

3 Contra; these obligations can in some cases be enforced; thus actions of aliment can be maintained by a child against the parent (Maule v. Maule, 1 W. S. 266; Maidment v. Maidment, 6 Dow, 257), and by a parent against the child. Ersk. 1, 6, 57; Bell's Pr. § 1634.
Contracts Generally.

into contracts of record, contracts by deed or specialty, or under seal, and simple contracts or contracts not under seal.¹

Contracts of record.—Contracts of record are those which are constituted by judgments of a court, by statutes merchant and statutes staple, the latter being now in disuse.ᵃ Judgments when registered bind the real estate of the party, against whom they are given.ᵇ

433. Contracts by specialty.—Contracts under seal or specialties, such as bonds and deeds, are constituted by writings sealed and delivered by the parties.ᶜ

434. Simple contracts.—Simple contracts, or contracts not under seal, are either verbal or in writing, which writing may be signed, but not sealed, by the parties. The distinction is not between verbal and written contracts, but only between contracts under seal, and not under seal; for a contract by writing not under seal, as a bill of exchange, is only an agreement by parol.

435. Simple contracts, as distinguished from contracts under seal.

—The chief characteristic of a contract under seal is, that no consideration is necessary to give it validity.⁵ The deed is binding upon

ᵃ See as to these, ante, § 130.
ᵇ 1 & 2 Vic. c. 110. See ante, § 134. ⁵ As to the formalities of deeds see ante, § 335 et seq.

IN SCOTLAND.

¹ There is no such division, debts having no priority in respect of their being constituted by deed; yet there are some debts called privileged, which have priority on another ground, as to which see post, "Succession," "Bankruptcy."

² Contra; there must be a further process, ending with a decree of adjudication, but the latter can be had without any preliminary action, if the debt is liquid, i.e., constituted by bond, bill, or other obligation in writing; and the decree is of itself an actual conveyance to the execution creditor. There are, moreover, remedies by inhibition and adjudication in security, which operate upon heritable property before decree in an action is obtained.

³ A seal is not required to any deed. See ante, § 336 n.

⁴ Contra; there being no seal, the distinction is chiefly between contracts in writing and verbal contracts.

⁵ Contra; all contracts or obligations are valid without a consideration, whether constituted by deed or not by deed. They cannot, in general, be impeached on the ground of no onerous consideration being proved. In impeaching a gratuitous obligation, it must either be brought within the Statute 1621, c. 18, by which gratuitous grants or bonds to conjunct and confident persons are challengeable by prior creditors, or the bond must be shewn to be collusive and fraudulent at common law. Bell's Com. by Shaw, 43.
the grantor, both in law and in equity, though he received no consideration.\(^a\) Nevertheless, a court of equity will not in general decree specific performance of a contract by deed, which is entirely without consideration.\(^b\)

436. **Estoppel.**—Another characteristic of a deed is, that by the doctrine of estoppel, the party cannot in courts of law prove by parol or other evidence, that an admission or statement in the deed was mistaken or untrue, except in cases of fraud, duress, and illegality,\(^c\) whereas in writings not under seal and verbal contracts, the party is not estopped or concluded by admissions, unless the other party has been induced thereby to alter his condition.\(^d\) In the latter case the admission or conduct is called an estoppel in pais.

437. **Merger.**—As a deed is a security of a higher nature, it operates as an extinguishment or merger of a simple contract. Thus, if a bill of exchange is given for a debt, and afterwards a bond is given for the same debt, the contract by bill merges in the contract by bond as between the two parties, *ipso facto*, whether the parties wish it or not; and the bill can be no longer enforced.\(^e\) And in the same way a debt by deed or bond will be merged in a judgment of the court when obtained, for a judgment is a higher degree of security.\(^f\)

438. **Remedy for special obligation.**—In the administration of the

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\(^b\) 1 Fonbl. Eq. 151 n.


\(^e\) *Price v. Moulten*, 10 C. B. 561.

\(^f\) *King v. Hoare*, 13 M. & W. 494.

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**IN SCOTLAND.**

1 The doctrine is unknown as between deeds and no deeds, but there is a doctrine which is more extensive, that a writ can only be taken off by another writ. This rule distinguishes all writings, whether by deed or not, from mere verbal contracts.

2 *Contra*: novation, which is the extinguishment of a debt by the substitution of a new contract or obligation, is not presumed in such a case. The new security, whether by deed or not, must be expressly taken in satisfaction, otherwise it is deemed only a corroborative security. Conduct, such as cancelling the old security, or delivering it up at the time the new security is given, is equivalent to express words. *Ersk. 3, 4, 22*; *M. 11,518*; *Cox v. Tait*, 6 D. B. M. 1283; *Campbell v. Craikshank*, 7 D. B. M. 548; *Roy v. Stalker*, 12 D. B. M. 722.
assets of a deceased debtor, debts constituted by specialty are entitled to be paid in preference to those constituted by simple contract. But this priority does not obtain where the assets are equitable assets, nor where a court of bankruptcy distributes the estate. If by the deed the heirs of the party are expressly bound, an action may be brought against the heirs and devisees as well as the executors of the deceased debtor.

439. So a different period of limitation applies to actions brought to recover debts created by deed under seal; the action may be brought within twenty years, whereas actions on debts by simple contract must in general be brought within six years.

440. But debts created by specialty have no privilege over debts created by simple contract as to the remedy by action, which must in both cases commence with a writ of summons, and proceed by the usual steps to judgment and execution. There is, on the contrary, a privilege in that respect conferred on actions on bills of exchange, which are simple contract debts, if such actions are brought in a certain form.

It is necessary in all cases, except where the deed is thirty years old, and comes from the proper custody, when a party relies on a deed, to prove affirmatively that it is genuine, by producing the witness who saw its execution, or if he is dead, by proving his handwriting.

441. Consideration in contracts.—A simple contract (i.e., one not constituted by writing under seal or by record) furnishes no ground of

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IN SCOTLAND.

1 Contra. See post, "Succession," and ante, § 432 n.

2 Contra; there is no distinction, as regards the period of prescription, between debts secured by deed and debts not so secured, merely on that ground; but see post, § 489 n.

3 Contra; there is a distinction. In bonds and other deeds securing liquid debts, containing a clause of registration, and on bills of exchange, diligence is summary (i.e. judgment can be signed, and execution can be had at once, without any action).

4 Contra; all deeds, if ex facie regularly attested, prove themselves, and no witness need be called. See ante, § 353 n. As to holograph deeds, see ante, § 351 n.
action, unless there is some valid legal consideration for the contract, some *quid pro quo*, the maxim being—*ex nudo pacto non oritur actio*. What amounts to a legal consideration, however, is a question liberally dealt with, and generally it is held that the promisor must either obtain some kind of advantage, or the promisee suffer some loss, injury, or inconvenience in respect of the promise.\(^1\) Mere love, affection, friendship, or a sense of moral duty, is not a legal consideration in this sense.\(^b\) Nor is the consideration good if it has been already executed, *i.e.*, in respect of something already done, unless it was so done at the express or implied request of the promisor.\(^c\) In many cases, however, the law implies a promise, and these are generally known as implied contracts and promises. Thus, if a person orders goods, a contract to pay a reasonable price is implied. So where a sum of money is lent, the debtor is held impliedly to promise to repay it.

In bills of exchange and promissory-notes, a consideration is presumed, but in certain cases this presumption may be rebutted.\(^d\)\(^2\)

In contracts under seal a consideration is not necessary.\(^e\)

442. **Statute of Frauds.**—There is no division of contracts as regards the mode by which they are proved, but some contracts and promises require to be by deed or in writing by the Statute of Frauds and other statutes.\(^3\)


\(^b\) *Harford v. Gardiner*, 2 Leon. 30; *Wen- neill v. Adney*, 3 B. & P. 249.


\(^d\) See *post*, "Bills."

\(^e\) See *ante*, § 435.

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**IN SCOTLAND.**

1 *Contra*; a consideration is not necessary to a contract either by deed or not by deed, and none requires to be proved, unless a consideration is part of the contract. See *ante*, § 435 n.

2 The same, with qualifications stated *post*, § 550-3.

3 The corresponding division of contracts is into consensual, real, and written. Consensual contracts are those which require mutual consent, and nothing more, to make them binding; such are sale, barter, location, mandate, partnership, which may be proved by writing, or witnesses, or oath of party. Real contracts are those which are not binding without actual possession, as loan, commodate, deposit, pledge; but consent alone may warrant implement. Written contracts are those to which writing is essential as a solemnity. *Bell's Pr.* § 15-18.
Where there is no valid writing within the Statute of Frauds, there is no remedy on the contract in a court of law; but if there has been part performance, and the contract is fair and clear, a court of equity will generally grant specific performance.¹

443. Contracts as to real property.—Any interest in or concerning land or real property must, subject to some exceptions, be created and assigned by deed or writing.ᵃ

444. Other contracts.—Some mercantile and other contracts require by statute to be in writing, as to which, see the special heads of sale, guarantee, infant, marriage, executor, etc.

445. Contracts not to be performed within a year.—By the Statute of Frauds an executory contract, which is not to be performed within one year from its date, must be in writing; ³ as a contract to become a subscriber to a work issuing in numbers which will not be concluded in a year, a contract to serve as clerk, etc.ᵇ

446. Consideration must be in writing.—In certain cases, where the Statute of Frauds requires the agreement to be in writing, viz., in contracts of sale of land and interests in land, in promises by executors, promises in consideration of marriage, and in contracts not to be performed within a year, the consideration, which is part of the agreement, must also be in writing.⁴ Hence parol evidence of the consideration will not be allowed to be given in such cases.⁵ In cases of guarantee, the mere circumstance of the consideration not appearing ex fácie of the writing, or by necessary inference therefrom, will not now defeat the action.ᵈ

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¹ Stat. Frauds, 29 Ch. II. c. 3, § 1-4. See ante, § 128 et seq.
³ 29 Ch. II. c. 3, § 4; Boydell v. Drummond, 11 East, 142; Giraud v. Richmond, 2 C. B. 835.
⁴ 19 & 20 Vic. c. 97, § 3. See post, “Guarantee.”
⁵ Contra; no contract requires to be in writing merely on this ground.
⁶ Contra; as no consideration is necessary to the contract, so none need appear in the writing.

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IN SCOTLAND.

¹ There being no division of courts into courts of law and courts of equity, a similar effect, but extending wider, is produced by the court holding that an imperfect writing cannot be taken advantage of, if there has been rei interventus (part performance), or homologation (conduct amounting to estoppel, acquiescence, or confirmation). Bell’s Pr. § 26, 27.
² The same by common law. Stair, 1, 10, 9; Ersk. 3, 2, 2.
³ Contra; no contract requires to be in writing merely on this ground.
⁴ Contra; as no consideration is necessary to the contract, so none need appear in the writing.
Chap. I.] ENGLISH AND SCOTCH LAW.

Contracts Generally.

447. Proof of mercantile letters, writings, etc.—Letters and documents used by mercantile persons in the way of commerce are not privileged over other writings as regards their efficacy or mode of proof, and none are held genuine on mere production without proof of handwriting, nor held conclusive against other parol evidence. It lies on the party producing them, in all cases, to prove affirmatively that they are genuine.

448. Bond to pay money.—A bond to pay £1000 is in this form:—

"Know all men that I (A) am bound to B in the sum of £2000, to be paid to B, to which payment I bind myself. Sealed with my seal, etc. Now the condition of the above obligation is such, that if A pays to B the sum of £1000 and interest on (a certain day), then the above obligation to be void, otherwise to remain in full force." The sum stated is in practice always double of the sum really secured. In an action brought on such bonds, judgment was at common law recoverable for the full or double sum; but by statute, if the money and interest really due are paid before or during action, it is a complete defence. And so, when a bond is given to secure performance of a contract, no larger sum can in general be recovered than the damages actually sustained, which damages are assessed by a jury.

\[a\] 4 Anne, c. 16.
\[b\] 8 & 9 W. III, c. 11.

IN SCOTLAND.

1 All documents in re mercatoria are held to be privileged to this extent, that if they are signed, though not written by the party, they are held, on mere production, and proof of handwriting to be genuine, and to prove their date, if any is stated, and they are not generally redarguable, except by writ or oath; whereas other writings are not on the same footing, unless they are deeds. What is a writ in re mercatoria is not very clearly defined. See Ersk. 3, 2, 24; Rhind v. Commercial Bank of Scotland, 29 Sc. Jur. 254; Bell's Com. by Shaw, 53.

2 Contra; the bond does not purport to be for double the amount really due, but the correct sum is stated with a liquidated penalty. The form is as follows:—"I, A, grant me to have borrowed from B £1000, which I acknowledge, which sum I bind myself to repay to B at, etc., with £200 of liquidate penalty in case of default, and the legal interest; and I consent to the registration hereof for preservation and execution. In witness whereof, etc." The practice is to fix on one-fifth of the principal as a penalty to cover all damages arising from non-payment; and the penalty is always reduced to the expenses actually incurred. Ramsay v. Goldie, 4 S. D. 744.
The advantage of taking a bond as a security is, that in the event of the death of the obligor, the debt will in general be entitled to be paid out of the assets, before all simple contract debts.  

But there is no privilege as regards speedy action and execution; on the contrary, while the action on a bond must proceed by the usual steps, an action on a bill of exchange is privileged, and execution can in general be had in twelve days.  

449. Loan of money.—A loan of money, whatever be the amount, can be proved* by parol evidence.

450. Gift of money.—So the fact of a gift of money, which has been actually delivered to the donee, may be proved* by parol evidence.

451. Promise to pay money.—A promise to pay money may be proved by parol.  

But some consideration for the promise must be proved in the event of an action being brought.  

An IOU addressed to, and produced by a party, is, after proof of handwriting, evidence

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IN SCOTLAND.

1 Contra; the debt secured by bond will have no priority over any other debts, all being equal in rank; but summary execution may be had without the necessity of bringing an action, provided the bond, as is usual, contains a clause of registration for execution. Ersk. 2, 5, 54; Bell’s Pr. 68. See ante, § 440n.

2 Contra; if above £8: 6: 8, a loan of money cannot be proved by witnesses, but only by the debtor’s writ or oath. M. 4474; Binnie v. Darroch, 4 D. B. M. 366; Fraser v. Bruce, 30 Sc. Jur. 70; Braid v. Linton, Ib. 385. So parol evidence is excluded as to a balance of debt originally above that sum; Clark v. Glen, 14 S. D. 966; and though the debtor admits receiving the sum, but denies it was a loan. Hamilton v. Lindsay, 1 W. S. 35.

3 Contra; a donation of money can be proved only by the writ or oath of the giver. See Barstow v. Inglis, 30 Sc. Jur. 117; Robertson v. Robertson, Ib. 209. See also post, “Bills.”

4 Contra; if above £8: 6: 8, a promise to pay money cannot be proved except by the writ or oath of the promisor (M. 16,830; Walker v. Home, 6 S. D. 204); but the objection to parole evidence must be taken at the time, M. 12,225; Hay v. Boyd, 3 Murr. 16. So an IOU is evidence to go to a jury of an existing debt, but it is deemed weak evidence. Per L. Fullerton, Hamilton v. Hope, 25 Sc. Jur. 357; Hamilton v. Struthers, 31 Sc. Jur. 42.

5 Contra; but if the sum is above £8: 6: 8, the promise cannot be proved by parole; Stair, 1, 10, 4; Ersk. 4, 2, 20; M. 12,286; M. 12,395; unless it is part of a contract, which may be proved by parole evidence.
of an account stated, or of an existing debt; and if existing, the law implies a promise to pay it.\textsuperscript{a}

452. \textit{Special agreement as to personalty.}—A special agreement as to personal estate, may be proved by parol evidence, except so far as it comes within the Statute of Frauds or other statute.\textsuperscript{1}

453. \textit{Mistake in contracts.}—Where there has been a mistake as to some material part of a written contract, arising out of mere accident, a court of equity, and also of law, will in many cases relieve a party. The objection may be set up in a court of law as a defence.\textsuperscript{2} And a court of equity will order the writing or deed to be reformed, \textit{i.e.}, drawn up according to the real intentions of the parties, if there was a preliminary agreement, which has not been properly carried out in the final contract. But it is no ground for redress either in a court of law or equity, that one or both parties mistook the meaning of a written contract, and acted on such mistake.\textsuperscript{b}

454. Where money has been by mistake, or improperly, received, the party entitled may sue for it in a court of law by an action for money had and received.\textsuperscript{3} While money, which has been paid under a mistake of fact, may be recovered back by this action, yet it is not recoverable, if paid under a mistake of law.\textsuperscript{4}

455. \textit{Fraud.}—Fraud is a good ground for proceeding in equity to set aside any deed or document procured thereby; or it may be set up as a defence\textsuperscript{5} in a court of law to an action, founded on such

\textsuperscript{a} Foeminayer v. Adcock. 16 M. & W. 449. \textsuperscript{b} Midland Gr. W. R. Co. v. Johnson, 6 H. L. Cas. 798.

\textsuperscript{1} \textit{Contra:} an innominate contract as to moveables, it is said, can be proved only by writ or oath (M. 12,297; M. 12,414), unless there has been \textit{rei interventus}. Ersk. 4, 2, 20. But this doctrine is obscure, and seems to be no longer to be relied on. Dicks. on Evid. 310.

\textsuperscript{2} A contract in writing will be held valid till reduced on the ground of error, and that objection cannot be pleaded by way of exception or defence merely. Bell's Pr. \textsection 14.

\textsuperscript{3} The same, by an action of \textit{condictio indebiti}, or repetition.


\textsuperscript{5} In all cases where a ground of action is excluded by a deed, or document, or judgment, it is necessary to reduce such deed or judgment before the action can be maintained. Yet if the deed, etc., was obtained by fraud, such fraud may be set up by way of exception. Bell's Pr. \textsection 13.
Contracts Generally.

deed or document. When fraud is alleged in a court of equity, the
details of the fraud must to some extent be set forth—in other
words, the allegations must be specific. But when fraud is alleged
in a court of law, in defence or replication, it is enough to allege it
generally, the details being mere matter of evidence at the trial.

456. Constructive fraud.—In courts of equity certain classes of
circumstances give rise to what are called constructive frauds, and
relief will be given by a court of equity. Thus contracts and con-
voyances, whereby children secure benefits to their parents, or to
those standing in loco parentis, will be set aside on the ground of
undue parental influence, if shown to be unreasonable, and against
good faith, unless third parties have acquired an interest in them.
So in contracts and transactions between attorney and client, the
onus lies on the attorney to show that the transaction was fair.
Bargains with needy expectant heirs, remaindernen, and reversioners,
must be shown to be for full valuable consideration, even though the
bargain was made known to the persons having the means of obvi-
ating the necessity of alienation in the circumstances. So dealings
with sailors are jealously watched, as that class is treated by a court
of equity as peculiarly liable to imposition.

457. Duress.—A contract entered into by a party, who is under
duress, is voidable at his option. And he may either file a bill in
equity to set aside the deed or document so obtained, or set up duress

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\( ^a \) Curzon v. Belward, 3 H. L. Cas. 742.  
\( ^b \) Story Eq. Jur., 2 309; Hoghton v. Hoght-
lon, 15 Beav. 273; Espley v. Lake, 10
Hare, 260.  
\( ^c \) Story, 3 310.  
\( ^d \) Story, § 334-340; Edwards v. Burt, 2
De. G. M. & G. 55.  
\( ^e \) Story, § 332.  
\( ^f \) 2 Inst. 483; Whelpdale's Case, 5 Co. 119,
Rea. 2.

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IN SCOTLAND.

1 There is no distinction between law and equity, and fraud must in
all cases be alleged with reasonable particularity. See Irvine v. Kirkpatric, 
2 Contra; this doctrine was expressly repudiated in the case of a rever-
sonian; and a sale by an heir substitute of entail of his contingent reversionary
interest was refused to be set aside, though he was shown to be needy,
and the price to be grossly inadequate. Nothing short of a combination of
the elements of facility, lesion, and circumvention will avail to reduce such a
contract. McKirdy v. Anstruther, 1 D. B. M. 855. Probably the same
doctrine would extend to other cases stated in the text.
as a defence in a court of law, when sued. What amounts to duress is often a difficult question arising out of the whole circumstances. Money paid under duress may be recovered back by an action for money had and received.

458. Maintenance and champerty.—It is not forbidden to any counsel or attorney to purchase real estate pending a litigation regarding it, provided he chooses to take the risk, unless fraud can be made out, or it amounts to maintenance or champerty. It is champerty for a person who has been out of possession of real estate, or whose predecessors have been so, for a year, to sell or bargain as to his title, and the contract is void. An agreement, whether by an attorney or stranger, officiously to advance money to another to prosecute or defend a suit, is void. And where one party agrees to pay the expense of ascertaining or establishing a right, supposed to belong to another, on the terms of receiving half the estate or benefit obtained, such an agreement, whether or not strictly amounting in law to champerty or maintenance, is contrary to public policy, and

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a See 2 Smith's L. C. 240.  
b 32 Hen. VIII. c. 9; 4 Bl. Com. 134; Re Masters, 4 Dow. 91; Doe v. Evans, 1 C. B. 717; Cook v. Field, 15 Q. B. 460.  

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IN SCOTLAND.

1 Contra; a deed or contract made or entered into under force and fear must be formally reduced, and the objection cannot be set up as a defence. Stair, 1, 9, 8; Ersk. 3, 1, 16; 4, 1, 26.

2 If a counsel or law agent purchase from his client heritage, which is the subject of a suit, the sale is good, but he is liable to deprivation (i.e., to be disbarred or struck off the rolls respectively). And he is forbidden by statute, as well as common law, to receive as remuneration a share of the property in dispute. 1594, c. 229; Johnstone v. Rome, 9 S. D. 364. But an agreement to stipulate for remuneration only on success is not of itself necessarily held illegal. Gilfillan v. Henderson, 10 S. D. 23; Clyne v. Scansen, 8 S. D. 718; Manson v. Robertson, 11 S. D. 718; Bolden v. Foggo, 12 D. B. M. 798; M. 9496. The statute applies only to an advocate or law agent. An agreement between a town agent and a country agent to allow the latter a share of the profits, is pactum illicitum. Gilfillan v. Henderson, 6 W. S. 489; but it is to be observed that in such a case the country agent is not himself entitled as such to practise in the Superior Court. An agreement to make a gift of £1000 over and above the bill of costs to a law agent during the employment has been set aside, as being incompatible with the proper performance of his duty. Anstruther v. Wilkie, 28 Sc. Jur. 136.
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will be set aside. But an attorney may freely, and sometimes does agree to be paid his bill of costs only in the event of the success of his client. He may also agree to take a gross sum from his client in lieu of costs. It is also legal and usual for a town agent to allow the country solicitor or attorney a share of the profits of the suit.

459. Wagers.—At common law, actions on contracts by way of wagers were competent, except so far as they were contra bonos mores or against public policy. But now by statute (8 & 9 Vic. c. 109, § 18) all contracts, whether by parole or in writing, by way of gaming or wagering, are null and void, except subscriptions towards a lawful game, sport, pastime, or exercise. Thus colourable contracts to sell shares, stock, etc., will be void as wagering. Lawful games are such as horse-racing, steeple-chases, foot-races, and dominoes.

460. Sunday.—Contracts made on Sunday are not void at common law; but if made in the course of the ordinary business of tradesmen, artificers, workmen, or labourers (works of necessity and charity excepted), they are void by the Lord’s Day Act. A few cases are excepted from the operation of the statute, as where food is sold in inns, cook-shops, and victualling houses, to persons who cannot be otherwise provided. So as to milk sold at stated hours; or mackerel before and after divine service; or bread under certain restrictions. Where, therefore, a person is not a tradesman, etc., as, for example, where he is an attorney, surgeon, or farmer, the

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1. At common law the Courts refuse to entertain a mere wagering dispute, as being a sponsio ludicris, and confine themselves to serious business. M. 9524; Harvey v. Muller, 7 D. B. M. 398. It seems the stat. 8 & 9 Vic. c. 109 applies to Scotland. Thomson v. Foulis, 29 Sc. Jur. 372.

2. Bargains or contracts made on Sunday are not null at common law, but there are numerous statutes on the subject prohibiting such contracts, and which make no distinction between contracts made in the ordinary business of persons and those not so made, nor do they confine the prohibition to artificers and workmen; but there is an exception of works of "necessity and mercy." Stats. 1593, c. 169; 1694, c. 201; see Phillips v. Innes, 2 Sh. & M'L 465; Elliott v. Foulis, 6 D. B. M. 41. It is doubtful how far these statutes are in desuetude. Jennings v. Burnet, 25 Sc. Jur. 175.
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contract, though made on Sunday, is not invalid.\(^a\) And where the tradesman is not contracting in the exercise of his ordinary calling, as where a baker, not being a horse-dealer, sells a horse on Sunday, the contract is good.\(^b\)

461. Payment of money and performance.—Performance of an agreement, or of an obligation to pay money, constituted by writing, can be proved by parole evidence.\(^1\) So where the agreement or obligation was not constituted by writing.\(^2\)

462. Stamped receipt.—Though a stamped receipt or acknowledgment of the payment of money has been given by the creditor, it is not in general conclusive, but merely prima facie evidence of payment, and hence oral evidence may be given\(^3\) to contradict or explain such receipt, and rebut its legal operation.\(^c\) The only receipt which is conclusive and admits of no contradiction in a court of law, except

\(^{a}\) Peate v. Dicken, 1 C. M. & R. 422; Scalf v. Morgan, 4 M. & W. 270; Sandiman v. Breed, 7 B. & C. 96.
\(^{b}\) Drury v. Defontaine, 1 Taunt. 131.
\(^{c}\) Lampon v. Clarke, 5 B. & Ald. 611; Skelie v. Jackson, 3 B. & C. 423; Gravett v. Key, 3 B. & Ald. 313; Forrer v. Hutchinson, 9 A. & E. 541.

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\(^1\) Contra; payment of money due under a written obligation can be proved only by the writ or oath of the payee (Stair 4, 43, 4; Ersk. 4, 2, 21; M. 12,357), except in case of fraud (M. 12,809; Foggo v. Hill, 2 D. B. M. 1322), or where the payment was part of a transaction (Glasgow Infirmary v. Caldwell, 30 Sc. Jur. 1). But performance of a written contract ad factum praestandum may be proved by parole. M. 12,356 et seq.; Stair, 4, 43, 4; Ersk. 4, 2, 21.

\(^2\) Contra; payment of money due under a verbal contract can be proved only by writ or oath, if the sum exceeds £8: 6: 8. Ersk. 4, 2, 21; Tod v. Flockhart, Hume, 498; M. 12,362; M. 12,365. Yet payment, whether the money is due under a written obligation or not, may often be inferred from circumstances, such as taciturnity or non-claim, which can be proved by parole. M. 12,701-2; Stewart v. Macomochie, 14 S. D. 412; Scath v. Taylor, 10 D. B. M. 377. And there is no well-defined principle on which the Court relaxes the general rule, so as to admit parole evidence. See Woodrow v. Wright, 34 Sc. Jur. 25; Wilson v. Marshall, Ib. 2; Rose v. Kennedy, 35 Sc. Jur. 398; L.-Adv. v. Macneill, 36 Sc. Jur. 304; Mackenzie v. Brodie, 21 D. B. M. 1048; and cases ante, § 449-51, n.n.

\(^3\) Contra; the receipt of money exceeding £8: 6: 8 cannot be proved by witnesses. Stair, 4, 43, 4; Anderson v. Forth Marine Ins. Co., 7 D. B. M. 268. See last two notes. Moreover, parole evidence is not in general admitted to contradict a written receipt, in the absence of fraud. See Crawford v. Bennet, 2 W. S. 608.
in the case of fraud, is one under seal. Yet, in a court of equity, the whole circumstances under which a deed was executed will be inquired into. Moreover, a stamped receipt is not the only mode of proving payment, for the evidence of witnesses is quite conclusive without it.

463. Presumption of payment.—After the lapse of a great time, independently of the Statute of Limitations, payment will be presumed, as in the case of servants' wages. Where money is due at regular intervals, as rent, the production of a receipt of rent due on a certain day is strong presumptive evidence that all prior rent has been paid.

464. A stranger paying a debt.—Where A owes money to B, and a stranger hears of this and voluntarily pays the debt, he cannot sue A for the sum so paid; for if so, any person may thrust a contract on another without the knowledge or consent of the latter, and whether he will or no. To enable a third party to recover the money so paid, he must prove that he was requested by A, either expressly or impliedly, to pay the debt, in which case, and in which case only, he may maintain an action against A for money paid. Yet the law in many cases construes an implied request out of the circumstances, and questions of nicety often occur in determining when a request is to be so implied; and this has been done in the case where a stranger volunteered to bury a deceased person, so as to entitle him to sue the executor for the expense. Nor can a court compel B to make an assignment of securities to a stranger so paying the debt of

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*a* See ante, § 436.

*b* Mcllland v. Gray, 2 Y. & C. C. C. 199.

c *Cooper v. Turner, 2 Stark. 497; Duffield v. Creed, 5 Esp. 51.*

d *Sellen v. Norman, 4 C. & P. 89; Evatt v. Birch, 3 Campb. 10.*

e *Gilb. Ev. 399.*


g *Ambrose v. Kerrison, 10 C. B. 776.*

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1 It is laid down that three consecutive discharges of periodical payments, as rents, interest, feu-duites, etc., form a presumption of payment of all preceding rent, etc.; and this is called the rule *apocho trium annorum*, obviously an artificial rule invented by a court before juries were in use, as no jury would hesitate to infer payment from slighter evidence. Ersk. 3, 4, 10.
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A, except where the latter is a surety who discharges the debt. It seems not decided whether and how far a payment made by a stranger will be a bar to an action against A for the debt.  

465. Excuse for non-performance of contract.—When a man voluntarily undertakes by his contract to do something which is not impossible, he is not excused either at law or equity from performance merely by inevitable accident; as, for example, if he undertakes generally to pay rent, he must continue to pay, though the house is burnt down; yet if the duty is cast upon him by law, he is excused, if performance becomes impossible by the act of God. But in the case of a gratuitous bailment or contract to carry a chattel from one place to another, it is an excuse that the carrier was forcibly robbed without any negligence on his part.

466. Tender of performance.—Where A covenants to pay money, or to give a promissory-note, or goods, etc., to B, and no place is mentioned where this is to be done, A is bound to seek out B, and make a tender to him of performance. And where no time is specified for paying or doing the act, a cause of action immediately arises to B.

467. If, however, before a writ of summons is actually issued,

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*Contra*; any stranger may, without A’s knowledge or consent, go and pay a debt due from A to B, which has been demanded. A cannot prevent the stranger getting an assignation of the debt from B, if B is so inclined, so as to enable the stranger to sue A. A creditor is not however bound to accept payment from a stranger, unless he is about to press the debtor by execution. “If the creditor insists on putting the debtor in jail, he must assign his security to a third party paying the debt.” Per L. Mackenzie in Smith v. Gentle, 6 D. B. M. 1164. The right of the stranger to an assignation is an equitable one, and the court may compel B to grant it, if it is not prejudicial to B. See Rainie v. Milne, 1 S. D. 377; Cunningham v. Hutton, 10 D. B. M. 307; Ersk. 3, 5, 11.

*Contra*; inevitable accident in general excuses the party. The destruction of the subject, without fault, extinguishes the obligation. Bell’s *Pr.* § 571; Bell’s *Com.* by Shaw, 70.

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2 *Contra*; inevitable accident in general excuses the party. The destruction of the subject, without fault, extinguishes the obligation. Bell’s *Pr.* § 571; Bell’s *Com.* by Shaw, 70.

3 There seems no difference on this subject.
A make a tender of the sum due, this will prevent B recovering costs in the action, provided A duly pay the money into court under the plea of tender.\textsuperscript{a}

467. Tender on the day appointed.—Where a particular day certain was agreed to be the day of performance, the tender must be on that very day.\textsuperscript{2} If no hour was mentioned, then the tender may be at any hour of the day, so that the money can be paid, or the thing can be completely performed before 12 o’clock p.m. But in some cases, by a particular usage, the tender must be made earlier, as in the presentment of bills of exchange within business hours.\textsuperscript{b}

468. Tender of rent.—Where rent becomes due, the tenant may tender it to the landlord wherever he finds the latter; but if he cannot find him, then the tenant must be ready, at the door of the mansion-house,\textsuperscript{5} or other most patent place on the premises, to pay the money in day-light. If the rent is due under a covenant to pay, and no place mentioned, then the tenant is bound to find the landlord and pay the money.\textsuperscript{c}

469. Tender in money.—A payment must be made in gold or in bank notes. There are no bank notes issued under £5.\textsuperscript{4} The Bank of England must pay its notes in gold, if required, and so each of its branches must pay notes made specially payable at such branch. All other banks and private persons are entitled to pay debts above £5 with Bank of England notes.\textsuperscript{d\textsuperscript{5}} Yet a payment with notes of country banks, or a banker’s cheque, is valid, if not specially objected to at the time on that ground.\textsuperscript{e}

\textsuperscript{a} Briggs v. Culverley, 8 T. R. 629; Moffat v. Parsons, 5 Taut. 307; see C. L. P. Act 1852, and rules of Court.
\textsuperscript{b} Haldane v. Johnson, 8 Exch. 689.
\textsuperscript{c} 3 & 4 W. IV. c. 98.
\textsuperscript{d} Polyglass v. Oliver, 2 Cr. & J. 15; Jones v. Arthur, 8 Dowl. 442.
\textsuperscript{e} Macdonald, 6 M. & Gr. 593.

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1 The same, if B consigns the money in a bank after giving A due notice.
2 The same.
3 There seems to be no substantial difference as to this. 2 Hunter, L. & T. 274.
4 Contra; £1 notes are the common currency. The head bank is bound to pay in gold, if required.
5 Bank of England notes are also a legal tender for payments above £5. Bell’s Pr. § 1334.
470. Effect of tender on costs.—The effect of an unconditional and valid tender of a debt due, if the amount is paid into court on action afterwards brought, is to prevent the plaintiff recovering costs on the plea of tender.¹ But where a sum has been offered after an action of damages, on grounds independent of contract, has been brought, and the jury give no more as damages, this does not affect the question of costs.² An exception is however made in favour of magistrates, who are empowered by statute to tender a sum as amends to the plaintiff, and if the jury give no larger sum as damages, a verdict will be given for the defendant.

