Corrigendum

page 803: 'Three lines from the foot of page, for "formal" read "informal".'

TO

T. R. S. SMITH
1944–1962
PREFACE

SINCE her Union with England in 1707 Scotland has in a sense survived as a nation by and through her Laws and Legal System. These were safeguarded in the basic constitution of the new Kingdom of Great Britain. At that time Scots law was very similar in outlook and content to those other systems of Western Europe which had developed from Romanistic and Feudal sources. English legal influence is apparent in certain aspects of Scots law, and has sometimes—though not always—proved beneficient and useful. If Britain is to enter the European Economic Community, however, Scotland’s European tradition may well be reasserted in legal as well as in economic and cultural matters. The first impact of entering the Common Market on the legal systems of Britain would no doubt be most obvious in the field of Public law, but there would be important repercussions also on Private law. Moreover, the ethos of the Scottish legal system—which for creative development is more significant than particular rules—should make co-operation with the other civilian systems of Europe natural and stimulating.

This book, though of moderate compass, aims to be rather more than just a factual statement of Scots law as on December 31, 1961. Where the law may be regarded as settled, I have not multiplied references or citations. On the other hand, a number of important questions of law, which have not yet been adequately examined or satisfactorily decided have been discussed in greater detail. Many of these questions are, however, discussed much more fully in my Studies Critical and Comparative which was published earlier this year. I have not hesitated to express personal opinions, nor to incorporate the views of those who have contributed to legal literature, as well as the opinions of judges. My debt to the legal outlook of the late Lord Cooper of Culross will be obvious. In particular, I accept his view that a creative—or indeed viable—law of Scotland cannot be envisaged if its civilian and cosmopolitan heritage is neglected, and if comparative influences are restricted to the solutions of English law.

I have written primarily for the benefit of those approaching Scots law for the first time—whether they be my fellow countrymen or those across the Border or beyond the seas. I hope, however, that the book will prove useful to the profession in Scotland. For them in particular, I should perhaps stress that I have not endeavoured to touch on every legal topic, and, except for incidental reference, have left matters of Industrial and Mercantile law to be dealt with in a
volume from the pen of my friend Professor J. J. Gow, which has been commissioned by Messrs. W. Green & Son of Edinburgh and is due to be published very shortly. This present book is being published by Messrs. W. Green & Son of Edinburgh as *A Short Commentary on the Law of Scotland*, as well as in the British Commonwealth Series by Messrs. Stevens of London who commissioned it in the first place. Since both Professor Gow’s book and mine have been prepared to meet an urgent need for up-to-date books on Scots law, we have had neither time nor opportunity to collate our respective contributions, but we have worked on an agreed plan regarding distribution of subject-matter. Moreover, I have profited enormously from Professor Gow’s comment and criticism. In Scotland this present book, and that of my colleague, will complement each other.

Due to the great increase in the number of law students attending at Scottish Universities, it became apparent last autumn that there would be no introductory books on Scots law available for those entering on their studies in 1962 unless this present work could be completed by that time. I should have preferred at least two more years to expand, reflect, research, and polish. Ever since Professor Keeton had enabled me to contribute in 1955 a Scottish section to the United Kingdom Volume in the British Commonwealth Series I had desired—and in some measure prepared—to write a new book built to some extent on that foundation. In this work I had hoped to do justice, within modest scope, to my country’s legal system. In the circumstances I have had to sacrifice to some extent a dream of perfection to the nightmare of urgent production during a year in which, besides other difficulties, I also published two other books. It would have been quite impossible to achieve the objective but for the invaluable help of others. Three of my brother Advocates, Mr. S. O. Kermack, Mr. R. H. Maclean and Mr. D. B. Smith undertook for me detailed and far-ranging research on particular topics, as did my friend, Mr. Ian Slessor Smith of Inverness. Mr. I. C. Kirkwood, Advocate, and Mr. M. R. Topping, Advocate, have contributed an Appendix on Statutory Tenancies. The work has also been enormously assisted by the encouragement, generosity and devotion of numerous friends who have found time in very busy lives to undertake proof-reading, checking of references and criticism of draft chapters. My debt to them all is quite beyond what an author usually acknowledges in his preface. In particular I express my warmest thanks to Miss Jean Smith, Sheriff J. G. Wilson, q.c., and Mrs. Nan Wilson, and to such colleagues and former colleagues at Edinburgh or Aberdeen Universities as Mr. Ian Hamnett, Advocate, Mr. V. S. Mackinnon, Professor Farquhar MacRitchie, Mr. G. C. H.
PREFACE

Paton, Advocate, Mr. J. V. M. Shields, Q.C., and Mr. I. D. Willock, Advocate. The publishers, moreover, with courageous optimism, agreed to accept chapters of the book as it was written and to set these up immediately in page proof. I have appreciated their co-operation very much and also the help of the Eastern Press.

Owing so much to so many, I am confident that these many will understand if I select three names only for special mention. First, Miss Cynthia Cole has with undaunted (or well-feigned) cheerfulness achieved under heavy pressure the near-miracle of rendering legible in form a constant flow of mosaic in manuscript. Secondly, my friend and colleague, Mr. M. R. Topping, Advocate, has been closely associated with the production of this book, and has undertaken the tedious and exacting burden of preparing the index. Thirdly, to my wife I owe a quite incomparable debt. In the space of one year, during which I have not been her only burden, she has supervised the presentation for publication of three books of mine, including the preparation of case and statute indices. But for her devotion and loyalty, my own task could certainly not have been carried through to the end.

Craig, first of the Scottish institutional writers, is said to have written his *Jus Feudale* primarily because Scottish law students had no introductory work to consult, and, therefore, he had been moved by the *misera conditio et difficultas candidatorum juris Scotici*. His treatise was, however, not published until nearly fifty years after his death. I rather envy—though I have rejected it—this precedent for gaining goodwill in respect of worthy intentions without incurring immediate jeopardy to reputation.

T. B. SMITH.

EDINBURGH.

*July 1962.*
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ADDENDA

The law as stated in this book seeks to represent the position on December 31, 1961, though it has been possible to add some later references. Certain changes could not, however, be noted in the body of the text at the stage of page proof, and these are noted below:

Page 67
On June 1, 1962, the Scottish Home Department and the Department of Health for Scotland were dissolved and replaced by two new departments, the Scottish Home and Health Department and the Scottish Development Department. The Scottish Home and Health Department now discharges the home affairs functions of the former Scottish Home Department and the health and welfare functions of the former Department of Health. The Scottish Development Department is responsible for the functions relating to local government, electricity, roads and industry formerly carried out by the Scottish Home Department, and the functions relating to housing, town and country planning and environmental services formerly carried out by the Department of Health.

Page 69

Page 252
The Commonwealth Immigrants Act, 1962 (10 & 11 Eliz. 2, c. 21), received the Royal Assent on April 18, 1962, and is now in force.

Page 260
The Law Reform (Damages and Solatium) (Scotland) Act, 1962 (10 & 11 Eliz. 2, c. 42), which came into force on July 19, 1962—and does not have retrospective effect—now permits the mother of a child to sue in respect of its death, notwithstanding the fact that its father is living. The Act expressly recognises the right of a child to sue in respect of the death of its mother even though its father is living. The parents of an illegitimate child are given the same rights to sue in respect of its death, as if it had been legitimate.

Page 308

Page 350
The Law Reform (Husband and Wife) Act, 1962 (10 & 11 Eliz. 2, xix
c. 48), received the Royal Assent on August 1, 1962. It enables spouses to sue each other in delict, but empowers the court to dismiss such an action, if it appears that no substantial benefit would accrue to either party.

Page 518
On September 11, 1962, Lord Hunter in the Outer House upheld the Crown's claim against the University of Aberdeen, principally on the ground that the Old Norse law had been superseded by Scots law quoad moveables in Shetland.

Page 521

Pages 697, 699
See now Law Reform (Damages and Solatium) (Scotland) Act, 1962.
Part 1

BACKGROUND AND SOURCES
CHAPTER 1

HISTORICAL BACKGROUND

In one sense it is not necessary to explore the antecedents of the law of Scotland before the late seventeenth century. Then it was that Stair, the most eminent of the Scottish institutional writers, systematised and virtually recast the civil law of Scotland, blending existing customary law with the most enlightened contemporary Continental teaching on Roman law and Natural law. A new point of departure in public law is also to be found shortly thereafter in the fundamental constitutional changes of 1707, when Scotland and England by treaty contracted to unite upon certain specified conditions.

On the other hand, a short survey of the earlier history of Scots law is desirable to explain the reasons why Scots law and legal institutions have developed as they have, why in some fields English law has exercised a substantial influence, and why in others constant pressure from the South for assimilation with English solutions has been resisted. It is proposed, therefore, by way of introduction, to survey briefly the general development of Scottish law and legal institutions. Historical development of the present Constitution, courts and, in particular, legal doctrines will be discussed in chapters which seek to expound these topics.

Law develops continually in response to social, political and economic conditions, and any attempt to divide up its history into "periods" must largely be arbitrary. Conservative influences may restrict progress in some branches of a legal system but not in others, while advances in the higher courts may not be reflected in the lower courts until many years later. However, if modern Scottish law—that is the law administered since the Napoleonic Wars—may properly be described as "post-Roman" in character, the history of Scottish law from the earliest times to the Napoleonic Wars may be broadly divided into two divisions—a medieval or feudal phase and a "classical" phase, the era of the conscious Reception of Roman law. Between the medieval and the classical phases there was an era of transition.¹

¹ More detailed accounts of the evolution of Scots law with references to the relevant literature will be found in Introduction to Scottish Legal History (Stair Soc., Vol. 20), Chaps. 1–5 by Lord Cooper, G. C. H. Paton and J. Irvine Smith, and in D. M. Walker, The Scottish Legal System, pp. 196–259.
HISTORICAL BACKGROUND

MEDIEVAL SCOTS LAW

The administration of justice in Scotland may be described as "medieval" at least until the establishment of the College of Justice in 1532. Of course, prior to that date there were manifestations of far-sighted and anti-feudal measures devised to meet certain problems, while, on the other hand, many archaic feudal traits survived long after 1532—in the preservation of the Heritable Jurisdictions until 1748, and in the land law generally. Apart from the feudal and other customary law, moreover, Roman and Canon law influences were of considerable importance. Nevertheless, when a centralised professional judiciary was established in Scotland, administration of justice in the higher courts was removed from a feudal basis, and 1532 can be taken as marking the beginning of the end of the medieval phase of Scottish law.

Medieval Scots law falls roughly into two periods: the period prior to the death of Robert the Bruce, and the subsequent period which falls within the Dark Age of Scots law.

Celtic Law

As regards Celtic influences, very little is known. There is, so far as the evidence goes, apparently little or no trace of a Celtic or Gaelic system of law in the law of Scotland today, and the only official connected with that earlier law who can trace his descent from the patriarchal and tribal form of society which prevailed in Celtic Scotland is the Lord Lyon King of Arms. Scottish institutional writers who, apart from Mackenzie, had no knowledge of the Gaelic and no great sympathy with Celtic ways of life, have largely ignored the historical treatment of Scots law, but it is only fair to add that the material for such treatment has not hitherto been accessible. Thus the further back we go, according to Cosmo Innes, the more ignorant do writers become of the precedent and practice of early times in our own country. Professor Dove Wilson of Aberdeen University wrote as follows in the Juridical Review of 1896: "The Celtic Scots were the ancestors in the male line of our kings: they gave the name to the country: they were a cultivated, poetic, civilised race, Christian long before our Anglo-Saxon ancestors. These things make it almost inexplicable that distinct traces of Celtic law are not to be found." The late Dr. Cameron in his work on Celtic Law

2 Robert I, ob. 1329.
3 Scotch Legal Antiquities, p. 2.
4 There are, of course, notable exceptions—such as Skene, Hailes, Kames, Thomson, and Cosmo Innes himself. The Stair Society (founded 1930) has done much to publish basic materials for research in legal history, but Scotland still lacks her Holdsworth.
5 (1896) 8 Jur.Rev. 221.
6 Published 1937.
disagreed strongly with this negative finding and endeavoured to bring to light surviving traces of Celtic law. He holds with Cosmo Innes that Scotland, at the different eras in her history, used the laws of the people cognate to her then dominant race, and that, whilst under Celtic sway, her laws were those which had received a certain shape and definiteness from their longer use and greater cultivation in Ireland. Dr. Cameron has collected the fragments which have survived. Quite rightly he stresses that any study of Scottish legal history must suffer from the fact that twice our national records have been plundered, and in any research the earliest period, namely the Celtic period, will have been most obscured by these depredations. He has traced Gaelic terms in grants of land as early as the eleventh century, in the Leges inter Brettos et Scotos and in Regiam Majestatem probably of the thirteenth century; he has noted the observance of Celtic rules of succession on the accession of David I; has directed attention to Scottish statutes dealing with allegedly special customs in Celtic society regarding handfasting; has pointed out that contracts of fosterage continued into the seventeenth century; and has discussed the jurisdiction of the Brehons or Brieves, the hereditary law-givers of the Celtic community. Dr. Cameron concludes, that the earliest sources of the Law of Scotland, of which we have any record, are not Roman, Norman or Anglo-Saxon, but that these earliest sources are Celtic, and are to be found expressed in the Gaelic language, which was the language of Scotland—King, Court and people—up to the reign of Malcolm Canmore.

Be that as it may, these early sources have had little influence on the development of modern Scots law—which is a product of the Lowlands and of comparative law—in which the Celtic contribution has played a very minor part.

Early Feudal Period

More important, and much better authenticated, are the Saxon and Norman influences on the law of Scotland. Scots law, particularly in the period which came to a close with the Wars of Independence in the early fourteenth century, manifested a certain maturity and individuality of its own, but was substantially modelled on the highly successful English experiment.

8 Statutes of Iona, 1609. Professor A. E. Anton has, however, demolished widespread misconceptions regarding "handfasting" generally. His article "Handfasting in Scotland" (1958) 37 Scot.Hist.Rev. 89 must be the starting point for any future discussion of the topic.
9 See also C. A. Malcolm (1953) 32 Scot.Hist.Rev. 153-154 for most recent comment on the functions of brieves.
10 Celtic Law, p. 198.
Anglo-Saxon influence preceded the Norman, but it is not easy to separate the Anglo-Saxon from the Norman with confidence. All Northumbria, it may be recalled, was claimed both by the King of Scots and by the King of England, but after the Battle of Carham in 1018, only that part of Northumbria which lay north of the Tweed came under the rule of the Scottish King and became part of Scotland. The Northumbrians were already an expanding and influential element in the then unconsolidated Kingdom of Scotland when Malcolm III (Canmore)—who reigned from 1057–93—married the Saxon princess Margaret. This was not the first instance of intermarriage between the rulers of Scotland and the Saxon noble families, but it accelerated the process whereby the interest of the Scottish monarchy became detached from the Celtic Gaelic-speaking North and became identified with the Teutonic English-speaking South-Lothian. Margaret had the force of personality to strengthen Southern influences on Church Law and Court manners, but she merely added impetus to a trend which had been already perceptible in Scotland prior to the Norman Conquest of England. Not only did the Scottish ruling class intermarry with the English, but further, there was a substantial infiltration into Scotland of Anglo-Saxons and Anglo-Normans who were made welcome at Court and given gifts of land for their services. Anglo-Saxons crossed the Forth and extended westwards from Lothian towns and thaneships, and by the end of the twelfth century they were widespread in Scotland. Like the Flemings, they were inclined to become dwellers in burghs. The laws which they took with them and implanted probably did not differ substantially from the laws which were recognised in English Northumbria, and there is indeed evidence of reference being made by the burghs of Scottish Northumbria to Newcastle to ascertain what the burgh laws should be. Anglo-Saxon legal practices thus had time to take root before Norman influence began to be felt. Modern authorities trace the earliest emergence of burghs in Scotland to the times of David I (1124–53) by the end of whose reign perhaps twenty had been founded.\\n\\nThe most reliable evidence which we have of Anglo-Saxon customary law as it probably applied in Scotland is that of the Leges Quattuor Burgorum (Laws of the Four Burghs) which may well be a thirteenth-century code borrowed from Newcastle. The extent to which the Scottish burgh laws are to be identified with or were influenced by the Leges Quattuor Burgorum is, however, still open to question; and the Leges themselves perhaps represent an ideal rather

11 See generally G. S. Pryde in A Source Book of Administrative Law in Scotland, Chap. 1, for full refs.; also Dickinson, op. cit. Chap. 12.
than an actual picture. The laws in their extant form are clearly not undiluted Anglo-Saxon, but have incorporated Norman ideas and expressions. Royal burghs tended to grow up under the protection of the King's castles as Anglo-Norman feudal influences expanded in Scotland. Accordingly, we cannot go as far as Dove Wilson in accepting the Leges as codifying more or less undiluted Anglo-Saxon customary law. At the same time, the Leges Burgorum provide valuable evidence of the influence of such law in Scotland.

The "Four Burghs" were the leading burghs of Scottish Northumbria—Edinburgh, Stirling, Roxburgh and Berwick—but customary laws prevailed also in other burghs where the influence of Anglo-Saxon and Flemish settlers had taken effect. The Convention of Burghs (later the Convention of Royal Burghs) possessed judicial and legislative functions which will be mentioned later. The Convention also supervised the customs of the burghs, guarded the interests of the merchant class, and generally promoted the interests of its members. A statute of William the Lion (1165-1214) gave the merchants within a particular area the exclusive right to trade, and this may well be the meaning of the confirmation by the same King to the burgesses of Moray, north of the Mounth, of their free Hanse (liberum ansum suum). In time the burghs were to provide the Third Estate in the Scottish Parliament. The Leges Burgorum were largely concerned with regulating the life of the community, such as the provision by each household of night watchmen and protection of the community from commercial competition.

The Leges Burgorum are also concerned with some matters of public and private law which may be noted briefly. The written records available date from a period when Norman influence had been at work for some time, but, on the whole, the burgh laws maintained a substantial Anglo-Saxon inspiration and content.

A burgess was bound to have a rood of land, and swear to be faithful and true to the King, his bailies, and the community of the burgh. Government of the community was oligarchic or democratic in the sense that the magistrates in earlier times were elected by the householders in the burgh. Originally the burgh courts may have exercised more or less unrestricted civil and criminal jurisdiction, but when the King's judicial officers went on ayre, they claimed jurisdiction over the pleas of the Crown—murder, rape, fire-raising and robbery, and exercised a general supervision over the administration.

12 (1896) 8 Jur.Rev. 221.
13 For discussion of the authority and inspiration of Scottish statutes prior to 1424, see Lord Cooper, "Early Scottish Statutes Revisited" (1952) 64 Jur.Rev. 197.
14 If not, then, it has been suggested, the Scottish Hanse might be older than the German league of like name—though this seems improbable.
of justice. In civil causes, process appears to have been of a somewhat primitive character, and the proceedings mainly verbal. No brief or writ was issued, but the defender was subjected to the jurisdiction of the court either by apprehending him and bringing him before the magistrate, or by taking a pledge from the defender and bringing it to court. From a stranger the pledge could be taken without leave, but from a burgess only with permission of the grieve. For trading activities in the burgh, feudal law would, of course, have been inadequate, and through trading contacts the burgh courts came to recognise the law merchant developed on the Continent and in England.¹⁵

Though the ownership of land in burghs later came to be feudalised in the guise of "burgage tenure," initially there seems little doubt that a man "owned" his land as much as his goods—that is, it was allodial not feudal land. Accordingly, it was not held merely for life with consequent obligation on one who wished to be served heir to pay feudal casualties. The land could be let or sold in the presence of witnesses (later feudal theory required also a bailie). If at any time there was a dispute as to ownership, the right to the land was decided (if the witnesses were dead) by twelve men who could speak to the narration of their fathers, or of those to whom they would give as much credence as to themselves. Inherited land could be sold or given in wadset (in security) only by reason of poverty, and when it was sold, either by the owner or the creditor, the first offer had to be made to the owner's heir. If land had not been inherited, there was no restriction on its sale—except that the sale must be to another burgess. Peaceful possession of heritage for a year and a day put title beyond challenge, except possibly by one who could plead non valens agere.

The customs with regard to succession recognised in the early burgh law are of special interest, since they provide evidence for the great antiquity of the present Scottish rules of succession to moveables. In the burghs, testing on heritable property was not permitted. The eldest son was entitled to the head house (houses were the principal form of heritable property in burghs) and had to give accommodation to the widow, at all events if she was his mother. She had no claim for terce. (A man had, however, a right in the nature of "courtesy," which may be a later innovation.) Apart from house property, the sons, it has been suggested,¹⁶ shared the heritage equally. As regards moveables, children (sons and daughters) had a claim to a third share—in short what later Scots law would call the legitim

¹⁵ Dickinson, p. 115.
¹⁶ Dove Wilson (1896) 8 Jur.Rev. 230; but see Lord Cooper, Regiam Majestatem (Stair Society, Vol. 11), pp. 134, 155, 141.
fund. It may presumably be inferred that the widow was also entitled to her *jus relictæ*. The deceased was permitted to test on the remaining third—and the Church had an interest to see that this was bequeathed to benefit the Church and close relatives materially and the deceased spiritually.

The origins of this division of moveables in succession have been hotly contested. Our earlier institutional writers had taken the view that the similarity between the terms *portio legitima* in Roman law and *legitim* denoted that the Scottish doctrine derived from Roman law. Professor Dove Wilson concluded that this law was based on Anglo-Saxon custom which had prevailed among the German tribes and also in England prior to the Norman Conquest.

Dr. Gardner contended that the custom of dividing moveables in succession into thirds was a custom of early French law introduced from Normandy first into England, then into Scotland, but Professor Anton's criticism of this view carries conviction: "The institution being so little favoured by the English protagonists of Anglo-Norman law, the view that its origin is to be sought in that legal system seems implausible."  

Whatever the true origin of the Scottish law regarding legal rights (discussed post, Chapter 13) it seems probable, however, that the main factors which operated to preserve the doctrine were that the courts spiritual in medieval Scotland favoured it as consistent with natural law, and that when Scots law became Romanised in the sixteenth and seventeenth centuries, Scottish lawyers identified the bairns-part or *legitim* with the "*portio legitima*" of Roman law, and thus gave it the authority of the *Corpus Juris*.  

Controversies as to the origins of particular legal rules—such as that just described—illustrate that it is not always possible to dogmatise as to whether a particular rule is of Anglo-Saxon origin, or that it derives from Norman usage. Norman usages came in by infiltration—not as a revolutionary system imposed by conquest. Undoubtedly, however, from the days of Malcolm Canmore until the War of Independence in the late thirteenth and early fourteenth centuries, Anglo-Norman ideas permeated the Scottish social, political and legal systems. Though Scoto-Norman customary law closely resembled Anglo-Norman customary law in the twelfth and thirteenth centuries, the systems were not necessarily identical, as had been assumed somewhat readily by Dove Wilson, Kames, and Brodie-Innes. It may be observed that feudalism was European, not an

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17 See *Origin and Nature of Legal Rights in Succession*, passim; he cites the previous authorities.

18 *Introduction to Scottish Legal History*, p. 122.

19 Ibid.

20 Goudy, *Fate of the Roman Law North and South of the Tweed*, p. 33.
English political and economic system, and direct influence of French feudal theory was important for Scottish jurisprudence.

Feudalism of the Norman interpretation—as of Anglo-Saxon interpretation—in Scotland was introduced by way of England after the Norman Conquest of that country, and was consciously developed and encouraged by David I (1124-53) who had been educated in England. It was a complete system of society, covering all aspects of life, and government in all its departments. The new system possibly made little difference in the practice of a large part of the country, but the theoretical change in the relations of landholders was fundamental. In Saxon and Celtic Scotland a proprietor of land no doubt made some return to his overlord for the land held by him, whether in the form of military service or in kind, but the obligation for such a return was personal to the proprietor. In feudalism, on the other hand, the basis of such a return was the land itself, which was deemed to be held mediately or immediately of the Crown. The vassal was not an unlimited proprietor; his right to the land was conditional and dependent on fulfilment of the duties which he owed to his superior. These duties were inherent conditions of his right, formed a kind of real burden which attached to the land itself, and went with the land no matter into whose hands it came. In a sense, therefore, it was the land itself which was responsible for the implement of the conditions on which it was held, a proprietor being in relation to it a kind of usufructuary or quasi-tenant. His right was originally revocable, but eventually became hereditary—in which case it was in the interests of the superior that the principle of primogeniture should apply.

The Scottish feudal law followed the feudal law which was systematised by the Norman lawyers before the Conquest of England.21 The feudal nexus was created by investiture, the vassal performing the act of homage and then being put in possession of the land which he was thereafter to hold from his superior. The vassal owed the superior aid and counsel; it was his duty to attend him on military expeditions for a limited time; and with the other vassals of the common superior to attend the superior's court and there consult regarding matters affecting the fief. In certain circumstances, as if the superior were taken a prisoner—which happened only too frequently to the Kings of Scotland—the vassal was under obligation for payment of an aid. These conditions were enforced by forfeiture, and, if the vassal failed to perform the duties he had undertaken, the land reverted to the superior. The superior for his part had certain duties to perform. He was bound to do nothing to prejudice the

21 See generally Craig's De Feudis. Lord Clyde's translation with commentary.
vassal; he was bound to protect the vassal if attacked, to give him counsel and to render him justice in his court. It may be stressed that there has never been in Scotland any restriction on subinfeudation such as was imposed by the English Statute Quia Emptores, 1289. Feuing is still in the twentieth century a normal method of creating a permanent payment out of land.

It is expedient to examine briefly what kind of law was administered in Scots feudal courts, and how the courts themselves were organised. Jurisdiction, generally speaking, went with land tenure, was largely concerned with land law, and was an important source of income. In the early feudal period of Scottish history—before the Wars of Independence to curb English expansion—the central authority in Scotland was, especially under Alexander III (1249–86), reasonably effective and strong. Indeed, for centuries thereafter, Scotsmen looked back to Alexander's reign as a golden age—a "lost Atlantis," as Lord Cooper has described it—when good government flourished in Scotland and cultural relations with England were welcomed, to the advancement of Scottish law in particular. So earnestly did Scotsmen of later centuries yearn after this age, that no doubt they have exaggerated the measure of actual achievement. Edward I's policy of aggrandisement first in Wales and then in Scotland put an end to that era of effective government. Though, unlike Wales, Scotland in the end—despite weakness and selfishness among her leading families—won through and maintained her independence as a nation, she did so at heavy cost in blood and treasure, culture and political wisdom. Robert I (the Bruce) had the personal authority to establish reasonably firm government in an exhausted country during the last years of his life, but after his death the central authority declined. Thus it is that from his death the "Dark Age" of Scots law may be said to run. The War of Liberation, therefore, divides the period of effective feudal justice supervised by the King from that when royal control had weakened, and justice had degenerated, pending the establishment of some new judicial machinery. This second period concluded, so far as private law is concerned, with the establishment of the Court of Session in 1532. Effective criminal justice came much later.

From as early as the times of David I there is evidence that at strategic centres the King had established his castles and his sheriffs to represent him as judge and administrator. The sheriff held the Sheriff Court—which administered justice in the King's name—and entertained the pleas initiated by brieve in the King's chancery.

22 See W. Croft Dickinson, "The Administration of Justice in Mediaeval Scotland" (1952) 34 Aberdeen Univ.Rev. 338. The author wishes to acknowledge his great debt to this concise and scholarly study.
Verdicts were returned by a jury of barons or freeholders of the King. The barons themselves, as feudal theory required, held courts regulating the affairs of their tenants. Some of these barons, through delegation by the Crown, might acquire larger powers in addition to those necessarily exercised in the baronial court. By “franchise” the baron might enjoy more extended rights as of pit and gallows, and indeed normally held a curia vitae et membrorum; or further, he might acquire a right in regalitatem to try the pleas of the Crown, excluding even the King’s writ except for treason. The burgh courts also exercised jurisdiction within the burgh.

Over this system of local courts in the period when royal justice was strong, the King and his great officers of state maintained supervision. The Justiciars went on ayre to take the pleas of the Crown and to supervise the justice administered by the sheriffs—who in their turn watched over the courts of the barons. The Chamberlain also went on ayre to supervise the courts of the burghs. Finally, the King’s Council sat as court of first instance in matters which concerned the magnates, and as a final appellate court from the Justiciar. From the Chamberlain a final appeal lay to the “Parliament” of the Burghs which declared the law of the burghs. Appeal was by way of “falsing of dooms”—and, if the complainer succeeded, the suitors in the lower court were fined for dereliction of duty. As appears from Quoniam Attachiamenta (c. 13) the challenger of a doom had to act at once in the court where it was pronounced. “Before turning his toes where his heels had been” he had to denounce the doom as “false, stinking and rotten”—sentiments which in modern practice are confided by the client to his advisers rather than to the court.

A fairly clear idea of the laws administered in the thirteenth and fourteenth centuries can be obtained from a study of the documents edited by Lord Cooper, and from his commentaries—in particular his Select Scottish Cases of the Thirteenth Century, Register of Brieves, Regiam Majestatem and Quoniam Attachiamenta. Scholarly criticism of details of Lord Cooper’s work by men of the calibre of Duncan, McKechnie and Richardson does not impair the essential value of his pioneer contribution. Some comment may be made on these early documents which illumine the period preceding and encroaching onto the Dark Age of Scots law.

23 See P. McIntyre, “The Franchise Courts,” Introduction to Scottish Legal History, Chap. 28; also Dickinson, passim. In Waverley Scott puts into the mouth of the Baron of Bradwardine much charter learning as to the powers conferred on a baron.
24 Published 1944.
25 Vol. 10, Stair Soc.
The Kings of Scotland in the thirteenth century had not achieved centralisation on the scale of that achieved by Henry II of England, yet a certain amount of customary and enacted law was evolved appropriate to Scotland's particular needs, and royal authority was effective in the field of judicial administration. The main influence in Scoto-Norman law was certainly from the South, and the English legal experiment was largely copied in Scotland, albeit after a time-lag, and supplemented by canon and Roman doctrine introduced by the clergy. This, it has been submitted by Lord Cooper, is the true explanation of the work known as *Regiam Majestatem* from the opening words of the text. To the extent of approximately two-thirds the *Regiam* coincides with Glanvill, and it is incontrovertible that the system described in it is in substance that which had been achieved in England by the time of Henry II. With regard to the remainder of the work, some of it can be identified with legislation attributed to David I and other Kings, and a large portion of the remainder is derived from Roman sources, such as the *Decretum* of Gratian, the *Corpus Juris*, or Ivo's *Panormia*. It describes legal theory and practice in which may be traced the primitive political and legal ideas which were common to the Teuton, Frank and (possibly) Celt. In these early times the right still depended on the existence of the remedy, rather than the remedy on the existence of the right. Rules of procedure were prescribed "with that excess of formalism and inequality of emphasis which are the features of primitive law." 27 The main centres of interest were the writs or briefs by which the King delegated the duty of affording a remedy, the excuse pleadable in court, the methods of proof, e.g., compurgation, the King's peace and the pleas of the Crown. The dividing line had not yet been accurately drawn between crime and delict, and the theory of mens rea was imperfectly appreciated. Questions of status, succession and consensual obligation were also treated. Substantive law was introduced incidentally to a description of procedure, and the procedure was largely that of the royal courts. It seems very possible that *Regiam Majestatem* is an unofficial compilation by a churchman engaged in legal practice, and it may well not have been intended for publication. For a basic structure the compiler would find in Glanvill's *Tractatus* the only comprehensive statement of the system which he wished to expand, and therefore he may well have "edited" Glanvill for use in Scotland, rejecting what was clearly inapplicable, and supplementing the main source with Scoto-Norman material as relevant.

Lord Cooper 28 summed up his position in language which may be quoted: "To the question whether *Regiam Majestatem* truly

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27 Cooper, *Introduction to Regiam Majestatem*, p. 46.
28 Ibid., p. 47.
portrays Scots law as Scots law once was, the successive answers have ranged between vehement denial and enthusiastic affirmation. As so often happens, the truth probably lies between these two extremes. Independently of *Regiam Majestatem*, we can only reconstruct the law of the reign of Alexander II in part, by utilising what we can derive from the charter evidence and legislation, and what we can infer from the later law as exemplified in the *Ayr MS.* styles and elsewhere. Precise comparison over the whole field is unattainable. The truth seems to be that Scoto-Norman law started from a point earlier than Glanvill, and by the close of the thirteenth century had reached a point far in advance of Glanvill without necessarily, or even probably, having passed through the exact phase which Glanvill depicted. But to a fairly close approximation Glanvill provided an adequate account of the cardinal features of the system which Scotland was building up, and there was justification for choosing the *Tractatus* as the basis of a Scottish restatement of the law. In broad outline *Regiam Majestatem* must be near the truth. In detail it must always be examined with a critical eye. It is certainly neither accurate nor exhaustive as an account of the position which had been reached by 1300, but it cannot be very far out as a general description of things as they were about fifty or sixty years before. We say 'a general description' advisedly. Too often passages of *Regiam Majestatem*, which are merely copied from Glanvill, have been cited in proof of the acceptance in Scotland of a legal doctrine or institution, and this type of error has not been wholly confined to the credulous lawyers of the seventeenth and eighteenth centuries. It follows that the significance of the work in the history of early Scots law is as clearly established as its verbal inspiration on specific questions of doctrine or practice is frequently more than suspect.

Since Lord Cooper's death A. A. M. Duncan, while not rejecting the traditional view that during the twelfth and thirteenth centuries Scotland was developing a simpler and less rigid version of English common law, has stated a case for dating *Regiam Majestatem* much later than circa 1230, as Lord Cooper had supposed, though there are certainly difficulties involved in accepting this view. The true explanation, in Duncan’s opinion, is that the thirteenth-century achievement of Scots lawyers was shattered during the struggle for independence, and that in the fourteenth century—certainly after 1318—Scotsmen “tried uncertainly to rebuild the vanished structure, taking for their materials whatever came to hand indigenous or foreign. Glanvill reshaped as *Regiam Majestatem* was part of the new structure.”

"Quoniam Attachiamenta" is again designated by its opening words—"Quoniam attachiamenta sunt principium et origo placitorum, etc." ("Since attachments are the foundation and source of proceedings in actions of wrang and unlaw, etc."). This work is substantially later than *Regiam*, and, unlike it, is purely Scottish—yet both have been linked together in professional tradition. *Quoniam Attachia-menta* is attributed by Lord Cooper to the century 1286–1386 but, if Duncan is right, the earlier of Cooper's dates is suspect. The version available today is not the original but has been supplemented from other sources. Its concern is with procedure in the feudal courts—while the corresponding chapters in *Regiam* deal with procedure in the royal courts. The author appears to have been an experienced practitioner.

Lord Cooper has also edited the *Register of Brieves* (1286–1386)—a work which must, however, be read with the criticisms contained in Sheriff Hector McKechnie's valuable original contribution "Judicial Process upon Brieves, 1219–1532." The history of the development of English common law is virtually a history of the writs appropriate to the various forms of action. The English writ was the equivalent of the Scottish brieve, but the brieves apparently never "ruled" in Scotland to the same extent.

The term "brieve" was used as a general term to cover not only judicial or procedural writs but also private acts (such as the appointment of attorneys) and administrative acts. The procedural brieve in respect of damage suffered by an individual was the equivalent of the English writ. Many styles are given in the *Register* of the brieves in use. The scope and development of judicial process by brieves has been discussed authoritatively by Sheriff McKechnie, who has traced their flourishing (reaching their heyday in the fifteenth century) and ultimate supersession by the signeted summons. Brieves, being addressed to justiciar or judge ordinary, were not, however, as in England, designed for procedure before the central tribunals—though these took cognisance of them on appeal. Lord Cooper overlooked this important consideration when he concluded that the progressive disappearance of brieves in the central courts must at the same time have been reflected in the practice of the lower courts. As early as the second half of the fifteenth century it may have been sufficient for a pursuer to lay the grounds of complaint before the Lords of Council, and leave the rest to the court. In general, however, it was only after 1532 that the brieve as a means of initiating

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30 David Murray Lecture, Glasgow, 1956.
31 e.g., Nos. xii and xx in Vol. 10, Stair Soc.
32 *Sup. cit.* note 30; see also Paton, *Introduction to Scottish Legal History*, p. 21.
process gradually fell into desuetude—except for a few forms which lingered on until later (and indeed, in some cases, modern) times.

The Dark Age of Scots Law

In 1328 the English Government concluded the Treaty of Northampton, by which the independence of Scotland was acknowledged. This achieved, in the following year the Bruce was laid to rest at Dunfermline. The Stuart dynasty which succeeded him had “come wi’ a lass,” and under this House Scotland was fated to suffer a succession of royal minorities and disputed regencies at home—and, as background, international war with a vastly richer and more numerous enemy. The centrifugal tendencies of feudalism asserted themselves in all matters of government, and particularly in the administration of justice. The privileges of franchises and realties now were asserted to the full, and royal justice was set at naught. The aggrieved individual felt powerless to secure redress in the feudal court, where his despoiler would often in effect be his judge. James I and James IV, it is true, maintained, or endeavoured to maintain, a system of justice-ayres, but the principal hope of redress for the individual who could not obtain justice in the feudal courts was to lay his complaint direct before the King as the fount of justice, or bring his case within the jurisdiction of the Church courts.

The King would arrange for his Council to hear “the petition and complaint” of the aggrieved subject. The persons thus appointed might at first be “Auditors” appointed by the King’s Council sitting as Parliament, or members of the smaller “chosen” or “secret Council” of the King might hear the complaints. From the time of James I (1424) many experiments were tried out to deal with the constant pressure on the time of the King’s advisers of direct petitions—either original or by way of appeal from denial of justice in the feudal courts. Sessions of varying composition were set up to relieve the King’s Council of judicial duties, but especially to deal with the case of the over-mighty subject. Lords of Council continued to administer justice, sitting in “session.” The interrelation of the various committees of Parliament and Privy Council which developed into the “Lords of Council and Session,” and finally into the College of Justice, is too complex to be described here, and may best be studied in such works as R. K. Hannay’s book, The College of Justice.33

It must not be forgotten that grants of wide jurisdiction were made to clerics and ecclesiastical houses in the same way as to other landholders, and many of those who sat in the Royal Councils to

33 Published 1933; see also Peter Stein (1952) 64 Jur.Rev. 204; Stair Soc. Vols. 8 and 14; Sayles (1954) Scot.Hist.Rev. 136; McMillan, The Evolution of the Scottish Judiciary.
determine appeals were also clerics. To a number of outstanding ecclesiastics such as Elphinstone and Dunbar the administration of justice in Scotland owed and owes an immeasurable debt. Quite apart from exercise by clerics of the usual jurisdiction of landholders, there also were Church courts which were served by legally trained practitioners, who had exclusive jurisdiction throughout the country over certain kinds of causes, and who showed remarkable ingenuity in extending their jurisdiction. These courts administered professional law even during the Dark Age. Cosmo Innes was even of opinion—and may well be right—that before the Reformation the greater part of the law business of Scotland was done in the Church courts. Appeal lay from the Church courts ultimately to Rome. The work of the Bishop’s Court was in fact carried out by a judge known as the “Official” appointed by the Bishop. He would be a trained canon lawyer, had knowledge presumably of Roman law, and might well have studied abroad at Oxford, or at Bologna, Pavia, or in France. Thus even before the general Reception in Scotland of Roman law its influence was infiltrating strongly.

The Bishop’s official had exclusive jurisdiction over matters involving status—such as legitimacy, bastardy, and nullity of marriage. He took charge, as befitted the moral duty and financial advantage of the Church, of the affairs of widows, orphans and all personae miserabiles. He decided all disputes between churchmen. He exercised jurisdiction over all suits concerned with succession to moveables; and this jurisdiction provided a considerable source of revenue. Whenever a promise was fortified by an oath, again the Church court had jurisdiction—and this jurisdiction seems to be the basis of our present doctrine of Scots law whereby a simple promise is enforceable irrespective of consideration. Notaries public, the skilled lawyers and men of business of the period, whose history dates back to the Roman Empire, were under the supervision of the Church courts. The Lateran Council in 1215 had provided that the clerks of court should be notaries, and this gave the Church an added influence in legal matters. Apart from causes which were specifically appropriated to the Church courts, by reason of the fact that the clerics alone were educated and trained in law, they were frequently invoked as arbiters by consent of parties to settle disputes in matters lying outside the specific jurisdiction of the Church courts.

It is probably self-evident that in the lay courts at all events a combination of centrifugal feudal “justice” and royal justice

34 Scotch Legal Antiquities, pp. 238-239.
35 For further discussion and references see “The Influence of the ‘Auld Alliance’ on Scots Law,” and “Scottish Universities and the Civil Law” in Studies Critical and Comparative, pp. 28, 62 (hereafter referred to as Smith, Studies).
administered by transient committees was unlikely to develop a satisfactory body of legal principle. There were good lawyers in Scotland—as a consideration of charters and early statutes well illustrates—but there was no opportunity for continuous professional development of the law in the lay courts. The law administered by civil courts in Scotland during the Dark Age shows three characteristics which may be noted. Naturally enough, in the first place—though there was no Iron Curtain—there was a revulsion against the practice, which had grown prior to the Wars of Independence, of borrowing legal ideas from England. Secondly, in the many cases on which no clear rules of law had been evolved in Scotland, there was a tendency to over-simplify all problems with the question whether the defender had done “wrang”—thus leaving the law vague, formless, delictal in outlook, and without clear principles to develop. Contrasted with this groping after formless justice, there was a craving for the certainty of revelation—which is apparent in a superstitious and conservative veneration for what was believed to be the “good old law.” The rediscovered manuscript versions of Regiam Majestatem from the fifteenth century onwards came to be prized by Scottish lawyers as a true record of “our most ancient law”—a corpus juris, as it were, dating back to that golden age of justice which men fondly believed had flourished before the near-anarchy of the centuries following the Bruce’s reign. Thus when James I returned to Scotland, we find that the Act 1425, c. 10, sets up a commission “to se and examyn the bukis of law of this realme, that is to say, Regiam Majestatem and Quoniam Attachamentiata, and mend the lawis that needis mendment.” These works, it will be observed, were venerated as “the bukis.” Clearly they were in need of revision to meet the changing conditions of two centuries. The project of 1425 was, however, as might be expected, stillborn. A generation later a further official project of statute law revision was launched, the material to be revised comprising “The Kingis Lawis, Regiam Majestatem, Actis, Statutis and uthir Bukis.” Nor is this the last project for codification of the laws.

While the yearning for a clearer formulation of the law is apparent in these projects of conservative revision of “the Auld Lawis,” practical and lasting results were achieved by a number of important statutes. Amid the political turmoils of the period of the legal “Dark Age,” there are a few flashes of light which strike one who is not expert in Scottish history as surprising. Indeed it is often

36 See Cooper, The Dark Age of Scottish Legal History.
37 This informal period has been well summarised by Cooper, ibid. p. 19, “The whole of Scots Law had been compressed into a single commandment: ‘Thou shalt do na wrang’.”
38 1469, c. 20; 1487, c. 115; and refs. Stair Soc., Vol. 1, p. 6.
at periods in which the historians find least of interest that one can
discern the greatest efforts of enlightened legislators. Acts of James
III in 1469 and 1471 gave a right of complaint direct to the King's
"chosen council" if justice were denied before a feudal court or by
a jury. These measures made it possible to by-pass the cumbrous
feudal courts, manned by non-professional judges who too often had
interests of their own at stake in the proceedings. The origin of the
Scottish tradition of free legal assistance to poor persons goes back to
the Act of 1424, c. 45. Lord Cooper observed in his "Supra
Crepidam" 39:

In Scotland many of our most distinctive doctrines are deeply rooted
in the distant past; the bulk of our pre-Stair law is not common law but
statute law, dating from the fifteenth century onwards, and many of these
old statutes are still the familiar pivots around which masses of modern
doctrine continue to revolve.

Thus there is a sporadic outburst of legal reform in the closing
years of James II and the early years of James III—a period which
the orthodox historians have not described as at all likely to produce
enlightened reform in matters of private law—concerning the relations
of feudal landowners and the peasantry. Yet between 1449 and
1500 no fewer than ten Acts were passed at short intervals for the
benefit of a class of the community described as "the puir tennentes"
or "the puir people that labouris the grund." These measures
provided greater security of title to landlords and tenants, freed land
from restrictions on alienation inter vivos, and are to the present day
the basis of the Scottish law of leases. It is still a mystery how and
why these important statutes were passed at this particular stage in
Scottish history.

THE RECEPTION OF ROMAN LAW

The medieval phase of Scots law was superseded by that of
Romanisation—though, of course, feudal land law in Scotland, as
throughout Europe, continued as part of the accepted legal order.
Three stages in the evolution of Scots law as a Civilian system may be
discerned. First, there was the age of Transition when, after the
establishment of the Court of Session as the College of Justice in
1532, a new consistency was given to Romanising influences—which
had already been long at work, especially mediated through
ecclesiastical lawyers. Secondly, there was the stage of Restatement,
associated with the Natural Law School and the publication of Stair's
Institutions in 1681. Thirdly, there came the "Classical Period" of
the second part of the eighteenth century—when Natural Law

39 p. 2.
influences were replaced by a rational, historical and comparative outlook inspired by Montesquieu, Hume and Adam Smith.40

It has been observed that the main obstacle to the evolution of a satisfactory legal system in Scotland prior to the sixteenth century was the lack of a centralised professional judiciary. Lord Cooper observed 41: “We may conclude that during this long intermediate period in our legal history there was plenty of law in Scotland and plenty of lawyers to apply it; but unfortunately an absence of tribunals adequately manned and equipped, in which the law could be effectively applied in contested litigation.” The establishment of the College of Justice in 1532—confirmed in 1540—provided that which was deficient, a professional tradition; and, since the Reception of Roman law in Scotland was through the unofficial medium of professional practice, it may be thought legitimate to regard the setting up of the Court of Session as the watershed between the pre-Roman and the Roman phase of Scottish legal history. The revival of Roman studies in Europe came in, as it were, in two tides. The first, that of the eleventh century, had a general influence in Italy, but in Scotland, which was remote from the centres of learning, the new interest in Roman law had direct influence mainly on the clergy. Pollock and Maitland observed 42: “Romanism must come sooner or later, the later it comes the stronger it will be, for it will have gone half-way to meet mediaeval facts,” and 43 “The Roman law that wins victories in Scotland and Germany is the law of the later ‘commentators’ (Baldus, Bartolus and so forth) which has accommodated itself to practical needs.” Indirectly, of course, some Roman doctrines can be traced in lay legal literature as early as the writings of Glanvill and Bracton or Regiam. Nevertheless, the second wave of Reception of Roman law in Europe, that of the fifteenth century onwards, was that of clearest importance for Scotland. There was certain delay, undoubtedly, due to Scotland’s geographical position and political situation. The fifteenth-century revival of Roman law was one aspect only of an intellectual force which swept through every channel of intellectual, aesthetic and ethical activity. The desire to reform the law on the foundations laid by the Roman jurists was just one manifestation of the admiration which men accorded to classical civilisation and which drew Scottish students in their thousands to the Continental universities.

The tide of the Reception can be discerned in the reign of James IV, whose name is associated with the Scottish Renaissance—and

41 Dark Age of Scottish Legal History, p. 24.
43 Ibid. Possibly underestimating the indirect influence of Church lawyers.
with the disastrous field of Flodden which blighted its promise. In his reign—possibly at the suggestion of Bishop Elphinstone, founder of King's College in the University of Aberdeen, and himself a lawyer of European reputation—a statute of 1496, c. 3, ordained that barons and freeholders should cause their sons to be educated in Latin in the schools and in law at the universities. This measure was presumably designed to improve the quality of the feudal courts which administered so much of the law—but it is doubtful whether the hopes of the legislators were rewarded by results. In Scotland the Universities of St. Andrews (founded 1411), Glasgow (founded 1451) and Aberdeen (founded 1494) all gave instruction in canon law prior to the Reformation, and the civil law was also taught in these universities—though in St. Andrews only for a short period in the sixteenth century.

Though the civil law was taught in the Scottish universities, and at times by men of distinction, it is also clear that the general standard of instruction could not compete with the fame of the Continental commentators. Accordingly, it was to the law schools, first of France, later of the Low Countries, that aspirants to success in the Scottish courts flocked in great numbers. Sir John Gilmour, who was appointed Lord President of the Court of Session in 1661, was described by Mackenzie as an exceptional example of one to have reached high judicial office "sine ullo juris civilis auxilio doctissimus raro miraculo dici poterat." The close political relations which were maintained between Scotland and France from the fifteenth to the seventeenth century naturally reinforced the incentive to study there, and Scottish lawyers of eminence, such as Craig, Mackenzie, Spottiswood and Fountainhall studied at Orleans, Poitiers, Bourges or Paris. In the sixteenth century Scotland produced three eminent Civilians in Scrimgeour of Geneva, Barclay of Angers, and Henryson of Bourges (who latterly became an Extraordinary Lord of Session). In the seventeenth and eighteenth centuries—despite the Union of the Crowns in 1608 and of the Parliaments in 1707—Scottish lawyers studied at Leiden and Utrecht. Between 1600 and 1800 about sixteen hundred Scottish students studied law at the University of Leiden alone, of whom the greater number were there towards the end of

44 A.P.S. II, 238.
45 For refs. see Smith, Studies, pp. 28, 62.
46 Ibid., p. 28.
47 Ibid., p. 46.
49 Idea Eloquentiae Forensis.
the seventeenth century. Returning to Scotland they passed advocate on their knowledge of civil law, and to this day an Intrant to the Scottish Bar must present a thesis in Latin on a Title from the Pandects. Stair was in exile in Leiden from 1682 to 1688; Lord President Forbes (1685–1747) was a student at the same university; and Lord President Dundas (1713–1787) studied at Utrecht. Boswell, who went to study at Utrecht in 1763, found other distractions which impeded his studies, and he may not have been alone in this respect. Nevertheless, the fact of studying at the Continental universities in itself was bound to make Scotsmen aware of a European tradition of culture, and thus to avoid the insular and chauvinistic attitude of too many of the English common lawyers of that time. The Library of the Faculty of Advocates (founded by Stair’s contemporary, Mackenzie) contained fifteen hundred libri juridici, of which the overwhelming majority were Continental treatises, mainly from Leiden. Lord Cooper, on an analysis of a section of Stair’s works, concludes that Stair was familiar with a mass of Continental treatises, mostly commentaries on the Roman law or on selected topics from that law, and that a large proportion of the books which he used were in his day comparatively modern, the authors being French, Dutch and German jurists of the seventeenth century. Further, Lord Macmillan has noted in Stewart’s Exrx. v. L.M.S. regarding the Scottish lawyers of the seventeenth and eighteenth centuries,

From their sojourn in Holland the aspirants to practice in the Parliament House brought back with them not only the principles which they had imbibed from the masters of the Roman-Dutch law, but also the treatises with which the law schools of the Dutch Universities were so prolific. No Scots lawyer’s library was complete in those days which did not contain the works of Grotius, Vinnius, the Voets, Heineccius and other learned civilians. Collections of decisions of the Scottish judges were few and inaccessible, and the Court of Session, with its predilection for principle rather than precedent, heard many arguments adorned with citations of the Roman law and its Dutch Commentators.

A full discussion of the influence of the Roman law in Scotland would be out of place in the present volume. A few observations must suffice to outline the rise and fall of its influence. The founding of a Court of Session in 1532 with a permanent professional judiciary, and the trend of legal education, gave Roman law increasing influence from 1532 until about the mid-eighteenth century. In the earlier stages, reported judgments and arguments were fortified by citations from civilian authorities—some of which may have been added ex

50 Few, however, are very proud of their work in this respect.
52 1943 S.C. (H.L.) 19 at p. 38. Paradoxically every one of these authorities can be cited against Lord Macmillan’s use of the term actio injuriarum—see post, Chap. 29.
post facto by the reporter. The full influence of Roman law was subsequent to the publication of Stair's *Institutions* in 1681—which was virtually a Restatement of Scots law. Balfour and Hope (sixteenth and seventeenth centuries), for example, in their *Practicks*, have a very different approach from that of Stair; while Craig's *Jus Feudale* (which is also pre-Stair), in Professor Stein's phrase, incorporates "much Roman law, using it, as it were, as mortar to bind together the irregularly shaped slabs of feudal law into a harmonious whole." For Stair's contemporary, Mackenzie, Roman law was a principal source of Scots law—"it has great influence in Scotland, except where our own express law or customs have receded from it." Criminal indictments might in his time aver that conduct was punishable as contrary to the civil law. Stair himself regards Roman law not as a law binding for its authority, yet as being, as a rule, followed for its equity." Both as judge and as author he relied heavily upon this law. Bankton (mid-eighteenth century) considered our judges ought to direct themselves by the Civil and Canon laws as a rule when our own statutes and customs fail." Erskine (whose *Institutes* were published posthumously in 1773) observed that "Great weight is to be laid on the Roman law in all cases not fixed by statute or custom." 57

Towards the end of the eighteenth century, however, Scottish institutional treatises were exercising influence in a field where the Continental commentators had formerly been cited without competition from Scottish legal literature. Moreover, the judges, having settled practice in a particular way, were becoming reluctant to review their decisions on the ground merely that another interpretation would be justified by commentators on the *Pandects*. In civil matters the appellate jurisdiction of the House of Lords was leading to the development of doctrines of precedent influenced by English notions. The Napoleonic Wars interrupted the tradition of study abroad, and among its consequences was the replacement of Roman-Dutch law in the Netherlands by a code. The code, rather than the Roman law, took first place in Continental legal studies; and this was no attraction to Scottish students—who, in any event, seem to have lost interest, in Leiden at least, after 1777. Further, the reorganisation of the Court of Session and improvements in the technique of reporting increased the importance of case law at the expense of the

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53 See "The Influence of Roman Law on the Law of Scotland" (1957) 23 *Studia et Documenta Historiae et Juris* 154, for the most up-to-date and comprehensive treatment of Roman law influences in Scotland. A revised version is expected to be published shortly in the Jur.Rev.
54 *Institutions* (pub. 1684), p. 3.
55 *Inst.* I, 1, 12.
56 I, 1, 42.
57 I, 1, 41.
**Corpus Juris.** Reorganisation of legal education in Scotland also played a significant part. Accordingly, in the nineteenth century the importance of Roman law in Scotland declined, mainly because of altered customs in legal education, though a few Scottish students of law studied in the German centres of Roman learning such as Halle and Göttingen—for German law was not then codified—and Roman law continued to be taught according to *modernus usus*.