471. Payment of money into Court by defendant.—In all actions for breach of contract, and generally in all actions whatever, except for assault, false imprisonment, slander, libel (except in a newspaper), seduction, and malicious prosecution, the defendant may, with leave of the court, pay a sum of money into court as compensation; and if the plaintiff is not satisfied, but insists in going to trial, and the jury do not, by their verdict, give a larger sum as damages, the effect is, that the defendant has his costs from the time of such payment into court.² In the cases excepted it is not competent for a defendant to pay money into court.

472. Release and discharge of contracts.—Contracts under seal can only be released and discharged by a release or discharge under seal, that is, by an instrument of equal force and validity.² Yet a court of equity may give effect to parole licences or dispensations, in cases where it would be inequitable to allow one party to insist on his legal title after the position of the other party has been altered;³ and acts and declarations may sometimes be set up as an


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¹ So if the defender, during action, judicially tender a sum equal to or exceeding what is ultimately found due, the pursuer pays the expenses after the date of tender. The tender must be founded on in the process. Anderson, 14 S. D. 54; A. B. v. Davidson, 15 S. D. 306; Imrie, 21st Jan. 1847, 9 D. B. M. 522; Bisset, 10 D. B. M. 233; Logan, 12 D. B. M. 841. ² Contra: in actions for damages generally, the defender may tender a sum as satisfaction; and if the jury give a less sum as damages, this will subject the pursuer to expenses. Strachan v. Monro, 7 D. B. M. 993. ³ A debt constituted by writing cannot be extinguished without either the writ or oath of the creditor. And generally the renunciation of a
equivalent to a release.\textsuperscript{a} And so a court of law may often allow such matter to be pleaded as an equitable defence.\textsuperscript{b} There is also an exception in the case of penal bonds, for a parole agreement by the parties before the day of payment to do something else as a satisfaction will be enough.\textsuperscript{c}

473. Simple contracts may, before breach, be released or discharged by parole agreement,\textsuperscript{d} subject, however, to the rule, that a mere subsequent oral agreement not acted upon, will not be allowed to vary a contract in writing.\textsuperscript{e} 1

474. When a contract has once been broken, the cause of action which thereupon accrues can only be discharged at law by a release under seal, or by an agreement between the parties that something shall be done or given on the one side, and accepted on the other side, as a satisfaction, generally called an "accord and satisfaction."\textsuperscript{f} But there is an exception in the case of bills of exchange and promissory-notes, for by the law-merchant there may be a release and discharge of a debt due on such instruments by word of mouth, unaccompanied by writing or any solemn instrument.\textsuperscript{g} 2

475. A covenant to pay money or perform some act cannot be discharged at common law before breach, by any contract or agreement which is not under seal,\textsuperscript{h} for nothing can discharge a covenant to pay on a certain day, but actual payment or tender on that day.\textsuperscript{i}

\textsuperscript{a} 2 Spence Eq. Juv. 912; Norton v. Wood, 1 Russ. & M. 178.  
\textsuperscript{b} 17 & 18 Vic. c. 125, § 83.  
\textsuperscript{c} Lit. § 344; Co. Lit. 213b.  
\textsuperscript{d} Goss v. Nugent, 5 B. & Ad. 65.  
\textsuperscript{e} Stead v. Dauher, 10 A. & E. 57.  
\textsuperscript{f} Langdon v. Stakea, Cro. Car. 383; see also Cro. Jac. 483, 620.  
\textsuperscript{g} Foster v. Dauher, 6 Exch. 399; Edwards v. Chapman, 1 M. & W. 231.  
\textsuperscript{h} Snow v. Franklin, 1 Laww. 358; Spence v. Healey, 5 Exch. 668.  
\textsuperscript{i} Pola v. Turnbridge, 2 M. & W. 226.

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right or obligation, constituted by writing, cannot be proved by parole evidence; for a written obligation is held usually to imply a written discharge. Ersk. 3, 4, 8; Scott v. Cairns, 9 S. D. 247. Yet the court will sometimes relax the rule and admit parole evidence. Dickson on Evidence, p. 329.

1 An obligation constituted verbally may be extinguished by a verbal declaration of the creditor that he passes from the debt. Ersk. 3, 4, 8. But it is otherwise as to an obligation constituted by writing. See last note.

2 So a discharge, whether before or after breach of contract, may be by acceptation. Ersk. 3, 4, 8. Payment of bills and promissory-notes can in general only be proved by the drawer’s writ or oath. See post, § 564 n.
Yet, accord and satisfaction is a good defence after a breach of contract, whether the contract was under seal, or not under seal.\footnote{Blake's Case, 6 Co. 43 b; Smith v. Trossdale, 3 E. & B. 83; Jones v. Sawkins, 5 C. B. 142.}

476. Assignment of debts.—A chose in action, with the exception of bills of exchange and bills of lading, is not assignable at common law, so as to enable the assignee to sue in his own name. But it is assignable in equity without the consent of the debtor, and the assignee may discharge the debtor without the concurrence of the assignor. At common law though the debt is assignable, yet power may be given to a third party to sue for it in the name of the creditor, by means of a power of attorney, which may be by writing, unsealed, or even by parole.\footnote{Howell v. M'Tiers, 4 T. R. 690; Heath v. Hall, 4 Taunt. 326.}

477. Where an assignment has been executed, the assignee must sue in the name of the assignor in courts of law; but the latter may insist on being indemnified. If the debt is equitable only, that is, such as can only be recovered in a court of equity, it may be assigned without a power of attorney, and the assignee may sue in equity in his own name.\footnote{Barstow v. Inglis, 30 Sc. Jur. 117; Bell's Com. by Shaw, 558.}

478. The assignment need not, strictly speaking, be intimated by notice to the debtor,\footnote{Buchan v. Farquharson, 24th May 1797, F. C.} though this is generally necessary, in order to prevent other assignees acquiring priority; and, if notice is not given to the debtor, he will be in safety to pay to the assignor, whose

\footnote{A discharge of a written contract can only be proved by a written discharge, or by the oath of the creditor, and it makes no difference whether a breach has taken place or not. See ante, \S 461 n.}

\footnote{The assignee or cessionary can sue in his own name. The assignation is regarded as a proper conveyance, and not as a procuracy. Book debts cannot be conveyed by indorsement. Taylor v. Scott, 9 D. B. M. 1504; Sutherland v. Munro, 10 D. B. M. 87. See Barstow v. Inglis, 30 Sc. Jur. 117; Bell's Com. by Shaw, 558. But the creditor may draw a bill on the debtor in favour of A (an assignee) for the amount, and this will be a good title to sue for and discharge the debt.}

\footnote{Intimation to the common debtor is absolutely necessary to complete the assignation of debts, and the date of intimation is the date of the transfer. Ersk. 3, 5, 3; Buchan v. Farquharson, 24th May 1797, F. C. Hence a second assignee, by first intimating the assignation, acquires priority, even though not strictly acting in bona fide.}

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discharge will relieve him. It is said to be the duty of the assignee, in most cases of assignments of choses in action, to give this notice to the debtor. And in the case of incumbrancers on a fund, the legal interest of which is in a trustee, if the second incumbrancer give notice to the trustee, and neither of them know of a prior incumbrance, the second incumbrancer will be entitled to priority.\(^a\) But notice, when given, need not\(^1\) be given by any formal notarial protest. It is enough if the notice be given to the trustee or debtor, so as to call his attention to the fact. The assignee takes the debt subject to all its equities.\(^b\)\(^2\)

479. Debts payable in futuro.—Where a party is bound by bond or otherwise to pay money at a future day, whether he becomes insolvent or not before that time, there is no mode of attaching his goods by way of security until the day of payment; and no cause of action arises till that time. In like manner, the creditor could not retain funds of the debtor in his hands by way of security.\(^3\) But if such party become bankrupt or insolvent, these debts can be proved against his estate. When an annuity is granted, it is usual to take a collateral bond and warrant of attorney to secure its punctual payment, by means of which a summary remedy may be had. And an

\(^a\) Smith v. Smith, 2 C. & M. 231; Meux v. Bell, 1 Hare 73; Deazle v. Hall, 3 Russ. 1.  
\(^b\) Mangles v. Dixon, 3 H. L. Cas. 702; Smith v. Parker, 16 Beav. 119.

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\(^1\) Contra; the regular mode of giving intimation is by a notarial instrument, but this may be dispensed with. If a letter has been sent to, and received by the debtor, and its receipt acknowledged or admitted by letter, that is sufficient. Wallace v. Davies, 25 Sc. Jur. 415; Bain v. Cunningham, M. 860; Bell’s Com. by Shaw, 559. But mere private knowledge of the debtor is not enough, in competition with subsequent formal intimations. Dickson v. Trotter, M. 873; Ersk. 2, 1, 28.

\(^2\) The cessionary does not always take, subject to latent equities. Redfearn v. Somervail, 17 F. C. 681; but see Gordon v. Cheyne, 2 S. D. 675.

\(^3\) Contra; where the debt is either future or contingent, the creditor may arrest the debtor’s funds, or adjudge his land in security of such debts. Ersk. 3, 1-6; 3, 4, 15; 3, 6, 18. And at common law, if the debtor is 

\textit{vergens ad inopiae}, or is diminishing a security relied on, diligence for security may proceed, or the creditor may retain funds of the debtor in security. D. Queensberry, 11th July 1817, F. C. Bell’s Com. by Shaw, 44. So a creditor entitled to an annuity can arrest or adjudge in security. M’Donald v. M’Leod, 15th Jan. 1811, F. C.
executor may be compelled in some cases to find security for legacies payable in futuro.

480. Remedy for debts generally.—Debts arising on matters of contract are chiefly and often exclusively recoverable in courts of law; legacies are not termed debts, and can in general only be sued for in a court of equity. In seeking to recover a debt, the mode of procedure is an action at common law, which consists of several stages; and the defendant may, by his pleading, protract the final stage of judgment. Until judgment is obtained, nothing can be done in the way of obtaining payment or security, unless the defendant is about to leave the country, or the debtor is sued in the Mayor's Court in the city of London, and some other places, the process in that case being called foreign attachment. When judgment is signed, the judgment-creditor can then, but not before, by the process of attachment at common law, attach in the hands of third parties, debts due to the defendant, but cannot attach legacies due to him. The creditor can also, after judgment, but not before, sue out execution against the debtor's person, and his real and personal estate. The fruits of an action are thus often lost by the length of time which must necessarily elapse before final judgment can be obtained. The only action which is privileged is an action on a bill of exchange, to which no defence is in general allowed, unless with leave of a judge; and judgment can be signed in twelve days. There is, however, an expeditious mode of proceeding for ordinary debts in Scotland.

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1 Contra; in all cases the creditor can at once arrest (attach) not only the debts due, but goods belonging to the debtor in the hands of third parties, concurrently with raising the action. This is called arrestment in security. See Laidlaw v. Smith, 2 Rob. Ap. 490. The creditor may even arrest goods in his own hands. 19 & 20 Vict. c. 60, § 3. He thus acquires a hold over the goods and debts till decree is obtained, when he can proceed against the goods or debts arrested, and also against the person and other heritable and moveable estate. Moreover the creditor can, in like manner, in most cases, at the outset of the action, use inhibition to prevent the debtor selling his lands or contracting debt to his prejudice. Further, bills of exchange and bonds and other deeds securing liquid debts, containing clauses of registration, are so far privileged, that decree can be extracted without action, no defence being allowed, although the debtor, if he has good grounds of defence, can suspend the proceedings on finding security to pay the debt and costs.
against a trader, in the Bankruptcy Court, the result of which is, that if he do not pay in seven days, or give security, he may be declared a bankrupt.

481. Staking the truth of the cause on adversary’s oath.—Though in general a plaintiff or defendant is compellable in all civil cases to be a witness, and may be examined on oath, there is no mode of staking the truth of his case on the voluntary answer on oath of his adversary, as an equivalent for any affirmative evidence, or after such evidence has failed.1

482. Interest.—Interest is not impliedly due at common law on

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1 Contra: this mode of proving a party’s case, called a reference to oath of the opponent, is competent in general, as a last resource, where the party despairs of other evidence. If the allegations of the party are not sufficiently explicit, or the matter is one of law and not fact, the reference is not allowed; and the oath will not receive effect so far as it contradicts the deponent’s own written statements or admissions on record. Dickson on Evid. 780, et seq.; Bell’s Pr. § 2269. When a reference is made during the cause, it may be directed to a single fact; but if made after decree, it must embrace the whole cause and all facts conclusive of the cause. White v. Murdoch, 9th June 1812, F. C.; Butters v. Loch, 8 S. D. 843; Thomson v. Patterson, 2 Deas and And. 177; Ibid. 189. The oath is in the nature of a reference or transaction, and is conclusive whichever way the party answers. Ersk. 4, 2, 8; 3 Bell’s Ill. 91. The party may resort to this proof even after verdict or judgment, provided the decree has not been extracted. Ibid.; Nicet v. Taylor, 3 D. B. M. 382; Sayer v. Haldane, 1b. 1005. He may retract before the oath is sworn, on paying expenses. 3 Bell’s Ill. 93; Dickson, 792. This mode of proof is not allowed where the contract requires to be in writing. Though the court seldom refuses to allow the reference, it has refused in circumstances where the truth was not likely to be obtained in this way. 3 Bell’s Ill. 98; Ritchie v. Mackay, 3 W. S. 349; Johnson v. Grant, 13 S. D. 606; Pattinson v. Robertson, 9 D. B. M. 226. It is for the court and not for a jury to construe the meaning of the answer, which is often so qualified as to give rise to difficult questions. A qualification which the court thinks necessary to the complete answer, and which is an essential ingredient in it, and is incompatible with the constitution or continuance of the obligation, is said to be an intrinsic quality. But where the obligation is admitted, and the party adds something to displace it, but which it lies on him to prove by other evidence, that is said to be an extrinsic quality. Thus, if the party admit the debt, but say it is paid, then payment is intrinsic; but if he admit and say that he has another debt against his opponent which will fall to be compensated, then compensation is extrinsic. Dickson on Evid. 826. See Ersk. 4, 2, 11; Gifford v. Rennie, 15 D. B. M. 451; Thomson v. Duncan, 17 D. B. M. 1081.
any debt though liquidated; but by usage of merchants it is allowed on bills of exchange and promissory-notes, and it is generally given at the discretion of the jury, unless the creditor has been remiss in suing. There is also an exception in favour of money ordered to be paid by an award when sued for by action; also in favour of money due on a bond. But in all cases, interest, either simple or compound, may be due by express contract, or by a contract implied by the course of dealing. By Statute 1 & 2 Vic. c. 110, § 17, interest is due on all judgment debts till payment. Also if the debt is a sum certain, payable by virtue of some writing, interest may be given by a jury from the date at which the debt is stated to be payable, or if no time is stated, then from the date of a formal demand made in writing, and accompanied with notice to the debtor claiming interest in default of payment. So interest is due on debts not arising under any writing, if a written notice is given that interest will be claimed from the date of the notice.

483. Damages for breach of contract.—The only remedy which a court of law could, until recently, give for the breach of a contract was a sum of money by way of damages to be assessed by a jury. But since 1854 and 1856, in actions of detinue for detention of a chattel, and actions for breach of contract in not delivering goods sold, the indirect effect of the execution is to compel the defendant to render up the specific chattels. In a few cases also, viz., where some public duty is involved in and mixed up with the contract, a court of law may, by mandamus, order the contract to be specifically performed, or by injunction prevent its breach. But in the vast majority of cases a court of common law can neither compel specific performance, nor restrain the breach of a contract; it can only give

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*a* 3 & 4 Will. IV. c. 42, § 28.  
*b* Ibid.  
*c* 17 & 18 Vic. c. 125, § 78; 19 & 20 Vic. 97, § 2.  
*d* 17 & 18 Vic. c. 125, § 68-82.

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1 Contra; interest is in general due ex lege in all cases of debt, even though not liquid, where there has been a breach of engagement, or mora in judgment. 2 More's Stair, 78n; Brown v. Brown, 4 W. S. 28; Ersk. 3, 3, 80. It is also due by statute on sums, to pay which execution of a charge has been registered. 1621, c. 20; 1 & 2 Vic. c. 114, § 3, 10. Interest is also due on bills of exchange by statute. See post, § 565.
a sum of money as damages, by way of compensation, after the contract has been broken.¹

484. Specific performance of contracts.—Nor does a court of equity in all cases order specific performance of contracts as a matter of course. On the contrary, it professes to do so mainly on the assumption that damages will not be a sufficient remedy.² Hence it practically confines the remedy of specific performance to a few cases. Such are contracts for the sale and purchase of lands; and contracts for the sale of some peculiar chattel having a pretium affectionis, as a statue, picture, antique horn, etc.² So contracts to sell the goodwill of a trade, to enter into partnership, to build a bridge on the defendant’s land for the use of the plaintiff, to settle money in consideration of marriage, are usually ordered to be specifically performed. But even the above classes of contracts will not be specifically performed by a court of equity, unless certain equitable conditions are fulfilled, such as—that both parties were competent to contract—that the terms were certain and definite—that there was a valuable consideration—and that the plaintiff has shewn due diligence and good faith. Where a contract has been in part performed, this circumstance will often give a court of equity jurisdiction to enforce specific performance. On the other hand, a court of equity could not, until recently, give damages for a breach of contract. If the court thought damages the proper remedy, it could only send the case to a court of common law to be tried by a jury. But now, in suits for specific performance, the party may ask damages in the alternative; and if the court thinks


² IN SCOTLAND.

¹ Contra; there being no separate administration of remedies as legal or equitable, the court administers both, and the following is the rule. An obligation ad factum prestandum, i.e., to do some specific act, may be specifically enforced in all cases where it is capable of being specifically performed; but where the party refuses to implement, or the act becomes impossible, damages only can be awarded. Hence it is common in all cases to sue in the alternative for implement or damages. The decree is executed by way of a charge to perform the act, failing which, other modes of execution are resorted to.

² Contra; implement is not ordered, on the ground that damages are not a sufficient remedy; but it is granted as a matter of course in all cases where the act is not impossible. See last note.
proper, it may summon a jury and try such questions itself. When a party has sued in a court of law for breach of contract, and has recovered damages, his equity to claim specific performance is gone; and if he is pursuing both remedies concurrently, the court of equity will put him to his election as to which remedy he will abide by.

485. **Set-off.**—Where mutual debts, unconnected with each other, existed, and one of the parties indebted sued the other, the latter had no other remedy but a cross action; but now, by statute, he can plead the set-off, so as to save a cross action, when the debts are between the same parties and in the same rights.  

**Statute of Limitations.**

486. **Prescription at common law.**—At common law there was no fixed time within which a cause of action became extinguished, or a debt was presumed to be abandoned. But statutes of limitation have been passed to enable a party to set up as a defence to an action the lapse of time since the cause of action accrued.

487. **Actions on deeds, etc., under seal.**—All actions of debt for rent upon an indenture of demise, and all actions of covenant or debt upon any bond or other specialty, must be brought within twenty years.  

488. **Actions on simple contracts, etc.**—All actions of debt for arrears of rent on a lease not under seal; all actions of trover, detinue, and replevin; all actions of account and on the case (and these include almost every action competent), must be brought within six years after the cause of action arose. Actions for debt under an award, where the submission is not by specialty, must also be brought.

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1 So compensation is allowed on similar grounds; but the same strictness is not observed as to one cause of action being ex delicto, and the other ex contractu. Stat. 1592, c. 141; Ersk. 3, 4, 15; Bell's Pr. § 573; Macintyre v. Macdonald, 26 Sc. Jur. 227.

2 The general period of prescription is forty years, called the long negative prescription, which applies to all actions, and extinguishes the right, as well as the remedy; but there are shorter periods applicable to particular rights and which do not extinguish the rights, but merely prevent their being proved by a particular mode of evidence.
Contracts Generally.

within six years. All actions for penalties, damages, or sums of money, given by statute to a party grieved, must be brought within two years.

489. Writings in party's handwriting.—The mere circumstance that the deed or document of debt is written in the handwriting of the party liable, makes no difference whatever, the sole test being whether it is under seal or not.

490. Actions as to the sale of goods, hiring, loan, deposit, and pledge, are included under the head of actions of debt, or for breach of contract mentioned above, and must be brought within six years, unless the contract is under seal.

491. Actions against sureties also resolve into ordinary actions on simple contract, or on contracts under seal, respectively, according to the nature of the writing.

492. Actions for workman's or servant's wages, for tradesman's accounts, for solicitor's bills of costs, for rent due on verbal lease, etc.,

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IN SCOTLAND.

1 Contra: a special statute applies to holograph missive letters and holograph bonds and subscriptions in compt books, which prescribe in twenty years. Stat. 1069, c. 9. This is called the viennial prescription. Ersk. 3, 7, 26; Napier on Prescrip. 866; Mowat v. Banks, 28 Sc. Jur. 542. But it is still competent within forty years to prove the debt by the defender's oath.

2 Contra: a five years', or quinquennial limitation applies to all bargains concerning moveables, viz., all independent mercantile transactions, exclusive of these transactions embraced in current accounts protected by the triennial prescription and referred to in the next page. Dickson, p. 268. It also applies to sums of money, provable by witnesses. These bargains generally include sale, hiring, loan, deposit, and pledge of moveables. But the statute is elided, if the debt can be proved, or contract established, within forty years by the writ or oath of the party. Stat. 1669, c. 9; Ersk. 3, 7, 20; Napier on Prescrip. 813; Hunter v. Thomson, 5 D. B. M. 1285; Campbell v. Grierson, 10 D. B. M. 361; M'Kinlay v. M'Kinlay, 14 D. B. M. 162.

3 Contra: the septennial, or seven years' limitation, applies in general to cautions. "No man binding himself for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sum for more than seven years after the date of the bond;" but the creditor must have notice that such party is expressly or in fact a cau- tioner. Stat. 1695, c. 5; see post, "Guarantee." This limitation extinguishes the right as well as the remedy.
are also generally included under the head of simple contract debts.  

493. From what time statute runs. — The time from which the Statute of Limitations begins to run is not the date of the document or of making the contract, but the time at which a cause of action accrued, i.e., when the contract was broken.

494. Exceptions in favour of persons under disability. — If, at the time the cause of action accrues, the person entitled to bring the action is an infant, a feme covert, or non compos mentis, such persons may bring the action within the same period after the disability ceases. There is no exception if the plaintiff was imprisoned or beyond seas; but if the defendant was beyond seas at the time, then the six years are counted from the time of his return. No part of the United Kingdom or the isles of Man, Jersey, or adjacent islands, is deemed to be beyond the seas in this sense.

\[ a \text{ Ante, } \|$ 488. \]
\[ b \text{ 21 Jas. I. c. 17, } \|$ 4 ; \text 3 & 4 W. IV. c. 42, } \|$ 44 ; \text 4 Anne, c. 16, } \|$ 19 ; \text 19 & 20 Vic. c. 97, } \|$ 10. \]
\[ c \text 19 & 20 Vic. c. 97, } \|$ 10. \]
\[ d \text 4 Anne, c. 16, } \|$ 19. \]
\[ e \text 19 & 20 Vic. c. 97, } \|$ 10. \]

**IN SCOTLAND.**

1 Contra; the three years’, or the triennial prescription, applies to these debts under the stat. 1579, c. 83, which describes them as “actions of debt for house maills, men’s ordinaries, servants’ fees, merchants’ accounts, and other the like debts not founded on written obligations.” Much litigation has arisen as to the meaning of these words, and what contracts they apply to. The statute has been held to apply to workman’s wages, law-agent’s (solicitor’s) accounts, furnishings to a domestic establishment (goods supplied), servant’s wages, and rent due on a lease which is verbal. Napier on Prescrip. 714. The statute is elided by proving the debt by the writ or oath of the party liable, any time within forty years. *Ibid*; Dickson on Evid. 271, et seq.

2 Contra; the time is counted in the vicennial limitation from the date of the writing, and not the day of payment, M. 10,992; so in the quinquennial from the making of the bargain, stat. 1669, c. 9; in the septennial, from the date of the bond, stat. 1693, c. 5; but in the triennial prescription the time is counted from the date of the last furnishing. 1 Bell’s Com. 331; Ersk. 3, 7, 17; Dickson on Evid. 277. M. 11,087. So the long negative prescription is counted from the day of payment or performance.

3 The vicennial and quinquennial prescription do not run against minors (1669, c. 9), but the triennial does. M. 11,150; *Campbell v. Wilson*, 2 Paton, 193. The long negative prescription does not run against minors. 1617, c. 12; Ersk. 3, 7, 35. There is no deduction for absence abroad, except the plaintiff is in prison there. See 2d Rep. Merc. L. Com. 22.
495. At what time disability must exist.—The disability above mentioned must exist at the time the cause of action accrues; for when the statute once begins to run, it cannot be stopped by any disability afterwards supervening.\(^a\)

496. Acknowledgment, payment of interest, etc.—If any acknowledgment has been made either by writing signed by the party liable under the deed or specialty, or by his agent, or by part payment, or part satisfaction of principal or interest, the period of the twenty years' limitation is then counted from the date of such or the last acknowledgment, subject to the further exception in favour of persons under disability.\(^b\)\(^c\)

In the case of simple contract debts, no acknowledgment or promise by words only will be evidence of a new or continuing contract so as to take the case out of the statute, but such acknowledgment must be by writing;\(^d\) signed by the party liable or his agent,\(^e\) or there must be part payment of principal or interest.\(^f\) The acknowledgment in writing must be made to the creditor or his agent;\(^g\) and it must be sufficiently specific to warrant the court in inferring therefrom a positive promise to pay.\(^h\) The part payment of principal or interest need not be in money.\(^i\)

\(^a\) Humphrey v. Scroope, 13 Q. B. 509; Smith v. Hill, 1 Wils. 134.

\(^b\) 3 & 4 W. IV. c. 42, § 5.

\(^c\) 21 Jas. I. c. 16; 9 Geo. IV. c. 14; 19 & 20 Vic. c. 97, § 13.

\(^d\) Williams v. Griffiths, 2 C. M. R. 48; Cleave v. Jones, 6 Exch. 578.


\(^f\) Williams v. Griffiths, 3 Exch. 335, 584.

\(^g\) Bodger v. Arch, 10 Exch. 341.

\(^h\) Ibid.

\(^i\) Ibid, 72.

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**IN SCOTLAND.**

1 *Contra*; the years of disability, when deducted, may occur at any point of the prescriptive period, and the cause of action will be suspended during the time the disability lasts.

2 So the long negative prescription may be interrupted by an acknowledgment of the debt, provided such acknowledgment is given during the forty years.

3 *Contra*; the acknowledgment of a debt may be established either by the writing of the debtor, or by his admission on oath of reference. Rep. Merc. L. Com. 147. And a memorandum written by the debtor may in some cases be sufficient, though not signed by him. *Ibid.*

4 *Contra*; it is not indispensable in all cases that the acknowledgment should be made to the creditor or his agent. Rep. Merc. L. Com. 147. If the acknowledgment be clear, it will be effectual to prove the debt though it contain no promise to pay. *Ibid*, 72.
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497. *Within what time acknowledgment given.*—The acknowledgment in writing and signed, which is required to take a case out of the statute, may be given either during the time of limitation, or after it has expired; and a fresh period of limitation runs from such acknowledgment.  

498. *Writ to save Statute of Limitations.*—Where the period of limitation has nearly expired, it is always competent to keep the debt alive by issuing a writ of summons, which, however, must either be served within six months thereafter, or must be renewed every six months until service.  

499. *Limitation does not extinguish debt, etc.*—The Statute of Limitations does not extinguish the debt, but merely bars the remedy, provided the defendant properly plead the statute specially as a defence. The debt still continues for other purposes—as, for example, to support a lien in respect of the debt, and to support an action on a subsequent acknowledgment of the debt, without proving any fresh consideration. The limitation of actions to recover land, however, extinguishes the right as well as the remedy.  

* 15 & 16 Vic. c. 76, § 11.  
  *Spears v. Hartley, 3 Esp. 81; Higgins v. Scott, 2 B. & Ad. 413.  
  *See ante, § 296.

IN SCOTLAND.

1 *Contra*; it is always competent within forty years from the breach of a contract, to prove the debt by an acknowledgment or payment of interest or principal, for the right is not extinguished by the long negative prescription until forty years elapse. An acknowledgment of a debt made within the period of short prescription does not elide prescription; but if an acknowledgment be made after the period of short prescription is completed, it will be effectual to prove the debt for forty years thereafter; 2d Rep. Merc. L. Com. 72.  

2 *Contra*; the written acknowledgment of a debt bars the long prescription only. See last note.  

3 So the long negative prescription may be interrupted judicially by raising an action in which the debtor must be cited as a party, or by diligence with which he must be served. The citation need only, however, be renewed every seven years; M. 11,331. The summons in the action must be called in court within a year, otherwise it falls.  

4 *Contra*; the long negative prescription of forty years extinguishes the debt for all purposes; but the minor prescriptions merely cut off one mode of proving the debt, leaving it to be proved in other modes competent.
CHAPTER II.

TORTS.

506. Torts generally.—A tort is a wrong independent of contract, and embraces those injuries to the person or property which a civil court will redress. Some cases, however, partake both of contract and tort, and the action may be treated as one arising either ex contractu or ex delicto; such are some actions of trover and trespass.

507. Death of wrong-doer.—The right of action for a tort in general dies with the person who committed it, and no action can be brought at common law against his executor.a

508. But now by statute, if the tort was committed in respect of another's property within six months preceding the wrong-doer's death, and the action be brought within six months after the representatives have acted, such action may be sustained.  

b There is also an action competent by the custom of England against the executor of an incumbent for dilapidations.c

509. Criminal punishment.—The criminal prosecution of a party for felony must be bona fide attempted by the injured party before he

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a 1 Saund. 216 a.  
b 3 & 4 W. IV. c. 42, § 2.  
c Manson v. Lambert, 12 Q. B. 795.

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IN SCOTLAND.

A delict is an offence committed with an injurious, fraudulent, or criminal purpose (Bell's Pr. § 544), in other words, a crime; but quasi delicts (torts) are remedied only by a civil court.

Contra; the obligation to repair the injury transmits to the representatives of the delinquent quantum lucroti, whether proceedings commenced during his life or not. Bell's Pr. § 546; Ersk. 3, 1, 15; M'Naughton, 15 F. C. 199; Davidson v. Tulloch, 32 Sc. Jur. 363.

Contra; there is no limitation other than the ordinary prescription of forty years, except as to actions of spuillie (trover or detinue for goods) which suffer a triennial prescription. Stat. 1579, c. 81; Ersk. 3, 7, 16; see post, § 515 n.
can enforce his civil remedy, but this rule does not apply to mis-
demeanours.a

510. Damages.—The damages recoverable in actions of tort are
in general confined to the pecuniary loss sustained by the injury, but
in certain cases, such as actions for seduction, or for malicious injuries,
what are called vindictive damages may be given, that is, whatever
sum the jury think proper, on a view of the whole circumstances, so
long as the jury are not actuated by any improper motive or wrong
principle in making their assessment.b c

511. Actions for tort to deceased person and his estate.—The rule
at common law is, that, if a person who has been injured in person or
property dies, the right of action to recover damages dies with him—
actio personalis moritur cum persona.d But by statute, an exception
was made where the injury was done to the personal estate of the
deceased in his lifetime, whereby it became less beneficial to the
executor.e So by statute, a right of action is given to the executors
for injuries to the real estate of their testator, committed in his life-
time, provided such injury was done within six months preceding the
death, and provided the action be brought within one year after the
death.f So by Lord Campbell’s Act, an action for injuries resulting in
death, caused by the wrongful act, neglect, or default of another, is
competent to the wife, husband, parent, or child of the deceased person,
but such action must be brought within one year after the death.g h

a 1 Hale P. C. 546; Crosby v. Long, 12 East. 409.  b 4 Edw. III. c. 7; 15 Edw. III. c. 5; 1 Saund. 217 n. (1).

IN SCOTLAND.

1 So the punishment of the crime does not extinguish the civil remedy
in any case, except where the punishment is capital. 1 Hume, Cr. L. 279.
2 Contra; the reparation in all cases includes not merely the pecuniary
loss, but also a solutum for the injury. Bell’s Pr. § 552.
3 Contra; the action for a solutum transmits to the personal repre-
4 The wife and family can sue in such circumstances, which they do at
common law, for assyment, which is a solutum for wounded feelings, as
well as an indemnification for damages. Bell’s Pr. § 2029. Parents may
sue, if the child de facto supported them; Weems v. Love, 33 Sc. Jur. 521.
The damages are divided, like the goods in communion. Ibid.
512. Seduction.—The seduction of an unmarried woman, by whatever deceit or misrepresentation effected, is no cause of action at common law, and she herself can recover no damages on that ground. But if she is a servant, her master may sue the seducer for the loss of service, if any, caused by the seduction. A father or mother, as such, has no right of action for the seduction of a daughter, but if he or she can prove some slight acts of service so as to sustain the allegation that she was a servant, the action will lie against the seducer. And though it is absolutely necessary for the parent to prove some loss of service, yet the jury are not confined to give damages for the mere loss of service, but may increase them in respect of the wounded feelings of the parent.\footnote{Grimaud v. Wells, 7 M. & Gr. 1033; Howard v. Crownther, 8 M. & W. 663; Eager v. Grimwood, 1 Exch. 61; Thompson v. Ross, 5 H. & N. 16; Griffiths v. Footgen, 15 C. B. 344;}

513. Action for criminal conversation.—The seduction of a wife was formerly a ground of an action at law by the husband for criminal conversation. Instead thereof, the adulterer may now be made a correspondent in a suit for divorce, and damages may be awarded against him.\footnote{Contra; this is a ground of action to the woman, who can sue in her own right, and recover damages for the seduction per se. In Hislop, 15th July 1696, the judges held that every promise and insinuation of marriage was not enough to found an action, as these are often made very lightly; yet that, on the other hand, debauchery and fraudulent designs should not pass unpunished, and, therefore, they would allow damages against the man who had dolosē induced a woman to trust him. M. 13,908; McCandy, 4 S. D. 520; Walker, 19 D. B. M. 340.}

514. Action for false imprisonment.—When an action is brought for false imprisonment, it is in the form either of an action of trespass, or an action on the case for malicious prosecution, according to circumstances. In the latter case, the plaintiff must prove malice and want of reasonable and probable cause.\footnote{An action for seduction of a wife was competent either before or after a suit for divorce. Bell's Pr. § 2033: M. 13,919. But the adulterer may now be made a co-defender in an action of divorce. 24 & 25 Vic. c. 86, § 7.}

515. Limitation of actions ex delicto.—Actions of trespass to land

\footnote{The action for wrongous imprisonment lies on the statute 1701, c. 6, and also at common law. Bell's Pr. § 2035, et seq.}

IN SCOTLAND.
or goods must be brought within six years; of trespass to the person, as for assault or battery, within four years; and actions for slander within two years.\(^1\) In the case of the executors of the wrongdoer or injured party being sued, or suing, then the time is further abridged,\(^b\) and so are actions against magistrates and official persons by particular statutes.

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CHAPTER III.

SALE OF GOODS.

520. Statute of Frauds.—The contract of sale, as regards the mode of establishing its validity by evidence, is regulated chiefly by the Statute of Frauds.\(^c\) If the price is above £10, the contract must be in writing;\(^2\) signed by the party sought to be made liable, or his agent, unless the buyer shall have accepted part of the goods sold, and actually received the same, or have given something in earnest to bind the bargain, or in part payment of the price. If the price is under £10, the contract may be proved by oral evidence.

521. Accepting and receiving part of the goods.—A delivery\(^3\) sufficient to take the contract out of the Statute of Frauds may be,

\(^{a}\) 21 Jan. I. c. 16. \(^{b}\) See ante, § 508, 511. 
\(^{c}\) 29 Ch. II. c. 3; 9 Geo. IV. c. 14, § 7; 2d Rep. Merc. I. Com. p. 41.

IN SCOTLAND.

\(^1\) Contra; there is no statutory limitation at all, except in actions on the statute 1701, for wrongful imprisonment, or in a few cases limited by particular statutes. An action of spuizie prescribes in three years; it is an action for the taking away or intermeddling with moveable goods in the possession of another, without the consent of that other or the order of law (trover and detinue). The delinquent is sued for restitution of the goods or their value, together with violent profits, i.e., such profits (estimated by the pursuer’s own oath) as he might have made of the goods while so deprived of them. Yet an action for simple restitution with ordinary damages is competent any time within forty years. Ersk. 3, 7, 16.

\(^2\) Contra; writing is not required, whatever be the amount of purchase money. Ersk. 3, 3, 2.

\(^3\) The question of delivery chiefly arises in questions of bankruptcy, as delivery is the criterion of the right of property in the goods. See post.
either by actual delivery, or by delivery of the key of the warehouse, or of the bill of lading, or other indicia of property.\(^a\) Acceptance must be in the character of owner, and is compatible with the right of the buyer to object to the quantum or quality of the goods.\(^b\)

522. Earnest, or part payment.—The earnest, or part payment, however small, must be actually paid \textit{bona fide}, and not as a mere form.\(^c\)

523. Writing signed by party or agent.—The writing must show the names of the contracting parties; also the price, if any was agreed upon, otherwise a reasonable price will be implied.\(^d\) The signature may be printed,\(^e\) or it may be implied in a document purporting to be in the name of the seller.\(^f\) The agent need not be authorised by writing.\(^g\) If an auctioneer write the purchaser’s name in his book opposite the lot sold, that is a sufficient signature.\(^h\) So, if a broker, being the common agent of both parties, make the entry in his book, that is a signature; but the bought and sold notes will suffice if there is no such entry.\(^i\)

524. Offer and acceptance.—Where A, by post or by an agent, offers to sell on receiving an answer by return of post or by messenger, he cannot retract until the time of return has arrived,\(^1\) the offer being supposed to be continuously made during every instant of time until the offer arrived.\(^j\) But if the offer is made by A to B directly, and B asks for time to consider, say for a day, A is not bound to wait,\(^2\) because it is a \textit{nudum pactum}, and he has received no consideration for waiting.\(^k\) And it seems, if no time for acceptance is men-

\(^a\) Chaplin \textit{v.} Rodgers, 1 East. 192; Mitchell \textit{v.} Eds, 11 A. & E. 888; Meredith \textit{v.} Meigh, 2 E. & B. 364.
\(^b\) Morton \textit{v.} Tabbett, 15 Q. B. 428; Parker \textit{v.} Wallis, 5 E. & B. 21; Hunt \textit{v.} Hecht, 8 Exch. 814.
\(^c\) Blankinop \textit{v.} Clayton, 7 Tant. 597; Walker \textit{v.} Nussey, 16 M. & W. 302.
\(^d\) Hoardly \textit{v.} Mackean, 10 Bing. 482; Ashcroft \textit{v.} Morrin, 4 M. & Gr. 450.
\(^e\) Johnson \textit{v.} Dodgson, 2 M. & W. 653.
\(^f\) Lobb \textit{v.} Stanley, 5 Q. B. 574.
\(^g\) Chapman \textit{v.} Partridge, 5 Esp. 256.
\(^h\) Emmerson \textit{v.} Heale, 2 Tant. 38.
\(^i\) Goom \textit{v.} Affairs, 6 B. & C. 117; Thornton \textit{v.} Meux, 1 M. & M. 43.
\(^j\) Adams \textit{v.} Lindsell, 1 B. & Ald. 681.
\(^k\) Routledge \textit{v.} Grant, 1 M. & P. 731; 4 Bing. 653; Cook \textit{v.} Oxley, 3 T. B. 653.

IN SCOTLAND.

\(^1\) The same, Dunlop \textit{v.} Higgins, 6 Bell’s Ap. 195.
\(^2\) Contra; if A expressly give B a certain time to consider, A would be bound to wait the full time given, because no consideration is necessary to support the contract.
tioned at all, A would not be bound to wait for any length of time; at least not unless, in the case of a letter by post or bearer, B had immediately, or by return of post, intimated his acceptance.\(^a\)

525. *When property in goods passes.*—Goods, which are the subject of sale, may be either specific goods in existence, or goods which are not identified, but are merely intended to be delivered at some future time; or which are not actually made or ready for delivery. The property in specific goods ready for delivery passes to the buyer on the making of the contract, and before delivery, whether credit be given for the price or not.\(^b\)\(^c\) But if the goods sold are not *in esse*, or not identified, or not completed, then the property does not pass till so completed, and approved of expressly or impliedly by the buyer.\(^d\)

526. *Risk of goods sold.*—The buyer of specific goods is subject to the risk of accidents to the thing bought from the date of the contract; and as to other goods, as soon as the property has passed to the vendee.\(^*\)

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\(^a\) See *Mosley v. Tinkler*, 1 C. M. R. 692.

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**IN SCOTLAND.**

1 *Contra*; A would be bound to wait a reasonable time, and such reasonable time generally means, in mercantile affairs, a very short time. See *Thomson v. James*, 18 D. B. M. 1.

2 Goods not yet in possession of the seller may be sold at common law. Bell's Com. by Shaw, 88.

3 *Contra*; the right of property in goods sold does not pass until actual or constructive delivery. *Boak v. Megget*, 6 D. B. M. 662; 2 Ross, L. C. 547; subject to the qualifications stated *post*, § 527, 528 n n.

4 So the risk is with the buyer, even of specific goods, after the date of the contract, risk not being a mere corollary to the right of property. Stair, 1, 14, 7; *Ersk. 3, 3, 7*. But if the bargain is to deliver the goods at a particular place, the risk is with the seller, till delivery at that place. *Milne v. Miller*, 1st Feb. 1809, E.C. The reason why in general the risk is with the buyer, is said to be that, as the seller's obligation is to deliver the goods sold, if such goods are accidentally destroyed without his fault, his obligation is extinguished. On the other hand, the obligation of the buyer being to pay the price, the destruction of the subject is held to be no defence to an action for payment. *Hausen v. Craig*, 31 Sc. Jur. 236.
527. Creditors of seller of undelivered goods.—Where specific goods are sold by A, and still remain with him, the creditors of A, the seller, whether suing or about to sue for a debt, can neither attach them by any process known to the law before judgment, nor can the creditors after judgment have execution against them,\(^1\) for they belong to the buyer. On the same principle, if the seller become bankrupt, his assignees, who have no greater right than himself had, cannot detain them, except so far as the seller could.\(^a\)

528. Creditors of buyer of undelivered goods.—Where A has sold to B specific goods, but has not delivered them, the creditors of B cannot, by any process of law, before judgment\(^2\) recovered in an action against B, attach those goods in the hands of A; but after obtaining judgment, they can issue execution against those goods, and the sheriff can seize and sell them, subject to any lien which A may have upon them, and pay the proceeds to such judgment creditors.

529. Goods in hands of a third party.—Where the goods sold are in the hands of a third party, the property in the goods passes to the purchaser by the contract of sale, as in other cases, though no notice has been given to such third party.\(^3\)

530. Seller's lien on goods for price.—If credit be not stipulated for, or the term of credit has expired, the seller has a lien on the goods, and may retain them till the price be paid.\(^b\) But if he take a bill of exchange as a security for the price, he loses the lien; and it does not revive on the dishonour of the bill, if the bill is in the

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\(^a\) See post, "Bill of Sale," \(\S\) 540. 3 C. & M. 504; \(S\)partali v. \(B\)enecke. 2d Rep. Merc. L. Com. 44; \(M\)ills v. \(G\)orton, 10 C. B. 212.

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IN SCOTLAND.

\(^1\) The same since 1856; for though the property in the goods still remains in A, no creditor of the seller, after the date of such sale, shall attach such goods, as belonging to the seller, by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same. 19 & 20 Vic. c. 60, \(\S\) 1.

\(^2\) \(C\)ontra since 1856; though the property in the goods does not belong to B, yet the right of B to demand delivery of such goods is, from and after the date of the sale, attachable by or transferable to the creditors of B; and they can arrest the goods in A's hands before decree, as in other cases. 19 & 20 Vic. c. 60, \(\S\) 1. See ante, \(\S\) 480 n, "Arrestment."

\(^3\) \(C\)ontra; intimation must be given by the buyer to the custodier of the goods, over and above actual or constructive delivery. \(E\)adin v. \(M\)ackinlay, 7th Feb. 1815, F. C.
hands of third parties, though it will revive, if the bill is in his own hands.b

531.—General lien.—But he cannot retain the goods for a general balance arising out of other transactions between him and the buyer.1

532. Sub-sale.—And if the buyer B before delivery sell the goods to C for value received, C cannot insist on delivery of the goods from the original seller until the price is paid, for the second vendee cannot stand in a better situation than his vendor.2

533. Stoppage in transitu.—The doctrine of stoppage in transitu is an equitable exception3 to the rule that the vendor's lien for the unpaid price is gone by the goods leaving his possession; and he is entitled to stop them while still in an intermediate agent's hands and undelivered to the purchaser.

534. Seller re-selling goods.—If goods are sold on credit, and before delivery to the buyer the seller again sell them, except in market overt, and deliver them to a third party, the first buyer can sue such third party for the goods or their value, whether the latter had notice or not of the first sale;4 and the first buyer can sue the

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1 Contra; the seller has a right of retention not only for the price, but for his general balance against the buyer, in respect of all other debts due to him by the buyer. Melrose v. Hastie, 13 D. B. M. 810; 26 Sc. Jur. 319; Macnoughton v. Baird, 14 D. B. M. 1010. 2d Rep. Merc. L. Com. 44; see post, § 595 n.

2 This is the same since 1856, an exception being made expressly by 19 & 20 Vic. c. 60, § 2, in favour of second and subsequent purchasers, to the general rule stated in the last note.

3 The doctrine of stoppage in transitu is not an exception to the general rule. Morton v. Abercromby, 30 Sc. Jur. 193. For the general rule in the case of all contracts is, that either party may withhold performance of his part of the contract if the other party refuses to perform the corresponding part.

4 Contra; there is no remedy, except an action of damages against the seller, unless the third party establish fraud or collusion. 2d Rep. Merc. L. Com. 45. The reason is that the property in the goods did not pass by the first sale.
seller for damages.\(^a\) Mere non-payment of the price of specific goods sold at the time appointed is not in general a ground for the seller rescinding the contract and re-selling them.\(^b\) But where the buyer refuses to accept or pay for the goods, the seller is entitled to re-sell them, after reasonable notice to the purchaser of his intention to re-sell, in case of the non-removal or non-payment of the goods in a reasonable time.\(^c\)

535. Actions for not delivering goods sold.—When the seller has sold specific goods, and wrongfully refuses to deliver them, the buyer can in general only bring an action of damages in a court of law for breach of contract by reason of the non-delivery; yet the Court will, on the plaintiff's application, after judgment in his favour, order execution to issue for the delivery of the specific goods, and thereby indirectly enforce specific performance of the contract.\(^d\)\(^1\) And a court of equity, in peculiar cases, will enforce specific performance, but only on the principle that mere damages do not constitute a sufficient remedy, as where the chattel has a preedium affectionis, as an antique horn, tobacco-box, picture, and such like.\(^e\)

536. Action for price.—Where the sale is of specific goods, the seller can sue the purchaser for the price of the goods. Where the sale is of goods not specific, the seller, on the buyer refusing to accept the goods, or pay the price, cannot sue for the price,\(^2\) but only for the damages he may have sustained by reason of the non-acceptance of the goods.\(^f\)

537. Sale by auction.—On a sale by auction, the seller may employ a person to bid for him up to a fixed sum, to prevent the

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\(^a\) Bondell v. Parsons, 10 East, 359; Hock-ter v. De la Tour, 2 E. & B. 688.  \(^b\) Milgate v. Keble, 3 M. & Gr. 100; \(^c\) Mackean v. Dunn, 4 Bing. 722. \(^d\) 19 & 20 Vic. c. 67, § 2. \(^e\) See ante, § 484.\(^f\) Wilmshurst v. Bocker, 7 M. & Gr. 382. \(^g\) 2d Rep. Merc. L. Com. 47.

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IN SCOTLAND.

1 \textit{Contra}; the buyer, as a matter of course, sues alternatively for implement or damages. He is entitled to the specific goods if they can be had, and to a decree to that effect \textit{ad factum præstandum}; but if the seller refuses to deliver, or becomes bankrupt, the Court can only substitute damages. 2d Rep. Merc. L. Com. 46.

2 \textit{Contra}; whether the sale is of goods specific or not, the seller can sue for the price, provided goods according to the contract have been tendered to the purchaser. 2d Rep. Merc. L. Com. 47.
property being sold at an undervalue. And he need not give any previous notice of this intention to the purchasers.\(^1\)

538. **Damage for non-delivery.**—In estimating damages in an action for not delivering goods sold, the buyer is entitled to recover the difference between the contract price, and that which goods of a similar description would cost if bought at the time when the delivery should have taken place. But a rise in the value subsequent to the latter date cannot in general be taken into consideration.\(^2\)

539. **Sale of stolen goods.**—A sale in market overt of stolen goods, gives the purchaser a good title against the real owner, until the latter has prosecuted the thief to conviction;\(^3\) but the real owner can sue an innocent vendee, if the goods are not so bought in market overt, without prosecuting the thief.\(^4\) A market overt in this sense means, in the city of London, every shop, the goods being such as are sold in the ordinary course of dealing there; but out of the city of London, it means only those places and those market days, and hours of the day, pointed out by charter and prescription for each locality.\(^5\)

540. **Bill of sale.**—A person may, by bill of sale, validly sell his goods, and yet retain possession; but such bill of sale will not be good against creditors who issue execution against the seller, unless

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\(^{a}\) 2d Rep. Merc. L. Com. 50; *Flint* v. *Woodin*, 9 Hare, 618.


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**IN SCOTLAND.**

\(^{1}\) Contra; the seller must give notice of his intention to employ a person to bid for him. Bell's Com. by Shaw, 97; *Paulds* v. *Corbet*, 31 Sc. Jur. 313. See ante, § 330 n.


\(^{3}\) Contra; the theft is called a *vitium reale*, and inheres in the goods, following them into whose hands soever they may go. Bell's Pr. § 1320; 1 Bell's Ill. 416. Hence the real owner can recover them from any innocent buyer.
the bill of sale has been duly registered before the sheriff seize the goods.  

541. Sale of furniture, etc., by tenant of a house.—A tenant may sell his furniture, stock, or other goods in his house, during the currency of the term, and before the time of payment of rent has arrived, and the landlord's power of distress cannot affect the sale in respect of rent not yet due. Hence, if no rent is yet due, he may, the day before it becomes due, sell all his goods, the landlord having no power to interfere. And even after rent is due, the sale will be good, if made bona fide and for valuable consideration to a party not privy to the fraud, before the landlord seizes them under the distress.

542. Proof of payment.—Payment of the price of goods may be proved by oral as well as any other legal evidence.  

543. Goods sold before execution against seller.—Since 1856, no writ of fi. fa., or other writ of execution, and no writ of attachment against the goods of a seller shall prejudice the title of a purchaser bona fide and for valuable consideration, before the actual seizure or attachment of such goods under the writ; provided the purchaser had not, at the time of the sale, notice of such writ being delivered to the sheriff.

544. Implied warranty.—There is no implied warranty in a sale

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1 See ante, § 463.  
2 See ante, § 461.  
3 19 & 20 Vic. c. 97, § 1.

IN SCOTLAND,

1 There is no registration required in such circumstances, and creditors of the seller cannot, by any diligence or process of law, including sequestration, attach the goods. 19 & 20 Vic. c. 60, § 1; see ante, § 527, 528 n n.  
2 Contra: the landlord's hypothec attaches on the goods from the commencement of the tenancy, and (like a maritime lien in E. to which possession is not necessary) follows the goods for a certain time. The hypothec may be made effectual by an action raised within three months after the last conventional term of payment of the rent in each year. See ante, § 407 n.  
3 Contra: it is only proveable by the writ or oath of the seller, unless in cases under £8:6:8, or where it was a ready money transaction. See ante, § 461 n.  
4 The same. The issuing of a precept of poindings and the execution of a charge for payment, until followed by an execution of poindings, does not prevent a sale of goods by the debtor. Rep. Merc. L. Com. 48.
of goods that they will be fit for the purpose intended, unless specially sold for that purpose.¹

CHAPTER IV.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

546. Parties to bills.—If an infant (i.e., a person under 21) be a party to a bill or note, he cannot be sued thereon during minority; nor after majority, unless he has ratified or confirmed the contract by some writing signed by himself.² And it makes no difference, that the bill was granted in the way of business or for necessaries.

A married woman, though carrying on trade, cannot, except in the city of London, be sued on a bill or note given in the course of such trade.³ It makes no difference, that she lives separate from her husband, except she is judicially separated, or has obtained an order protecting her property, or except he is transported beyond the seas.

Directors of joint-stock companies, who accept bills for the company in their own names, are in general personally liable; but not if the company is limited, and it is so stated in the bill. An

¹ Williams v. Harrison, Holt, 359; 9 Geo. IV. c. 14, § 3; See post, "Infants."² Byles on Bills. 60. ¹⁹ & 20 Vic. c. 47, § 43; 20 & 21 Vic. c. 14, c. 49, c. 80.


IN SCOTLAND.

¹ The same since 1856. If, at the time of sale, the seller was without knowledge, that the goods were defective or of bad quality, the goods with all faults, shall be at the purchaser's risk, unless the goods have been expressly sold for a specified and particular purpose. ¹⁹ & 20 Vic. c. 60, § 5.

² Contra: a minor is liable on a bill of exchange, if he is in business, and granted the bill or note in course thereof; and he is also liable on a bill given for furnishings. See post, Part IV. "Infant."

³ Contra: a married woman, who is a party to a bill, and is carrying on business apart from him, is liable in all cases if her husband is abroad; 2d Rep. Merc. L. Com. 59; Orme v. Differ, 12 S. D. 149; Fraser, D. R. 259; but not if she is judicially separated. Ib. 261.
authority to directors to make bargains and contracts for their company, does not in general authorize the directors to draw bills.a

Official persons representing public bodies, are in general personally liable on bills or notes made for such bodies.b

547. Inland bills.—All bills are now deemed to be inland, which are drawn in any part of the United Kingdom, the Islands of Man, Guernsey, Jersey, Alderney, Sark, and islands adjacent thereto, and made payable in, or drawn upon any person resident in any part of the said United Kingdom or islands.c

548. Signature.—A party may sign the bill by his mark, or by the hand of another person, or by initials, though this is not stated ex facie of the bill. But when an action is brought against such party, and he denies the signature, witnesses must be called who were present when the mark or authority was given.4 The summary remedy, or privileged action, is competent on these as on other bills.d e

When the acceptor accepts a bill, he generally does so by writing his name across the face of the bill under the word “accepted.”f And it is now necessary for the acceptor of both inland and foreign bills to sign his name himself, or by some person duly authorised.g

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a Byles on Bills, 60; Harmer v. Steele, 4 Exch. 9.
b 19 & 20 Vic. c. 97, § 7.
c 18 & 19 Vic. c. 67.
d 19 & 20 Vic. c. 97, § 6.
e 456.

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IN SCOTLAND.

1 It seems the same.
2 Contra: corporations may grant bills or notes by the subscription of their office-bearers, and the latter do not bind themselves personally. Thompson on Bills, 216 (2d ed.)
3 The same since 1856 by 19 & 20 Vic. c. 60, § 12.
4 The same, though witnesses generally attest the mark by signing their names. M. 16,802; Craigie v. Scobie, 10 S. D. 510. And some evidence at the trial must be given of a custom on the part of the party to sign by his mark or initials.
5 Contra: if the signature is by mark, unless it is authenticated by two notaries and four witnesses, summary diligence is not competent. M. 1419; M. 16,983; 5 Br. Sup. 887.
6 Contra: the acceptor’s signature is usually written under that of the drawer on the face of the bill. The word “accepted” is not usually added. The signature, which is necessary, may be by the acceptor himself or an agent duly authorised. 19 & 20 Vic. c. 60, § 11.
549. Proof of date.—The date on a bill or note is merely \textit{prima facie} evidence of the true date, and oral evidence may be given to rebut the date stated in the bill.\footnote{Contra; in the absence of fraud alleged, and if the sum exceeds £8; 6 s. 8, the date can only be supplied by written evidence. 2d Rep. Merc. L. Com. 55; (Ersk. 3, 2, 25; Bell’s Com. by Shaw, 305; 1 Ross, L. C. 182; Thomson, 60); but if there is no date, oral evidence of the true date of issue is admissible. 19 & 20 Vic. c. 60, § 10.}

550. Proof of no consideration.—Contrary to the general rule applicable to simple contracts, a good consideration is presumed in bills of exchange, and the holder need not in general allege or prove it.\footnote{It is the general rule, that an adequate consideration is presumed in all contracts, bills included.}

551. The defendant cannot put the plaintiff on proof of the consideration, unless he, the defendant, can make out a \textit{prima facie} case against him, by showing that the bill was obtained from the defendant or some intermediate party by means of fraud or duress, or by showing the bill was lost, or was originally given for an illegal consideration. And in such cases the defendant can prove his case by parole evidence.\footnote{Formerly want of value as to a bill lost, stolen, or got by fraud, could only be proved by some writing signed by the holder, or it must have been admitted by him when referred to his oath; and the same must have been proved as to the intermediate holders, if any. M. 1484; 1 Ross, L. C. C. 144, 229; Paterson v. Govan, 29 Sc. Jur. 8. Yet a judicial examination of the holder would, in the first instance, be ordered in suspicious cases (Wilson v. Pollock, 13th Nov. 1827; Hunter v. George, 7 W. S. 333; Miller v. Kappen, 9th Dec. 1848); or the above rule would be relaxed. Bannatyne v. Wilson, 29 Sc. Jur. 99. But now it lies on the holder of bills so obtained to prove that he gave value, and he may prove that fact by parole evidence. 19 & 20 Vic. c. 60, § 15.}

552. But as between privies, \textit{i.e.}, immediate parties to the bill, such as the drawer and acceptor, the payee and the drawer or maker, the indorsee and immediate indorser, etc., the absence or failure of the consideration is a good defence to the action;\footnote{Contra; it can only be proved by the writ or oath of the pursuer. Peat v. Wilson, 6 S. D. 225; Cargill v. Gould, 14 D. B. M. 485. And see last note.} and may be proved by parole evidence.\footnote{Byles on Bills, 109.}
553. As between remote parties, such as payee and acceptor, indorsee and acceptor, etc., D, the defendant, in order to set up a defence of no consideration, must not only be in a position, as stated above, to put P, the plaintiff, on the proof of the consideration which P gave; but D must also prove that he, D himself, got no consideration for his liability. Both of these facts may be proved by parole evidence.¹

554. Stranger accepting.—A person cannot in general accept a bill, who is not named in the address.⁶ But there is an exception in the case of a stranger, accepting supra protest, for the honour of one of the parties.² ²

556. Duress.—Where a bill or note has been obtained by duress, it is not void,³ but a bona fide holder can be put to prove that he gave value; and if he does so, he will recover.⁴

557. Protest.—The form of a protest of a foreign bill is the same mutatis mutandis for non-acceptance and non-payment. Where no notary public is near the place, any respectable person, with two witnesses, may protest the bill.⁵ And where a notary protests the bill, no witnesses are necessary, but at the trial he must be called as a witness to prove the protest.⁶ The protest need not be registered for any purpose.⁷

558. Besides the protest for non-acceptance and non-payment,

ⁱ Nichols v. Diamond, 9 Exch. 157; Davis v. Clark, 6 Q. B. 16; Mare v. Charles, 5 E. & B. 978.
⁲ Ibid; Jenkins v. Hutchinson, 13 Q. B. 744.
⁳ Jones v. Durell, 6 C. B. 596.
⁴ Bayley on Bills, 210; Anon. 12 Mod. 345.

IN SCOTLAND.

¹ Contra; these things can only be proved by the writ or oath of the pursuer.
² It seems he will be liable jointly with the other acceptor. Macara v. Watson, 2 S. D. 360; Thomson on Bills, 75, 77, 183.
³ Contra; a bill obtained by force and fear has been treated as void, even in the hands of an onerous indorsee. Wilcox v. Callender, 25th Nov. 1787; 1 Ross, L. C. C. 151; but see 19 & 20 Vic. c. 60, § 15.
⁴ Contra; a notary is necessary. M. 1518.
⁵ Contra; witnesses are necessary; but at the trial the instrument of protest proves itself.
⁶ Contra; for the purpose of summary diligence a notarial protest is necessary. But since 1856 a notarial protest of an inland bill of exchange is not necessary in order to preserve recourse against the drawer or indorser respectively, and it is sufficient to prove presentment and dishonour by other competent evidence, either written or parole. 19 & 20 Vic. c. 97, § 60.
there is another protest called a protest for better security, which is
used when the acceptor’s credit is publicly impeached, and which
enables a second person to accept for honour, which otherwise a stranger
cannot do.\footnote{a}

559. Death of drawer of check.—The drawer’s death is a counter-
mand\footnote{b} of a banker’s authority to pay the check; yet if it is paid
before the banker hears of the death, the payment is good.\footnote{a}

560. Transfer.—A bill or note is not negotiable, unless it be
expressed to be payable either to bearer or to order. If it is payable
to bearer, it is assignable by mere delivery; if payable to order, it is
assignable by indorsement only.\footnote{c}

561. Effect of presenting bill.—A bill of exchange, when pre-
..sented and accepted, has not the effect of charging specific funds of
the drawer in the hands of the drawee.\footnote{d} 4

562. Day of payment a holiday.—Christmas Day\footnote{5} and Good
Friday,\footnote{6} and all days appointed by proclamation for solemn feasts and
thanksgivings, are treated as Sundays, and payment must be made on
the preceding day, of bills falling due on those days.\footnote{c}

563. Receipt on bill.—A receipt on the back of the bill or note
is \textit{prima facie} evidence of payment by the acceptor.\footnote{d} But it must.\footnote{6}

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\footnote{a} \textit{Tate} v. \textit{Hilbert}, 2 Vet. 118. \hspace{1cm} Geo. III. c. 42; 7 & 8 Geo. IV. c. 15;
\footnote{b} 2d Rep. Merc. L. Com. 56; \textit{Laycock} v. \textit{Johnson}, 6 Hare, 199.
\footnote{c} \textit{Tussell} v. \textit{Lewis}, 1 L. Raym. 743; 39 & 40
\footnote{d} \textit{Pfie\l} v. \textit{Vanhateder}, 2 Camp. 439.

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IN SCOTLAND.

1 \ Not used, as any stranger can accept the bill, and make himself liable.
See ante, § 554 n.

2 \ It seems the same.

3 \ \textit{Contra}; it is negotiable without either of those words. M. 1446;
Rep. Merc. L. Com. 63. So a Scotch bill without those words is transferable
by indorsation in England, so as to enable the transferee to sue in his own

4 \ \textit{Contra}; acceptance operates as an assignation to the payee of the
drawer’s funds in the drawee’s hands to the amount of the bill; and so does
presentment for acceptance. 1 Bell’s Ill. 479-480; \textit{Briery} v. \textit{Macintosh}, 5

5 \ \textit{Contra}, so far as regards Christmas Day and Good Friday.

6 \ \textit{Contra}; if there is a receipt on the back of the bill, it operates as an
extinction of the debt in favour of the acceptor, and the contrary can only
be proved by the acceptor’s writ or oath. Thomson on Bills, 355; \textit{Martin}
be proved to be in the handwriting of a person entitled to demand payment.a

564. Discharge.—In order to prove the discharge of any party to a bill or note before it becomes payable, it is sufficient to prove by parole evidence 1 an express renunciation of his claim on the part of the holder.b

565. Interest.—Interest is allowed on bills and notes by usage of trade as well as by statute; but the plaintiff is not of right entitled to interest, unless it is expressly stated in the instrument to be payable.c 2 Hence, though juries generally add the interest to their verdict, they may give none, or a reduced rate.d If the action is summary under the recent statute, the plaintiff may add the interest on signing judgment. The interest claimable runs only in both cases to the date of the judgment being signed; 3 but by statute all judgment debts also bear interest till paid. It is necessary to produce the bill at the trial to entitle the plaintiff to interest, otherwise he will be allowed interest only from the date of the writ, which is the commencement of the action.e

566. Lost bill.—If a bill, note, or check, negotiable by indorsement or delivery, be lost or destroyed, the loser cannot, at common law, sue either of the parties liable on the bill, nor can he sue on the consideration.f But relief was allowed in equity on an indemnity being given; and now also at common law the loss shall not be set up as a defence, provided an indemnity is tendered.g h

567. Register of protested bills.—There is no register where protested or dishonoured bills of exchange and promissory-notes can be

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c 3 & 4 W. IV. c. 42, § 28; Florence v. 7 Crowe v. Clay, 9 Exch. 604.

Jennings, 2 C. B. N. S. 454. 2 17 & 18 Vic. c. 125, § 87.

d Ibid; Cameron v. Smith, 2 B. & Ald.

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IN SCOTLAND.

1 Contra; express discharge of any party to a bill or note from liability upon it can only be proved by the holder's writ or oath. Martin v. Smith, 27 Sc. Jur. 49.

2 Contra; it is due of right at common law and also by statutes 1681, c. 20; 1696, c. 36; 12 Geo. III. c. 72; Brown v. Brown, 4 W. S. 28.

3 Contra; interest is due up to and after decree until payment.

4 It seems the same. It has been said an action of proving the tenor of a bill was a matter of great delicacy, and should not be permitted except on strong grounds. McFurdane v. McNee, 4 S. D. 509.
recorded, so as to convert them into warrants of attorney, on which judgment can be at once entered up and execution issued.¹

568. Actions on bills privileged.—But actions on bills or notes are so far privileged that, if the writ of summons is in a certain form, the defendant is not allowed to plead a defence, unless he can get the leave of a judge to do so, and if he fails to satisfy a judge that he has a good defence on the merits, judgment may be signed, and execution issued, in twelve days.²

569. Limitation of actions on bills.—An action must be brought on the bill or note, as on any other simple contract, within six years from the time it was payable, unless the party has revived the debt by acknowledgment, or by part payment of principal or interest.⁶
Such acknowledgment (which must be in writing, signed by the party or his agent duly authorised), if made within the six years, revives

¹ 18 & 19 Vic. c. 67.
² 21 Ja. I. c. 16; and see ante, § 488.

IN SCOTLAND.

¹ Contra; summary execution may be had upon foreign and inland bills and notes for non-payment, as well as non-acceptance, against the drawers and indorsers, as well as against the acceptors, conjunctly and severally. Stats. 1681, c. 20; 1696, c. 36; 23 Geo. III. c. 18, § 55. The protest is registered, and an extract (or office copy) given out, containing a warrant to charge the party liable to pay in six days, failing which a warrant for poinding or imprisonment issues (i.e., final execution of fi. fa. or ca. sa.). 1 & 2 Vic. c. 114. This is called summary diligence on the bill or note. But the protest for non-payment must be registered within six months from the date of payment. A protest for non-acceptance must be registered within six months from the date of the bill to authorize execution against the drawer or indorsers. Moreover, if the bill is ex jucie erased or signed by initial, or blank as to date, the summary remedy is incompetent, and an ordinary action must be raised. The only mode of suspending summary diligence is by finding caution for the debt and costs (i.e. giving security).²

² The same remedy by summary diligence. See last note.

³ The period is also six years, and is called the sexennial prescription or limitation (12 Geo. III. c. 72, § 37, 39; 23 Geo. III. c. 18, § 55), subject to the proviso in the next note.

⁴ Contra; an acknowledgment of the debt made during the six years is inoperative as regards the sexennial prescription (Pergeson v. Bethune, 7th Mar. 1817, F. C.), and cannot revive or perpetuate the legal existence of the bill beyond the six years; but after the expiration of the six years, it is competent to raise an action for the debt, for which the bill or note was granted, and to prove that the sum is owing by any other writing or by the oath of the debtor. 2d Rep. Merc. L. Com. 60.
the debt for six years more from the date of such acknowledgment. If an acknowledgment has been made after the six years, the right of action is also revived for six years more after its date. The Statute of Limitations is only a bar to the action, if specially pleaded. And if a party chooses, after the statute has run, to pay the bill, he cannot afterwards recover back the money so paid.

570. No remedy after six years.—If no such acknowledgment has been made within or after the six years, no action is competent to recover the debt for which the bill or note was given, provided the Statute of Limitations is properly pleaded.