It would be fair to conclude that the law of Rome—or possibly at times what Scottish lawyers thought was the law of Rome—had been a factor of major importance at a formative period of Scots law. It had inculcated a respect for principle rather than for precedent; it had encouraged the profession to look to the learning of Europe for solutions to new problems, and it may well have saved Scots law from absorption by English law. The Scottish law of movable property and of obligations owes a very substantial debt to Roman law sources. Roman law categories and terminology have also been used in Scotland to cover legal concepts very different from those contemplated by Justinian—as for example the Scottish law of interdict. The *Digest* is still cited from time to time (but with decreasing confidence by the profession in its grasp of the Latin), and Roman law is still a compulsory study for practice of the law in Scotland. It remains a mine which can still be exploited for solutions to undecided questions. The truly “Roman” phase of Scots law, however, in the writer’s view, did not continue beyond the Napoleonic Wars. By this era Scots law had largely absorbed into itself the rules and principles of Roman jurisprudence necessary for its future development. Modern Scots law, with which this book is concerned, is a national product, drawing on a wider range of inspiration than the laws of Rome or England—though the influence of the latter is particularly noticeable, mediated through Parliament in its legislative and judicial capacities; and the influence of the former is by no means spent as a potential comparative source, especially as expounded in contemporary South African law. Moreover, only by retracing established doctrines to their civilian sources can modern Scots lawyers maintain their legal heritage as a coherent, rational and vital system in the conditions of the twentieth century.

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58 In 1850, moreover, written arguments or “cases,” which had abounded in citations from Roman law, were finally abolished in favour of oral argument, 6 Geo. 4, c. 120; 13 & 14 Vict. c. 36.
CHAPTER 2

THE FORMAL SOURCES OF SCOTS LAW

The formal sources of the law of Scotland which may be relied upon as giving authority to a legal rule may be considered under five heads: namely, legislation, authoritative writings, judicial precedent, custom and equity. The authority attached to each of these sources has varied at different stages in the history of Scots law.

LEGISLATION

Enacted law in Scotland comprises prerogative legislation by the Crown, the statutes of Parliament and the laws promulgated by an authority to which Parliament has delegated powers of legislation. Delegated legislation includes statutory instruments, rules and by-laws—all of which are only valid if intra vires of the authorising statute.

Legislation by Royal Prerogative

The Crown, through Orders in Council, Letters Patent or Proclamation, still exercises a residual power to legislate. This power is seldom exercised regarding the internal affairs of this country in times of peace, but has been used extensively to regulate the affairs of overseas territories, and in time of war to control commerce, reprisals and contraband.

Acts of Parliament

Acts of Parliament to which the courts must give effect include the statute law of the pre-Union Scottish Parliament (Scots Acts) so far as still in force, and statutes passed since the Union by the new Parliament at Westminster. Since the Union of 1707 the British or United Kingdom Parliament has legislated for Scotland and England alike, but has developed its rules and procedure from the English Parliament which sat at Westminster before it. A detailed discussion of the law and conventions of the British Constitution regarding the legislative process would thus be out of place in a work on Scots law. Unless perhaps they purport to infringe some entrenched provision of the Union Agreement, Acts of Parliament

3 For an admirable summary of the categories of legislation and the rules regulating construction see D. M. Walker, The Scottish Legal System, p. 198 et seq.
which concern public rights cannot be questioned in a court of law. It was provided, however, by Article XVIII of the Union Agreement, 1707, that, though matters of public right should be subject to change at the discretion of Parliament, alterations should not be made in the law of Scotland relating to private right except "for the evident utility of the subjects within Scotland." The Scottish courts have not yet had occasion to decide whether they have power \(^2\) to declare an Act of Parliament relating to private right to be *ultra vires* because not for the "evident utility" of the lieges. They have not, however, rejected that possibility: *MacCormick v. Lord Advocate*.\(^3\) Legislation by Parliament may either be by public general statute or by local or personal Acts which confer powers on local authorities or deal with such matters as private estates or status. If an Act is to apply to Scotland alone, the word "(Scotland)" is now included in the title, while, if a measure is not to apply to Scotland in whole or in part, this should be expressly stated. Nevertheless the question of whether an Act applies to Scotland has often been left as a doubtful matter for judicial construction. Statutes passed by the United Kingdom Parliament, unless the contrary appears, are presumed to apply generally to Great Britain and Northern Ireland; but the presumption that such an Act extends to Scotland may be rebutted if it is expressed as an amendment of a statute from which Scotland was expressly excluded, or in some cases if technical expressions of English law have been used without mention of Scottish equivalents.\(^4\)

It is clear that the importance of statute law as a source of law has increased enormously during the nineteenth and twentieth centuries, and, although some may complain that there is too much legislation, clearly complex social, economic and financial relationships cannot be regulated by the ponderous methods of case law alone. The United Kingdom Parliament sits at Westminster. When new problems emerge affecting the whole United Kingdom in identical manner, it is convenient that the same statutory provision be made for all concerned.\(^5\) Much of the mercantile law of the

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\(^2\) Though English authority may be helpful in considering the scope of this power, the author must dissent emphatically from the statement in Gloag and Henderson, (p. 1), "It is probably settled that in questions of constitutional law English decisions are authoritative in Scotland." The Scottish contribution to constitutional law will be more apparent when Professor J. D. B. Mitchell's authoritative study is published in the near future. Meanwhile, such cases as *Glasgow Corp. v. Central Land Board*, 1956 S.C. (H.L.) 1, point the dangers of making general assumptions such as that quoted.


\(^5\) The possibility that Britain may enter the European Economic Community prompts the reflection that mercantile legislation may also have to take into account Continental solutions, and with these Scots law has traditional associations. See Smith, *British Justice: The Scottish Contribution*, Chap. 5.
United Kingdom, for example, is now governed by reasonably well-considered and carefully drafted enactments, which approximate to a common code applicable (with relatively few specialties) to the whole United Kingdom. In the field of mercantile law uniformity of practice is certainly desirable—though not perhaps at the price of the confusion which has resulted, e.g., from the Sale of Goods Act, 1893. Too frequently statutory assimilation of Scottish and English law has been carried out without realisation on the part of the legislators (including Scottish Members) that fundamental principles of Scottish law may be affected thereby. This policy of assimilation has at times done violence to the Scottish system, not through any intention on the part of those who made the laws, but through ignorance or apathy regarding the possibility of Scotland and England having adopted different approaches in principle to common problems.

The Scottish legal profession in 1953 made representations to the Royal Commission on Scottish Affairs regarding a number of points upon which unnecessary difficulty is created by certain practices in United Kingdom legislation. Objection was taken to the practice of extending to Scotland what are essentially English statutes, conceived in English legal terminology, by the device of an “application section.” At times this method makes it difficult if not impossible for a Scottish lawyer to construe the legislation with confidence—and causes an intolerable waste of time and effort. It is not possible in the complex conditions of today to ensure that all laws should be drafted so that he who runs may read, but they should not be made more difficult for one sitting in Edinburgh to understand than for one sitting in London; and it was recommended that, wherever a statute might lead to difficulties in interpretation if drafted to apply to the whole United Kingdom, measures applicable to Scotland and England separately should be enacted. This view was accepted in the Report of the Royal Commission presented in July 1954 (Cmd. 9212), but has had little noticeable influence on Government policy.

An associated complaint is of the inordinate delay in securing parliamentary time for certain reforms of Scottish law on which there is fairly general agreement among Scottish lawyers—for example the law of intestate succession. English lawyers, of course, have comparable, but less serious, difficulties. If the Government’s legislative programme is crowded, as it usually is, it naturally does not wish to fight over substantially the same ground twice with an English and a Scottish Bill. Moreover, in the Scottish Standing Committee the motives for the Opposition in attacking a particular item in the Scottish legislative programme may have the oblique object of frustrating a measure to be considered later in the session. The Government is tempted therefore to concentrate on legislation for
Britain as a whole, and to recognise, if at all, the specialties of Scots law by re-enacting measures in Scottish form—as was done, after constant rebuffs, in the case of the Town and Country Planning (Scotland) Act, 1959. Unless or until there is some devolution of legislative powers to deal with domestic problems of Scottish law reform—such as succession—the present irritations are almost bound to continue. The present system, moreover, virtually precludes Scots lawyers from participating in the processes of law-making.6

Private Legislation Procedure

In considering legislation as a source of law, mention must be made of private legislation procedure in Scotland. The provisional order system, which is a method alternative to the private Bill system for the obtaining of parliamentary powers, has been widely extended in Scotland.7 Though the particular procedure to be followed varies according to the nature of the order to be obtained, the general form of procedure is standard. Application is made to the Secretary of State for a provisional order; an inquiry is held locally by Commissioners into the merits of the proposals; and, if the application is found to be justified, a provisional order is then issued. Ultimately Parliament passes an Act confirming the order. Subject to this final control at the stage of confirmation, Parliament under provisional order procedure delegates the duty of considering the merits of the proposals. The whole procedure is cheaper and simpler than by private Bill.

Scots Acts

Certain special considerations apply to those statutes of the Scottish pre-Union Parliament which still remain in force. Many of the pre-Union statutes bear testimony to the skill and foresight of their authors and are still quite frequently involved in matters of land law, trusts, and prescription in particular.8 There are two collections of revised statutes of the Scottish Parliament covering the period 1424–1707, both being published in 1908, one by authority in the second edition of Statutes Revised and the other by Messrs. Green of Edinburgh. Lord Cooper,9 however, made out a persuasive case for the acceptance as valid legislation of certain earlier statutes dating as far back as the twelfth century, and the authoritative edition of the Acts of Parliament of Scotland by Thomson and Cosmo Innes

7 See generally Private Legislation Procedure (Scotland) Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 52).
9 (1952) 64 Jur.Rev. 197.
begins at 1124. It may be regretted that, despite important modifications since 1908 of the Scottish Acts, the third edition of Statutes Revised\textsuperscript{10} (which is intended to prepare the ground for extensive legislative consolidation) notes alterations to English legislation from 1235 to 1707, but, as a result of policy or apathy in London, Scottish pre-Union legislation was entirely ignored.\textsuperscript{11} Recently, however, the Lord Advocate has arranged for a survey to be undertaken of pre-Union Scots Acts.

Scots Acts may differ from the statute law of the United Kingdom in two important respects. First, they are subject to liberal rather than to literal interpretation, and special weight must be given to the construction placed on them by the Scottish courts shortly after the legislation was passed.\textsuperscript{12} One of the outstanding Scottish judges of all time, Lord President Inglis, when Lord Justice-Clerk, observed as follows on the practice of liberal interpretation:\textsuperscript{13}

If this had been a modern statute, I should have had no hesitation in holding that even practice following on it would not justify a court of law in interpreting these words in the way contended for by the pursuer. But the Act of 1621, like other old statutes, is open to a different rule of construction, and has received construction according to principles different from those applicable to modern statutes.

The old Scots Acts were published in very different circumstances from those in which modern legislation is passed. Often the laconic language is a general direction which the judges had to clothe with fuller meaning.

Secondly, it must be noted that the Scots Acts are certainly liable to repeal by proof of desuetude and contrary practice.\textsuperscript{14} Mere proof that the Act has not been relied on for a long period of time will not suffice; there must be proof of contrary practice or that the Act is out of keeping with modern conditions. The underlying theory seems to be that the general will, though expressed informally through custom, may repeal a formal statement of the community's will in form of a statute.\textsuperscript{15} As examples of repeal by desuetude there may be instanced the Act of James I (of Scotland) prohibiting the playing of football, and the Act of 1581, c. 116, requiring landed gentlemen,

\textsuperscript{10} Published 1950.

\textsuperscript{11} See this commented upon, 1930 S.I.T. (News) 240.


\textsuperscript{13} Thomas v. Thomson (1865) 3 M. 1160 at p. 1165.


\textsuperscript{15} Erskine, 1.1.45.
under penalty, to reside at their seats. There is a certain presumption
that Acts which are not included in the Schedule of legislation repealed
by the Statute Law Revision (Scotland) Act, 1906, are still in
observance. There are certainly disadvantages in the uncertainty
which prevails as to whether several old Acts (particularly those
relating to the observance of the Lord’s Day) are still in force. This
has been ably discussed by the late Sir Randall Philip. The doctrine
of desuetude has never been successfully invoked to repeal legislation
of the new British Parliament at Westminster which was established
in 1707; this doctrine is unknown to English law and dicta have
suggested that the English rule must apply to the construction in
Scotland of post-Union legislation. The question has never been fully
argued and may theoretically be regarded as not conclusively decided
—especially where legislation is applicable only to Scotland.

Acts of Sederunt and Acts of Adjournal

Judicial regulation of adjective law under statutory authority is
only one aspect of delegated legislation, but historically the Scottish
courts have exercised wider powers. As supreme civil tribunal of
Scotland, the Court of Session has an inherent power to regulate its
own procedure by Acts of Sederunt. In the sixteenth and seventeenth
centuries, however, and to some extent in the eighteenth century,
certain of these Acts trespassed on the province of the legislature. An
interesting commentary on the scope of Acts of Sederunt is to be
found in the Report (dated February 27, 1810) of the Senators of the
College of Justice to the House of Lords in response to an order
from that House—when, one may note, it was pointed out that the
doctrine of desuetude applied to some of the older judicial legislation.
Acts of Sederunt, which rest ultimately on statutory authority, form
part of the written law of Scotland and were codified in 1913; but
the codifying Act of Sederunt has been superseded quaod Rules of
Court by Rules enacted in the Act of Sederunt (Rules of Court
Consolidation and Amendment) Act, 1948. The supreme criminal
court of Scotland, the High Court of Justiciary, exercises comparable
legislative control in procedural matters affecting the criminal courts
(including the sheriff courts) by means of Acts of Adjournal.

16 Edw. 7, c. 38.
18 e.g., Lord Deas in Bute v. More (1870) 9 M. 180 at p. 189; see also Gloag and
Henderson, Introduction to the Law of Scotland, 6th ed., p. 4; D. M. Walker,
The Scottish Legal System, p. 206.
19 Conferred originally on the court’s constitution by the Act 1532, c. 36.
20 S.I. 1948, No. 1691 (S. 149) enacted under the Administration of Justice (Scot-
land) Act, 1933 (23 & 24 Geo. 5, c. 41).
Delegated or Subordinate Legislation

A great deal of legislation in modern times is not imposed directly by Parliament, but by persons or bodies authorised by the legislature to make law within the scope of the statutes conferring the authority. Such statutes may, for example, authorise Orders in Council, or regulations to be made by Ministers of the Crown, or Rules to be made by rule-making bodies such as the superior courts, or by-laws to be made by a local authority or public corporations. By the Statutory Instruments Act, 1946, s. 1, Orders in Council, Ministerial legislation and rules of procedure made by the courts are designated "statutory instruments." The validity of any subordinate legislation depends upon whether it is *intra vires* in terms of the authorising statute and also in many cases upon the question whether the purported exercise of power has been in good faith. In deciding these questions the respective functions of Legislature, Executive and Judiciary may be sharply in issue, and superficial treatment of them could be most misleading. They must be studied more fully in the context of detailed treatises on administrative and constitutional law.\(^{21}\)

The somewhat prevalent assumption that the conclusions which an English court would reach on questions of delegated legislation must necessarily be reflected in Scottish practice can be confounded by citation of leading judicial decisions and by the researches of an expert in the field of administrative law such as Professor J. D. B. Mitchell. In what is presumably a pilot study for his authoritative treatise, Professor Mitchell has made a valuable contribution in his article "Reflections on Law and Order."\(^{22}\) To Sir Carleton Allen's contentions\(^ {23}\) that "Sub law grows in range and vigour" and that "the march of events has defeated the resources of the common law," Mitchell rightly replies from the viewpoint of a Scots lawyer that "neither a simple nor a general answer can be given."\(^ {24}\) He notes that the attitude of Scottish judges and the generality of Scottish procedural machinery facilitate to a greater extent than in England the review of administrative orders and decisions,\(^{25}\) and justly queries whether in present circumstances the fact of parliamentary scrutiny of delegated legislation is entitled to carry such weight as it does at the stage of judicial review.

\(^{21}\) An excellent summary will be found in Walker, *op. cit.*, note 18, *supra*; a detailed treatment may be expected shortly in Professor J. D. B. Mitchell's treatise on *Scottish Constitutional Law*.


AUTHORITATIVE WRITINGS

The idea of a judicial precedent as binding authority is relatively recent in the history of Scottish law. In the eighteenth century and before, advocates fortified their argument with copious citation from “the foreign doctors.” While such citation is now only occasional and merely persuasive authority, the works of certain Scottish authors, referred to as the “institutional writers,” are regarded as of high authority. They provide a valuable foundation of legal principle in Scots law. In civil matters, for example, Craig, Mackenzie, Stair, Bankton, Erskine and Bell are regarded as of institutional status; likewise Kames on equity; and Mackenzie and Hume on criminal law. (Their place in Scots law is comparable with that of Continental jurists such as Domat and Pothier in France during the era before Napoleon’s codification. Indeed, but for the long term consequences of the Union, Scottish civil law might well have been codified on institutional foundations like the Continental systems with which it was closely associated in the eighteenth century.)

The precise relative authority of an institutional opinion in comparison with a judicial decision is uncertain. An opinion from Stair, Erskine or Bell, for example, would never be rejected by a Scottish court without anxious consideration—“When on any point of law I find Stair’s opinion uncontradicted, I look upon that opinion as ascertaining the law of Scotland,” said Lord Benholme in *Drew v. Drew*.26 “The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland,” observed Lord President Inglis in *Kennedy v. Stewart*.27 Lord Normand, in an address to the Holdsworth Club of the University of Birmingham in 1941, attributed to the Scottish institutional writers very high authority indeed.28

Stair, Erskine and Bell are cited daily in the courts, and the court will pay as much respect to them as to a judgment of the House of Lords, though it is bound to follow a judgment of the House of Lords whatever the institutional writers may have said.

The present writer would submit that the authority of an institutional writer is approximately equal to that of a decision by a Division of the Inner House of the Court of Session, and will venture the comment that certain recent dicta which would give them less weight by comparison with judicial precedent purport to alter the very foundation of Scots law with no greater justification than the *ipse dixit* of an individual judge.

No definition can be given of when a writer becomes institutional; thus Alison is considered by some and not by others to be an institutional writer on criminal law. Again, it is not all the works of a writer

26 (1870) 9 M. 163 at p. 167.
27 (1889) 16 R. 421 at p. 430.
of institutional calibre that are regarded as of institutional authority—as Lord President Normand (as he then was) explained in Fortington v. Kinnaird.29 In that case, the First Division had been referred to the lectures delivered by Baron Hume in 1821–22, when he held the Chair of Scots Law at Edinburgh, lectures which had recently been edited and published by the Stair Society. The Lord President pointed out that, though Hume's Commentaries on the Law of Scotland respecting Crimes (first published in 1797) enjoyed institutional status, the same authority could not be attached to the publication of lectures without his authority, especially since Hume had had ample opportunity to publish or direct publication prior to 1838, when he died.

Legal treatises which do not fall within the category of "institutional writings" enjoy authority according to the reputation of their authors. Though it is asserted that theoretically the work of a living author is never authoritative, in fact books by living authors—such as Candlish Henderson on Vesting30—have exercised considerable influence on the law. Without adequate legal literature Scots law will not survive as a coherent and rational system. Those who assume the labour of contributing to it have the satisfaction of knowing that their errors are binding on no one, while the correction of them judicially may tend to improvement of the law. In certain chapters of the law English legal treatises are freely quoted and, provided no specialty of Scottish law is involved, these can prove most helpful. There is, of course, the danger that latent specialties of English law may not be apparent to the Scottish practitioner, and, if comparative techniques are invoked to solve Scottish legal problems, it is highly undesirable to refer to one foreign system only.

**JUDICIAL PRECEDENT**

On the whole, Scottish judges and legal writers have tended to evade consideration of doctrines of precedent. The present writer has considered these doctrines in some detail in his book Doctrines of Judicial Precedent in Scots Law,31 and the conclusions stated here may be found argued in detail in that book. Until the nineteenth century, though a series of decisions could determine the law, single precedents did not have that effect. During the eighteenth century Lord Kames frequently pointed out that there was a cycle in the importance of case law. After an authoritative institutional work had appeared, the law was for a time reasonably clear and ascertainable. Inevitably, however, the law had to be carried farther by judicial decision (though, of course, Continental doctrines of precedent rather than stare decisis

30 Published 1938.
31 Published 1952.
THE FORMAL SOURCES OF SCOTS LAW

were then accepted in Scotland). Eventually the ground covered by judicial decisions required consolidation in a new institute which resolved doubts regarding the body of case law.

Regard for the rules of *stare decisis* applicable in normal circumstances has crept in imperceptibly; and modern doctrines of precedent seem to be due principally to the influence during the nineteenth century of the appellate jurisdiction of the House of Lords, to improved methods of law reporting, and to the reorganisation of the Court of Session. Though regard for case law has developed in criminal law much as in civil law, it may well be that some rules regarding precedent in Scotland may vary according to which hierarchy of courts is exercising jurisdiction. The rules in the Justiciary Court and in the Lands Valuation Appeal Court need not be identical with those adopted by the Court of Session. Superior courts, it is suggested, may exercise a measure of choice as to the rules of precedent which they will observe, and, if courts are not in the same hierarchy of jurisdiction, it is not necessary for them to select the same rules of precedent. Moreover, it is submitted, that the courts may from time to time modify their views on the authority to be attached to judicial precedent. The supreme courts of Scotland at one time did not regard their own decisions or those of the House of Lords as binding (quoad the Court of Session) in future cases. Thus the logical paradox appears that on a doctrine of strict precedent, these courts would be bound by earlier authority to reject that very doctrine. In the interest of consistency they have, however, deliberately chosen to use judicial precedent as a means of developing the law. Precedent is a good servant and a bad master, however, and (apart from the binding force of precedents established by the House of Lords) there is nothing to compel the Scottish judges to accept any rule which offends their sense of justice, or which would subject them to servile compliance with recognised errors in policy or interpretation propounded by those who may now—too late—repent of them in the light of fuller understanding.

Case law, broadly speaking, raises two main questions. First—What courts in a hierarchy are bound by previous decisions of another court or by decisions pronounced by themselves? Secondly—What

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34 Moreover, when the Court of Session exercises Exchequer jurisdiction, it may well be that the rules of precedent should conform to the essentially English nature of Exchequer causes. *Op. cit.* p. 35, and see *I.R. v. Barr*, 1961 S.L.T. 343.
35 In *Breen v. Breen*, 1961 S.C. 158, the Second Division was clearly of opinion that *McLachlan v. McLachlan*, 1943 S.C. 382, was contrary to principle and could not stand with their decision in the instant case. This, it may be thought was sufficient to dispose of it, without, as Lord Strachan suggested, reconsidering it in a fuller court.
element or elements in a previous decision must be regarded as authoritative?

To understand the effect of precedent in the various courts, it is necessary to observe the system of appeals within particular hierarchies of courts. In the principal towns of each county there are appointed one or more resident judges called sheriffs, who are usually chosen from the Scottish Bar and who exercise civil and criminal jurisdiction comparable with, though more extensive than, that of the county court judge and recorder in England. The highest civil court in Scotland is the Court of Session, which always sits in Edinburgh and comprises sixteen judges. The normal organisation of the Court of Session is into an “Inner House” (two chambers each of four judges, known as the First Division and the Second Division respectively); and an “Outer House” (eight judges who sit singly and are known as Lords Ordinary). The Court of Session is, however, fundamentally a collegiate body, and, in cases of difficulty or importance, through special sittings of the court its collegiate powers may be exercised. Appeals in civil cases lie either from a sheriff or Lord Ordinary to the Inner House, and from the Court of Session to the House of Lords, which is the final appellate court for civil causes originating in Scotland. Since the judges in the House of Lords are for the most part trained in English law, the appellate jurisdiction of Parliament has introduced much English doctrine into Scottish law, either directly or indirectly, through encouraging, in certain branches of the law, the citation by counsel of English precedents to the House or to the Court of Session.

In criminal causes, no appeal lies to the House of Lords, the supreme criminal court in Scotland being the High Court of Justiciary, which comprises the Lord Justice-General, the Lord Justice-Clerk and all the other judges of the Court of Session as Lords Commissioners of Justiciary. There is, however, no division of the High Court into permanent chambers and, again unlike civil jurisdiction, judges go on circuit to try the graver crimes with a jury of fifteen. Until the Criminal Appeal (Scotland) Act, 1926, came into force, no appeal was competent from conviction on indictment, but, since that date, appeal against conviction or sentence after trial by a judge and jury may be taken to the High Court of Justiciary in Edinburgh, which also hears other appeals in criminalibus from the lower courts. The

36 Statutory tribunals manned by the judges of the Court of Session include the Lands Valuation Appeal Court and the Election Petition Court. The Land Court is presided over by a chairman, who takes precedence equivalent to a judge of the Court of Session. Land Court decisions are fully reported, as are decisions of the Lyon Court, which has a very ancient jurisdiction in matters of heraldry and arms. 37 16 & 17 Geo. 5, c. 15.
It may be accepted that the Court of Session and the sheriff courts are bound by previous decisions of the House of Lords in Scottish appeals—provided, at all events, that such decisions were not reached as a result of concessions by counsel which may have been unwarranted. Contrary to the views of some writers and judges, there is now high authority for the proposition that the Court of Session is not absolutely bound by decisions of the House of Lords dealing with questions of Scots law raised in English or Irish appeals. Nor, it is submitted, would the Scottish courts be bound by precedents of the House when dealing in English appeals with United Kingdom statutes or with alleged questions of general jurisprudence. Such decisions of the supreme appellate court will, however, be approached by Scottish judges with appropriate respect, and may justify a Scottish court in departing from a view of the law hitherto accepted in Scotland. In *Glasgow Corporation v. Central Land Board*, Lord Simonds stressed that “it would be clearly improper to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries,” and Lord Normand rejected the conclusion that “the law of Scotland is to be altered by a side wind and that we are to have our long-established rules of law overturned by dicta pronounced without adequate citation of Scottish authorities and without debate.” His Lordship also spoke caustically of the value of a decision of the House of Lords in a Scottish appeal where judgment had been given on the assumption that the rules of English law applied. Since the *Central Land Board* case was not concerned with statutory interpretation, Lord Simonds’ reference in that case to the binding effect of a House of Lords precedent in cases of statutory interpretation was strictly *obiter*, and it may be submitted with respect is not altogether sound. Even when a United Kingdom statute is under review, it cannot be assumed that in an English appeal interpretation will be assisted by a consideration of factors relevant to Scots law. Thus words of general meaning such as “infant,” “grievous bodily harm,” and “charity” have special technical implications to English lawyers, which may not be applicable to Scots law, and it would be unreasonable to extend these specialties to Scots

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38 Judicial Precedent, p. 54 et seq.
39 1956 S.C. (H.L.) 1; see also R. Cross, Precedent in English Law, p. 15.
40 1956 S.C. (H.L.) 1 at pp. 9–10.
41 At p. 17.
42 At p. 13.
43 e.g., in the Homicide Act, 1957 (5 & 6 Eliz. 2, c. 11).
law merely because the House of Lords applied them first in an English appeal. It is significant that in construing the Criminal Evidence Act, 1898— which applies to both Scotland and England—the High Court of Justiciary has not adopted the interpretation of the House of Lords.

In the past the attempt to invoke the idea of "general questions of jurisprudence" to extend the effect of House of Lords precedents laid down in English appeals to Scotland caused considerable confusion and resentment. As Lord Normand makes clear, until there has been citation of authority and debate it must always be a mere matter of conjecture whether any particular question is one of general jurisprudence. Of course, the Scottish courts themselves may conclude after argument that a decision of the House of Lords in an English (or Irish) appeal deals so clearly with a matter common to the system concerned that it would be merely putting a party to the expenses of an appeal to the Lords to hold in his favour on the strength of a previous Scottish decision which conflicted with a subsequent precedent in the ultimate court wherein that decision had been considered and rejected. In such a case, the Court of Session may well elect to apply the principle of what is technically an English precedent—but to do so is only to treat precedents as servants and not as masters. (A similar attitude may be taken by the English courts as in the sequellae to Donoghue v. Stevenson South of Tweed.)

It must be stressed emphatically, however, that it would be altogether inconsistent with the fundamental severalty of administration of justice in Britain to regard any Scottish decision as "overruled" in the House of Lords except in a Scottish appeal. Dicta to the contrary in Davie v. New Merton Board Mills and Sullivan v. Gallagher and Craig cannot prevail over the basic principles of Scottish jurisprudence.

It has not yet been decided that the House of Lords is bound quoad Scots law by its own previous decisions. The doctrine of "certainty and finality" enunciated in the English appeal London Street Tramways v. L.C.C. has no roots in Scottish practice—which indeed seems to have recognised the opposite view, namely that a final court of appeal has the duty to review the law when circumstances require. There has, however, during the past few years been a tendency for the House of Lords to increase the rigidity of precedent,

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45 61 & 62 Vict. c. 36; see post, p. 232.
48 1959 S.C. 243 esp. at p. 264; and see generally W. A. Elliott, 1959 S.L.T. (News) 97, also ibid. T. B. Smith at p. 221.
and from a practical viewpoint it is difficult to anticipate the formulation by that House of more liberal rules for Scottish appeals than are applied in those which are brought up from English courts.

Within the Court of Session itself the practice seems to have crystallised that the decisions of a Division (a chamber of three or four judges) normally binds both Divisions, and that conflicts are to be resolved and bad precedents rejected only by convening a fuller court of seven or sixteen judges. There is, however, no fixed rule that every single decision of a Division of the Court of Session is irrevocably binding, and in exceptional cases a decision directly in point may not be followed. The power of the Court of Session to review a questionable precedent in a fuller court specially convened for the purpose, and to reorientate the law in accordance with current social needs, gives the system greater flexibility than that of England. This power of review is, of course, lost when an appeal is taken to the House of Lords, which may well apply English doctrines of stare decisis. Despite some authority to the contrary, it is not decided conclusively that even the whole Court of Session is irrevocably bound by its own previous decisions. In any event the Scottish courts do not accept the doctrine propounded by the English Court of Appeal in Young v. Bristol Aeroplane Co.—namely that the decisions of a Division of the court have the same authority as those of the full court. The Court of Session is a collegiate body, and it is contrary to principle that the majority of judges should ever be bound by a minority.

A Lord Ordinary (a judge of the Court of Session sitting alone) will follow the decisions of a Division of the court as binding upon him, but a sheriff, though inferior in the judicial system to a judge of the Court of Session, is not bound by the decision of a judge in the Outer House, nor do decisions by one judge in the Outer House bind another judge exercising like jurisdiction. A sheriff-substitute will usually follow the decisions of the sheriff-principal—as a usus fori.

So far as the criminal courts are concerned, it may also be accepted that the decisions of single judges are not binding on each other, but the practice has emerged that a quorum of the High Court of Justiciary will normally follow the previous decision of a like quorum unless a fuller court be convened to overrule the earlier case. Decisions of the House of Lords, even on a United Kingdom criminal

JUDICIAL PRECEDENT

statute, are merely persuasive. A single Scottish judge presiding at a
criminal trial accepts the law previously laid down by a bench of
judges. There is, however, no known reason which would restrict a
bench of judges of the High Court of Justiciary from reversing a
precedent which is shown to be undesirable. Normally this would
be done by convening a fuller court, but even a decision of the
Whole Court does not seem to be binding for all time if justice and
changed circumstances make expedient a change in the law.
Certainty and finality are no real substitutes for justice, though in
the interests of consistency precedent is normally followed, subject to the
safeguards of review of any suspect doctrine in a larger court.

Because the High Court of Justiciary is the final Scottish criminal
court, it may be that the Justiciary Court would apply even more
liberal doctrines of precedent than does the Court of Session, from
which an appeal lies to the House of Lords. It is not the nature of
criminal justice, but rather the fact that the High Court's decisions
can never be questioned in another court, that might justify a freer
interpretation of precedents. The English Court of Criminal Appeal
in R. v. Taylor considered that, though finality and certainty are
expedient in civil causes, they need not have equal weight in criminal
matters, where the consequences of rigidity may be more grave.
There are, however, circumstances in which the consequences of
losing a civil action may be more severe than those of conviction.
The defects of a rigid doctrine of stare decisis are manifest both in
civil and criminal causes. It may, however, be relevant to note that,
as the supreme Scottish courts in civilibus and in criminalibus com-
prise the same judges, there is not the same risk of collision between
civil and criminal courts as has occurred in England between the
Court of Appeal and the Court of Criminal Appeal.

So far as the actual binding content of a particular decision is
concerned, it appears that the Scottish courts accept two elements as
binding in normal circumstances—namely the "judgment itself" (the
decree pronounced on the material facts) and also the "ratio decidendi" (the reason or ground upon which a judgment is rested).
The interpretation of a precedent is an art rather than a science, and
the personal factor of the judge cannot be excluded either in ascertain-
ing what facts in a precedent are material—or in construing the ratio. Where the ratio decidendi is obscure, it may be disregarded, and this
fact makes easier the interpretation of decisions reached by divergent
or ambiguous judicial reasoning, especially when a number of

53 Judicial Precedent, p. 63 et seq.
54 [1950] 2 K.B. 368.
opinions have been delivered. The Scottish courts seem to be less obsessed with "the facts" of a case than is usual in the English courts. This seems to be due partly to the basis of principle — institutional and civilian — upon which Scots law is based; partly because the procedure on relevancy (anglice "demurrer") has focused attention on principle through a syllogistic consideration of the legal consequences to be attributed to facts averred but not proved; and partly because the machinery for striking bad precedents from the books enables a broader view to be taken of ratio decidendi than is possible in England. Thus a court of seven judges has been convened to consider and reject an expression of the law which in England would be considered mere obiter dictum, because it was desirable that the whole problem should be reconsidered.

There is also reason for believing that the Scottish courts are prepared on occasion to apply the maxim cessante ratione legis, cessat lex ipsa to precedents which seem to be on all fours with the case sub judice, and to consider a precedent in relation to social and economic developments. Thus in Beith's Trustees a mere quorum of judges refused to follow a precedent, though directly in point, pronounced by seven judges in 1875, the reasoning of the court in 1950 being that the social position of married women had altered substantially since 1875. It may be stressed that the earlier authority was not overruled, and would presumably still be valid if it were necessary to construe today what the effect of a marriage settlement would have been in 1875. This view may be contrasted with the English doctrine that when a precedent is unambiguous it cannot be rejected on grounds of obsolescence, except by a superior court. This consideration seems to suggest the anomaly that the Court of Session would experience no difficulty in setting aside the decision of a Scottish court prior to 1707, while, if the House of Lords were to apply the London Street Tramways doctrine to decisions of the Scottish courts prior to 1707, they would be obliged to reinforce many quite obsolete doctrines.

It may be added that, though the machinery for setting aside bad precedents by convening a fuller court makes possible law reform by the Scottish courts, the occasions on which it is used are relatively rare, though there are, however, usually several cases each year. The

58 Judicial Precedent, p. 98 et seq.
techniques of “distinguishing on the fact,” “doubting,” and “refusing to follow” are familiar in Scotland as in England, and are used when the occasion does not justify the convening of a fuller court. A substantial number of cases cited as authorities can usually be distinguished without difficulty, and are really irrelevant.

Custom

Custom or usage is a source of law in the sense that certain courses of conduct which have taken definite shape and gained general acceptance in a community may be given the binding force of law through recognition by the State. The importance of this source (which was formerly considerable) has declined as the legal system has developed. In the majority of cases customs first receive the stamp of official approval through the medium of judicial decisions, but it seems that such decisions are merely declaratory of the fact that a legal custom exists and is binding upon the parties. In this view then, custom is already part of the law before the actual decision. *Opinio juris seu necessitatis* has had the effect of giving it obligatory force.59

Some customs are judicially noticed by the courts and will be enforced without actual proof. On the other hand, some customs must be proved before they will be recognised and enforced by the courts.

The former class of customs, *i.e.*, those which need no longer be proved, are, in effect, the common law. The history and development of the common law is the history of the recognition of general or local customs and usages—what Stair describes as “our ancient and immemorial customs.” Recognition of them is to be found in judicial decisions, in authoritative writings and in inveterate practice.60

Other customs have to be proved to the satisfaction of the court, and the position is well stated by Erskine 61: “The most essential articles of our customary law are so interwoven with our constitution that they are notorious, and so require no evidence to prove them; as the laws of primogeniture and deathbed, the order of legal succession, the *legitim* of children, the husband’s courtesy, and the widow’s terce; but where any later usage 62 which has been gradually gathering strength is pleaded upon as law, the antiquity and universality of that usage must be proved to the judge as any other matter of fact, for all customary law is founded on long usage, which

60 See Learmonth *v.* Sinclair’s *Trs.* (1878) 5 R. 548 (a local custom of Caithness that the price of woodwork added by the tenant in farmsteadings should be repaid to him at the end of the lease); also Duncan *v.* Lodijensky (1904) 6 F. 408, *per* Lord Kinnear on the jurisdiction of the sheriff.
61 I, 1, 44.
62 *e.g.*, Clydesdale Bank *v.* Snodgrass, 1939 S.C. 805 (custom of Stock Exchange).
is fact. No precise time or number of facts is requisite for constituting custom, because some things require in their nature longer time, and a greater frequency of acts to establish them, than others.”

Proof of custom or usage as a rule of law must fulfil certain conditions: (a) The custom must have been generally acquiesced in so as to warrant the belief that it was a rule of law. As Erskine ⁶³ points out, there is no particular time qualification as in England. If the custom is established, then ignorantia juris neminem excusat. The distinction between “general” and “local” custom may not be always significant in law—since local customs may be survivals of general customs. Local forms of land tenure have been recognised as secured by custom. ⁶⁴ Thus “Kindly tenants of Lochmaben”—tenants in the demesne of the Bruces—enjoy a perpetual right of landholding on favourable conditions. ⁶⁵ (b) The custom must be definite and certain. (c) It must also be fair and reasonable. Thus in Bruce v. Smith ⁶⁶ landlords who gave no return for their alleged claim were held not entitled by custom to one-third of the small whales killed on the seashore adjoining the pursuer’s lands in a Shetland “whale drive.” (d) The custom must be consistent with legal principle. Of necessity a particular custom must vary from some general principle of law, but it must not run counter to an absolute rule of law, statutory or otherwise. ⁶⁷ Contrary usage can, however, assist in establishing desuetude of statute law—at least of a Scots Act (prior to 1707).

In considering customs and usages which have to be proved, an important distinction must be made between founding on custom as a rule of law on the one hand, and proof of usage for interpreting or implying a term in a contract on the other. In the former case the custom is referred to as being a rule of law which ought to be judicially recognised whether the parties knew of it or not. In the latter case, proof of a custom of trade is often allowed to augment or explain a contract in re mercatoria, on the grounds that the parties knew of and must be taken to have intended to act according to a trade usage.

**Equity**

Possibly because of the dangers of confusion with equity in the special sense attributed to that word by the English Chancery lawyers,

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⁶³ I, 1, 44.
⁶⁴ Udal tenure in the Orkneys and Shetlands is not a derogation from Scots law, but was already established before government by the Kings of Scotland was established. See post, Chap. 21.
⁶⁶ (1890) 17 R. 1000; see also Brodie v. Watson (1714) Mor. 14757.
it has not been customary to acknowledge equity as a distinct source of Scots law. Moreover, remarkably little attention has been paid to this aspect of the legal system by Scottish judges and scholars. In 1760 Henry Home, Lord Kames, published the first edition of his *Principles of Equity*; the fifth (new) edition was published in 1825. Apart from this work, which enjoys institutional status, no detailed study of equity in Scotland seems to have been undertaken until in 1952 Professor D. M. Walker submitted a Doctorate thesis entitled “Equity in Scots Law.”

The Court of Session has always administered law and equity together. Freedom from the tyranny of the forms of action and reverence for the Roman law gave Scotland no inducement to imitate the English solution. In Scotland, as on the Continent, it may be said that, in the ordinary administration of justice, equity and law have been so blended that, almost inevitably, these two elements are not usually considered separately. Yet, if the development of the legal system is studied, it will be found that equity—in the sense of reason or natural justice—has been invoked to rectify the rigidity of rules of law in many fields. Kames noted:

In England, where the courts of equity and common law are different, the boundary between equity and common law, where the legislature doth not interpose, will remain always the same. But in Scotland and other countries where equity and common law are united in one court, the boundary varies imperceptibly; for what originally is a rule in equity, loses its character when it is fully established in practice; and then it is considered as common law.

Professor Walker’s valuable study confirms this statement of Kames, and shows that equity has played its part in Scots law in most of the chapters of the law which in England were reserved to the Court of Chancery. Speaking of the ordinary equitable jurisdiction exercised daily in the Court of Session, Walker demonstrates that, with the conspicuous exception of the law of trusts, equity has not in Scotland so much added distinct subjects to our law but has rather introduced rules modifying and amending fundamental principles of common law. In the field of contract and succession, for example, he amply illustrates this proposition. In practice, therefore, equity as a separate source of Scots law (except in the exercise of the *nobile officium* of the Court of Session) tends to be overlooked both in Scotland and in the House of Lords. Lord Eldon considered that, until a division between law and equity was established in Scotland, the House of Lords could not understand and cope properly with

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68 See now his *Scottish Legal System*, pp. 253–254; and (1954) 66 Jur.Rev. 103.
Such a drastic innovation was fortunately never made for the convenience of the House of Lords—though it may be observed that the foisting on Scotland of civil jury trial in 1815 was for the convenience of that same august body. In some respects Lord Eldon's misgivings have been justified, since in Scottish appeals the judges of the House of Lords have on several occasions applied a ruling which the English common law would support but not the rules of equity—oblivious of the fact that in Scotland this dichotomy is not recognised. One may quote, for example, their difficulty in dealing with Scottish cases invoking error or good faith in contract. Similar lack of discernment is apparent in other fields—as in House of Lords dicta, which seek to restrict the operation of the *jus quaesitum tertio* in Scots law. Had it been fully appreciated that equity was a source of law in Scotland—albeit not administered as a separate auxiliary system—some anomalies might have been avoided.

Apart from the "ordinary" equitable jurisdiction of the Scottish courts which is apparent, for example, in the courts' intervention to modify exorbitant conventional penalties, to permit irritancies to be purged at the Bar, and to grant redress by decree of interdict or specific implement, there is an extraordinary equitable jurisdiction exercised by the Court of Session alone, recognised by the designation "nobile officium." 71 Kames observed 72 that when the Scottish Privy Council was abolished in the year after Union with England, the courts succeeded to its "noble office"—which had been exercised freely—to modify or abate the law. "No defect," he observed, "in the constitution of a State deserves greater reproach than the giving license to wrongs without affording redress . . . it is the province . . . of the sovereign and supreme court to redress wrongs of every kind where a peculiar remedy is not provided." 73 Not only did the Court of Session as supreme civil court assume these functions; the High Court of Justiciary, whose jurisdiction was formerly supplemented by the Scottish Privy Council, also administers a "criminal equity" by virtue of the *nobile officium*.

It is possibly significant that many of the matters referred to by the Institutional writers as appropriate to the *nobile officium*, in modern practice are not so regarded, and have been merged in the ordinary jurisdiction of the courts. This trend has misled some

70 Turbeville, " The House of Lords as a Court of Law " (1936) 52 L.Q.R. 189 at p. 205.
71 See Stair IV, 3, 1; Bankton 4, 7, 24; Kames, *Historical Law Tracts*, p. 231; Erskine I, 3, 22.
authorities into the belief that the term nobile officium (the extraordinary equitable jurisdiction of the Court of Session) is applicable to the general equitable jurisdiction of the court. In a case on charities, Lord President Clyde stressed the distinction:

Owing to its peculiar history the law of Scotland has never known either distinction or conflict between common law and the principles of equity. It is often said, and truly said, that in the law of Scotland law is equity, and equity law; and when a Scots lawyer uses the expression common law, he uses it in contradistinction to laws made by Parliament. From this it at once appears that considerable reserve must be used in accepting too literally some of the descriptions of the nobile officium in the textbooks, which might be read as suggesting that the nobile officium is only another name for our general jurisdiction, inasmuch as our whole jurisdiction is nothing unless equitable. It may not be easy to trace historically the connection between what the commentators called the nobile officium of the praetor, and what we know as the nobile officium of the Court of Session. But both the nature of our nobile officium and the limitations upon its competent exercise in the case of charitable bequests and trusts are readily discoverable from even a cursory examination of the law as administered by this court with regard to charities.

At the present day the nobile officium itself remains in theory the ultimate equitable power vested in the Supreme Court to intervene in order to modify or abate the rigour of the law when justice requires a remedy. In fact, like the Chancery jurisdiction in England, the Court of Session, in exercising this power, has become restricted by adherence to precedents, and has thus tended to surrender (perhaps not irrevocably) much of the initiative it claimed in the past. The chief heads of the exercise of the nobile officium are summarised in Mackay's Practice, and may be slightly expanded:

1. application by petitions not founded on statute, as for appointment of judicial factors;
2. applications for the appointment of public officers ad interim in the event of death or incapacity of the existing officer;
3. equitable jurisdiction with reference to charitable trusts;
4. on rare occasions the supplying of omissions in the provisions of statutes or deeds. It may appear that a particular case has been overlooked by the draftsmen of a statute, and in non-contentious proceedings the Court of Session may surmount the difficulty and supply the casus omissus by virtue of the

74 Gibson's Trs., 1933 S.C. 190 at pp. 198-199.
75 Valutius, De Judicibus, II, iv, 431; Barrolus, Ad Digestum, II 1, 12, De Jurisdictione omnium judicium.
76 1, 209, 214, 216.
77 Certain matters concerning private trusts were also dealt with through exercise of the nobile officium, e.g., Coats' Trs., 1914 S.C. 723; an extensive new statutory jurisdiction to vary trusts has recently been conferred on the Court of Session by the Trusts (Scotland) Act, 1961 (9 & 10 Eliz. 2, c. 57).
nobile officium. Where a statutory right has been conferred on certain specified persons, e.g., those over majority, the courts cannot, however, extend it to others, e.g., pupils.78 On the other hand, where in the circumstances there was no statutory provision for the resuscitation of a company after its dissolution,79 or for the recalling of a sequestration,80 the equitable jurisdiction was successfully invoked; and where the formalities prescribed by a statute could not be observed, the court dispensed with them.81 Again, the nobile officium was exercised to rectify the innocent omission of an entry in the minute book of a licensing court.82

Lord Justice Denning has in England called for the development of “a New Equity,”88 to redress the rigidity of the present legal system. Clearer recognition that equity is still a valid, valuable and unexhausted source of Scots law is also, it is submitted, much to be desired. There are chapters of Scots law, such as error in contract, which have become so confused through the interaction of English common law influences upon fundamental Roman doctrines that only legislation or a bold resort to equitable principles by the Court of Session can establish rational and just solutions of the many problems involved. Similarly, the principles of bona fides which are latent in the Scottish law of contract, could with advantage be resuscitated to deal with problems of the twentieth century.

78 Crichton-Stuart’s Tutrix Petrs., 1921 S.C. 840.
79 Forth Shipbreaking Co., Ltd., and Ors. Petrs., 1924 S.C. 489.
81 Roberts Petr. (1901) 3 F. 779.
Part 2

PUBLIC LAW
CHAPTER 3

CONSTITUTIONAL LAW AND HISTORY

THE CONSTITUTIONAL SIGNIFICANCE OF THE UNION

It would be redundant in a work of the present compass to examine the details of the position of the Crown and of the law-making power in Scotland prior to the Union of 1707. The law and custom of the United Kingdom Parliament have been developed almost exclusively from the practice of the English Parliament, which sat at Westminster before its supersession by the new body representing Scotland and England. It is, however, a matter of importance to ascertain in what respects Scottish constitutional principles may still be relevant in modern practice. At the time of the Union the idea had not emerged in Scotland that an absolute sovereign power was to be found in King or in Parliament, or in both combined. The theory that the Scottish King was not above the law is of ancient acceptance. Neither in public nor private law was the King above the law, and he could not concede powers of absolute supremacy to Parliament. In questions of private law the Scottish courts prior to the Union did not accept the English doctrine that “The King can do no wrong.” The former English doctrine was apparently adopted for the sake of uniformity in the late nineteenth century in the dubious decision of Smith v. Lord Advocate. We still have the record of an early assize where one, Robert Spink, crossbowman, on behalf of his wife, claimed the King’s garden at Elgin and other lands from which the King or his servants were seeking to oust the complainers. The verdict was in favour of Robert. In Baron v. Earl of Morton and Earl of Morton v. Fleming it was held that the courts should disregard any “privie writingis” under the King’s hand which interfered with the administration of justice. In 1542–43  an Act

1 Dicey and Rait, Thoughts on the Scottish Union, pp. 20–21.
2 (1897) 25 R. 112; see also Somerville v. L.A. (1893) 20 R. 1050, esp. at pp. 1067, 1072, 1075.
3 A.P.S. I, 90; Cosmo Innes, Scotch Legal Antiquities, pp. 226–227.
4 (1553) Mor. 7319.
5 (1569) Mor. 7325.
6 In Bruce v. Hamilton (1599) the judges of the Court of Session resisted the demands of James VI to his face when he sought to influence the decision—“whereat the King raged marvellously.” See discussion of this incident by Lord Normand, 1954 S.L.T. (News) 153 at pp. 154, 155; Cooper (1946) 58 Jur.Rev. 83.
7 Register of Acts and Decrees, i, 178.
of Sederunt was passed by the Senators of the College of Justice ordaining that if there are any who complain:

upoun wrangis done to tham at the Kingis grace command quham God assolze be his officiaris or servandis in his name . . . for the wele of his Grace saule thai salbe privilegit to call be bill or summandis the Kingis grace Comptroller and advocat to here tham reponit to thar possessionis as thai had of before.8

It is reasonable to assume that the judges were at least as concerned to assert the subject’s right to sue the Crown through his officers of State as with the spiritual well-being of His Majesty. If the King assumed the role of Ahab, his judges would—if the King were not overmighty—assume the mantle of Elijah and vindicate the right of Naboth. The subject would have his remedy against the King’s officers of State. Moreover, it was the presumption of pre-Union Scottish law (contrasting with English doctrine) that statutes bound the Crown unless otherwise expressly stated.

For his public acts the King was not answerable before his own courts, but here again it was not assumed that he could do no wrong. This theory of respect for law was, of course, submerged or abused at various times in the troubled history of Scotland under the Stuarts. Nevertheless the theory was remarkably viable. The Estates of Parliament, or sometimes an ad hoc organisation of the King’s subjects, would maintain, by force if necessary, checks upon unconstitutional actings by the King. If he acted beyond his constitutional powers, the sanctions were not judicial but beyond the law. They were certainly not deemed against the law. Thus in Scotland’s most important ancient constitutional document—the Declaration of Arbroath, sent by the Barons of Scotland to Pope John XXII in 1320—the loyalty expressed to Robert the Bruce is qualified in the striking language of the Abbot Bernard de Linton:

Quem si ab inceptis desisteret, Regi Anglorum aut Anglicis nos aut regnum nostrum volens subijicere, tanquam inimicum nostrum et sui nostrique juris subversorem, statim expellere niteremur, et alium regem nostrum qui ad defensionem nostram sufficeret faciemus.9

Even prior to the final period of freedom and power enjoyed by the Scottish Estates between 1689 and the Union, they had at times exercised—especially during the minorities of the Scottish kings prior to the Union of the Crowns—substantial powers. Some of these


9 Translation from Cooper, Supra Crepidam, p. 67. “But were he to abandon the task to which he has set his hand or to show any disposition to subject us or our realm to the King of England or the English, we would instantly strive to expel him as our enemy and the betrayer of his own rights and ours, and we would choose another King to rule over us who would be equal to the task of our defence.”
powers indeed were possibly more appropriate to the executive than to a legislature. Thus, for example, at times they sent instructions to ambassadors, and up to the time of the Union of 1707, it has not been decided whether or not the Crown had a veto over the legislation of the Estates.\textsuperscript{10} Hill Burton, in his History of Scotland, stated his opinion \textsuperscript{11} that

The Scots Estates did not admit the irresponsibility of the sovereign. We have seen them bringing King James III to task, and the precedent was made all the more emphatic by the attempt of the lawyers of the seventeenth century to conceal it by mutilating the record in which it is set forth. The punishment of bad sovereigns is a thing in which the literature of the country deals in a tone evidently directed towards practice.

During the sixteenth century Buchanan (tutor to James VI) expressed similar views in his celebrated De Jure Regni apud Scotos. There were precedents in Scots history for the deposition and punishment of wicked kings; their right to rule derived from the people, and to them the rulers were responsible. As much possibly depended on might as on right, but there seems to be little doubt as to the constitutional theory.\textsuperscript{12} Even during the long period when the powers of the Estates were circumscribed by the appointment of Lords of the Articles, who alone had the right of initiating legislation which Parliament often obsequiously “registered,” royal power did not go unchallenged. The “Band” or association for mutual protection against arbitrary invasion of person or property formed the precedent for the Covenant of 1638 which sought to bind the whole nation in covenant with God under the provocation of Charles I’s endeavour to foist unconstitutionally on Scottish Presbyterians the Canons and Liturgy of the English Church. The Wars of the Covenant were the answer to pretensions of absolute sovereign power. In the same tradition the Convention of Estates, 1689,\textsuperscript{13} asserted the right to declare that James VII had forfeited the throne and also to elect his successor. After specifying the unlawful acts of James, the Convention declared that he had invaded the fundamentall Constitution of the Kingdome, And altered it from a legal limited monarchy to ane Arbitrary Despotick power ... whereby he hath forefaulted the right to the croune, and the throne is become vacant.