571. Disabilities.—The statute does not run against infant plaintiffs, provided the disability existed at the time the cause of action accrued; for when the statute once begins to run, no supervening disability will stop it. If the person entitled to sue is beyond the seas, or imprisoned, when the right accrues, he is not, since 1856, entitled to any further time on that account, and the statute runs against him. But if the defendant or person liable on the bill is beyond seas at the time the action accrues, the plaintiff is entitled to sue within six years after such defendant’s return. Absence however in Scotland, Ireland, the Isle of Man, Jersey, and the Channel Islands, is not absence beyond seas in this sense.

573. Overdue bill.—The indorsee of an overdue bill takes it subject to all the equities and objections to which it was subject in the hands of the indorser, as far as they are intrinsic to the bill, but not subject to collateral matter, such as a right of set off against the former holder.

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IN SCOTLAND.

1 Contra, for forty years. See last note.
2 Contra; provided the pursuer can prove, by the writ or oath of the party, non-payment; and he may sue in that case any time within forty years from the date of the debt. See stat. supra; 2d Rep. Merc. L. Com. 67.
3 Contra; the years of minority of the person having the present right to sue are not counted, whether they exist at the commencement or middle of the six years.
4 So it was always as to the sexennial limitation.
5 Contra; the absence of the defender does not save the sexennial prescription.
6 The same since 1856 by 19 and 20 Vic. c. 60, § 16.
CHAPTER V.

SHIPPING—INSURANCE—COPYRIGHT.

Shipping.

579. Joint owners of ship.—Where part owners of a ship disagree as to its employment, the majority are entitled to decide the point. And the minority cannot compel a sale;¹ but they can arrest the ship in security, and thereby compel the majority to find security, either to bring back the ship, or to pay the minority the value of their shares, the minority in that case having no share in the undertaking.a

580. Freighter's lien on ship.—The freighter has no lien on the ship in respect of his goods sold, lost, or injured during the voyage.²

581. Seamen's lien for wages.—Seamen have no lien for their wages on the freight after the cargo has been removed from the ship.ᵇ ³

582. Collision of ships.—Where a ship A causes a collision with ship B, the owners of B have a maritime lien upon the ship A for the damage thereby caused.c ⁴

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²d Rep. Merc. L. Com. 74; The Apollo, 1
Hagg. 306; Strely v. Wilson, 1 Vern.
297; Barnardiston v. Chapman, 4
Harmer v. Bell, 7 Moore, P. C. C. 267.

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IN SCOTLAND.

¹ Contra; the minority have a remedy by an action of sett and sale, whereby they can insist on the majority either buying the shares of the minority, or selling their own shares. Stair, 1, 16, 4; Ersk. 3, 3, 56; 2d Rep. Merc. L. Com. 74.

² Contra; he has not only a lien, but a hypothec on the ship in such a case. Bell's Com. by Shaw, 440.

³ Contra; they have a hypothec over the freight, which is a lien subsisting without possession. Ersk. 3, 2, 34; 2d Rep. Merc. L. Com. 75.

⁴ Contra. Bell's Com. by Shaw, 440, 467.
Chapter V.

Insurance—Copyright.

Insurance.

585. Assignment of fire policy.—A policy of fire insurance is not assignable at common law without the consent of the insurer; but it is assignable in equity like any other chose in action.a

586. Condition precedent to right of action.—Where the policy contains a condition that the loss-money should not be recoverable until a certificate of character from the minister of the parish should be obtained by the insured, this is treated as a condition precedent, and no action can be brought without the certificate, even though the minister wrongfully refuse to give it.b

587. Floating policy on goods in trust.—Where a carrier or warehousman insures goods "held by him in trust," he can recover the full value of the goods; and it seems, after paying his own charges, he is a trustee of the surplus for the real owners of the goods.c

Copyright.

590. At common law.—An author has no copyright at common law, and his rights depend entirely on statute.d

a Lynch v. Dalseil, 4 Bro. P. C. 431; Baillie, 7 Bing. 349.
see ante, § 476; Saddler's Co. v. Badcock, 2 Atk. 545.
b Worsley v. Wood, 6 T. R. 710; Levy v.
c Waters v. Monarch Life Ins. Co. 5 E. & B. 870.
d Jeffreys v. Boosey, 4 H. L. Cas. 815.

IN SCOTLAND.

1 In general all debts are assignable, so as to allow the assignee to sue in his own name. See ante, § 476 n.
2 Contra; this is not a condition precedent, if the minister willfully refuses to give the certificate.
3 It seems the same; but see dicta in Dalgliesh v. Buchanan, 26 Sc. Jur. 160.
4 The same, and under the same statutes. 8 Anne, c. 19; 5 & 6 Vic. c. 45.
CHAPTER VI.

LIEN—PLEDGE—DEPOSIT—BAILMENTS.

594. Lien.—Lien is a right vested in a person, who has the possession, actual or constructive, of a thing, but not the property, to retain the thing, in respect of some pecuniary claim. Possession is essential to a lien; but in maritime liens possession is not required.\(^a\)
A lien in general is waived by taking a security for the debt, as a bill of exchange payable at a future day;\(^2\) though, on dishonour of the bill, if possession continues, the lien revives.\(^b\)

595. Liens general and particular.—Liens are known as general and particular. General liens are where the person claims to retain the goods in respect of a general balance of accounts, \textit{i.e.}, debts due not only in respect of the thing itself, but due on any other ground. Particular liens are where the person claims in respect of money or labour expended upon the particular goods.

596. General liens.—General liens are unknown and odious to the common law.\(^3\) Yet there are several instances of general liens,

IN SCOTLAND.

\(^{1}\) This is generally called hypothec, and is not confined to maritime cases. There are some tacit or implied hypothecs, as the landlord’s hypothec on crops and furniture (see \textit{ante}, § 407 \textit{n})—a law agent’s, on the expenses recovered in a suit (see \textit{post}, “Solicitors”)—and a superior’s hypothec, for his feu-duites (see \textit{ante}, § 179 \textit{n}). Hypothec thus differs from retention or lien, in the former not requiring possession.

\(^{2}\) \textit{Contra}; the lien is not waived by taking a bill as the security, unless there was an express or implied contract to that effect. See \textit{Miller v. M’Nair}, 14 D. B. M. 935.

\(^{3}\) \textit{Contra}; a general lien or retention is the common law in all cases where the possession was acquired by an unlimited title, and also exists by usage or agreement; but the special agreement cuts down the common law general lien, in many cases, into special (\textit{i.e.} particular) lien or special retention. See \textit{Sibbald v. Gibson}, 25 Sc. Jur. 143; \textit{Forbes v. Robb}, 31 Sc. Jur. 50; \textit{Lawrie v. Anderson}, 25 Sc. Jur. 226; \textit{Hamilton v. Western Bank}, 29 Sc. Jur. 77. In the case of \textit{Forbes v. Robb}, 31 Sc. Jur. 52, L. J. C.
which have grown up out of inveterate usage of trade, or the course of dealing. Thus attorneys, bankers, calico-printers, dyers, and factors, have a general lien on the monies, papers, and goods of their clients and customers, provided such monies, papers, and goods, come into their hands in the ordinary course of business. As to some of these, the usage is confined to particular localities where the trade is carried on.\(^a\)

598. _Pledgee has no general lien._ Where A pledges property with B for a certain debt, B has no lien\(^1\) on that property in respect of any other debts due to him by A, and not specifically charged on such property.\(^b\)

599. _Livery stabler._ A livery stable keeper has no lien on the horse kept at livery for its keep, for the nature of the contract, which implies that the horse be given up when the owner requires, is inconsistent with such lien.\(^c\) So an agister of milch cows has no lien upon these for the agistment or hire.\(^d\)

600. _Future advances on real property._ A security for debts to be afterwards incurred, of indefinite amount, may be effectually created

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\(^a\) Holdereness v. Collinson, 7 B. & C. 212.  
\(^b\) 2d Rep. Merc. L. Com. 76.  
\(^c\) Judson v. Etheridge, 1 C. & M. 743.  
\(^d\) Jackson v. Cummins, 5 M. & W. 342.

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**IN SCOTLAND.**

Inglis thus stated the result of the recent authorities,—"In every case of retention, the first and most important inquiry is, what is the title on which the party has attained the possession which he proposes to hold till his debt is paid; for this title of possession furnishes the precise measure of the right of retention. If the title of possession be unlimited as a title of property, the party is entitled to retain, till every debt, due to him by the party demanding delivery of the subject, is paid. If his title be limited, he can retain only for the payment of that particular debt which is secured by his possession. This is very well settled law. But the whole of this subject received the most thorough consideration in two recent cases, of which the one (Melrose v. Hastie, 12 D. B. M. 665) afforded an excellent example of an absolute and unlimited title of possession, and the other (Lawrie v. Anderson, 15 D. B. M. 404) an equally instructive example of a limited title of possession." See as to retention in sale, _ante_, § 531; in pledge, _post_, § 598.

\(^1\) _Contra_; it has been said, that the pledgee has a right of general retention for all other debts due to him from the pledger, though not specifically charged on the subject pledged. 2d Rep. Merc. L. Com. 76. But see Forbes v. Hobb, 31 Sc. Jur. 50, and the note preceding.

\(^2\) _Contra_; this is not an exception.

\(^3\) _Contra_; milch cows may be detained for their grassmall. Ersk. 1, 6, 3.
over real property; and no limitation of the amount need be declared.\(^a\)

601. **Sale of pledge.**—A pledgee of personal chattels has in general an implied power of sale, *i.e.*, he is entitled, after giving reasonable notice to the pledger to pay the debt, and after default, to sell the goods and apply the proceeds in payment. And he requires no authority of any judge to enable him to do so.\(^b\)

602. **Gratuitous bailment.**—A gratuitous bailment (such as deposit, mandate, commodatum, or an agreement for the gratuitous carriage of goods) which the bailee has agreed to, but not begun to act upon, is no ground of action,\(^c\) for a consideration is wanting. If, however, a party, who has undertaken gratuitously to perform work for another, has once commenced the work, he will be liable for gross negligence or any wrongful act injurious to the promise.\(^d\)

603. **Carriers' loss by fire.**—Carriers are, at common law, liable for the loss by accidental fire of goods in their care.\(^e\) They are in the situation of insurers of the goods, and are answerable for every loss or damage happening to them while in their custody from whatever cause, except the act of God (such as a tempest), or the act of the Queen's enemies.\(^f\)

604. **Deposit.**—A depositor is not impliedly bound to reimburse the depository for extraordinary expenses which the latter may have been put to in the preservation of the thing deposited; though slight

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\(^a\) See ante, § 97, 120.
\(^b\) *Pathonier v. Dawson*, Holt, 395; *Smart v. Sanders*, 3 C. B. 401, 5 C. B. 915;
\(^c\) *Lockwood v. Ever*, 9 Mod. 278.
\(^f\) *Dale v. Hall*, 1 Wils. 281; 1 Inst. 89.

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**IN SCOTLAND.**

1 *Contra*; securities over land for an indefinite or fluctuating sum cannot be created, except it be a cash credit or other bond specifying a fixed sum as a limit to cover advances. 2d Rep. Merc. L. Com. 76; see ante, § 97 n.; 120 n.

2 *Contra*; the pledgee cannot sell the pledge without the authority of the judge ordinary or sheriff, who, on petition, grants warrant to sell, after calling the pledger as a party. *Stair I*, 13, 11; *Ersk. 3*, 1, 33.

3 *Contra*; the consideration makes no difference.

4 The same since 1856 by the Stat. 19 & 20 Vic. c. 60, § 17.

5 The general rule is the same, being derived from the Roman edict *Nauta, cumpone, Stabularii*. Bell's Pr. § 235.
evidence, such as recognition, will satisfy a jury of the existence of such promise.\textsuperscript{1} Much less can the depositary detain\textsuperscript{2} the thing deposited for such expenses.

606. Negligence of hirer.—Where a thing hired is injured, the onus is on the owner to prove negligence in the hirer.\textsuperscript{3}

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CHAPTER VII.

PRINCIPAL AND AGENT.

610. Appointment of agent.—An agent may in general be appointed by parol, even in those cases where the principal can only be bound by writing of the agent, within the 4th and 17th sections of the Statute of Frauds.\textsuperscript{6} But for the purpose of creating a freehold or leasehold interest, or any uncertain interest in lands (other than leases under three years), the authority of the agent must be in writing.\textsuperscript{c}\textsuperscript{4}

611. Agent of corporation.—A corporation can appoint their agent only by writing under seal;\textsuperscript{d}\textsuperscript{5} yet there is an exception in

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IN SCOTLAND.

\textsuperscript{1} Contra; he must reimburse necessary charges. Ersk. 3, 1, 27.

\textsuperscript{2} Contra; the depositary may detain the thing deposited, until such extraordinary expenses have been reimbursed. Ibid.; Stuart v. Macgregor, 7 S. D. 622.

\textsuperscript{3} Contra; the onus is on the hirer, to show he was not guilty of negligence. Marquis v. Ritchie, 2 S. D. 386; Pyper v. Thomson, 5 D. B. M. 498.

\textsuperscript{4} Contra; the agent need not be appointed by writing for this purpose.

\textsuperscript{5} Contra; all corporations can appoint their agent in writing.
minor contracts where it is a trading corporation, and in all contracts, where the corporation is a limited joint stock company.

612. Agent to sign a deed.—An agent can only be appointed by writing under seal to sign a deed on behalf of his principal.a

614. Factor’s right to pledge.—A factor had no right at common law to pledge his principal’s goods; b but now by statute he is in certain circumstances impliedly authorised to do so.b

615. Brokers in London licensed.—Brokers acting as such within the city of London and liberties, must be admitted and licensed by the court of Mayor and Aldermen, and without such licence, cannot recover their commission and charges. c But brokers acting elsewhere are subject to no such restrictions.d

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CHAPTER VIII.

GUARANTEE.

620. Contract must be in writing.—A contract of guarantee or any “special promise to answer for the debt, default, or miscarriage of another,” d must be in writing, signed by the party guaranteeing, or

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IN SCOTLAND.

1 Contra ; the mandate need not be by deed.
2 He had such right at common law. 1 Bell’s Ill. 467; Attwood v. Kinnear, 10 S. D. 817.
3 Contra ; there is no restriction in any part of Scotland.
4 The same since 1856 by 19 & 20 Vic. c. 60, § 6, which enacts that “all guarantees, securities, or cautionary obligations, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable of him,” shall be in writing, subscribed by the guarantor or his agent.
his agent. And so must a representation as to the character, credit, or responsibility of a third person, in order to induce the owner of goods to sell them to the latter on credit. And though no consideration need be stated on the face of the document, yet parol evidence must be given at the trial of any action against the guarantor of some legal consideration.

621. New surety introduced.—Where a new surety has been introduced without the knowledge of the former sureties, it seems that in a court of equity it may be proved, by parol evidence, that he was merely a surety for the former sureties.

622. Discharge of guarantee.—The discharge of a written guarantee may be proved by oral evidence.

623. Discharge of one of several sureties.—Where the creditor discharges A, one of several sureties, whether on paying his share or not, the remaining sureties are thereby discharged entirely from further liability, and not merely to the extent to which A would have been bound to contribute his share.

624. Limitation of action against surety.—All actions must be brought on a simple contract of suretyship within six years from

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2 *Contra*; it can only be proved by the writ or oath of the creditor. Lennox v. Campbell, 18th May 1815, F. C.

3 *Contra*; the discharge can only be proved by the writ or oath of the creditor. But when the implement of the principal obligation admits of being proved by parole, such implement by the cautions may be so proved. 2d Rep. Merc. L. Com. 83.

4 The same since 1856, by 19 & 20 Vic. c. 60, § 9, except where the discharge is merely to a co-cautioner who has become bankrupt.

5 *Contra*; the time of limitation is seven years in both cases, by stat. 1695, c. 3, provided the cautioner have an express clause of relief or a separate bond of relief intimated to the creditor. Bell’s Pr. § 601; Scott v. Yuille, 5 W. S. 436. The time runs from the date of the bond or contract, and does not depend on the cause of action arising; and at the end of seven years the cautioner is *co ipso* free. But the cautioner may continue bound beyond the seven years, if diligence has been raised against him within the seven years. Bell’s Com. by Shaw, 279.
the accrual of the cause of action; but if the contract was by deed or specialty, the action may be brought within twenty years.\(^1\) The cause of action accrues, and the time of limitation runs from the period of the principal making default in payment, or from the time when the debt indemnified against was paid, etc., and not from the time of the giving of the guarantee or indemnity.\(^a\)

625. Guarantee to or for a firm.—No guarantee given to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no guarantee for a firm, or individual trading under the name of the firm, shall be binding on the surety after a change in any one or more members of the firm, unless the intention of the parties to the contrary shall appear, either by express stipulation, or by necessary implication from the nature of the firm.\(^b\)\(^2\)

626. Surety and debtor sued jointly.—Where an engagement by principal and surety is joint, though the creditor must institute proceedings against both, yet, after judgment is obtained, he is at liberty to enforce payment against the surety, being living, and if there be two or more sureties, against any one of them who is living exclusively, such surety being left to adjust with the principal and with the other sureties, if any, his rights to indemnification and contribution.\(^c\)\(^3\)

Surety, on payment, entitled to assignment of security.—Where a surety pays the debt, he is now entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security held by the creditor, so as to use the name of the creditor in any action or suit against the principal debtor, or any co-surety, for their just proportion of the debt.\(^d\)\(^4\) He was not so entitled previous to 1856.

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\(^a\) Humphreys v. Jones, 14 M. & W. 1.  
\(^b\) 19 & 20 Vic. c. 97, § 4.  
\(^c\) 2d Rep. Merc. L. Com. 81.  
\(^d\) 19 & 20 Vic. c. 97, § 5.

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IN SCOTLAND.

\(^1\) Contra. See last note.  
\(^2\) The same, since 1856, by stat. 19 & 20 Vic. c. 60, § 7.  
\(^3\) The same, since 1856, by 19 & 20 Vic. c. 60, § 8. Formerly, if the cautioner had not been bound "jointly and severally," or "as full debtor," he was entitled to the benefit of discussion, i.e., to have the principal compelled by diligence or execution to perform the obligation, so far as the creditor could enforce it. 2d Rep. Merc. L. Com. 81.  
\(^4\) This is the same at common law. 2d Rep. Merc. L. Com. 82.
CHAPTER IX.

JOINT INTERESTS—PARTNERSHIP—JOINT-STOCK COMPANIES.

JOINT INTERESTS AND RIGHTS OF ACTION.

627. Joint contract.—The general rule at law is, that the contract of several persons is joint and not several; and that there must be express words creating a several liability in order to render them separately responsible. a

628. Joint creditors.—Where several parties to a deed are entitled to performance of a covenant, or to be paid a sum of money, each cannot sue for his separate share, but all must join in the action and sue for the whole, unless the interests of the covenanters are clearly severed, in which case, each may sue for his portion. b If any one refuse to join in the action, his name may be used on tendering him an indemnity for costs. c

The rule is, that all must sue, unless there is an express or implied agreement that each may sue. d

629. Simple contracts.—In the case of simple contracts, the nature

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IN SCOTLAND.

1 Contra; it is a contract in which each is concerned to the extent of his own share only. Bell’s Pr. § 51; Ersk. 3, 3, 74. But if the contract is expressly stated to be conjunct or joint, each is bound for the whole or in solidum. Com. Bank v. Sprott, 3 D. B. M. 939; 1 Bell’s III. 72.

2 Contra; the presumption is the reverse, the rule being that though the whole debt can only be sued for by all the parties together, yet each can sue in his own name for his own share separately. It requires express words to enable one to sue in the name of the rest, the obligation in that case being taken to the parties jointly and severally. Bell’s Pr. § 52; see Stewart v. Gibson, 1 Rob. Ap. 260.

3 Contra; the reverse is the rule. See last note.
of the contract, and the situation of the parties from whom the consideration moved, must be looked to in order to see whether all must sue for the whole, or each may sue for his portion.  

630. Survivorship.—When the creditors are joint, all must join in the action and sue for the whole. If one dies, the survivors alone can sue.  

631. Want of proper parties.—The want of the proper parties suing as plaintiffs may be objected to by the defendant, by a plea in abatement to the non-joinder, but the chief effect is to cause the plaintiff to add the other parties at his own expense, or, at a later stage, to apply to a judge to amend the record by inserting the names.  

632. Joint debtors.—Where there are several joint debtors, all must be sued together for the whole debt; for if only one is sued, it can be pleaded in abatement that others are jointly liable with him. If, however, one pay the whole debt, whether before or after judgment, he may sue his co-contractors for contribution of their shares; and he may have an assignment from the creditor of all securities, so as to recover the excess over his just proportion from his co-sureties or co-debtors.  

If, on the other hand, B, C, D are joint debtors to A, who sues B only, and B does not avail himself of the defence of non-joinder, viz., that C and D are also liable, and judgment goes against B, then A loses all further remedy against C and D. The reason is, that there is only one cause of action for a joint debt, and such cause of action is merged in and extinguished by the judgment; the judgment of a Court of record changes the nature of that cause of action, and prevents it being the subject of another.  

633. Joint and several debtors.—Where B, C, and D are joint  

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**IN SCOTLAND.**

1 The form of the security makes no difference, nor does the consideration as such.

2 This is only so where there are express words of survivorship. Where there are no such words, the interest of the party dying is transmitted to his representatives.

3 *Contra*; this is no defence, and the want of it has no such effect.

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*a C. L. P. Act, 1852, § 34, 36; Rule Pr. 6, 1853; Pat. M. & M's C. L. Pract. 1083.  
*b 19 & 20 Vic. c. 97, § 4.  
*c Per Parke B. in *King v. Hoare*, 13 M. & W. 504, and see post, § 636.*
Joint Interests and Rights of Action.

and several debtors of A, either all may be sued for the whole debt, or any one may be sued for the whole debt.¹

**634. Discharge of one of several debtors.**—If A, the creditor, without, in terms, reserving his remedy against the other debtors, discharge any one of B, C, and D, who are joint, or joint and several debtors, and whether on payment or not by B of his share, or any portion thereof, this operates as a discharge not only of B, but of C and D his co-contractors.²

**635. Reserving remedy against one of several debtors.**—It seems doubtful whether A, on releasing B, can expressly reserve his remedies against C and D, the co-debtors, without their consent; at least what purports to be such a release will, if possible, be construed not as a release of B, but merely a covenant not to sue B.²

**636. Limitation of actions where one of several debtors abroad, etc.**—Where one or more of several debtors are abroad when the cause of action accrues, the Statute of Limitations runs not against them, but against those who are within the jurisdiction. And the creditor will not be barred from suing those joint-debtors who were beyond seas, after their return, by reason only that judgment has been already recovered against those who were not beyond seas.³ So where one of several debtors, by part payment, keeps himself out of the statute, the statute nevertheless runs against the others.⁴

**Partnership.**

**639. Partnership not a distinct person in law.**—A private

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**IN SCOTLAND.**

¹ The same. Ersk. 3, 3, 74.
² Contra; it is merely a discharge of B’s share. A discharge of one of several joint-debtors does not release the others further than their right of relief against the party so discharged may be affected. 2d Rep. Merc. L. Com. 91.
³ Prescription runs against joint-debtors who are absent from Scotland, provided their absence is voluntary, and they remain subject to the jurisdiction of the Scotch Courts. 2d Rep. Merc. L. Com. 71.
partnership of two or more persons is not a distinct person in law, and cannot sue and be sued in the partnership name.\(^1\)

640. \textit{Remedy of partners against each other, etc.}—One of the private partners cannot in general sue or be sued by the others, or by the private partnership, except in a court of equity. Hence also private partnerships, having one or more members in common, can sue each other only in a court of equity. When a partnership sues or is sued at common law, all the partners must be individually named and served with process if the opposite party insist, and it be possible to serve them.\(^2\) But in courts of equity a few of the partners, if these are numerous, and it is impracticable to serve the whole with process, may sue or be sued as representing the whole.\(^3\)

641. \textit{Actions at law.}—A defence, which is competent to the defendant against any one of the partners suing as co-plaintiffs, is good against all.\(^4\) Pending an action or suit by copartners, one or more of them may gratuitously release the defendant from the whole cause of action.\(^5\)

642. \textit{Set-off of partnership debt.}—In a proceeding against copartners as such, or against one or more of the copartners individu-

\(a\) C. L. P. Act, 1852, \textit{q} 34, \textit{et seq.; Lush's Pract. by Steph.} 24, 65. \hspace{1cm} \(b\) 2d Rep. Merc. L. Com. 93, 94. \hspace{1cm} \(c\) 2d Rep. Merc. L. Com. 96.

\(1\) \textit{Contra; the partnership is a separate and distinct person in law, the partners being, as it were, only its cautioners (sureties E.) Bell's Com. by Shaw, 213.}

\(2\) \textit{Contra; the individual partners need not be named or served where the firm contains names of persons. See next note.}

\(3\) \textit{Contra; the courts are courts of both law and equity. The firm can sue and be sued in its own name, without naming or serving any of the partners, though it is considered safer to use the names of the individual partners. Wallace v. Ploch, 3 D. B. M. 1047. Bell's Com. by Shaw, 214. A private partnership can sue and be sued by any of its members. And if the company be anonymous, \textit{i.e.}, have no denomination but what is descriptive of its object, the names of three at least of its members must be used along with the descriptive name of the company. 2d Rep. Merc. L. Com. 96.}

\(4\) \textit{Contra; a defence, though it would be valid against one of the partners, would not be available against the company and the other partners. 2d Rep. Merc. L. Com. 96.}

\(5\) \textit{Contra; one of the partners cannot, during a suit by the company, release the defender. 2d Rep. Merc. L. Com. 96.}
ally, a debt due from the plaintiff to one or more of the copartners in the former case, or to all the copartners as such in the latter case, cannot be set off against the plaintiff’s claim.\textsuperscript{a} \textsuperscript{1}

643. 

Partner binding copartners by deed.—In general a partner cannot bind his copartners by a deed or instrument under seal, though otherwise within the scope of the business; he must be authorised by deed or writing under seal to do so.\textsuperscript{b} \textsuperscript{2}

644. Bankruptcy of partnership.—When an adjudication of bankruptcy is made against all the partners, the joint property of the partners as well as the separate property of each partner vests in the assignees\textsuperscript{3} in bankruptcy; but the separate creditors of each partner must be first paid in full, before his property can be applied to the debts of the partnership.\textsuperscript{4}

645. Notice of retirement of partner.—Where a dormant partner retires from the partnership, his liability will continue, unless he give special notice of his retirement to those persons then having dealings with the partnership, and who knew of his connection with the firm. But no notice need\textsuperscript{5} be given to those customers who were not

\textsuperscript{1} 2d Rep. Merc. L. Com. 98; France v. White, 829; Stacy v. Dicey, 2 Esp. 469 n.
\textsuperscript{2} 3 Scott, 257; Gordon v. Ellis, 2 C. B.
\textsuperscript{3} 6 Harrison v. Jackson, 7 T. R. 207.

\section*{IN SCOTLAND.}

\textsuperscript{1} Contra; in a proceeding against a company, or against one or more of the copartners, a debt due from the pursuer to one or more of the copartners in the former case, or to the company in the latter case, may be set off against the claim of the pursuer. 2d Rep. Merc. L. Com. 98.

\textsuperscript{2} Contra; a deed is not necessary. A partner may bind his copartners in any form in which he can bind himself. 2d Rep. Merc. L. Com. 97.

\textsuperscript{3} Contra; the partnership may be sequestrated without the individual partners being sequestrated. 2d Rep. Merc. L. Com. 95.

\textsuperscript{4} Contra; the debts are ranked \textit{pari passu}. Upon the sequestration of copartners, their separate estates are applicable to the payment \textit{pari passu} of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy. The creditor in a company debt in claiming upon the sequestrated estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company’s funds, and he is ranked as a creditor only for the balance. 2d Rep. Merc. L. Com. 99.

\textsuperscript{5} Contra; a dormant partner, on retiring from the partnership in order to avoid liability for the subsequent engagements of his copartners, must give special notice of his retirement to all persons then having relations with the partnership, whether they were or were not aware of his connection with it, and also public notice by advertisement. Hay v. Mair, 27th Jan. 1809, E. C. 2d Rep. Merc. L. Com. 100.
Corporations.

aware of his being a partner.\textsuperscript{a} A notice by public advertisement, or in the Gazette, is unnecessary, if there has been special notice,\textsuperscript{1} and does not amount to a special notice unless proved, directly or by strong implication, to have been seen by the customer.\textsuperscript{5}

646. \textit{Insolvency of a partner.}—If a partner is adjudged a bankrupt, this is a ground for dissolving the partnership.\textsuperscript{2}

\textbf{Corporations.}

648. \textit{Municipal Corporations.}—Municipal corporations are to a great extent now regulated by a general statute.\textsuperscript{d}\textsuperscript{3} The mayor or head of the corporation is elected for one year;\textsuperscript{4} but may be re-elected as often as the town council please. The town-clerk is appointed during pleasure.\textsuperscript{5}

649. \textit{Common seal.}—One of the incidents of a corporation is to have a common seal. By affixing this seal only can it be bound by deed or contract,\textsuperscript{e}\textsuperscript{6} except in minor contracts and cases of necessity. But now joint-stock companies, which are quasi corporations, may be bound by their agents in the ordinary manner.

650. \textit{Suing and being sued.}—A corporation can only sue and be sued in a court of common law by their attorney, appointed under the common seal.\textsuperscript{7}

651. \textit{License to hold lands.}—To enable corporations to purchase


\textsuperscript{c} 2d Rep. Merc. L. Com. 100.\quad \textsuperscript{d} 5 & 6 W. IV. c. 76, et seq.\quad \textsuperscript{e} 1 Bl. Com. 475.

\textbf{IN SCOTLAND.}

\begin{itemize}
  \item \textsuperscript{1} \textit{Contra}. See last note.
  \item \textsuperscript{2} \textit{Contra}; notour bankruptcy, without sequestration, is not a ground of dissolution of the partnership. 2d Rep. Merc. L. Com. 100.
  \item \textsuperscript{3} The corresponding statutes regulating burghs are 3 & 4 W. IV. c. 76, 77.
  \item \textsuperscript{4} The provost is elected for three years.
  \item \textsuperscript{5} In royal burghs, the town-clerk is appointed for life; but in burghs not royal, for a period of one year.
  \item \textsuperscript{6} \textit{Contra}; the corresponding incident is to elect some officer to represent the corporation, the seal not being used to execute deeds.
  \item \textsuperscript{7} \textit{Contra}; the law agent does not require to be appointed under the common seal.
\end{itemize}
Companies.

and hold lands in mortmain, a licence from the crown was necessary,\(^a\) by ancient statutes; but now statutory corporations or joint-stock companies may hold land with few restrictions.

652. *Visitor of Ecclesiastical Corporation.*—All corporations ecclesiastical are liable to be visited by a visitor, who is the ordinary, but the Crown is the visitor of the archbishops.\(^2\) Eleemosynary corporations have the founder or his nominee, failing whom the Crown, for visitor. And civil lay incorporations have no visitor, but are controlled summarily by the Court of Queen’s Bench.

**COMPANIES.**

656. *Joint-stock companies.*—A joint-stock company having transferable shares could not exist by common law.\(^3\) Now joint-stock companies are chiefly regulated by statute.\(^4\) There are various Consolidation Acts which now regulate to a great extent public companies:—the Lands Clauses Act,\(^5\) 8 Vic. c. 18, 23 and 24; Vic. c. 106; the Railways Clauses Act,\(^6\) 8 Vic. c. 20, 26 and 27 Vic. c. 92, 27 and 28 Vic. c. 120, 121; the Companies Clauses Act,\(^7\) 8 Vic. c. 16, 26 and 27 Vic. c. 118; Gas-Works Clauses Act,\(^8\) 10 Vic. c. 15; Markets and Fairs Clauses Act,\(^9\) 10 Vic. c. 14; Harbours, Docks, and Piers Clauses Act,\(^10\) 10 Vic. c. 27; Cemeteries Clauses Act,\(^11\) 10 and 11 Vic. c. 65; Water-Works Clauses Act,\(^12\) 10 Vic. c. 17; Commissioners Clauses Act,\(^13\) 10 Vic. c. 16.

\(^a\) Co. Lit. 2, 7 & 8 W. III. c. 37. \(^b\) 25 & 26 Vic. c. 89; 27 & 28 Vic. c. 19.

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**IN SCOTLAND.**

\(^1\) *Contra*; no license was necessary.

\(^2\) There is no such functionary as a visitor, and an action of declarator is the only remedy, the Court of Session having no summary jurisdiction.

\(^3\) *Contra*; a company with transferable shares could exist at common law without the authority of the Legislature, the Crown, or the Board of Trade. 2d Rep. Merc. L. Com. 102; *Stevenson v. M'Nair*, 3 Ross, L. C. 580.

\(^4\) The Joint Stock Companies Acts apply to Scotland.

\(^5\) The corresponding Act is 8 & 9 Vic. c. 19.

\(^6\) 8 & 9 Vic. c. 33.

\(^7\) 8 & 9 Vic. c. 17; 26 & 27 Vic. c. 92; 27 & 28 Vic. c. 120, 121.

\(^8\) The same Act applies.

\(^9\) The same Act applies.

\(^10\) The same Act applies.

\(^11\) No similar Act exists.

\(^12\) The same Act applies.

\(^13\) The same Act applies.
PART III.

SUCCESSION TO A DECEASED PERSON'S ESTATE.

WILL OF REAL AND PERSONAL ESTATE.
EXECUTORS AND ADMINISTRATORS.
DEVISE OF LAND.
STATUTE OF DISTRIBUTIONS.
DESCENT.
CHAPTER I.

WILLS.

WILL OF REAL AND PERSONAL ESTATE.

660. Meaning of terms.—A will originally denoted the instrument by which a person devised real estate, while a testament denoted that by which personal estate was bequeathed. But now the term "Will" is generally used to denote either or both indifferently, as the same statutory solemnities attach to both instruments.

661. Will not classed with deeds.—Wills are not classed with deeds, though a deed may be so contrived as to operate in many respects like a will.

662. Will passes real estate.—A will passes real as well as personal estate. The power of devising real estate by will was conferred on all subjects of the realm by the Statute of Wills, 32 and 34 Hen. VIII.

IN SCOTLAND.

1 The word testament or will is used to denote a testament of moveable or personal property only.

2 Contra; as heritable property can only pass by a de presenti deed, a disposition and settlement (equivalent to a will), including both heritable and moveable property, is generally executed, and must therefore be a deed. Moreover, a testament or will of moveable property is executed like a deed. The term "deed" is frequently used to denote any written instrument, whether in the nature of a will or of a deed in the technical and more restricted sense.