If the King as an individual was not an absolute ruler, neither was the King in Parliament. Parliament, for example, had to share its

\textsuperscript{11} p. 387.
\textsuperscript{12} Cf. Buchanan’s contemporary and compatriot, William Barclay, who was professor of law at Pont-à-Mousson and Angers, and whose book De Regno et regali potestate was published at Paris in 1600. He concedes the right to revolt only when the Sovereign connives at the cession or subjection of his realm to a foreigner.
\textsuperscript{13} A.P.S. IX, 38–39. A “Convention” signified a meeting of the Estates without Royal Summons. It was not a novelty in Scotland as in England.
powers of government with an autonomous Church—which at times exercised autocratic influence—and with the Convention of Royal Burghs. Though Robert the Bruce had summoned the representatives of the burghs to Parliament, the burgesses preferred to debate matters of importance to themselves in their own Convention. Pre-Union Scottish legislation, moreover, could be abrogated by the doctrine of desuetude when it could be proved that a custom had been established contrary to the Act which would indicate the intention of the community to treat the particular Act as repealed. Dicey and Rait have examined the essential difference between the English doctrine and that of Scotland. In England in theory at least the King and the Houses, however they divided sovereignty between them, became in their own eyes and in those of the nation the omnipotent sovereign of England. In Scotland it was far otherwise . . . from historical circumstances, the Parliament of Scotland never had, or felt that it had, the omnipotence of the English Parliament. Indeed, the Scottish Parliament almost at all times acknowledged some power which restrained or competed with parliamentary authority.

Thus when Dicey and Rait refer to the “transference in Scotland of authority from a non-sovereign to a sovereign Parliament” at the time of the Union, it is difficult to appreciate how they concluded that a non-sovereign Parliament could transfer greater powers than it could itself lawfully exercise. “Nemo plus juris ad alium transferre potest, quam ipse habet.” Moreover, it is suggested, they misconceived the legal steps by which the Union of 1707 was accomplished. There is, however, no particular point in combating errors now of historical interest alone.

Against this background may be considered the Acts and Treaty of Union of 1707 and associated Union legislation, which may well be considered as the fundamental law of the British Constitution. This complex of documents may, for convenience, be described as the Union Agreement, since Scottish obsession with the Treaty is misleading and English preoccupation with the legislative processes has resulted in even greater misunderstandings. The main relevance of

14 Thoughts on the Scottish Union, p. 21.
16 The Scottish Acts, largely based on the Articles for a Treaty, are set forth in Appendix A. It may be well to stress that the English Act of Union, though substantially similar in terms, has no authority whatsoever in a Scottish court, though it has been cited per incuriam. It is interesting to speculate on the authority of the English Act in a Scottish appeal before the House of Lords.
17 The author’s considered and more detailed views on the legal implications of the Union of 1707 are published in Smith, Studies, at p. 1 et seq. This paper is substantially based on an address delivered on the 250th anniversary of the Union, entitled “The Union of 1707 as Fundamental Law,” and published [1957] Public Law 99. He wishes to acknowledge a particular debt to the helpful criticism of Professor J. D. B. Mitchell in [1956] Public Law 294, which resulted in the author rethinking fundamentally his earlier views on the implications of the Union.
the Union Agreement was and is as a basic constituent document—a new and revolutionary Grundnorm for a new state. The temptation must be resisted to discuss the many abortive attempts made to unite the Kingdoms of Scotland and of England. The Henrys, like the Edwards, had sought Union first by marriage then by massacre; Cromwell in the mid-seventeenth century had achieved a temporary Union by force; in 1689 the project of Union was taken up more willingly by the Scots—but it was blighted by the Glencoe Massacre and by the frustration of the Darien enterprise, with the sour connivance at least of King William, between whom and his Scottish subjects there was little understanding or affection. Both were at fault. A century after the Union of the Crowns (1603), the Scots Parliament showed its reluctance to follow England’s wish to secure a Hanoverian succession to the Crowns—except on certain conditions. The prospect of Scotland and England—which remained separate states in international law—being ruled by different dynasties after the death of Anne greatly perturbed Godolphin and the English political leaders. Since the days of James VI and I the subjects of one of the King’s realms had not been regarded as aliens in the other, and the prospect of a reversion to the situation prevailing in the sixteenth century was not tolerable. Accordingly, every effort was made to negotiate an incorporating Union of Scotland and England.\(^\text{18}\) (Scotland’s preference was for a Federal Union—though the implications of this were probably not very clearly appreciated.) Thirty-one Commissioners were appointed for each country to negotiate provisional articles for a treaty of union, and on July 22, 1706, they signed an agreed draft for submission to the Queen and to their respective Parliaments. They were expressly forbidden to conclude a treaty; nor, of course, were they plenipotentiaries under Royal prerogative empowered to negotiate a treaty jure gentium. The so-called “Treaty of Union” in fact merely sets forth certain Articles agreed by the Commissioners as preliminaries. The main terms of the Union Agreement are, however, contained in these Articles, which were slightly amended and passed by the Scottish Parliament, and ratified in England without alteration. Articles I–III provided for an incorporating Union—as desired by England—and for the United Kingdom to be represented by a new Parliament representing both the former separate states. Article IV granted to all subjects of the United Kingdom free access to the Colonies and Plantations; Articles XVI and XVII provided for standardised coinage, weights and measures. Articles XVIII and XIX are probably the terms of the greatest importance from the viewpoint of Scots law since they secured severalty of administration of justice

in the United Kingdom—preserving the separate status of Scots law. It was provided that no alteration should be made “in Laws which concern private Right, except for evident utility of the subjects within Scotland.” Laws concerning “publick right, Policy and Civil government,” on the other hand, might be made the same throughout the whole United Kingdom, though in this connection it must be mentioned that there were certain fundamental conditions based on the Treaty itself which were to be binding “in all time coming.” By Article XIX the independence of the supreme Scottish civil and criminal courts, the Court of Session and the High Court of Justiciary, was guaranteed, and it was provided that the Scottish Court of Admiralty should continue in being. No causes in Scotland were to be “cognoscible,” i.e., subject to review by any court “in Westminster Hall”—a proviso which was held soon after the Union not to exclude the jurisdiction of the House of Lords in civil causes, on the grounds that it was the judicial organ of the United Kingdom Parliament and had therefore succeeded to the appellate jurisdiction of the Scottish Parliament. This—from the Scottish viewpoint at least—was an unexpected interpretation of the Treaty. Articles XX and XXI preserved for a space the heritable jurisdictions and the privileges of the Royal Burghs in Scotland. Scotland’s representation in the new Parliament was laid down in Article XXII, which provided that Scotland should have sixteen representative peers in the House of Lords and forty-five Members of the House of Commons. Besides the Articles for a Treaty incorporated in the Scottish Act of Union 1707, there were two other Scottish Acts which were made part of the Union legislation. An Act was passed for securing the Protestant religion and Presbyterian Church government in Scotland. (A corresponding Act was passed in England to secure the Church of England as by law established.) Thus two Established Churches of widely differing doctrine and Church government were established in the new State of Great Britain. The Scottish Act also bound the Principals, Professors and other holders of office in the Scottish Universities to subscribe to, profess and practise the Presbyterian Confession of Faith as a condition of their appointment. This Act, it was provided, should be observed in all time coming as a fundamentall and essentiaall Condition of any Treaty on Union to be Concluded between the Two Kingdoms without any Alteration thereof in Derogation thereto in any sort for ever.20

19 1707, c. 6, and c. 8.
20 But see Universities (Scotland) Act, 1932 (22 & 23 Geo. 5, c. 26), s. 5; and Statute Law Revision Act, 1948 (11 & 12 Geo. 6, c. 62), also p. 72, post. The use of such language in a Scots Act would not, of course, have excluded the possibility of repeal—see Stair IV, 1. 61; Erskine 1.1.19 and Mitchell at note 17 supra. The permanence of the establishment depends on its recognition as a constituent not as a legislative provision.
In addition to the Acts securing the State Churches, a further Scottish Act prescribed the manner of electing the representative peers and commoners for the United Kingdom Parliament.

It may be noted that certain terms of the Union—such as the provisions in Article XIX regarding Admiralty jurisdiction and the future of the Exchequer Court and Privy Council in Scotland, were expressly made liable to variation by Act of the new Parliament of the United Kingdom. Other terms, such as those safeguarding the Presbyterian Church in Scotland, were expressly made irrevocable. As to the greater number of terms, the fundamental legislation neither authorises nor forbids variation. The complex of documents which constitute the Union Agreement have, as I have argued elsewhere with considerable citation of authority, a threefold significance. First, they constituted a treaty in international law between two sovereign states—the treaty being concluded not by the Parliaments, which did not exercise the prerogative treaty-making powers, but by Anne, Queen of Scotland, with Anne, Queen of England. This treaty, however, was executed on May 1, 1707, and can no longer be invoked qua treaty. Secondly, the respective Acts of the pre-Union Parliaments operated as ordinary legislation binding the subjects within the jurisdictions for which these Parliaments could competently legislate. Thirdly, the Union Agreement took effect as a skeletal, but nonetheless fundamental, written constitution for the new Kingdom of Great Britain when it came into being.

It is, therefore, from the legal viewpoint, somewhat surprising that Parliament from shortly after the Union till the present day has undertaken—without serious scrutiny of its powers—the purported variation by ordinary Acts of Parliament of many of the conditions of Union without much consideration of whether this legislation was intra vires. Some of these measures, though certainly inconsistent with the spirit of the constitution, may not have actually been in breach of the actual terms as expressed. Thus, for example, soon after the Union the Toleration Act and the Patronage Act struck at Scottish religious feelings in a most vindictive way—as did the House of Lords in its judicial capacity when it assumed appellate jurisdiction in Greenshield's Case 21 and supported the somewhat provocative actings of the appellant, an episcopal clergyman in Scotland. In 1711 a motion was actually made in the House of Lords to dissolve the Union in protest at the abolition of the Scottish Privy Council, the denial of seats in Parliament to Scottish holders of British peerages, and the proposed malt duty; and this political gesture was followed four years later by the Rising of 1715, which provided a focus for

some of the undoubted discontent at the tactless and malicious actings of the English Tories in relation to the Union. After the '45 there was no prospect of concerted action against parliamentary attacks on the fundamental law, and, moreover, certain changes became clearly desirable in the light of altered conditions. It may well be that it would not be a violation of the basic constitution to abrogate with the general consent of the people of Scotland even provisions in their favour expressed to be fundamental; but it is very doubtful whether this difficult question has been seriously considered. Certainly it would be impracticable to regard any constitution as immutable throughout all time. The *clausula rebus sic stantibus* has perhaps a place in constitutional as in international law. A possible example of this doctrine is the abrogation of the requirement that Principals and Professors of the Scottish Universities should subscribe to the Presbyterian Confession of Faith.22 Again, in 1748 the heritable jurisdictions were abolished (despite Article XX). During the nineteenth and twentieth centuries the electoral system has been substantially altered from that envisaged by Article XXII and Scotland is now given no fewer than seventy-one seats in the House of Commons. Moreover, several reorganisations of the Scottish courts have been carried out despite Article XIX. In all, nine Articles have been ostensibly repealed wholly and five in part by ordinary Acts of Parliament.

Changing conditions were bound to make expedient alteration of certain Articles—as, indeed, most relationships require revision from time to time. No general revising power was, however, conferred on the new Parliament of Great Britain in ordinary session, and in some respects it would appear to have been specifically excluded by Treaty. It might indeed have been thought that, had the Scottish negotiators in 1706 directed their minds to the possibility of the fundamental provisions being repealed—especially if the variation was to take place in the near future—one method they would have rejected as altogether impracticable would have been legislation by the Parliament at Westminster with an overwhelming English majority in both Houses. It is possible, of course, that some shared the hope of Jerviswood that the Scots at Westminster might hold the balance between Whigs and Tories, and thus have the final word in their own destinies. But Party, then as now, was a more powerful influence than Country, and an added paradox is that the majority Party in Scotland may be the Party in Opposition at Westminster—as is the case in 1962. The provision of some method for securing equal representation of Scotland and England in varying the Treaty would have seemed

22 See refs. note 20, *supra.*
a desirable adjunct to the Treaty. Thirty-one Commissioners for each country negotiated the Union, and these included distinguished ecclesiastics, judges, and representatives of municipal authorities as well as politicians, and revision of the Treaty even today could be undertaken by means much less suitable. Could the Commissioners of 1706 have foreseen a day when many representatives of Scottish constituencies would no longer have their normal residence in their constituencies, nor live their daily lives subject to the laws of Scotland, they might have been even more perturbed at the prospect of Parliament assuming responsibility for revising the fundamental provisions. Voters—but not candidates since 1832—require a residence qualification to exercise the franchise at parliamentary elections.

Due at different periods to political weakness, to desire to secure necessary reforms, and to reliance on English works on constitutional law, Scots have not until recently challenged the prevailing but not unanimous English view that the Queen in Parliament has unlimited legislative competence. The Scottish theory—if not always the practice—was that sovereignty resided in the community.

In 1953 in the case of *MacCormick v. Lord Advocate* 23—commonly called the “E.I.I.R. Case”—the First Division of the Court of Session examined and rejected the English theories that Parliament is an unlimited sovereign, and can lawfully vary any conditions of the Union by ordinary legislation.

The Lord President, with the full concurrence of Lord Carmont and (on this point) Lord Russell, emphatically rejected Lord Guthrie’s view in the court below—which was substantially an adoption of the doctrine of parliamentary sovereignty as enunciated by Dicey in *The Law of the Constitution*. 24 His Lordship observed that the theory of the “unlimited sovereignty” of Parliament was distinctively English, and had no counterpart in Scottish constitutional law. Since at the Union the Parliaments of England and Scotland were both extinguished and replaced by a new Parliament of Great Britain, it was difficult to see why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done.

The opinion continues:

Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the

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23 1953 S.C. 396; see also the discussion of this case; Beinart (1954) S.A.L.R. 135 at p. 138; Smith, Studies, pp. 12–16.
24 Compare the more modified view expressed in Dicey and Rait, *Thoughts on the Scottish Union*, pp. 252–253.
25 At p. 411.
separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provisions shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.

The Lord Advocate himself in argument had conceded that the Parliament of Great Britain “could not” repeal or alter the “fundamental and essential” conditions of the Union, and the Lord President also concluded that there was nothing in the Union legislation which lays down that the Parliament of Great Britain should be “absolutely sovereign” in the sense that Parliament is free to alter the fundamental constitution at will.

Though it seems clear that the court concluded that Parliament is bound by the fundamental law of the Union, it did not necessarily follow, in their opinion, that, if that law were broken by Parliament, the issue would always be justiciable in the Scottish (or English) courts in the same way as the Supreme Courts of the United States, South Africa or Australia may declare legislation to be *ultra vires* of the Constitution. There is, however, at least room for a distinction between legislation on questions of “public right” and “private right.” As to the latter, the Union Agreement provides that Parliament has only a power to alter the law of Scotland when it is for the “evident utility of the subjects in Scotland”—and as to this the Court of Session may well have the duty to decide.26 Sixteen Scottish judges should certainly be better able to assess the “evident utility” of Scotsmen than a legislature composed of an overwhelming majority of Members who are not qualified to express a reasoned opinion on the matter. With regard to questions of public right (where it may not always be easy for a private citizen to establish title to sue) the *obiter* opinion of the First Division as expressed by Lord Cooper was that the competency of judicial review in the particular and peculiar circumstances had not been established.27 Unlike Chief Justice Marshall of the United States he did not supply the omission of review by assuming that authority. Lord Cooper observed:

This at least is plain that there is neither precedent nor authority of any kind for the view that the domestic courts of either Scotland or

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26 And to define “private right.” The majority Party in Parliament representing a minority of Scottish voters would not seem the appropriate arbiter of “evident utility.”

England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent States and merged their identity in an incorporating union. From the standpoint both of constitutional law and of international law the position appears to me to be unique, and I am constrained to hold that the action as laid is incompetent in respect that it has not been shown that the Court of Session has authority to entertain the issue sought to be raised.

This did not, however, lead to the conclusion which Dicey had expressed that Parliament “can” lawfully break the fundamental law of the Union. The Lord President put the matter in perspective when he referred to the two senses in which Parliament “can” do a thing. In the sense that if an Act of Parliament dealing with public right “cannot” be (on one view) declared ultra vires by a court of law, Parliament “can” enact what it chooses. This would not, however necessarily make such an Act a legitimate exercise of power. If Parliament wished to impose episcopacy on Scotland or to substitute English legal institutions for Scottish (or to impose Presbyterianism and Scottish law on England), legislation to that effect would conflict with the fundamental conditions of the Union. In that sense Parliament “cannot” legitimately legislate in breach of the constitution. 28 Parliament may, of course, by usurpation of power alter the Constitution. The whole Union legislation might be abrogated and a new “Grundnorm” might be substituted extra-legally by revolution in legal form. Contravention of a so-called entrenched clause is the equivalent of constitutional amendment—either tolerated, or rejected by civil war, the method most familiar to those who drafted the constitution of 1707. A lawyer is not, however, concerned with those changes which naked power could achieve, except, if possible, to ensure that procedures such as judicial review are made available to oppose arbitrary constitutional changes, and to secure those which are necessary by peaceful means.

Though the author is not over-sanguine regarding the prospect of the Mother of Parliaments altering her practice of a lifetime for the sake of a “scrap of paper” which has already been drastically varied without dangerous opposition, nevertheless, Lord Cooper and his colleagues have not stated, and did not intend to state, the final word on judicial review of legislation. Such a system of review is accepted in most civilised states, even where, as in the United States of America, no express provision for it was made in the Constitution. Lord Cooper hazarded the conjecture that an advisory opinion of the International Court of Justice might be competent, but he was misled

28 The arguments of Goodhart in English Law and the Moral Law are also very relevant—see esp. p. 53 et seq.
(as perhaps he would have conceded had he lived) by the "treaty argument" of the petitioners. Moreover, the ground of decision in MacCormick's case was that the petitioners in the circumstances had no title to sue *inter alia* because the Queen's Style was not dependent on the Act of which they complained. The question whether judicial scrutiny of legislation is competent in Scotland remains open, and there is as yet no conclusive authority for or against. The achievement of the *E.II.R. Case* was to challenge the dogma propounded by Dicey—a dogma based on the fallacy that the Kingdom of Great Britain was the creation of legislation and indeed that there was an Act of Union (presumably the English Act).

The author is not disposed to favour the invocation of judicial review of the British Constitution on minor matters. Occasion for submitting that Constitution to the Judiciary may seldom arise. If it does, it may be hoped that the judges—should they accept this difficult duty—would construe the Constitution as a constitution with the flexibility that the circumstances demand, and not with the techniques appropriate to the interpretation of a taxation statute. There are sound reasons in law for the Scottish courts at least to assume duty as custodiers of the Constitution, and there are ample precedents, in countries which Scotsmen have helped to build, for the appropriate techniques.

**SCOTS LAW AND THE BRITISH COMMONWEALTH**

Though it is clear that during the seventeenth century Scottish merchants traded in the English colonies, the Union Agreement, by Article IV, expressly recognised the rights and privileges of all British subjects in British possessions overseas. Scots and English alike in the centuries after the Union were to develop new lands. Economic and political factors drove many Scotsmen from their own country to settle overseas, yet Scots law had no part in the overseas projection of British legal institutions after the Union; and Scotland's two colonial ventures prior to the Union had not taken root. The project of founding the Colony of Caledonia in Darien had miscarried, due to the jealously of Spain and England, and with the connivance of William III, shortly before the Union. This misfortune was eventually to prove an important factor in securing Scottish concurrence in the Union. Scotland's other colonial venture, which had taken the law of Scotland overseas, had been the founding of the colony of Nova Scotia under royal charter in 1621, but Nova Scotia was established too close to the centre of the contests between British

29 See for detailed argument Smith, *British Justice: The Scottish Contribution*, p. 201 *et seq.*, also *Studies*, p. 16.
and French settlers in America, and did not survive long as a separate Scots colony. When, in the reign of Anne, Nova Scotia was recovered from the French by the Treaty of Utrecht, 1713, the Union of Scotland and England had been in operation for six years. After the Union, all British settlers overseas—Scottish as well as English—were deemed to take with them to their new homes in unsettled territories as much of the English common law as was necessary to regulate their affairs. This was a paradoxical situation in some areas of New Zealand, or in those regions of North America, such as Glengarry, which were essentially Scottish settlements, and where the last thing that the inhabitants would have thought of taking with them overseas would have been the law of the “auld enemy.” 30 However, they never were permitted to develop in America civilian systems based on Scots law comparable to those developed by the French settlements in Quebec and Louisiana. Had it been otherwise, who can say whether the civil law rather than the Anglo-American common law would not now prevail in some form through much of North America?

Whatever the defects of Scottish criminal law, and those of the law administered in the heritable jurisdictions, the private law of Scotland at the time of the Union was more than capable of bearing comparison with the law of England. The English common law had lapsed into an arid formalism in the era before Mansfield and his colleagues set about the task of rationalising the system. At the time of the Union, therefore, the private law of Scotland as stated by Stair and Mackenzie was much fitter for export to the Commonwealth beyond the seas than the English common law. Yet the latter has become the basic law for most of the Commonwealth countries—and also for great republics such as the United States and India, which, while repudiating political dependence on Britain, accept in many matters the basic authority of English law.31

SPECIAL ASPECTS OF SCOTTISH CONSTITUTIONAL LAW

Much constitutional law in Britain, though of English origin, is common to the whole United Kingdom. The present book aims only to add, as it were, a gloss or supplement on matters which concern Scotland in particular.

Executive

“The Crown” in former times was a term appropriately associated with the Monarch for the time being, who personally

30 Often they had little reason to regard the law of Scotland with affection either.
31 This theme is developed in British Justice: The Scottish Contribution, esp. Chaps. 1 and 5; cf. Campbell v. Hall (1774) 1 Cowp. 204.
directed the executive actions of his or her servants. As personal
rule gave way to rule by the Monarch's ministers responsible to
Parliament, the Crown has acquired the dual significance of "the
personal Crown" and the "governmental crown"—though doctrines
associated with the one have influenced development of legal rules
affecting the other. For present purposes it may be convenient to
comment separately upon the Crown in the sense of the personal
status of the Monarch, before touching on other aspects of the
Executive.

The Monarch

In Scottish constitutional theory the Monarch's powers were never
unlimited. As has already been observed, the Scottish document—
the Claim of Right, 1689—which corresponds to the English Declara-
tion of Right and Bill of Rights—declared that James VII by abuse
of prerogative powers had altered the fundamental constitution of the
kingdom "from a legal limited monarchy to an arbitrary despotick
power... whereby he hath forefaulted the right to the Crown, and
the throne is become vacant." The English documents refer to
James II as having abdicated.

The title to the Crown was determined for England by the Act of
Settlement, 1701, and was adopted for the whole of Great Britain by
the Act of Union, 1707. In a learned article dealing with the "Law
of Accession" Dr. C. d'O. Farran discussed the problem, which had
not previously been determined in England, as to whether the elder
of two daughters of a deceased monarch should succeed to the throne
without legislative provision. On the analogy of English peerage
law she would not. In Scottish law this matter was never in doubt,
and the elder daughter would succeed under the ordinary law of
succession. Another point of interest, which arose with regard to
Her Majesty's Accession in 1952, was that, since she was out of the
United Kingdom on the death of King George VI, she was proclaimed
before taking the oath to preserve the Church of Scotland.

It has been the practice for the Sovereign to take this oath
at the first official Council meeting of the reign before the proclama-
tion is made. It is possible that, had the proclamation (which was,
of course, unnecessary to authorise the succession) taken place after
Her Majesty had taken the oath to secure the Church of Scotland,
official attention would have been directed to the question whether
it would be historically accurate or politically desirable for Her

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32 As late as 1731, however, a distinction seems to have been made between the
33 (1953) 16 M.L.R. 140. See also Stair, III, 5. 11.
33a Which the Government directed to take place in Scotland on the anniversary of
the liquidation by Elizabeth Tudor of the Queen of Scots.
Majesty to be styled “Elizabeth II” in Scotland or at all. This form of style apparently did not depend on the Royal Titles Act, 1953, or other statutory authority, but on the practice of attaching the number to the name of a Sovereign by reference to the Kings of England since the Norman Conquest of England. Sir Winston Churchill, speaking in Parliament as Prime Minister, has since stated that, in future, Kings and Queens will be numbered according to the highest numeral applicable in Scotland or England. Thus if a King of the United Kingdom were to be named Robert, he should take the numeral IV. Though the Queen is Head of the Church of England, she has no special status in the Established Church of Scotland. Queen Victoria regarded herself as a communicant member of the Church of Scotland, and her royal successors when in that country worship in its Established Church, which is Presbyterian in government.

The eldest son of the Sovereign inherits in the peerage of Scotland the titles of Prince and Steward of Scotland, Duke of Rothesay, Earl of Carrick, Baron of Renfrew and Lord of the Isles. The lands of the Principality are not held, as other feudal lands in Scotland are held, of the Crown—but of the Prince and Steward of Scotland, whose interest is now only in the feu duties owed to him as feudal superior.

The Prerogative

The Crown owns, by virtue of the prerogative, certain rights known as the Regalia. The regalia majora are held by the Crown in the public interest, and may not be alienated except by Act of Parliament. Erskine states the law regarding these as follows:

All the subjects which were by the Roman Law accounted res publicae are, since the introduction of feus, held to be inter regalia or in patrimonio principis. But as the regalia of this sort are little capable of property, and chiefly adapted to public use, the King's right in them is truly no more than a trust for the behoof of his people.

On the other hand, the regalia minora, such as rights of salmon fishing, may be alienated by the Crown to grantees. Over the foreshore the Crown has rights both from the regalia majora and minora.

34 See this discussed in MacCormick v. Lord Advocate, 1953 S.C. 396.
35 1 & 2 Eliz. 2, c. 9.
36 It may be observed that in the Treaty of Union which preceded the Union of Parliaments the Consort of Mary was referred to as William III—though Scotland had had only one King of that name.
37 See infra, p. 72.
38 See Hope, Major Practicks, 1.2.15. “The King's eldest son is prince and steward of Scotland and duik of Rothesay so soon as he is borne.”
39 See Lord Dunedin “A Short Account of the Principality of Scotland—The Title of Prince and Steward of Scotland ” (1925) 22 Scot.Hist.Rev. 81.
40 Inst. 2,6,17.
Though the foreshore as inter regalia minora may be alienated, the Crown has an inalienable right to safeguard the public right to use the foreshore for certain purposes of navigation, fishing and possibly recreation, though statute may abrogate. Further discussion is appropriate to the chapters on Property Law, but it may be noted in passing that udal lands in the Orkneys and Shetlands are not subject to feudal claims.

The feudal prerogatives were not permitted to give the Crown immunity against the positive or negative prescriptions, and though the Monarch's personal estates were originally exempted from taxation, this exemption had the practical justification that he was expected to live on their revenue. The scope of this exemption was, nevertheless, narrowly construed. The influence of the Exchequer Court, set up on an English model after the Union of 1707 has, however, had the effect of introducing to some extent through fiscal litigation more general concepts of English law. This, as will be seen, has affected the law regarding "charitable" trusts in Scotland, and has indirectly influenced the scope of Crown prerogative. After recognition of the Crown's immunity from taxation, wider doctrines of immunity were claimed by analogy; while the erroneous belief that in constitutional questions Scots law must conform to that of England tended to subvert the more equitable rules of Scottish jurisprudence. Fortunately, after an era of obsequious conformity, a sharp repudiation of this misconception was given in 1956 by the House of Lords in Glasgow Corp. v. Central Land Board. In this case it was held that under Scots law—by contrast with the rule in England—the courts were not conclusively bound by a Minister's certificate refusing to allow a document to be disclosed in legal proceedings "in the public interest."

The Crown as Litigant

As regards rights of action against the Crown, these are now substantially regulated by the Crown Proceedings Act, 1947. In Scotland prior to the Act, as has been explained, it had for centuries

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41 Burnet v. Barclay, 1955 J.C. 34. Probably the most important case of modern times concerning the foreshore is Consolidated Diamond Mines of S.W. Africa v. Administrator of S.W. Africa [1958] (4) S.A. 572 (A.D.). An elaborate study was made of the world's jurisprudence, including that of Scotland. See also H. R. Hahlo, "The Great South-West African Diamond Case" (1959) 76 S.A.L.J. 151.


44 1956 S.C. (H.L.) 1. In fact the Scottish courts have not been noticeably anxious to exercise the right asserted in this case.

45 10 & 11 Geo. 6, c. 44. The Crown is represented in litigation by the Lord Advocate.

46 p. 49, ante; also Encyclopaedia of Laws of Scotland, title "Crown."
been the custom to call the officers of state or the Lord Advocate to represent the Crown's interests in litigation. In 1897 the Scottish courts, probably mistaking the earlier Scottish law, applied the English doctrine in tort that "the King can do no wrong" in a Scottish action for reparation. Of this case and its sequellae it has been well said that the proposition that the King can do no wrong was "a doctrine which arrived late, had but a weak foundation and was received with little enthusiasm in Scots law." The point is academic now, in view of the 1947 Act which, generally speaking, allows an action in delict against the Crown when an action would be competent against a subject. It has always been competent to sue the Crown in respect of contract or breach of contract, though there are doubts as to what remedies are available to civilians employed by the Crown in respect of breach of their contract of service. Actions by or against government departments in Scotland are generally raised by or against the Lord Advocate. Prior to the 1947 Act the ordinary forms of procedure had been competent against the Crown, and there was no special procedure such as the English Petition of Right. Thus the Act made little change in procedure, with one important exception. Possibly inadvertently, in excluding the right of the subject to seek injunctions against the Crown in England, the 1947 Act excluded the right of the subject which had previously been recognised in Scotland to seek the equivalent remedy of interdict. An order declaratory of the rights of the parties is substituted for interdict as a remedy. One important alteration of previous Scottish procedure when the Crown was litigant is that now (by s. 44) proceedings against the Crown may be instituted in the Sheriff Court as well as in the Court of Session.

Central Government Departments

The executive functions of the Crown in modern times are mainly exercised by Ministers of the Crown responsible to Parliament. The present author is concerned only with the main factors affecting Scottish administration. With departments such as the Treasury, War and Foreign Affairs this book is not concerned.

50 Standard authorities on practice should be consulted for the exceptions.
51 Bell v. Secretary of State, 1933 S.L.T. 519. Decree of specific implement against the Crown is also excluded. See Mitchell, sup. cit. p. 15.
52 See the Act, s. 21 (1) (a); cf. Somerville v. L.A. (1893) 20 R. 1050.

S.L.S.—3
The Secretary of State for Scotland, assisted (apart from permanent staff) by a Minister of State and three Parliamentary Under-Secretaries, is responsible for the conduct of Scottish administration. The Lord Advocate, and the Solicitor-General for Scotland when they are Members of Parliament, also help to represent the Government's Scottish policy in Parliament— even on matters outside the strictly legal field. The Lord Advocate represents the Crown in litigation, and generally acts whenever the public interest is concerned. As will be explained in the context of criminal law, prosecution of crime in Scotland is his concern, and a wide discretion is committed to him (and to those acting on his directions) regarding the criminal process generally.

Shortly after the Union, in 1708, the Scottish Privy Council, which had till then conducted Scottish administration, was abolished. The Lord Secretary had been one of the eight Officers of State authorised by James VI in 1617 to sit in the Scottish Parliament ex officio. At the time of the Union of 1707 the office was held jointly by Mar and Loudoun. Shortly after the Union, in 1709, the system was varied so that, of three Secretaries of State for the United Kingdom, one was a Scotsman whose concern was with Scottish affairs. In 1725 the Scottish Secretary was dismissed and from that time until 1926—with a brief revival of the office from 1741 till 1746—there was no Secretary of State charged with Scottish Affairs. It may be recalled that during the first half of the eighteenth century, Scotland did not enjoy the advantages from the Union for which its promoters had hoped; and in the Risings of 1715 and 1745 there were influential Scotsmen who supported the Stuart cause as a means of challenging the Union rather than for the sake of the Stuart dynasty. Thus Scotland was regarded with suspicion or alarm by the London Government, and responsibility for Scottish affairs was undertaken by the English Secretaries of State. Since, however, they were necessarily unfamiliar with Scottish law and conditions in Scotland, they invoked the advice of the Lord Advocate. Thus the Lord Advocate, besides his duties as law officer, became concerned with the conduct of Scottish affairs generally, and was given extensive duties quite unconnected with his primary function as law officer. Lord Advocates like Duncan Forbes of Culloden and Dundas exercised wide powers which might be used well or ill.\footnote{The great officers of State no longer sit ex officio in Parliament, though the Lord Advocate is nearly always an elected Member of Parliament. The Lord Justice-Clerk presides over the Second Division of the Court of Session; while the Lord Clerk-Register has the responsibility of presiding over the meeting which elects the representative Scottish peers to the House of Lords.}

\footnote{See Milne, \textit{op. cit.} p. 11 \textit{et seq.}; G. W. T. Omond, \textit{The Lord Advocates of Scotland}, 3 vols., also Cockburn's \textit{Memorials}, p. 185, on the powers exercised by Hope.}
In 1885 the office of Secretary for Scotland was created to take over certain of the functions which had since 1828 been discharged for Scotland mainly by the Home Secretary assisted by the Lord Advocate. By the Secretary for Scotland Acts, 1885 and 1887, powers and duties previously vested in or imposed on Principal Secretaries of State were transferred to the Secretary for Scotland, so far as these affected Scotland; while certain functions previously discharged by the Privy Council, the Treasury and the Local Government Board, were also transferred to him. The powers of the Lord Advocate were not superseded, but the Secretary for Scotland shared with the Lord Advocate the duty of representing Scotland in the Government. In 1926 the Secretary for Scotland was raised to the status of Principal Secretary of State; he is now assisted in Parliament by a Minister of State and three Joint Parliamentary Under-Secretaries of State. By the Reorganisation of Offices (Scotland) Act, 1939, the system of administration in Scotland was substantially altered. Until the Act came into force the Secretary of State was head of a department styled the Scottish Office, and had also certain responsibilities for a number of other departments and boards. Now the functions previously vested in the various boards and departments have been transferred to the Secretary of State, who has organised his administrative staff of civil servants into four sections (known, however, as departments) each under a Permanent Secretary. These departments are (first) the Scottish Home Department (which is concerned, inter alia, with problems of local government, prisons and police, the royal prerogative, and also is charged with general duties of watching over Scottish interests and making representations regarding them to the United Kingdom Departments in London); (second) the Scottish Education Department; (third) the Department of Health for Scotland; and (fourth) the Department of Agriculture for Scotland. These Departments are established in Edinburgh, but a small staff responsible to the Secretary of State is also maintained in London to handle parliamenary business and to liaise with government departments established in London. The Secretary of State has also to exercise certain functions which in England are exercised by the Lord Chancellor and by the Minister of Labour, and a number of smaller Scottish departments are also his responsibility in different ways—e.g., the office of the Registrar-General. He is also responsible jointly with other Ministers in London for certain boards and commissions—such as the Forestry Commission. The Government has implemented a number of the proposals of the Royal Commission on Scottish Affairs including the transfer to the Secretary of State from

2 & 3 Geo. 6, c. 20. The Reorganisation of Offices (Scotland) Act, 1928, had made certain preliminary changes.

But see Addenda.
the Lord Chancellor, the Minister of Agriculture and Fisheries and the Minister of Transport and Civil Aviation, of functions which they were then exercising in Scotland—including appointment of justices of the peace and responsibility for animal health and roads. Under the Town and Country Planning (Scotland) Act, 1947, the Secretary of State became the Minister responsible for town and country planning in Scotland and, by the Electricity Reorganisation (Scotland) Act, 1954, he has duties of supervision over the two Scottish Electricity Boards. He has also widely ranging responsibilities for or related to numerous bodies such as the Crofters’ Commission, the Advisory Panel on the Highlands and Islands and the Scottish Council (Development and Industry).

Policy has tended to transfer to the Scottish Office those functions of government which can be handled on a geographical basis, while other functions are handled by Great Britain and United Kingdom departments in London. In matters of administration, Scotland’s problems are not merely regional but national, and efficiency alone could not solve them. The Royal Commission on Scottish Affairs, in 1954, noted: “Harmonious relationship does not depend only upon efficient and acceptable administration.” The increase during recent years of government intervention in everyday life is bound to aggravate “emotional dissatisfaction” unless understanding also increases. It is accordingly with change of outlook rather than with changes in methods of government that the Report mainly deals. It is a document notable above all for its excessive discretion. It might be thought that, bearing in mind the fact that the population of Scotland is over five million, an unduly heavy burden is imposed on the Secretary of State in making him responsible for the discharge of so much Ministerial business, but the Royal Commission stressed its strong opposition to any proposal which would divide the Secretary of State’s statutory functions and thus detract from his general authority as “Scotland’s Minister.” It may be questioned whether in modern conditions one man can exercise all these functions efficiently, though it may well be desirable to secure that one man should be acknowledged as ultimately responsible for the effective administration of Scottish affairs.

Administrative Law and Judicial Control

The “prerogative writs” known to English law have no place in Scottish procedure. It is generally agreed that ordinary judicial methods are not necessarily the most suitable and expeditious means of determining questions of administrative law, when the subject disputes an issue with some organ of the executive; nor is Parliament

57 Report, paras. 177-179.
capable of legislating regarding the detail of administration. Accordingly, judicial powers and powers to exercise an administrative discretion have been entrusted by statute to various branches of the executive, with or without liability to independent scrutiny; while powers to make orders and regulations of various kinds are freely conferred on members of the executive.

The whole system of administrative law is haphazard, and, far from sharing Dicey's deprecatory opinions on *droit administratif*, there are many in Britain today who, instead of this situation, would prefer a systematised administrative law enforced by a body comparable to the Conseil d'Etat in France. Since realisation of such a project is scarcely to be anticipated in the foreseeable future, it may at least be hoped that increased attention will be given to ensuring that the individual is protected against arbitrary and inscrutable acts of the Executive. In 1954 Lord Cooper suggested a number of safeguards which should be maintained, if justice is not only to be done, but also manifestly be seen to be done by the Executive. Where a public inquiry is held, the report of the person who conducts the inquiry should be made available for comment by the parties before action is taken thereon; if an administrative tribunal has exceeded or misinterpreted its powers or has proceeded on a demonstrably erroneous basis, its proceedings should be subject to judicial review; where "principles of natural justice" have been denied—as if a party has been denied a hearing or if decision has been reached on alleged facts obtained without the knowledge of any party—the proceedings should be liable to judicial scrutiny; the evidence of official witnesses should be liable to the testing of cross-examination; and, lastly, when a question of "pure law" arises in any administrative dispute, it should be remitted to the courts for decision.

There is a long tradition in Scots law, which Professor Mitchell has done much to revive, to the effect that the courts will review administrative acts—testing them both by the scope of legal powers conferred and by the principle of good faith. The distinctions made in English law between judicial and executive decisions are not reflected to the same extent in Scottish procedure. Much may be lost and little advantage gained by following slavishly the conclusions of English courts—where the decisions on administrative matters are largely conditioned by history and specialties of procedure. In Scotland flexibility of practice and the overriding duty of the courts to remedy wrongs, however, and by...
whomsoever committed, have enabled the courts on many occasions to act with courage and common sense in determining administrative problems. The Tribunals and Inquiries Act, 1958, following the recommendations of the Franks Committee, set up a Council on Tribunals, whose function is to keep under review the working of some 2,000 tribunals and inquiries. A Scottish Committee of this Council, comprising seven members including a Queen’s Counsel, is concerned with the particular supervision of about 200 of these bodies. The Council is not, however, a court of appeal, but acts in an advisory and consultative capacity—its activities being moreover little publicised. Hence perhaps the yearning expressed by some—but certainly not all—lawyers and laymen for a British equivalent to the Danish Ombudsman.

The Legislature

The Scottish Parliament sat in one chamber. Already, prior to the Union, it had lost the spiritual estate on the secure establishment of the Presbyterian form of Church government. After 1690 the Estates had been freed of control by the Lords of the Articles, and were a very active and controversial assembly. At the time of the Union the representation in the Scottish Parliament comprised ninety commissioners from the shires, sixty-seven from the burghs, and a like number of peers in regular attendance. The commissioners from the shires represented an important but limited class of landowners, while the burgh members were elected by the town councils of royal burghs, which were by this time self-elective bodies representing the merchants and master craftsmen. The Union legislation restricted Scottish representation in the United Kingdom Parliament to sixteen representative peers and forty-five commoners, but subsequent legislation increased the number of Scotland’s representatives in the House of Commons to seventy-one. There has been no corresponding increase in the number of Scottish representative peers. The number of peers on the “Long Roll” and entitled to vote in elections stands at present at one hundred and fifteen. The United Kingdom Parliament, like the former English Parliament, sits in two chambers, and the Bishops of the Church of England sit in the Upper House. The Established Church in Scotland being Presbyterian, no Scottish prelates sit in the Lords, and ministers of religion of the Church of

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61 6 & 7 Eliz. 2, c. 66.
62 Cmnd. 218/1957.
65 Sir James Ferguson of Kilkerran, Keeper of the Records of Scotland, published in 1960 his scholarly study of The Sixteen Peers of Scotland. Such peers are elected to the House of Lords by special procedure from the Scottish peerage.
Scotland may not sit in the House of Commons. The Royal Commission on Scottish Affairs, in 1954, recommended that the claims of the Church of Scotland to be represented in the Upper House should be considered by those who were deliberating reform of the House of Lords.

The Scottish membership in the House of Commons could, in these days of narrow majorities, be a powerful force. In fact, however, Party interests and wider political considerations rather than national interests have, in the last resort, influenced for better or worse the voting of Members from the time of the Union onwards. At the time of the Union there were Scottish statesmen, such as Jerviswood, who hoped that Scotsmen in Parliament would be able to "hold the balance," but this has not often been the case. One factor of representation which has altered since the Union is that, though a wider section of the Scottish population is now represented through the principle of adult suffrage, Members of Parliament themselves are no longer necessarily Scotsmen normally resident in their constituencies—nor indeed need they be habitually subject to the laws of Scotland. Special opportunity for considering Scottish affairs in Parliament is in theory provided through means of the Scottish "Grand Committee"—though in 1954 the Royal Commission considered that this Committee could have undertaken more work if governments had thought it expedient to make greater use of this machinery. Bills which are essentially Scottish in content may be remitted to the Scottish Standing Committee, both after formal First Reading and also at the Committee stage, for consideration both in principal and in detail. This is potentially a valuable privilege. The Scottish Standing Committee comprises all seventy-one Scottish Members of Parliament, together with several (usually ten) Members from other constituencies in Great Britain to ensure that the balance of parties in the Committee is similar to that of the House of Commons as a whole. No power to initiate legislation is conferred on the Scottish Standing Committee. The Royal Commission rejected proposals that this Committee should meet and deliberate in Scotland. Though the legislature is vigilant to protect the red deer and salmon in Scotland, in November 1961 the Secretary of State had to repeat yet again the sorry excuse that Parliamentary time was not available for legislation to modernise the Scottish law of intestate succession. A measure to amend this branch of the law, at present redolent of medieval concepts, had been long contemplated and even promised two years previously in the Queen's Speech. If

66 Unless the House objects, consideration of a Bill by the Standing Committee is deemed equivalent to a debate on the second reading.

67 Cmd. 9212/1954, paras. 82-85.
Parliament is in fact so pressed with matters of general importance that time is never available to deal with urgent questions of law reform in Scotland, comparable to those dealt with for England by Lord Birkenhead in the 1920s, the regrettable conclusion must be stated that the legislative machinery is demonstrably inadequate for dealing with essentially Scottish concerns. It is somewhat surprising that the main argument for devolution should per incuriam be advanced by Scotland’s Minister in a Government which has so far repudiated that policy.

The Judiciary

The organisation of the courts and legal profession in Scotland may be treated more conveniently in a chapter specially devoted to that purpose.

Church of Scotland

The Established Church of Scotland is presbyterian in confession and in Church government. By an Act of 1560, ratified in 1567, the authority of the Pope was abolished in Scotland. After the Reformation, according to the fluctuations of political power, Church government in Scotland was at times controlled by episcopacy and at other times by presbytery. Persecution of those who denied Royal authority in matters of religion was followed (at times when the martyrs held the power) by theocracy of the Kirk; and toleration had quarter from neither persuasion. At first Church government was committed to presbyters under the control of “superintendents,” but in 1584 bishops were again established. By the Act 1592, c. 114, Presbyterian Church government was established in kirk sessions, presbyteries, provincial synods and general assemblies. By various measures passed between 1606 and 1612, after James VI had succeeded to the throne of England, episcopacy was restored in Scotland, only to be ousted by presbytery in 1638. Presbyterian opposition to episcopal forms of worship culminated in the adoption of the Westminster Confession of Faith in 1647. On the Restoration of Charles II, episcopacy was again enforced (1662), but in 1690 the Presbyterian form of Church government was re-established in Scotland. As has been explained, this form of Church government is declared by the Union legislation of 1707 to be a fundamental and

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69 See p. 85 et seq.
70 By the Act 1690, c. 7. For the extremely complicated trends and ramifications of the Church of Scotland, see J. H. S. Burleigh, *A Church History of Scotland*, and G. Donaldson, *Scotland: Church and Nation through Sixteen Centuries*. A. Taylor Innes, *The Law of Creeds in Scotland*.
71 p. 54, ante.
essential condition of the Union. The Established or National Church is Presbyterian; other religious communities have been regarded as lawful voluntary societies in the eyes of the law—but only after toleration had come to be regarded in Scotland as a virtue rather than as a vice. They have freedom to worship as they choose and to regulate their own affairs, but have no special status in the Constitution. This in no way diminishes the value of their spiritual contribution to the nation. Moreover, the courts may have to investigate tenets of the voluntary Churches in deciding questions of title to property. From the viewpoint of constitutional law, however, the position of the Church of Scotland alone need be discussed.

The Church of Scotland’s assertion of independence of State control, while enjoying the privileges of a national and established Church, led in the past to contention and heart-searching. A satisfactory conclusion seems to have been achieved by the legislation of 1921.

The Church of Scotland, while recognising the authority of the civil magistrate within his own sphere, has always asserted its own undisputed jurisdiction in matters spiritual under Christ as Head and King. Its organisation consists of a hierarchy of representative assemblies of ministers and elders from kirk session to General Assembly. The right of the congregation of each parish church to choose its own minister has long been urged. Accordingly, when in 1712 the new United Kingdom Parliament passed legislation imposing on Scotland lay patronage, this was bitterly resented, and regarded as in breach of the conditions of Union. The unpopularity of lay patronage led to the establishment of Secession Churches, supported by those who could not tolerate the opportunities which patronage gave for privileged men to exercise influence in spiritual matters, nor could the seceders accept the dependent status of the Church, which they regarded as the inevitable consequence of intervention by the State.

Antipathy to the idea that the State could have any authority over the Church of Scotland continued, and led in 1843 to the Disruption, whereby the Free Church was formed, with a large following, amid great enthusiasm. The step was taken after a series of important legal decisions had held that the Church of Scotland’s claims to complete self-government could only be sustained upon condition that it abjured its privileged position in the nation, and became a

72 See, for example, the celebrated case of Free Church of Scotland v. Lord Overtoun (1904) 7 F. (H.L.) 1, which occasioned particular perplexity to the House of Lords—as did their decision to many Scotsmen.
74 Church of Scotland Act (11 & 12 Geo. 5, c. 29).
“Voluntary” Church. It was laid down judicially that, while individuals might renounce the Established Church, “the Union of the Church of Scotland with the State is indissoluble while the Statutes remain unrepealed.”

In 1874 by the Church Patronage (Scotland) Act the objectionable institution of lay patronage was abolished; and it was provided that the congregation of each parish church should have the right to elect and appoint its minister.

With a view to furthering the projected Union between the Church of Scotland and the United Free Church—which was achieved in 1929—statutory provision was made by the Church of Scotland Act, 1921, to confer expressly on the Church powers which it had long asserted. Articles drawn up by the Church were expressly recognised by the State as representing the Constitution of the Church. These Articles are a clear statement of spiritual independence and freedom from State interference in matters of doctrine, worship and Church government. The Schedule setting forth the Articles is thought of sufficient importance to merit publication in an Appendix in view of its primary importance in Scottish constitutional law and history.

The General Assembly of the Church of Scotland, which comprises ministers and elders commissioned from the Presbyteries, thus has power to legislate and adjudicate on spiritual matters and matters of Church government and discipline, without control by any other law-making body or court. The effect of the 1921 Act is that the civil courts of Scotland have no power to interfere with matters recognised by the legislature as within the exclusive jurisdiction of the Church courts, but it is for the civil courts to say—as a matter of construction of the statute—whether a particular matter falls within that jurisdiction.

The Royal Assent is not required to validate legislation of the General Assembly. From the first, the Sovereign has been represented in the General Assemblies by a Commissioner, whose presence in modern times is a gesture of courtesy as much as a medium of communication with the Sovereign. He has no vote, no right of interference in debate, and technically his throne is not within the House. Proceedings may continue in the absence of the Commissioner. In the time of William III the Church and Crown were at variance regarding the question which had the right to summon Assemblies.

75 See in particular Robertson’s Lethendy case, Clark v. Stirling (1839) 1 D. 955 and Second Auchterarder Case (Earl of Kinnoull v. Ferguson) (1841) 3 D. 778; 1 Bell’s App. 662.
76 37 & 38 Vict. c. 82.
77 11 & 12 Geo. 5, c. 29.
78 See Appendix B.
It became the practice, without deciding the question, for the Moderator of the General Assembly and the Commissioner to announce separately, and in a voice of authority, the date for the next Assembly (which they had earlier agreed together). In 1928, however, the State abandoned its theoretical claim to call Assemblies.81

There being no hierarchy of clergy but only of assemblies in the constitution of the Established Church in Scotland, there is no Scottish counterpart of the English "lords spiritual" in the House of Lords.82 An Archbishop of York83 has aptly summarised the constitutional position of the Church of Scotland: "The Church of Scotland is the outstanding example of a Church which is Established and yet is Free. . . . No other Church has a Constitution which asserts so strongly its complete freedom from the State."

The Convention of Royal Burghs

The Convention of Royal Burghs was originally a burghal court or Parliament, which met until the early sixteenth century under the Lord Chamberlain.84 It exercised an appellate jurisdiction over the decisions of the Chamberlain Ayre, and legislated within wide limits on matters affecting the burghs. Its field of activity was at one time very extensive—including even the nomination of the Conservator of the Scottish Staple in the Low Countries85; and the late development of the Third Estate in the Scottish Parliament is largely due to the opportunities which the representatives of the burghs enjoyed of settling their own affairs in their own assembly apart from the lords spiritual and temporal.86 Sir James Marwick, editor of the Records of the Convention of Royal Burghs, has summarised its earlier powers as follows87: "Scarcely anything affecting Burghs of Scotland, in their internal administration, or in their commercial relations at home and abroad, escaped the cognizance of the Convention. It defined the rights, privileges and duties of the Burghs; it regulated the merchandise, manufactures and shipping of the country, it exercised control over the Scottish merchants in France, Flanders, and other countries in Europe, with

81 See G. D. Henderson, op. cit. p. 199.
82 A writ to attendance issues to the English judges of the High Court summoning them to the House of Lords, but equivalent privileges are not accorded to the Senators of the College of Justice in Scotland—Wade and Phillips, Constitutional Law, p. 75; also ante, p. 70.
83 Quoted G. D. Henderson, p. 141.
84 Rait, Parliaments of Scotland, p. 11.
85 On the Staple generally see Davidson and Gray, The Scottish Staple at Veere.
86 For an interesting account of the legal significance of the Convention see Convention of Royal Burghs v. Cunningham (1842) 1 Bell's App. 628.
which from time to time commercial relations existed; it sent commissioners to foreign powers, and to great commercial communities, entered into treaties with them, and established the staple trade of Scotland wherever this could be most advantageously done; it claimed the right, independently of the Crown, to nominate the Conservator (of the privileges of Scottish merchants in Flanders), and it certainly did regulate his emoluments, and control his conduct; it sometimes defrayed, and sometimes contributed towards the expenses of ambassadors from the Scottish Court to that of France and other foreign powers in matters affecting the Burghs and the common weal; it allocated among the whole Burghs of the Kingdom their proportion of all extents and taxes granted by the three Estates of the realm; it adjudicated on the claims of Burghs to be admitted to the privileges of free Burghs, and to be added to its roll; it took cognizance of weights and measures.”

By the Act 1487, c. 17, and subsequent statutes, commissioners of the Royal Burghs were enjoined to meet once a year to treat of divers matter affecting the well-being and prosperity of the burghs. 88 This ancient assembly of the Royal Burghs continues to meet annually to deliberate in Edinburgh. Its proceedings are no longer of such importance as they were formerly, but matters of general municipal interest are discussed, and an informed public opinion is nourished. Through the Convention the Scottish Departments have a means of communication and consultation on matters of policy with a body representative of important local government interests. Certainly the Convention cannot be overlooked in a survey of the Scottish Constitution. It gave emphatic evidence before the Royal Commission on Scottish Affairs in 1953.

Local Government 89

The history of town councils in Scotland differs greatly from that of the county councils. The latter are modern creations of statute, while the former can be traced to the medieval social structure. Under the Act of 1469, c. 5, town councils were enjoined to elect their own successors so that municipal power was concentrated in an oligarchy of leading merchants and master craftsmen. This deplorable situation continued until 1833 when, among the first legislation to be passed by the Whigs on coming to power after the Reform Act,

1832, were measures to secure democratic elections in local government—the Royal Burghs (Scotland) Act, 1833, and the Parliamentary Burghs (Scotland) Act, 1833. Cockburn, who constantly fulminated against the corruption, inequity and ineptitude of the older system, has given in his Memorials and Journal an account of how municipal affairs were managed prior to these reforms, and welcomed the reforms with enthusiasm. County councils were first introduced into Scotland by the Local Government (Scotland) Act, 1889, largely superseding the régime of Commissioners of Supply, and has conferred upon them powers comparable with those exercised by town councils in burghs. The Commissioners of Supply were finally abolished altogether by the Local Government (Scotland) Act, 1929.

The Secretary of State for Scotland, who in Scotland exercises Governmental responsibility for the great majority of matters with which local authorities are concerned, indicates the general policy to be implemented by local authorities, leaving it to them to work out the detail of administration. The central government exercises control and supervision largely through its powers to make grants and to appoint auditors to examine the accounts of the local authorities. By-laws of local authorities are not only subject to judicial scrutiny to ascertain whether they are intra vires, but they must also as a rule be confirmed either by a sheriff exercising his administrative function, or by a department of the central government.

A town council has responsibilities (varying according to its category) for the administration of a burgh. Members of the council are elected for three years. One-third of the council retires each May, and accordingly elections for the vacated seats are held annually in that month. The council itself elects the chief magistrate, the "Provost" (in the largest burghs the "Lord Provost") and the other magistrates or "bailies" who preside in the burgh police courts.

Burghs are classified by section 1 of the Local Government (Scotland) Act, 1947 into counties of cities, large burghs and small burghs, and the Act by Schedule allocates each burgh to the appropriate category. The powers and duties of a town council...
depend on the category in which it is placed. In the case of counties of cities (Edinburgh, Glasgow, Aberdeen and Dundee), the powers of a county council may be exercised by the town council. The town councils of “large burghs” (that is, those with a population of 20,000 or above) have substantially greater powers than the town council of a small burgh—many of the powers of the latter having been transferred by the Local Government (Scotland) Act, 1929, to the county councils. Even in the large burghs responsibilities for education and valuation for rating are not committed to the town councils. Police and Fire Services are in the main amalgamated.

Elections for county councils are held each third year in May, and members serve for three years before retiring. Membership of county councils comprises representatives directly elected by the local government electorate in the “landward” area (outwith the burghs) and also representatives of any burgh which is administered by the county for any purpose. These burgh members are appointed, not by the electorate directly, but by the town council which they represent. Since the 1929 Act the powers of county councils have increased substantially. In the “landward” area of the county, a county council has rather larger powers than the town council of a large burgh can exercise in the burgh. The chairman of the county council is known as the “Convener,” but unlike the Provost, who is formal head of the burgh, the Convener does not hold an equivalent position in the county—the head of which is the Lord-Lieutenant appointed by the Queen.

Military Law

New codes of law for the Armed Forces of the Crown were promulgated in the Naval Discipline Act, 1957, the Army Act, 1955, and the Air Force Act, 1955. These Acts, which apply to all serving in the Forces and to certain civilians, deal with specifically military crimes and also with a few specific “civil offences.” In addition, however, by sections of general reference, powers are conferred on military courts to try under military law “any act or omission punishable by the law of England”—whether such civil offence was committed in the United Kingdom or elsewhere. The gravest of these “civil offences,” such as murder are, however, tried by the ordinary courts exclusively when the crime is committed in the United Kingdom. Parliament when considering this legislation,

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88 19 & 20 Geo. 5, c. 25.
89 See note 95 supra.
1 5 & 6 Eliz. 2, c. 53.
2 3 & 4 Eliz. 2, c. 18.
3 3 & 4 Eliz. 2, c. 19.
4 ss. 42, 70 and 70 in the respective Acts.
rejected suggestions that self-contained Service codes should be enacted, excluding general reference to English law; and that the solutions of Scots law should be taken into account in reaching the best solutions available. The result is most unsatisfactory, and a soldier stationed in Scotland, for example, may well be unable to obtain reliable professional assistance locally if charged, e.g., with one of the more technical crimes of dishonesty known to English law.

FUNDAMENTAL LIBERTIES

Since there is no written code setting forth the fundamental liberties in Scotland, the limits and safeguards of the liberties of the lieges are to be found in the ordinary law of the land.

Safeguards against arbitrary Arrest, Search, Detention and Imprisonment

Personal freedom rests on the common law. In 1778 the Court of Session decided that a negro slave who had been brought to Scotland was a free man. A shameful exception to the principle of personal freedom survived, however, until 1799 in the case of “salters and colliers” who were in effect serfs, subject to special laws and excluded from the benefits of the Act of 1701, which safeguarded the personal liberty of the other lieges in Scotland.

Stair in discussing reparation for injury observes “Next to life is liberty. . . . And though liberty itself be inestimable, yet the damages sustained through delinquencies are reparable.” Bell lays down: “Everyone who lives under the protection of the law has an absolute right to the safety of his person; and wherever this right is invaded, there is in civil law a provision for redress of the injury, as well as in penal law a punishment for the crime.”

A citizen may have his personal freedom restricted lawfully, as when arrested on a criminal charge, or in rare cases where civil

5 See generally Smith, British Justice: The Scottish Contribution, pp. 30–33, 220.
6 See generally on the subject of English law and military law a valuable article by M. J. Prichard, “The Army Act and Murder Abroad” [1954] Camb.L.J. 232—discussing in particular R. v. Page [1954] 1 Q.B. 170. At p. 240 Prichard notes that prior to the 1881 Act it was at one time contemplated that only three “civil offences” should be punishable by military law (murder, manslaughter and rape) but that other acts which prejudiced good order and military discipline should be punishable on that account, and not as “civil offences,” though they might be contrary to the ordinary criminal law of England.
7 Knight v. Wedderburn (1778) Mor. 14545.
8 Erskine 1, 61, and see Cockburn’s Memorials, p. 76 et seq.: (1899) 189 Edin.Rev. 119; Scott Moncrieff (1882) Transactions of Banffshire Field Club, p. 23; Smith, Introduction to Scottish Legal History, p. 135 et seq. The doctrine of “necessary service” was invoked unsuccessfully with reference to prison labour, Keatings v. Sec. of State for Scotland, 1961 S.L.T. (Sh.Ct.) 63.
9 19.4.
10 Principles, § 2028.
imprisonment is still competent, or when certified insane under the
Mental Health (Scotland) Act, 1960, or earlier legislation.

The conditions upon which a citizen suspected of crime may
be arrested without warrant and detained, or have his person or property
searched, are discussed more fully in the context of criminal
procedure. A private citizen is entitled to arrest a person whom he
sees committing a serious crime and who is likely to abscond. Fuller
powers are given to the police to arrest a suspect on
information by a credible witness that he has committed a serious crime, or if the
constable reasonably believes that the suspect is about to commit
a breach of the peace or crime of violence, or in certain cases where he
has reasonable grounds for suspicion that a particular individual has
committed an offence. Violation of these conditions will expose the
person responsible to liability to prosecution for assault and to a civil
action for reparation for wrongful apprehension or assault.

In the case of detention by police or other public officers acting
within the scope of their duties, an action will not lie where the arrest
was made under honest mistake, but only where there was lack of
reasonable and probable cause. At common law general search
warrants are illegal, but this protection has been removed in
circumstances covered by certain statutes such as the Official Secrets
Act, 1911, and the Public Order Act, 1936. Redress for illegal
search of the citizen or his property is also provided by the civil
courts in an action for reparation, and by criminal prosecution where
there has been assault. The removal of a child under the age of
puberty from the custody of its parents or legal guardians is punished
in Scotland as an aggravated form of theft known as plagium. The
de facto consent of the child is no defence.

The Habeas Corpus Acts do not apply in Scotland. There are
other judicial safeguards against detention without lawful authority,
and against undue imprisonment without trial. The remedy of a
person who has been detained without warrant is to present a petition
to the nobile officium of the High Court of Justiciary asking for
liberation. Section 43 of the Criminal Procedure (Scotland) Act,
1887, supersedes the Act of 1701 which was passed for "preventing
wrongful imprisonment and against undue delay in trials." The
effect of this section is that an imprisoned suspect can ask the

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12 1 & 2 Geo. 5, c. 28.
13 See Smith, Studier, p. 261.
well be that the Court of Session has concurrent jurisdiction in certain circum-
stances at least.
16 50 & 51 Vict. c. 35.
17 Discussed more fully in connection with criminal procedure, p. 221, post.
court to liberate him if the prosecutor fails to serve a final indictment on him within the period specified in the Act; and further lays down that a suspect who has been imprisoned for 110 days from committal without his trial being concluded is entitled to be released and declared free from all liability in respect of the crime with which he was charged. The only exceptions to this rule are cases where delay has occurred due to illness of the accused, the judge, or of material witnesses—or because of some other reason for which the prosecutor is not responsible.

A person cannot be detained in custody as suspect without any charge being made against him. There is, however, a procedure whereby the court may grant warrant to apprehend an absconding witness, and commit him to prison till the date of trial unless he finds sufficient caution (i.e., security) for his appearance at the trial. The procurator fiscal, but not the police, may also compel a person to attend for precognition when a crime is being investigated (to give such information as he has bearing on the crime). If a witness fails to attend for precognition, or if, after appearing, he refuses to speak, he may be committed to prison.

Scots law, moreover, recognises—though it is seldom resorted to—one method of retaining a witness to some extent under pressure, namely, calling of a socius criminis as evidence for the prosecution. Such a witness is compellable, though clearly his testimony is not regarded as free from suspicion. The consequence of the prosecution requiring a socius criminis to testify is that, after he has given evidence, as Hume puts it, “The prosecutor discharges all title to molest him for the future,” that is, by operation of law, the prosecution is barred from instituting criminal proceedings against the socius criminis for the conduct to which he has testified.

**Right to Free Expression of Opinion and Right of Public Meeting**

There is no very substantial difference between the laws of Scotland and England regarding expression of opinion and right of public meeting: a statement of the essentials is, however, desirable since, though similar, the laws of Scotland and England are not identical regarding the exercise of basic civic rights.

The subject in Scotland is free to express what opinions he likes in written or oral form provided that in so doing he does not infringe

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18 These safeguards of the ordinary law were suspended during the War by Regulation 18B. The English case of *Liversidge v. Anderson* [1942] A.C. 206 may be consulted as to the effect of this legislation.
19 See Renton and Brown, *Criminal Procedure*, 3rd ed. by Watt, pp. 87-88; also *ibid.* p. 231 *et seq.* for summary procedure.
other interests protected by law. Thus he must not offend against the civil law of defamation\(^{22}\) nor against the criminal law which prohibits sedition,\(^{23}\) blasphemy, obscenity, "horror comics" contravening the Children and Young Persons (Harmful Publications) Act, 1955, improper reporting of legal proceedings, and comment which might prejudice a fair and impartial trial. Prosecutions for sedition and blasphemy are almost unknown in modern practice, but there has been occasion recently for the High Court of Justiciary to re-emphasise the strict standards demanded in Scotland regarding Press reports pending trial of an accused. The author has discussed the relevant authorities in detail elsewhere.\(^{24}\) The essence of the law is well expressed in Macalister v. Associated Newspapers, Ltd.,\(^{25}\) where the Lord Justice-General observed, "Once a person has been apprehended and committed for trial, the function of the Press in commenting upon the guilt of the accused and the nature of the offence charged is, at least for the time being, at an end; and the public dissemination thereafter of insinuations or suggestions capable of prejudicing the public mind and the minds of prospective jurors with regard to a pending prosecution cannot be tolerated, for it is in our view prejudicial to the interests of justice." It may be added in this connection that in Scotland there is no public "preliminary hearing" as in England, with the result that there is no public disclosure before the actual trial of the evidence upon which the Crown founds its case.

Restricion upon free expression imposed by the law on obscenity is also of topical importance. The Obscene Publications Act, 1959,\(^{26}\) which does not apply to Scotland, has attempted a statutory formulation of the principles to be applied in England. The Children and Young Persons (Harmful Publications) Act, 1955,\(^{27}\) which strikes at a different type of harmful publication—pictorial representations of violence or of a horrifying nature—applies to Scotland and England.

\(^{22}\) False and injurious statements are struck at by the criminal law only when they take the form of "leasing-making" (an obsolescent crime consisting in calumny of the Sovereign); "murmuring of judges" (insulting, threatening or slandering judges contrary to the Act, 1540, c. 104); or false statements regarding the personal character or conduct of candidates at Parliamentary elections contrary to the Representation of the People Act, 1949 (12, 13 & 14 Geo. 6, c. 68), s. 91 (1).

\(^{23}\) Intention to stir up disturbance is not a necessary element of "sedition" if disorder is the likely result of the conduct of the accused. Grant (1848) J. Shaw 17 at p. 89. There are also statutory offences in the nature of sedition—see the Incitement to Disaffection Act, 1934 (24 & 25 Geo. 5, c. 56).

\(^{24}\) See Smith, Studies, p. 286.

\(^{25}\) 1954 S.L.T. 14 at p. 16. This case is discussed [1954] Crim.L.R. 506. It preceded the so-called Scottish Nationalist "Conspiracy Trial" which provided a focus for strong and divergent opinions on certain Scottish problems. See also Stirling v. Associated Newspapers, 1960 J.C. 5.


\(^{27}\) 3 & 4 Eliz. 2, c. 28.
Obscenity in Scots law still rests on common law principles, though these are usually invoked as a result of statutory prohibitions directed against the exhibition or distribution of obscene literature. In Galletly v. Laird\(^{28}\) it was laid down that the test of obscenity comprised two elements, (a) that the publication complained of was of such a nature as to be calculated to produce a pernicious effect in depraving and corrupting those who are open to such influences; and (b) that such publication was being indiscriminately exhibited, circulated or offered for sale in such circumstances as to justify the inference that it was likely to fall (and perhaps intended to fall) into the hands of persons liable to be so corrupted. The law on obscenity in Scotland and England has been attacked by serious critics, who consider that freedom of expression has been unduly restricted. In particular, those entrusted with decisions, it is said, have applied somewhat capriciously an objective test without adequate regard for the intentions of the person exhibiting; and further, evidence of artistic merit has been restricted. On the other hand, the Lord Advocate in Scotland recently refused to prosecute booksellers who offered for sale the novel *Lady Chatterley's Lover*, which was the subject of an unsuccessful prosecution in England.\(^{29}\)

So far as the right to free discussion or ventilation of opinion is concerned, the right to hold public meetings is a necessary complement. In a general sense the right to hold public meetings is recognised in Scottish law—but, again, citizens exercising this right must not infringe other interests protected by the law.

In the first place the right of public meeting is restricted by the ordinary law of trespass which protects private property against unauthorised entry.

Secondly, since the right of free, unrestricted passage is the paramount public right recognised by the law with regard to public streets and squares, any obstruction of that right by a meeting is strictly illegal—though the enforcement of the law may be tempered with discretion.\(^{30}\) In *McAra v. Magistrates of Edinburgh*\(^{31}\) Lord President Dunedin observed, "The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings in the street . . . streets are for passage, and passage is paramount to everything else. That does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along. It is quite clear that citizens may meet in the streets and may stop and speak to each other. The whole thing is a question of


\(^{30}\) *Aldred v. Miller*, 1924 J.C. 117; but see *Docherly, Scotsman*, Jan. 19, 1962.

degree. . . . The right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised.” In public parks and open places passage is not the paramount right, and at common law it may be legitimate to hold meetings there. Indeed open spaces may well be dedicated for that purpose, and in Burgh of Dunblane Petrs. the Sheriff (now Lord Strachan) refused to confirm a by-law which would have prohibited meetings in a public park—the only open public space in the town available for public expression of opinion.

On the other hand, the use of many public parks is controlled by by-laws which prohibit the holding of meetings there without permission. If a meeting in the public streets is not static, but takes the form of a moving procession, this will be illegal if it causes obstruction—though, unlike a stationary meeting in the streets, it does not always necessarily involve obstruction of the right of passage.

Thirdly, the right of public meeting is restricted by the requirement that it must not occasion a breach of the peace. This restriction applies not only to cases where the persons assembled have an unlawful purpose but also to cases where, though the meeting itself is orderly, other persons will probably be induced to act in a disorderly manner if the meeting is held. By the Public Order Act, 1936, magistrates of burghs in Scotland are empowered to impose restrictions on public processions, or to prohibit all or any class of public processions for a period not exceeding three months, if they have reasonable grounds for apprehending serious public disorder.

35 Deakin v. Milne (1882) 10 R. (J.) 22—decided in the same year and on substantially the same facts as the case of Beatty v. Gillbanks (1882) L.R. 9 Q.B.D. 308. Opposite conclusions were reached in the two countries, but the English view seems to have altered to some extent since 1882.
36 1 Edw. 8 & 1 Geo. 6, c. 6. This Act also imposes prohibitions, inter alia, on uniforms, weapons and abusive language at public meetings; and strengthens the powers of the police under the Public Meeting Act, 1908 (8 Edw. 7, c. 66), to maintain order at meetings.
CHAPTER 4

THE COURTS AND LEGAL PROFESSION

CIVIL COURTS

General

For present purposes it would be superfluous to give a detailed historical account of the various jurisdictions of the courts in Scotland.\(^1\) In medieval times the local courts included sheriff courts, barony and regality courts and burgh courts. The King's Justiciars administered peripatetic justice, and in Parliament and the King's Council ad hoc judicial committees were formed as required to deal with legal business. Judges in the local courts were laymen, except where legally qualified sheriffs deputes were appointed, and they administered in the main customary law or rough justice according to their lights or prejudices. Church courts assumed jurisdiction in many matters which were outside the ecclesiastical field. In these Church courts clerics trained in canon law sat in judgment, while in Parliament and the King's Council distinguished churchmen sat with lay magnates, reaching decisions in particular instances—which, owing to the fluctuating nature of their sessions, could not achieve such consistency and publicity as to warrant reasonable prediction in law as to what would be decided in the future on similar facts to those of matters already determined. The fragmentary nature of Scottish law was inevitable until the establishment in 1532 of the Court of Session as College of Justices—a permanent central court manned by a professional judiciary, and comprising also their clerks, writers, notaries and advocates within the college. As has been discussed already, the establishment of such a court enabled professional standards, and Roman law as expanded by the Continental commentators, to mould Scottish law into a coherent and rational system. In the local courts lay justice with its many defects continued to be administered until the abolition of the heritable jurisdictions by the Heritable Jurisdictions (Scotland) Act, 1747,\(^2\) after the Rising of 1745, though it was not until the nineteenth century that the sheriff court attained its present importance. The development of satisfactory machinery for the administration of criminal justice came late. Though

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\(^1\) For a detailed historical account see *Introduction to Scottish Legal History*, Chaps. 23–34; and for a short conspectus Smith, *British Justice: The Scottish Contribution*, Chap. 2.

\(^2\) 20 Geo. 2, c. 43. Minor powers, now in desuetude, were reserved to baron courts.
CIVIL COURTS

BEFORE REORGANISATION
(16th - 19th CENTURY)

CENTRAL COURTS

PARLIAMENT HOUSE OF LORDS

LORD PRESIDENT PLUS 16 SENATORS
INNER HOUSE

OUTER HOUSE

SHERIFF COURTS (ALSO REGALITIES & STEWARTRIES PRE-1748)

BARRON COURTS

J.P. COURTS

BURGH COURTS

APPELLATE OR SUPERVISORY JURISDICTION

PRE-UNION SCOTTISH COURTS

POST-UNION GRAFTINGS

MODERN ORGANISATION

PARLIAMENT HOUSE OF LORDS

INNER HOUSE

FIRST DIVISION

SECOND DIVISION

OUTER HOUSE

LAND COURT

LYON COURT

RESTRICTIVE PRACTICES COURT

VARIOUS STATUTORY TRIBUNALS

SHERIFF COURTS

SH.

SH.

SH.

SH.

SH.

SH.

SH.

SH.

SH.

SH.

TO H.C.J ON CIRCUIT
(SMALL DEBT ONLY UP TO £20)
the High Court of Judiciary was established by the Act 1672, c. 16, its jurisdiction was never effective throughout Scotland in Stuart times.

House of Lords

The ultimate appellate tribunal for civil causes originating in Scotland is the House of Lords, as the judicial organ of the United Kingdom Parliament. Though the matter was much disputed "protestation for remeid of law" had been competent to the Scottish Parliament—but was virtually confined to cases where the Court of Session had exceeded its jurisdiction. A denial of this right of appeal by King Charles II and the judges of the Court of Session led in 1674 to the temporary disbarring of a number of advocates who asserted the right. They were readmitted in 1676 on making their submission, but in 1689 the right to appeal to Parliament was reasserted in the Claim of Right. In the terms of Union the question of appeals to the United Kingdom Parliament was not mentioned—possibly as a matter of policy. In the first Session of Parliament after the Union, however, an appeal was taken to the House of Lords from the Court of Session, and the House accepted jurisdiction. Appeals multiplied, and became of general rather than of exceptional use. On the grounds that criminal appeals had not been taken to the Scottish Parliament from the Justiciary Court, the Lords eventually refused to entertain Scottish criminal appeals. Until the Appellate Jurisdiction Act, 1876, no statutory provision was made for any Scottish judge to guide the House of Lords in Scottish civil appeals on Scottish law—which led inevitably to misunderstandings of various kinds.

Ultimate decision on intricate questions of Scottish private law, which was largely Romanistic in its concepts, was left to judges trained only in the English common law. Significantly, the Corpus Juris of Justinian did not find a place in the Library of the House of Lords even in the first half of the nineteenth century. It is not surprising, therefore, that their Lordships tended to approach Scottish legal problems either with distaste or by translating them into terms with which they were familiar. Moreover, due indirectly to this appellate jurisdiction, doctrines of stare decisis, civil jury trial, the mystique of the single judge as evaluator of testimony, and radical changes in methods of

3 The Privy Council exercises appellate jurisdiction only in a few matters specified by statute, e.g., University questions.
4 See MacQueen, House of Lords Practice, p. 286.
5 See Lord Mansfield's speech, Bywater (1781) 2 Paton 563, and authorities reviewed in Mackintosh v. Lord Advocate (1876) 3 R. (H.L.) 34.
6 39 & 40 Vict. c. 59.
7 A full description of the functioning of this unusual jurisdiction will be found in Professor A. Dewar Gibb's stimulating book Law from over the Border.
8 Ferrier v. Alison (1845) 3 Bell's App. 161 at p. 170.
pleading were introduced into Scotland. 9 Paradoxically, some of the Scottish lawyers in the House of Lords have at times been responsible for the subversion of valuable principles of their national system. Lord Hunter has observed 10: "It would be a fascinating pursuit to discover how many false doctrines—that is false so far as the law of Scotland is concerned—have had their origin in that august assembly and also, which is more shameful, how many of these false doctrines have been fathered or preached by peers and Lords of Appeal of Scottish origin who have crossed the Border and found in the metropolis of London their spiritual home." In modern times judges appointed to the House are of a very high quality, and they would not deliberately override an established principle of Scots law when brought to their attention. On the other hand, there is still a certain tendency to ask counsel whether the principle under discussion is identical in Scots law and English (a question which few counsel are professionally qualified to answer). Counsel, for their part, often introduce an elaborate citation of English authority of doubtful relevance in the hope that it may be followed, if favourable to their clients' interests. This introduces an element of unpredictability in stating what the law of Scotland is on certain matters.

It is now customary for two Lords of Appeal to be Scottish judges, which might be thought to give them theoretically too much power in relation to the judges of the Court of Session and too little power in relation to the English and Irish law lords. Though there is a body of Scottish opinion which would like the House of Lords to hear Scottish appeals in Edinburgh, the profession desires to retain a right of appeal from the Court of Session. 11 If Scottish appeals were heard in Edinburgh, this would not only reduce the expenses considerably but would make it more practicable to reinforce the supreme appellate tribunal with selected judges of the Court of Session—or indeed to take the advice of all the judges, as may be done in England. (As will be explained presently, there is already an established procedure for convening seven judges or the whole Court of Session to decide matters of importance.) From the purely Scottish viewpoint it may be regretted that two of the ablest exponents of Scottish law sit permanently in London, where only a small proportion of their judicial time is devoted

9 See generally Smith, British Justice: The Scottish Contribution, pp. 66-68, 76-78, 83-89.
11 The Law Society of Scotland recommended in 1953 to the Royal Commission on Scottish Affairs that, if there were constitutional difficulties in appeals being heard in Edinburgh by the House of Lords, the Scottish appellate jurisdiction might be transferred to the Judicial Committee of the Privy Council. On the other hand the Faculty of Advocates, in their memorandum of evidence, expressed the wish to retain the symbolism of appealing to Parliament in its traditional Chamber. The Royal Commission in their Report, para. 102, considered that it would be inappropriate for them to comment on the constitutional issues which might arise if the present system were altered.
to questions of Scottish law.12 On the other hand, it is most desirable that Scottish views should be represented in construing United Kingdom legislation generally, and in interpreting the law on many matters affecting Britain as a whole.

The character of the House of Lords in its judicial capacity is by no means clear.13 It may be regarded as a United Kingdom court or an English, Scottish or Northern Irish court, according to the forum from which an appeal is taken. Or it is possible that it is a United Kingdom court administering the law of the country in which the cause originated—though entitled to take judicial notice of other United Kingdom jurisdictions. Subject to reservations already stated,14 the author inclines to the view finally expressed.

“United Kingdom” Courts in Scotland

There are certain courts which may sit in either Scotland or England, and in large measure administer a code of United Kingdom law. The Restrictive Practices Court was set up by statute in 1956,15 and comprises five judges of whom one is appointed on the nomination of the Lord President of the Court of Session. It has jurisdiction to hold certain restrictions in trade agreements disclosed to be contrary to the public interest.16 Appeal on point of law lies, if the court sits in Scotland, to the Court of Session. Few cases have so far been decided in Scotland. Professor Mitchell has already demonstrated17 that, though it was intended to give the Restrictive Practices Court “a United Kingdom character,” the Act, which confers jurisdiction over restrictive practices in some matters, leaves substantive and procedural questions to be resolved by the different national systems of Scotland, England and Northern Ireland.

The Courts-Martial (Appeals) Act, 1951,18 constituted a Courts-Martial Appeal Court, which when sitting in Scotland consists of such Lords Commissioners of Justiciary as the Lord Justice-General may nominate, being uneven in number and not less than three. This court hears appeals against conviction by courts-martial of all three Services. Ironically, when this court sits in Scotland it has to administer in effect English criminal law and procedure, though counsel and judges may have no professional experience of this system. The opportunity to

12 There were only three appeals from the Court of Session to the House of Lords disposed of in 1953, six in 1954, four in 1955, eight in 1956, four in 1957, three in 1958 and four in 1959.
14 Ante, at p. 36.
18 14 & 15 Geo. 6, c. 46.
draft self-contained codes of Service law was deliberately rejected by Parliament in 1955.19

The Court of Session

The Court of Session, Scotland's supreme civil court, has now absorbed a number of courts which formerly competed with its original jurisdiction. Brief mention will be made of these after the constitution of the Court of Session has been explained.20

When the Court of Session was first established it comprised clerical and lay lawyers and also a number of lay magnates who normally possessed no legal qualification. At first the composition of the court included the Chancellor, the President, fourteen Ordinary Lords and several Extraordinary Lords. Clerics and lay lawyers, prior to the Reformation, were appointed to the court in approximately equal numbers, but the nomination of clergy to the Bench was prohibited by the Act of 1584, c. 133, and again, which implies evasion of that Act, by the Act of 1640, c. 20. The Extraordinary Lords—usually about four in number—were nominees of the Sovereign and required no legal qualifications, but might, as in the case of Archbishop Burnet, who died in 1684, be distinguished in other fields. In 1723, by the Act of 10 Geo. 1, c. 19, further appointments of Extraordinary Lords were prohibited. Until the Union of 1707 the Chancellor occasionally sat in the Court of Session representing the King. The King himself was entitled to attend, and James VI availed himself of this privilege—though not always in the interests of justice.21

The essential character of the Court of Session was collegiate. Until the early nineteenth century "the hail fifteen"—or a substantial number of the judges—sat together to determine any cause of consequence, and the role of the single judges who went in rotation to the Outer House was as delegates of the court to settle matters of evidence or procedure or minor questions. This collegiate system, which was unduly cumbrous and dilatory for transacting the day-to-day business of the court, has been preserved in modern practice in sessions of five or seven judges or of the whole court to determine questions of special importance or to set aside obnoxious precedents.22

The organisation, procedure and jurisdiction of the Court of Session were all the subject of extensive legislative reform in the first half of the nineteenth century, after numerous Select Committees and Royal Commissions had reported the need for reform and urged a wide variety of proposed solutions.

19 See ante, p. 78; also Smith, British Justice: The Scottish Contribution, pp. 30–33, 135.
20 See post, p. 93.
22 See Doctrines of Judicial Precedent in Scots Law, pp. 18, 30, 105.
As regards organisation of the court, after certain experiments from 1808 to 1825, the solution adopted was to divide the Court of Session into an Inner House of two permanent chambers or Divisions, and an Outer House in which the remaining judges sit singly as permanent Lords Ordinary. The First Division of the Inner House is presided over by the Lord President, and in the Chair of the Second Division is the Lord Justice-Clerk. Each Division comprises four judges, though three may act as a quorum. The Inner House exercises both an original and an appellate jurisdiction, though its work is mainly appellate; its original jurisdiction is concerned with such matters as petitions to the *nobile officium* of the court. The 1825 organisation provided for seven permanent Lords Ordinary, but in 1830 the number was reduced to five. In 1948 statutory provision was made to increase, if necessary, the number of Outer House judges; and at present the composition of the Court of Session includes eight Lords Ordinary.

By the Court of Session Acts, 1825 and 1868, causes of difficulty or importance may still be heard by five judges, seven judges or by the whole court, and it is competent for a single judge to report a case of difficulty, without deciding it himself, in order to obtain an authoritative pronouncement on the law.

As regards procedure, the older system of litigation involved prolixity of written pleadings and arguments, and these were replaced by the present practice of "closed record" and oral argument. The "record" contains conclusions or general requests for particular forms of legal remedy; a statement of the facts relied on by either side, with the answers of each party of the other's averments; and pleas-in-law which ask the court to decree in the way concluded for, with special references to the facts of the case. In the Court of Session today proceedings, though sometimes by petition, are usually initiated by summons in the Outer House. The summons, a writ running in the name of the Queen and passing the Signet, is prepared by the pursuer's legal advisers. After the summons proper identifying the parties and requiring the defender to appear, there follow conclusions, i.e., brief statements of remedies claimed, a "condescendence" (i.e., numbered paragraphs setting forth the facts on which the pursuer relies) and pleas-in-law, which are brief propositions of law stating the legal foundations of the pursuer's case. The defender in his defences must answer statement by statement the pursuer's allegations of fact, counterclaiming when appropriate; and state his pleas-in-law. An open record is then prepared, so that the several paragraphs of the pursuer's condescendence are each followed by the defender's answers, and the defender's pleas-in-law follow those.

23 Administration of Justice (Scotland) Act, 1948 (12, 13 & 14 Geo. 6, c. 10).
24 6 Geo. 4, c. 120; 31 & 32 Vict. c. 100.
for the pursuer. After adjustment the record is "closed," by inter-
locutor of the Lord Ordinary, and unless subsequent amendment is
permitted, this defines the limits of competent argument.

Procedure on "relevancy" (comparable to "demurrer" in English
law) is extensively used to test whether a remedy would be granted in
law if the facts averred were in fact proved, and many important
questions of law have been decided authoritatively in this way—as, for
example, in the case of Donoghue v. Stevenson. The late Lord
Cooper criticised the complexity and slowness of contemporary Court
of Session procedure in certain cases, and suggested that cheapness and
simplicity might often be preferable to technical perfection—which is
costly. It may be added that the profession has made surprisingly
little use of available procedure by way of petition for summary trial to
secure a final judgment from a judge of the Court of Session in what
would amount to a judicial arbitration.

In 1815, jury trial in civil causes was imposed on Scotland, pre-
sumably for the benefit of the House of Lords, which, when hearing
appeals, was accustomed to the English method of having facts
determined by a jury. This surprising and unwelcome experiment
introduced by Lord Eldon, though opposed by leading Scottish and
English lawyers, was first tried out in a separate Jury Court but in
1830 the powers and duties of the Jury Court were transferred to the
Court of Session. In 1868, a Royal Commission reported that the system,
as anticipated, had not given general satisfaction in Scotland, but
despite criticisms its retention within a restricted field was recom-
mended in 1927. In the most recent Report on this question—that of
the Strachan Committee in 1959—a majority again recommended the
retention of civil jury trial in the Court of Session, describing the pro-
cedure as "a plant which has taken root and flourished but is now
overgrown." They recommended, however, that civil jury trial should
be abolished in the sheriff court (where it is rarely used), and also
abolition of the "enumerated causes" in the Court of Session—thus
restricting jury trial to actions in respect of death or personal injury,
breach of promise, seduction and wrongful arrest. The minority,
noting that the majority view of the legal profession was opposed to
civil jury trial, while no evidence had indicated lack of confidence in
judicial trial, recommended general abolition of the civil jury. One of

26 1932 S.C. (H.L.) 31—the celebrated "snail in the bottle" case; for a less satis-
factory (or expensive) example of Scottish procedure on relevancy see British
27 (1953) 2 Journal S.P.T.L. (n.s.) 91. Though of course the expenses of litigation in
Scotland are far less than in England.
28 1954 S.L.T. (News) 41; but see, e.g., British Hydro Carbon Chemicals v. British
29 See also ante, p. 43.
30 Cmd. 851.
the minority (Sheriff Kermack) considered that, if a plurality of minds associating laymen with the administration of justice was desired, it would be preferable to have a panel of experienced "lay judges" rather than a jury called for service perhaps once in a lifetime. (Traditionally, of course, the Court of Session brought to bear a plurality of trained minds to questions both of fact and of law. The mystique of a single judge invested with the virtual inscrutability of a jury is, so far as Scotland is concerned, an innovation with questionable antecedents.31)

No action has yet been taken on the recommendations of the Strachan Committee. Meanwhile there are certain "enumerated causes" for which jury trial is laid down as appropriate,32 and these are where the appropriate remedy is an award of damages. Since the Court of Session is permanently established in Edinburgh, the jury in civil actions is always chosen from residents within the sheriffdom of the Lothians and Peebles—which in itself casts an unreasonable burden on this section of the community. It is a paradox, since civil juries were revived in Scotland on the English model in the nineteenth century (they had gone out of use in the Dark Age of Scots law),33 that in England ordinary actions for damages for personal injury should today normally be tried by a judge alone, while in Scotland such cases should still come before a jury—which is a form of trial much favoured by those who urge speculative claims.34 It may be conjectured that the retention of civil juries has had its effect on the law of oral evidence in civil causes. The general requirements of corroboration, rules against hearsay evidence and the like are more needed in jury trial than in proof before a judge.

During the nineteenth century, legislation extended the jurisdiction of the Court of Session to absorb the functions of other courts including the Jury Court which had formerly exercised original jurisdiction in certain fields. The Jury Court, as has been indicated, was brought into existence as a separate court in 1815 and operated as a separate tribunal for fifteen years until its jurisdiction was transferred to the Court of Session. The first Chief Commissioner of the Jury Court was Lord Commissioner Adam, a Scotsman who had practised at the English Bar. The Jury Court Reports by Murray contain some interesting cases on the development of the law of reparation.35

Before the Reformation, consistorial causes were adjudicated in the ecclesiastical courts, the Courts of the Officials, but in 1563 Commissary

32 See Court of Session Acts, 1825 (6 Geo. 4, c. 120) and 1850 (13 & 14 Viet. c. 36); and Evidence (Scotland) Act, 1866 (29 & 30 Viet. c. 112). The civil jury numbers 12 as contrasted with the criminal jury of 15. Both can return a majority verdict.
33 Cognition of the insane, however, has continued to be a matter of inquest by a jury, though this procedure is no longer used in practice.
35 See post, Chap. 31.
Courts were set up to deal with consistorial questions and succession to moveables. The higher Commissaries were appointed from the Faculty of Advocates, and a number later became distinguished Senators of the College of Justice—such as Lord Hermand. In 1823 the inferior Commissaries were merged in the sheriff courts, while in 1836 the jurisdiction of the Commissary Court was suppressed, and thereafter original jurisdiction in consistorial matters has been exercised by the Court of Session.

A Scottish Court of Exchequer was set up after the Union in implement of the Treaty. It sat in Edinburgh, and was primarily concerned with questions of Crown revenue. In 1856 its jurisdiction was merged in the Court of Session. This jurisdiction is still subject to certain specialties, since financial legislation is usually applicable to the whole United Kingdom and phrased in the technical language of English law. Moreover, the whole Exchequer jurisdiction is in effect a grafting of English law and procedure for certain limited purposes onto the Scottish system. Some of the indirect consequences are apparent in connection with "charities." Lord President Cooper has questioned whether in Exchequer causes it is competent to review a precedent in a larger court, as may be done in other types of cause in the Court of Session, since the narrower English rule may be appropriate.

The Scottish Court of Admiralty formerly exercised substantial civil, criminal and prize jurisdiction, and Scottish writers, such as Wellwode, acquired by their writings a reputation outside Scotland. During the seventeenth and eighteenth centuries, however, the Court of Session was jealous of the Admiralty Court's success in commercial litigation, and the Justiciary Court grudged the Admiral's criminal jurisdiction. Eventually the Admiralty Court succumbed to the claims of its various rivals. In 1825 the prize jurisdiction of the Admiralty Court was transferred to the English Court of Admiralty. In this connection it may be noted that the Faculty of Advocates, in evidence before the Royal Commission on Scottish Affairs in 1953, pointed out that prize law now extends to aircraft; and that Scotland's naval and air bases in war are of special importance. They therefore urged that a prize jurisdiction should now be restored to Scotland and vested in the Court of Session. In 1830 the civil jurisdiction of the Admiralty Court was transferred to the Court of Session, and its criminal jurisdiction to the High Court of Justiciary.

36 See "Two Scots Cases" (1953) 69 L.Q.R. 512; also Smith, Studies, p. 213.
38 Drummond v. I.R.C., 1951 S.C. 482 at p. 488.
Judges of the Court of Session also sit to determine questions as members of statutory courts, such as the Valuation Appeal Court and Election Petition Court.

Further, regarding the jurisdiction of the Court of Session, it may be stated that this court has exclusive jurisdiction in actions for reduction (anglice—rescission), of proving the tenor of documents which have been lost or destroyed, in consistorial actions and actions relating to status generally (such as declarator of marriage, divorce, nullity and bastardy), and in matters appropriate to the nobile officium of the court. Since there is no separation of legal and equitable principles, as in England, remedies such as interdict (anglice— injunction) and specific implement (anglice—specific performance) are normal, and granted even by the sheriff.

Jurisdiction against foreigners may be founded in Scotland if the defender owns or possesses “heritage” (roughly “immoveables”) in Scotland, and the jurisdiction thus founded will extend to all claims of a pecuniary nature. Another method of founding jurisdiction against a foreigner is by arrestment ad fundandam jurisdicionem, a doctrine borrowed from Holland in the seventeenth century. Thus if A wishes to found jurisdiction against B, who is resident outside Scotland, and C, who is resident in Scotland, owes a debt to B, the debt can be arrested in C’s hands so as to found jurisdiction against B.

The Lyon Court

The Court of the Lord Lyon King-of-Arms has jurisdiction in questions of right to bear arms and in determining certain matters in relation to clans and families in Scotland. Jurisdiction to determine chieftainship is a matter of some contention—Maclean of Ardgour v. Maclean. Persons who carry heraldic devices or clan badges to which they are not entitled (and a tartan may be a cognisance) are liable to be prosecuted in the Lyon Court; and Lyon has jurisdiction to punish offenders and interdict the use of unauthorised arms. The jurisdiction of the Lord Lyon is of great antiquity and was confirmed by statute in 1867. Appeal lies from the Lyon Court to the Inner House,
and thence to the House of Lords. The Lord Lyon also discharges important ministerial duties, such as marshalling State processions and supervising messengers at arms.

**The Land Court**

The Scottish Land Court was set up by the Small Landholders (Scotland) Act, 1911. Its Chairman, who must be an advocate of at least ten years' standing, enjoys the same rank and tenure of office as a judge of the Court of Session. Six other members may be appointed who need not be lawyers, and one of them must speak Gaelic. The court, though it has ministerial functions, is a court of law in the fullest sense, with power to regulate its own procedure. Its original concern was with questions relating to smallholdings, but the scope of its work has been greatly increased by the Agriculture (Scotland) Act, 1948 and the Agricultural Holdings (Scotland) Act, 1949 and it may determine a wide variety of questions relating to agricultural land of very considerable extent and value. Either party to a dispute decided by the Land Court may require a case to be stated by the court on point of law to a Division of the Court of Session. Land Court decisions are reported in a series of decisions issued as a supplement to the *Scottish Law Review*.

**The Sheriff Court (Civil)**

The office of sheriff, as has been noted, is of great antiquity. Sheriffs became hereditary at an early date, and were magnates rather than lawyers, but certain statutes authorised an hereditary sheriff to appoint a legally qualified depute, for whom he would be responsible. With other heritable jurisdictions the hereditary sheriffdoms were abolished in March 1748. After 1748 no appointment was made to the office of "sheriff" strictly so called, and in 1892 power to appoint titular sheriffs was abolished. The sheriffs deputes were, however, continued in their offices, and, after the abolition of the heritable jurisdictions, were paid out of public funds. These judges had to be advocates of the Scottish Bar, and practised in Edinburgh, visiting their sheriffdoms from time to time. They were empowered to appoint "substitutes" to act in their absence, and in 1838 the "substitutes"...

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45 1 & 2 Geo. 5, c. 49.
46 11 & 12 Geo. 6, c. 45.
47 12, 13 & 14 Geo. 6, c. 75.
49 For a somewhat undifying difference of opinion on this issue between the Chairman of the Land Court and the Court of Session, see Kennedy v. Johnstone, 1956 S.C. 39.
50 e.g., 1592, c. 28.
51 An exception was made, in the Act abolishing heritable jurisdictions, of certain minor jurisdiction in baron courts.
who also had to be members of the Bar, became full-time resident judges in the sherifffdoms. From 1787 the Crown paid the salary of the "substitutes" and in 1877 assumed the sole power of appointing "sheriffs-substitute" so called. The professional status of the sheriff-substitute has changed enormously in modern times from the original conception of his office. The sheriffs-depute—who except for the Sheriff of the Lothians and Peebles and the Sheriff of Lanarkshire are senior members of the Bar still engaged in practice—have come to be known as "sheriffs" or "sheriffs-principal" (a designation at times also used by the old hereditary sheriffs). Since the "sheriff-substitute" is not a substitute at all, but a full-time resident judge with very extensive jurisdiction, the nomenclature of these sheriff court judges is most misleading to the uninitiated. The "sheriff-depute" (or "sheriff" or "sheriff-principal") is depute to an office which, after being in abeyance since 1748, is now abolished; the "sheriff-substitute" is substitute for no one at all, but a judge in his own right, holding his office ad vitam aut culpam by Crown appointment. From time to time reform has been urged of the titles of the sheriff court judges. Both the sheriff-principal and the sheriff-substitute are, in practice, addressed as "sheriff" off the Bench, and as "My Lord" when presiding in court. Apart from the sheriff-principal's appellate jurisdiction, the judicial powers of sheriff-principal and sheriff-substitute are the same. The sheriff-principal alone, however, can exercise certain administrative powers.

A sheriff exercises a very wide civil and criminal jurisdiction. His powers are laid down mainly in the Sheriff Court Acts of 1876, 1907 and 1913. In civil matters there is no pecuniary limit on the sheriff's jurisdiction, except that his jurisdiction in winding up companies does not apply where the paid-up capital of the company exceeds £10,000. A sheriff can grant interdict or decree specific implement. Certain types of action are, however, reserved to the Court of Session. These include actions involving status, such as marriage, divorce, nullity and bastardy—though a sheriff has jurisdiction in actions of separation and aliment and regarding custody of children. Reductions (that is, cancellations) of deeds and actions to prove the tenor of lost documents are excluded from the sheriff's jurisdiction. An action raised in the sheriff court for damages, if it is to be tried by jury, must be remitted to the Court of Session—subject, however, to the somewhat

52 For history of the office see Isabel A. Milne in Introduction to Scottish Legal History, Chap. 25.
55 39 & 40 Vict. c. 70.
56 7 Edw. 7, c. 51.
57 2 & 3 Geo. 5, c. 28.

S.L.S.—4
anomalous exception, rarely encountered until recently, of actions brought by workmen against employers in respect of personal injury.\textsuperscript{58} If the value of the cause does not exceed £50 the sheriff has privative jurisdiction. An appeal lies from the sheriff-substitute to the sheriff-principal, or—except where the value of the cause does not exceed £50—to the Inner House of the Court of Session. If an appeal before the sheriff-principal fails it is competent to take a further appeal to the Court of Session. If an action is brought in the sheriff’s small debt court—where the claim does not exceed £20—a special procedure applies. The sheriff’s findings in fact and law are final, and his decision can be reversed only by the High Court of Justiciary on grounds of corruption, incompetency, malice or oppression.\textsuperscript{59}

A sheriff-substitute follows the precedents of the sheriff-principal of his sheriffdom as a usus fori, but is not bound by decisions of Outer House judges of the Court of Session, though clearly they will be considered with care and respect.

**Criminal Courts**

**The High Court of Justiciary**

The present High Court of Justiciary is descended from the Court of the Justiciar, which had at first both civil and criminal jurisdiction. The number of Justiciars fluctuated. At some periods of Scottish history there was only one Justiciar, at other times the number seems to have risen to four, but for a considerable period the normal arrangement seems to have been to appoint one Justiciar for Scotland North of the Forth and another for Scotland South of the Forth.\textsuperscript{60} As was customary among the Great Officers of State, a Justiciar had power to appoint deputes to act for him, and justiciary ayres were meant to be held twice yearly throughout Scotland by the Justiciars or their deputes. During the sixteenth century the office of Justiciar (or Lord Justice-General, as it came to be known) became vested in the family of the Duke of Argyll. In 1628, by agreement with Charles I, the Duke resigned this hereditary office into the King’s hands, but retained the office of Justice-General for Argyll and the Isles, which continued in his family until its abolition by the Heritable Jurisdictions Act, 1747.\textsuperscript{61} The office of Lord Justice-General of Scotland between 1628 and 1830


\textsuperscript{59} Small Debt (Scotland) Act, 1837 (7 Will. 4 & 1 Vict. c. 41). Justice of the peace and magistrates in burghs have a civil jurisdiction restricted in practice to actions for debt not exceeding £5.

\textsuperscript{60} See Hume, Vol. II, Chap. 1. For history of the Justiciary Court see W. Croft Dickinson, Introduction to Scottish Legal History, p. 408.

\textsuperscript{61} 20 Geo. 2, c. 43; see also Argyll Justiciary Records, Stair Soc. Vol. 12.
was conferred by the Crown as a mark of favour upon a succession of noblemen, who were not required to have any legal training.

In 1672 the Justiciary Court, as we know it today, was established by statute. No longer were "deputies" appointed by the Justiciars, but five Senators of the College of Justice (judges of the Court of Session) were appointed Commissioners of Justiciary, together with the Lord Justice-General and the Lord Justice-Clerk. It is clear, however, that during Stuart times there was no effective administration of criminal justice throughout Scotland. Arnot, in his Criminal Trials, gives a bitter account of those who administered criminal justice in the early years of the Justiciary Court, and Stair is believed to have declined to serve as Commissioner of Justiciary, though the office carried an additional salary. In Stevenson's Weir of Hermiston and in Cockburn's Memorials there are vivid and unflattering sketches of the criminal judges of the late eighteenth and early nineteenth centuries—Braxfield in particular. Great ability in exercising civil jurisdiction as a judge of the Court of Session was too often combined with brutality in dispensing criminal justice as a Commissioner of Justiciary. The Lord Justice-Clerk's office developed from humble beginnings as that of clerk of the criminal court; but the Lord Justice-Clerk came to be recognised as the court's normal president, since the Act of 1672 provided that the Justice-Clerk should preside when the Lord Justice-General did not sit. Most holders of the office of Justice-General regarded it as honorary, but on occasion they did sit, and, if the nobleman who held the office wished to preside over the Justiciary Court—which would in these days have a quorum of three or more—a special method of voting applied, which reduced the effect of the lay president's vote as much as possible. Those familiar—either from the trial reports or from Stevenson's romanticised account in Kidnapped and Catriona—with the trial of James Stewart of the Glen for the murder of Campbell of Glenure in 1752, will recall that Argyll presided at this trial, as the then holder of the office of Lord Justice-General of Scotland (by grant from the King). The controversy regarding the Appin murder still waxes warm from time to time, and in particular revived during the years 1952-54. Without entering on the merits of the case, which must be regarded by the standards of the post-'45 era, the fact that Argyll, Chief of the Campbells, decided to preside at the trial of a Stewart for the murder of a Campbell, in the head town of the Campbell country and with a jury comprising eleven bearers of the name of Campbell, must be among the classic violations of the maxim that "justice must be

62 See Arnot's Criminal Trials, p. 192, and Notable British Trials, 2nd ed. (ed. Mackay); also "The Appin Murder—a Summing-up," by Sir John Cameron (now Lord Cameron) (1954) 23 Scot.Hist.Rev. 89—wherein the learned Dean of Faculty reviewed current controversy and stressed the prejudice which James suffered through the deliberate "obstruction" of the defence by the authorities.
CRIMINAL COURTS

BEFORE REORGANISATION (17th - 19th CENTURY)

HIGH COURT OF JUSTICIARY

HOME L.J.G. L.J-C.

CIRCUIT COURT PLUS JURY

WEST CIRCUIT

NORTH CIRCUIT

SOUTH CIRCUIT

L.J.G., L.J-C.

PLUS 5 LORDS COMMISSIONERS OF JUSTICIARY

J.P. COURTS

SHERIFF COURTS (ALSO REGALITIES ESTEWARTRIES PRE-1748)

BURGH COURTS

COMMISSION OF OYER AND TERNER (TREASON ONLY)

MODERN ORGANISATION

HIGH COURT OF JUSTICIARY

HOME L.J.G. L.J-C.

PLUS 14 LORDS COMMISSIONERS OF JUSTICIARY

CIRCUIT COURT PLUS JURY

WEST CIRCUIT

NORTH CIRCUIT

SOUTH CIRCUIT

HOUSE OF LORDS

COURT MARTIALS APPEAL COURT

BURGH SHERIFF COURTS (SOLEMN SUMMARY PROCEDURE)

J.P. COURTS (MINOR SUMMARY)

J.P. COURTS (MINOR SUMMARY)

BURGH POLICE COURTS (MINOR SUMMARY)

JUVENILE

APPELLATE OR SUPERVISORY JURISDICTION

POST-UNION JURISDICTION

THE COURTS AND LEGAL PROFESSION
clearly seen to be done.” Though Argyll, unlike many holders of the office of Lord Justice-General, had received a legal training, and sat with two Commissioners of Justiciary, the conscience of Scotland has been disturbed about this trial for over two and a half centuries. The Court of Session Act, 1830,63 by section 18 provided that on the death of the then holder of the appointment of Lord Justice-General, the office should become vested in the Lord President of the Court of Session. This took effect in 1836.

A remarkable improvement in the administration of criminal justice may be discerned during the nineteenth century, though sentences were severe by modern standards. It is fair, however, to observe of Scottish criminal law of the late eighteenth and early nineteenth centuries that the field of capital punishment was restricted compared with the system described in Radzinowicz’s *History of English Criminal Law*, Vol. I 64; and, further that a person accused in Scotland before the Justiciary Court was entitled to defence by counsel,65 and also to full information regarding the indictment and witnesses against him.

In 1887, by the Criminal Procedure (Scotland) Act,66 all the Senators of the College of Justice were made Commissioners of Justiciary, so that today the same sixteen judges as sit in Scotland’s supreme civil court are judges in the supreme criminal court. Unlike the Court of Session, however, which is permanently established in Edinburgh, Commissioners of Justiciary travel on circuit to the chief towns of Scotland to try the graver crimes. Normally one judge sits with a jury at High Court trials, but in cases of difficulty it is competent for two or three judges to sit. The High Court has exclusive jurisdiction regarding certain crimes, namely, treason, murder, attempted murder, rape, incest, deforcement of messengers, breach of duty by magistrates, and certain disclosures of official secrets.

Since the Criminal Appeal (Scotland) Act, 1926,67 came into force the Justiciary Court has also exercised jurisdiction to hear appeals from conviction and/or sentence after trial on indictment—a jurisdiction which was much needed. In cases of exceptional importance a Full Bench of judges may sit to determine the law. In *Kirkwood* 68 the Whole Court (less the trial judge and one other) sat to consider the effect on sentence of a plea of diminished responsibility. No appeal lies from the Justiciary Court to the House of Lords. The *nobile*
officium of the High Court of Justiciary can only be exercised by a bench of judges and not by a judge sitting alone.\textsuperscript{69} Appellate sessions of the High Court of Justiciary since 1926 have had a striking effect in developing the Scottish criminal law. It may be added that the High Court has power to hear civil appeals in Small Debt Causes.

**The Sheriff Court (Criminal)**

The sheriff does not only exercise very considerable civil jurisdiction; he has also wide powers in criminal causes. His jurisdiction comprises both solemn jurisdiction, when he sits with a jury of fifteen to try serious crimes, and also a summary jurisdiction, in which, sitting alone, he tries those accused of less grave offences.