3 Contra; heritable estate can only pass by dispositive words of conveyance de presenti; in other words, by a deed. Stair, 3, 4, 26; Ersk. 3, 8, 20. However clear may be the intention of the testator, his testament has no effect on heritable property, nor will the Court, as a court of equity, compel the heir to execute a conveyance in implement of such intention (Montgomery v. Fowles, Bell's Cas. 205), and though the will or testament was made in England or other country where real estate can pass by will. M. 4481, 4483. Hence it is a common practice for persons possessed of herit-
Will of Real and Personal Estate.

663. Formalities of will.—Before 1838 a will of personal estate required no solemnities of any kind. The signature or seal of the testator was not necessary, and though written by another, and not signed, it might in many cases be a good will. Even instructions for a will, though not reduced into a will in testator's life, might operate as a will. And such informal wills, if executed before 1838, may still be good, for they are expressly excepted from the operation of the stat. 1 Vic. c. 26.

Before 1838 a will of lands required to be in writing, signed by the testator, and attested by three or more credible witnesses.

A will since 1838, and also all codicils to the will, must be in writing, and must be signed and attested.

664. Signature of will.—A will must be signed by the testator; but the signature may be supplied if it occur in the testimonium clause, written by his own hand.\(^1\) If he cannot write, the testator may make his mark \(\times\); or a third person, or even one of the witnesses, may sign for him at his request and in his presence.\(^2\) If the

\(^a\) Re Mann, 28 L. J. Prob. 17.
\(^b\) 1 Vic. c. 28, § 9; Smith v. Harris, 1 Robert. 262.

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able property to execute a deed or disposition, reserving his own liferent, and power to alter the same, and keeping the deed in his own possession till death; the same effect being circuitously produced as if he had been able to devise real estate by will. In such a case the disposition generally contains a clause declaring it effectual, though not delivered at his death. Ersk. 3, 2, 13. And it must in general be executed more than sixty days before the death. See post, § 675 n.

There is, however, one case in which a will, purporting to affect heritage, but inoperative for that purpose, may become operative to some extent, viz., where the will gives a legacy to the heir-at-law, and heritage to a third party. In such a case the heir cannot both approbate and repugrate the same instrument, and he cannot have the legacy without giving effect to the gift of the heritage. See Dundas v. Dundas, 4 W. S. 460; Trotter v. Trotter, 3 W. S. 407; see post, § 710.

\(^1\) Contra; this would not be sufficient. Dunlop v. Dunlop, 1 D. B. M. 912.

\(^2\) Contra; a notary, or the parish minister, or clergyman, with two witnesses, only can attest the will of a person who cannot write. Stat. 1584, c. 133; Stair, 3, 3, 34; Ersk. 3, 2, 23; Bell's Pr. § 1867; see Galley v. M'Farlane, 6 D. B. M. 1. It seems a clergyman other than the parish minister would not suffice. M. 16,827. The witnesses must see and hear the testator give authority to the notary. M. 12,668; 4 Br. Sup. 418. As to dispositions of heritable estate, see ante, § 331 n, et seq., and ante, § 662 n.
person, who so signs for the testator, signs his own instead of the testator's name, the will is good ; and a mere mistake of the testator's name by the person who writes the name, will not vitiate the instrument.\textsuperscript{a} The signature may be either at the foot or end, or beside or opposite it, and the will will not be vitiated by a blank space intervening, unless very large.\textsuperscript{b}

665. Where the will is written on several sheets of paper, only the last\textsuperscript{1} requires to be signed, though it is usual for the testator to sign each sheet.\textsuperscript{c} It is not necessary that the sheets should be all connected together; it is enough if they were in the same room where the execution took place, and it will be presumed \textit{prima facie} that they were there.\textsuperscript{d}

666. \textit{Witnesses to a will.}—There must be at least two witnesses. The will must either be made or acknowledged in their presence. The acknowledgment may consist in the testator producing the will with his signature attached to it, without expressly stating it to be his signature, and requesting the witnesses to subscribe\textsuperscript{e} it. These witnesses must be both present at the same time, or at least they must\textsuperscript{f} attest the will in presence of the testator. "\textit{In presence of the testator}" means in such a situation that he could see them if he chose to look.\textsuperscript{g} The witnesses may sign by their mark, or their hands may be guided in signing.\textsuperscript{h} And their names, residences, and additions, need not be mentioned in the attestation clause.\textsuperscript{i}

\textsuperscript{a} Re Clarke, 1 Sw. & T. 22.
\textsuperscript{b} 15 Vic. c. 24 ; Wms. Exec. 79 ; Re Hammond, 9 Jur. N. S. 581.
\textsuperscript{c} Gregory v. the Queen, 4 Not. Cas. 620.
\textsuperscript{d} Wms. Exec. 73 ; Cook v. Lambert, 32 L. J. 93 Prob.
\textsuperscript{e} Gaze v. Gaze, 3 Curt. 451 ; Wms. Exec. 77.
\textsuperscript{f} Casement v. Fulton, 5 Moore, P. C. 130 ; Hindmarch v. Charlton, 8 H. L. C. 160.
\textsuperscript{g} Wms. Exec. 81 ; Tribe v. Tribe, 7 Not. Cas. 132.

IN SCOTLAND.

\textsuperscript{1} \textit{Contra} ; unless the will is holograph, or is contained on one sheet of paper, each page must be signed by the testator. Ersk. 3, 2, 14. See ante, § 350 n.

\textsuperscript{2} \textit{Contra} ; the witnesses need not sign their names in presence of the testator, but he must either sign in their presence or acknowledge his signature. See ante, § 343 n.

\textsuperscript{3} \textit{Contra} ; as the witnesses must subscribe, those who cannot write are incompetent. M. 16,806 ; 16,906 ; Setton v. Setton, 1 Murr. 10.

\textsuperscript{4} \textit{Contra} ; their names and designations must be stated in the testing-clause. See ante, § 342 n ; 345 n.
testation clause merely states that the testator signed in presence of the witnesses present at the same time. But no particular form of attestation clause is necessary, and the want of it merely leads to the Court requiring an affidavit from one of the witnesses that the solemnities of the statute were complied with.\(^1\)

667. *Handwriting of will.*—It need not be stated in whose handwriting the will is written or engrossed.\(^2\)

668. *Testator's own handwriting.*—And though the will is written by the testator's own hand, witnesses are not the less necessary.\(^3\)

669. *Legatee a witness.*—Where a person, to whom or to whose wife or husband a legacy or any beneficial interest is left by a will made since 1837, is one of the witnesses, such legacy is void, but he or she is a good witness.\(^4\)

670. *Creditor a witness.*—A creditor whose debt is thereby charged on the real or personal estate of the testator, is\(^5\) nevertheless a good witness to the will.\(^6\)

671. *Wills of infants and feme coverts.*—Infants, i.e. persons under the age of 21, cannot, since 1838, make a will.\(^7\) It was otherwise before 1838 as regards personal estate.\(^8\)

672. A feme covert can make a will, as regards her separate personal estate;\(^9\) and even without separate estate, if her husband

\(\text{\textsuperscript{1}}\) Wms. Exec. 82. \\
\(\text{\textsuperscript{2}}\) 1 Vic. c. 26, § 15. \\
\(\text{\textsuperscript{3}}\) 1 Vic. c. 26, § 16. \\
\(\text{\textsuperscript{4}}\) 1 Vic. c. 26, § 7. \\
\(\text{\textsuperscript{5}}\) Wms. Exec. 14.

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**IN SCOTLAND.**

\(\text{\textsuperscript{1}}\) *Contra*; a testing-clause is an essential part of the deed, or will, unless it be holograph, and an affidavit of the witnesses will not be allowed to supply its place. See *ante*, § 344 n.

\(\text{\textsuperscript{2}}\) *Contra*; the testing-clause must show this. See *ante*, 344 n.

\(\text{\textsuperscript{3}}\) *Contra*; if the will is holograph, no witnesses are necessary. See *ante*, § 351 n.

\(\text{\textsuperscript{4}}\) *Contra*; if the legacy is small, but not otherwise, the legatee is a good witness. M. 16,887; M. Apx. Writ. No. 2; Ersk. 4, 2, 27. A deed or will has been held void, where the witness was one of the trustees; *Ferrie v. Buchanan*, 35 Sc. Jur. 196; *Kirke v. Russell*, 27 Nov. 1827.

\(\text{\textsuperscript{5}}\) *Contra*; it seems the will would be void. Ersk. 4, 2, 27; *National Bank v. Forbes*, 12 D. B. M. 437.

\(\text{\textsuperscript{6}}\) *Contra*; all persons under 21, except pupils, i.e. females under 12, and males under 14, may make a will of moveable property. Ersk. 1, 7, 33.

\(\text{\textsuperscript{7}}\) *Contra*; see *post*, § 894, "Marriage."
consent, her will is good. But she cannot dispose of her real estate by will. See post, "Marriage."

673. Limits of testamentary power.—A man’s wife and children have no inchoate interest in his personal estate during life, and consummate at his death, amounting to an absolute right to certain proportionate shares thereof. Hence, though leaving a wife and children, he can by will freely bequeath his whole personal \(^1\) and real estate, which he is entitled to at law or in equity, to strangers, without any regard to such wife and children.\(^2\)

674. Deadman’s part.—But previous to 1857 in some parts of England, viz., the city of London, province of York, etc., a father could only bequeath what was called the dead-man’s part of his personal estate, being one-third, after making certain deductions, his widow being entitled absolutely to a customary share, or rationabilis portio, generally another third, and the children to an orphanage share, also a third. It has been matter of controversy whether this custom was not originally the general law of the land; but if it was general, and not local law originally, it has, by imperceptible degrees, been altered.\(^3\) These customs are now entirely abolished.\(^4\)

675. Will may be made on deathbed.—A will of lands, made by a testator, while ill of the disease of which he died, cannot be set

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\(1\) Contra; the widow has her \textit{jus relictæ}, being one-third or a half of the moveable estate, according as there are children or not, and the children their \textit{legitimum}, being another third or a half, according as there is a widow or not, with which the testator cannot interfere by will, unless by ante-nuptial contract power is given to him to do so. Bell’s Pr. § 1579. See as to the \textit{jus relictæ}, post, § 738 \(n\), and as to the \textit{legitimum}, post, § 848 \(n\). The husband and father is entire master of his whole moveable property during his life; and it is subject to his contracts made during his life. See post, "Marriage." He cannot, however, execute on deathbed, \textit{i.e.}, while ill of the disease of which he afterwards dies, any gratuitous deeds tending to diminish the right of the widow and children. Yet if the deed is rational, and is executed in the form of a disposition \textit{inter vivos}, it may be sustained though the effect is suspended till his death. Ersk. 3, 9, 16.

\(2\) Contra; these local customs of London nearly resembled what is still the common law of Scotland.
aside merely on the ground that it is injurious to the heir-at-law or any other person. It is enough that the testator had a sound disposing mind at the moment of execution. Yet he cannot devise land or bequeath personal estate to purchase land for a charitable purpose, for

IN SCOTLAND.

1 Contra; by the law of deathbed, a deed, or disposition mortis causa, alienating or affecting heritage, may be reduced (i.e. set aside) by the heir-at-law, if made while the granter was ill of the disease of which he died, and if he died within sixty days thereafter, however sane he might be. Bell's Pr. § 1786, et seq. The state of a man in his ordinary health, and sui juris, and not cognosced as an idiot or interdicted, is called liaje poustie, in contradistinction to the above critical state, known as deathbed or in leto. The heir-at-law, in reducing the deed, must show that his ancestor was sick of his last illness at the date of the deed (Cogan v. Lyon, 12 S. D. 569; Ersk. 3, 8, 96); that he did not die by accident, or by another disease. Mackay v. Davidson, 5 W. S. 210; Stair, 3, 4, 28. Assuming the disease to exist at the date of the deed, the dispence is by statute entitled to rebut the presumption of deathbed by proving that the granter survived sixty days after the execution of the deed, or afterwards went to kirk or market unsupported. 1696, c. 4. Many nice questions have arisen as to what is "kirk," what is "market," and what is "unsupported;" but the Court in general has refused to accept any equivalents for these statutory requisites. Thus where half the sermon only was heard, and the person left before the end of it, this was held to be not "kirk." Faichney, M. 3316, Apx. "Deathbed 1." And where the person attended at a meeting of road trustees, this was held to be not "market." Maitland, 16th May 1813, F.C. An act of sederunt, 29th Feb. 1692, attempted to define "kirk" to be "in the day-time, and when people are gathered together, in the church or churchyard, for any public meeting, civil or ecclesiastical," and "market" to be "in the market-place for public market." The sixty days are computed exclusively of the date of the deed. M. 3336.

The right to challenge deeds ex capite lecti, i.e. on the ground of deathbed, is competent to the heir-at-law, whether of line or of conquest (Ersk. 3, 8, 99), and also to the heir of provision (remainderman E). The crown, if succeeding as ultimus hæres, and the crown's donator has the same privilege. Brock, 2d Feb. 1809, F.C. It is a privilege personal to the heir, i.e. if he approve of the deed, no one claiming under him has a right to insist in the objection. The heir may homologate or ratify (confirm) the deed, and thus waive his privilege; Ibid, see Leith v. Leith, 10 D. B. M. 1137; but he cannot do so to defeat his own creditors. Stat. 1621, c. 18; Richardson v. Richardson, 10 D. B. M. 872; Bell's Com. by Shaw, 1058. Many questions also arise as to what deeds of alienation may be challenged; and in general they are only spontaneous and gratuitous deeds (voluntary) which tend directly or indirectly to the prejudice of the heir, i.e. to diminish his succession; but even deeds for a price, if inadequate, may also be challenged. Bell's Com. by Shaw, 1058.
the Mortmain Act, subject to some exceptions recently made, requires such alienation to be by deed executed during his life.\(^{a}\)

676. Revocation by alteration of circumstances.—Since 1838 there is no implied condition\(^{1}\) in a will either of real or personal estate, which is made by a testator, who has at the time no children, that such will shall be valid only if he die without leaving lawful issue; nor will any other alteration of circumstances than marriage operate as an implied revocation.\(^{b}\)

Previous to 1838 the subsequent marriage of the testator and birth of children were an implied revocation of the will, if the children were wholly unprovided for.\(^{c}\) But previous to 1838 the subsequent marriage alone of the testator was not an implied revocation, though the marriage of a testatrix was so.\(^{d}\)

677. Revocation of will by marriage.—But since 1838 the

\(^{a}\) See ante, § 26; and Recreation Grounds Act, 22 Vic. c. 27.
\(^{b}\) 1 Vic. c. 26, § 19.
\(^{c}\) Wms. Execc. 165, 172.
\(^{d}\) Wms. Execc. 165.

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A deed executed in liege poustie sometimes reserves power to the granter to alter it on deathbed, or in articulo mortis, but this power is bad unless the original deed effectually conveyed the heritage away from the heir-at-law (Clyne’s trs. v. Clyne, 1 Rob. Ap. 7; Miller v. Marsh, 27 Sc. Jur. 378; 2 Macq. Ap. 284); yet a power to declare trusts or uses on deathbed may be effectually reserved. Ker v. Ker, 5 W. S. 718. Where a liege poustie deed excluded the heir but reserved power to alter on deathbed, and such alteration is made and a new settlement thereby results, it seems the heir’s right of challenge will revive by the revocation of the first deed (Coutts v. Crawford, 5 Paton, 73; Moir v. Mudge, 2 Sh. Ap. 9; Ker v. Erskine, 13 D. B. M. 492), unless the revocation is expressly made conditional on the latter deed being free from challenge. See also 1 Ross, L. C. 594.

\(^{1}\) Contra. Ersk. 3, 8, 46; Thomson v. Robb, 13 D. B. M. 1326; Bell’s Pr. § 1776, 1780, 1865. There is in such a case an implied condition, called the conditio si sine libris decesserit. The birth of a child is an implied revocation of the deed or will; so is the legitimation of an illegitimate child. The condition, however, is ambulatory until the death of the settler; for if the child do not survive him, the disposition or will remains good. So if the disposition or will does not deal with the whole estate, and the child survive long enough to give the settler an opportunity of altering the deed or will, and he do not alter it, the implied condition will not hold. See also post, § 700 n, 722 n.
marriage of a testator or testatrix operates as a revocation of the will, except the will is made in exercise of a power of appointment, and operates on property which would not, in default of appointment, go to the testator or testatrix’s heir or next of kin.a

678. _Verbal or nuncupative will._—A verbal will or legacy is bad,² unless the testator be a soldier in actual military service, or a mariner or seaman being at sea. But a soldier must be on an expedition at the time, and not merely living in barracks at home or in the colonies. So the seaman must be, strictly speaking, “at sea.” And sailors cannot bequeath their pay or prize money, except in writing, executed in a certain way. e

679. _Donation mortis causa._—But a donation mortis causa is valid, though there is no will. Its characteristics are, first, that the gift must be with a view to the donor’s death, and, secondly, it must be conditioned to take effect only on the death of the donor from his existing disorder; thirdly, there must be a delivery of the subject of donation. The donation is revocable during life; it is liable to legacy duty, and to the debts of the testator; and it may be made to the donor’s wife.f


IN SCOTLAND.

1 _Contra_; but it may restrict the effect of the will by preventing it from operating upon more than the dead’s part, i.e., what remains after the wife’s _jus relictew_ and the children’s legitrem are deducted.

2 _Contra_; a nuncupative will of any person, whether a soldier, etc., or not, is good to the extent of £8:6:8. Stair, 3, 8, 34; Ersk. 3, 9, 7; M. 1350; M. 6847; M. 6594. And if the legacy exceed that sum, it will be held good to the amount of £8:6:8. And it will be a good legacy, though the testator directed it to be committed to writing; but a mere verbal direction to a person to prepare a will is not equivalent to a nuncupative legacy to the person indicated, as not being a final intention. Elch. Leg. No. 13; Stainton v. Staindon, 6 S. D. 363.

3 _Contra_; this condition is not essential. Ersk. 3, 3, 91; Bell’s Pr. § 1868, 1870. Though a donation is made in contemplation of death, if the subject is delivered, it is held to be a gift and irrevocable.

4 A donation _inter vivos et uxorem_ is good, not merely on deathbed, but any time during the marriage; but it is revocable.
Mortgages, bonds, policies of insurance, may be the subject of such a gift, as well as all negotiable instruments.  

680. Nomination of executor.—A will generally names an executor. If it does not, or if the executor fail from death or other cause, the Court of Probate will appoint an administrator. The executor takes out probate, and the administrator obtains letters of administration from the Probate Court.

681. Vesting of estate.—The personal estate vests in the executor from the date of the death; but in the administrator from the date only of the letters of administration, his title, however, relating back to the death for many purposes.  

682. Executor dying, etc.—B, the executor of A, may bequeath his interest to his own executor C, who will also be executor of A. But where B dies intestate before obtaining probate, an administrator to A cum testamento annexo is appointed; where B dies after probate, but before fully administering the estate, an administrator to A de bonis non is appointed. Where an administrator dies before administering the estate, neither his own executor nor administrator is entitled to be administrator of A, but another is appointed to A in the regular order.

683. Executor’s claim to residue.—If there is no residuary legatee expressly nominated, but a clear residue exists, then it is a question of intention, to be collected from the whole will, whether the executor

\[\text{a} \text{ Wms. Exec. 692; Watt v. Amiss, 39 L. J. Q. B. 318.}\]

\[\text{b} \text{ 20 & 21 Vic. c. 77.}\]

\[\text{c} \text{ Wms. Exec. 557.}\]

\[\text{d} \text{ 20 & 21 Vic. c. 77.}\]

\[\text{e} \text{ Wms. Exec. 557.}\]

IN SCOTLAND.


2 Called an executor-nominate.

3 Called an executor-dative.

4 An executor, in both cases, obtains confirmation from the commissary, who is generally the sheriff. 21 & 22 Vic. c. 56, § 2. An executor-nominate is said to obtain confirmation of a testament-testamentar; an executor-dative gets confirmation of a testament-dative.

5 The succession vests at the death, whether there is a will or not, but the executor (i.e., including administrator) cannot in general sue till confirmation. 4 Geo. IV. c. 98; 21 & 22 Vic. c. 56, § 10.

6 Contra; the executor-dative of a deceased executor-dative would be executor-dative of A quoad non executa. Confirmation vests all the property which had been confirmed in the first executor.
was meant to be a mere trustee as to this residue, or to exclude the
next of kin and take it to himself. But in the absence of a contrary
intention, the executor is deemed a trustee for the next of kin.\textsuperscript{1}

684. **Executor's duty to pay debts of testator.**—The duty of an
executor or administrator is to appropriate all the legal assets in hand
towards paying the debts of the deceased according to a certain order
of priority.

685. **Privileged debts.**—The first debt which the executor is entitled
to pay, and which is preferred to all other debts, is for funeral ex-
enses according to the rank of the deceased;\textsuperscript{c} but these neither in-
clude mourning to the widow and family, nor medical expenses.\textsuperscript{2}

686. Servants' wages are not entitled to any priority merely as
such;\textsuperscript{3} though the ancient law was otherwise.\textsuperscript{d}

687. The landlord's claim for current rent has no priority\textsuperscript{4} over
other debts of the same degree; but he can always consign for rent
that is already due, provided there is furniture or goods to distract
upon, and rent has priority over simple contract debts, as stated post,
§ 688.

688. **Order of priority of debts.**—After funeral expenses and ex-
enses of proving the will, the testator's debts must be paid in a

\textsuperscript{b} 1 Will. IV. c. 40. \textit{d} 1 Roll. Abr. 927.
\textsuperscript{c} Yardley v. Arnold, 1 Car. & M. 434;

\textsuperscript{1} The same, since 18 Vic. c. 23, § 8. Previously the executor was
entitled to one-third of the residue, unless he was also trustee. \textit{Lowndes

\textsuperscript{2} \textit{Contra}; suitable mournings to the widow and to such of the children
as are present at the funeral are included in deathbed and funeral expenses
(Bell's Pr. § 1403); but the mourning must be moderate if the husband died
Medical expenses are also privileged, and are presumed to be unpaid from
the time the deceased became unable to manage his own affairs. M. 4473;

\textsuperscript{3} \textit{Contra}; Bell's Pr. § 1404. This privilege applies to domestic and
farm servants, and gardeners (\textit{McLean v. Sheriff}, 10 S. D. 217); but not to
amount claimable is only wages for the current term, \textit{i.e.}, a year's, half-
year's, or month's wages, according to the hiring.

\textsuperscript{4} \textit{Contra}; Bell's Pr. § 1404; the landlord has a hypothec which
attaches on the furniture and goods for the current rent, and he can make
it effectual by sequestration. See ante, § 408 n.
certain order of priority; and if the executor neglects this order, and pays a debt of a lower degree before debts of a higher degree, he will, on a deficiency of assets, make himself personally liable.\(^1\) Debts for this purpose are ranked in certain degrees.

1. Debts due to the crown by record or specialty, but not those due on simple contract.\(^a\)

2. Debts declared preferable by certain statutes, such as those due to the poor from deceased overseers of the poor; those due to friendly societies from their officers, etc.

3. Debts of record, \(i.e.,\) debts due under a judgment of a court of law, or decree of a court of equity. These debts have no precedence among themselves according to date.

4. Debts due on recognisance.

5. Debts of specialty, \(i.e.,\) debts on bonds, covenants, and writings under seal; to which head belongs also rent, whether such rent was due on a lease under seal or a verbal lease, provided the lands were in England.\(^b\) It makes no difference that the bond or covenant is for a future debt not yet due.\(^c\) But voluntary bonds and covenants, though preferred to legacies, are postponed to simple contract debts incurred for valuable consideration.\(^d\) So bonds for contingent debts shall not stand in the way of simple contract debts.\(^e\)

6. Debts of simple contract, \(i.e.,\) constituted by parol or writing not under seal; such are bills of exchange, the price of goods purchased, etc. But it seems simple contract debts due to the crown have precedence.\(^f\)

689. Time for paying debts.—There is no fixed time allowed to the executor\(^2\) within which he cannot be compelled to pay any of the debts of the deceased. Any creditor may commence an action at law immediately, and convert his debt into a judgment debt;\(^2\) or he

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\(^a\) Wms. Exec. 893.  
\(^b\) Vincent v. Godson, 4 De G. M. & G. 546.  
\(^c\) Ibid, 920; see also 22&23 Vic. c. 33, § 27.  
\(^d\) Ibid, 914.  
\(^e\) Wms. Exec. 919.  
\(^f\) Wms. Exec. 922.

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\(^1\) \textit{Contra}; all debts are paid \textit{pari passu} and are of equal rank, except the privileged debts, which are those due to the crown, those made preferable by statute, and deathbed and funeral expenses, and servants’ wages. It is not clear whether crown debts rank before these other privileged debts. Bell’s Com. by Shaw, 637.

\(^2\) \textit{Contra}; he cannot be compelled to pay any creditor before six months. Bell’s Pr. § 1900; A. S. 28th Feb. 1662. See next note.
may file a bill or take out a summons in the Court of Chancery for
the administration of the estate of the deceased.

690. Preference of debts by executor.—The executor may, out of
several debts of equal degree, prefer any creditor he chooses, or prefer
a debt of his own; \(^1\) and this can be done to some extent even after
a creditor has brought an action for his debt, so long as judgment is
not obtained.\(^2\) So he may go on preferring such debts up to a
decree in a court of equity to account, or up to a final decree. When
an action has been brought, of which the executor has notice, he
cannot \textit{volunteer} to prefer another, though he may do so after notice of
a suit in equity; \(^b\) but he may pay a debt which is demanded. When
one of several creditors of equal degree obtains judgment against
the executor, the latter must pay such creditor before the rest.\(^c\) But
all the debts of a higher degree must be paid before any of a lower
degree can be paid. For this purpose the executor is held to have
notice of all debts of record; but as to debts by specialty, an actual
notice is required to make him personally liable for paying debts of
inferior degree out of their due order.\(^d\) And he will be protected, if
he has given due notice to all creditors to make their claim.\(^e\)

If an executor has any difficulty in ascertaining and dealing with
debts, he may devolve the administration on a court of equity, when
he will be protected\(^f\) from all risk, as the court undertakes the
administration.\(^g\) It will also give him advice.\(^h\)

\(^a\) Cock v. Goodfellow, 10 Mod. 496; Gla-
holm v. Romtree, 6 A. & E. 710.
\(^b\) Wms. Exec. 931.
\(^c\) Ibid. 930.
\(^d\) Smith v. Day, 2 M. & W. 684; Oxenham
v. Clapp, 2 B. & Ad. 312.

\(^1\) \textit{Contra}; the executor cannot prefer even his own debt, and it is con-
trary to his duty to pay any creditor, until six months after the death. No
creditor can acquire priority by first obtaining decree for his debt. All
creditors who commence an action and cite him within six months of the
death are entitled to share equally in the assets. Stat. 1654, c. 16 & 18;
Act of Sed. 28th Feb. 1662. And even after the six months, if the fund
is undivided, creditors may apply and be let in to a share of the fund. M.
3140; 2 Bell’s Ill. 463. Each creditor must raise an action within the six
months, or a trustee may sue for a number of them.

\(^2\) \textit{Contra}; the executor is fixed with notice from the date of citation
(i.e., service of the writ of summons). 2 Bell’s Ill. 463-4.

\(^3\) \textit{Contra}; an executor is not entitled directly to devolve the administra-

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\(^2\) \textit{Contra}; the executor is fixed with notice from the date of citation
(i.e., service of the writ of summons). 2 Bell’s Ill. 463-4.
Will of Real and Personal Estate.

691. Legal and equitable assets.—What has been stated as to the rules of priority in paying debts of the deceased, applies only to the legal assets, i. e., such assets as the law vests or would have vested in the executor or administrator, as such, for the payment of debts generally, whether the aid of a court of equity is necessary to reach the property or not. On the other hand, equitable assets are such as vest in the executor or administrator, not by law, but by virtue of an express disposition of the property, which must be carried into effect by a court of equity.\(^a\) It has been said, however, that the true test as to whether the assets are legal or equitable, is not whether the executor, but whether the claimant can reach them without resorting to a court of equity.\(^b\) Equitable assets also include all real property which the deceased by will charged with his debts. Courts of equity follow the same rules as courts of law, and give the same priority to different classes of creditors. Equitable assets, on the other hand, must be appropriated in paying all the testator’s debts pari passu, and without preference of speciality to simple contract debts.\(^1\) Thus, where the testator’s land is mortgaged at the time of his death, the equity of redemption is equitable assets. So if the testator devise his land to the executor to be sold for the payment of his debts and legacies, the proceeds of this sale will be equitable assets.

692. There is one exception, however, to the equality of payment of debts by the Court of Chancery out of assets which are equitable. All creditors by speciality contract, in which the heirs are expressly bound, must be paid in full before other creditors by speciality and simple creditors, out of the real assets of the deceased, i. e., the real estate which the deceased died seised of, or entitled to.\(^c\) This exception, as already stated, does not hold, where the testator by will

\(^a\) Smith’s Comp. 361.  
\(^b\) Wms. Exec. 1520.  
\(^c\) 3 & 4 W. IV. c. 104.

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\(^1\) Hence the rule is in general the same as to all assets, as it is in England, when the testator charges his debts on his real estate.
charged his real estate with the payment of his debts, for this makes such real estate equitable assets, and consequently all creditors must be paid \textit{pari passu}.\footnote{11 Jarm. \& Byth. by Sweet, 435.}

693. \textit{Marshalling the assets.}—Where the testator has left assets, both legal and equitable, and a creditor has obtained a part payment out of the legal assets in preference to other creditors, the Court of Chancery will postpone further payment to such creditor out of the equitable assets, until the other creditors have obtained therefrom equal proportional payments. This is called a marshalling of the assets.\footnote{Wms. Exec. 234.}

695. \textit{Executor de son tort.}—Where a person without authority interferes and acts as executor or administrator, he subjects himself to all the liabilities, but has few of the privileges of a regular executor. He is called an executor \textit{de son tort}. He has not the usual privilege of retaining assets to pay his own debt first of those in the same degree. Yet it seems he may prefer one of several creditors of equal degree.\footnote{2 Bl. Com. 567; Wms. Exec. 920.} And the executor \textit{de son tort} does not make himself liable to creditors beyond the assets come to hand, provided he plead properly;\footnote{Wms. Exec. 234.} and it is a good defence to an action by a creditor against the executor \textit{de son tort}, that he has exhausted the assets in paying debts of an equal or superior degree.\footnote{2 Bl. Com. 567; Wms. Exec. 920.}

696. \textit{Executor's personal liability.}—An executor or administrator, though not personally liable by law for the debts of the deceased, except so far as he has assets, may yet make himself personally liable beyond that extent by express promise. Such express promise, however, is not binding upon him, unless there is a sufficient consideration

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\footnote{1} This is not necessary, as all debts are paid \textit{pari passu}. But where a catholic creditor and a secondary creditor have similar claims on funds or estates, a capricious use of the higher right is not allowed in prejudice of the other. Bell's Com. by Shaw, 389.

\footnote{2} \textit{Contra}; a vicious intromitter is personally liable for all the debts; but if he shows he acted \textit{bona fide} and without fraud, and gives an account, he will be relieved beyond the extent of assets. Bell's Pr. § 1921; Stair, 3, 9, 9; Ersk. 3, 9, 49. As to how far fraud is necessary to render a vicious intromitter universally liable, see \textit{Adam v. Campbell}, 26 Sc. Jur. 500.
Legacies

alleged and proved, and unless the promise is in writing.\textsuperscript{1} But a sufficient consideration in such a sense is the forbearance of the creditor to sue the executor, such forbearance being requested by the executor.\textsuperscript{b} The writing must be signed by the executor or administrator, and the consideration must also appear on the face of the writing, either expressly or by clear implication.\textsuperscript{c} An executor will be liable personally, not only for his own contracts in writing, but also for his own tortious and negligent acts, or for a devastavit, \textit{i.e.}, a misapplication of the funds.\textsuperscript{d}

**LEGACIES.**

699. General, specific, and demonstrative legacies.—Legacies are general, or specific, or demonstrative, the last being a mixture of the other two.\textsuperscript{2} A general legacy is a legacy of personal estate by a general denomination, so as not to indicate any particular thing, nor to be bequeathed out of any particular fund. A specific legacy is a legacy of a specific chattel, or of a specific part of testator’s property. A demonstrative legacy is a bequest of so much money payable out of a particular fund. The distinction is important in the event of a deficiency of assets, for the holder of a general legacy must always abate.

700. Legacy to testator’s children.—The rule as to lapse of legacies by the death of a legatee, who is a child, before the death of the testator, mentioned \textit{post}, § 722, 725, applies to personal as well as real estate.\textsuperscript{3}

\textsuperscript{1} 29 Ch. II. c. 3, § 4.
\textsuperscript{2} Wms. Exec. 1612.
\textsuperscript{3} 29 Ch. II. c. 3, § 4.
\textsuperscript{b} Saunders v. Wakefield, 4 B. & Ad. 535.
\textsuperscript{c} Wms. Exec. 1630.

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\textsuperscript{1} \textit{Contra}; an executor will be liable for the debts of his testator, if he expressly undertake to be liable, without receiving any consideration, or the consideration appearing \textit{ex facie} of the writing.

\textsuperscript{2} The division of legacies is into general and special (the last including specific and demonstrative legacies).

\textsuperscript{3} The same rule holds by reason of the \textit{conditio si sine liberis deceaserit}. See \textit{post}, § 722. But excluding the case of children, legacies are subdivided into simple legacies and legacies with substitutions. A simple legacy is a legacy to A, either by name or description. A legacy with substitutions is a legacy to A, whom failing to B, whom failing to C, or to A and his heirs, whom failing to B and his heirs, etc.
701. Lapse of legacy.—A legacy to "A and his heirs" will, in the absence of a contrary intention, lapse by A’s death before the testator, unless A is a child or other issue of testator. But a legacy to "A or his heirs" does not so lapse. *a*

So a legacy to A and his assignees lapses in the same circumstances, subject to the above exception. *b*

702. Legacy to A and his children, etc.—Where a legacy is given to A and his children, it seems that this is an absolute legacy to A, if he has no children at the date of the will and the death of the testator. *b* If A had children living at the date of the will, then the legacy is to A and such children jointly, unless the context shows that A was to take only for life, with remainder to his children. *c* A legacy to "A and the heirs of his body," is a legacy absolutely to A, whether he has children or not.