The sheriff court has jurisdiction to try all crimes committed within the sheriffdom, except treason, murder, attempt to murder, rape, incest, certain offences against the Official Secrets Acts, defacement of messengers, and breach of duty by magistrates. Since, however, the sheriff’s powers of punishment in solemn procedure are restricted to the infliction of two years’ imprisonment\textsuperscript{70} in respect of a crime tried before him, the Crown may proceed in the High Court of Justiciary if it is thought that a heavier punishment would be appropriate than lies within the sheriff’s powers. If, however, the crime, though deserving a more severe punishment than the sheriff can impose, is one which may competently be tried before him, the Crown may bring a prosecution in the sheriff court in the expectation that the sheriff may remit the accused after conviction to the High Court for sentence. Under summary procedure, unless statute provides otherwise, a sentence of imprisonment normally does not exceed three months. An appeal by way of stated case or bill of suspension may be taken to the High Court of Justiciary. If a new statutory offence is created, it is implied that the sheriff will have power to try it. Other courts exercising summary jurisdiction only have jurisdiction over statutory offences when powers are expressly conferred on them.

**Police Courts, Burgh Courts and Justice of the Peace Courts**

In Scotland such extensive use is not made of lay judges as is the practice in England. Within a burgh, however, a burgh police court deals with certain minor offences.\textsuperscript{71} The judge in this court is a magistrate or bailie of the burgh, an elected local government representative.

\textsuperscript{69} Milne v. McNicol, 1944 J.C. 151.

\textsuperscript{70} He can, however, impose a longer sentence of corrective training, Mullen, 1954 J.C. 83.

\textsuperscript{71} Yet a high proportion of alleged offenders are tried each year by police, J.P., and juvenile courts. Though the offences are usually trivial, the judges have the heavy responsibility of deciding the fate of the alleged first offender. See Lord Cooper’s Preface to J. Robertson, *Handbook for Magistrates*. 
The Secretary of State has power, on application by the corporation of the burgh, to appoint a stipendiary magistrate as a whole-time professional judge, and in Glasgow a stipendiary magistrate has been appointed.

These lower courts' powers of punishment, unless statute has specifically increased them, are limited (except in the case of the stipendiary) to sixty days' imprisonment or a fine of £10. An appeal lies to the High Court of Justiciary on questions of law. In the counties, similar criminal jurisdiction is exercised by the Justice of the Peace Courts, which comprise two justices of the peace. Panels of justices are also employed where special juvenile courts are established to deal with juvenile offenders, but in Scotland only four such courts have been set up, and most young offenders are dealt with by the sheriffs under a special procedure.

THE SCOTTISH LEGAL PROFESSION

The legal profession in Scotland is divided into advocates and solicitors or law agents. The former are members of the Faculty of Advocates (the Scottish Bar). These wear wig and gown, give specialist opinions on questions submitted to them, have an exclusive right of audience in the superior courts, and from their ranks the judges of the Court of Session and most of the sheriffs are appointed. The solicitors' branch of the profession, though it has not the right of audience in the Supreme Courts, undertakes most of the forensic business in the sheriff courts, which, as has been explained, exercise very wide civil and criminal jurisdiction. Moreover, among the solicitors or law agents are to be found the masters of conveyancing and the feudal land law, while, as the advisers in direct contact with the client in need of all kinds of legal assistance, they enjoy in particular measure the privilege of his trust and confidence. In Scotland, where the Bar does not specialise as in England, the experts in such fields as company law and taxation are often to be found in firms of solicitors, where certain partners may concentrate on particular branches of law.

72 Procedure is regulated by the Summary Jurisdiction (Scotland) Act, 1954. The justices have also a small civil jurisdiction restricted in practice to actions for recovery of debts not exceeding £5; but during much of the eighteenth and nineteenth centuries the justices exercised considerable powers—see, e.g., Hutcheson's Justice of the Peace, 3rd ed. 1815.

73 For a general survey of other courts and tribunals exercising jurisdiction in Scotland see Walker, The Scottish Legal System, pp. 135-163; see also Weir v. Cruickshank, 1959 J.C. 94, for powers of sheriff to try children despite existence of special juvenile court.

74 For history of the profession see Introduction to Scottish Legal History, passim; also refs. in Walker, op. cit., pp. 175-195.
Advocates

In the reign of James I, professional advocates were already established, and, even earlier, in the Church courts professional legal representation had long been familiar. An early Act of James I—that of 1424, c. 45—ordained that the judges ordinary must ensure that any poor and ignorant person who could not otherwise pursue his cause should be provided with "a lele and wys advocate to follow sic pur creaturis caus." In 1455 a distinctive dress—a green tabard—was laid down for advocates appearing before Parliament. On the constitution of the Court of Session in 1532, eight of the most learned lawyers were appointed "general procuratoures of the Council," and provision was made for the Lords to raise the number thus specially appointed to ten. In 1587 advocates were permitted in criminal cases.

In the early period of the Court of Session advocates were admitted at the discretion of the Lords, and no specific qualification was required of those seeking admission; but in 1619, at the instance of the Faculty of Advocates, an examination and thesis in civil law were required as the normal qualification for admission. In 1692 it was laid down that this trial would not be dispensed with unless on special recommendation to the Lords—who then remitted the candidate to the Dean of the Faculty of Advocates for examination in Scots law. Accordingly, the two methods of entry were by study of civil law, usually in Holland or France, or by examination in Scots law. Continental study was the more usual method of preparation. Admission to the Faculty is now initiated by petition to the court, which then remits the intrant to the Faculty for examination. The intrant then undergoes private examinations in general scholarship to the standard of a Degree in Arts in a Scottish University (normally the intrant submits proof of having thus graduated), and thereafter in law to the standard of an LL.B. degree in a Scottish University (here again the intrant normally proves that he holds this qualification). After success by the intrant in private examination, the Dean of Faculty appoints him a title of the Pandects upon which the intrant must write a thesis in Latin, and thereafter defend it orally before the Faculty in Latin. (The standard of this test is not unduly strict.) For a year prior to admission, "the idle year," an intrant must not have engaged in any trade or profession—but may have acted as pupil to a Member of Faculty. This is commonly, but inaccurately, called "devilling," and is a gratuitous arrangement.

The Faculty of Advocates had been gaining in corporate spirit during the reign of Charles II, and a substantial number of Advocates,

75 Hee Hannay, College of Justice, p. 135 et seq.
76 See Smith, Studies, p. 51.
77 Ibid., p. 36 et seq.; 65.
“the Appealers,” suffered temporary deprivation of office in support of their brethren’s claim to appeal from the Court of Session to Parliament, “for remeid of law.” Moreover, it was in this reign that Mackenzie established the Advocates’ Library, the forerunner of the National Library of Scotland, which was set up in 1925. After the Union of 1707, when court, Parliament and Government were all transferred to London, the Supreme Court of Scotland sat, symbolically it might be, in the Parliament House. The Lord Advocate was probably the most powerful man in Scotland. After the divisions and disasters—economic, military and political—which overwhelmed Scotland in the eighteenth century, the brilliant revival of culture in the late eighteenth and early nineteenth centuries was due in large measure to the initiative and prestige of members of the Faculty of Advocates. Their talents were by no means restricted to the law, as Kames, Monboddo, Boswell, Walter Scott, Cockburn, Jeffrey, Fraser Tytler, Hill Burton, and Hope in their different fields amply demonstrated. The Faculty nourished, and still preserves, a corporate spirit of its own—which is fostered by daily contact in the Parliament House, and by the fact that practising members of the Bar are expected to have an address within a particular area of the New Town of Edinburgh. This may be contrasted with the English Bar, where the barristers occupy “chambers” in Inns of Court, which are the foci of their corporate life.

A system of free legal aid to the poor has existed in Scotland since 1424, though the success of that year’s Act is doubtful in view of the Act of 1535 appointing two advocates for the poor. Admission to the Poor’s Roll was at first in the hands of the court, but latterly—especially after an Act of Sederunt of 1842—reporters on probabilis causa appointed by the Faculty considered applications; and each year a number of advocates were appointed counsel for the poor. The Legal Aid (Scotland) Act, 1949, has now replaced this system of free aid to poor people with a scheme of “assisted litigation.” Assistance is made available to that wider section of the community which possesses moderate means, and a modified fee is paid to counsel. The scheme does not yet (in 1961) extend to appeals to the House of Lords or to criminal causes—a situation which has very serious contemporary implications. The tradition of free defence for any accused who lacks means to pay is long and honourable, but probably dates from the institution of the Justiciary Court in 1672 with plenary powers, rather than from the Act 1587, c. 91, to which “by a patriotic anachronism” Alison

79 R. L. Stevenson, who was, of course, later in date, passed advocate but rarely practised; see G. J. S. King, 1950 S.L.T.(News) 135.
80 See review of Cowper, “A Prospect of Gray’s Inn” (1952) 64 Jur.Rev. 87.
81 12, 13 & 14 Geo. 6, c. 63.
82 See post, p. 107.
attributed it. At present advocates are appointed each year by the Faculty to defend poor persons charged with crime. It is a tradition that, if the crime alleged is very serious, such as murder, the junior counsel concerned will request a Q.C. to lead him for the defence. This places an obligation of honour upon the senior to act—also gratuitously. A temporary arrangement was made in 1952 under which the Exchequer has paid the travelling and hotel expenses of advocates who go on circuit to defend without fee persons who cannot afford to instruct counsel.

The head of the Faculty of Advocates is the Dean—an office comparable to that of the French bâtonnier. He presides at meetings of the Faculty, and acts on its behalf. Within the Faculty he takes precedence over the Lord Advocate, though in court the Lord Advocate takes precedence over the Dean. It is the privilege of the Dean of Faculty—though one which has rarely been invoked in recent years—to defend the interests of members of Faculty against the Bench.

The dignity of Queen’s Counsel is now conferred upon leaders of the Scottish Bar. Formerly only the Law Officers of the Crown and Deans of Faculty received this honour, but in 1897, after disputes had arisen with regard to precedence between eminent Scottish advocates and English and Irish Q.C.s associated with them in the House of Lords or Privy Council, a petition to create a roll of Queen’s Counsel in Scotland was approved.

Solicitors

The great majority of professional lawyers in Scotland belong to the solicitors’ branch of the profession. By the Legal Aid and Solicitors (Scotland) Act, 1949, every solicitor holding a certificate authorising him to practise in Scotland at the date when the Act came into force became a member of the Law Society of Scotland. The creation of this society did not, however, supersede the various existing legal societies, many of which have ancient and honourable traditions. The Society of Writers to H.M. Signet (W.S.) in Edinburgh, for example, has particular standards with regard to apprenticeship, and still owns a fine library of legal works, although many of the more valuable general works have been sold in recent years. (The Society’s history was published in 1890.) Besides many local Faculties of Procurators throughout Scotland, special mention may be made of certain other professional societies of solicitors. The Society of Solicitors in the Supreme Court (members of which are designated S.S.C.) obtained a charter in 1797; the Royal Faculty of Procurators in

84 12, 13 & 14 Geo. 6, c. 63.
85 See Sir J. Muirhead, 68 S.L.R. 25, for history.
Glasgow boasts many illustrious names; and the Society of Advocates in Aberdeen (whose members are, somewhat confusingly, solicitors and not members of the Scottish Bar) is justly proud of its history and achievements. Admission as a solicitor may be granted either after taking a University Degree in Law or (in relatively rare cases today) after examination by the profession and after serving an appropriate period of apprenticeship in a law firm.

The understanding and operation of Scottish feudal land law has required minds of deep learning and ingenuity. In each generation there have been worthy upholders of the traditions of Dallas of St. Martins, David Erskine and John Russell. Today, moreover, the provisions of the Legal Aid Act, 1949, have increased the volume of work with which the profession has to deal. The need of "poor persons" for representation in civil and criminal causes had been covered in the past by the Poor's Roll—a system, organised by the profession, of allocating solicitors to represent and advise the poor. Today, however, the Law Society has to implement the terms of the Act, which gives a right to legal aid to "assisted persons" of moderate means, who are to be partly State-aided and in part contribute themselves. The number of applicants for legal aid each year continues to increase. At present, however, the provisions of the Act regarding legal aid in criminal causes are not in force. "Poor persons" accused of crime are defended, as formerly, by lawyers for the poor, appointed annually for this purpose, and meanwhile, as a temporary measure, a certain sum of money is allocated (1961) for distribution among those so engaged. The sum allocated (£8,000 for the whole of Scotland) is altogether inadequate, and only goes a small way to meet the expenses actually incurred by defending solicitors. In the past Scottish solicitors have acted gratuitously for all persons accused of crime who sought their aid—without requiring them to prove lack of means (which would involve delays), but with the substantial increase of criminal work in recent years this system imposed an intolerable burden. In 1960 a Committee presided over by Lord Guthrie reported its findings after reviewing the provisions of the Legal Aid (Scotland) Act, 1949, so far as they related to criminal proceedings. They observed: "The day in which the doctor and the lawyer were the rich men of the community and could afford to spend a fair proportion of their time on unremunerative work of a charitable nature is over . . . in present conditions, with high taxation and high overhead expenses, it is unreasonable to expect the legal profession to continue to act for accused persons in the criminal

86 For the various statutes, Acts of Sederunt and Schemes in force relating to legal aid in Scotland see Parliament House Book 1960-61, Vol. 1, Division E.
87 Cmnd. 1015/1960; see also N. Gow, 1960 S.L.T.(News) 146.
88 At p. 19.
courts without remuneration.” They recommended the discontinuance of the Poor’s Roll arrangements and the introduction by statute of provisions for legal aid in criminal proceedings. Though, of course, public funds have been made available in England for legal aid in criminal proceedings no action has (in 1961) been taken to extend like facilities to Scotland. In consequence, solicitors in Glasgow, where there is very heavy criminal business in the sheriff court, and elsewhere in Scotland indicated that, as from March 1962, they would only act gratuitously for persons who had been admitted to the Poor’s Roll in terms of the Sheriff Court (Scotland) Act, 1907.89 Subsequently the Secretary of State announced that the Government had accepted in principle the Guthrie Committee’s recommendations. The provisions of the Legal Aid Act regarding legal aid in matters not involving litigation were implemented in 1959, and are regulated by the Legal Advice (Scotland) Scheme made by the Law Society of Scotland in that year.

LEGAL EDUCATION IN SCOTLAND

The striking influence of legal education on the development of Scottish law has already been discussed in connection with the Reception of Roman Law. No legal system has flourished without legal scholars as well as able practitioners—while legal scholarship without a legal profession could scarcely merit much attention. It seems necessary to the author to give space to a consideration of the part played, and to be played by the legal scholar in Scotland—though the topic has caused him no little anxiety.90

As early as the twelfth century there were Scottish students studying law at Bologna, and a few also attended at the University of Oxford. Later, France rather than Italy became the main centre for Scottish legal studies, possibly due at first to the official support given by Scotland to the Anti-Pope in the Great Schism. France, then the Low Countries and—at the end of the “Roman period” of Scottish law—Germany, influenced Scottish legal thought. Today the most powerful foreign influences on Scottish legal studies are probably the Law Schools of Oxford and Cambridge. It is a comprehensible paradox that among the main opponents of excessive anglicisation of Scottish law are Scotsmen, who have learned at first hand to appreciate the merits and limitations of the English common law, and are naturally very sensitive to the danger of spoiling the Scottish system of law through a superficial assumption that certain Scottish and English legal doctrines are identical. One may admire the English legal genius, the

89 7 Edw. 7, c. 51.
90 See for further discussion Smith, Studies, p. 62, and refs. there cited.
English way of life, and the English as a people, without necessarily believing that the new Jerusalem should have its sole earthly manifestation in England's green and pleasant land, nor that the English common law is the final embodiment of legal wisdom.

The course of legal education in Scotland has been somewhat uneven. When in 1758 Blackstone delivered his Inaugural Lecture at Oxford, he noted that on the Continent of Europe a gentleman of education of that time would normally study the Institutes of Justinian and the local constitutions of his own country. He continued: "And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science which is to be the guardian of his natural right and the rule of his civil conduct." Blackstone seems to have been fortunate in his Scottish contacts; and, if his English audience blushed at the comparison of their own lack of enlightenment in 1758, the Scottish Universities could not claim most of the credit for the general interest in law shown by Scotsmen of education. These were mainly exported for "finishing."

A Faculty of Law was contemplated at each of the pre-Reformation Scottish Universities. At St. Andrews (founded 1411) some teaching was given in law—but only intermittently. Fraser Tytler observes of Sir Thomas Craig of Riccarton, author of the Jus Feudale, who passed advocate in 1563, that "As Craig left college in the year 1555 he could not at this early age have profited by the lectures of the professor of the Laws, who, under the title of Civilist, in the interval between 1538 and 1553 became one of the constituent professors of the university." Lorimer notes that "The Reformers" scheme for remodelling the University of St. Andrews assigned to St. Salvator's College the privilege of granting degrees in law after one year's course in ethics, economics and politics, and a four years' course under two readers in municipal and Roman law. Yet the melancholy fact is that legal scholarship has not flourished extensively at St. Andrews in past centuries, and indeed quite recently the Tedder Report had to urge that law be given its proper status in the senior University of Scotland.

Professor Dewar Gibb of Glasgow University, delivering a Commemoration Lecture in 1951 as part of the Fifth Centenary Celebrations, observed that the Bull of Pope Nicholas, who founded Glasgow University in 1451, directed the foundation of a studium generale, not only in the humane arts, but also in the civil and canon law. "It was

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91 Commentaries, I, 4-5.
92 Life of Craig, p. 7.
almost certainly less for the advantage of legal practitioners that instruction in these subjects was required than for the enlightenment of those who sought high place in the service of Church or State.” Even so, it would seem,\(^9\) that, though some instruction was given in law, and degrees in law were conferred at various times between the foundation of Glasgow University and the Reformation, no real law school evolved, and by the time of the Reformation teaching was nearly dormant. Instruction in law went into abeyance at Glasgow until 1713, when it was revived, and William Forbes was appointed to the Regius Chair of Civil Law. His reputation is rightly assessed by Dewar Gibb at a higher level than that conceded by many critics, who overemphasize Forbes’s concern with the law regarding witchcraft—a superstition of wide acceptance often manifested by savage reactions in Scotland of the early eighteenth century. Forbes’s successors were of unimpressive quality until, in 1761, John Millar was appointed. Millar, who held his Chair for forty years, achieved high reputation as scholar and lecturer, and attracted students from the whole kingdom. It is said that his students were always in class before him waiting as for a treat. Though his primary duty was to instruct in the civil law of Rome, he ranged widely over the theory of government, Scots law, and latterly included some teaching on English law.\(^9\) Millar’s predecessor had discontinued the tradition of lecturing in Latin on Justinian—a factor which no doubt contributed to the decline of civilian influence in Scotland. In 1841 it became established that the senior professor in the Law Faculty of Glasgow University should have the duty of lecturing on the Law of Scotland, and thus the Regius Chair became appropriated to the teaching of Scots law. A Chair of Conveyancing (which in Scotland comprises land law generally as well as a study of the legal instruments by which rights are transferred) was established in Glasgow in 1861; and since then the Glasgow Law Faculty has expanded considerably. (It has been the practice in appointing Professors of Conveyancing in Scotland to choose experienced members of the solicitor’s profession who continue in practice. The general standard of Scottish conveyancing professors has been notably high. Certainly it is true that, like a professor of surgery, a professor of conveyancing must continue to exercise his art in the practice of conveyancing.) In 1905 Professor W. M. Gloag was appointed to the Regius Chair in Glasgow, and his reputation in the field of Scottish legal scholarship—especially his work on *Contract*—has virtually raised him to a place among the “immortals” with Stair and Bell. Professor A. Dewar

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\(^9\) Gibb, *Fortuna Domus*, p. 163.

Gibb, until lately Regius Professor in Glasgow, has served the law of Scotland with fervour and with learning. In recent years the Glasgow Law Faculty has recruited a team of energetic and enthusiastic scholars who have made a substantial contribution not only to legal education but also to the literature of Scots law.

The older College of the University of Aberdeen was founded in 1494 by Bishop Elphinstone who had himself been a professor of canon law at Paris and had studied civil law at Orleans. Naturally, therefore, a civilist and a canonist were on the original foundation, and were enjoined to lecture after the manner observed in the Universities of Paris and Orleans. To Bishop Elphinstone is also ascribed the inspiration of the Act of James IV (1496, c. 3) which required barons and freeholders to send their sons and heirs to the grammar schools till “they be competentlie founded and have parfite Latin and thereafter to remain three years at the schules of art and jure, swa that they shall have knowledge and understanding of the laws.” It may be noted that law was considered the appropriate study for men of affairs—not only for those who intended to practise as professional lawyers. Though instruction in law may have flourished in the earlier years of the foundation of King’s College, Aberdeen, the early promise was not maintained—presumably as a consequence of the Reformation. The reformers would have little enthusiasm for canon law in particular and suppressed the Chair of Canon Law at Aberdeen. In 1619, a Commission of Visitation finding that there were no canonist or civilist teaching in Aberdeen accordingly made appropriate appointments. In 1639, apparently on religious grounds, the canonist was dismissed, but was later permitted to instruct, though only on the law of marriage and wills. According to the Records of the University, in 1640 Sandilands bargained to exchange his appointment as canonist for that of civilist. In 1661 a commission reported that there was no canonist at Aberdeen, nor any need for such a professor; while the Principal in 1680 told a further commission (inaccurately but significantly) that since the Reformation there had only been a titular canonist. The office seems to have disappeared finally in 1684 on the death of the last canonist appointed—Robert Forbes. The civilist’s appointment continued, however, and was held by a number of fairly eminent lawyers, such as

98 See Smith, Studies, p. 37, for further discussion and reference.
99 As to the library available to law students at Aberdeen in the sixteenth century, see Dove Wilson, 9 Jur.Rev. p. 374.
1 Rait, Universities of Aberdeen, pp. 125-127.
3 p. 415.
4 It is presumably to this Sandilands that Dove Wilson refers, supra, note 99, as being considered a strange appointment in view of the fact that he had not studied abroad.
5 Records, pp. 320, 356-357, 377-378.
Sir George Nicolson of Cluny (1673) who later became Lord Kemnay. Nicholson seems to have evaded the proper discharge of his duties. The 1680 Commission ordained him to give attendance and to teach at least once each week during term time. His successor (later Lord Whithill) was notable in that he did actually lecture, but up to the time of the Union of the Colleges of Aberdeen University in 1860, the civilist seems generally to have evaded or delegated his duties, and the evidence of Dr. Dauney to the University Commission of 1820—by recommending the suppression of his own Chair—marks the nadir of law teaching in the North East. Over the past century there have been professors worthy of the Chair of Law in men such as Dove Wilson, Mackenzie Stuart, and the late Principal of the University, Sir Thomas Taylor. Since Hitler's war there have been important developments and expansions in the Aberdeen Law Faculty—many of whose members have established a national or international reputation for their contributions to legal scholarship. The viability of Scots law depends largely on the vitality of its legal literature, and the profession is particularly indebted to the Professor of Conveyancing at Aberdeen for the present standard treatise on that subject.

Edinburgh, as the seat of the Court of Session, might have been expected to develop from an early date the pre-eminent law school in Scotland. There were two efforts made prior to the founding of the Court of Session (1532) to establish professorships of laws at Edinburgh. They miscarried, as did another in 1589. Advocates, who had themselves possibly studied abroad, gave private classes in civil law and feudal law, and for a long time were jealous at the prospect of professorial competition. In 1710 one Craig was permitted to lecture in civil law in a room within the college at Edinburgh, and twelve years later a professor of Scots law was also given accommodation. A Chair of Public Law was established in 1707 and continued through various vicissitudes until 1832, when it went into abeyance until revived for Lorimer in 1862. The Edinburgh Chairs of Scots Law, Civil Law, Public Law, Conveyancing and Constitutional Law have attracted many men of outstanding gifts—though the succession of such men has not been unbroken. Erskine, Bell and Hume, to mention three outstanding names, were not only gifted teachers but have left works of

6 For an entertaining account of Lord Kemnay's indignation at the treatment of his son by the Examinators of the Faculty of Advocates—see Hannay, College of Justice, pp. 158-159.
7 Records, supra, pp. 356-357.
8 Rait, supra, note 1.
9 See W. R. Humphries, William Ogilvie and the Projected Union of the Colleges, 1786-1787, p. 23 et seq.
11 Alexander Bayne; see Hope's Minor Practicks, 1726 ed., for Bayne's discourse.
Institutional status as lasting contributions to Scottish jurisprudence; while among their successors are the honoured names of many who have repaid in ample measure the debt to their profession. The legal profession as a whole expects—and rightly so—that the University Law Faculties will accept a principal share in maintaining the quality and quantity of legal literature. Edinburgh has made many notable contributions. Nomination for certain of the Edinburgh Chairs is vested in the Faculty of Advocates, a matter which raised a division of opinion in the Normand Committee which reported several years ago on the Edinburgh Law Faculty. It would be justifiable to conclude that the founders of the three pre-Reformation Universities included a study of law not necessarily for professional ends; while the Edinburgh Law Faculty was founded to train professional lawyers. The professional aspect of legal training, however, came to prevail excessively in all Scottish law schools with too little regard for the value of law as an academic discipline and for modern techniques in higher education.

As from October 1961, however, a “new look” has been given to legal training in Scotland after prolonged and friendly consultation between the professional bodies and the Universities. It was recognised by all that to train a lawyer most effectively he must have the advantage of University teaching no less exacting than in other Faculties, and that (except for the most robust and diligent) this cannot be combined with a concurrent apprenticeship in a legal office. Therefore, the new LL.B. degree now introduced as the basic qualification in law without the necessary preliminary of an Arts degree, is designed to be undertaken on the basis of full-time university study. (Only after such study will the aspirant to practice proceed to the practical part of his training—“devilling” for an advocate or apprenticeship in a legal office for a solicitor.)

Provision has also been made to adapt the new LL.B. degree as a suitable qualification for those who study—not with a view to practising law as a profession—but rather as a preparation for a career in administration, industry, commerce, agriculture or public life. Moreover, the Honours degree should supply a long felt need for a course in law which could stimulate and develop the talents of those who aspire to a higher level of legal scholarship—whether in preparation for professional practice or for law teaching and legal writing. In 1956 provision was made by Ordinance to restore to Scottish universities the right to confer the higher degree of LL.D. recognising major contributions to legal literature. The first recipient of this degree was Professor D. M. Walker for his compendious treatise on Damages. The real success of

12 Naturally, since their subjects were of general concern, men such as Lorimer and Mackintosh are better known outside Scotland than those whose works concentrated on Scots law.
the University Law Faculties has so far been in training lawyers for practice, but wider considerations are also now taken into account.

The legal profession in every country requires legal scholars. These fulfil in many ways the functions of a planning staff on a military formation. Theirs is not the glory nor the hazard of the regimental soldier, nor do they carry the prestige or the responsibility of the commander of a battalion, regiment, division or corps. Yet without meticulous staffwork, critical analysis and far-sighted planning a legal system cannot achieve its fullest possibilities. The University Law Faculties, while recognising that in certain fields eminence in scholarship is the main qualification for a teacher, also wisely recruit staff from those who have practical experience of the law in action to teach the "professional" subjects; but the current policy is to appoint law teachers who will be engaged on substantially full-time university work. Recruitment of first-class staff from the profession may become increasingly difficult since the general scale of University salaries does not compare favourably with the rewards to be gained by success in other fields of the legal profession; and this factor is more obvious to those who have practised than to those whose legal training has been exclusively academic. There are, however, intangible rewards open to the University law teacher. His pen is urgently needed in the service of Scottish law, and to him is entrusted the inspiration and guidance of a new generation of Scottish lawyers.

The Scottish Universities Law Institute

In modern times Scots law has suffered noticeably from the inadequacy of Scottish legal literature and from the abundance of English legal works which, though often helpful, are frequently cited uncritically for want of better guidance. In a small profession which responded so generously to the challenge of two world wars, those who could best have vindicated the law of Scotland with the pen preferred to vindicate international justice with the sword. Moreover, the cost of publishing large legal works for a small profession latterly proved economically impracticable. The perils of the situation were well summarised in the Report submitted by the Carnegie Trust for the Universities of Scotland in 1961:

The Law of Scotland has been said to be the country's most distinctive national heritage, containing elements which, when clearly discerned, are the admiration of other systems; yet by the end of this century this legal system will have decayed beyond hope of revival unless strenuous and far-sighted measures are taken now to restate Scots Law, by applying and adapting traditional principles to the needs of the twentieth century.

This is primarily the duty of the universities, and the fact that Scots Law is threatened by decay is largely due to the fact that Scottish law faculties and indeed the profession as a whole have been unable to discharge adequately the duties of legal writing. At present the Scottish legal system is developed by case law, but, through lack of those influences which legal education and Scottish legal literature should supply, reliance is increasingly placed by judges and practitioners on English textbooks and precedents.

Fortunately in the year 1960, through the generosity of the Carnegie Trust, altogether new hope was given that the Scottish legal heritage may be adequately restated within the traditions of the past, but in accordance with contemporary case-law and legislation—reflecting the social and economic conditions of the present day. In February 1960 the Scottish Universities Law Institute was constituted with the primary task of restating the law of Scotland by 1970 in a series of up to twenty comprehensive treatises dealing with the main divisions of the law. The Council of the Institute comprises distinguished members of the Bench, of the Faculty of Advocates and of the Law Society of Scotland, as well as representatives from the four Scottish law faculties. The main burden of legal writing will fall on the university law faculties, but advisory committees of professional experts are associated with the authors of treatises on various branches of law, and the Institute itself decides ultimately whether a work commissioned is of the necessary quality to merit publication under the auspices of the Scottish Universities Law Institute.

CHAPTER 5

THE SOURCES AND PRINCIPLES OF CRIMINAL LAW

THE SOURCES OF SCOTTISH CRIMINAL LAW

The principal source of criminal law in most countries is legislation. Further, in most civilised countries the criminal law has been codified. Though the English criminal law has not yet been codified, seven Criminal Law Consolidation Acts of wide scope were passed in 1861 and a substantial number in the present century. Scotland has neither a criminal code, nor even a statutory consolidation of the graver crimes. There are, of course, many statutes applicable to Scotland enacting particular crimes; and the courts have also to take cognisance of a large number of statutory offences which involve a relatively minor criminal sanction often imposed mainly in the interests of social adjustment and regulation. Further, so far as adjective law is concerned, though Scottish criminal procedure is largely regulated by statute, evidence depends mainly upon the practice of the courts. The Criminal Procedure (Scotland) Act, 1887, the Summary Jurisdiction (Scotland) Act, 1954, the Criminal Justice (Scotland) Act, 1949, and the Criminal Appeal (Scotland) Acts, 1926 and 1927, have in effect codified a procedure which, it is submitted, works very successfully. It contrasts strongly with English procedure. Yet Scottish reliance on common law rather than on legislation is one of the principal differences between substantive Scottish and English criminal law. The Lord Justice-General (Lord Cooper) giving evidence before the Royal Commission on Capital Punishment, not only stressed the distinction between Scottish and English criminal law with respect to their respective reliance on common law and legislation, but also expressed the opinion that it would be unwise to attempt the codification of Scottish criminal law at the present time. Certainly the report of the Royal Commission seems to justify the view that the Scottish system has benefited by avoiding premature rigidity. Scottish criminal law matured much later than the civil law, Hume's

1 50 & 51 Vict. c. 35.
2 2 & 3 Eliz. 2, c. 48.
3 12, 13 & 14 Geo. 6, c. 94.
4 16 & 17 Geo. 5, c. 15.
5 17 & 18 Geo. 5, c. 26.
6 Minutes of Evidence, 1950, 18th Day q. 5406, 5434, 5442; it may be as well to point out that q. 5406 is by error designated q. 5706.
Commentaries being over a century after Stair's *Institutions*. Notable contributions to the development of the law have, moreover, been achieved by the Justiciary Court since the Criminal Appeal (Scotland) Act, 1926, provided for benches of judges to hear appeals from conviction on indictment. These appellate sessions have been presided over by a succession of particularly distinguished criminal lawyers who have been concerned to rationalise the law. The time might now be ripe for codifying the Scottish criminal law—but there is no strong movement for such a step to be taken in present circumstances. In civil law a different approach might have been practicable. Thus Lord Cooper, who opposed emphatically the codification at present of Scottish criminal law, was much more sympathetic to codification of the civil law. In a stimulating address, of the latter he observed:

"Whatever the abstract merits or demerits of codification, it is undeniable that it is the systems codified and applied on the civilian principle which have spread far and wide throughout the modern world as a result of voluntary imitation and free adoption. . . . Despite our powerful Romanist tradition, we in Scotland have never yet codified, but we possess in our great Institutional treatises by Stair, Erskine and Bell what are in substance codifications of the mass of our law as it was in the seventeenth, eighteenth and early nineteenth centuries respectively. . . . For us complete codification would present no insuperable difficulty; and, but for the political and economic consequences of the Union with England in 1707, we should unquestionably have codified long ago."

Since Scotland has no criminal code and since legislation is relegated in the Scottish criminal law to a subordinate position as a source, the main sources must be sought elsewhere. As said Lord Deas in *Clendinnen*:

"Decisions and practice make the great body of our criminal law"; or, to quote Principal Sir Thomas Taylor:

"Apart from legislation, the sources of the Criminal law are to be found in the practice of the criminal courts, influenced to some extent by the civil and canon law and mediated through the institutional writers and the justiciary reports."

As concerns the civil (or Roman) law, Sir George Mackenzie observed:

"We follow the Civil law in judging Crimes, as is clear by several acts of Parliament, wherein the Civil Law is called the Common Law. . . . And that the Civil Law is our rule, where our own Statutes and Customs are silent, or deficient, is clear from our

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8 Possibly fearing its submersion in a British code; cf. p. 27, ante.
10 (1875) 3 Coup. 171 at p. 180.
11 Sir Thomas Taylor's unpublished lectures on Scottish criminal law have been an invaluable source in the preparation of this chapter.
12 *Laws and Customs of Scotland in Matters Criminal*, 2nd ed. 1699, at p. 4.
own Lawyers.” Hume, however, when discussing the major proposition of the indictment, observed 10: “In former times, when the authority of the civil and canon law was higher than it now is, it was not uncommon to call in the aid also of those systems; describing them as ‘the common law, baith civil and canon,’ in contrast to the peculiar and municipal practice of Scotland.” In his introduction he commented 14: “Accordingly, although our lawyers have been in the use of resorting to the Roman code for a confirmation of their arguments in criminal matters; and though of old they even sometimes set it forth in the preamble of indictments as law... yet I cannot find that the Imperial constitutions ever were incorporated into our municipal system, or were held to possess an authority, farther than as some of them occasionally express a reasonable sentiment, with a brevity and an elegance which are fit to recommend it.” Citations continued to be made during the nineteenth century in criminal trials to the “foreign doctors” such as Matthaeus and Carpsovierus 15 (referred to by Mackenzie) and to the Voets and Heineccius; but, following Hume, there were increasing references to English decisions for cross bearings on unsolved legal problems. Thus, though the civil law may have been, as Lord Justice-Clerk Boyle put it in Smith,16 “the origin and foundation of our criminal law” it had been a Roman law mediated through the Commentators 17; and by Hume’s time Roman doctrines were at most persuasive, not obligatory. Despite his dictum in Smith, and the fact that he applied the Roman law doctrine to theft of lost property, the learned Lord Justice-Clerk might not have accepted the full definition of theft contained in Dig.L.47 Tit.2.1 18 as capable of being received into the law of Scotland. The most notable consideration in recent years of the relation between Roman law and the Scottish criminal law was the leading case of Sugden.19 The main point in issue was whether, as the case of Macgregor 20 seemed to indicate, the Roman doctrine of vicennial prescription of crime applied in Scotland.21

16 (1838) 2 Swin. 28 at p. 50; see also pp. 53, 55.
17 See per Lord Cooper, note 9, supra, at p. 470.
18 Furtum est contractatio rei fraudulosa luci faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionis. Seaforth, 1926 J.C. 100, is not clear authority (pace the editors of Macdonald, Criminal Law, 5th ed.) for the view that Scottish criminal law recognises the furtum usus.
20 (1773) Mor. 11, 146.
21 Sheriff Gillon (supra), at p. 14, on analysis of earlier material disposes of the view that prescription was ever accepted as part of Scotland’s criminal law prior to Macgregor.
This view was rejected by the majority of twelve judges presided over by Lord Justice-Clerk Aitchison. Lord Murray said 22: "It is, however, in my opinion quite settled that, however valuable as a guide in principle, Roman law becomes the law of Scotland in so far only as it has been adopted as part of our law by what Stair calls 'the acquiescence of the nation,' that is to say, either by custom, decision, or statute." 23 The truth is that—though the influence of Roman and Romanistic authority is certainly not at an end—Scots law no longer turns as it once did to Roman law, nor to canon law, for a solution to all unsolved problems. "Borrowing still goes on; but under the impact of the new interest in comparative jurisprudence, the lawyer in search of new ideas has now the civilised world at his disposal." 24 Generally speaking, it must be admitted, unless there is some pointer in the authorities indicating that a search of the Digest or Code may be profitable, the Scottish criminal lawyer of uncertain Latinity probably directs his comparative researches to works written in a more familiar language. It is, however, suggested that the Roman association has been of first importance in assisting the development of a corpus of Scottish criminal law independent of English law. Since the House of Lords has no jurisdiction to hear Scottish appeals, 25 there could not be the same pressure by English law lords as in civil appeals for assimilation of Scottish and English criminal law. The English solutions to problems of criminal law which Scottish courts have adopted from time to time are those which commend themselves to Scottish lawyers on their merits. They are accepted gratefully, not grudgingly.

Practice of the courts was also mediated through the institutional writers; in criminal law, one might indeed say, through the Commentaries of Hume (first published in 1797), since Sir George Mackenzie's Laws and Customs of Scotland in Matters Criminal, which Hume frequently cites, has been in normal practice for the most part eclipsed by the later and greater work of Hume. MacLaurin's work does not merit institutional status; Hume's successors, Alison and Burnett, aimed to supplement the magnum opus of the Commentaries; and Macdonald, essentially a practical treatise in origin, and of limited scope, has not increased in authority with successive editions. Hence it was with good reason that Lord

22 1934 J.C. 103 at p. 124.
23 In argument (vide p. 100) the Crown had argued that the fact that a doctrine was recognised as Roman law did not make it part of the law of Scotland. While the Roman law was always worthy of consideration, to use the words of Lord Dunedin "The real question must always be what is the law of Scotland"—Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co., 1923 S.C. (H.L.) 105 at p. 123.
24 Vide ante, note 9, per L. P. Cooper at p. 469.
25 Mackintosh v. L.A. (1876) 3 R. (H.L.) 34 and authorities there quoted
Justice-Clerk Hope described Hume in Grant as "one whose authority is so great, and whose services to the law are so incomparably beyond any writer on any branch of the law of Scotland, except Lord Stair." Crime was a subject with which the other institutional writers dealt inadequately or not at all, a precedent set by Stair. "This great man," says Professor Forbes, "did always decline to be concerned, either as a judge or lawyer, in criminal trials. He had been much pressed to be one of the judges of the Criminal Court before the year 1660, with a considerable addition of salary; and after the Restoration was again desired to be King's Advocate, or one of the Lords of Justiciary. But he excused himself, alleging for his reason the danger of acquitting the guilty, or wounding the innocent in such offices; and, no doubt, the gentleness of his nature, as well as the hazard he foresaw in deciding concerning State crimes, had influence on that resolution." Stair's reasons may have blended preference and policy. Stair's grandson, though aged only eight, in 1687 had to obtain a Crown pardon for the accidental killing of his brother—which is eloquent testimony to the backward state of Scottish criminal jurisprudence in Stair's time. Further, Stair, like Mansfield in England at a later date, was the victim of scurrilous political attacks in pamphlet form. The learned biographer of Lord Mansfield has well remarked of him: "His political associations were a source of embarrassment. In the eighteenth as in the seventeenth century, public issues were often raised in a legal form." Of Stair the same might be said, and his avoidance of the criminal law set a precedent for his successors.

Accordingly, as there has been no comparable work in the field of criminal law, Hume's Commentaries on the Law of Scotland respecting Crimes have had, and retain, a particular reputation and authority. The fact that Hume is still our leading authority on crime, after more than a century and a half, and is the foundation on which case law has been built, tends to explain the continuity and strength of the Scottish tradition in criminal matters. But the need to resort to law books of bygone centuries is a serious inconvenience, and one cannot pass from consideration of institutional authority without noting the poverty of contemporary Scottish legal literature dealing with the substantive criminal law, especially when the riches of other systems are compared. Macdonald's Criminal Law had a restricted aim; we lack a modern work of the compass and depth of, say, Glanville Williams' or Russell's Criminal Law in

26 (1848) J. Shaw 17 at p. 92.
27 Quoted Preface to More's edition of Stair's Institutions, i, xiii.
29 C. H. S. Fifoot.
30 Lord Mansfield, p. 41. 31 First published in 1797.
THE SOURCES OF SCOTTISH CRIMINAL LAW

England or Donnedieu de Vabres' *Droit Criminel* in France. There is, moreover, in Scotland no practitioners' "bible" comprising the detail contained in (say) Archbold's *Criminal Pleading, Evidence and Practice* or (for summary offences) Stone's *Justices' Manual*. The history of our criminal law still awaits its Stephen or Radzinowicz. The student of Scottish law has no such gentle and fascinating introduction to the criminal law as his English counterpart found (or finds?) in Kenny. Even the very learned authors of detective fiction seem to feel ill at ease in the Scottish field. What wonder, then, that the merits of the Scottish criminal law should be largely a closed book to intelligent men outside Scotland and also—for too many non-lawyers—even inside Scotland.32 However, it may be hoped that the scholarly thesis of Dr. G. H. Gordon, "Criminal Responsibility in Scots Law" 33 may be harbinger of a new comprehensive treatise in the criminal law of Scotland.

The part played by judicial decisions in mediating the practice of the Court of Justiciary is of first importance. Since the legislature has not codified nor consolidated the great part of the substantive criminal law, and since the last edition of Hume was published in 1844, development of the criminal law has in the main been the responsibility of the judges of the High Court. In the day-to-day administration of justice the contribution of the sheriffs has been of excellent quality. The sheriff court in Scotland has an inherent universal criminal jurisdiction—excluding, however, treason, murder, rape, incest, defacement of messengers, certain crimes relating to official secrets, and breach of duty by magistrates. The High Court of Justiciary alone, however, can by decisions of a Bench of judges settle the criminal law of Scotland, and it is in the Justiciary Reports that the principles of Scottish criminal law have been worked out since Hume set the field in order. Fortunately, doctrines of precedent in criminal law are not too rigid to prevent development of the law as required.34

The High Court of Justiciary has always claimed the inherent right to formulate and declare rules in all matters criminal.35 The

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32 In Professor Donnedieu de Vabres' monumental treatise on *Droit Criminel et de Legislation Pénale Comparée*, not a single Scottish work is included in the copious and multi-national bibliography. The wonder is that some foreign jurists—such as the eminent American Orfield, in his *Criminal Procedure from Arrest to Appeal*—should have made the effort.

33 Glasgow, 1959.


rule-making power is exercised partly through Acts of Adjournal, which have the force of statute. The criminal law of Scotland was largely developed in the past through the inherent jurisdiction of the High Court of Justiciary to declare new crimes. This reserve of equitable jurisdiction in crime, though it has been used sparingly, has obviously been a considerable factor in adapting the law to changing conditions and maintaining its vitality.

It is well that such equitable power should be used with the greatest discretion. There is much force in the dissenting opinion of Lord Cockburn in Greenhufj when it was decided that the keeping of a gaming house was a crime by the common law of Scotland—an activity which falls somewhat short of what many persons would consider malum in se. Lord Cockburn would have restricted the Court of Justiciary’s power to punish unprecedented harm to cases where new methods had been devised of doing an act already in principle acknowledged as a crime.

It is submitted, and the point will be developed presently, that the cases in which the declaratory powers of the High Court have been used since Greenhufj seem to illustrate a tendency in the common law to deal with cases within an already recognised principle—rather than to declare new offences sui generis. It may be that, as with the nobile officium of the Court of Session, the special powers of the Supreme Criminal Court are less required now than in former times, though it must also be recognised that Parliamentary time is less readily available than in the nineteenth century to deal with new problems of criminal justice in Scotland.

**Criminal Responsibility and the Nature of Crime**

The terms “crime” and “offence” are used both in a broad and in a narrow sense in the law of Scotland. The broad sense in which the words are used makes them virtually synonyms, and would comprise all infringements of the criminal law. In this sense both the terms might be defined as “an unjustifiable act or omission in violation of those duties which an individual owes to the community; and for the breach of which the law has provided that the offender shall make satisfaction to the public.” This definition is so wide as to include

36 See Alison, i, 624 “Of Innominate Offences”; Sugden, 1934 J.C. 103 at p. 109.
38 No lover of Hume—see Journal (1874 ed.) pp. 57–58.
39 (1838) 2 Swin. 226.
40 See ante, pp. 45–46.
41 See definitions in Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 28; Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), s. 1; Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. 7, c. 65), s. 1; and Interpretation Act,
within its scope acts of the utmost villainy and also the unwitting infringement of some obscure technical regulation. Unfortunately, not only are the terms “crime” and “offence” used as synonyms; they are also used as suggesting different genera of conduct incurring public sanction. Apart from statutory definitions, which only relate to specific contexts, no distinction in principle is recognised between these genera. Modern judges and writers, though they recognise an arbitrary distinction between the two, have naturally been reluctant to attempt a definition of their exact limits.

The one distinguishing factor between the two concepts so far discernible is that the gravity of certain types of punishable delinquency raises them from the category of “offences” to that of “crimes” (stricto sensu). Thus Lord Sands said in *Padden*:

> “Every crime is an offence, but every offence is not a crime.”

On grounds of convenience Macdonald, in his treatise on the criminal law of Scotland, treats as crimes only those wrongful acts for the suppression of which the judge has power to pronounce sentence of death or deprivation of liberty without the option of a pecuniary penalty. Thus he included in his work discussion of some offences (common law and statutory) but excluded others. Some statutory offences, he suggested, were not truly criminal, but were made punishable to secure the health or comfort of the community. In *Mitchell v. Morrison*, the opinion was expressed by Lord Mackay—and is respectfully adopted by the writer—that no distinction in kind can be drawn between statutory offences and other offences involving like sanction. The general principles governing them are identical except in so far as the legislature may impose, in enacting statutory offences, the criminal sanction irrespective of dole on the part of the accused.

Admittedly it may tend to blunt the moral sense of the community when both “material” and “moral” wrongdoing are designated alike as “offences.”

1889 (52 & 53 Vict. c. 63), s. 29. “Crime” according to the 1887 Act includes “high crime and offence, felony, crime and offence, offence and misdemeanour.” The English terms “felony” and “misdemeanour” (which describe a distinction in English criminal law which is not recognised in Scotland) have sometimes been intruded into Scottish criminal law through poorly-drafted United Kingdom legislation. According to the 1887 Act the acts covered by both these terms are “crimes.” The 1889 Act, however, provides that the expression “felony” shall as regards Scotland mean a high crime and offence, while the expression “misdemeanour” shall as respects Scotland mean an offence. The Summary Jurisdiction (Scotland) Act, 1954, s. 77, provides that “offence” shall mean an act or omission punishable by law; see also s. 4.

The difficulties encountered in judicial pronouncements may be illustrated by reference to *Colquhoun v. Liddell* (1876) 4 R. (J.) 3 at p. 7; *Rintoul v. Scottish Insurance Commissioners* (1913) 7 Adam 210; and *Strathern v. Padden*, 1926 J.C. 9.


1938 J.C. 64 at p. 81.
THE ELEMENTS OF CRIME

The essence of crime has been summarised in the phrase "a dolous act inferring punishment." There are, however, many cases—the Criminal Justice (Scotland) Act, 1949, has extended their number—where the consequence of conviction is not necessarily punishment but some form of treatment. Accordingly, though liability to punishment is a normal consequence of crime, it may be preferable to consider the concept of crime as containing three essential elements: (a) breach of the criminal law; (b) dole—or mens rea; (c) conduct of the pannel (accused) or actus reus wherein the dole is manifested. To avoid reiteration of qualifications the gloss may be made in limine that physical conduct includes omissions as well as acts; that gross negligence may amount to dole (culpa lata dolo aequiparatur); and that the concept of dole has been whittled away as an element in some offences by the absolute phraseology of the statutes or delegated legislation which created them.

A Breach of the Criminal Law

In most civilised countries criminal law is jus scriptum. When the prosecutor alleges that there has been a breach of the criminal law he has, so to speak, to quote chapter and verse of the Criminal Code. In Scotland this is true in respect of certain crimes and also of relatively minor statutory offences, where the prosecutor must refer to the statute or regulation. But, as has been stated already, most of the graver crimes are ruled by common law in Scotland. Until the Criminal Procedure (Scotland) Act, 1887, came into force, when the crime or offence was charged at common law, the indictment was in the form of a syllogism. It asserted that a particular nomen juris was a crime of a heinous nature and severely punishable, that the pannel had committed certain acts which amounted to this crime, and that therefore he was liable to suffer the pains of the law. The Act of 1887 made radical changes. Simple forms of indictment (in which, however, the syllogism is latent) narrating the more common types of criminal conduct are contained in Schedule A to the Act, and these should be used if circumstances permit. The prosecutor, however, need no longer state specifically any nomen juris for the alleged crime (s. 5). It is enough that the facts set forth in the libel are relevant and sufficient to constitute what according to the law of Scotland is recognised as an indictable crime. Theoretically, this flexibility might involve unfairness to an accused, but there is no evidence that the system has been abused. Tradition and etiquette

46 12, 13 & 14 Geo. 6, c. 94. 47 50 & 51 Vict. c. 35.
in a small profession and in a country of five million are powerful forces which cannot be discounted.

Another point of importance must be made. The High Court has exercised an inherent power to take cognisance of fresh phases of crime unknown to the law of Scotland, and to impose arbitrary punishment. This power has never been renounced expressly, and the questions as to whether it remains available, and (if so) within what limits, can be regarded as open to argument.\(^49\) It is the writer's personal opinion that the declaratory power as described by Hume,\(^50\) though indispensable to the development of the law at a certain stage, should not, even in exceptional circumstances, be invoked today. Clearly, the declaratory power was necessary in the days when the criminal law was developing, and, when the legislature was not constantly available to prohibit injurious conduct which had not been previously punished, the judges justifiably themselves declared to be criminal acts which were grossly immoral and mischievous. The field of such conduct, it is suggested, is now substantially, if not completely, covered by the principles of the Scottish criminal law firmly established. New ways of committing recognised crimes will, of course, always be discovered—but these can be repressed by interpretation of (or possibly analogy to) established principles, which differs somewhat from declaration of a new crime sui generis. Thus irreverent treatment of a corpse, which is an element in the crime of violating sepulchres, might be punished when a dead body had been committed for cremation.

If the High Court of Justiciary is still prepared to exercise the power of declaring new crimes, as stated by Hume, it might be thought that the related principles of *nullum crimen sine lege* and *nulla poena sine lege* (in a broader sense) were overlooked in Scottish criminal law. It might even be suggested that the citizen's liberties were not adequately protected from arbitrary prosecution and conviction. When the declaratory power was used to extend the protection of the criminal law to suppress offences against person or property,\(^51\) the results merited general approbation. When, however, the judiciary used this power to repress conduct deemed to be dangerous to the community\(^52\) or immoral,\(^53\) neither wisdom nor justice was always manifested.

In the first place, however, it must be stressed that the power to declare new crimes could not be delegated to individual judges, and,

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\(^51\) Cf. Alison, I, 624.


\(^53\) e.g., *Greenhuff* (1838) 2 Swin. 236.
as with other exercises of nobile officium, pertained to the Justiciary Court as a collegiate tribunal. In Coutts,54 a case of violation of sepulchres, Lord McLaren observed:

If this had been a case of formulating a new crime under the law of Scotland, or of giving any extension to the definition of what had hitherto been regarded as a crime, I should not have been disposed on my own responsibility to decide it. . . . By a new crime is meant not an attempt to make a species of fact hitherto well known into a crime, but a crime consisting in some mode (hitherto unknown) of dealing unlawfully with the person or property of another.

Lord McLaren thus indicates limits on the declaratory power, and confines its exercise to the Court of Justiciary as a collegiate body.

Secondly, despite dicta by the first Lord Justice-General Clyde in two cases,55 the courts since Greenhuff have not in fact exercised the declaratory power in the broad sense contended for by Hume. Even during the nineteenth century, the judges accepted that it should not be invoked to repress conduct which was not in the clearest sense grossly immoral (as to which existing principles are probably already sufficient) and was also so harmful to the community that prohibition by legislation would be too tardy a remedy.56 Thus it was that Lord Justice-Clerk Inglis (as he then was) in Ballantyne,57 though he recognised the doctrine that the Judiciary Court has inherent power to punish acts which, though not covered by authority, are "grossly immoral and mischievous," refused to hold a clandestine celebration of marriage as indictable at common law. He observed 58:

The proposition that this court has jurisdiction at common law to try an offence, may be maintained on either of two grounds: 1st, On the ground of authority and precedent; or 2nd, On the ground that the fact charged, though never hitherto made the object of punishment, is yet, in the language of Baron Hume (1 Hume 12) "obviously of a criminal nature," or, as it is elsewhere expressed, malum in se . . . . I agree with the late Lord Mackenzie (see Greenhuff's case),59 that to bring any act within the jurisdiction of this Court as a crime (by the mere force of common law principles), the act must either in itself be so grossly immoral and mischievous on the face of it, that no man can fairly be ignorant of its nature, or it must be settled by a course of experience, and become notorious, that such is its nature.