703. Substituted legatee.—If a legacy is given to A, whom failing, to B, whom failing, to C, etc., neither A nor B nor C being children or other issue of the testator, and if A dies before the testator, and B survives, the legacy goes to B in substitution; and if both A and B die before testator, then C takes in substitution, precisely as A would have done on surviving. *d*

*a* Wms. Exec. 1088.  
*b* Wms. Exec. 985; but see authorities there cited.  
*c* Ibid.

IN SCOTLAND.

1 Contra; a legacy to A and his heirs or executors does not lapse by A’s predecease (2 Bell’s Ill. 446) in the absence of a contrary intention, unless A die without issue, and is a child of testator, and the legacy is a provision. Ibid; M. 6372; Fyfe v. Fyfe, 3 D. B. M. 1205; Menz. Conv. 477.


*Contra;* in the cases stated, the legacy would be to A in fee, or absolutely; but his children would be conditional institutes if he died.

4 The same; this is called a conditional institute of B and of C respectively, i.e., B would only succeed on the condition that A, who is called the institute, predeceased the testator; hence, if A succeeds, the right of B, or of B and C, the conditional institutes respectively, is gone. Menz. Conv. 2 A. Johnson v. Greig, 6 W. S. 406. In general, when substitutes are appointed in moveables, they are presumed to be, not substitutes proper (remaindermen E), but conditional institutes (substituted legatees E); for proper substitutes are those whose right does not fly off upon the succession of the institute, but continues, so that they may take the provision, when the institute, after enjoying the right, shall die. See Fogo v. Fogo, 2 Bell’s Ap. 195; 4 D. B. M. 1063.
Legacies.

The effect would not be different if the legacy was to A and his heirs and executors, whom failing, to B and his heirs and executors; for if A died before the testator, his children would not take in preference to B. But if the legacy was to "A or his heirs," to "A or his personal representatives," etc.; then upon A's death, his heirs, etc., if any, would take before B.

704. Words, "dying without issue," etc.—Where, in a devise or bequest of real or personal estate, the words "die without issue," or, "die without leaving issue," or "have no issue," or like words are used, this, in general, is taken to mean a want or failure of issue in the lifetime, or at the death of the person alluded to, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a previous estate-tail or otherwise.

705. General terms common in bequests.—There are many general terms used in bequests, which, though loose, have received specific meanings, such as "goods and chattels, estate, furniture, money, things, plate," etc., but the meaning of these is often materially qualified by the context.

There are also several general terms, such as "issue, children, descendants, heirs of the body," as to which technical, and somewhat arbitrary meanings have been adopted, especially in devises of real estate.

706. Payment of legacies.—All debts must be paid before any legacies, whether general or specific, can be satisfied. And even voluntary debts by bond, etc., must also be paid before legacies.

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1 Contra; the heirs, etc., of A, in such a case, would be conditional institutes, and would take before B.

2 The same vagueness attends the use of such terms as goods and gear, moveables, effects, debts, etc. It is to be borne in mind that leases, bonds and dispositions in security, etc., are heritable and not moveable estate. See post, § 715 n.

3 There being no disposition of real estate by will, but only by deed, there are fewer disputes as to these loose expressions, as a deed generally requires to be executed with professional assistance, and therefore the language is more technical and precise.
Legacies.

Where no time, or even though an earlier time, of payment of a legacy is appointed by the will, the executor cannot be forced to pay it, until a year after the death of the testator. Yet, if the state of the testator’s affairs admit of it, the executor has authority to pay legacies before the end of the year.

Interest is in general payable on legacies, where no time of payment is specified, only from the end of the first year. But where the legacy is specific, interest accrues from the death of the testator. And where even general legacies are given to children of the testator, or to those towards whom he stands in loco parentis, interest will be given from the death. Where the testator fixes the time of payment, interest in general is not given until such time arrives, whether the legacy has vested or not, unless in the case of legacies to children who have no other maintenance, or in the case of legacies of which the testator apparently meant the interest to be given for maintenance.

707. Suit for legacy.—No action in a court of law can be brought by a legatee against the executor, unless for a specific legacy to which the executor has assented; the only remedy is in a court of equity. There is however an exception in favour of small legacies under £50, which may be recovered in the County Court.

708. Legacy to feme covert.—Where a legacy is left to a married woman, the executor may decline to pay the husband if he has made

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\[\text{\textit{a} Wood v. Penoyre, 13 Ves. 333; Brooke v. Lewis, 6 Mad. 15.}\]
\[\text{\textit{b} Angerlein v. Martin, 1 T. & Rass. 241; Pearson v. Pearson, 1 Sch. & Lef. 12.}\]
\[\text{\textit{c} Sleech v. Thorington, 2 Ves. Sr. 563; Wms. Exec. 1283.}\]
\[\text{\textit{d} Blackford v. Robin, 1 Ves. Sr. 310; Crickett v. Dolby, 3 Ves. 13.}\]
\[\text{\textit{e} Heath v. Perry, 3 Atk. 101; Coventry v. Higgins, 14 Sim. 20.}\]
\[\text{\textit{f} Wms. Exec. 1288.}\]

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IN SCOTLAND.

1 \textit{Contra}; the general rule is, that payment of a legacy cannot be enforced until after the expiration of six months. Bell’s Pr. § 1880; 2 Bell’s Ill. 452.

2 \textit{Contra}; if no term of payment is mentioned, interest seems to be payable from the death. \textit{Ibid.}

3 There being no division into courts of law and equity, an action lies for a general legacy against the executor, and for a special legacy against the possessor of the subject of such legacy, the executor in the latter case being called as a party. 2 Bell’s Ill. 444.
no provision for her, and if the husband sue for it, which he can in general only do in a court of equity, the court will, in such circumstances, order a reasonable settlement out of it to be made on the wife, or the wife herself may take the initiative and file a bill for such settlement. And if the husband dies after the testator, but before payment of the legacy, and his wife survives, then the legacy will go to the widow, and not to his representatives.

But if the parties have obtained a judicial separation, the wife is entitled to sue for the legacy as a feme sole, and to have it paid to herself for her absolute use.

709. Election.—Where a testator bequeathes a chattel or other property of S, a stranger, to A, the bequest is entirely void, if S chooses to repudiate it; and whether the testator did or did not know, that the property was not his own, the executor is not bound to purchase the chattel, or make compensation to A for the loss of the legacy. But if S gets anything under the will, he cannot claim the benefit without making good at the same time the attempted legacy; he must elect one or the other.

710. The doctrine of election applies also to real estate. The doctrine is however not applicable to those cases where real property is assumed to be devised by a will made before 1838, but was not in fact devised, owing to defective execution; and if a legacy is given

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a Re Cutler, 14 Beav. 229; Re Kincaid, 1
Drew. 326; Francis v. Brooking, 19
Beav. 347. See also post, "Marriage."

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1 The husband was entitled absolutely to payment of the legacy; but since 1861 he is bound to make a reasonable provision for her if she claim it (24 & 25 Vic. c. 86, § 16), before he or his creditors have obtained possession.

2 This will now be the same since 1861. 24 & 25 Vic. c. 36, § 16.

3 This will now be the same since 1861. Ibid.

4 Contra; if the testator knew it was not his own property, the executor must purchase it, or make compensation to A, the intended legatee. Such a legacy is known as legatum rer aliena. M. 13,301; Bell's Pr. § 1882.

5 This is called the doctrine of approbate and reprobate, which is founded on the same principles. A party cannot both approbate and reprobate the same deed or testament. See 1 Ross L. C. 617; Dundas v. Dundas, 4 W. S. 460; Douglas' Trustees v. Douglas, 24 D. B. M. 1191.
by the same will to the heir, he may take the legacy without making good the attempted devise,\(^1\) unless the will contains an express condition to that effect annexed to the legacy.\(^6\)

711. *Satisfaction of legacy by portion.*—Where a testator by will leaves a legacy to a daughter, child, or person, towards whom he stands in *locus parentis*, and afterwards in his lifetime gives the child a like sum of money, or even a less sum as a portion on marriage, such portion is *prima facie* presumed to be in satisfaction, or an ademption of the legacy, unless there is something in the will or settlement to rebut that presumption.\(^5\)\(^2\) And it makes no difference though the portion was not paid at the time, but the parent merely covenanted to pay it at a future time.\(^6\)

712. *Heirlooms.*—Certain chattels called heirlooms\(^3\) are said to go to the heir-at-law by special custom, and not to the executor; but it is not clearly settled what things are heirlooms, and things are seldom claimed on this ground.\(^d\) It is said they are the best things of every sort, as of beds, pots, tables, pans.

713. It seems, however, they must have come to the intestate through several descents,\(^4\) and the custom must be strictly proved by the heir who claims them. The ancestor cannot by will devise heirlooms, though he can sell them in his lifetime.\(^6\)

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\(^1\) Jarman on Wills, 374; Boughton *v.* Broughton, 2 Ves. 12; Brodie *v.* Barry, 2 Ves. & B. 127.\(^a\)

\(^2\) Wms. Exec. 641.\(^d\)

\(^3\) Glengall *v.* Thynne, 2 H. L. Cas. 131.\(^b\)

\(^4\) Hopwood *v.* Hopwood, 34 L. T. 59.\(^c\)

\(^5\) 2 Bl. Com. 429.


**IN SCOTLAND.**

\(^1\) *Contra*; the heir in such a case would be bound to elect, though no express condition was attached to the legacy.

\(^2\) *Contra*; there is no such presumption, unless the father was liable by contract to give the portion—the maxim *debitor non presumitur donare* not applying, unless the tocher was *in obligatione*. Kippen *v.* Darley, 30 Sc. Jur. 563; 3 Macq. Ap. 203.

\(^3\) There are no moveables which go to the heir-at-law by custom; but at common law, the heir of every person who dies seised in land has "heirship moveables," being the best articles of furniture in every house, the best farm stock, etc., of the intestate, in order that he may not enter to his predecessor's dwelling-house, etc., quite dismantled by the executors. Bell's Pr. § 1902, *et seq.*; 2 Bell's Ill. 4; Ersk. 3, 8, 17; Stair 3, 5, 7; 3, 3, 8; *Fisher v.* Dixon, 4 Bell's Ap. C. 353. See a list of heirship moveables in Oliphant *v.* Thomson, 32 Sc. Jur. 132.

\(^4\) *Contra*; it is enough that the deceased died seised of land.
715. **Real and personal.**—In questions between the heir and the executor, the following distinctions are to be noticed:—Leases or leasehold estates for a term of years, and whether limited to heirs or not, are personalty, and go to the executor; also a lease *pur autre vie*, but the heir of the lessee may take as special occupant.¹

716. The following also are personal,—advowsons or rights of presentation;² tithes;³ annuities,⁴ unless expressly limited to the heir; copyrights and patent rights;⁵ life estates;⁶ mortgage⁷ debts, *i.e.*, debts due to the mortgagee; estates by eject;⁸ deer in a park, *i.e.*, a park by prescription, conies in a warren, doves in a dove-house, fish in a pond, if the deceased was owner of the freehold;⁹ canal shares, etc., are real at common law, but in many instances special statutes have declared them personal.

The right of the heir or executor to fixtures varies according to the nature of the interest which the testator had in the freehold—whether he was tenant in fee, tenant for life, tenant for years, etc.¹

¹ *Wms. Exec.* 597, 603; *see ante*, § 56.

**IN SCOTLAND.**

¹ *Contra*; leases, whether for a fixed term or for the life of another, are heritable, unless the destination expressly excludes heirs.

² *Contra*; patronage is heritable. *Bell’s Pr.* § 1485.

³ *Contra*; teinds are heritable.

⁴ *Contra*; annuities and liferents of a sum are heritable as being rights, having *tractum futuri temporis*. *Ersk.* 2, 2, 6.

⁵ Not decided. *See Bell’s Pr.* § 1480.

⁶ *Contra as to liferents*. *See ante, § 715 n.*

⁷ *Contra*; money due on heritable bonds and on bonds and dispositions in security, is heritable. *See ante, § 102 n.*

⁸ *Contra as to the security of adjudication*. *See post, “Procedure.”*

⁹ *Contra*; these seem to be heritable.

⁰ *Contra*; *Bell’s Pr.* § 1474.

¹ As to fixtures the law seems to be the same. *Dixon v. Fisher*, 4 Bell’s Ap. 286.
DEVISE OF LANDS.

718. **Will of lands.**—As already stated, real estate may pass by will as well as by deed.\(^1\) Such will must be executed by the same formalities as a will of personal estate.\(^1\) It is revoked by a subsequent marriage. And it may be made on deathbed, provided the testator has a sound disposing mind.\(^2\)

There are no technical words necessary or essential to pass real estate by will, and the law dispenses with the want of words in wills which are absolutely required in all other instruments, and frequently gives effect to a mere implication.\(^3\)

719. **Testator selling land after will.**—After a will is executed, the testator, being still alive, may dispose of the lands comprised therein;\(^4\) though if he re-acquire them, they will again be subject to the will, and the will speaks from the time of the testator’s death, and includes all estates acquired subsequently to the date of the will, unless a contrary intention is shown.\(^5\)

720. **Device of estate-tail.**—A testator may, by his will, give the fee or an estate-tail or any lesser estate in his lands; and, excepting

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\(^a\) 2 Bl. Com. 381.  \(^b\) 1 Vic. c. 25, § 23, 24.

IN SCOTLAND.

\(^1\) Contra; a will cannot pass lands; they can only pass by deed or disposition. See ante, § 662 n. Yet the formalities of a testament are the same as those of deeds, as to which, see ante, § 331, et seq. n. n.

\(^2\) Contra; by the law of deathbed, the proprietor of heritable estate in general is restrained even from executing a disposition mortis causa to a stranger during his life, provided he is then ill of the disease of which he afterwards died within sixty days. See ante, § 675 n, and 677 n.

\(^3\) Contra; not only is a deed necessary to convey lands, but that deed must contain the word “dispose” in the dispositive clause, such word being held to be essential to the conveyance, and no other words, however clear, are accepted as an equivalent. 1 Ross L. C. 21. See ante, § 361 n.

\(^4\) This would depend on whether the disposition and settlement mortis causa was delivered, and so irrevocable; if not delivered, then the granter could effectually sell the lands, for he had still the jus disponendi. Chalmers v. Chalmers, 14 D. B. M. 57.
marriage settlements, wills are the instruments, by which estates tail are usually given.¹

721. Limitation of the fee by will.—When real estate is devised to "A," without adding words of limitation, such as "and his heirs," etc., such devise passes the fee-simple, or other the whole estate, which the testator had power to dispose of, to A, unless a contrary intention appears by the will.² The rule is different as to a conveyance by deed.³

722. Lapse by death of devisee of fee-simple.—Where D, the devisee of the fee-simple of real estate, dies before the testator, the devise lapses. But if D is a child⁴ or other issue of the testator, and leaves issue who survive the testator, such issue will take in lieu of D, if the estate or interest bequeathed was not determinable at or before the death of D, unless a contrary intention appear by the will.⁵ In such a case the same effect is produced as if the devisee or legatee D survived the testator, and it is not a mere substitution of the children for the legatee; and accordingly, D may dispose of the devise or legacy by will.⁶ And where D is a stranger to the testator, and dies before him, it would make no difference, though the testator expressly provided, that the devise should not lapse by death, unless he gave the estate, in the event of D’s death, to some one else.

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¹ 1 Vic. c. 26, § 28.
² See ante, § 23.
³ Johnson v. Hare, 3 Hare, 157.
⁴ 1 Vic. c. 26, § 33.
⁵ Contra; the destination in a deed to A, without further words, gives the fee to A. See ante, § 23 n.
⁶ The same. In legacies and dispositions mortis causa to the testator’s children and grandchildren, when the heirs of the legatee or disponee are not named, the testator is presumed to have intended that the issue should come in place of their parent; and any substitution of a third party is held to be made on the implied conditio si sine liberis decesserit. In such a case the grandchild will take before E, even though the destination is to D, whom failing to E. Ersk. 3, 8, 46; Bell’s Pr. § 1776; Moubray v. Scongall, 2 Sh. & M.L. 305; Dixon v. Brown, 2 Rob. Ap. 1. The rule has also been extended to the issue of a predeceasing cousin-german; Christie v. Paterson, 1 S. D. 543; and to the children of legatees, to whom the testator is an uncle or near collateral relation.
⁷ Contra; D in this case could not dispose of the legacy by will.
Devises of Lands.

723. But if the testator devised to D, and in case of his death to D's executors or personal representatives, or to E, a stranger, etc., then if D died before the testator, whoever comes within the description of "executors," etc., will take.\(^a\)

724. When a devise lapses by the death of the devisee, or from the devise failing or being otherwise void, the estate or interest comprised therein falls into the residue and passes by the residuary devise,\(^1\) if any, unless the will shows a contrary intention.\(^b\)

725. \textit{Lapse by death of devisee of estate tail}.—An exception to the general rule as to lapse also exists where D, the devisee, takes an estate tail or an estate in \textit{quasi} tail, and dies before the testator, leaving children who survive the testator, and who would be inheritable under such entail; in such a case D's child takes,\(^2\) unless the will shows a contrary intention. The effect is the same as if D had died immediately after the testator.\(^c\)

726. \textit{Devise to heir-at-law}.—Where a testator devises his real estate to H, his own heir-at-law, such heir, since 1833, takes as devisee or purchaser, and not by descent.\(^3\) Hence, upon the death of H intestate, the land will descend to the heir-at-law of H, and not to the next heir of the original testator.\(^d\)

727. \textit{Completion of devisee's title}.—A devisee's title is the will itself, and he requires to do nothing further to complete his title; except that, in copyhold estates, he must present a copy to the lord of the manor, to be entered on the court rolls, whereupon the devisee is

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\(^a\) Hincheside v. Westwood, 2 De G. & S. 216.
\(^b\) 1 Vic. c. 26, \S\ 25.
\(^c\) 1 Vic. c. 26, \S\ 32.
\(^d\) 3 & 4 W. IV. c. 106, \S\ 3; \textit{Strickland} v. \textit{Strickland}, 10 Sim. 374.

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IN SCOTLAND.

1 It seems the same.
2 The same, if D is a child or grandchild of the grantor, but not otherwise. See \textit{ante}, \S\ 722 n.
3 The same; the heir would take as a singular successor, yet the result would be, as regards the succession on his death, that the land would go, not to H's heir of conquest, but to H's heir of line, for it is not conquest in H. Ersk. 3, 8, 15; see \textit{post}, \S\ 758 n. The course of dispossessing to the heir is often taken by testators in order to facilitate the completion of the heir's title, and exempt him from a universal representation. Menzies' \textit{Convey.} 620.
4 \textit{Contra}; the disponee completes his title in a manner resembling other disponees and vendees. See \textit{ante}, \S\ 364 n, and 21 & 22 Vic. c. 76, \S\ 12.
at once admitted. The devisee does not require in general to obtain probate of the will, but if the will is disputed and requires to be proved in solemn form, then the devisee must be cited, and will be bound by the proceedings and by the decree of the Court of Probate. When the devisee requires to prove his title in a court of law or equity, he must either produce the original will, or, on giving notice to the opposite party, must produce the probate or a stamped copy.

728. Devises to A, whom failing to B, etc.—Where a testator devises his estate to A, whom failing to B, whom failing to C, etc., A is the devisee and takes by purchase. And if A, not being issue of the devisor, died before the devisor, and thus B took, B would be equally a devisee and purchaser, and on the death of B intestate, the estate would go to B's heir-at-law.

729. Executory devises and interests.—A devise, by which a future interest is limited, contrary to the rules of the common law, is called an executory devise—that term however being often used in another sense as contradistinguished from immediate devises, bequests, or limitations. Thus if testator devises lands to his son A and his

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IN SCOTLAND.

1 In such a case, A would be the institute, and B and C are generally called substitutes; A would be a singular successor, but not B and C, who would be heirs of provision to A. The effect is chiefly seen in the manner in which A and B would proceed to make up their titles; and much obscurity exists on this subject. See Fogo v. Fogo, 4 D. B. M. 1063; 2 Bell's Ap. 195; Ersk. 3, 8, 44; Bell's Pr. § 1745; Sandford on Herit. Succession, 264, 380; Menz. Conv. 443. When A's institution is made conditional or contingent on certain events, he is called a conditional institute. When there are several conditional institutes, and any one, on the succession opening, takes the estate, then the interest of the other conditional institutes vanishes. If none of these conditional institutes survives the opening of the succession, the estate goes to the institute last named, and through him to the substitutes, and if there are no substitutes, then to the last institute's own heirs. Sandford on Herit. Succ. 397. A disposition mortis causa made by A himself to A, whom failing to B, gives the estate to B preferably to the heirs of A, unless A has a child or other issue subsequently to the date of the disposition; but a destination to A and his heirs, whom failing to B and his heirs, etc., excludes B until all the heirs of A are exhausted. Menz. Convay. 669; Graham v. Graham, 20th June 1816, F. C.; see ante, § 703 n, and Whittet v. Johnson, 6 W. S. 83.

2 Wills do not pass real estate, but similar results are attained by means of a deed of entail, executed with proper fettering clauses. See ante, § 53 n.
heirs, but in case A should die under twenty-one, then to B and his heirs, A has an estate in free-simple in possession, subject to an executory interest in B, and if A die under twenty-one, B acquires the fee-simple. If a similar limitation had been by deed, A would have had the fee-simple, and the limitation to B would be void.\(^1\) Formerly, until B’s estate vested, his expectancy could not be alienated; but now it can be alienated.\(^b\) An executory interest is subject to the rule against perpetuities; it must arise within the period of any fixed number of lives existing, and twenty-one years more.\(^c\) The Thelluson Act\(^d\) also strikes at accumulations by means of these limitations.

730. Doctrine of cyprès.—Where a testator, under a power to appoint by will to children, appoints to children and their issue, this settlement gives an estate tail to the children; and so, if a strict settlement be made by will on a person unborn before the testator’s death, his estate for life will be converted into an estate tail by the doctrine of approximating the intention as nearly as possible, called the doctrine of cyprès.\(^e\) So in a devise to a person, followed by a devise to his issue, an estate tail sometimes arises in such person’s favour by the same doctrine of cyprès.\(^f\)

Moreover, by a rule peculiar to gifts for charitable purposes, which are not within the Mortmain Act, if the donor declare his intention in favour of charity indefinitely, without defining the objects, or, if defining them, where those objects fail, though the particular mode of application is uncertain or impracticable, and so the gift would be void for uncertainty, yet the general purpose, being charity, will be carried into effect as nearly as possible by the doctrine of cyprès.\(^g\)

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\(a\) Wms. Real Prop. 270.  
\(b\) 8 & 9 Vic. c. 106, § 6.  
\(c\) Bart. Comp. § 826; 2 Sagd. Pow., 4-10, 55-61.  
\(d\) Fearne, Cont. Rem. 430.  
\(e\) 39 & 40 Geo. III. c. 98.  
\(f\) Smith’s Fearne, § 504.  
\(g\) 2 Jarman on Wills, 199.

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**IN SCOTLAND.**

\(1\) *Contra*; the second destination in a deed of entail, properly framed, would not be void on such ground.

INTESTACY AS TO PERSONAL ESTATE.

732. Right to letters of administration.—The persons entitled to be appointed administrators are entitled in the following order:—

1. The husband is absolutely entitled, as a civil right, and not merely at the discretion of the Court of Probate,\(^a\) to be the administrator of his deceased wife.\(^b\) But this right will be excluded in whole or part, if the wife has made a will of the whole or part of her estate with his consent; and her will, so far as it affects her separate estate, is valid.\(^c\)

2. The widow or the next of kin, or both, at the discretion of the Court of Probate.\(^d\) The widow is generally preferred by the Court of Probate, unless she has been judicially separated, or been guilty of misconduct.\(^e\)

3. The next of kin, the Court selecting one, if several are equal in degree.\(^f\) In the first place, the children and their lineal descendants to the remotest degree; and on failure of children, the parents of the deceased; on failure of parents, then brothers and sisters; then grandfathers and grandmothers; then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins. Relatives by the father’s side and the mother’s side are in equal degrees of kindred; and the half blood are equally entitled with the whole blood, though the latter are generally preferred. The Court prefers a sole to a joint administration.\(^g\)

4. A creditor.

5. Any discreet person, at discretion of the Court.\(^h\)\(^1\)

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\(\text{\(^a\) Wms. Exec. 358.}\)
\(\text{\(^b\) 29 Ch. II. c. 3; but see }\) Breachley v.\(^\) \(\text{\(^LYNN, 2 Robb. 441.\)}\)
\(\text{\(^c\) Wms. Exec. 364.}\)
\(\text{\(^d\) R. v. Bettesworth, 2 Str. 1111.}\)
\(\text{\(^e\) 21 Hen. VIII. c. 5, § 3.}\)
\(\text{\(^f\) 21 Hen. VIII. c. 5, § 3.}\)
\(\text{\(^g\) Wms. Exec. 375.}\)
\(\text{\(^h\) Wms. Exec. 378.}\)

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IN SCOTLAND.

\(^1\) \text{Contra. 1. The next of kin, i.e., surviving children, if any, etc. All in the same degree are entitled to be conjoined in the office, if they please. The whole blood excludes the half blood in the same degree. All persons related through the mother, excepting brothers and sisters uterine and their issue, are excluded. See 18 Vic. c. 23, § 1, 5.}\n
2. The widow or relict.
733. Creditor appointed administrator.—Where a creditor is appointed administrator, he is in the same position as other administrators, and his powers are not limited to his merely helping himself to his own debt, though, as a matter of course, he will pay himself first, as he is entitled to do, if the other debts are of equal degree. Yet if other creditors petition the Court of Probate, the Court will compel such creditor administrator to enter into a bond to secure his paying each his debt pro rata.

Where an executor or administrator has been appointed, the creditor can at any time bring an administration suit in the Court of Chancery, or commence an action at law to recover his debt. But the creditors of the next of kin cannot in general intervene in such suits, or, by any kind of legal process, attach or intercept the payment of the next of kin’s share; such creditors must sue the next of kin in the usual way.

STATUTE OF DISTRIBUTIONS.

734. Wife dying intestate.—1. Where a wife dies intestate, the

IN SCOTLAND.

3. A creditor.
4. The procurator-fiscal or a factor appointed by the Court.

Where the deceased has left a will or general disposition mortis causa, but not nominated an executor, or the nomination has failed, the following is the order in which an executor dative quoad non executa (Nicol v. Milne, 28 Sc. Jur. 457), is appointed:

1. The general disponee or residuary legatee.
2. The next of kin in the enlarged sense given to the phrase by the recent Act 18 Vic. c. 23, § 3, 4, 5.
3. The widow or relict.
4. A creditor.
5. A special legatee.
6. A factor appointed by the Court.

1 An executor creditor, who holds a liquid ground of debt, may apply for confirmation to the effect of administering to so much of the property as is sufficient to pay his own debt, but not beyond (Bell’s Pr. § 1895), all debts being equal in rank. Other creditors may also apply to be confirmed along with him. And all creditors so confirmed within half a year of the deceased’s death, are entitled to share pari passu. Act of Sed. 28th Feb. 1662; Globe Ins. Co. v. Mackenzie, 7 Bell’s Ap. 296.

2 Contra; creditors of the next of kin can arrest the share of such next of kin. Bell’s Pr. § 1895, 1900.
husband is absolutely entitled to be her administrator. He also becomes as such entitled to all her personal estate, which she could have left by will, whether she leave children or not. The Statute of Frauds, 29 Ch. II. c. 3, § 35, expressly enacted that the Statute of Distributions should not extend to the estates of feme coverts, and that husbands should have administration of their rights, credits, and personal estates as before that Act. So, if the husband die before obtaining administration, his next of kin, and not those of the wife, will be entitled to letters of administration.

735. But if the husband was judicially separated from the wife, her personalty will go to her next of kin as if she had been a feme sole.

736. Husband and father dying.—2. Where a husband dies intestate, leaving no children or descendants of children, one-half of his whole personal estate goes to the widow, and the other half to his next of kin, and if there are no next of kin, such half goes to the crown.

If there is a child or children, but no widow, surviving, the whole goes to such child, or to the children, as next of kin, in equal shares.

737. If both widow and children survive, then one-third goes to the widow, and the remaining two-thirds to the children in equal shares.

738. Widow’s share.—A wife has, at common law, no right to any share of the husband’s personal property; and he can by will bequeath the whole to a stranger. It is only where he happens to die intestate, that she becomes entitled to anything. The widow’s thirds, or her claim to a share under the Statute of Distributions, may

\[a\] 22 Ch. II. c. 18. As to wife’s power of making a will, see "Marriage."
\[b\] Wms. Exec. 360.
\[c\] 20 & 21 Vic. c. 85, § 25.
\[d\] 22 Ch. II. c. 10.

IN SCOTLAND.

1 Contra; the wife’s next of kin are entitled; Leighton v. Russell, 25 Sc. Jur. 63; but they cannot now claim anything as her jus relictae. 18 Vic. c. 23, § 6.
2 Contra; her next of kin would be entitled.
3 The same.
4 The same, on different grounds; one-third being the wife’s jus relictae, one-third being the living children’s legitim, and the other third going to the children, and dead children’s issue, as next of kin. See next note, and post, § 848 n.
be barred by express words in an antenuptial settlement. Where the husband by will leaves a provision, stating it to be in bar of her thirds or share, and such provision lapses or fails, she can then claim her share.\(^a\) Where the husband has covenanted to pay after his death to the widow a sum or part of his personal estate, and he dies intestate, then her share, under the Statute of Distributions, is counted a performance \textit{pro tanto} of that covenant, and she cannot claim both;\(^b\) unless the covenant is entire, or there was a breach of it during his lifetime resulting in a debt to the wife.\(^c\)

\textbf{739. Some of the children dead leaving issue.—}Where some of the children have predeceased their parent leaving issue, such issue represent their own parent, and take his or her share.\(^2\) Thus if the father had three children, A, B, C, of whom C has died before him leaving issue, and the father's widow survives, and the personalty amounts to £900; the widow takes £300, A and B each £200, and C's children £200, equally divided among such children. But if all

\(^{a}\) Pickering v. Stamford, 3 Ves. 332; \(^{b}\) Ibid, Bland v. Widmore, 1 P. Wms. 324.
\(^{c}\) Garthshore v. Claitie, 10 Ves. 17.

IN SCOTLAND.

\(^1\) Contra; the widow is not entitled to any share of her deceased husband's personal estate, solely on the ground of his dying intestate. But she has a higher right called the \textit{jus relictue}, which cannot be barred or interfered with by the husband's will, or any revocable deed. It may however be barred by an antenuptial contract of marriage, which either expressly or by strong implication excludes such right. The rule also is, that the \textit{jus relictue} is still due, though a separate and reasonable provision be granted, unless the contrary is stated. Ersk. 3, 9, 17; Keith's Trustees v. Keith, 29 Sc. Jur. 497. Where the wife in a postnuptial settlement renounces her \textit{jus relictue} for provisions greatly inferior, she may, on the death of her husband, revoke it, and resort to her legal provision. Dickson, 5 W. S. 455; Gaywood, 6 S. D. 909; Dixon v. Fisher, 2 Rob. Ap. 345. But where there is a plain intention by the marriage-contract to regulate the whole succession, it may be inferred that the \textit{jus relictue} was intended to be discharged. Bell's Pr. § 1946. Previous to 1855, if the wife predeceased the husband, her next of kin, executors, or other representatives, could demand from the husband her \textit{jus relictue}; but this right is taken away, and her will cannot now affect such share of the goods in commination. 18 Vic. c. 23, § 6.

\(^2\) The same, since 1855, by 18 Vic. c. 23, § 1, as to the dead's share, but not as to legitim. Hence, if some of the children have died, the division is in the result slightly different, for grandchildren do not take their parent's legitim. Hence, in the case put above, the widow takes £300, A and B each £250, and C's children £100.
the children are dead and only grandchildren exist, then the grand-
children take each equally and not per stirpae, i.e., by families.\(^1\)

740. **Heir-at-law is one of the next of kin.**—The heir-at-law if
also one of the next of kin, is entitled to take a share under the
Statute of Distributions, along with the other next of kin, if of equal
degree, and is not excluded merely because he takes the real estate
as such heir.\(^2\)

741. **Hotchpot.**—Moreover, one of the children who is the heir-
at-law and thereby succeeds to the real estate, is nevertheless equally
entitled with the rest to his share of the personality, without bringing
into hotchpot the value of such real estate.\(^3\) And this is also
the case where the lands descend to the youngest son by the custom
of Borough English.\(^4\)

742. **Advancement to a child.**—If the heir-at-law or any other
child shall have received an advancement out of the intestate's per-
sonal estate, this will be counted as part of his distributive share.\(^5\)

\(^{a}\) Stat. Distrib. 22 & 23 Ch. II. c. 10, § 5. \(^{c}\) 22 & 23 Ch. II. c. 10, § 5; Wms. Exec.
\(^{b}\) Wms. Exec. 1352.
\(^{b}\) Wms. Exec. 1352.

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**IN SCOTLAND.**

\(^{1}\) The same.

\(^{2}\) *Contra*; he is also one of the next of kin, but if he has succeeded to
the heritage, he must collate. See next note.

\(^{3}\) *Contra*; the heir-at-law, in claiming his legitim, and also his share of
the dead's part, must first collate the heritable estate. Bell's Pr. § 1910,
1913. Collation is a privilege which the heir-at-law has. He must collate
everything he has got, which he would have succeeded to as heir. Though
he got the estate by deed from his ancestor he must collate it. M.
2372. He must also collate his linterest in an entailed estate. *Anstruther v.
Anstruther*, 2 Sh. & M'L. 369. Every heir-at-law was, however, formerly
not entitled to collate; it was only where he was one of the next of kin.
Ersk. 3, 8, 77; M. 2383. But now where B, a person predeceasing the ancestor
A, would have been heir, B's child, being B's own heir-at-law, is entitled
to collate, and if B's child refuse to collate, the brothers and sisters of B's
child and their descendants shall take a share of the moveable estate equal
to the excess in value which they thereby lose. 18 Vic. c. 23, § 2. An
heir of conquest has also the right to collate. Bell's Com. by Shaw, 662.
The heir may renounce his right of collation, but not so as to prejudice his
c. 23, § 2, ante.

\(^{4}\) *Contra*; an advance is only counted as part payment of the share of
legitim, but not of the child's share of the dead's part. *Clark v. Burns*, 3
If the advancement he has got should be less than his share would be, then he must first bring into hotchpot what he has already received. But this rule applies only to the distribution of an intestate father’s estate, and not to that of an intestate mother. A loan by the father to the son, though released in the father’s lifetime, has been held an advancement.

743. So if any of the younger children, not being the heir-at-law, has received an advancement out of the intestate’s real estate, this is counted as part of such child’s share. The advancement must be by virtue of some act in the intestate’s lifetime, and not by will.

744. How degrees of kin counted.—Where there are no children or descendants, the degrees of next of kin are reckoned according to the civil and not the canon law, i.e., a great-uncle, a cousin, and a nephew’s children, are all in the fourth degree.

745. Half blood.—A brother or sister of the half blood, whether by the mother or father’s side, shares equally with the whole blood, for they are both equally near of kin to the intestate.

746. The mother and her relations.—The mother is not restricted to a fixed proportion of the estate, but she shares equally with the brothers and sisters, and their issue, if any. The relations on the mother’s side share equally with those on the father’s side.

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IN SCOTLAND.

1 Contra; a loan by the father, for which he proved on the son’s bankrupt estate, was held no advance. Webster v. Rethie, 31 Sc. Jur. 304.

2 Contra; this is not so either as to children’s legitim or to their next of kin’s share. Bell’s Pr. § 1588; Ersk. 3, 8, 25.

3 Contra; the degrees of next of kin are counted neither by the civil nor the canon law.

4 Contra; the brothers and sisters german and their issue first take exclusively, then brothers and sisters consanguinean and their issue exclusively, and then brothers and sisters uterine and their issue. 18 & 19 Vic. c. 23, § 5.

5 Contra; neither the mother nor relations on her side formerly succeeded; but since 1855 the mother gets a fixed proportion of one-third of the dead’s part if the intestate leaves no issue and no father. 18 Vic. c. 23, § 4; Ersk. 3, 8, 9. Also brothers and sisters uterine succeed after, but not equally with, brothers and sisters consanguinean, since 1855 by 18 Vic. c. 23, § 5, as stated ante, § 745 n, provided the father and mother are both dead; but they never take more than one half of the dead’s part.
747. Where one of kin is dead leaving children.—There is representation of a parent by children among descendants ad infinitum, and among collaterals as far as the class of brother and sister's children, but no farther; for example, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and the brother the other; but if one of two uncles, who together are the next of kin, is dead leaving children, the surviving uncle takes the whole, and the children of the other uncle nothing.\(^a\)

748. The father.—The father succeeds immediately after the issue of the intestate, and takes the whole in preference to all collateral next of kin.\(^b\)

\(^a\) Wms. Exec. 1354.

\(^b\) Wms. Exec. 1357.

IN SCOTLAND.

1 Formerly there was no representation of one of several next of kin who had died; but since 1855, by 18 Vic. c. 23, § 1, there is representation to the extent of 'brothers' and sisters' children. There is, however, no representation of children as to legitim. Ersk. 3, 9, 15.

2 Contra; it is only since 1855, by 18 Vic. c. 23, § 1, that the father succeeds after the issue, and he takes, not the whole, but only a half; but if the issue are dead, he takes the whole of the dead's part.

The following Tabular View shows how the personal estate of a deceased person intestate is distributed in England and Scotland respectively; but it is to be borne in mind, as already stated, that in Scotland the widow has her jus relictue, and the living children their legitim, whether the husband and father dies testate or intestate:
The following is a tabular view of the

IN SCOTLAND.

| 1. Living Children as \[ \frac{1}{3} \] \text{Living children as next of} | Widow, \[ \frac{1}{3} \] \text{as jus retic.} |
|---|---|---|
| legitim - - | kin - - \text{per cap.} | as jus retic. |
| | Dead children's issue \text{per stirp.} | |

<table>
<thead>
<tr>
<th>2. Grandchildren living</th>
<th>[ \frac{1}{2} ] \text{per cap.}</th>
<th>Widow, [ \frac{1}{2} ] \text{retic.}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dead grandchildren's issue</td>
<td>- - \text{per stirp.}</td>
<td></td>
</tr>
<tr>
<td>And so on downwards.</td>
<td>[ \frac{2}{3} ] \text{as jus retic.}</td>
<td></td>
</tr>
</tbody>
</table>

| 3. Living brothers and sisters, full blood \text{per cap.} | Father \[ \frac{1}{3} \] \text{failing whom, Mother} \[ \frac{1}{3} \] \text{of the dead's part.} |
|---|---|---|
| Dead ditto's issue \text{per stirp.} | |

<table>
<thead>
<tr>
<th>4. Nephews and nieces by full blood \text{per cap.}</th>
<th></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>5. Great-nephews and nieces by full blood, children of No. 4</th>
<th>[ \frac{1}{4} ] \text{per cap.}</th>
</tr>
</thead>
<tbody>
<tr>
<td>And so on downwards till exhausted.</td>
<td>Mother as above, failing whom, Brothets and Sisters uterine, and issue, [ \frac{1}{3} ] \text{of the dead's part.}</td>
</tr>
</tbody>
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<tr>
<th>6. Living brothers and sisters, consang. \text{per cap.}</th>
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<tbody>
<tr>
<td>Dead ditto's issue \text{per stirp.}</td>
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<tr>
<th>7. Nephews and nieces (children of No. 6) \text{per cap.}</th>
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<tr>
<th>8. Great-nephews and nieces (children of No. 7)</th>
<th>[ \frac{1}{4} ] \text{per cap.}</th>
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<tbody>
<tr>
<td>And so on downwards.</td>
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</table>

| 9. Father. | |

| 10. Uncles and aunts paternal \[ \frac{1}{4} \] \text{per cap.} | Mother as above, failing whom, Brothets and Sisters uterine, and issue, \[ \frac{1}{3} \] \text{of the dead's part.} |
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<thead>
<tr>
<th>11. Cousins-german (children of No. 10) \text{per cap.}</th>
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<tr>
<th>12. (Children of No. 11) [ \frac{1}{4} ] \text{per cap.}</th>
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<td>And so on downwards.</td>
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<tr>
<th>14. Great-uncles and aunts paternal [ \frac{1}{4} ] \text{per cap.}</th>
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<tr>
<th>15. Children of ditto [ \frac{1}{4} ] \text{per cap.}</th>
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<tr>
<td>And so on downwards.</td>
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<tr>
<th>16. Great-grandfather paternal, etc.</th>
<th></th>
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</table>
distribution of an Intestate's personal estate.

**IN ENGLAND.**

<table>
<thead>
<tr>
<th>1. Living children</th>
<th>per cap.</th>
<th>Widow, 1/3</th>
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<tbody>
<tr>
<td>Dead children's issue</td>
<td>per stirp.</td>
<td>1/3</td>
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<tr>
<th>2. Living grandchildren</th>
<th>per cap.</th>
<th>Widow, 1/3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dead grandchildren's issue</td>
<td>per stirp.</td>
<td>1/3</td>
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</table>

And so on downwards.

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<thead>
<tr>
<th>3. Father.</th>
<th>Widow, 1/3</th>
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<tbody>
<tr>
<td>Mother.</td>
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<thead>
<tr>
<th>4. Living brothers and sisters, full and half blood, per cap.</th>
<th>Widow, 1/3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dead brothers and sisters’ ditto’s children, per stirp.</td>
<td></td>
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<thead>
<tr>
<th>5. Grandfathers and grandmothers paternal or maternal</th>
<th>per cap.</th>
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<tbody>
<tr>
<td>Nephews and nieces by father or mother’s side</td>
<td>per cap.</td>
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<tr>
<th>6. Nephews and nieces by father or mother’s side per cap.</th>
<th>Widow, 1/3</th>
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</thead>
<tbody>
<tr>
<td>Uncles or aunts by father or mother’s side</td>
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<tr>
<td>Great-grandfathers and great-grandmothers by father and mother’s side per cap.</td>
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</tbody>
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<tr>
<th>7. Great-uncles and aunts paternal and maternal per cap.</th>
<th>Widow, 1/3</th>
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<tbody>
<tr>
<td>Cousins-german by father and mother’s side</td>
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<tr>
<th>8. Children of nephews and nieces by father and mother’s side per cap.</th>
<th>Widow, 1/3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great-uncles’ and aunts’ children paternal and maternal per cap.</td>
<td></td>
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<tr>
<td>Children of cousins-german per cap.</td>
<td></td>
</tr>
<tr>
<td>Great-uncles and aunts per cap.</td>
<td></td>
</tr>
</tbody>
</table>

| 9. Second cousins, i.e., children of great-uncles’ and great-aunts’ children per cap. | Widow, 1/3 |

**Note.**—*Per capita* means per head; *per stirpes* means per family, the person being dead through whom the children claim.

The persons mentioned in one number all take equally, and must all be dead before those in the following number can succeed.

Brothers, etc., consanguineum, mean those by the same father; brothers, etc., uterine, mean brothers, etc., by the same mother.
Descent.

Descent.

751. Heir-at-law legitimate at birth.—The heir-at-law must have been born in lawful wedlock and so must have been legitimate at his birth; and he cannot succeed to real property in England, where he was born illegitimate in another country, though by the law of such country he was afterwards made legitimate, and would have succeeded if the property had been situated in that country.\(^1\)

752. Heir presumptive.—An heir presumptive is a person who, though not certain to be heir, would succeed in the event of the ancestor’s immediate death; thus an only daughter is presumptive heir to her father, until a son is born.\(^2\)

753. Heir apparent.—An heir apparent is the person, who will certainly be heir if he survive the ancestor; thus the eldest son is the heir apparent of his father.\(^3\)

754. The moment the ancestor dies, the latter is called the heir, and not the heir apparent.\(^4\)

755. From what stock traced.—From 1833 to 1859 descent was traced not from the person last seised\(^5\) but from the last purchaser, whether such purchaser was actually seised or not, provided he was entitled to be so.\(^6\) But to avoid going too far back, the person last

\(^a\) Birtwhistle v. Vardell, 5 B. & C. 438; Re Don’s Estate, 4 Drewr.
\(^b\) 3 & 4 W. IV. c. 106, § 1.

IN SCOTLAND.

\(^1\) Contra; it is quite enough if the child be legitimate at the time he or his issue succeeds to heritage. Thus a child legitimated \textit{per subsequens matrimonium} is legitimate for all purposes in Scotland. But where the child is born in a country where his parents are domiciled, and where the law of legitimation \textit{per subsequ. matr.} is unknown, it is different. See post, Part VII.

\(^2\) The heir presumptive means the heir-at-law, \textit{i.e.}, the person who is certain to be heir if he lives and survives the ancestor. See next note.

\(^3\) An apparent heir means the heir-at-law, who, after the date of the ancestor’s death, has the right, but has not yet made up his titles. See post, § 773 \textit{a}. Thus he, who is called the heir apparent in England, is generally called in Scotland the heir presumptive. Yet these phrases are also sometimes used popularly in the English sense.

\(^4\) Contra. See last note.

\(^5\) Contra; the root of the title is the person who died last vest and seised, Bell’s Pr. § 1658, whether he inherited or not, \textit{i.e.}, whether he took as heir or as singular successor; but in the latter case the succession slightly varies, being what is called, succession to conquest. See below.
entitled to the land was taken to be the purchaser, unless it could be proved that he inherited the estate.\textsuperscript{a} And now, where there is a total failure of heirs of the purchaser, or where any land is descpicable as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, the descent is traced from the person last entitled, as if he had been purchaser.\textsuperscript{b}

756. Order of descendants.—In succession by descent males are preferred to females; the eldest of several males in equal degree of consanguinity is preferred; females inherit together and are called coparceners; all the lineal descendants \textit{in infinitum} of any person deceased represent their ancestor.\textsuperscript{1}

757. There are, however, two exceptions to these rules by peculiar local custom, viz., that of gavelkind, prevailing chiefly in Kent, whereby the land goes to all the sons or brothers, etc., in equal shares; and the custom of borough English prevailing in several cities and boroughs, whereby the land goes to the youngest son or brother, etc., to the exclusion of the other sons or brothers.\textsuperscript{2}

758. Where a middle brother purchases land.—In descent it makes no difference that the intestate himself did not inherit the land but acquired it by purchase, except that in that case he must himself be the stock from which descent is traced. And if he was a middle brother, and had no issue, his father, and next his eldest brother, would be his heir-at-law.\textsuperscript{3}

\textsuperscript{a} 3 & 4 W. IV. c. 106, \$ 2. \textsuperscript{b} 22 & 23 Vic. c. 35, \$ 19.

\begin{flushright}
\textbf{IN SCOTLAND.}
\end{flushright}

\textsuperscript{1} The same. Ersk. 3, 8, 5.
\textsuperscript{2} These customs are not known, but see next note.
\textsuperscript{3} \textit{Contra}; there is a difference as to conquest (\textit{i.e.}, land acquired otherwise than by descent). Succession to conquest is seen, where the intestate is a middle brother or sister, who acquired the estate, not by inheritance, but as a singular successor, in which case the succession ascends once before it follows the ordinary rule. Bell's Pr. § 1670 ; Ersk. 3, 8, 14. That is to say, the next elder brother succeeds instead of the next younger brother. If a sister dies, the succession goes to her next elder brother; where there are sisters only, then there is equal partition among the other sisters. If there are no brothers or sisters of the full blood, the same rule holds as to brothers consanguineum. When the heir of conquest dies after his titles are made up, then the succession goes in the usual way. The rule of succession does not apply to all heritable subjects, but only to those which are vested by sasine, or require sasine to complete the right. Thus it does not apply to leases or personal bonds excluding executors. Bell's Pr. § 1672.
759. *Father succeeds after descendants.*—Since 1833, on failure of lineal descendants, the nearest lineal ancestor inherits, *i. e.* a father succeeds before a brother.\(^1\)

760. *Order of succession after father.*—Since 1833 the father and then all the males of his paternal ancestors, and their descendants\(^2\) are next admitted, and then the females of the paternal ancestors or their descendants. Then the males of the maternal ancestors or their descendants; then the females of the maternal ancestors and descendants. Hence the father and all his most distant relatives have a preference over the mother\(^3\) and her relatives.\(^b\) And the mother of a more remote male ancestor is preferred to the mother of the less remote male ancestor.\(^c\)

761. *Brothers and sisters.*—When the succession comes to brothers and sisters, if the intestate had both elder and younger brothers, it goes, after the father, first to the intestate’s eldest\(^4\) brother and his issue, and so on according to age down to the youngest of the brothers, and lastly to sisters as coparceners.

762. *Half blood.*—Since 1833 a kinsman of the half blood inherits next after a kinsman of the whole blood in the same degree, and after the issue of such kinsman when the common ancestor is a male, but next after the common ancestor when such ancestor is a

\(^{a}\) 3 & 4 W. IV. c. 106, § 6.  
\(^{b}\) 3 & 4 W. IV. c. 106, § 6, 7.  
\(^{c}\) Ibid, § 8.

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**IN SCOTLAND.**

1 *Contra*; instead of ascending, the succession deviates to the collateral line, that is, to the next younger brother and descendants, and after the younger brothers are exhausted, then the succession returns inversely to the next elder brother and then to the eldest brother, and next to the father. Ersk. 3, 8, 8.

2 *Contra*; the order of succession to heritage is this. After the father comes the father’s next younger brother and descendants, and so on to youngest brother and descendants, then back to the father’s next elder brother, etc., as in last note.

3 *Contra*; the mother and her relatives never succeed in any contingency. Bell’s Pr. § 1667, 1668. Even the mother’s own estate, after vesting in her son or daughter, never ascends to the maternal line again. Ersk. 3, 8, 9; Stair, 3, 4, 35.

4 *Contra*; before reaching the father, the succession goes to the next younger brother and so on down to the youngest, then to the next elder and so on to the eldest, and lastly to sisters as heirs-portioners. Ersk. 3, 8, 8; see ante, § 759 n.
female.\textsuperscript{a} So that the brothers of the half blood on the father’s side, \textit{i.e.}, brothers consanguinean inherit next after the sisters of the whole blood and their issue; and the brothers of the half blood on the mother’s side, \textit{i.e.}, brothers uterine inherit next after the mother.

763. Hence the half blood uterine is not excluded.\textsuperscript{b} \textsuperscript{2}

The accompanying Table of Descent shows the Order of Succession to Real or Heritable Estate in England and Scotland respectively.

764. \textit{One of the line attained.}—Since 1833, where one of the relations of the ancestor has been attained before the ancestor’s death, the attainer shall not prevent persons from claiming descent through such attained relation.\textsuperscript{c} \textsuperscript{3}

765. \textit{Devises to heir-at-law.}—Since 1833, where land is devised to the heir-at-law, the latter is held to have acquired the land as a devisee, \textit{i.e.}, by purchase, and not by descent.\textsuperscript{d} \textsuperscript{4}

766. \textit{Descent of estate-tail.}—The descent of an estate-tail, which is not barred, is traced from the donee in tail,\textsuperscript{5} he being the last purchaser, and each of the heirs of the body taking \textit{per formam doni}.\textsuperscript{e}

777. \textit{Coparceners.}—The females or their heirs, being coparceners, take equal shares in the inheritance. And the eldest daughter or parcener is not exclusively entitled to the whole of the mansion-house

\textsuperscript{1} Contra; only the half blood consanguinean, \textit{i.e.}, brothers and sisters by the same father, but not the same mother, succeed after the full blood. 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. Bell’s Pr. \textsection 1665.

\textsuperscript{2} Contra; the half blood uterine, \textit{i.e.}, collateral relations by the same mother, but not the same father, never succeed in any event. Bell’s Pr. \textsection 1665; Stair, 3, 4, 8.

\textsuperscript{3} Contra. Bell’s Pr. \textsection 1639; it seems his blood is corrupted for all purposes, and the estate would go to the crown when it reaches that point.

\textsuperscript{4} Contra; this is not conquest in the heir. Bell’s Pr. \textsection 1673; Ersk. 3, 8, 15; see ante, \textsection 726 n.

\textsuperscript{5} Contra; each succeeding heir of entail is heir of provision of the immediately preceding heir, who died last vest and seised. See ante, \textsection 51.

\textsuperscript{a} 3 & 4 W. IV. c. 106, \textsection 9.
\textsuperscript{b} Ibid.
\textsuperscript{c} Doe d. Gregory v. Whichelo, 8 T. R. 211; see ante, \textsection 51.
\textsuperscript{d} 3 & 4 W. IV. c. 106, \textsection 3.
\textsuperscript{e} Ibid, \textsection 10.
on the country estate and the land on which it stands, nor to the
custody of the title-deeds. Nor is the eldest coparcener exclusively
entitled to a peerage dignity, or title of honour, but it is in abeyance
until the crown prefer one of the sisters.

778. Any coparcener can compel a partition of the property by
filing a bill for a partition in the Court of Chancery, when the court
will appoint commissioners to make the best division they can; they
generally assign the shares by lot.

TITLE AND LIABILITY OF HEIR-AT-LAW.

779. Vesting of realty.—When a person seised of real estate dies
intestate, the real estate vests ipso facto et ipso jure in the heir-at-
law, whether the latter will or no, without any process or form of
law. The maxim is—mortuis sasit vivum.

780. Hence the heir cannot disclaim or renounce, though he may

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IN SCOTLAND.

1 Contra; the eldest heir-portioner takes the country mansion-house as
her praecipuum or exclusive right, without compensation to her sisters. Bell's
Pr. § 1654; Halbert v. Dickson, 29 Sc. Jur. 350; see ante, § 164.
2 Contra. Ibid.; Denholm, M. 2447.
3 Contra; the eldest heir-portioner is entitled to such peerages, dignities,
and titles of honour, as are not limited otherwise, i.e., as do not exclude
heirs-portioners. Bell's Pr. § 1559.
4 The heir-portioner can also obtain a division for a like purpose.
5 Contra; the land lies in abeyance, as it were, and is called hereditas
jacens, and the heir must make up his title by an active proceeding called a
service. He has a year to make up his mind (annus deliberandi) whether
he will be served heir. Dignities, leases, etc., vest, however, without
service. In this transition state he is called the heir-apparent, and is
entitled to enter into possession, and draw the rents. He is entitled also
to an action of exhibition ad deliberandum, i.e., to see the title-deeds, and
debts, and liabilities affecting the estate, in order to make up his mind
whether it is for his advantage to be served heir; also to challenge any
deeds done on deathbed. Bell's Com. by Shaw, 1029, 1031.

But to complete his title, he must be served heir. Service is a judicial
proceeding for transmitting or vesting the succession. It is either special
or general; the former establishes his right to enter and be infeft in special
lands, the latter establishes his general title as heir in the general hereditas
of the deceased, without application to any particular subject. The mode of
proceeding is chiefly regulated by 10 & 11 Vic. c. 47; see also 21 & 22 Vic.
c. 76, § 11.
6 Contra; he may decline to enter as heir.
sell the estate next day, or alienate it without consideration, subject to the intestate’s debts, if any. If his ancestor was indebted, then the estate is in general bound in the heir’s hands for such debts.

781. *Heir-at-law’s liability for debts of ancestor.*—The heir is only liable for the ancestor’s debts to the extent of the value of the real estate, and in general he cannot be liable beyond that, in the absence of express contract.¹

782. And he does not require to take any precautions or other active steps to restrict his liability ² to that extent, as he is not considered *eadem persona cum defuncto*, and has no risk to run beyond losing the estate for the ancestor’s debts.

783. Hence also, where A’s heir-at-law H has been in possession of the real estate of A for a time, and then dies intestate, I, the heir of H, can only take the estate of A, subject, *primarily*, to the debts of A, and, *secondly*, subject to the debts of H.³

784. And where H, the heir-at-law, enters upon the estate of A, it still continues liable for A’s debts, however long H may be in possession,⁴ provided the prescriptive period has not expired. H’s creditors will be postponed to A’s creditors, *quo ad* that estate.⁵

¹ Kinderley v. Jervis, 22 Beav. 1.

² *Contra*: to restrict the heir’s liability to the extent of the real estate, he must, within a year, serve himself as heir *cum beneficio inventarii* (i.e., register an inventory of the real estate E), or be served heir with specification. ¹0 & ¹¹ Vic. c. 47, § 23, 25.

³ *Contra*: the heir, an apparent heir, has entered upon and continued in possession for three years and upwards, and then died, without making up his title to A, then I, the next heir, must serve himself heir to A, but in that case will be personally liable to the extent of the value of the estate for all H’s onerous debts. Yet it required a stat. 1695, c. 24, to make I liable to this extent. Smith v. Harris, 16 D. B. M. 727; Brown v. Henderson, 14 D. B. M. 1041; Taylor v. Hutton, 26 Sc. Jur. 450. Bell’s Com. by Shaw, 1031.

⁴ *Contra*: the creditors of A must do diligence within three years, otherwise H, the heir in possession, and his creditors, may acquire priority over A’s creditors in respect of the estate. Stat. 1661, c. 24; Bell’s Pr. § 1932.
785. Exoneration of the real estate.—The general rule is, that all
the debts of the deceased must be paid out of his personal estate,
unless there is an express or implied intention of the testator to the
contrary; and if the heir-at-law or devisee is sued and made to pay
any of these debts, he is allowed to stand in the place of the creditor,
and to reimburse himself out of the personal estate in the hands of
the executor.\(^1\)

786. In all specialty debts, where the intestate has expressly
bound his heirs, either the heir or the executor\(^2\) may be sued by the
creditor; and if the heir pays the debt, he is entitled to be reimbursed
by the executor.

787. But the personal estate is not primarily liable to pay the
debts of the deceased, where the testator has shown an intention to
exonerate it, and to charge the real estate with such debts,\(^a\) as where
he expressly devised the real estate or some other fund for the pay-
ment of the debts; where the debt or charge is in its own nature
real, as a jointure or portion out of certain lands; or where the debt
was not a proper debt of the deceased, but was a debt of an ancestor,
unless such heir has by some act made the debt his own.\(^b\)

788. There is also an exception as to real estate which is mort-
gaged, for now, since 1854, the heir is not entitled to call upon the
executor to pay off the mortgage debt, but he must pay it himself,
the land being considered the primary fund as between the heir and
the personal representatives of the deceased.\(^c\).

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\(^a\) 2 Spence's Eq. Jur. § 333, 894.  

IN SCOTLAND.

1 The order of responsibility among heirs is as follows:—Where in the
obligation particular heirs are bound, these are first to be called upon.
Where the debt is a burden on a particular subject, the heir taking that sub-
ject is liable prima facie. Where the debt is properly heritable, the heir
of line is primarily liable, and is bound to relieve the heir of provision or of
conquest. The creditor must sue and discuss the heirs in a certain order,
viz., first the heir of line, next the heir of conquest, then the heir of pro-
vision, then the heir of marriage. Bell's Pr. § 1935; Stewart v. Campbell, 24 Sc. Jur. 217.

2 Contra; whether the heir or the executor is primarily liable depends
on whether the debt is heritable or moveable. If the debt is heritable, the
heir alone must be first sued. See last note.

3 The same at common law. Bell's Pr. § 1935.
789. Order of applying assets in equity.—The order in which a court of equity applies the assets in payment of the debts is as follows:—First, The general personal estate is applied, subject to the qualifications stated, ante, § 787. Secondly, Any estate which has been particularly devised simply for the payment of debts. Thirdly, Estates descended. Fourthly, Estates devised to particular devisees, but charged with the payment of debts. Fifthly, Lands comprised in a residuary devise. Sixthly, Specific legacies and lands specifically devised. Seventhly, Freehold estates over which the testator had a general power of appointment, and which he had appointed by his will.a

790. Executor throwing estate into Chancery.—An executor or administrator of a person deceased, who finds the estate burdened with a complication of liabilities, is entitled to devolve the administration upon a court of equity by filing a bill, or a claim, or summons, in an administration suit.¹ He is then relieved from all liability, and has only to abide the orders of the court.⁵ He may also, without instituting a suit, obtain the opinion of a court of equity, and if he act thereupon will be protected.⁶  

791. Creditor’s remedy against estate of deceased.—A creditor of a deceased person may either sue the executor or administrator in a court of law, if an action lies; or he may file a bill or claim, or take out a summons in an administration or creditor’s suit in a court of equity, whether he could or could not sue for his debt in a court of law. Until a decree is made by the court of equity, the executor, in general, is entitled to go on paying the debts in the order of preference prescribed by law for legal assets; but when such decree is made, it is considered a decree for all the creditors, who thereafter share, subject to the qualifications stated ante, § 690-2, 787,


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IN SCOTLAND.

¹ The executor is also entitled to raise an action of multiplepouding, which brings all the creditors into the field, and a decree protects him in a similar manner; but he must be pressed by double distress, to entitle him to such a remedy.

⁵ Contra; this is not competent to an executor.
789. But the estate of a deceased person cannot be declared bankrupt and divided amongst the creditors in the Court of Bankruptcy. 2

792. Administration in Chancery.—The chief clerk of the Vice-Chancellor or Master of the Rolls, in lieu of the Master in Chancery, superintends the progress of the suit, and creditors appear and compete before him until the order of distribution is finally settled. The Court, if necessary, orders a sale of the real or personal estate for the purpose of meeting all the claims.

IN SCOTLAND.

1 So an action of ranking and sale may be commenced, and upon evidence that the debts exceed the value of the estate, the Court will authorize a sale, all the creditors being brought into the field. Gordon v. Campbell, 1 Bell's Ap. 563; Ferrier v. Gartmore, 6 W. S. 155. A judicial factor may also be appointed by the Court to sell the heritable estate. Personal creditors can attach the estate for their debts.

2 Contra; the estate of a deceased person may be sequestrated, and the same proceedings taken as in the ordinary case when the debtor is alive.

3 Contra; if the estate of the deceased is sequestrated, the trustee in the sequestration divides the funds. If a ranking and sale is the process, the common agent appointed reports to the court the order in which the creditors rank. If a judicial factor is appointed, he also divides the proceeds among the creditors.
PART IV.

PERSONAL AND DOMESTIC RELATIONS.

CHAPTER I. LUNATICS—ALIENS—FELONS-INFANTS.
II. MASTER AND SERVANT.
III. PARENT AND CHILD.
IV. MARRIAGE.
CHAPTER I.

LUNATICS—ALIENS—FELONS—INFANTS.

800. Lunatics and idiots.—No man could at common law be deprived of the right of dealing with his own property, and disposing of his own person, except by the verdict of a jury. The incapacity of a lunatic or idiot to contract is now conclusively established by the verdict of a jury, under an inquisition de lunatico inquirendo, held before a master in lunacy, or in cases too clear for a jury, by a certificate of a master in lunacy. The Lord Chancellor, and the Lords Justices in Chancery, as the delegates of the Crown, then appoint a committee of the estate, and of the person. The lunatic must be visited once a year by one of the visitors in lunacy.

801. A lunatic sued on a contract may set up lunacy as a defence, and does not require to file a bill in equity to set aside any deed or document made during lunacy; though it is competent for him to do so.

IN SCOTLAND.

1 The term most used for lunacy is furiosity, and that state of mind is established by an inquest before the sheriff, on a brieve of furiosity. Ersk. 1, 7, 50. The party is then said to be cognosced as a fatuous or furious person. The term idiot is used in the same sense as in England.

2 The Court appoints a curator bonis or judicial factor as to the estate of a furious or fatuous person, and a curator, or tutor-dative as to the person. These curators and factors are subject to the provisions of the stat. 12 & 13 Vic. c. 51. As to the inherent powers of the Court of Session to interfere with lunatics not cognosced, see Bryce v. Graham, 2 W. S. 481. The Court will appoint a curator bonis or judicial factor before any inquisition has taken place. The nearest male agnate of twenty-five is entitled on finding security to be tutor-at-law, and as such to take charge of the estate. Ersk. 1, 7, 6.

3 A lunatic must be visited twice a year by the Commissioners. 20 & 21 Vic. c. 71, § 17.

4 Contra; a cross action of reduction is in general necessary. See Pollock v. Paterson, 10th Dec. 1811, F. C.
802. Weak-minded persons.—Where a person is of weak mind, but not so low in degree as to warrant a verdict of insanity, or a certificate of a master of lunacy, there is no mode by which a court of law or equity can lay a restraint on his power to deal with his real property as he pleases. Yet such weakness may be a strong element of fraud, so as to lead a court of equity to set aside any deed or document obtained from him by undue advantage. He might, moreover, convey his real estate to trustees.

ALIENS.

803. Aliens.—The rights of aliens are now regulated chiefly by statute.\(^a\)

\(^a\) 7 & 8 Vic. c. 66.

FELONS.

804. Felons, etc.—A felon, \(i. e.\), one found guilty of felony, forfeits his personal estate,\(^3\) which goes to the Crown, strictly speaking, though it is generally in practice re-granted to the relatives. A felon is also liable to disabilities in suing. If the crime is a capital felony, he forfeits both his real and personal estate. Where a person is found

\(^3\) There is no division into felony and misdemeanor. In capital crimes except treason, the criminal forfeits only his moveable property, but in lower crimes he forfeits nothing. 2 Hume, Cr. L. 482.

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\(^1\) Contra; a weak-minded person may put himself or be put under a ban, called interdiction, which may be judicial or voluntary, and has the effect of rendering the consent of certain persons, called interdictors, necessary to all deeds affecting heritable estate granted by him. Bell's Pr. \(\S\) 2123. The party may grant, for that purpose, a bond of interdiction. If the consent of the interdictors is not obtained to deeds and contracts, and there is lesion (prejudice E), these are voidable and may be set aside. The interdiction must be first registered in the Register of Inhibitions. Ersk. 1, 7, 54; 2, 11, 4; stat. 1581, c. 119. The effect of interdiction is thus to enable the interdicted party, on proof of non-consent of his interdictors and lesion, to set aside all deeds affecting his heritable estate; but it does not affect his moveable estate. Ersk. 1, 7, 57; Bell's Pr. \(\S\) 227; M. 7142; Kyle v. Kyle, 5 S. D. 128; Mansfield v. Stewart, 3 D. B. M. 1103; Lockhart, 19 D. B. M. 1075.

\(^2\) The statute extends to Scotland.
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guilty of a misdemeanour, he forfeits neither his personal nor his real estate.

INFANTS.

805. Infants, who are.—An infant is a person under twenty-one, and there is no distinction as to capacity to contract between the ages of pupillarity and non-pupillarity.¹

806. Contracts of infant.—Contracts, except by deed, made by an infant, are not absolutely void, but are voidable only at the infant’s option.² Though the infant is not himself bound, the other contracting party is bound. And in the case of breach of promise of marriage, though the infant can sue if the other party is a major, yet he cannot be sued.³ But in equity, specific performance of a contract will not be enforced against the one party where the other is an infant and so not mutually bound.

807. Infant’s contract for necessaries.—An infant, however, can always bind himself for necessaries, if not otherwise provided;⁴ though he cannot, it seems, contract for these by way of a bill, bond, or deed.⁵

¹ Holt v. Ward, 2 Str. 937. ² Rainbridg v. Pickering, 2 W. Bl. 1325; Story v. Perry, 4 C. & P. 526.
⁴ Rainbridg v. Pickering, 2 W. Bl. 1325.
⁵ Rainbridg v. Pickering, 2 W. Bl. 1325.

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¹ Contra: a male under fourteen and a female under twelve are called pupils. From fourteen or twelve until twenty-one they are called minors. The capacity of a minor to contract differs from that of a pupil. See post.
² Contra: the contracts of pupils are absolutely void. Ersk. 1, 7, 14; M’Gibbon v. M’Gibbon, 14 D. B. M. 605. As to minors, they are in general voidable only on proof of lesion. But if the contract or deed is made by the tutors of the pupil, it is not absolutely void, except as regards the sale of the pupil’s heritage, but only voidable, and that within four years after majority by the pupil challenging such deed. M. 2184; 2 Fraser, D. R. 61. The tutor’s powers of management are extended by 12 & 13 Vic. c. 51. He requires authority of the Court to sell the pupil’s heritage, and it will only be granted in cases of necessity. Ersk. 1, 7, 17; M. 16, 389; Boyle, 15 D. B. M. 420; Mutter v. Dixon, 16 D. B. M. 536; White, 17 D. B. M. 599.
³ Contra: a pupil cannot bind himself, though his property will be liable for necessaries furnished. The proceeding to sell the pupil’s estate for debt is an action of cognition and sale. A minor may bind himself for necessaries by writing, bill, or deed. M. 8927.
808. Liability of infant's father for necessaries.—A father or mother is not liable for necessaries supplied to the child, unless an express or implied contract can be made out against the parent.1 Hence, if a stranger find the child utterly destitute, and maintain it, such stranger cannot sue the parent for the money so expended. Slight evidence of a contract, however, will be seized on to fix this liability. If the infant lives in the father’s house, and the father has given him what he considers a sufficient sum for necessaries, the father will not easily be made liable for more; but if no such allowance has been made, very slight circumstances, such as the clothes having been delivered at the father’s house, and having been seen by the father, will suffice as evidence of an implied contract on the part of the father to pay. Where the infant does not live in the father’s house, the difficulty of fixing an implied contract on the father is greatly increased.