It is submitted, however, that Lord Mackenzie applied his own principle incorrectly to the facts of Greenhuff. In that case a majority of the High Court of Justiciary in 1836 held the running of a gaming

54 (1899) 3 Adam 50 at p. 59; see also Lowson (1909) 6 Adam 118. Milne v. McNicol, 1944 J.C. 4.  
56 See particularly Semple, 1937 J.C. 41.  
57 (1859) 3 Irv. 352.  
58 At p. 359.  
59 (1838) 2 Swin. 236 at p. 268.
house to be a crime at common law. Such conduct, it is thought, was not in fact so “grossly immoral and mischievous” as to justify its condemnation by judicial legislation. It is a matter for reflection that the meagre precedents for the decision in Greenhuff were directed against combinations of workmen to raise wages by striking—and this emphasises the great danger of abuse of the declaratory power in political questions. A sense of justice demands that in such questions—whereon moral law is silent or speaks uncertainly—alleged crimes should be clearly recognised before prosecution.

In fact, the dissenting opinion of Lord Cockburn in Greenhuff has probably prevailed—and he, it may be noted, had defended the accused workmen in some of the trials cited in 1836, and knew the danger of the declaratory power. Lord Cockburn contended that, however valuable the declaratory power had been in developing the law in former times, the occasion for invoking the power had now passed. He affirmed, however, the continued vigour of the doctrine which empowers the Justiciary Court to punish all acts falling within the spirit of previous decisions or of an established general principle. New aspects of criminal activity falling within the principle of a crime already recognised occur from time to time, and the courts do not hesitate to strike at them. Cases in which the common law has extended a recognised principle by interpretation or analogy may be illustrated by Seaforth (clandestine taking and using a motor-car); Kerr (making an invented statement to the police with intent that they should investigate it); Sweenie (intercourse with a sleeping woman); Grainger (or with one made drunk by another); and Fraser (or by pretending to be the woman’s husband).

The first Lord Justice-General Clyde in two judgments seemed to give support to Hume’s broad view of the declaratory power of the High Court—though in the first his observations were clearly obiter. In Logue, dealing with an indictment for bribery of a judge (a crime long recognised in Scotland) in an obiter comment, he quoted Hume on crimes: “Our Supreme Criminal Court has an inherent power as

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60 For this reason many who detested the activities of William Joyce (Joyce v. D.P.P. [1946] A.C. 347) (Lord Haw-Haw), who was convicted in England, welcomed the dissenting speech of Lord Porter in the House of Lords and admired the persuasive reasoning of Joyce’s counsel. It may be recalled that when, at the time of the Union, the English treason laws were extended to Scotland, the Scottish peers strove in vain to have a schedule annexed to the Act specifying these laws.

61 1926 J.C. 100. The case proceeded on analogy with theft, without expressly recognising the doctrine of furtum usus.

62 1936 J.C. 71.

63 (1858) 3 Irv. 109. In this case, as in those next cited, there was clearly an averment of aggravated indecent assault. Since rape was a capital crime until late in the nineteenth century, the courts tended to construe it narrowly.

64 1932 J.C. 40.

65 (1847) Arkley 280.

such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution.” Again, in McLaughlan v. Boyd, in which the accused’s conviction on a charge of using lewd, indecent and licentious practices was upheld, Lord Clyde commented “It would be a mistake to imagine that the criminal common law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime... I need only refer to the well-known passage in the opening of Baron Hume’s institutional work in which the broad definition of crime—a doleful or wilful offence against society in the matter of ‘violence, dishonesty, falsehood, indecency, irreligion’ is laid down. In my opinion the statement in Macdonald’s Criminal Law that ‘all shamelessly indecent conduct is criminal’ is sound, and correctly expresses the law of Scotland.” While there is no obvious objection to defining certain crimes today, such as those involving dishonesty, according to broad principles (since the need to restrict capital punishment by narrow construction is past), some categorising is necessary and it may be observed that Hume’s wide language states why certain acts are treated as crimes and does not provide definitions of criminal conduct. To hold otherwise would come close to concluding that, to adapt Lord Cooper’s phrase, “the whole of Scots law had been compressed into a single commandment, ‘Thou shalt do na wrang.’” Clearly not all lying, extra-marital sexual activity or hostility to the Christian ethic which affects third parties could or should be accounted criminal today.

In a later case, that of Semple, a strong court refused to recognise as criminal according to Scots law the supplying of abortifacient drugs to a woman who (contrary to the belief of the accused) was not pregnant, and instigating their use. The Lord Justice-Clerk (Aitchison) commented, “It may be reprehensible conduct; it may be injurious to private and public morality; it may be conduct which ought to be criminal conduct; but that will not make it a crime by the law of Scotland. The matter is not free from difficulty, but I think we ought not to declare new offences in this branch of the law. If that is to be done, it should, in my view, be done by the legislature.” Lord Fleming and Lord Moncrieff shared this view, the latter declaring that to hold the charge relevant would result,
however, in introducing a new crime, and not merely in recognising an existing crime; and would, accordingly, be beyond the competence of a judicial as contrasted with a legislative act."

Single judges (who, even if it survived, could not exercise the declaratory powers of the High Court of Justiciary) have applied their minds to the problem. In one case, that of Martin, Lord Cameron expressed no conclusive view; while in Mannions—a case in which the accused entered a plea of guilty—the Lord Justice-Clerk (Thomson) might seem to have gone further than the Justiciary Court would have approved in upholding the validity of an indictment charging the accused with disappearing so as to avoid citation as witness. It is in the field of "hindering" or "perverting" the course of justice and in that of sexual morality that criminal justice is most likely to overflow its proper limits on the allegation that the public welfare as such is endangered. The more serious aspects of criminal conduct threatening the person or property of the individual citizen are already quite clearly categorised and catalogued. It is difficult to conceive of the possibility of a new form of anti-social behaviour, hitherto unknown, which would rank in gravity with culpable homicide or theft. "Bothering the police" and licentious conduct may well be deplored without invoking the sanctions of the criminal law—and, if certain aspects of such behaviour (not already recognised as criminal) deserve punishment, it should surely be for the legislature to specify the limits.

Lord Reid, who as Solicitor-General for Scotland appeared for the Crown in Semple, has recently in the House of Lords expressed strong dissent from the view that the English judges should be free to extend at will the scope of the criminal law. (In England, though not generally in Scotland, the fact of conspiracy may render criminal an act which is not otherwise a punishable offence, but the element of conspiracy is an anomalous technicality obscuring the principle of legality—nullum crimen sine lege.) In the "Ladies Directory" Case (Shaw v. D.P.P.) concerned with the publication of addresses and particulars of prostitutes, Lord Reid stated emphatically: "Notoriously there are wide differences of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. . . . Parliament is the proper place, and I am firmly of opinion the only proper place to settle that. When there is sufficient support from public opinion, Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the courts

73 1956 J.C. 1.
76 At p. 923.
to rush in." It may be thought that this opinion of a Scottish judge, dealing with a general principle of jurisprudence, should carry weight in Scotland, and that the Scottish courts should be slow to extend on their own initiative the sanctions of criminal law to repress anti-social conduct not hitherto held to be punishable. If A communicates to B the addresses of accessible ladies in the locality, or if a man refuses to co-operate fully with the police or prosecuting authorities, it should surely be for the legislature to determine whether and when such behaviour should be criminal. The modern Scottish view on this problem is probably that stated in Semple 77 and in Quinn v. Cunningham.78 In the latter case, the prosecutor unsuccessfully invoked the declaratory power to support the relevancy of a complaint alleging riding of a pedal cycle in a reckless manner, and causing it to collide with a pedestrian. The (second) Lord Justice-General Clyde, with the support of the other judges, considered that if such conduct were to be made criminal, this must be by legislative action; and observed 79: "To hold this complaint relevant would, in my view, introduce a novel and far-reaching extension of our criminal law for which there is no precedent and no warrant in principle." This reflects the sentiments of Lord Cockburn's dissenting opinion in Greenhuff.80 In short, though the courts remain free to extend or restrict by interpretation the scope of crimes already recognised, they should not declare new ones; nor should flexible interpretation 81 of recognised principles and precedents of criminal law be confused with the broad moral consideration which underlie social behaviour generally as well as the criminal law. The same sentiment is well expressed by Mr. Turpin commenting on Shaw's case 82: "Clearly, under any system of law the courts must have a certain power to deal with cases which have not been specifically foreseen and provided for. The function of the principle of legality is to restrain this power within the limits necessary for the maintenance of a free society and one of its minimum requirements is surely that the elements of a crime should not be defined with such generality as to leave appreciable doubt as to what conduct is criminal. . . . Without (the principle of legality) we should have what Donnedieu de Vabres calls a 'justice de circonstance, d'occasion, abandonée à l'influence des passions individuelles.'"

77 Supra, note 70.
78 1956 J.C. 22; see now Road Traffic Act, 1960 (8 & 9 Eliz. 2, c. 16) s. 9.
80 (1838) 2 Swin. 236, esp. at pp. 274-279.
81 Judicial interpretation of "breach of the peace" has, however, extended the offence far enough to cover forms of criminal conduct which have little relationship to the basic concept: Young v. Heatly, 1959 J.C. 71; 1959 S.L.T.(News) 229.
Whatever the position in England may be since Shaw's case, it is submitted that the weight of modern authority and considerations of justice alike justify the present author's submission that the declaratory power of the Justiciary Court in Hume's broad sense would and should not be invoked at the present day. If this view is well founded, there is possibly no substantial difference in practice between the attitude of modern Scots law to the principle of "legality" and that of countries with criminal codes towards the maxim *nullum crimen sine lege*.83

No code interprets itself: interpretation is a function of the court. Accordingly, notwithstanding the principle of *nullum crimen sine lege* the French courts have found little difficulty in punishing acts which could not have been foreseen by the framers of the code of 1810. Thus diversion of electric current, though not "un objet," has been held to be theft under the code (*secus* in Germany); the principle of liability for false personation has been extended to assuming a false number for a motor-vehicle; the principle of liability for fire-raising by fires or lamps has been extended to like injury caused by negligent use of electricity.84 It may well be that between the interpretation of the spirit of principles stated in a code on the one hand and the interpretation of the spirit of principles consecrated by practice on the other, there is no great gulf fixed. Both systems recognise that the citizen must be safeguarded from arbitrary declarations of crime, especially where political issues are involved.85

A plea to the relevancy is the Scottish equivalent of applying the principle of legality.86 The procedure in Scotland which requires a plea to the relevancy of the indictment to be taken at the first diet of compearance, which precedes the "second diet" by not less than nine clear days, probably explains the more frequent use of that plea than seems to be the case in the English equivalent of "demurrer." It may be noted in conclusion that the declaratory power of the High Court extended to the abrogation of defences which had become outmoded and unnecessary in changed circumstances.87

Dole

There must be two concurrent factors to incur liability for a breach of the criminal law, one material and one formal. The material

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83 It is fair to add, as Dr. Glanville Williams has noted (*Criminal Law*, 2nd ed., 1961, at p. 600), "Although *nullum crimen* is now supported by the strong weight of professional opinion, it is not so plainly right that no two opinions are possible about it."

84 See Donnedieu de Vabres, *Droit Criminal*, p. 55 et seq.


86 e.g., *Martin*, 1956 J.C. 1.

87 See *Sugden*, 1934 J.C. 103, per L.J.-C. Aitchison at p. 109.
element is the conduct which, on account of its mischief, the law prohibits; the formal element is the mental state, mens rea or dole, which may manifest itself in guilty intention or culpable negligence. As culpa is the basis of liability in the law of delict or reparation, so dole is the basis of liability in crime. As has been observed already, the legislature may either in delict or in criminal law impose an absolute prohibition whereby liability is established by proof that the defender or pannel performed the forbidden act, or omitted to perform the act enjoined by statute, or acted with culpable recklessness. So far as serious crime is concerned, however, the brocard remains unqualified actus non facit reum nisi mens sit rea. A man is not to be held liable for inevitable accident or mistake or for mishap not involving criminal negligence.

Dole has been defined by Hume as “that corrupt and evil intention, which is essential... to the guilt of any crime,” not necessarily in the sense of the intention to do that particular crime, but in the sense that the actus reus “must be attended with such circumstances as indicate a corrupt and malignant disposition, a heart contemptuous of order and social duty.” Though this definition or description may be appropriate in certain grave crimes like murder or rape, it is clearly exaggerated when certain minor offences are under consideration. To quote Professor Goodhart, In most crimes mens rea means nothing more than that the person has intentionally done the prohibited act, and that he must realise that certain consequences are likely to follow from his conduct.

In certain cases there must, of course, be knowledge on the part of an accused of facts which make his voluntary act criminal—as, for example, relationship in cases of incest or, in cases of unlawful carnal knowledge of a lunatic, the fact that the woman was a lunatic under care and treatment. Ignorance of the law will not avail, except in mitigation of sentence. There is not, of course, one particular state of mind known as “dole.” This term has a changing content according to the definitions of particular crimes, yet remains a constant in the general sense that the mind must have intended or have been reckless with regard to the actus reus. In many statutory offences the general sense is even more refined, and might be defined as “voluntary conduct of the accused resulting in breach of the substantive law”; while limited recognition has unfortunately been given to the doctrine of “vicarious liability”

89 English Law and the Moral Law, p. 85.
91 There is an apparent anomaly in cases of breach of the peace where the element of mens rea has a protean quality within the limits of what is ostensibly one category of offence. See “Breach of the Peace,” 1959 S.L.T.(News) 229, esp. at p. 232.
for crime so as to make certain classes of employers—in particular those concerned with the licensed trade and road haulage—criminally liable for the failure of their servants to fulfil certain statutory requirements.

In the normal case of crime, there is the express intention to achieve the consequence of an act with which one is charged. That this is not essential has been recognised long ago by Hume, whose elucidation of the topic may be taken as a guide.

To establish the existence of dole it is not necessary to prove that the accused intended to injure the person who has suffered from his action. When Hamlet struck through the arras intending to kill King Claudius, and in fact slew Polonius, this, in Scots law was murder; similarly, in the Duel Scene, when Claudius had prepared poisoned wine, which was unexpectedly and against his wishes drunk by Queen Gertrude, this likewise would be murder. Again, even if a man has focused his malice against no one in particular, but does an act indicating general malice which kills or injures another, this is clearly sufficient proof of dole. Thus in the case of Niven it was held relevant to charge murder on averments that the pannel had fired a small cannon up a lane and killed one of the public, even though no suggestion was made that the pannel had enmity towards any of the persons in the lane.

Per contra even if death or serious injury result from a man’s act, if the animus is blameless or excusable there is no crime. Thus if a blow struck in self-defence injures a bystander, this is no crime; since self-defence is justifiable, dole is negatived. Likewise where injury is caused by one player to another in the normal course of manly sports such as rugby football or shinty.

The Crown need not in all cases prove that the accused’s intention in doing an act was to achieve the exact kind of consequence which has resulted. Where harm results from an act which was lawful, and could not reasonably have been contemplated by him as likely to do injury, there is no crime. Where, however, there has been an initial unlawful act which has resulted in more serious harm than the pannel contemplated, nice questions arise. Analogies from the English law in this context are best avoided.

Until the Homicide Act, 1957, came into force, the English law of murder was encrusted with doctrines of “constructive malice,” which,


93 Vol. I, p. 21 et seq.

94 The nature and quality of Hamlet’s “madness” is, of course, irrelevant to this illustration.

as the Royal Commission on Capital Punishment recognised, constituted the crucial difference between the Scottish and English interpretation of this crime. They observed: “There may be room for doubt whether the Scottish law was not at one time more severe that it is now; but it seems clear from the evidence presented to us that, at the present time, the fact that a homicide was committed in the perpetration of another crime has no necessary effect in establishing whether or not the crime of murder has been committed, and is material only in so far as it may serve to indicate evil intent and go towards satisfying the jury that the act was one of wicked recklessness. Thus the Crown Agent told us that to constitute murder there must be an act of violence likely to cause death or grievous bodily harm, and the Lord Justice-General said, with some reservations, that ‘in Scotland we have practically reached the position where only intentional killing is murder.’”

To these definitions may be added the law as stated in Macdonald: “the principle is that where the result which has happened was likely to occur, the perpetrator is answerable, and accordingly the circumstances of each case must determine the applicability of the rule”; or, as Hume put it, if the accident is the “near and natural result of the crime which was meant to be committed,” the pannel will be held responsible for the accident.

Where death results from the perpetration of some criminal act which of its nature was not likely to result in such serious consequences, the wrongdoer is guilty—not of murder, but of culpable homicide. Since his act was unlawful, it cannot as the authorities stand be mere casual homicide. On the other hand, the Scottish courts have not yet had to pronounce conclusively on the question whether in a case of homicide, which was in fact unintended by the accused, he should be held responsible for “the near and natural consequences” assessed by the objective criterion of the reasonable man. The result of such an approach would be to introduce a doctrine of constructive intention into the law of murder as has been done in England: *D.P.P. v. Smith.*

There may be cases where the accused acted with such gross brutality as to show complete disregard of the consequences to his victim, and in such circumstances he can scarcely be heard to say that, since he was indifferent as to his victim’s fate, he did not actually intend to kill. On the other hand, there could be circumstances in which the

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96 1953, Cmd. 8932, p. 34, para. 92.
97 5th ed., p. 2.
2 This may be the inference to be drawn from the somewhat exceptional case of *Miller and Denovan,* Nov. 1960 (unreported).
accused may not have foreseen consequences which the reasonable man would anticipate.

The decision of the House of Lords in *D.P.P. v. Smith* which apparently restores a doctrine of "constructive malice" to English law has been trenchantly criticised in the learned journals and qualified by extra-judicial utterances of an eminent English judge. It is suggested that Scots law would be most consistent to its modern principle of restricting murder to intentional killing if the subjective test were adopted. The South African courts after some conflict of opinion have finally reached this conclusion, and the Appellate Division laid down in *R. v. Nsele* that intention is now regarded in law as present only where it is proved that the accused foresaw the consequences of his act. It is not sufficient that, although the accused did not foresee, as a reasonable man he ought to have foreseen these consequences. Centlivres C.J. has commented "the words 'knew or ought to have known' contrast knowledge [of the consequences] with a merely reprehensible failure to know and wrongly import that either is sufficient for proving intention." (Naturally, of course, the accused's state of mind must be inferred from his conduct as well as his testimony.) If the subjective test of intention is adopted, it would seem logical to impute intention when an accused had foreseen a consequence as possible—though not necessarily probable.

A good motive will not excuse acts otherwise criminal. Further, at least provided there is no question of disease of the mind, it avails the panel nothing to prove that he did not realise that the acts labelled against him were regarded as punishable. *Ignorantia juris neminem excusat.* Yet it goes too far to say that motive is irrelevant in the Scottish criminal law. Generally speaking the law is concerned—not with the "motive" at the back of a man's mind or the ulterior object which prompts the operation of the will—but with the "intention." ("Intention" is simply the operation of the will directing an overt act, and is deduced from the circumstances proved.) The position is clearly put by Lord Justice-Clerk Cooper in *Rutherford*.

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5 1955 (2) S.A. 145 (A.D.).
7 Special reference may be made to E. M. Burchell in *South Africa* (British Commonwealth Series) at pp. 297-298.
8 The most obvious examples of this proposition are the celebrated treason trials. Thus gallant and honourable men, such as the great Marquis of Montrose and the Duke of Argyll, were executed for treason. In a genuine case of "mercy killing" the Lord Advocate in his discretion might not frame the indictment to charge murder.
10 1947 J.C. 1 at p. 6.
The Crown is not obliged in any case of this kind to establish the motive with which the crime is committed. What the law looks for is, not the motive at the back of a man's mind but the intention, the intent with which he acts; and of course it is just there that the difficulty arises, because no-one can see inside any person's mind, and intent must always be a matter of inference—inference mainly from what the person does, but partly also from the whole surrounding circumstances of the case.

Another locus classicus is in the charge to the jury by another great Lord Justice-Clerk (who, like Lord Cooper, was later promoted to the highest office in the High Court of Justiciary—Lord Justice-General). In the celebrated trial of Dr. Pritchard,11 prisoner of his wife and mother-in-law, Lord Justice-Clerk Inglis thus charged the jury: "The absence of motive, in the ordinary sense of the word, is not a very uncommon thing in the experience of a criminal court. In truth, the existence of any adequate motive for the perpetration of a great crime is a thing impossible. There is no adequate or sufficient motive for the commission of a great crime. Still there may be what is called an intelligible motive—the existence of some foul passion, or some immediate and strong excitement, which, in a moment of half frenzy, drives a man to the commission of murder. These are all very evident and intelligible incentives to crime. But when we are told that, in the opinion of the prisoner's counsel, there is no motive for the perpetration of this crime, it means no more than that the motive has not been discovered if the crime has been committed—and that it was committed by somebody, I fear, admits of little doubt. There must have been a motive or incentive, and yet we may never discover what it was. You are never in a condition to say that there was no motive, but only that the motive has not been discovered; and the motives of human action, we know from history and experience, are often unscrutable." Neither of these eminent judges was suggesting, however, that proof of motive in a criminal trial is irrelevant; they were indicating that it is not necessary for the Crown to establish motive.

It is perfectly legitimate for counsel for the defence to suggest that the absence of any imputable motive should be weighed by the jury in considering whether the pannel in fact committed the crime. Further, after giving proper notice to the defence, the Crown may prove circumstances which might have supplied a motive for the pannel to commit the crime libelled, as, for example, in a case of fire-raising that the accused's affairs were embarrassed, or, in a case of wife-murder, that an adulterous association existed between the accused and another woman. Thus in Pritchard, immediately after the passage quoted, Lord Justice-Clerk Inglis went on to discuss a motive suggested by the Crown for Pritchard's crime 12—"Another motive or incentive for the

11 (1865) 5 Irv. 88 at p. 184.
12 At p. 185. Not a very probable motive in the circumstances.
perpetration of the murder of his wife has been suggested against the prisoner, and that is the existence of illicit relation between himself and the girl Mary McLeod. This is a very important part of the case undoubtedly, and one to which you are bound to give attention. Moreover, an ulterior object is sometimes incorporated into the definition of particular crimes, e.g., casting away a vessel with intent to prejudice insurers; but this is rather dolus specialis than “motive” stricto sensu. In penal systems, such as those of Scotland and England where it is rare to have a minimum penalty fixed by law, consideration of the accused’s motive frequently influences the court in fixing the punishment. This may be considered further in the context of the doctrine of “necessity.” Generally speaking, it appears that Scottish criminal law is in harmony with other modern systems in the attitude which it adopts to motive.

Cases where Dole is absent or Reduced in Degree

Error or Mistake

It is no excuse for an accused person to plead that he was unaware that an act which he did deliberately was forbidden by law. Ignorantia juris neminem excusat. A man is bound, as Hume says, to know as much of the law as concerns the regulation of his own conduct. Except where the definition of particular offences is absolute in its terms, mistake will, however, be a relevant defence, provided that the erroneous belief was a reasonable one, and, if it had been well founded, would have justified the acts done. No distinction appears to have been drawn between mistake of fact and of private law, as has been done in some of the English bigamy cases. The case of Dewar is most instructive. The accused, who had been manager of the Aberdeen Crematorium, was charged with the theft of over one thousand coffin lids and a number of coffins. Dewar contended that he believed bona fide that it was a general practice in crematoria to remove coffin lids when bodies were delivered for cremation, and to appropriate them. As he put it “The property was, in my opinion, completely under my jurisdiction for disposal.” The Lord Justice-Clerk after pointing out that the accused had no proprietary right whatever in the coffins, as they and their contents were committed to him for the limited purpose of

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13 Thus in a genuine case of “mercy killing” the Lord Justice-Clerk (Thomson) imposed sentence of only 15 months’ imprisonment, Brown, Scotsman, Dec. 6, 1961.
17 1945 J.C. 5; see also Clark v. Syme, 1957 J.C. 1.
18 At p. 8.
cremation, charged the jury as to the position if it were proved that Dewar had mistakenly entertained the belief that he was entitled to treat the coffins and lids as "scrap." He emphasised that for the pannel's defence to succeed "the belief must be reasonable and he must prove it." It is not enough that a man should entertain a belief founded on fantastic notions of his own devising. Whenever knowledge of particular facts is an essential element of a particular crime, error or ignorance regarding such facts will elide responsibility.

Whereas questions of mistake in theft usually depend upon "claim of right," and in bigamy on mistaken belief in the dissolution of a previous marriage, mistake may also be relevant in crimes of violence. This is well illustrated by Owens. The pannel's defence to an indictment for murder was self-defence. His evidence was to the effect that, having seen what he thought was a knife in the hand of the deceased, he used his own knife in the fatal struggle which ensued. He was convicted by a jury which had been charged by the presiding judge that, if the pannel was mistaken in thinking that there was a dangerous weapon in the hands of the deceased, then his own use of a lethal weapon could not be justified. The conviction was quashed on appeal, the appellate court taking the view that the defence of self-defence is established when the jury is satisfied that the pannel believed himself to have been in imminent danger, and that he held the belief on reasonable grounds. "Grounds for such belief may exist though they are founded on a genuine mistake of fact." In Crawford the opinion was expressed, however, that, when self-defence is pleaded, if the pannel's acts are based on mistaken belief, they must have an objective background and not be purely subjective or in the nature of hallucinations. It may be thought, however, that these observations should not be construed too sweepingly, but against the background of the particular case, where the defence really rested on a somewhat remote apprehension of danger. Error may be reasonable, though the victim had done nothing to induce it—as in the case of Desdemona.

A somewhat curious statutory provision with regard to mistake is contained in the Criminal Law Amendment Act, 1885, s. 5 (as amended by subsequent Acts), whereby it is made a valid defence for a man who has not reached his twenty-fourth birthday and who is charged for the first time with unlawful carnal knowledge of a girl under sixteen years, to prove that he believed and had reasonable cause to believe that she was over that age.

19 See ref. p. 132, ante; also generally, for a comprehensive treatment of English and allied systems, Glanville Williams Criminal Law, 2nd ed., Chap. 5.
20 1946 J.C. 119.
21 At p. 125.
22 1950 J.C. 67 at p. 71.
23 48 & 49 Vict. c. 69; Criminal Law Amendment Acts, 1922, s. 2, and 1928, s. 1; Sexual Offences Act, 1956, ss. 6 and 49.
Non-Age

In Hume's time there was a divergence of opinion as to the age at which a child should be held responsible for crime. The question of responsibility had become involved with that of punishment, as indeed, in some respects, recent legislation has also brought about. Grünhut observes 24: "English Criminal Law is unique in fixing the lower limit of criminal responsibility at the early age of eight years." This is not quite accurate, since by the Children and Young Persons (Scotland) Act, 1937,25 the same age was fixed for Scotland. On the other hand there is no rule in Scots law as in that of England that a boy of under fourteen years cannot in law be guilty of rape: Fulton.26 It is a matter for reflection that in France, for example, "penal irresponsibility" extends up to thirteen.27 Digressing into the field of penology, it may be noted that by the Criminal Justice (Scotland) Act, 1949,28 ss. 17–20, powers of "punishing" young offenders are greatly restricted. Moreover, that Act and the Children and Young Persons (Scotland) Act, 1937, largely codify the law as to treatment of young offenders. The Homicide Act, 1957,29 s. 92 (3), provides that sentence of death or life imprisonment shall not be pronounced upon a person who appears to be under the age of eighteen at the time when an offence thus punishable in the case of an adult was committed. It might seem desirable to adjust the age of criminal liability to correspond more closely with the practical consequences of crime. This point cannot, however, be developed in the present context. Powers to control young delinquents are certainly needed today.

Compulsion or Necessity (Jus Necessitatis)

Though the defence of necessity or compulsion postulates a general principle, this has been illustrated rather than enunciated in Scots law so far. It is submitted that necessity is a general defence, in all cases where the law itself recognises that literal compliance with the prohibitions and injunctions of the criminal "code" may justifiably be excused. The defence supplements the law—and is not in derogation of it. Thus, if it succeeds, it operates in exculpation, not merely in mitigation. Necessity can be recognised in many circumstances—from gross physical compulsion to strong moral compulsion, as to save the lives or property of others. In each case the law has to evaluate whether the course followed maintained an interest more worthy of protection than literal observance of the law. This may not be easy.

24 Penal Reform, p. 344.
25 1 Edw. 8 & 1 Geo. 6, c. 37.
26 (1841) 2 Swin. 564.
27 Between 13–18 a child may be responsible—R. Vouin, Droit Criminel, p. 235.
28 12, 13 & 14 Geo. 6, c. 94.
29 5 & 6 Eliz. 2, c. 11.
Exceeding the speed limit to get a patient who is bleeding to death to hospital in time may in some circumstances be justifiable—but presumably not where the risk to other users of the highway would be excessive.\(^3\) Again, the values involved in the salvaging or defence of property are recognisably different from those relevant in cases of rescue or personal defence.\(^3\)

The law of Scotland regarding compulsion imposed on the pannel \textit{ab extra} is not closely defined. In the case of wives, threats of death or violent coercion by the husband may excuse certain lesser offences, and likewise in the case of children intimidated by parents.\(^5\) Again, in times of public commotion or riot, if the individual is concussed by threat of death or serious injury to take a minor part in a rebellion or riot, he may be allowed to plead compulsion.\(^3\) The compulsion of want is not, however, regarded as an excuse for crime, though the old law of Burthensack excused from capital penalty a thief who stole no more meat that he could carry on his back. It is uncertain whether the reasoning of the leading English case of \textit{R. v. Dudley and Stephens} \(^3\) would be applied in Scotland without qualification. The fact that the shipwrecked seamen in that case would probably not have survived had they not consumed the cabin-boy did not in the opinion of the court support a plea of justification by the law of necessity. Lord Coleridge C.J.\(^3\) suggested that it may be a man's duty to sacrifice his life rather than take the life of another. In ethics this may well be so, but when either A or B must die, with the alternative that both must perish, the law might hesitate to dictate the solution which condemned both. Moreover, in a disaster at sea, the only qualified navigator in a lifeboat already full might well be excused in law if he drove off a crowd of survivors who could sink his already crowded boat. Preservation of his own life would be the means of saving many others.

The compulsion of superior orders is, where the act ordered is \textit{prima facie} lawful, a good defence to a soldier or sailor on duty. This doctrine was applied in its most favourable sense in \textit{Sheppard}.\(^3\) In that case the pannel was acquitted on an indictment charging him with shooting a deserter whom he had under escort at Dundee railway station and who endeavoured to escape. It appeared that there was some ambiguity about the orders the pannel had received from his unit with regard to shooting at British prisoners. Lord Robertson left it

\(^{30}\) General reference for a discussion of these problems may be made to Glanville Williams, \emph{op. cit.}, Chap. 17; also T. W. Price, \"Defence, Necessity and Acts of Authority\" (1954) Butterworths S.A.L.R. 1.


\(^{33}\) \textit{Ibid.}, p. 51 et seq.

\(^{34}\) (1884) 14 Q.B.D. 273.

\(^{35}\) At p. 287.

\(^{36}\) 1941 J.C. 67.
to the jury to say 27 "on the charge of culpable homicide, whether there was an order to shoot given, or whether there was not an order to shoot given, and whether there has been established such gross and wicked recklessness that the conduct of the accused ought properly to be regarded as criminal conduct." On the special obligations of soldiers he cited Hume, Vol. I, p. 54. Soldiers are trained to arms and obedience in the interest of the defence of the nation.

There is another aspect of the doctrine of necessity on which our law has little to say directly, that of causing abortion to save the life of the mother. The fact that a criminal intent is a necessary ingredient of the crime of procuring abortion indicates that the law of necessity is in Scotland regarded in such cases—for example the case of Minnie Graham. 28 In a balancing of competing interests, consideration for the existing personality 29 of the pregnant woman may reasonably be regarded as taking precedence over consideration for an unborn child, which is not yet a personality capable of rights. It may be that the reasoning in the well-known English case of R. v. Bourne, 40 which rejected a narrow interpretation of the doctrine of necessity, would commend itself to the Court of Justiciary. The defendant in that case was an obstetrical surgeon of eminence who had performed an operation upon a girl of under fifteen years who had been the victim of a rape of most violent character—whereby she had become pregnant. Macnaghten J. directed the jury that "preserving the life of the mother" was to be construed in a reasonable sense, and that 41

if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of saving the life of the mother.

Mr. Bourne, supported by other eminent medical men, had given his evidence to that effect, and the jury returned a verdict of "Not Guilty." Macnaghten J. expressed the opinion that a doctor who, on account of certain religious views, refused to save a woman's life by performing such an operation, might be guilty of manslaughter by negligence. By inference, he suggested that the husband who denied his wife such assistance might also be liable—a point which presumably did not occur to that careful lawyer, Soames Forsyte, in Galsworthy's celebrated novel In Chancery.

27 At p. 70.
28 (1897) 2 Adam 412.
41 At p. 694.
Private Defence and Provocation

Private defence, which usually takes the form of self-defence, is justified in all men; and this right may be regarded as extended to the protection of family and indeed of such of the lieges as may stand in peril without means of adequate resistance. Such defence is an aspect of the law of necessity though it may be for convenience treated, for the sake of contrast, with provocation which, on a quite different principle, is recognised as a mitigating—though not as an exculpating—factor.

The defence of provocation in practice is often based on substantially similar facts to a plea of self-defence, but its effects are quite distinct. Self-defence can justify an act; but not palliate it. Crawford disapproves earlier dicta in Hillan. Hume suggests that though a defence of provocation normally operates only as a palliative, in cases of assault provocation by real injuries may justify the acts complained of. This view seems to confuse provocation with self-defence.

The doctrine of self-defence extends to those cases where there has been imminent danger to life or limb, and in consequence retaliation has been necessary to secure the safety of the person threatened. The law does not weigh in fine scales the exact proportion of retaliation used by an individual to defend himself, and will make allowances for the excitement and fear which may be aroused at the moment of attack. If, however, retaliation is clearly excessive in method or duration, or if retaliation is resorted to by a person when attacked, though he could have protected himself by escape, then the plea of self-defence will fail. The defence of provocation may, however, still be available by way of palliation. The onus of establishing the guilt of an accused who has pleaded self-defence or provocation still rests on the Crown, and it is not required of the defence that the pannel's story should be actually proved—provided that the jury believe his account to be probably true. For a plea of self-defence to be relevant there must apparently at least be an objective background to the pannel's belief that he was in danger of attack. A mere subjective apprehension, with no reasonable grounds to support it, will not suffice. If there is no evidence relevant

44 Kigilevicius, 1938 J.C. 60.
45 1950 J.C. 67.
46 1937 J.C. 53.
49 A threat to honour will not justify homicide in self-defence secur if a woman kills in resisting an attempt to rape: McCluskey, 1959 J.C. 39.
51 Ibid.; see also Hillan, supra.
52 Crawford, supra.
to infer self-defence, the judge will be justified in withdrawing the special defence from the jury.\textsuperscript{53}

Provocation in the present law must be such as would deprive at least a reasonable man of self-control. A more lenient view is accepted today than in Hume's time.\textsuperscript{54} The courts, so far as the author is aware, have not in modern times considered the difficult question of whether the objective test of the reasonable man would do justice in cases where the prisoner, for reasons beyond his control, was particularly sensitive to certain types of affront. The ordinary Scotsman would presumably treat with contempt epithets such as "dirty nigger."\textsuperscript{55} An Indian Army officer, for example, might reasonably be expected to react strongly. Justice requires that the reasonable man should, as it were, look on the alleged provocation to some extent with the eyes of the accused who has retaliated. The wholly subjective approach need not necessarily be accepted,\textsuperscript{56} but the subjective element should surely be weighed. Whether an accused was deprived of self-control is essentially a question of fact. It is thought that a Scottish court would not follow the views expressed by the House of Lords in the English case of Bedder v. D.P.P.\textsuperscript{57} where the factor of the appellant's impotence was not considered material to a defence of provocation, since it would not influence the reactions of the reasonable (potent) man.

There has been some controversy as to the methods of provocation which the courts will recognise—a distinct question from the degree of provocation. Provocation by blows raises no difficulty, nor does the case of actual discovery of a spouse in the act of adultery. What, however, if the message as to adultery or other gross provocation is conveyed to the brain from the ear rather than from the eye? The former English view as expressed in Holmes v. D.P.P.\textsuperscript{58} did not recognise as sufficient provocation a sudden admission of adultery. Though some suggested that Holmes might be imported into Scottish criminal law, the better view, which seemed to have the support of Lord Justice-General Cooper, was that a Scottish court would not draw hard-and-fast distinctions of this kind. The question to be considered would be "would the reasonable man in the circumstances have been deprived of self-control?" In three Scottish cases prior to Holmes—Gilmour,\textsuperscript{59} Hill\textsuperscript{60} and Delaney\textsuperscript{61}—this more liberal interpretation was accepted. Ob

\textsuperscript{53} Ibid.  
\textsuperscript{55} See discussion of the Fisher case by Frankfurter J. in evidence before Royal Commission on Capital Punishment, 1950, 26th day, q. 7971 et seq.  
\textsuperscript{56} See also 1953 S.L.T.(News) 197.  
\textsuperscript{57} [1954] 1 W.L.R. 1119.  
\textsuperscript{58} [1946] A.C. 588.  
\textsuperscript{59} 1938 J.C. 1.  
\textsuperscript{60} 1941 J.C. 39.  
\textsuperscript{61} 1945 J.C. 138; see also H.M.A. v. McRorie (1960) Crim.L.R. 839. It has been held that lesbianism may be treated as provocation equivalent to adultery: Callander, 1938 S.L.T. 24.
The Royal Commission on Capital Punishment suggested that its recommendation that the *nature* as opposed to the *degree* of provocation should be regarded as immaterial should extend to Scotland.

By section 3 of the Homicide Act, 1957, which was not made applicable to Scotland—presumably because Parliament considered the effects of the statutory reform to have been established already in the law of Scotland—it was provided that on a charge of murder, the question whether provocation was enough to make a reasonable man do as the accused did should be left for determination by the jury, taking into account everything done and said. Had there been any doubt in the matter as presented to them, the legislators would certainly have included Scotland (as the Royal Commission suggested) *ob majorem cautelam*. Lord Cameron, one of Scotland’s outstanding criminal lawyers, has noted that the older authorities did not recognise provocation by words in Scotland. The point was not, however, argued nor really in issue in *Dodson*. A slap or blow with the fist are less likely to destroy restraint than a gross calumny on a man’s mother or the taunt (perhaps without foundation) that his wife has played the strumpet. In England the plea of provocation seems to be restricted to murder. In Scotland, as with diminished responsibility, it would seem relevant generally.

The plea of provocation, to be effective at all, must relate to acts done on the sudden impulse of resentment, and not deliberately for revenge after the blood has cooled.

### Involuntary Dissociation

A person who does injury while unconscious or in an epileptic fit, or while asleep, cannot be convicted of crime. The classic case is that of *Fraser*, the facts of which were that a child of eighteen months had been killed by its father, who dreamt that the child, which slept with him, was a wild beast against which he had to defend himself. There was evidence of prior incidents of sleep-walking and violence towards members of his family. On his undertaking to sleep alone in future, he was dismissed from the Bar. The principle of dissociation also operated in *Ritchie*. In this case the pannel was charged with causing the death of a pedestrian by reckless driving. A special defence was lodged on his behalf that he was not guilty—

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65 See Mcguiness, 1937 J.C. 37; and Gallocher (1902) 3 Adam 665.
66 (1878) 4 Coup. 70.
67 1926 J.C. 45.
in respect that by the incidence of temporary mental dissociation due to toxic exhaustive factors he was unaware of the presence of the deceased on the highway, and of his injuries and death, and was incapable of appreciating his immediate previous and subsequent actions.

There was no suggestion that the panel had been affected by drink in this case. He was known to be a man of exemplary character and habits, who had been severely wounded in the war, and had since undergone several operations for abscess in the lungs, the last occasion being not long before the accident. Medical evidence supported the theory of "dissociation," under which a person may continue to carry out functions such as driving, though, due to the absorption of poison into the blood, the acting might not be conscious or only partly conscious. After a favourable charge by Lord Murray, the jury acquitted. Dissociation due to poisoning may take many forms, such as carbon monoxide fumes due to a leaking exhaust pipe in a car, a diseased condition of certain organs and so forth. Extreme exhaustion may also produce this dissociation of mind, which may lead to a vehicle accident. In normal conditions it would be the exhausted driver's duty to stop rather than continue his journey to the danger of the lieges. Exceptional circumstances might, however, justify the risk, but it may be observed that a defence of dissociation will always be closely scrutinised. Moreover, even if it succeeds, the High Court of Justiciary may impose conditions upon the panel before discharging him.

**Drunkenness**

If the panel suffered from *delirium tremens* at the time of the alleged crime, he will be judged according to the rules prescribed for insanity. If the state of drunkenness is involuntary this will be a good defence. In other cases of drunkenness the condition, if voluntarily induced, cannot excuse completely the commission of crime. If the drunkenness is so serious as to prevent the formation of the intent prescribed by law for the particular crime charged, the panel may be acquitted of that crime, but yet remain liable to conviction on a charge less grave, as of culpable homicide instead of murder. In cases where the mind is not too clouded to form the requisite intent, the mere fact that drink causes the accused to give way more readily to violent passions cannot apparently in modern practice (unless the decisions are re-interpreted) be urged in exculpation where the minimum sentence is prescribed.\(^68\)

In *Carraher*\(^69\) it was held that the defence of "diminished responsibility" was not competent to an accused who, it was contended,

\(^68\) *Campbell*, 1921 J.C. 1; *Kennedy*, 1944 J.C. 171 (Full Bench). Scottish law has been influenced by *D.P.P. v. Beard* [1920] A.C. 479 though, of course, the specialities regarding "felony" do not apply in Scotland.

combined psychopathic personality and heavy drinking about the time of the crime. On the other hand alcoholism has been a feature in several cases where the defence of diminished responsibility has been admitted.\(^7\) Indeed, in the past intoxication seems to have been considered in the context of diminished responsibility, which in the broad Continental construction,\(^7\) provides perhaps a more satisfactory solution. The man who fortifies himself with drink to accomplish a crime which he already contemplates should certainly not be allowed to plead his condition at the time in mitigation; but the man in drink, whose responsibility is in fact diminished (though a menace to society) would seem less culpable morally than the deliberate perpetrator of crime.

**Insanity**

There is no particular mental disease known as insanity. Insanity is simply the technical description for numerous separate mental states having some characteristic in common which make possible the general designation. This general designation excludes various forms of mental aberration which are associated with certain more or less transient diseases. There are many gradations between sanitas and insanitas. The gradations are frequently of degree rather than of kind, and merge into each other. In medical circles, it is believed, “insanity” infers that the patient is suffering from a major mental disease (usually a psychosis) to such a degree that restriction of his liberty is justified in his own and in the public interest, and that he can therefore be properly certified under the Lunacy and Mental Health Acts.\(^7\) Scottish law provides that persons suffering from the more acute forms of mental disease shall be completely immune from criminal punishment and are to be treated as State mental patients; that others, whose mental illness is less severe, shall be held to have “diminished responsibility” and are subjected to both punishment and treatment if advisable; and that yet others, whose mental disturbance is deemed of less significance, shall be treated as fully responsible for their infractions of the criminal law. By contrast with the English law regarding criminal responsibility, the Scottish law has not been the subject of much controversy, and the Royal Commission on Capital Punishment\(^7\) could suggest only minor improvements.

There is provision made in the Criminal Appeal (Scotland) Act, 1926,\(^7\) s. 6 (e), empowering the High Court of Justiciary to appoint a psychiatrist to sit as assessor with the court. In Carraher,\(^7\) where

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\(^7\) See Dingwall (1867) 5 Irv. 466; Granger (1878) 4 Coup. 86; Brown (1886) 1 White 93.

\(^7\) Cf. Vouir et Léauté, Droit Pénal et Criminologie, pp. 274–275.


\(^7\) 1953, Cmd. 8932.

\(^7\) 16 & 17 Geo. 5, c. 15

\(^7\) 1946 J.C. 108.
counsel for the appellant suggested this course should be adopted, it was refused. Clearly Carraher’s case was not calculated to arouse sympathy on the merits, and was perhaps not a suitable occasion for trying the experiment. It may possibly be regretted, however, that the Lord Justice-General spoke of the statutory power to appoint a psychiatrist as assessor in such discouraging terms. Nautical assessors, selected from a list of persons in whom the courts have confidence, have proved useful in practice and, in an appropriate case, it might be helpful to have a neutral psychiatrist of eminence and responsibility sitting with the court and, like the judge, above the conflict of evidence.

Insanity and certain cases of mental deficiency may be relevant at four different stages of the criminal process: (i) before trial; (ii) in bar of trial; (iii) as a special defence; (iv) after conviction.

(i) Insanity and Mental Deficiency while waiting Trial or Sentence. If it appears to the Secretary of State that a person in custody while awaiting trial or sentence is suffering from a mental disorder of a nature or degree which warrants his admission to hospital, he may apply to the sheriff for an order that such person be removed to and detained in a hospital to be specified in the order. Before making such an order, the sheriff must be satisfied by the reports of two medical practitioners that the person in custody is in fact suffering from a mental disorder which would justify his admission to hospital. The transfer order must specify the forms or forms of mental illness or mental deficiency from which the patient is found by the sheriff to be suffering.76

(ii) Insanity in Bar of Trial. The question of insanity in bar of trial is of very considerable importance in Scotland, since the certifiably insane are not, except in the rarest cases, called on to thole an assize. The issue of insanity in bar may be raised, not only by the defence, but also by the Crown or by the judge ex proprio motu. At the hearing of evidence by the Royal Commission on Capital Punishment there was some divergence of view among the witnesses as to the degree of insanity which would justify holding an accused person to be unfit to plead. The Lord Justice-General and three distinguished medical witnesses substantially recognised that a person who is certifiably insane is unfit to plead. The representatives of the Faculty of Advocates (the Scottish Bar) considered that the criteria of certifiability and unfitness to plead might in some cases differ, while the Crown Agent apparently came close to adopting the English view that a very gross

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76 See generally Mental Health (Scotland) Act, 1960 (8 & 9 Eliz. 2, c. 61), s. 65, for details of procedure. The types of mental disorder which justify it are specified in Part IV of the Act, and in particular in s. 23. In short the test is whether the accused’s mental state would warrant his admission to hospital as an ordinary patient.
degree of mental incapacity is necessary to support the contention that he is unfit to plead. It is thought that the Commission reached the right conclusion in their statement,

whatever the law may be in theory, in practice, if the accused is insane at the time of trial, the medical witnesses will give evidence that he is unfit to plead, and this evidence will be accepted without question both by the prosecution and by the judge.77

It is, of course, also true that ability to instruct a defence would in dubio be a most material factor, and this factor has also been considered where some other disability suggests the possibility that the accused should not be tried. Mere amnesia as to the period covered by the alleged crime will not suffice, though in such a case the court will expect the proof advanced by the prosecution to be particularly convincing, and will make allowances for the disadvantage of the defence. This was decided in Russell 78—a case in which the accused's memory had allegedly failed for the somewhat inconvenient period covered by a series of forgeries.79 Another difficult case was that of Wilson 80 in which a deaf mute, who was in the opinion of some doctors not of normal intellect, was charged with murder and robbery. The Crown suggested that the accused might be dealt with as unfit to plead, but counsel for the defence assured the court that his client was able to transmit sufficient instructions. A plea of "not guilty" was accordingly accepted, and the accused was acquitted. The Royal Commission on Capital Punishment recommended 81 that no distinction should be made between mental deficiency and insanity with regard to the plea in bar of trial. As the law stands at present, though an accused who is mentally deficient can be disposed of before and after trial by special procedure, mental deficiency does not operate as a defence or as a plea-in-bar—except in gross cases treated as insanity—as where the accused is quite incapable of instructing his defence: Breen.82 Insanity as a bar to trial was accepted by the courts before the category of mental deficiency was clearly recognised; and the Mental Health (Scotland) Act, 1960, leaves unchanged the broad common law concept of "insanity in bar."

Some form of proof which did not involve a pronouncement on legal guilt, but which perpetuated the evidence as to the facts, might

77 § 254.
79 It may be of general interest to note that the same issue arose with regard to the trial of Hess at Nuremberg at about the same time—see "Mental Abnormality and Responsibility," Transactions of the Grotius Society (1955), Vol. 37, 99, at p. 108 et seq.
80 1942 J.C. 75; 1942 S.L.T. 194.
82 1921 J.C. 30 at p. 38.
usefully be introduced into Scottish procedure in cases where a plea-in-bar succeeds. In some cases persons found unfit to plead have later been tried. Thus in Bickerstah[1] the accused, who was originally charged with murder, had been released after some seven months’ treatment in an asylum, and accordingly evidence against him was still available—though the charge itself was reduced. As a rule, however, by the time a suspect has been released from hospital, evidence can no longer be reassembled to support a prosecution nor is there a dossier identifying the injurious act with a specified individual. When an accused charged on indictment is found insane so that trial cannot proceed, or if in the course of trial the jury find him to be insane, a finding to this effect is recorded, and the court is then required to order his detention in a state hospital or such other hospital as for special reasons the court may specify. Such order has the same effect as a “hospital order” together with an order restricting discharge without limitation of time.83 Thus control of discharge is committed to the Executive. Provision is now made for insanity to be raised in bar of trial when an accused is charged summarily in the sheriff court. Such a plea can only be founded on on behalf of the accused, if, before the prosecutor’s first witness is called, notice is given of intention to raise the issue.84 This would not, however, seem to preclude the prosecutor or sheriff raising the issue of insanity ex proprio motu as in trial on indictment. Moreover, the prosecutor, if he has reason to suspect that the accused may be suffering from mental disorder, has a duty to lead evidence as to mental condition.85 If a person is charged before a court of summary jurisdiction other than the sheriff court, and it appears that he may be suffering from mental disorder, the court should remit the accused to the sheriff court where an appropriate order may be made.86

(iii) Insanity as a Defence. Since the Scottish courts repose considerable confidence in certain eminent psychiatrists, it is seldom that insanity as a special defence is raised. Persons who are certifiable are very rarely tried, while those whose mental aberration does not amount to insanity avail themselves of the plea of “diminished responsibility.” Partly for these reasons Scotland has been spared from the strife regarding the McNaughten Rules which has raged in England.

Hume was actually cited at the trial of McNaughten, and in the somewhat remarkable case of Gibson87 Lord Justice-Clerk Hope adopted the Rules at the time of their promulgation. Fortunately, however, the Scottish doctrines of legal responsibility have developed

83 Mental Health (Scotland) Act, s. 63 (1)–(5).
84 Ibid. (6)–(8).
85 Ibid. s. 55 (5).
86 Ibid. s. 55 (4).
87 (1844) 2 Broun 332.
discreetly with the advances of medical science, and the McNaughten Rules have been authoritatively rejected by the Scottish courts. As Lord Dunedin said in Brown—a case decided in 1907:

It is quite certain that what may be called scientific opinion on insanity has greatly altered in recent years; and courts of law, which are bound to follow, so far as they can, the discoveries of science and the results of experience, have altered their definitions and rules along with the experts.

A general test of insanity (which would apply in many cases) might be stated as "whether the accused had or had not a sane understanding of the circumstances of his act," but there is no sacrosanct formula. Unlike the English interpretation (at least formerly) of the McNaughten Rules, mere knowledge that a particular act is forbidden by law will not invalidate a defence of insanity. In Sharp, the pannel was charged with the murder of two of his children. Though he was fully aware of the penalty fixed by law for homicide, through morbid obsessions he believed his act to be meritorious, and that he was required to make a solemn sacrifice of himself. The legal view as developed in Scotland is that a man may be quite in a position to appreciate the nature and quality of his deed as an illegal act, which by the law of the country will be punished in a certain way, and may nevertheless be insane, his insanity consisting in a failure to recognise that the act is morally wrong. Lord Constable quoted with approval an earlier pronouncement by Lord Justice-Clerk Moncreiff in Miller.

A man may be entirely insane, and yet may know well enough that an act which he does is forbidden by law. . . . If the man has not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden, or not to do it because it is enjoined.

As regards delusions, the approach of Lord Justice-Clerk Inglis in 1863 may be contrasted with the English view on delusions expressed by the Lord Chief Justice of England (Lord Hewart) in the thirties—namely, "After all the mere fact that a man thinks he is John the Baptist does not entitle him to shoot his mother." By contrast, in Milne, laying down the law of Scotland the learned Lord Justice-Clerk declared:

if you are once satisfied that this man was under the influence of insane delusions at the time this act was committed, you have no occasion to inquire farther whether he knew what was right from what was wrong, or

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89 (1907) 5 Adam 312 at p. 343.
90 See also Lord Moncreiff in Macklin (1876) 3 Coup. 257, and Barr, ibid. 261.
91 1927 J.C. 66.
92 (1875) 3 Coup. 16 at p. 18; see also Macklin, ibid. 257, and Barr, ibid. 261.
93 Essays and Observations, p. 224.
94 (1863) 4 Irv. 301 at p. 343.
whether he knew what was murder in the eye of the law, or what was a punishable act; because if he was in point of fact at the time under the influence of insane delusions, the law at once presumes from that that he cannot appreciate what he is doing.