809. Infant’s contracts not for necessaries.—The infant’s contracts for things not necessaries, are voidable only, and not void, but they are in general voidable at the infant’s option, without any proof of damage or prejudice.a 2

810. Infant in trade.—Though the infant pursue a business for a livelihood, and make contracts in the course thereof, these are voidable as in other cases,b 3 In like manner infants cannot be made bankrupts.c 4

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1 Contrā; a father or mother is bound, ex debito naturali, to aliment the child; but to supply bare aliment only, and not luxuries suitable to the child’s rank. Maule v. Maule, 1 W. S. 276. The obligation does not result from contract, though that may be superadded.

2 Contrā; as to pupils, their contracts, unless made by their tutors, are void; as to minors, voidable only in certain cases. A minor may bind himself if he has no curators; but if he has curators, and they do not concur with him, the contract is voidable at his option; and even if they do concur, he may, within four years after majority, reduce it on proving lesion. Wallace v. Wallace, 8th March 1817, F. C. There is no distinction between contracts for necessaries, and not for necessaries merely as such.

3 Contrā; a minor’s contracts in business, or in the way of a livelihood, are not voidable. He can carry on trade like other persons. Ersk. 1, 7, 38; M. 9027; Crawford v. Bennet, 2 W. S. 608.

4 Contrā; as a minor can trade, so he can be made bankrupt.
811. Deeds of infant.—Deeds granted by an infant are in general absolutely void, and not merely voidable, except leases and contracts which are beneficial to the infant or his real estate; or marriage settlements made with leave of the Court of Chancery. If, after majority, he wishes to ratify them, he must re-execute and re-deliver the deeds.

812. Infant cannot make a will.—Infants cannot make a will of real estate. Nor of personal estate.

813. Infant, when of age, ratifying contract.—When he has arrived at maturity, the contract made by the infant may become binding if he expressly ratify or confirm it; which ratification must be in writing, signed by himself. In one case only does he require to disaffirm it, namely, where it was a continuing contract; and slight negative evidence of ratification of this will suffice.

814. Infant, when of age, disaffirming contract.—In other cases the infant need not disaffirm the contract at all, nor in general file a bill in equity to set aside any deed granted. It is enough for him to set up

\[a\] Oliver v. Woodroffe, 4 M. & W. 650; \[c\] 1 Vic. c. 26.
\[b\] Maddox v. White, 2 T. R. 161; \[d\] 9 Geo. IV. c. 14, § 5.
\[c\] 18 & 19 Vic. c. 43.

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1 Contra; a minor's deeds, if granted in trade, are valid; and otherwise are reducible only for lesion. Ersk. 1, 7, 35. The curators, however, if any, must have consented to the deed; unless the consideration for the deed was in rem versus, i.e., to the minor's profit; Dennison, 12 D. B. M. 613; Bruce, 17 D. B. M. 264; or the minor was guilty of fraud. 2 Fraser, D. R. 209. A pupil's deeds are absolutely null.

2 Contra; a minor can make a will of moveable estate (M. 8966), but not a disposition mortis causa of heritable estate, whether with or without his curator's consent. Ersk. 1, 7, 14; M. 8966; 2 Fraser D. R. 212. But he may sell real estate with their consent and bequeath the purchase-money.

3 Contra; homologation or ratification of a contract by a minor need not be by writing, any more than if he were of age. Ersk. 1, 7, 39; Dempster v. Potts, 15 S. D. 364; M'Cibbon, 14 D. B. M. 605.

4 Contra; the minor in few cases can plead minority by way of exception, and requires, by a separate action of reduction, or by reduction being repeated in the course of the action, to reduce all deeds granted with consent of his curators, if any, and that must be done by himself or his heirs raising an action, and not merely setting up a defence within four years after majority, called the quadrennium utile. Ersk. 1, 7, 34; Snedgrass, 23 D. B. M. 187. He must prove lesion or prejudice, and on doing so, is entitled to restitution. But if the deed is null on other grounds, as
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infancy as a defence to any action brought on the deed or contract. But he may take the initiative, and file a bill in equity if he chooses. So there is no particular period after majority when he must file a bill for an account against his guardian; but acquiescence and express ratification will often disentitle him to his remedy.

815. Defence of infancy.—The defence of infancy is in general good,1 however beneficial the contract may have been to the infant.

816. Infant recovering back money paid.—If the infant has paid money on a contract during infancy, he can recover it back at majority, by an action for money had and received, if he used no deceit, and has had no intermediate advantage from it.

817. Infant's misrepresentation.—If an infant, by fraudulent misrepresentation that he is of full age, procures a contract to be entered into, he will not be liable2 upon it; nor on the other hand will a court of equity help him to enforce its specific performance.a

818. Infant sues in its own name.—A father cannot maintain an action of damages in his own name for assaulting or maltreating his child;3 but the child sues in all cases in its own name, coupled with a prochein ami or next friend, who may be, and generally is, the father. The prochein ami is responsible for costs.

819. Guardians of child.—A father is the natural guardian of his children during infancy, and he may appoint a guardian for them either by a deed or by a will, and failing such appointment,

a Bartlett v. Wells, 1 B. & S. 836; Cory v. Geatchen, 2 Madd. 40.

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on the ground of the curators not consenting, the minor is not limited to the quadriennium utile. Manuel, 15 D. B. M. 284. So within these four years he must call the curators to account for any irregularities they may have committed. So a pupil's deeds and contracts made for him by his tutors may be challenged within four years after he attains majority.

1 Contra; the minor must, in general, prove lesion as the natural result of the transaction, unless the contract was made without the concurrence of the curators, in which case lesion is presumed; but if he can be shown to have profited, the presumption of lesion will be removed. M. 891; Forest v. Campbell, 16 D. B. M. 16; 2 Fraser, D. R. 232.

2 It seems the same. Bell's Pr. § 2088; Denvistown v. Madie, 12 D. B. M. 615; Sutherland, 19 Jan. 1825.

3 Contra; the father can sue in his own name as administrator-in-law. Findlater, 1 Rob. Ap. 911; Milne, 3 D. B. M. 1163; M'Conachie, 9 ibid. 791; Cattenach, 20 ibid. 1206. But he may be required to give caution if insolvent; M. 16,263; Dumbreck, 4 Macq. H. L. C. 80.
the mother becomes such guardian. The mother cannot appoint a guardian by will or otherwise, though she survive the husband. When an infant has no guardian, the Court of Chancery, as the delegate of the Crown, has a right to appoint one. This is always done when there is a suit depending relative to the infant or his estate, and in that case the infant becomes a ward of court. But the court may also appoint a guardian, though there is no suit depending; the infant, however, in such a case, does not become a ward of court. When infants are appointed wards of court, they are not allowed to marry, except with the leave of the court; and parties attempting to effect or promote a clandestine marriage, are guilty of a contempt of court. A person marrying a female ward clandestinely, may be committed to prison for the contempt, and not discharged without making a settlement upon his wife.

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a *Ib.; Villareas v. Mellish, 2 Sw. 536.
b Butler v. Freeman, Amb. 301; Story Eq. Jur. 2 1333.
c Winch v. James, 4 Ves. 386; 2 Tudor's L. C. 468.

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1 So the father is administrator-in-law of his children, that is, he is tutor during their pupillarity, which as to males, is under the age of fourteen, and as to females is under twelve; and he is curator during their minority, i.e., between twelve or fourteen and twenty-one. But his natural guardianship ceases as to minors who are forisfamilated, subject to the right's reviving if the child return to his family. The father is not subject to the same strict responsibility as other curators. The father can also, by deed executed in lieu of procate, appoint tutors and curators, thence called tutors and curators nominate, and can limit their responsibility. Stat. 1696, c. 8. *Graham*, 14 D. B. M. 357. And a stranger can appoint a special guardian, if he gives also property to be protected. If there is no tutor-nominate, then one of certain relations is entitled to be served tutor-at-law to the pupil, viz. the nearest male agnate, unless he is next heir. Bell's Pr. § 2078. Failing a tutor-at-law, the Court of Session appoints a tutor-dative or judicial factor. 12 & 13 Vic. c. 51. In like manner, during minority, in default of the father or curators-nominate, the minor himself may name curators upon citing two of his nearest of kin. The Court will not undertake the management of the estates of minors, who can choose curators. *Macarthur*, 17 D. B. M. 61; Menz. Conv. 31. Tutors have control over the pupil's person, but curators have not over the minor's person. A minor can marry without the concurrence of his curators.
CHAPTER II.

MASTER AND SERVANT.

821. *Contract, how far in writing.*—A contract of hiring servants must, by the Statute of Frauds, be in writing if for more than a year. If for an indefinite time, determinable on a certain notice, then writing is not necessary.

822. *Writing to be signed.*—When the writing is necessary, it must be signed by the party or his or her agent, but need not be by deed; it must state on the face of it some consideration.

823. *Verbal contract.*—A verbal contract for more than a year is not good even for one year. And part performance, except in the case of artisans, etc., will not set up the contract for a longer term.

824. *Earnest money.*—Earnest, i.e., part payment of wages, has no effect whatever in making the contract more binding on either party than it would be without it.

825. *General hiring.*—Where a domestic or menial servant is hired generally, no term being specified, the hiring is presumed to be for one year. The same is the rule as to other servants, unless

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\[a\] 29 Ch. II. c. 3, § 4; *Bracegirdle v. Heald,* 1 B. & Ald. 722.
\[b\] *Sykes v. Dixon,* 9 A. & E. 693.
\[c\] *Bracegirdle v. Heald,* 1 B. & Ald. 722.
\[d\] Per Parte B. in *Turner v. Mason,* 14 M. & W. 112; *Fawcett v. Cash,* 5 B. & Ad. 901.
\[e\] *Bailey v. Rimmell,* 1 M. & W. 506.

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IN SCOTLAND.

1 The same. *Ersk. 1, 7, 62; Bell's Pr. § 173, 190.

2 *Contra*; if the contract is in writing, it must be probative or holograph, i.e., either in the party's handwriting, or by way of a deed, unless there has been *rei interventus.* 2 Fraser, D. R. 373.

3 *Contra*; the consideration is not required to appear *ex facie* of the writing.

4 The same. *Paterson v. Edington,* 8 S. D. 231. When there is *rei interventus,* which, if inconsistent with a shorter contract, will make the contract good for the whole term, see *Napier v. Dick,* Hume, 388; 2 Fraser, D. R. 375.

5 It seems the same. 2 Fraser, D. R. 376.
some special custom be imported from the locality indicating a different period, as sometimes happens in the case of agricultural servants. A custom in a particular trade may also override the general presumption with regard to other servants.

826. One servant injuring another.—Where one servant negligently injures or causes the death of a fellow-servant in the course of a common operation in which they are engaged, the master is not liable for the damages caused by such tortious act of one towards the other, unless he can be shown to have been guilty of some negligence in employing or retaining the servant who caused the injury.

827. Specific performance of contract.—A contract of hiring domestic, agricultural, or other servants, will not be ordered by a court to be specifically performed, whether the servant has entered upon the service or not; the only remedy being an action of damages for breach of contract, which, considering the station in life of the servant, is seldom resorted to by the master for redress. Much less can a servant, who refuses to serve, be compelled to give bail to do so, or be imprisoned. But it is otherwise by statute as regards artificers, workmen, and certain apprentices, who can be convicted and imprisoned for absenting themselves without lawful excuse.

828. Notice to leave.—The general rule as to domestic and menial servants is, that, if the hiring is by the year or indefinite, called a defeasible yearly hiring, one month's notice on either side puts an

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\[a\] Baxter v. Nurse, 6 M. & Gr. 935.

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IN SCOTLAND.

1 Contra; the contract of general hiring is only for six months as to domestic servants, but in the case of agricultural servants it is for a year. Bell's Pr. § 174.


3 Old decisions sanction this common law jurisdiction, especially in the case of workmen, artificers, etc., but it is now seldom or never exercised, and is obscure. The Court of Session also refuses to order implement of a contract of hiring, and justices of the peace confine their action to the Master and Servant Acts, 4 Geo. IV. c. 34; 10 Geo. IV. c. 52; 5 Geo. IV. c. 96. See Murray v. Bisset, 15th May 1810, F. C. Baird on Master and Servant, 173.

4 Contra; the hiring, which in that case will be for half a year, cannot be put an end to without forty days' previous warning, and until the half-year is ended; and if dismissed without notice, and not for misconduct, the servant can claim, not only wages, but board wages till the end of the term. Ersk. 3, 3, 16; Cooper v. Henderson, 3 S. D. 425.
end to the hiring at any time of the year. Hence any person can in general dismiss a domestic servant at any moment without cause, by paying a month’s wages in advance, in which amount board wages are not included.\(^a\)

829. As to agricultural and other servants, the yearly hiring is indefeasible, and can only be put an end to, unless for misconduct, by some notice, whether a month’s or other notice, specially agreed upon or implied by the custom of the locality; but such notice must expire at that period of the year at which the hiring commenced.\(^b\)

830. Where a hiring is for a time certain, no notice on either side is necessary to terminate the contract.\(^2\) If, however, the time expire, and the servant continue without anything being said, a fresh hiring on the same terms for a year, or other lesser period equal to the original time agreed upon, would be presumed.\(^3\)

831. Death of master.—When a master dies, the servant is thereby discharged, but is not entitled to any wages for the broken time, unless there is some custom to the contrary as in the case of domestic servants, who are, however, entitled only to wages for the period actually served up to the death, and not for the whole current term.\(^4\)

832. Moreover, the servant’s wages are not a privileged debt


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1 The same. See last note.
2 Contra; forty-eight days’ warning is necessary, even where the hiring was for a time certain, otherwise by tacit relocation a new engagement for a half-year or year will arise, if the servant does not waive notice, which he may do by acts or conduct amounting to a dispensing with warning. Ersk. 2, 6, 35; Morison v. Allardyce, 27th June 1823; Finlayson v. Mackenzie, 6th June 1829.
3 The same, there being what is called tacit relocation, i.e., an implied re-hiring for another like period.
4 Contra; the servant can claim wages for the whole term; and if no warning has been given, when it is necessary, for one term more after the master’s death. But it is the duty of the servant to look out for another situation on the master’s death, if the executors do not, as they are entitled to, claim the servant’s services. It is only in the event of no new situation being obtained, that the executor is liable. M. 13,999; 2 Fraser, D. R. 449; Ersk. 3, 3, 16; Bell’s Pr. § 180-7.
against the master's estate in the event of the master's death; and the
servant is on the footing of an ordinary creditor.\textsuperscript{1}

833. Bankruptcy of master.—But in the event of the master's
bankruptcy, the servant's wages, if not exceeding a certain sum, are
privileged to the extent of three months, leaving the servant to prove
for the remainder like ordinary creditors.\textsuperscript{a}\textsuperscript{2}

834. Servant's death.—Where the servant was engaged for a year,
at wages payable yearly, the contract is entire and indivisible, and if
such servant die in the middle of the year, his or her executors
cannot recover wages in proportion for the time actually served.\textsuperscript{b}\textsuperscript{3}
But if the contract was mutually abandoned, or it seems if the servant
was a domestic servant, the wages, \textit{pro rata}, are recoverable.\textsuperscript{c}

835. Servant's wages in case of a distress.—Where a landlord, or
the owner of a rent-charge, distresses the master's goods or crops for
rent, the servant of the master, whose goods are so distrainted, has no
privilege or priority of claim for his or her wages out of the proceeds
of such distress.\textsuperscript{4}

836. Limitation of actions for wages.—An action for wages may
be brought any time within six years after the time at which they are
due;\textsuperscript{d}\textsuperscript{4} but if so long a time elapse, a jury will be slow to believe any
evidence of non-payment, especially if no claim had been made, and
the delay satisfactorily accounted for, the presumption being that
wages are paid promptly.

\textsuperscript{a} 12 & 13 Vic. c. 106, § 168. \textsuperscript{b} Plymouth v. Throgmorton, Salk. 65; 6 T.R. 326; Cutter v. Powell, 2 Smith, L. C. 1.
\textsuperscript{c} Ibid.; Lamburn v. Cruden, 2 M. & Gr. 252; Philips v. Jones, 1 A. & E. 333.
\textsuperscript{d} 21 Jas. I. c. 16.

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\textsuperscript{1} Contra; servants are entitled to be paid their wages for the current
term before ordinary creditors, in the event of the master's death. Ersk.
3, 9, 43; Bell's Pr. § 1404.
\textsuperscript{2} Contra; they are also privileged, but to the extent of wages and
board-wages for the current term. M. 11,832; 19 & 20 Vic. c. 91, § 122.
\textsuperscript{3} Contra; the wages and board-wages for the time actually served may
be recovered. Maclean, 4th Feb. 1813, F. C. See ante, § 831 n.
\textsuperscript{4} Contra; there is a preference given to wages due to a bankrupt
tenant's agricultural servants, and it would seem also to domestic servants,
who are privileged over the landlord's hypothec and poining of the ground.
McGlashan v. D. Athole, 29th June 1819, F. C.; Preston v. Gregor, 26th
\textsuperscript{1} Contra; in three years; the triennial prescription applies expressly
to wages of servants. Stat. 1579; c. 83; see ante, § 492 n.
837. Attachment of wages.—The wages due, but not yet paid, to a servant cannot be attached by the servant’s creditor in the hands of the master, except in the city of London, until after judgment obtained against the servant; but after judgment there is no limit to the sum attachable, on the ground of part of it being necessary for the servant’s maintenance.\textsuperscript{a}\footnote{C. L. P. Act, 1854.}

838. Seduction of and injury to servant.—A master or mistress has a right of action to recover damages against any person who seduces or injures the female servant, thereby causing a loss of service;\textsuperscript{b} but the servant has no right of action in her own name for seduction.\textsuperscript{c}\footnote{Lumley v. Gye, 2 E. & B. 216. See ante, § 512.}

839. Service with relations.—When the servant has been in actual service with near relations, as with a parent, uncle, etc., a hiring is not presumed, as in other cases, from the mere fact of service; but an express contract must be proved in order to support the claim for wages, for the law regards services rendered by near relations as gratuitous acts of kindness and charity.\textsuperscript{d}\footnote{Davies v. Davies, 9 C. & P. 87; R. v. Geo. IV. c. 52.}

840. Workmen, artificers, etc.—The law as to servants in husbandry, artificers, workmen, and apprentices, is regulated to some extent by statute; and justices of the peace have larger powers in enforcing their contracts than is competent to any court with regard to domestic servants.\textsuperscript{e}\footnote{Lowe, 1 B. & Ald. 181; R. v. Stokesley, 6 T. R. 757. 4 Geo. IV. c. 34; 5 Geo. IV. c. 96; 10 Geo. IV. c. 52.}

\textsuperscript{a} C. L. P. Act, 1854.  \textsuperscript{b} Lumley v. Gye, 2 E. & B. 216. See ante, § 512.  \textsuperscript{c} 4 Geo. IV. c. 34; 5 Geo. IV. c. 96; 10 Geo. IV. c. 52.  \textsuperscript{d} Davies v. Davies, 9 C. & P. 87; R. v. Geo. IV. c. 52.

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\textsuperscript{1} All debts are arrestable both before and after decree, but an exception existed at common law and by the Small Debt Acts, 1 Vic. c. 41, § 7, and 8 & 9 Vic. c. 39, to this extent, that the surplus only of a servant’s wages, which have become due, but are not yet paid, after deducting a reasonable sum for aliment or subsistence-money, could be arrested in the hands of the master. Hence a difficult question has often arisen, What is a reasonable sum for subsistence-money or aliment? which is obviously entirely a question of circumstances in each case. Ersk. 3, 6, 7; see Shanks v. Thomson, 14 D. B. M. 1353.

\textsuperscript{2} This seems doubtful; Allan v. Barclay, 2 Macph. 873, sed quere.

\textsuperscript{3} Contra; a female servant can also herself sue the seducer in her own name for a solatium. See ante, § 512.

\textsuperscript{4} Contra; a servant who has actually served a near relation, is presumed to have been hired on the usual terms, and it lies on the master to show an express contract to the contrary. Hume’s Dec. 394, 396.

\textsuperscript{5} The Master and Servant Acts also extend to Scotland.
CHAPTER III.

PARENT AND CHILD.

841. Legitimacy.—A legitimate child is the offspring of parents lawfully married at the time of the birth, and there can be no legitimation per subsequentum matrimonium, i.e., by the subsequent marriage of the parents.¹ Nor is a child deemed to be legitimate where the parents bona fide believed² they were married, but were not in fact so. A child born of an incestuous marriage in England, the parents being domiciled in Scotland, though, from the fact of no suit of nullity having been promoted during the lives of the parents, there were no means of establishing the illegitimacy in England.³

¹ Contra; Ersk. 1, 6, 49. A child, though born illegitimate, may be afterwards made legitimate by the subsequent marriage of the parents, by the doctrine of legitimation per subsequentum matrimonium. This was said to proceed on the fiction that the marriage drew back (related back) to a period prior to the birth; but that fiction seems now exploded. Kerr v. Martin, 2 D. B. M. 752. The parties must have been under no legal impediment to marry at the time the child was born. Where, after the birth, one of the parents of the bastard has married and had children, and then both parents of the bastard have married, the quondam bastard does not take precedence of the other children. Ibid. If the marriage with the bastard’s mother takes place on deathbed, and thereby the rights of presumptive heirs are displaced, this seems no ground for reducing the marriage ex capite levi. Dirleton, 252; Bank. 1, 5, 57. Where the child is born out of Scotland, see post, Part VII. If a bastard were to die without heirs, it seems the subsequent marriage of the parents would not displace the crown as ultimus heres. Grant v. Grant’s Trustees, 32 Sc. Jur. 27; see M. 1354; Stair, 3, 2, 42. There is no presumption that the child of a woman who afterwards marries a man is the child of that man. Innes v. Innes, 2 Sh. & M-L.

² Contra; a child of a putative marriage, i.e., where one or both of the parties bona fide believed the marriage was good, but it was not, is legitimate. 2 Fraser, Pr. 11. Jolly v. McGregor, 3 W. S. 85.

³ As to legitimacy of heir to real estate, see ante, § 751.

842. *Declaration of legitimacy.*—It is now in the power of any natural-born subject to present a petition to the Divorce Court, praying for a declaration that he is legitimate. A child born after marriage, and though the mother was even visibly pregnant of it at the time of the marriage, is presumed to be the husband’s. But the presumption of paternity may be rebutted by strong evidence, other than the parents’, of the impossibility or improbability of non-access.

843. *Right of father to custody of child.*—A father has a right as against third parties to the custody of his legitimate child till the child’s majority, and the courts will not deprive him of such custody, unless on strong grounds. The Court of Chancery practically confines its control over this parental right to those cases where the infant is entitled to property; though, like the courts of common law, it also relieves in other cases against improper custody by granting a writ of *habeas corpus*. Where a child under sixteen—the age of nurture—is brought before a court of common law, and the father or guardian is not shown to be cruel or immoral, the child will be delivered up to the father or guardian; but if the child is above sixteen, it is entitled to choose where to go. The Court of Divorce also may control the custody when arising out of suits there, but has no larger powers than other courts.

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*a* 21 & 22 Vic. c. 93.  
*b* Co. Litt. 244 a; 1 Ph. Evid. 473 (10th ed.)  
*c* Bull. N. P. 112; St. George’s v. St. Margaret’s, 1 Salk. 123.  
*d* See Forsyth on the Custody of Infants.  
*e* R. v. Smith, Str. 982; R. v. Delaval, 1 W. Bl. 412; R. v. Clarke’s, 7 E. & B. 186; R. v. Howes, 50 L. J., 47 M. C.  
*f* Ryder v. Ryder, 2 Swab. 225.

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**IN SCOTLAND.**

1 So an action of declarator of legitimacy could always be raised; and the above statute also extends to Scotland.  
2 *Contra*; there is no presumption of legitimacy of the child, unless born more than six lunar months after the marriage. Ersk. 1, 6, 49; 2 Fraser, Pers. Rel. 1. The presumption of legitimacy may also be redargued by reasonable evidence of the impossibility of the husband’s access to the wife. *Webster v. McKay*, 27 Sc. Jur. 207; Walker, 19 D. B. M. 290.  
844. *Mother's right of custody.*—The mother has, at common law, no right to the custody of the child as against the father; but Tal- fourd's Act a has enlarged her powers. Where the child is under seven, she can apply to the Court of Chancery for the exclusive custody till that age,¹ and afterwards she can apply for leave of access to the child at reasonable times. If, however, she has been guilty of adultery, or other misconduct, the court will refuse her this favour, and in all cases the court exercises a discretion as to granting or refusing the application. And the same discretion is vested in the Court of Divorce during suits in that court.⁵

845. *Obligation of parent and child to maintain each other.*—At common law a father is not bound to maintain his child. Hence, if a stranger find the child utterly destitute, and maintain it, he cannot sue the father for the expense. The father can only be made liable for the maintenance of the child by virtue of some express or implied contract to pay; yet very slight evidence will sustain such contract.²

¹ 2 & 3 Vic. c. 54.
² 20 & 21 Vic. c. 85, § 35.
⁵ See ante, § 898.

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**IN SCOTLAND.**

1 *Contra;* the Act does not extend to Scotland, yet the Court assumes, as its *nobile officium*, the right to interfere on similar terms, and to appoint times and places for the mother to obtain access to her children. *M'iver v. M'iver,* 31 Sc. Jur. 619; *A. v. B.,* 10 D. B. M. 229.

2 *Contra;* at common law a parent is bound *ex debito naturali* to aliment a child, and so is a child bound to aliment a parent. Other relations are liable also. The following is the order of primary liability:—*First,* a child is bound; then a grandchild and other descendants. *Muirhead v. Muirhead,* 1st February 1845. *Second,* the father. Ersk. 1, 6, 56. *Third,* the mother. *Ibid; Maidment v. Landers,* 6 Dow, 257; More’s Stair, notes 29. Then the paternal grandfather and great-grandfather. The amount of aliment does not vary with the rank of the parties, and in all cases extends only to “support beyond want.” *Maule v. Maule,* 1 W. S. 266. The party can raise an action for aliment.

The obligation to aliment a relation does not expire with the life of the party bound, but transmits to that party's representatives, at least so far as such representatives are *tuerati* by the succession. Hence an eldest or other son, though not liable as a brother to aliment his brothers and sisters, is nevertheless bound as having succeeded to the father's heritage or moveables. Ersk. 1, 6, 58, Ivory's note; M. 431, et seq.; *M'Conochie v. M'Conochie,* 2 Sc. Jur. 260; *Buchanan v. Morison,* 21st Jan. 1813, F. C. So the mother's heir or executor is likewise bound. M. 419, 440. The father's
So a child is not bound at common law to maintain its parent.  

846. If, however, a person is utterly destitute, i.e., poor, old, blind, lame, or impotent, and not able to work, and thereby become chargeable to the parish, the Poor Law Act compels the father, grandfather, mother, grandmother, or child, if able to support such person, to do so. It must be first proved that such person is not able to work. It is not settled in what order these relatives are bound to support the pauper, and it seems they are all bound to contribute; but the justices of the peace, in their discretion, generally single out the relative or relatives who are most able to bear the expense.

847. Brothers and sisters are not liable, either at common law or by statute, to maintain each other, whether one or more of them have succeeded or not to all the father’s property.

848. Child’s claim on father’s estate.—A father can, without any restriction, devise and bequeath his whole estate, real and personal, by will to strangers; and in such a case the child has no claim whatever to any part of such estate. But in the event of the father’s heir is, however, only liable to continue the aliment till the brothers arrive at majority, and the sisters arrive at majority or marry, and no longer. M. 413, 419, 425, 450. The heir is liable in preference to the mother. M. 429; see also 2 Fraser, D. R. 43.

1 Contra. Bell’s Pr. § 1634; see last note.

2 The same, as to fathers and mothers, by 8 & 9 Vic. c. 83, § 80. The Poor Law Act makes it punishable for a husband, father, or mother to neglect to aliment the wife and children respectively.

3 Contra; they are primarily liable at common law in a certain order, viz., father, grandfather, great-grandfather, mother, grandmother, great-grandmother.

4 Contra; though brothers and sisters are not bound to aliment each other merely as such, yet if one represents the parent and has been enriched by the succession, it is otherwise. See ante, § 845 n; Ersk. 1, 6, 58; More’s Stair, notes 30.

5 Contra; a father cannot bequeath more than a share of his moveable estate, and cannot dispose any of his heritable estate by will. He can, however, by a proper deed alienate and dispose his whole heritable estate mortis causa to strangers, provided he execute such deed in liege poustaie; or, if suffering from the disease of which he afterwards died, provided he survived sixty days after its date, or went to kirk or market unsupported there-
dying intestate, the children are entitled, in a certain order, to succeed to the real estate; and all take a share in the personal estate under the Statute of Distributions.\(^a\)

**ILLEGITIMATE CHILDREN.**

849. *Bastardy.*—As a parent is not bound at common law to maintain his legitimate child, neither is he bound to maintain his illegitimate child;\(^1\) yet the Poor Law Statutes make both parents liable, for a certain time, to contribute.\(^b\)

\(^a\) See ante, § 739, 751.  \(^b\) 4 & 5 W. IV. c. 76, § 71; 7 & 8 Vic. c. 101.

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after. See ante, § 675. As to his moveable estate, the father, if his widow and children survive, cannot by will bequeath more than one third, and if his children, but not his widow survive, or *vice versa*, cannot bequeath more than one half of such estate. Another third, or the half respectively, belongs to the children as their *legitim*.

*Legitim*, or bairn’s part, is due only to those children who survive the father; and if a child predecease the father, leaving children, these grand-children take nothing. It is due to all the children by whatever marriage. If there is only one child, such child takes legitim, though also succeeding to the heritable estate; but if there are several children, one of whom succeeds to heritable estate, then he can only claim a share as legitim, after collating such heritable estate. Though a child is married, and living apart from the father’s family, such child has nevertheless a right to legitim. Though a father is entire master of his moveable estate during his life, and by squandering it can reduce the fund for legitim, yet he cannot, on deathbed, by any deed fraudulently disappoint the children of their legitim. But the child’s right to legitim may be excluded by an antenuptial contract, which expressly, or by strong implication, takes such right away. *L. Panmure v. Crokat*, 28 Sc. Jur. 297. A child may also renounce, or expressly discharge, his or her share of legitim, in which case he is said to be forisfamiliiated, and such share accrues to the other children. So the legitim may be excluded by a provision given to and accepted by the child, with a condition that such acceptance shall discharge the legitim. But where a child has received a large sum “as her portion” on marrying an Englishman, the English settlement not expressly declaring it to be in satisfaction, it was held that the legitim was not thereby barred. *Breadalbone v. M. Chandos*, 2 Sh. & M’L. 377. Yet advances made to a child out of the moveable estate will count as between the children themselves as part payment of the legitim. See ante, § 742; Bell’s Pr. § 1582, 1590; Ersk. 3, 8, 25; 3, 9, 15; *et seq.*; Stair, 3, 8, 45; *Keith’s Trustees v. Keith*, 29 Sc. Jur. 497. Bell’s Com. by Shaw, 681.

\(^1\) *Contra*; both father and mother are liable at common law to support
850. The mother is bound by statute to maintain her illegitimate child till the age of sixteen, as part of her family; or if the child is a female, and marries under that age, then till marriage.\textsuperscript{a} 1

851. The father is also bound by statute to contribute to maintain the child, under the penalty of imprisonment. But the proceeding against the putative father to compel him to contribute, must be taken either within twelve months after the birth, or at any time thereafter, on proof that he had, within such twelve months, paid money for the child's maintenance.\textsuperscript{b} 2

852. The mother is entitled, as against third parties, to the custody of her illegitimate child till the age of seven, and it seems she (or her husband, if any) is entitled also to the age of sixteen.\textsuperscript{c} Whoever marries a woman is expressly bound by statute to maintain her illegitimate as well as legitimate children till the age of sixteen.\textsuperscript{c}

853. The courts decline to interfere in favour of the father, so as to give him the custody of his illegitimate child; all they do is of a negative kind, viz., where force or fraud has been used to change the custody, they will merely restore the child to the same custody it was in before such force or fraud was used.

854. \textit{Filiation of bastards.}—The mother may affiliate the child on the father by applying to a justice of the peace for a summons of filiation. The alleged father may attend by himself or counsel, and

\begin{align*}
\texttt{a} & \ 4 & 5 \text{ W. IV. c. 76, § 71.} & \texttt{b} & \ 7 & 8 \text{ Vic. c. 101, § 2.}
\texttt{c} & \ 4 & 5 \text{ W. IV. c. 76, § 57.}
\end{align*}

\textbf{IN SCOTLAND.}

their illegitimate child, and such obligation to aliment transmits to the representatives of the father and mother. \textit{Fleming v. Clarkson}, 30 Sc. Jur. 725; Ersk. 1, 6, 56. Also both parents are made liable, under pain of imprisonment, by the Poor Law Statute, 8 & 9 Vic. c. 83, § 80.

\textit{Contra}; the obligation to aliment the bastard continues on both parents for ever, if the child is not in business or otherwise provided. 2 Fraser, D. R. 41.

\textit{Contra}; the obligation continues on the father for ever, and an action of filiation and aliment can be raised at any time. See last note.

\textsuperscript{a} The mother of illegitimate children is generally said to be entitled to the custody of daughters till ten, and sons till seven or ten. Bell's Pr. § 2062. But the age is not clearly fixed. Ersk. 1, 6, 56; M. 442, \textit{et seq.}; see also \textit{Goodby v. McCandy}, 7th July 1815, F. C. If the father support the child after the above age, he is entitled to the custody. \textit{Pott v. Pott}, 12 S. D. 183.