In a certain type of case some aspects of the McNaughten Rules might provide a convenient framework for the judge's charge to the jury—but they would be no more than a useful guide. Lord Keith has expressed the view that where a defence of insanity is submitted, the judge in his charge to the jury might consider the Rules, but that "more regard would probably be paid to the actual evidence that was led by specialists in insanity, and the jury would be directed in the circumstances of each case." The Lord Justice-General (Cooper) observed that, however much the jury was charged, the question they would put to themselves when they retired would be "Is the man mad or is he not?" This broad approach to the question of insanity as a defence is apparent in the charge of the Lord Justice-Clerk Thomson in one of the few recent cases on the question: Mitchell. In Kidd, where a special defence of insanity had been lodged, the inquiry was complicated by the circumstance that the accused was not held out as insane at the time of trial but claimed to have lost his memory. Lord Strachan in a careful and elaborate charge told the jury that, if they held that the pannel was genuinely suffering from amnesia, the burden of proving the special defence was reduced. Though acceptance or rejection of such a defence depended on the balance of probabilities, the jury should bear in mind loss of memory in considering the possibility of loss of evidence on the issue of insanity through the amnesia of the accused. The nature of insanity as a defence was treated in this way: "Treat it broadly and treat the question as being whether the accused was of sound or unsound mind. That question is primarily one of fact to be decided by you, but . . . in order to excuse a person from responsibility for his acts on the ground of insanity, there must have been an alienation of the reason in relation to the act committed. There must have been some mental defect . . . by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason to control his conduct and reactions. If his reason was alienated in relation to the act committed, he was not responsible for that act, even although otherwise he may have been apparently quite rational." The judge then

85 Evidence before Royal Commission on Capital Punishment, 1950, 18th Day, q. 5189, 5201-5202, 5216.
86 Ibid. q. 5479.
87 1951 J.C. 53; see also note 88, supra. The form of verdict was as follows: "The jury finds that the pannel committed the act charged but that he was insane at the time, and they therefore acquit him on the ground of insanity."
88 1960 J.C. 61.
89 See esp. at pp. 69-71.
explained that the McNaughten Rules were not part of Scots law and added "Knowledge of the nature and quality of the act, and knowledge that he is doing wrong, may no doubt be an element, indeed are an element in deciding whether a man is sane or insane, but they do not... afford a complete or perfect test of sanity. A man may know very well what he is doing, and may know that it is wrong, and he may nonetheless be insane. It may be that some lunatics do an act just because they know it is wrong."

It is provided by section 63 (2) of the Mental Health (Scotland) Act, 1960, that if, when a person is charged on indictment, evidence is brought to establish that he was insane at the time of doing the act constituting the offence of which he has been charged, then the court shall direct the jury to find whether the accused was in fact insane at that time and to declare whether he was acquitted by them on that account. If the jury so declare, the court orders his detention in a state hospital or such other hospital as for special reasons the court may specify.2

(iv) Insanity and Mental Deficiency after Trial. States of insanity and mental deficiency after convictions are, of course, not relevant to the exclusion of mens rea, but may be touched on conveniently in the present context. Procedure is regulated by section 55 of the 1960 Act. When an accused has been convicted in the High Court or sheriff court of an offence (other than an offence for which the punishment is fixed by law) punishable by imprisonment, if, after receiving medical evidence as required by statute, the court is of opinion, having regard to all the circumstances, that the most suitable method of disposing of the case would be by an order in the terms of the Act, such order may be made. This may direct the admission and detention of the accused in a hospital or place him under the charge of a local health authority or person approved by such authority. If the accused has been charged summarily and, on conviction, the court would have power to make an order as described, the order may be made without actually convicting the accused. It may be noted that in all these cases the machinery is more flexible than when insanity is put forward as a defence, presumably because the judge dealing with the matter has fuller medical information at his disposal. Thus a state hospital is not to be specified unless the court is satisfied that the patient, on account of his dangerous, violent or criminal propensities requires treatment under conditions of special security and could only be cared for suitably in a

1 See also Breen v. Breen, 1961 S.C. 158.
2 Mental Health (Scotland) Act, s. 63 (2)-(3). See also subs. (4) for procedure when the High Court of Justiciary on appeal substitutes a verdict of acquittal on the ground of insanity for the verdict of the jury. As to procedure generally see p. 149, supra.
state hospital. In general, it may be observed that the eventual allocation to institutions of those suffering from mental illness will in future be determined according to their personal condition rather than according to the procedure by which their condition was first brought under judicial scrutiny.

Prisoners serving sentences and other prisoners, such as those committed for civil debt and aliens in detention, may be removed from prison to a hospital by a "transfer direction" if the Secretary of State is satisfied that they suffer from a mental disorder justifying such action. Such "direction" has the same effect as a hospital order.3

**Diminished Responsibility**

A state of mental instability falling short of insanity has been recognised as a defence by the Scottish courts for nearly a century. Since little has been written on the defence of "diminished responsibility" in Scotland, and particularly because there seems to be some danger of the doctrine being misunderstood, it may be justifiable to consider the scope and development of the doctrine at some length and to attempt a critical evaluation of the present law.4

Continental systems usually admit the doctrine of diminished responsibility as a concept of general application. This, it is thought, is also true of Scottish law. The Royal Commission on Capital Punishment (which was, of course, only concerned with the law of murder) stated,5 however, that whereas in Europe diminished responsibility is a concept of general application, the Scottish doctrine is confined to murder, which may be reduced by this defence to the lesser crime of culpable homicide. The Commission concluded in short that the doctrine did not affect the general criminal law of Scotland. Such error in interpretation is possibly not unreasonable, since the great majority of cases in which diminished responsibility has been pleaded and discussed are murder cases. Macdonald,6 however, states that in principle the doctrine applies to assault, while in *McLean*7 Lord Deas, with the concurrence of three other judges, applied it in sentencing a prisoner for housebreaking. This case was followed in a number of other cases unconnected with murder.8 The true view of the doctrine, the author submits, is that the primary purpose of the doctrine is to mitigate punishment generally. Punishment in Scotland (unlike punishment

4. For a more detailed study of the doctrine and additional references, see *Smith, Studies*, p. 241.
5. § 413.
7. (1876) 3 Coup. 334.
8. See *post*, p. 161. In *Kirkwood*, 1939 *J.C.* 36, the doctrine of *McLean* is apparently accepted by the whole court.
under certain codes on the Continent) is a matter of judicial discretion, and is not laid down by law. In cases of murder alone, however, there is a statutory minimum penalty (sentence of death), and therefore, to permit the plea of "diminished responsibility" to operate on sentence, it is necessary for it to reduce the quality of the crime from murder to culpable homicide. Naturally, therefore, determination of the category of crime has been emphasised in cases where the indictment is for murder.

Hume and Alison did not recognise the doctrine of "diminished responsibility," and it was first clearly enunciated by Lord Deas in Dingwall. That was a case where the accused was charged with the murder of his wife to whom he was at other times kind, by stabbing her once with a knife. There was no premeditation. It appeared that the pannel, though not insane, was peculiar in his mental condition; and that his mind had been weakened by successive attacks of disease, particularly of delirium tremens, and also probably of epilepsy and sunstroke in India. The judge considered that there was such approximation to insanity that the jury would not be violating the law, if on that account they returned a verdict of culpable homicide only; and they did so. Next may be considered McLean. McLean had been convicted of theft aggravated by housebreaking and three previous convictions, but the jury recommended him to the leniency of the court in respect of his weak intellect. It appeared that, though he was not at the date of the commission of the crime insane, yet he had very recently escaped from a lunatic asylum where he had spent two years, including more than a year in the refractory ward. The Lord Justice-Clerk certified the case to the High Court for sentence, and remitted to a medical practitioner skilled in mental diseases for a report. Lord Deas, with the concurrence of the other judges, repeated the views he had expressed in Dingwall, and observed that diminished responsibility

9 But see the humane approach of Mackenzie (The Bloody Advocate), Laws and Customs of Scotland in Matters Criminal, Book 1, title 1.; Bell's notes on Hume's Commentaries, p. 5.
10 (1867) 5 Rv. 466, though the expression "diminished responsibility" seems only to have been adopted judicially in the 20th century—see Lord Keith, sup. cit., note 6 at p. 112.
11 In Edmondstone, 1909 2 S.L.T. 223 the pannel, whose acts were consistent with calculated murder for money, pleaded "diminished responsibility" on the grounds that he had suffered from sunstroke and epilepsy. Lord Guthrie left this question to the jury, but, stressing the facts of the case, he warned them that it was not sufficient for the pannel merely to establish some mental deterioration; it must be such as in the circumstances entitled him to be dealt with unlike other men. The jury convicted of murder.
12 The sentence imposed was of ten years' penal servitude.
13 (1876) 3 Coup. 334. Lord Keith has observed (note 6, supra, at p. 112): "I am not sure that this case has always been sufficiently noticed in considering the scope and effect of a plea of diminished responsibility." The author respectfully agrees. Sentencing policy in McLean's case was considered by the Judiciary Court in its collegiate capacity, being specially convened for that purpose.
by weakness of intellect might be taken into account as modifying the character and punishment of the criminal offence. Further consideration of the influence of this doctrine on sentence may be postponed till the other aspect is further examined.

Granger was another case of murder where diminished responsibility was pleaded successfully before Lord Deas. The jury convicted of culpable homicide on the grounds that the pannel had been suffering to some extent from delirium tremens at the material time. Since they rejected a defence of insanity, they, presumably accepting Lord Deas’ charge based on Dingwall, regarded the disease of the mind induced by drinking as producing aberration of intellect short of insanity.

Three years later Lord Deas presided at another murder trial where this plea was urged—in Ferguson. The pannel, who was not insane but of feeble intellect, had once been confined in a lunatic asylum for insanity due to intemperance, and was subject to alcoholic fits. In his charge to the jury, Lord Deas drew their attention to the absence of such mitigating factors as had been present in Dingwall, e.g., normal kindness and lack of premeditation, but left it to them to decide whether the crime was murder or culpable homicide. He explained the doctrine of diminished responsibility as follows:

That doctrine was founded on a principle of natural justice, which recognised a distinction between what in other countries, equally enlightened as our own, was termed murder in the first and in the second degree, and which under our own humane system we could act upon better and more conveniently by the distinction between murder and culpable homicide.

In two murder cases in 1882, Brown and Gove, Lord Deas left the question of diminished responsibility to the jury. Both pannels were proved to be of weak intellect but not insane; and there was no suggestion of intoxication or other self-induced abnormality. In the one case a woman had killed her two-year-old illegitimate son, and in the other a man had killed his father for no reason so far as the report discloses. The jury took the merciful view in both instances and sentences of seven and fourteen years’ penal servitude were imposed.

In Smith, the doctrine of diminished responsibility was successfully invoked when it was established that the pannel’s mind had been

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14 A sentence of six months’ imprisonment was imposed, which was very lenient in those days.
15 (1878) 4 Coup. 86; see also Brown (1886) 1 White 93—where, however, the influence of insanity, drunkenness and diminished responsibility were not clearly distinguished.
16 Sentence of five years’ penal servitude was imposed.
17 (1881) 4 Coup. 552.
18 At p. 558.
19 The jury convicted of murder but the sentence was afterwards commuted.
20 (1882) 4 Coup. 596.
21 Ibid. p. 598.
22 (1893) 1 Adam 34.
so unhinged by a prolonged course of verbal persecution by his fellow workmen that in the end, after being jeered at, he shot two and killed one of his persecutors. He was sentenced by Lord McLaren to penal servitude for life. This case was referred to as an example by the same judge in *Abercrombie* 23 where a girl was tried for child murder. The learned judge indicated that it would be a legitimate topic for consideration in connection with diminished responsibility that, according to the evidence, the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be alone, experiencing acute suffering, and apprehensive as to the disclosure of her condition.24

A case with some affinity to Smith is that of Aitken.25 In that case a man was tried for the murder of his wife, who had been unfaithful. The jury were told that in the sane man neither jealousy nor drink, nor both combined, could make the crime less than murder. The principle of "diminished responsibility" could only be applied if the jury were satisfied that the pannel suffered from some mental debility amounting to brain disease; and, further, only if they were satisfied that the pannel had so brooded over his wife’s conduct that, apart altogether from the ordinary effects of drink or jealousy or anger, his mind had become morbidly affected, would they be justified in returning a verdict of culpable homicide. In this case, however, the jury convicted of murder.

A strong attack on the doctrine of "diminished responsibility" was delivered by Lord Johnston in *Higgins*.26 Strictly, his observations were *obiter*, since he considered on the facts of the case before him that there was no evidence of any such mental condition. It is of interest that, though nearly half a century had elapsed since *Dingwall*, and though in *McLean* a Bench of judges had approved the principle enunciated in that case, there were some judges in Scotland who in 1914 regarded the quality of mercy as being overstrained through the introduction of the doctrine of diminished responsibility.

However, in the case of Savage 27 in 1923, though the jury convicted of murder and the accused was eventually executed, the Lord Justice-Clerk Alness gave a statement of the law 28 of diminished responsibility which has frequently been quoted since.29

23 (1896) 2 Adam 163.
24 The jury, somewhat surprisingly in view of the charge, found the pannel "not guilty on the ground of insanity."
25 (1902) 4 Adam 88.
26 1914 J.C. 1.
27 1923 J.C. 49.
28 At pp. 50-51.
29 It may be noted that the case of *Higgins* had been quoted to him, and, though the case was not one calculated to enlist judicial sympathy, the Lord Justice-Clerk did not associate himself with Lord Johnston’s views.
Our law has now come to recognise in murder cases a third class . . . namely those who, while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide . . . . It is very difficult to put it in a phrase, but it has been put this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions.

A later judicial attempt to express in words the somewhat imprecise concept of "diminished responsibility" was made in Muir.30 There the Lord Justice-General (Clyde) quoted with approval from a charge of Lord Moncreiff, "was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide?"; and Lord Sands adopted the description of "partial insanity, which is that weakness or great peculiarity of mind which the law has recognised as possibly differentiating a case of murder from one of culpable homicide."

In 1939 the very important case of Kirkwood31 was argued before the Whole Court on the question of sentence, a point to be discussed presently; but the Lord Justice-General (Normand) in delivering the opinion of the court took the opportunity to trace the development of the doctrine of diminished responsibility. He accepted the statement of the law as made by Lord Deas in McLean,32 but went on to suggest (what the writer ventures to doubt) that the doctrine is somewhat anomalous. He observed 33:

I think that there is no doubt that the defence of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible. It is a modern variation of that basic doctrine, justified in each case by medical testimony directed to the special facts of the case. The mental weakness, or weakness of responsibility, is regarded by our law as an extenuating circumstance, and it has effect as modifying the character of the crime, or as justifying a modification of sentence, or both.

Higgins34 does not appear to have been referred to,35 but Kirkwood may be taken as settling the law of "diminished responsibility" beyond question as part of the law of Scotland.

Lord Justice-Clerk Cooper (as he then was) in the case of Braithwaite,36 in which a murder of the most brutal kind was established,

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30 1933 J.C. 46 at pp. 48 and 49. 31 1939 J.C. 36.
32 (1876) 3 Coup. 334. 32 At p. 40.
33 1914 J.C. 1.
34 1939 J.C. 36.
35 Thus Lord Normand, at p. 39, says that "no later case qualifies."
36 1945 J.C. 55.
instructed the jury on the doctrine of diminished responsibility by quoting the passages already-referred to from Savage and Muir. He stressed that it would not do to show that the accused was of very short temper, or was unusually excitable and lacking in self-control. For the plea to succeed the pannel must be shown to suffer from "something amounting or approaching to partial insanity and based on mental weakness or aberration." 38

The last case to be considered in defining the scope of the doctrine of diminished responsibility is Carraher, a case of particular importance. This case has special interest on legal, medical and sociological grounds. The murder with which the report is concerned was committed by the pannel by stabbing the deceased in the neck with a chisel —which had been selected to attack another man. A plea of diminished responsibility was advanced on his behalf on two grounds: (a) that he was a psychopathic personality (a condition which per se, it was suggested, inferred diminished responsibility) or, alternatively, (b) that psychopathic personality, taken in association with the drink he had consumed, inferred diminished responsibility. Lord Russell, who presided at the trial, after some hesitation left to the jury the question of diminished responsibility. He took the responsibility, however, of directing them that, as there was no evidence that the pannel was actually suffering from illness due to alcoholism, the jury would dismiss entirely from their minds any question of drunkenness, unless they considered it to be proved that the pannel was so drunk at the material time as to be incapable of forming the intention to kill or do grievous bodily harm —which, one may infer, no reasonable jury could have done. The effect of drink being, so to speak, severed from that of "diminished responsibility," that plea had to rest upon the evidence of two doctors who described him as a "psychopathic personality." 39 This state, it was contended by counsel for the defence, per se inferred diminished responsibility. The learned judge indicated clearly that he himself would not be disposed to accept the evidence of psychopathic personality as amounting to diminished responsibility. In the event, the jury

37 Supra, note 28.
38 At p. 58.
39 1946 J.C. 108.
40 The gist of the evidence on psychopathic personality is quoted by Lord Russell at p. 111. "Now, ladies and gentlemen, you have heard evidence yesterday from Dr. McNiven and Dr. Blyth to the effect that the accused is in the category of a word they used, psychopathic personality. Well, naturally, you and I do not know the meaning of that term; we had to ask them what it meant, and Dr. McNiven's evidence was to this effect. 'I am inclined to place the accused in the category of a psychopathic personality. A psychopathic personality is a clinical condition in which are included persons who from childhood or early youth show all the gross abnormality in their social behaviour and emotional reaction, and who do not as a rule show enough insanity to be certifiable as insane.' 'Broadly speaking,' he says again, 'it is a condition in which there is an inability on the part of the person affected to adapt himself to the ordinary social conditions, usually less than insanity which is certifiable. It is associated with emotional instability.'"
convicted of murder, and the pannel appealed, mainly on the grounds of misdirection in severing the question of the influence of drink from the general question of diminished responsibility. For the appellant it was contended that a normal man could not complain if his conduct when affected by drink was regarded as voluntary, but in the case of psychopathic personality there was an inability, as opposed to a mere failure, to refrain from the conduct in question. Counsel also took the novel and somewhat bold step of moving the Court of Criminal Appeal to use its powers under the Criminal Appeal (Scotland) Act, 1926, s. 6 (e), to appoint a psychiatrist to act as assessor to the court.

The appeal was heard by a Full Bench, and was rejected. The Lord Justice-General (Normand) delivered the opinion of the court. So far as the issue of diminished responsibility based on psychopathic personality was concerned, Lord Normand said:

The court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility.

On the other point, the Lord Justice-General rejected the second point that diminished responsibility induced by drinking could be accepted as a valid defence and continued:

I am of opinion that the plea of diminished responsibility which, as was said in Kirkwood's case, is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions.

Taken literally by itself, this dictum would neither be easy to understand nor to accept. Leaving aside for the present the question of whether the plea is anomalous, it may well be doubted whether it is possible to fix the limits of the doctrine merely by reference to past decisions. The concept is too protean to be thus treated. Diminished responsibility has been described but never defined. The judicial dicta on diminished responsibility quoted above from the leading cases are, one conjectures, deliberately left somewhat general and comprise very different mitigating circumstances. A judge's charge to a jury of fifteen ordinary men and women could not with advantage take the form of a lecture on psychological medicine. As it is, one of the advantages possibly of the jury system is that the jury are not obliged to explain the logical or other processes by which they reach a conclusion. If the question of diminished responsibility is to be left to a jury, it is best, as learned judges have realised, to leave the question on broad

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41 16 & 17 Geo. 5, c. 15.
42 At p. 117.
43 At p. 118.
common sense lines. What caused anxiety to the Lord Justice-General, and to the judges associated with him in Carrather, was the danger that unverified hypotheses of individual psychiatrists might lead to abuse of the defence of diminished responsibility. It is suggested that the judges will be prepared to recognise the consensus prudentium in matters of science. Until such matters are fully tested and generally accepted, the courts decline to take the responsibility for relaxing legal sanctions because of what may prove to be an erroneous theory. Though in 1946 the High Court seemed to reject psychopathic personality as a proper basis for a plea of diminished responsibility, Sir David Henderson and other eminent medical witnesses before the Royal Commission on Capital Punishment considered that such persons are not sane enough to be at large and not insane enough to be certifiable. They differ, Sir David suggested, from other people not qualitatively—but quantitatively.

On this the author expresses no opinion, but conjectures that Lord Normand in Carrather had no more intention than Lord Dunedin in Brown of rejecting out of hand the verified results of scientific research. What was appropriate in 1946 need not be binding on the courts in 1964. The Royal Commission recommended that so long as the Scottish courts did not accept psychopathic personality as a basis for defence of diminished responsibility, the Secretary of State should give this factor greater weight than in past practice as a ground of reprieve. But, as Lord Keith had noted, in Carrather the Scottish courts did not decide that the issue of diminished responsibility should not be left to the jury when the evidence only established that the accused suffered from psychopathic peculiarities. Some such cases may well fall within the ambit of the doctrine, and the English courts (which admit the doctrine of diminished responsibility under statute only in cases of alleged murder) have already apparently recognised diminished responsibility based upon some categories of psychopathic personality.

The other reason suggested by the Lord Justice-General in Carrather for setting bounds to the doctrine of diminished responsibility was that the doctrine was anomalous. It is submitted, however, that the doctrine itself is not anomalous but, if not introduced to correct, at least has corrected an anomaly in the law regarding punishment. It is the general rule of our law that the judge exercises an unrestricted discretion as regards punishment. To that rule murder has been and

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44 1953, Cmd. 8932, p. 137 et seq.
45 (1907) 5 Adam 312.
46 Recommendation (25), at p. 276.
capital murder now is an exception. The judge is bound to impose the fixed minimum penalty of death by hanging, 49 and is accordingly precluded by law from considering the degree of responsibility of a pannel convicted of capital murder. Now it has been judicially recognised that proof of diminished responsibility may justify reducing the character of the crime or sentence, or both: Kirkwood. Though the doctrine has been invoked to modify sentence for various types of crime such as fire-raising, 50 firing haystacks, 51 housebreaking, 52 theft from the Post Office, 53 and culpable homicide, 54 it is only in cases of murder that it has so far been invoked to modify the quality of the crime. It has not been urged to reduce, for example, wilful fire-raising to culpable, wicked and reckless fire-raising, or to reduce rape to indecent assault. Lord Keith has, however, observed 55:

There is no instance of its (the defence of diminished responsibility) ever having been applied in Scotland with similar effect to any other category of crime (than murder, to reduce the quality of the crime). But if the judgment of Lord Deas in McLean's case be accepted there is no reason why this should be so, if there is postulated a crime which may be reduced from a higher to a lower category. I can conceive of some such. On the other hand it is difficult to see what lower category could be invoked in a case of simple theft. But the question is largely academic because, as only murder . . . carries with it a fixed penalty, the other cases can be met by mitigation of sentence.

Moreover, as Lord Walker has wisely discerned, over the years 56 "there has been a drift from the higher to the lower category" of crime. Be that as it may, as the doctrine of diminished responsibility has operated in Scotland so far, it may be legitimate to draw the inference that the real purpose and justification of the doctrine is to mitigate punishment where the pannel is not fully guilty in the moral sense owing to diminished responsibility. This doctrine cannot be given effect to in cases of murder where the minimum punishment is fixed by law; and, to overcome this anomaly, the doctrine of diminished responsibility has been extended to reduce the quality of crime in this one case—thus making it possible for the judge to exercise discretion as to punishment. If murder had been divided into different degrees, or, if there had been no death penalty, or if sentence had been merely a

49 The death penalty may, of course, also be imposed for treason and theoretically for certain forms of attempted murder under the Criminal Law (Scotland) Act, 1829 (10 Geo. 4, c. 38), but they can give little scope in practice for pleas of diminished responsibility.
50 Ferguson (1894) 1 Adam 517.
51 Wilson (1877) 3 Coup. 429; however, when the doctrine was first introduced into Scottish practice the death penalty was a competent punishment for many crimes including rape, and some cases of theft. Perhaps diminished responsibility might have been invoked to preclude the quality of crime other than murder when the category might have determined the punishment.
52 McLean (1876) 3 Coup. 334.
53 Kirkwood, 1939 J.C. 36; Muir, 1933 J.C. 46.
55 Small (1880) 4 Coup. 388.
S.L.S.—6
competent but not a fixed penalty in cases of murder, it is submitted that the doctrine of diminished responsibility need not have been invoked to modify the quality of crime. If the sentence for murder ceased to be fixed by law the doctrine *quoad* modifying the quality of crime would probably lose its importance. In the Netherlands, for example, it may be observed where the judge has discretion as to punishment in all cases and where there is no death penalty, the equivalent doctrine to diminished responsibility is relevant only in determining sentence. The great object of reducing murder to culpable homicide by plea of diminished responsibility—and it is with this point that most of the cases are concerned—is to make possible a discretion in punishment. Thus the anomaly is not in the doctrine of diminished responsibility, but in the fixing of inflexible rules of punishment for murder.

The effect of the doctrine of diminished responsibility on punishment has, it is thought, altered somewhat since the earlier cases. The older view may have been that proof of diminished responsibility would justify the judge in "punishing the bad and excusing the mad." There are, however, other considerations to be borne in mind.

The whole question was so well examined by the Whole Court in *Kirkwood* 57 that a summary of that case summarises the law. The pannel was originally charged with murder of a woman by particularly violent and horrible means. His defence was insanity; and the Crown led evidence at the trial of his mental condition. It appeared that *inter alia* he had been treated for frequent epileptic fits (sometimes of a violent character), that he suffered from severe headaches, and that on one occasion he had apparently attempted to commit suicide. One of the Crown medical witnesses considered that the pannel was sane, but not fully responsible at the time of the crime; the other medical witness considered that there were circumstances connected with the crime which would lead him to conclude that the pannel was insane at the time he committed the crime and had no idea of what he was doing. After this evidence, Kirkwood's counsel offered a plea of guilty of culpable homicide on grounds of diminished responsibility, and this plea was accepted by the Crown. No further evidence was led, and the Lord Justice-Clerk (Aitchison) imposed sentence of penal servitude for life. An appeal was taken against this sentence. Appellant's counsel maintained (first) that in cases of diminished responsibility the judge in awarding sentence must apportion guilt and misfortune—so that the greater the degree of irresponsibility, the lighter should be the punishment; (secondly) that protection of the public was not a relevant consideration for the judge in imposing criminal punishment; and (thirdly)

57 1939 J.C. 36.
that an indeterminate sentence would prejudice any chance of the appellant's recovery. In refusing the appeal, the Lord Justice-General observed that other life sentences had been imposed in cases involving diminished responsibility, e.g., *Muir,* \(^{58}\) and that he was satisfied that the authorities would have the appellant's mental and physical condition carefully considered, and, if necessary, that ameliorative treatment would be given to him. \(^{59}\) Further, his Lordship observed, Kirkwood's case would be reviewed from time to time by the authorities who had power to control treatment and eventually order release. The Lord Justice-General, delivering the opinion of the court, rejected the suggestion that protection of the public was not a relevant consideration in a case like that under consideration. \(^{60}\)

The mental weakness or weakness of responsibility is regarded by our law as an extenuating circumstance, and it has effect as modifying the character of the crime, or as justifying a modification of sentence, or both. When the jury has, under the presiding judge's direction, given effect to this extenuating circumstance by reducing the crime from murder to culpable homicide, the judge has still to consider whether it should have further weight when he is imposing sentence. . . . I cannot assent to the contention that the protection of the public is to be disregarded, nor to the implied separation of the pannel's own protection from that of the public. . . . The interests of society include the reformation of the criminal, the prevention of the repetition of the crime by him or by others, and the protection of other members of the community. When a pannel is convicted of a crime committed under an impulse which he is less able to resist than the normal person, and when there is evidence that the impairment of his powers of resistance may come into play after a long interval during which there have been no premonitory signs of danger, and when the crime has been one of atrocious ferocity, the protection of the public against its repetition is specially relevant.

**Conduct in which Dole Manifest**

**Attempt**

At common law, only in the case of the *graviora delicta* was attempt to commit a crime indictable, though as Lord Walker has pointed out, \(^{61}\) after wide experience and deep research into the criminal law, "It was . . . largely in relation to attempted crime that the power of the court to declare criminal any conduct which tends to corrupt public morals and to injure the interests of society . . . came to be exercised." Now by the Criminal Procedure (Scotland) Act, 1887, \(^{62}\) s. 61, it is provided that an attempt to commit any indictable crime is itself an

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\(^{58}\) 1933 J.C. 46.

\(^{59}\) See new provisions of Mental Health (Scotland) Act, 1960, esp. s. 66.

\(^{60}\) 1939 J.C. 36 at pp. 40, 41.

\(^{61}\) (1958) Jur.Rev. 230 at p. 236. It is interesting to note that attempt to commit culpable homicide has apparently never been charged.

\(^{62}\) 50 & 51 Vict. c. 35.
indictable crime, and also that, on an indictment which charges a completed crime, the accused may be convicted of attempting to commit such a crime. The Summary Jurisdiction (Scotland) Act, 1954, makes similar provisions regarding attempts to commit offences punishable on complaint.

There must be conatus maleficio proximus—conduct which amounts to "an inchoate act of execution of the meditated deed." Whether the deed has gone beyond the stage of preparation and into the stage of perpetration is often a question of fact which the jury is left to determine. In the notable case of Camerons, a charge of attempt to defraud underwriters through a fabricated story of the theft of a pearl necklace was sustained, though no claim had actually been made on the company. On the other hand in Mackenzie the alleged copying by an employee of his employer's secret chemical processes with intent to sell them, was held not to be sufficiently proximate to make an indictment for attempt relevant. Again, in Baxter averments of the sending of abortifacient drugs to a pregnant woman with instructions as to how to use them were held to be irrelevant on an indictment for attempt to procure abortion. A very full discussion of the law as to attempt was given by Lord Justice-Clerk Macdonald in this case. In Tannahill and Neilson it was held that, since the accused had not been proved to have done any overt act, the consequences of which they could recall, they could not be convicted of attempt. The test therefore seems to be "Has the accused put it beyond his power to prevent the consequences of his plan by his own voluntary act?" Thus Lady Macbeth with dagger poised over the sleeping Duncan drew back—"Had he not resembled my father as he slept, I had done't." Doubtless had she been apprehended in Duncan's chamber, it might have proved difficult to convince a jury with this story.

In some cases, a charge of attempt may succeed, although the defence can prove that the crime attempted could not have succeeded—as where an endeavour is made to steal from a pocket which has nothing in it: Lamont. On the other hand, an indictment for attempted abortion cannot succeed on proof that abortifacient drugs have been given to a woman who is not in fact pregnant. In this case the pregnancy of the woman is an essential element of the crime of procuring abortion: Anderson.

63 2 & 3 Eliz. 2, c. 48, Sched. I, clause 61.
64 1911 J.C. 110.
65 1913 S.C. (J) 107.
66 (1908) 16 S.L.T. 475.
67 1943 J.C. 150.
68 1933 J.C. 33.
69 1928 J.C. 1.
It may be observed that in some cases where a charge of attempt would fail, because there is no evidence of an overt act, a valid charge of instigation might be brought. Thus in *Tannahill and Neison* 70 Lord Wark held that by the law of Scotland instigation to commit a crime might in itself be criminal, although the crime envisaged was never committed nor was an attempt made to commit. This view has been affirmed. 71 The Scottish law of conspiracy is, perhaps, merely an extension of the law regarding attempts. 72

**Accession**

The law of Scotland in general makes no distinction between commission and accession. Except in cases of treason (where the English law has been extended to Scotland) murder (as laid down in the Homicide Act, 1957) and concealment of pregnancy (where the crime itself does not admit of accession) a person may be guilty of the crime charged either as “actor” or as “art and part.” “Actor” is the principal in the crime. “Art” implies that the crime was committed by the art or skill of the pannels, while “part” means that the pannels were sharers in the crime committed. (The expression “art and part” may be derived from “artifex et particeps.”) The theory of the law is that it is immaterial whether a pannel is guilty as “actor” or as “art and part.” The jury does not need to indicate in which category they find the accused guilty. Now, moreover, by the Criminal Procedure (Scotland) Act, 1887, 73 s. 7, it is unnecessary to libel in an indictment that the pannel is “guilty actor or art and part,” as this is now implied in all indictments.

Accession after the fact is not recognised by the law of Scotland except in cases of treason, though what is done after the commission of a crime to conceal it or protect the culprit may be a substantive crime, and may afford evidence of previous participation.

Accession before the fact may take several forms. In the first place, it may take the form of counsel and instigation. This must be direct and serious, tending to induce commission of the crime, and not mere general advice. Further, the counsel and instigation must relate to an act likely to result in the crime charged. Even detailed counsel to break into a bank would not implicate the instigator in liability for murder if the “actor” carried and used a pistol. Secondly, accession before the fact may be by giving practical assistance—which, of course,

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70 1943 J.C. 150 at p. 153.
73 50 & 51 Vict. c. 35. The 1954 Act has similar provisions regarding summary complaints.
may be combined with advice. It is necessary, however, that the assistance be both immediate and material. Thus the making of a skeleton key for a gang of housebreakers, or the lending of a car for their use generally is insufficient, as would be the supplying of a criminal with food to sustain him during a criminal enterprise, or with a waterproof to keep him dry.

Accession concurrent with the fact (in ipso actu) may be deduced from the accused's conduct at the time of the crime without evidence of previous concert. Thus when a gang sets out with razors and other weapons in their possession in the expectation of encountering a rival gang, though no preconcerted plan has been arranged, all may be held guilty by accession of a murder caused by the blow of one of their number in the course of a general scuffle in which all engaged.74

On the other hand, if a number of men agree together to attack certain others, but one of the associates, unknown to the others, carries a weapon which he uses with fatal result, that one alone will be guilty of murder—unless the others encouraged that crime by inciting the man with the weapon to use it, or helped by holding the victim while the weapon was used.

As a rule accession will not be inferred from mere presence without active participation, but this depends on the facts. Thus in Webster v. Wishart 75 it was held that when two men had together committed theft and thereafter had used a motor vehicle to escape and to transport the stolen goods, the fact that they were associated in a criminal enterprise did not necessarily make all occupants of the car liable for such breaches of the Road Traffic Acts as the driver might commit. On the other hand, in a case of assault with intent to ravish, Kerr,76 it was held relevant to allege accession on the part of one pannel by "looking on and failing to interfere" on the girl's behalf. Encouragement to the assailants might have been given by the accused's presence, which might also have further intimidated the victim. After the evidence had been heard, it appeared that the accused had been on the far side of a hedge from the girl's assailants, and Lord Ardmillan advised the jury that it would not be safe for them to convict.

Where a crime must have been committed by the hand of one of two persons, if concert can be established both will be guilty. If, however, no common purpose can be proved, and it is a case of either one or the other being guilty, but which the jury cannot decide, both accused are entitled to acquittal: Robertson.77

74 For a case of robbery and assault see Lappen, 1956 S.L.T. 109.
76 (1871) 2 Coup. 334.
In *Camerons* 78 and *Tobin* 79 the law on concert was carefully considered. Where concert is charged, the jury must consider the evidence against each accused separately, with reference to the evidence against him, to ascertain if concert is established so far as he is concerned. If not, then he is responsible only for the acts proved against him. On the other hand, if concert with others is proved against him, then the evidence against the other associates is also admissible against that individual accused. 80

The Homicide Act, 1957, which was introduced mainly as a compromise measure to mitigate existing anomalies in the English law of murder, has by a by-wind introduced into Scotland specialities regarding the law of accession. It is provided by section 5 (2), which deals with capital murder, "If in the case of any murder falling within the foregoing subsection, two or more persons are guilty of the murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him: but the murder shall not be capital murder in the case of any other of the persons guilty of it." This subsection cuts across the general principles of the law of Scotland regarding accession. It may be noted that "grievous bodily harm" is an expression which has a technical implication in English law—but this is not a meaning to be presumed in a United Kingdom statute. 81

**Punishment**

Punishment inflicted by the State is the normal consequence of crime, though, by contrast to what was formerly implied when describing a crime as "a dolous act inferring punishment," the main object now is reformation rather than retribution. Even in Hume's time, 82 however, the death penalty was used sparingly in Scotland compared with England. A scientific approach to penology is quite a recent development in Scotland. Even today the judge may often feel bound to pass sentence, after conviction, before the accused's background has been adequately investigated and brought to the notice of the court.

Capital punishment is now restricted to treason and capital or repeated murders. 83 The Homicide Act, 1957, s. 9, provides that the

78 *Ame.*, p. 164.
79 1934 J.C. 60.
80 *Lappen*, 1956 S.L.T. 109; *Shaw*, 1953 J.C. 51; distinguishing *Docherty*, 1945 J.C. 89; 1945 S.L.T. 247, as to what is necessary in a charge to the jury, where concert is not essential to the Crown case against an accused.
82 *Vol. 1*, p. 10.
83 *Homicide Act*, 1957 (5 & 6 Eliz. 2, c. 11), s. 5.
punishment for murders not punishable by death shall be life imprisonment. For other crimes, though a maximum may be prescribed by statute, and, if certain types of sentence are imposed, they must be for a minimum period, in general no minimum punishment either of fine or imprisonment is prescribed. In certain Road Traffic cases, however, disqualification from holding or obtaining a licence may be obligatory unless special circumstances can be shown. On the whole, however, punishment is left to the discretion of the judges in Scotland.

Subject to any maximum which may be prescribed by statute, the High Court of Justiciary has unlimited powers to imprison, fine or order caution; and in cases of treason and capital or repeated murders has power to impose sentence of death. In solemn proceedings the sheriff's powers of imprisonment are limited to two years. If a person tried in the sheriff court merits a heavier punishment, the sheriff must remit him to the High Court for sentence. If, however, the accused is over twenty-one, has already two previous convictions for serious offences, and is convicted again of an offence punishable with two years' imprisonment or more, the sheriff as well as the High Court may impose a sentence of "corrective training." This is a prison sentence of from two to four years' duration designed to submit the prisoner to special training of a corrective character. The High Court alone may impose a sentence of preventive detention of from five to fourteen years. Such a sentence is competent in the case of a person over thirty years of age convicted of an offence punishable with imprisonment for two years or more, and having previously been convicted on indictment on at least three occasions since the age of seventeen of crimes similarly punishable, and having been on at least two of these occasions sentenced to Borstal or corrective training or to imprisonment. Courts exercising solemn jurisdiction may also dispose of an accused by those less severe methods which are in more general use by courts exercising summary jurisdiction, but, if in solemn procedure the court determines on

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84 e.g., by corrective training and preventive detention. Criminal Justice (Scotland) Act, 1949 (12, 13 & 14 Geo. 6, c. 94), s. 21.
85 As to fines generally in summary procedure see the Summary Jurisdiction (Scotland) Act, 1954 (2 & 3 Eliz. 2, c. 48), ss. 40-50 and 52, and Barbour v. Robertson, 1943 J.C. 46. In this case it was pointed out in deciding whether to allow time to pay the judge must not consider the nature of the offence.
86 See Road Traffic Act, 1960 (8 & 9 Eliz. 2, c. 16), s. 104 and Eleventh Sched.
87 See note p. 102, ante. For discussion of when this sentence is appropriate see Craig, H.C.J., May 18, 1961 (unreported); cf. McElrane, 1953 J.C. 12. Since McElrane, however, the curriculum of corrective training has been altered to 16 months, and the Lord Justice-Clerk's observations must be construed with this consideration in mind.
88 Criminal Justice (Scotland) Act, 1949, s. 21 (2). Such a sentence is very rarely imposed in Scotland, and is of doubtful value.
absolute discharge and probation, a conviction is nevertheless recorded.\textsuperscript{89}

Under summary procedure, the courts (other than that of a sheriff or stipendiary magistrate) may for common law offences impose a sentence of imprisonment not exceeding sixty days or a fine not exceeding £10. Moreover, they may ordain the accused to find caution (security) for good behaviour for a period not exceeding six months and to an amount not exceeding £20. The sheriff’s summary powers are imprisonment for three (and in some cases six) months, fines not exceeding £25 and caution for one year for a maximum of £25. Maximum punishments for statutory offences are prescribed by statute.

In appropriate cases there are other competent methods of dealing with offenders. The court may discharge an accused absolutely and, though it must be established that the offence was committed, no conviction is recorded in summary proceedings.\textsuperscript{90} It is competent, and may be desirable, to dismiss the accused with admonition\textsuperscript{91} or to defer sentence.\textsuperscript{92} Again, the court may require the offender to be placed on probation under the supervision of a probation officer for a period of not less than one and not more than three years. The accused himself must have been willing to comply with the probation order and with conditions imposed thereunder. In summary proceedings such an order may be made without recording a conviction.\textsuperscript{93}

\textbf{Special Categories of Offenders}

\textbf{Young Offenders}

In the case of young offenders certain special provisions are applicable. Any court of summary jurisdiction sits as a juvenile court\textsuperscript{94} when hearing charges against persons under seventeen years of age, and the procedure is intended to take special account of the welfare of the offender.\textsuperscript{95} Suspected persons under the age of seventeen while awaiting trial are normally detained (if detention is necessary) in remand homes, though in exceptional cases those over

\textsuperscript{89} Ibid. s. 1.
\textsuperscript{90} Ibid.
\textsuperscript{91} Summary Jurisdiction (Scotland) Act, 1954, s. 55.
\textsuperscript{92} The competency of this procedure may perhaps be questioned—see Use of Short Sentences of Imprisonment by the Courts Regal of the Scottish Advisory Council on the Treatment of Offenders, 1960, § 47.
\textsuperscript{93} Criminal Justice (Scotland) Act, 1949, ss. 1–3.
\textsuperscript{94} The sheriff court has concurrent jurisdiction with any specially constituted juvenile court, but proceedings should not be taken in the sheriff court rather than in such juvenile court except on the special instructions of the Lord Advocate: \textit{Weir v. Cruickshank}, 1959 J.C. 94.
\textsuperscript{95} See generally Children and Young Persons (Scotland) Act, 1937 (1 Edw. 8 & 1 Geo. 6, s. 37), Part IV.
the age of fourteen may be committed to prison.\textsuperscript{96} No conviction is recorded against a person under the age of seventeen; the court merely makes “a finding of guilty.” Again, no person under that age may be sentenced to imprisonment.\textsuperscript{97} They may be committed to the care of “a fit person,” sent to Borstal or to an approved school, or committed to custody in a remand home.\textsuperscript{98} Offenders convicted of murder (committed when under the age of eighteen) are not liable to the normally prescribed sanctions, but are ordered to be detained until Her Majesty’s pleasure be known: in short, they are at the disposal of the executive authorities.

Under the Criminal Justice (Scotland) Act, 1949, s. 19 (1), persons between the ages of fourteen to twenty-one may be sentenced to a period of training in a detention centre for up to a maximum of three months. The first such centre for boys in Scotland was opened at Perth in June 1960, and is available for offenders dealt with by the sheriff courts or by the stipendiary magistrate.

No judge below the status of sheriff or stipendiary magistrate may sentence a young offender to a period of Borstal training. Such training may competently be ordered when the accused is over the age of sixteen and under twenty-one, if, after report, he or she appears a suitable subject.

\textbf{Insanity and Mental Deficiency}

The prosecution has a duty to bring before the court any evidence known about the mental condition of the accused. In cases of insanity, if proceedings are on indictment, the accused is ordered to be detained during Her Majesty’s pleasure and is committed to a State Mental Hospital. In summary proceedings before a sheriff, if he is satisfied that the accused did the act or made the omission charged against him, and is also satisfied on medical evidence that he is of unsound mind, the judge must commit him to a mental hospital or State Mental Hospital. If the High Court or a sheriff are satisfied on medical evidence that a person convicted is mentally defective, the court may—instead of dealing with him in any other way—commit him to an institution for mental defectives or place him under guardianship. Summary courts other than the sheriff court must remit to the sheriff any person charged before them who appears to be insane or mentally defective.\textsuperscript{99}

\textsuperscript{96} Criminal Justice (Scotland) Act, 1949, s. 28 (2)-(4).
\textsuperscript{97} Ibid. s. 18 (1).
\textsuperscript{98} Children and Young Persons (Scotland) Act, 1937, s. 61 (1); Criminal Justice (Scotland) Act, 1949, s. 20. On remand homes in Scotland see generally the recent report, "Remand Homes," 1961, Cmnd. 1588.
\textsuperscript{99} See p. 149, ante.
First Offenders

A sentence of imprisonment may not be imposed by any court upon a person over the age of seventeen and under twenty-one unless the court, after inquiry into his circumstances, decides that no other method of disposal is appropriate. The prescribed procedure must be followed strictly. Similar restrictions, but without limit of age, were imposed on courts of summary jurisdiction by the First Offenders (Scotland) Act, 1960.

Women

The principle of the equality of the sexes is in general accepted in the Scottish penal system, though sentence of death would not be demanded in the case of a woman who was pregnant, and there is no detention centre in Scotland for girls. It must, however, be realised that women constitute a very small proportion of the prison population in Scotland. Consequently classification is difficult and accommodation unsuitable. Moreover, the factors relevant to a penal régime for men and boys are not necessarily also relevant for women and girls. This is a field of penology which, until recently, has never been adequately explored. General reference may be made to Women in Prison by Dr. Ann D. Smith of Edinburgh, published in 1962.

General Considerations

The elements of prevention, retribution, reformation and deterrence still constitute the main objects of punishment in Scotland today. So far as capital punishment for murder is concerned, there is no evidence that it is an effective deterrent—and few would care to advocate its retention on retributive grounds alone. Unless perhaps in the case of preventive detention, which is intended to "warehouse" those too addicted to crime to break the habit, imprisonment is intended to reform, if possible, the character of the prisoner. This cannot be achieved in the case of short sentences, while, moreover, the short sentence prisoner disrupts the prison routine aiming at rehabilitation. The Scottish Advisory Council on the Treatment of Offenders reported in 1960 on the problem of the use of short sentences. Paradoxically though civil imprisonment in Scotland is very rare compared with the situation in England, the use of short sentences in the criminal field has been strikingly frequent by comparison. Cases perhaps will arise for which such disposal is the only

2 8 & 9 Eliz. 2, c. 23. It has been held, however, that the effect of this Act is not to substitute the opinion of probation officers for that of the judge, who has to pass sentence: Scott v. Macdonald, 1961 S.L.T. 257.
3 See note 92, ante.
possibility—though there are no suitable institutions at present for such prisoners. It may be hoped that the Report of the Advisory Council will be taken into consideration by judges at all levels.

The factor of retribution cannot be altogether ignored in imposing punishment, and is relevant in questions of aggravation and mitigation. The prosecutor may show in aggravation of punishment that the accused had previously been convicted in the United Kingdom of a similar offence, or an offence falling into the same general class as that of which he has just been convicted. Crimes of dishonesty, personal violence, lewdness, and disorderly conduct are treated as such classes, while in the case of statutory offences it may be shown that the accused has been convicted of other analogous offences.4 Whilst it is relevant to take into consideration previous convictions when awarding sentence, the judge must not tell the accused that he will impose a specified sentence if there is a further offence.5 Nevertheless, a judge may properly consider the frequency of certain crimes in his jurisdiction and, on that account, impose a specially severe sentence—preferably after warning as to his intention.6 It has been held improper for a judge, in considering previous convictions, to consider anything except the facts that they were recorded against the accused and the sentence imposed.7 Investigation of the circumstances was disapproved. On the other hand in McGovern8 the same judge as made these observations (Lord Justice-General Cooper) considered it legitimate to take into account information in a probation report which brought to light previous misdeeds and convictions of the prisoner. He observed that “the court is entitled to have regard to all the factors disclosed in such a report, which should include all available information upon the accused’s character, history and background.”

In mitigation a wide variety of considerations may be urged. Among those relevant may be included provocation, diminished responsibility, recommendation of a jury, poverty, previous good character, youth, bad example or the evil influence of some person who should have exercised responsible control. Intoxication may aggravate some offences, and operate in mitigation of others—carpe judicem.

4 Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), ss. 63-65; Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. 7, c. 65), ss. 34 and 77—as amended by the Criminal Justice (Scotland) Act, 1949; Summary Jurisdiction (Scotland) Act, 1954, s. 42; see also Wishart v. Healy, 1949 J.C. 67; Mitchell v. Adair, 1949 J.C. 114; McGeachy v. Macdonald, 1953 J.C. 60. If the previous conviction took place a long time before the subsequent offence, it may be reasonable to treat the latter as a first offence: Gorman, H.C.J. June 22, 1961 (unreported).
A certain uniformity in sentencing policy is maintained through unofficial discussion and consultation. Generally speaking the same considerations weigh whether sentence has been imposed by a High Court judge or by the sheriff. Judges in the High Court of Justiciary, however, are more frequently called upon to decide whether sentences imposed by a sheriff are oppressive than to review the sentencing policy of their brethren. The sheriffs, of course, carry the main burden of the administration of criminal justice, and the best of them are among the finest judges in criminalibus. There are, however, occasions when in imposing a sentence either in the High Court or in the sheriff court (or in the summary courts) the penalty is not properly related to the offence,9 and in Edinburgh the adjustment is ultimately made. The Lord Justice-General (Cooper) made no new law in Macleod v. Mackenzie,10 but his whole opinion in that case (where a fine of £60 had been imposed for trivial overcharging) brings into focus—in perfect English—the essential principles and an even more essential humanity:

In the heart of the Island of Lewis near the head of Loch Erisort there is a clachan called Balallan, in which the complainer keeps the local store, selling articles of clothing, provisions and general merchandise. He also acts as merchant for the local Harris tweed, and he works a croft, and at certain times of the year, particularly in the spring and summer, he also works at cutting, weathering and ingathering peats. His must be a full life, for his activities touch current regulations at countless points. In May 1946 there penetrated into Balallan from Inverness two inspectors of the Price Regulation Committee. . . . Seven months later there were served upon the complainer, not one, but five separate complaints. . . . The maximum penalties stated (in some cases inaccurately) in the complaints are, as usual Draconian. . . . This is a case which may fairly be described in the language of the Lord Justice-General in Stewart v. Cormack 11 as one in which the penalty is not properly related to the offence.

It was with very different language that Lord Cooper charged the jury and imposed sentence in Dewar,12 when the accused was indicted with stealing over one thousand coffin lids and a number of coffins

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9 As illustrations of the considerations which should weigh in imposing sentence, the following cases may be consulted: Moorov, 1930 J.C. 68 (assault and indecent assault). H.M.A. v. D., 1944 J.C. 132 (acts of indecency with male persons—imprisonment rather than probation with treatment); O'Reilly, 1943 J.C. 23 (first offence of reset; discussion of "social effects" of crime as relevant to punishment); W. & A. W. Henderson, Ltd. v. Forster, 1944 J.C. 91 (breach of Factories Act—irrelevance of considering that fine might be applied as compensation to victim); Edward & Sons v. Mackinnon, Russell v. Mackinnon, 1943 J.C. 136 (failure to register as manufacturer selling taxable goods—maximum fine imposed); Gunn, Collie & Topping v. Adair, 1944 J.C. 21 (breach of regulations by tailors—fine to be at least "such amount as will in the opinion of the court secure that the offender derives no benefit from the offence"—how benefit to be calculated).

11 1941 J.C. 73.
12 The trial on Oct. 10, 1944 and the subsequent days is unreported. For appeal against convictions and sentence see 1945 J.C. 5.
committed to him with bodies for disposal at the Aberdeen Crematorium.

Delinquency is one of the major problems of the twentieth century, and society itself, as well as the will of the offender, contributes to criminality generally. Among those responsible for legislation and administration there are many enlightened men and women striving to identify the causes of crime, and to prescribe appropriate solutions. Nevertheless, the accommodation available in Scotland for the rehabilitation or segregation of delinquents is altogether inadequate, and the type of work which is provided for those in prison is not on the whole well suited to develop character or prepare the prisoner for his return to society. Reform of the penal system itself—suitable buildings, improved conditions for staff and so forth, all cost money. Generally speaking, society is reluctant to expend money on such purposes. The public as a whole is probably unaware of, or insensitive regarding, the positive contribution made by the Prison, Borstal and After-Care Services. Unsentimental understanding of the basic problems is, however, being furthered by various official and unofficial bodies, while the Universities, particularly in Glasgow and Edinburgh, have in recent years encouraged the development of teaching and research in the field of criminology. Judicial discretion as to sentence, when exercised in the future should certainly have a more scientific basis than had the sentencing policy of certain judges in the past, who conceived of punishment primarily in terms of retribution.
Chapter 6

Notes on particular crimes

As has been explained earlier,¹ it is not necessary in Scotland to indict criminal conduct by any particular nomen juris. On the other hand, familiar crimes are known by familiar names. No comprehensive survey of crimes is possible or desirable in a work of the present compass. It is proposed to discuss only the most important crimes in three categories—crimes against the State, crimes against the person, and crimes against property. Clearly all crimes in the sense of public wrongs involve the interests of the State. In the present context, however, the classification of crimes against the State is chosen by way of contrast with crimes where injury to an individual is the main factor.

Crimes against the State

Treason and Treason Felony

By the Treason Act, 1708,² in the year after the Union of Scotland and England, the law of treason then applicable in England was imposed on Scotland. The Scottish peers in the House of Lords at this time urged unsuccessfully that to the Act of 1708 there should be annexed a statement of the English treason law—which had been elaborated by highly technical judicial construction of the Act of Edward III. During the eighteenth century those who participated in the unsuccessful Risings against the Hanoverian dynasty were often tried in England for alleged treason committed on Scottish soil, an arrangement which can be explained but not justified on political grounds; while in 1820, Cockburn recalls,³ Commissions of Oyer and Terminer on the English model were sent to try Scotsmen on treason charges in Scotland with an English prosecutor to keep the court right on the English law of treason. The Act of Edward III ⁴ has since been amended, and jurisdiction to try the crime of treason has now been vested in the High Court of Justiciary, by the Treason Act, 1945,⁵ but the difficulty remains that a Scottish court could not anticipate what interpretation an English court would place upon the

¹ Ante, p. 124.
² 7 Anne, c. 21.
³ Memorials, p. 366.
⁴ 25 Edw. 3, c. 2. See Archbold (35th ed.), § 3001 et seq.
⁵ 8 & 9 Geo. 6, c. 44.

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law in novel circumstances—as when William Joyce, a foreign subject, was alleged to enjoy the King's protection abroad in wartime by reason of an unexpired British passport. It is doubtful whether a Scottish court would have reached the same conclusion as that of the English courts which supported Joyce's conviction, and this branch of English law must be studied in the standard English works. In these circumstances, it is possibly not surprising that for well over a century the practice has been followed that trials are not held in Scotland for treason as such. There was the additional objection that until section 14 of the Criminal Justice (Scotland) Act, 1949, came into force, a barbarous and degrading sentence was prescribed. The Treason Felony Act, 1848, made it possible to punish acts in the nature of treason, without dealing with them as such, but there have been few prosecutions under this Act in Scotland. The statute declares certain offences to be felonies—as, for example, seeking to depose the Sovereign, levying war to force a change of measures or to intimidate Parliament, and instigation of invasion. The Treachery Act, 1940, made liable to capital punishment persons who committed acts with intent to help the enemy or to impede the operations of H.M. Forces during the war, and this statute was easier for the Scottish courts to operate. Offences created by particular statutes, such as the Official Secrets Acts, 1911-39, and the Incitement to Disaffection Act, 1934, need not be discussed here.

Conspiracy

The law of conspiracy is invoked to cover such political crimes as conspiring to overthrow the Government, or conspiring to coerce the Government to set up a separate Government in Scotland. Modern prosecutions for "political" conspiracies are rare, though a case on these charges, which raised general interest, was reported in the Glasgow Herald, Scotsman, and The Times, November 19-26, 1953. However, there is an indictable conspiracy whenever two or more persons agree to render one another assistance in perpetrating any act which would be criminal if done by an individual—and this crime has therefore wide scope. It may, indeed, be regarded as an extension of the law of attempts, but has not the implications of "conspiracy" in English law, where the element of conspiracy may render criminal conduct which would not be punishable if an individual only was involved.

7 12, 13 & 14 Geo. 6, c. 94
8 11 & 12 Vict. c. 12.
9 But see John Grant and Ors. (1848) J. Shaw 17. It may be observed that "felony" is not a nomen juris in Scotland.
10 3 & 4 Geo. 6, c. 21.
11 24 & 25 Geo. 5, c. 56.
Sedition

Sedition is the crime of acting in a manner which tends to inflame the minds of the people to interfere illegally with the Government of the country. The crime consisted, according to Hume,\textsuperscript{12} in “all those practices, whether by deed, word, or writing or of whatsoever kind, which are suited and intended to disturb the tranquillity of the State—for the purpose of producing public trouble or commotion and moving his Majesty’s subjects to the dislike, resistance, or subversion of the established government and laws, or settled frame and order of things.” In \textit{John Grant and Ors.},\textsuperscript{13} however, it was held that it was unnecessary to libel intention, and it was sufficient that the words used were calculated to excite disaffection. In the late eighteenth and early nineteenth centuries many harsh sentences were, as Cockburn deplores, passed on persons convicted of sedition—including Thomas Muir, a member of the Scottish Bar, who was zealous for reform. There have, however, been very few prosecutions for sedition in modern times, due to political rather than to legal considerations.

Breach of the Peace

Breach of the peace was formerly a familiar \textit{nomen juris} applicable to a wide variety of acts done in breach of public order or decorum which alarmed or might reasonably be expected to alarm or upset the lieges.\textsuperscript{14} In modern times, however, judicial decisions have gone far beyond the previous requirements of rowdism, alarm and publicity. Thus conduct calculated to provoke others to cause a disturbance has been held to constitute a breach of the peace,\textsuperscript{15} as has conduct calculated to cause alarm.\textsuperscript{16} In \textit{Raffaelli v. Healy}\textsuperscript{17}—where the complaint was in respect of the activities of a “peeping Tom”—the Lord Justice-Clerk observed:\textsuperscript{18} “Where something is done in breach of public order or decorum which might reasonably be expected to lead to the lieges being alarmed or upset or tempted to make reprisals at their own hand, the circumstances are such as to amount to breach of the peace.” More recently, in \textit{Young v. Healy},\textsuperscript{19} the complaint was laid in respect of certain gross and improper remarks addressed by a deputy headmaster to a pupil. The Lord Justice-General, in upholding the conviction, commented:\textsuperscript{20} “It is not essential

\textsuperscript{12} Vol. I, p. 553.
\textsuperscript{13} (1848) J. Shaw 48.
\textsuperscript{15} \textit{Dougall v. Dykes} (1861) 4 Irv. 101.
\textsuperscript{16} \textit{Ferguson v. Carnochan} (1889) 2 White 278.
\textsuperscript{17} 1949 J.C. 101.
\textsuperscript{18} At p. 104.
\textsuperscript{19} 1959 J.C. 66.
\textsuperscript{20} At p. 70.
for the constitution of this crime that witnesses should be produced
who speak to being alarmed or annoyed. At the same time, however,
I consider that a very special case requires to be made out...if
a conviction for breach of the peace is to follow in the absence of
such evidence of alarm and annoyance. For then the nature of the
conduct giving rise to the offence must be so flagrant as to entitle
the court to draw the necessary inference from the conduct itself.”
It may be thought that the basic idea of this crime as a minor form
of mobbing or rioting has been in part superseded rather than
extended by judicial legislation—and that Lord Clyde wished to
emphasise that this process had more or less reached its limits.21

Mobbing and Rioting
The crime of mobbing and rioting is committed when a number
of people assemble and combine together for an unlawful and violent
purpose to the fear of the lieges and to the disturbance of the public
peace. The element of common purpose distinguishes in law the
acts of a mob from those of a number of individuals who
independently commit a breach of the peace. The conduct of a
crowd lawfully assembled may develop into mobbing and rioting
through the sudden taking up of a common purpose. The common
unlawful purpose which is of the essence of the crime may either be
unlawful in its aim or in its means. Thus, in the notorious Porteous
Riots—described by Scott in The Heart of Midlothian—the object
of the mob was itself unlawful, namely, to break into the Tolbooth
and hang Porteous lest he be pardoned. Alternatively, the purpose
may be lawful—as, in Wild,22 the removal of an unlawful obstruction
in the highway—but the alarming and tumultuous manner of the
crowd may infect their action with an unlawful character. The
unlawful purpose need not be actually carried out for the crime to
be complete. “The bare act of being tumultuously assembled for a
violent purpose” 23 is enough. Once the common purpose has been
proved, all members of the mob are guilty of its actings—if within
the scope of the common enterprise—and the law of accession has
been largely developed in connection with the crime of mobbing and
rioting. In addition to this crime at common law, the Riot Act,
1715,24 provides that if twelve or more persons assemble riotously
and do not disperse within an hour after being required by a magistrate

21 For a criticism of the recent developments, see 1959 S.L.T.(News) 229; but cf.
22 (1854) 1 Irv. 552.
24 1 Geo. 1, c. 5. Persons whose premises have been damaged by riotous mobs are
entitled under the Act to compensation from the burgh in which the premises are
situated: Capaldi v. Magistrates of Greenwich, 1941 S.C. 310; Cola v. Robertson,
1942 S.C. 111; Pompa’s Trs. v. Mags. of Edinburgh, ibid., 119.
in the Queen's name to do so, those concerned will be liable to punishment and may be forcibly dispersed.

**Corruption, Neglect and Breach of Duty**

Corrupt conduct by public officials is indictable at common law, while, moreover, statutory provisions deal with particular aspects of corruption—as at elections or where public bodies are involved. Neglect to discharge public duties and gross breach of the duties of care owed to the lieges involve criminal sanctions—as by statute does breach of a contract of service to the danger of the lieges.

**Deforcement, Obstruction and Prison-Breaking**

Deforcement of officers and messengers executing the law; obstruction of the police; prison-breaking and assisting escape from prison are other crimes against public order. In this category may also be placed offences against Revenue officers in the execution of their duty.

**False Information of Crime**

It is a crime knowingly to give false information to the police, thus causing them to investigate with a view to criminal proceedings.

**Revenue and Currency Offences**

Smuggling and unlawful distillation of spirits is conduct struck at by the Customs and Excise Act, 1952. The Revenue statutes contain many provisions for the punishment of fraudulent evasion of taxes and duties. Counterfeiting and uttering of base coins incur the sanctions of the Coinage Offences Act, 1936.

**Perjury: Subornation of Perjury: Prevarication**

Perjury consists in the judicial affirmation of falsehood on oath, or in an affirmation equivalent to oath as under the Oaths Acts, 1888 and 1961. To constitute this crime, the violation of truth must have consisted in wilful and corrupt statements as to matters which were material and admissible as competent evidence. Reasonable allowance ought to be made for forgetfulness or misapprehension, according to the accused's age, health and other circumstances. The falsehood must be explicitly and absolutely affirmed. It is essential for conviction that the false statement should

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25 Nicolason (1887) 1 White 307; Cunningham (1900) 3 Adam 243; McLean (1886) 1 White 232. See also Scott, *The Antiquary*, Chap. 42.


28 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44.

29 26 Geo. 5 & 1 Edw. 8, c. 16.

have been made as part of evidence which was competent. Otherwise, even if no objection was taken to the evidence, there can be no conviction. The affirmation must be made in a judicial proceeding before a person competent to receive it. A proceeding before a court of the Church of Scotland or an arbiter is undoubtedly judicial. In many cases false oaths are declared by statute to be perjury. It is not enough to prove mere discrepancy between two statements made by the accused, one of them having been made on oath; the truth must be established and shown to be inconsistent with the testimony. The false statement usually relates to external fact, but it is not incompetent to prove a perjured statement of opinion. The falsehood must be wilful and corrupt, i.e., promulgated by one who knows the truth and deliberately tells lies. The purport of the false evidence is spoken to, as a rule, by the judge who presided on the occasion, with the help of notes taken at the time, and by other officials then present; but judges of the Supreme Court are apparently not competent to give evidence in these cases. The real facts may be proved, though they may instruct some other crime of which the accused has been acquitted. Falsehoods uttered under an oath in which there is no appeal to the Deity, or under an affirmation not held by law to be equivalent to an oath imprecating the Deity, may competently be punished as fraud.

Subornation of perjury consists in tampering with persons who are to swear, and counselling or procuring them to commit perjury.

Prevarication consists in attempting while giving evidence to mislead the court, a kind of unsuccessful perjury. It may be punished at once by the presiding judge. There is statutory power to punish prevarication in a summary trial.

Frustrating the Ends of Justice

Certain types of conduct designed to frustrate the ends of criminal justice have been held indictable, as aspects of a general principle. Thus in *Turnbull* an indictment was sustained which libelled that an accused person had formed a criminal purpose to hinder the course of justice by effecting the escape of a prisoner from lawful custody by fraud and uttering of forged documents. Again in *Martin* Lord Cameron sustained an indictment which libelled that the accused, with

31 Barr (1839) 2 Swin. 282.
32 False Oaths (Scotland) Act, 1933 (23 & 24 Geo. 5, c. 20); Waugh v. Mentiplay, 1938 J.C. 117.
33 Bole (1883) 5 Coup. 350; Sanderson (1899) 3 Adam 25; cf. Roberts (1882) 5 Coup. 118.
35 Summary Jurisdiction (Scotland) Act, 1954, s. 33.
36 1953 J.C. 59.
the felonious intention of defeating the ends of justice, had escaped or assisted escape from legal custody. The more recent case of Mannion\(^38\) raises more serious doubts as to the proper scope of this crime, and, with respect, seems to go too far. All that was alleged against the accused was that, to avoid citation as witness at a criminal trial, he had disappeared. It may be thought that the scope of the crime of "hindering or frustrating the ends of justice" merits discussion by a Full Bench of the Justiciary Court.

**CRIMES AGAINST THE PERSON**

**Murder**

The law regarding murder and culpable homicide in Scotland has developed considerably since the time of Hume. Though, as will be discussed presently, since the Homicide Act, 1957, murder is divided into two categories, and of these one alone is punishable by death on first conviction, the general principles to be applied are the same. It is true that for purposes of appeal the categories are treated as separate crimes. Moreover, in McAdam\(^39\), the Lord Justice-General (Clyde) recognised that non-capital murder is now essentially a form of aggravated assault, and that evidence of admissions by an accused might be more readily admitted in such cases than in those of capital murder. He admitted, however, that it would be difficult in logic to justify any differentiation. It may, therefore, be convenient first to discuss the law of murder generally and then proceed to an examination of the specialties affecting "capital murder."

"Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences." This definition in "Macdonald"\(^40\) is echoed by the evidence of the late Lord Justice-General to the Royal Commission on Capital Punishment\(^41\)—"in Scotland we have practically reached the position where only intentional killing is murder." In Miller and Denovan\(^42\) the High Court recently upheld a direction withdrawing from the jury the competency of returning an alternative verdict of culpable homicide against an accessory to one who struck a single blow on the head with a piece of wood. The facts were, however, special and the presiding judge can have been in no doubt regarding the utter indifference of the accused as to whether the victim lived. Even so, certain dicta uttered in this case might

\(38\) Reported Glasgow Herald and Scotsman, Feb. 10, 1961.

\(39\) 1960 J.C. 1 at pp. 4–5.

\(40\) 5th ed., p. 89.

\(41\) Minutes of Evidence, 18th day, 1950, q. 5417.

\(42\) Nov. 1960 (unreported), interpreting s. 5 (2) of the Homicide Act, 1957.
be construed to extend the scope of murder beyond killing through intention or ruthless recklessness for life. It is submitted, however, that in Scotland as in South Africa—by contrast with the much criticised English decision of D.P.P. v. Smith—45—the test of intention is subjective and not objective. As Burchell puts the matter,44 "intention is now present only where it is proved that the accused foresaw the consequences of his act. It is not sufficient that, although the accused did not foresee, as a reasonable man he ought to have foreseen those consequences."

In Scots law, if the accused causes death by violence when in the course of perpetrating another crime such as rape or robbery, the question will still remain—did he intend to inflict such serious injury as he foresaw could be expected to kill? It may, however, be stressed that the law is concerned with "intention"—not "premeditation." Moreover, where there is intention, a person who seeks to kill A but inadvertently kills B is guilty of murder.

The amount of violence used which will constitute murder will vary with circumstances. Relatively little force may prove fatal to a child, an aged person, or an invalid. A fist can be deliberately used to strike a mortal blow.

Suicide though once criminal is not recognised as a crime in Scotland today45 and the survivor of a so-called "suicide pact"46 would almost certainly not be indicted for murder. "Mercy killings" would probably be prosecuted by the Lord Advocate as cases of "culpable homicide" not of murder, and if a woman who is pregnant were to be indicted for capital murder, it is thought that the practice for the Lord Advocate to "restrict the pains of the law" (which was adopted formerly in cases of murder) would be followed so that the death sentence is not imposed. Again, in Scotland, though a mother who kills her child soon after its birth is not prosecuted for murder, this practice rests on the discretion of the Lord Advocate and not (as in England) upon statute.

In cases where the victim has not died immediately, the question may arise in all cases of unlawful homicide (murder and culpable homicide) as to whether the criminal act of the accused actually caused death. This is decided by a jury on broad common-sense principles. A disease such as tetanus or erysipelis may be regarded as the natural result of the crime: Wilson,47 Norris48; and it is no

46 (1838) 2 Swin. 16.
47 (1886) 1 White 292.
defence that if the victim had received proper medical attention in time he would not have died: *Shearer*. A delayed attack of tuberculosis after a prolonged period of weakness might be regarded as too remote. Where a slight injury, which is not itself dangerous, proves fatal through grossly incompetent treatment or refusal by the patient to co-operate in furthering his cure, the defence of *malum regimen* may be open to the accused if he is prosecuted for homicide. The author's favourite authority is *Crombie*. The deceased "had misgoverned himself . . . by hard drinking, keeping much company and dancing at a bridal, contrary to the advice of his surgeon."

**Capital Murder and Murders Punishable by Death**

The Homicide Act, 1957, has begotten of compromise and expediency, has prescribed various categories of murder for which sentence of death must be imposed. These categories are based on alleged public interest, and have little relation to the relative turpitude of the conduct punished. Part I of the Act was designed to remove certain anomalies from English law and to bring it into closer conformity with Scottish practice. It may be observed that section 3, dealing with provocation, apparently assumes that Scots law on this point already accepts the broad approach enacted for England.

Part II of the Act (which applies to Scotland) prescribes the death penalty for certain murders, and provides (by section 7) that no person shall suffer death for any case not covered by sections 5 and 6. Section 5 specifies five types of "capital murder"—namely:

(a) "murder done in the course or furtherance of theft." Theft in this context includes any offence which "involves stealing or is done with intent to steal." Lord Sorn has construed this section to imply that "If a burglar is interrupted in that course, the course of perpetration, and if he murders, even in order to get away, not with the idea of getting on, but with the idea of getting away, it still is murder done in course of theft." Even so, theft is committed at a particular moment in time and the crime is strictly distinguishable from other offences of dishonesty, such as clandestine borrowing. Many difficulties, as was foreseen in debates on the Homicide Bill, may emerge in construing this section.

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49 (1851) J. Shaw 468.
50 But see *Heidemesser* (1880) 17 S.L.R. 266, where a chill supervening on a period of weakness resulting from injury was held not to interrupt the pannel's responsibility for the victim's death—albeit the charge was reduced to culpable homicide.
52 5 & 6 Eliz. 2, c. 11.
(b) "murder by shooting or by causing an explosion." It has not been decided that shooting necessarily implies the use of a firearm. The weapons of the Royal Company of Archers are not necessarily outside the intention of the statute. Again, it is doubtful what rate of combustion constitutes "explosion" under the Act.

(c) "murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest."

(d) murder of a police officer acting in the execution of his duty or of a person assisting him.

(e) murder by a prisoner of a prison officer acting in the execution of his duty or of a person assisting him.

Subsection 5 (2), however, provides that if in the case of murders falling within these categories two or more persons are guilty, it shall only be capital murder "in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him." This cuts across the principles of art and part in Scots law, but it is not to be assumed that the technical meaning of "grievous bodily harm" in English law is applicable in a United Kingdom statute.

Section 6 provides that a person who is convicted of two or more murders committed on different occasions in Great Britain is to receive sentence of death. The death sentence for "repeated murders" does not depend upon whether they were "capital." There may be difficulty in construing the meaning of "different occasions," and already a case in which several victims were killed in a succession of assaults has been treated as one of murders committed on one occasion only.55

It is unsatisfactory that the decision whether or not to hang should depend on the narrow technicalities of an Act which was forced through Parliament without regard to criticism on the merits or as to the drafting. Both for those who support and for those who oppose capital punishment the present state of the law is profoundly unsatisfactory.

**Attempt to Murder**

Attempt to murder is a crime at common law, but certain methods specified in the Criminal Law (Scotland) Act, 1829 56—as by shooting, cutting, stabbing or poisoning—were made capital crimes. Now by

55 See Glasgow Herald and Scotsman, July 3, 1957.
56 10 Geo. 4, c. 38.
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the Homicide Act, 1957, s. 14, a sentence of imprisonment for life is prescribed.

Concealment of Pregnancy

In the seventeenth century in Scotland the authorities were disturbed at the prevalence of child murder, and equally at the difficulty of proving that a woman who was suspected of killing her child had actually brought it into the world alive—in which case alone would her crime be murder. Terror of the kirk session and the stool of repentance for the sin of fornication drove many wretched women to conceal their pregnancy as long as possible, and at the last moment to bear the child in secret and without assistance. Walter Scott, himself an experienced advocate, had justification for the words he put in the mouth of Jeanie Deans, explaining to the Queen and Lady Suffolk reasons for the prevalence of child murder in Scotland in the early eighteenth century: “Some think it’s the Kirk Session—that is—it’s the—it’s the cutty stool, if your Leddyship pleases . . . the stool of repentance for light life and conversation and for breaking the seventh commandment.” Since proof that the mother had actually killed her living child was difficult, the Act of 1690, c. 21, obliged a jury to convict a woman of murder on proof of certain presumptions of guilt—namely that the woman had concealed her pregnancy during the whole period thereof, had not called for help to her delivery, and that the child was found dead or was missing. It was under this Act that Effie Deans was tried, and Chapters 22 and 23 of The Heart of Midlothian give an accurate account of the older and harsher law of Scotland regarding concealment of pregnancy. It created in effect a presumptive murder, which could be elided only by proof that the woman had disclosed her condition to another. On this vital issue and on Jeanie Deans’ refusal to help her sister by perjury, depends the poignant trial scene.

By the Act 49 Geo. 3, c. 14, the severity of the law was relaxed in so far as to make the crime of concealment of pregnancy not presumptive murder but a crime punishable with imprisonment for a period not exceeding two years. The presumptions of the older law are retained. The crime of concealment of pregnancy is committed when a woman, whether married or unmarried, conceals her pregnancy during the whole period, does not call for or use assistance at the time of delivery, and is delivered of a child which is found dead or is amissing.

The statute strikes at “concealment,” and, though the purpose of the legislators was presumably to safeguard child life, there is a difference of opinion as to whether the meaning of “concealment”
under the Act can or cannot be extended by examining the motives for disclosure of pregnancy. If disclosure is made even to the father of the child alone, this is sufficient: Ann Gall.\textsuperscript{57} In that case opinions were expressed, however, by some of the judges that disclosures for an improper purpose—as with a view to the procuring of abortion, or by letter to a person in Australia who could give no assistance—would not take a case out of the statute. Macdonald,\textsuperscript{58} on the other hand, holds that it is not competent to scrutinise the motives for a woman’s disclosure of her pregnancy, and contends that no question of accession can be raised in connection with this crime. The law cannot be regarded as settled, but there is a natural reluctance to extend the scope of presumptive crimes. Concealment of pregnancy may be charged as an alternative to “child murder”—though this latter crime, for reasons stated, is most difficult to establish and consequently rarely pressed.

**Culpable Homicide**

“Culpable homicide” comprises many types of unlawful killing ranging, on the one hand, from those which in turpitude are not far from murder, and on the other hand, to killing which comes close to accident or misfortune.

In the first place, the crime of culpable homicide may comprise cases of intentional killing, when the accused acted under gross provocation (which, it is thought, should also be the appropriate plea when self-defence has been carried too far), or suffered from diminished responsibility, or went too far under the compulsion of duty. In the examination of dole, consideration has already been given to these mitigating factors.

Secondly, it is apparently culpable homicide to kill another as a result of bodily harm deliberately inflicted upon him, though not of such a nature as to make death the near and natural result of the injury.\textsuperscript{59} Thus, if in the course of a quarrel one man strikes another with his fist, or if a house-breaker, seeking to escape from one who has detected him, pushes that other aside and he falls against a projection and is killed, the appropriate charge, according to the authorities, is culpable homicide. It might be thought, however, that, since judicial interpretation in modern times has, in cases of negligent killing, insisted on a much higher standard of culpability than formerly to justify conviction of culpable homicide, a comparable development would be appropriate when death has resulted from a minor assault which was not intended nor calculated to cause serious

\textsuperscript{57} (1856) 2 Irv. 366.
\textsuperscript{58} 5th ed., pp. 111–112.
injury. Indeed, the author recalls that in Cameron 60 Lord Cooper indicated that this point might well be argued, in circumstances where the accused, under provocation, had made relatively slight retaliation on the deceased woman, whom he loved, and who had thereupon died, due to a lymphatic condition. Counsel for the defence, however, appreciating that the judge was likely to be sympathetic in imposing sentence, preferred to plead guilty to an indictment charging culpable homicide. The final word on this question may not yet have been spoken.

If death results from the doing of any act which is of a wrong and unlawful nature, the doer may be held guilty of culpable homicide though he had no intention to injure anyone: Wood, 81 Niven. 62 Under this head it may be legitimate to classify, not only cases such as the housebreaker who inadvertently sets the house on fire, killing the household, but also cases where an accused who has killed another was at the time too drunk to form the intent to cause injury.

Culpable homicide may also be charged against an accused who has caused death while performing an act otherwise lawful “with great heedlessness and indiscretion.” Lord Walker has recently observed, 63 “when Macdonald first published his book on criminal law in 1866 he included under culpable homicide the case where death resulted from negligence. Some, at least, of the instances he figures would today be treated merely as civil wrongs, for the tendency has been to emphasise the high degree of culpability or blameworthiness required for the crime.” It may well be that judges and jurors who drive motor vehicles feel greater need for the grace of God in the presence of an offending motorist than did their forebears when dealing with an engine driver. Today to support indictment for culpable homicide the prosecutor must show a degree of gross and wicked recklessness, and an examination of the degree of recklessness has, because of judicial distinctions, become very relevant in cases where death has been caused by reckless driving: Cranston. 84

In such cases mere contravention of a statute does not necessarily result in the consequences which would flow from the causing of death in the course of committing an offence which was malum in se. Only gross, wicked or criminal negligence in driving—amounting to or at least analogous to, indifference—will warrant a jury in convicting a driver of culpable homicide. The burden of proof is not

60 H.C.J., Feb. 16, 1951 (unreported).
61 (1842) 1 Broun 262.
62 Hume, Vol. I, p. 23, where, if all the allegations had been proved, the conviction would have been of murder.
64 1931 J.C. 28.
so exacting when the accused has been charged with the statutory crime of causing death by dangerous or reckless driving: Dunn.\(^{65}\)

Reckless driving in contravention of section 11 of the Road Traffic Act, 1930,\(^{66}\) comprised cases where a verdict of culpable homicide would have been warranted and other cases where it would not: Paton.\(^{67}\) Therefore, by the Road Traffic Act, 1960, the specific offence of causing death by dangerous or reckless driving has been introduced. Careless driving, such as would merely have warranted conviction under section 12 of the 1930 Act—now section 3 of the 1960 Act—was not of so gross a character as to warrant conviction of culpable homicide.

Where a person undertakes a duty which calls for special skill, as in performing a surgical operation or building a house or operating a colliery engine, it is no defence to plead that an efficient fulfilment of the duty was beyond his power: Wilson,\(^{68}\) Stenhouse,\(^{69}\) Wood.\(^{70}\) In an emergency, of course, a man may have to take a chance, as if the navigator is killed and someone must endeavour to steer a vessel to safety.

Culpable homicide may also be charged (at least) against a person who, because of a special relationship to the deceased, had a duty to act, and has neglected that duty—as, for example, a parent’s duty to his child or a shipmaster’s duty to his crew: Nicol,\(^{71}\) Watt and Kerr \(^{72}\); or a lodging-house keeper’s duty towards a person on his premises who is seriously ill.\(^{73}\)

It may be noted that so far no indictment for “attempted culpable homicide” seems to have been laid: such a crime may be impossible.

**Sexual Crimes**

The crime of rape consists in the carnal knowledge of a woman forcibly and against her will. The extent of penetration is immaterial, nor is it relevant that there has been no actual emission.\(^{74}\) The force may take the form of threats with a weapon which so overcame the woman’s will that she submitted without physical struggle, but mere detention or solicitation will not be deemed sufficient force to justify indictment for rape. The woman’s resistance must continue until she is overcome by force or fear, unconsciousness or exhaustion. It

\(^{65}\) 1961 S.L.T. 106. S. 8 (1) of the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67), has been replaced by s. 1 of the Road Traffic Act, 1960 (8 & 9 Eliz. 2, c. 16).

\(^{66}\) Now Road Traffic Act, 1960, s. 2.

\(^{67}\) 1936 J.C. 19; see now 1960 Act, ss. 1 and 2.

\(^{68}\) (1852) 1 Irv. 84.

\(^{69}\) Ibid. 94.

\(^{70}\) (1903) 4 Adam 150.

\(^{71}\) 1835 discussed Watt and Kerr (1868) 1 Coup. 123 at p. 128.

\(^{72}\) (1868) 1 Coup. 123.

\(^{73}\) Discussed M’Manimy v. Higgans (1847) Arkley 321.

\(^{74}\) Robertson (1836) 1 Swin. 93.
is sufficient that enough force has been used to overcome the opposing will of the woman: *Sweenie*; and less force will suffice to satisfy the elements of the crime where the woman is physically or mentally defective than where the woman enjoys normal health: *Murray*.

The deliberate administration of drink or drugs to overcome her resistance will be regarded as the use of force: *Logan*.

A girl under the age of puberty (twelve years) and a lunatic cannot give consent, and intercourse with such females is in law regarded as achieved by constructive force. It might have been thought that these special cases, which have long been recognised in law, would have justified a definition of rape which would have subordinated the element of force to "absence of consent." This was the view of the Lord Justice-General and Lord Ivory in the important case of *Sweenie*, but their view did not prevail—perhaps because rape was a capital crime. In that case it was held irrelevant to frame an indictment for rape on averments that the woman had been asleep, because there had been no force used to overcome resistance on the part of the woman. The same doctrine applies where a man who encounters a woman who is drunk and insensible has intercourse with her. This is not the crime of rape, though, as has been observed, rape is committed by a man who deliberately stupefies a woman with drink to overcome her resistance. At common law, again concentrating on the element of force, the Scottish courts held that it was not rape to have connection with a woman by personating her husband: *Fraser*, though by the Criminal Law (Amendment) Act, 1885, this crime was declared to be rape: *Montgomery*.

It has been observed that the powers of the High Court to punish new forms of immoral conduct were invoked to deal with these sexual crimes which did not amount to rape. Where proof of the full crime of rape is lacking, there may be a charge of attempt to ravish, or of assault with intent to ravish. It is permissible to convict of indecent assault on an indictment charging intent to ravish.

Offences against children and young girls are covered both by statute and common law. At the age of twelve years in Scots law a girl could at common law consent to intercourse, but now by the Criminal Law (Amendment) Act, 1885, s. 4 (as amended), it is

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76 (1858) 3 Irv. 262.
77 1936 J.C. 100.
78 Supra, note 75.
79 (1847) Arkley 280.
80 48 & 49 Vict. c. 69. This provision is replaced in England by the Sexual Offences Act, 1956 (4 & 5 Eliz. 2, c. 69), s. 1, which (except for s. 49) does not apply to Scotland. S. 51 and the Fourth Sched. repealed the whole of the 1885 Act quoad England.
81 1926 J.C. 2.
82 In England s. 4 has been replaced by s. 5 of the 1956 Act.
made a crime punishable with imprisonment for life to have carnal knowledge of a girl under thirteen. Section 5 (1) of the same Act elides the defence of consent to intercourse by girls between the ages of thirteen and sixteen. Except in the case of a man under the age of twenty-four years it is no defence that the accused thought that the girl was over the age of sixteen. At common law, lewd, indecent and libidinous practices are indictable. Their use towards boys and girls near and under the age of puberty is an aggravation, and the Criminal Law Amendment Act, 1922, s. 4 (1), makes it criminal to use such practices to a girl under sixteen whether she consents or not. Provision is made for a jury to convict under certain sections of the Criminal Law Amendment Acts though the actual indictment be one of rape.

Incest is the crime of carnal intercourse between persons within the degrees of relationship set out in the eighteenth chapter of Leviticus and incorporated into the law of Scotland by the Act of 1567, c. 14. Some of the prohibited degrees have in modern times been relaxed by statute—notably that of deceased wife's sister or deceased husband's brother. It seems that only legitimate relationships are recognised for the purposes of the crime of incest, except perhaps in the case of mother and son: *Black*. Bigamy is the crime of contracting an ostensible marriage with another partner during the lifetime of a spouse. Reasonable belief in the death of the former spouse is a good defence.

Unnatural offences in the view of the law include sodomy, indecent practices between males and bestiality. These crimes need not be developed in a work not mainly concerned with criminal law, except to note that by the Criminal Law (Amendment) Act, 1885, acts of gross indecency between males—and also attempts to procure such acts—are punishable, irrespective of the age of the persons involved and even though committed in a private place. Indecent exposure is an offence if done to the annoyance of persons mentioned in the charge, but not otherwise. "Street prostitution" proved to be a major problem in England—especially in London, and in consequence

83 In England s. 6 of the 1956 Act.
84 Criminal Law (Amendment) Act, 1922 (12 & 13 Geo. 5, c. 56), s. 2; a charge under s. 6 of the 1956 Act is to be taken into account under the provisions of the 1922 Act.
85 Repealed *quo ad* England by the Sexual Offences Act, 1956.
86 Criminal Procedure (Scotland) Act, 1938 (1 & 2 Geo. 6, c. 48), s. 13. See *infra* for prohibited degrees as modified by statute.
87 (1894) 1 Adam 312.
88 *Macdonald* (1842) 1 Broun 238.
89 The relation between s. 11 and the common law regarding lewd conduct is discussed in *McLaughlin v. Boyd*, 1934 J.C. 19; see also *Ogg*, 1938 J.C. 152.
90 *Mackenzie* (1864) 4 Irv. 570.
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the Street Offences Act, 1959,\(^91\) was passed to cope with it. In Scotland no commensurate problem has emerged. The Burgh Police Act, 1892, s. 381 (and equivalent provisions in local police Acts), prohibits soliciting in the streets, while the Immoral Traffic (Scotland) Act, 1902,\(^92\) strikes at male persons who knowingly live on the earnings of prostitution or who solicit for an immoral purpose. In dealing with the problem of female soliciting, the Scottish police have developed a very effective “cautioning system,” which has succeeded in many cases both in eliminating the nuisance and in reclaiming the young prostitute.

Assault

Though, with the exception of the crime of “murmuring judges” cases of verbal *injuria* are now within the province of private law, real injuries are punishable by the criminal law. Every intentional attack upon the person of another is an assault whether it injures or not. The act need not actually take effect—as if a pistol be aimed at another, though it be not cocked. The charge of assault may be aggravated in many ways—as by the method adopted, the place of the offence, the official capacity of the party injured, or by reason of previous conviction of a crime involving personal violence. Provocation may be urged in mitigation, but not as a defence, while the application of moderate chastisement is justifiable in the case of parents, teachers and some others—but no longer in the case of husbands. In the manly sports such as football and boxing there is consent to the application of force within the rules of the game, but no man or woman can consent to unlawful violence.\(^93\)

Abortion

Procuring of abortion with criminal intent is a crime: *Minnie Graham* \(^94\); but the termination of pregnancy without such intent is not criminal. Such a course may be necessary for the safeguarding of the life or health of the woman who is pregnant and thus comes within the scope of the doctrine of necessity. It is submitted that the law will not weigh in fine scales the safety of a life *in esse*, as against a life *in posse* which is not yet a *persona*. To justify conviction for attempting to procure abortion, it is necessary that the woman should actually have been pregnant at the time: *Semple*.\(^95\)

\(^91\) 7 & 8 Eliz. 2, c. 57.
\(^95\) 1937 J.C. 41. See this discussed, ante, p. 141.
False Accusations and Threats

To be criminal a false accusation must impute crime or gross immorality to the victim.\(^{96}\) This crime may be associated with "murmuring judges" or conspiracy. The uttering of threats to injure a person, his property or reputation is a crime, giving, as they do, reasonable grounds of alarm both to the individual and to the public. It is no defence that the threats were not seriously intended (if they appeared to be meant in earnest) nor that the accused had no power to carry his threats into effect: *Miller.*\(^{97}\) It is a crime to attempt to extort money or a benefit or commission by threats of violence or delation to the criminal authorities, and it is no justification that the allegations were true nor that the money was in fact due to the person making the threats: *Crawford,*\(^{98}\) *Macdonald.*\(^{99}\)

Cruelty

Cruelty exercised on certain of the lower animals is penalised by statute, and may be described as treatment causing pain without adequate motive.\(^1\) Cruel conduct towards persons, such as wives and lunatics, who have no adequate power to resist, is indictable, though it may not amount to assault. The exposure of infants and unnatural treatment of children were sufficiently dealt with at common law,\(^2\) but statute has also stepped in for their protection, and statutory prosecution is more common. In particular the Children and Young Persons (Scotland) Act, 1937,\(^3\) renders criminal various forms of ill-treatment of children and young persons, including (in the case of girls) the encouragement of prostitution or seduction or allowing them to reside in or frequent brothels.

Intimidation

Though the Conspiracy and Protection of Property Act, 1875,\(^4\) as amended by the Trade Disputes Act, 1906,\(^5\) is concerned primarily with trade disputes, section 7 of the 1875 Act provides generally for the punishment of every one who, with a view to compel any other person to abstain from doing or to do any act which such other

\(^{96}\) *Margaret Gallochar* (1859) 3 Irv. 440.
\(^{97}\) (1862) 4 Irv. 238. Intimidation to prevent lawful acts is punished by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86).
\(^{98}\) (1850) J. Shaw 309.
\(^{99}\) (1879) 4 Coup. 268.
\(^1\) Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77); Protection of Animals (Scotland) Acts, 1912 (2 & 3 Geo. 5, c. 14) and 1934 (24 & 25 Geo. 5, c. 25); Protection of Animals (Cruelty to Dogs) Act, 1933 (23 & 24 Geo. 5, c. 17); Protection of Animals (Amendment) Act, 1954 (2 & 3 Eliz. 2, c. 40).
\(^2\) McIntosh (1881) 4 Coup. 389.
\(^3\) 1 Edw. 8 & 1 Geo. 6, c. 37.
\(^4\) 38 & 39 Vict. c. 86.
\(^5\) 6 Edw. 7, c. 47.
person has a legal right to do or abstain from doing, wrongfully and without legal authority uses violence or intimidation, persistently follows him about, hides his property or hinders him in the use of it, besets his dwelling or place of business, or follows him with two or more other persons in a disorderly manner. But it is lawful for one or more persons, in contemplation or furtherance of a trade dispute, to attend near a house or place where a person resides or works, if they so attend merely for the purpose of peaceably obtaining or communicating information or of peacefully persuading any person to work or abstain from working.  

**CRIMES AGAINST PROPERTY**

**Theft**

Theft is the felonious taking and appropriation of property without the consent of the owner or custodier. Theft is distinguished from robbery in that the latter offence infers the taking of property by violence: theft is also to be distinguished from breach of trust and embezzlement—in which crime the felonious appropriation is effected by a person who has received property upon a limited ownership, subject to restoration at a future time, or by a person who has possession of property subject to liability to account to the owner for it. In theft the property which has been appropriated feloniously is neither in the limited ownership of the pannel, nor yet in his possession subject to liability to account.

The offence is clearly theft where the subject appropriated is taken by one who has no right or title to it at all. More difficult questions arise where the accused has had custody of the subject. Thus, an agent who has custody of goods, but whose agency has been cancelled, may be guilty of theft if he keeps the goods. They are merely temporarily in his custody; and if one who has received the custody of property for a limited and specific purpose (after performance of which it is to be returned to the owner in *forma specifica*) feloniously appropriates, then the crime is theft. Typical examples of theft are shop assistants stealing goods or customers' money; messengers sent with money or goods appropriating the money or goods for their own purposes; tradesmen engaged upon repairing articles appropriating them; or a soldier selling part of his equipment: *Brown*, O'Brien v. Strathern. The distinction between theft and breach of trust is sometimes narrow, though no longer of vital importance.

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6 MacKinlay (1897) 2 Adam 366—participation in a disorderly crowd "booing and shouting."

7 Trade Disputes Act, 1906, s. 2 (1); Wilson v. Renton, 1910 S.C.(J.) 32.

8 (1839) 2 Swin. 394.

9 1922 J.C. 55.
Prior to 1887 it was a matter of importance to determine whether the crime should be properly libelled as breach of trust and embezzlement or as theft, since, if the wrong crime were libelled, the pannel was acquitted. The Criminal Procedure (Scotland) Act, 1887, now provides that under an indictment for breach of trust and embezzlement the pannel may be convicted of theft or vice versa. Section 63 provides that it is competent to libel as an aggravation of either type of crime a previous conviction of any crime inferring dishonesty. The distinction between theft and breach of trust and embezzlement may be of importance to the pannel, as the former crime is usually more severely punished.

There can be no theft of anything unless it is the subject of either public or private property. Thus wild animals at liberty cannot be stolen, though animals *mansuetae naturae* can. To steal a child below the age of puberty from its parents or guardians is known as *plagium*. There can be no theft of an adult; nor of a dead body after burial. Though the thing taken must be property, it does not matter whether it is public or private property, nor whether the owner be known or not. Thus felonious abstraction of lost property is theft. Even if the goods be in the hands of one whose possession of them is wrongful, it is still theft to appropriate them feloniously.

To constitute the crime of theft there must be felonious intention in the appropriation. To take what the accused honestly believes to be his own property is not theft; nor again is it if the taker believes bona fide that he has or would have the owner's permission to take goods. The felonious purpose need not be the acquisition of gain. The true motive may well be malice or revenge. *"Furtum usus"* has not been accepted in the law of Scotland—but it appears that the clandestine taking possession of another's property and using it, when the owner would not have consented, will be recognised as a crime at common law: *Strathern v. Seaforth*.

When the crime of theft is charged against a person who has allegedly taken from the custody of another, there must be proof of *amotio*. Thus it is not theft if the owner seizes the hand of the pickpocket who is seeking to withdraw a watch from the pocket: *Cameron*. But it is theft if the watch is withdrawn from the pocket but still remains attached to its chain (*ibid.* and see *Reilly*). Once there has been removal, however slight, the crime is complete.

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10 50 & 51 Vict. c. 35. The section further provides for conviction of various crimes of dishonesty under an indictment charging another type. The 1954 Act makes similar provisions in summary procedure.
11 See *Dewar*, 1945 J.C. 5.
12 *Pace* Macdonald, p. 20.
13 1926 J.C. 100; cf. *Murray v. Robertson*, 1927 J.C. 1, where the actings were not clandestine.
14 (1851) J. Shaw 526.
15 (1876) 3 Coup. 340.
Theft may be aggravated in various ways—for example, plagium, habit and repute, theft by housebreaking, theft by opening lockfast places; or where the theft is by one whose special duty is to protect property, such as a policeman. Possession of stolen articles within a short time after the theft, without the accused being able to account satisfactorily for the circumstances, is evidence of theft. In Fox v. Patterson it was explained that to justify a jury convicting on evidence of recent possession three circumstances must concur. The goods must have been found in the possession of the accused, they must have been recently stolen, and there must be other criminative circumstances. Mere handling of stolen goods as a servant will not justify conviction of a man on the doctrine of recent possession: Simpson. On the other hand, the doctrine of "recent possession" is not restricted to cases where the accused is actually found by the police in physical possession of stolen goods. The degree of possession which will give rise to a duty of explanation depends on circumstances, and may include cases of constructive possession or cases where the accused has parted with possession. Moreover, the doctrine extends to aggravated cases of theft as by use of explosives. Under the Burgh Police (Scotland) Act, 1892, s. 403 (and equivalent local police Acts), known or reputed thieves found in certain places with intent to commit a crime, or in possession of housebreaking implements, or in possession of money or articles for which they cannot account satisfactorily, may be imprisoned for a term not exceeding sixty days.

As in the case of other crimes, an accused may be convicted of the attempt under an indictment which charges the full offence. When the attempt only is libelled, the accused may be convicted though the full crime is actually proved. It is no answer to the charge of attempt to steal that there was no property in the place where the thief thought to steal from—as if the pocket from which the pickpocket tried to steal was in fact empty.

**Housebreaking**

Housebreaking is not itself a point of dittay. It is, however, the main aggravation of theft or of the attempt to commit that crime. Breaking into a house, with intent to assault, and assaulting the

16 1948 J.C. 104.
17 1952 J.C. 1.
18 Brannan, 1954 J.C. 87. Bare possession is not sufficient; it must be of a character tending to incriminate. Moreover, failure of an accused person to make any reply when cautioned and charged does not per se constitute a criminating circumstance: Wightman, 1959 J.C. 44; cf. Cryans v. Nixon, 1955 J.C. 1.
19 Cameron, 1959 J.C. 59; but would not be available to establish guilt of assault even if allegedly associated with theft.
occupier is an aggravated form of assault known as hamesucken. Housebreaking has also been held to be an aggravation of malicious mischief: *Munro.*

Hume defines housebreaking as the "forcible entry of a house." The term "house" includes any roofed building (even though unfinished) "so fastened as to indicate that the owner relies on its strength to protect property." A church or shop are "houses" for this purpose. Where a house is divided into several apartments, each let to a separate tenant, each apartment is regarded as a "house." (*Quaere* as to rooms in an inn or hotel.) Forcible entry implies the existence of security to be overcome.

The law always understands it to be housebreaking when the thief opens a way into the house for himself, and overcomes the ordinary obstacles provided against entry, and for the safe keeping of the effects within; though this be done without the piercing or effraction of any part of the building, or of what is attached thereto; since it is nevertheless true that the defence and safeguard of the house are broken.

Felonious entry is essential to the crime. The entry need not be with the whole body. It may be, for example, by a crooked stick. "Forcible" entry may be effected, *inter alia,* by the actual breaking of some portion of the building—such as a window; adopting some unusual mode of entry like a chimney, ventilator or sewer—or by a window (provided that the window, if near the ground floor, is not open); entry by the door, if this has been secured in such fashion as to guard a house from the violation of its security; procuring the opening of the door on false pretences and then forcing entry; or securing entry by collusion with someone inside the house.

There is statutory provision whereby every known or reputed thief or associate of known or reputed thieves in whose possession are found picklocks or other implements usually employed in housebreaking is liable to be apprehended and charged.

**Opening Lockfast Places**

It is an aggravation of theft that it has been committed by opening lockfast places. This includes breaking into rooms, etc., within a house, cabins in a ship, and any article the contents of which are secured by lock and key. It is immaterial whether the security of the lockfast place is overcome by actual violence or by guile, as by stealing and using the true key.

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21 (1831) Bell's *Notes to Hume,* Vol. 1, at Notes, p. 48.
24 It is apparently not housebreaking if access has been gained by using a key left on the outside of a locked door: *Alston* (1837) 1 Swin. 433.
25 See note 20, *supra.*
Habit and Repute

It is an obsolescent aggravation of the crime of theft that the offender is "habite and repute" a thief. The reputation requisite to be established must amount to something like making a trade in theft. That the pannel is of doubtful reputation or the subject of rumours is insufficient. Previous convictions for theft are, however, not essential, although they are important adininicles of proof. The essential point to be established by the Crown is that the pannel "must have been marked as a known thief, by the common bruit and report of the neighbourhood, and have had a character affixed to him as a brother of the trade." 26 This aggravation is limited to theft, and does not extend to other crimes of dishonesty. In modern practice "known and reputed thieves" are dealt with under statutory provisions such as the Burgh Police Acts.27

Robbery

The crime of robbery consists in the taking of property by violence—forcible theft "committed by invasion of the person." 28 Robbery and stouthrief are not clearly distinguished. Hume says that the crime which is now termed robbery "formerly passed under the name of Stouthrief, which was applicable, generally, to every sort of masterful theft or depredation." The term "stouthrief" is seldom used, and the taking of property forcibly or by menaces is now termed robbery. It is not essential to the crime that the property taken should have been upon the person at the time. It is sufficient if it is under the immediate care and protection of the person molested—as, for example, goods from a carter in charge of a van. To constitute robbery there must be actual violence: but actual application of violence to the person is not necessary. What is requisite is only the taking against the will of the owner as contrasted with taking by stealth or surprise. By violence is meant such behaviour as justly alarmed for the personal and immediate consequences or resistance or refusal. For the crime of robbery to be complete, property must be actually taken, and must be taken feloniously with the purpose of appropriating it. The rules applicable to theft are relevant.

It is important to distinguish between robbery and assault followed by theft, and between both and theft followed by assault.

Reset

The crime of reset consists in knowingly receiving and feloniously retaining articles taken by theft, stouthrief, robbery, breach of trust

and embezzlement, or falsehood, fraud and wilful imposition. There must be guilty knowledge. The proof is complete when it is established that the accused was privy to the retention of the stolen property knowing it to have been stolen. It is not enough that the pannel was suspicious; but, on the other hand, he need not be directly informed that the goods were acquired dishonestly. If a person receives property without knowing at the time that it was acquired dishonestly, when he discovers the true situation he commits reset if he continues to keep the property. The crime applies only to retention of specific articles—not where there is retention of the proceeds of sale of stolen goods or of goods obtained with stolen money or pledging of goods improperly acquired.

Under an indictment for robbery, theft, breach of trust and embezzlement, or for falsehood, fraud and wilful imposition, a person accused may be convicted of reset.

Breach of Trust and Embezzlement

This is the nomen juris for a single indivisible offence. The term “embezzlement” is now commonly used by itself in indictments. The main characteristic of this crime is the felonious appropriation of a thing which has been entrusted to the pannel with certain general powers of administration or only under obligation to account. Where there is felonious appropriation by a person who has received a limited ownership of property, subject to liability to account for it to the true owner, that is breach of trust and embezzlement.

It is breach of trust and embezzlement if there is a duty to account for an amount, as distinguished from a duty to hand over particular notes or coins. Thus, if a trustee or executor or factor for collecting rents appropriates funds under his charge, the crime is breach of trust and embezzlement. It is always a question for the jury to determine whether, in cases where an agent has mingled his client’s money with his own, the whole circumstances show a guilty intention to appropriate the money to his own purposes.29 Probably because theft is no longer a capital crime, the modern tendency is apparently to enlarge its scope to diminish that of the crimes of embezzlement and fraud.30

Violation of Sepulchres

All unauthorised removal of bodies from their resting places in graves or tombs is criminal. The essence of the crime is the disturbing or attempt to disturb the body, and it is immaterial whether the

29 See on the mixing of moneys Allenby v. H.M.A., 1938 J.C. 55; generally, Keith (1875) 3 Coup. 125; Dingwall (1888) 2 White 27.
person charged obtained any benefit or that the cemetery was a private one: Coutts. It appears that the crime can only be committed when the body is not so far decomposed as to be no longer an object of reverence and respect.

Fire-raising

"Fire-raising" is the nomen juris appropriate where fire is criminally applied to inanimate objects and actually takes effect. It corresponds to "arson" in English law, and includes several offences of varying degrees of gravity. Most of these are common law offences, but some are covered by statute.

Wilful fire-raising is the gravest form. Here there must be a deliberate intention to destroy property of certain important categories—such as a dwelling-house or shop.

A man is not guilty of wilful fire-raising by setting his own property on fire, provided that it is not occupied by another, is not insured, and does not in burning endanger the lives or property of others. It has not been decided whether the crime is committed if the pannel fires his own property over which another has a heritable security.

Fire-raising to defraud insurers differs from wilful fire-raising in respect that the act must have been done with intent to defraud an insurer; and any property capable of being insured against fire suffices—even the property of the pannel himself. It is competent to prove that at the time of the alleged crime the pannel's affairs were embarrassed.

Wicked, culpable and reckless fire-raising differs from wilful fire-raising in that here the pannel may have raised the fire without the deliberate intention of destroying property—but has so done when perpetrating some other unlawful act or in such a state of recklessness as not to care what result might follow from his acts. Mere accident or want of due care is not enough.

Other offences involving fire-raising and attempts are prosecuted on indictment if they are serious. Less grave cases are punished as malicious mischief or breach of the peace. Such other offences include firing by the accused of his own property to the danger of a neighbour—even though the fire was not intended to spread and did not spread—or malicious firing of property not comprised in the categories enumerated in connection with wilful fire-raising.

31 (1899) 3 Adam 50—The Nellfield Cemetery case.
32 See also Soutar (1882) 5 Coup. 65—the Dunecht case; also Hume. Vol I, p. 85.
33 See generally Smillie (1883) 5 Coup. 287; Pollock (1869) 1 Coup. 257; Grieve (1866) 5 Irv. 263.
Malicious Mischief

This is the common law crime of feloniously injuring property. The essence of the crime is the malice which prompts the injurious act. There must be some damage done, but, so long as it is substantial and the result of malicious act, the extent is immaterial—examples are breaking windows or injuring trees and plants. There may be cases where some injury to the property of another may be justifiable or where the relative triviality of the damage done does not raise the implication of malice; but in general wilful disregard of the property rights of another is sufficient to make the deliberate destruction of his property an act of malicious mischief as if a farmer, even to protect his own land, shoots his neighbour’s sheep. There are also numerous statutory instances of malicious mischief, as, for example, the contamination of the contents of a letter box. The crime may be aggravated by previous convictions, or by intent (as with intent to concuss workmen), or if committed by means of housebreaking.

Falsehood (Crimen Falsi)

Falsehood (or the crimen falsi) is a generic term which includes all those offences of which the essential characteristic is that there is either a fraudulent imitation of the truth or the fraudulent suppression of the truth to the prejudice of another. The essence is fraudulent deception, and of such crimes there are many varieties. Some have acquired nomina juris of their own—such as forgery. Other species, such as coining and bankruptcy frauds, have tended to become separated from the main current associated with fraud, and now rank as distinct species.

A convenient classification may be adopted by distinguishing falsehood by writ (forgery and other fabricated writings which do not amount to forgery) from fraudulent deceptions which are not perpetrated by writ and which have not acquired distinct nomina juris of their own, such as coining. This general category of deception is known popularly as swindling, and is normally technically designated in Scots law as “falsehood, fraud and wilful imposition,” or, more simply, as “fraud.”

Forging and Uttering

The crime commonly referred to as forgery consists in making and uttering as genuine a writing falsely intended to represent and pass for the genuine writing of another person: Fraser. The crime

36 (1859) 3 Irv. 467.
is not completed by fabricating a false document, but only when the document is put beyond the fabricator's control by being put into the hands of a third party as a genuine document: Reid.37 It is not necessary that any person should actually have been deceived, provided that the document was used with the intent of prejudicing someone. A writing may be forged either by appending a false signature to a genuine writing, or by setting a false writing to a genuine signature. As was said in Taylor 38: "The general notion of forgery is that it is misleading a person to believe that to be a genuine document which is not so." It is not necessary "that a forgery should be of a signature." Though it is doubtful whether a man can be guilty of forgery if he puts his own name to a document, he can be guilty art and part to the forgery of his name by another: Duncan and Cumming.39 In this unusual case Cumming conspired with Duncan to personate the latter at an examination of the Royal College of Surgeons in Edinburgh and obtained Duncan's name on the diploma. Cumming signed Duncan's name on the application form presented before the examination, and it was held that Duncan might be guilty by accession of the crime of forging his own name.

In Richardson v. Clark 40 it was held that, though the value of evidence relating to handwriting given by experts must vary according to their skill and experience, advances made in the science of comparison of handwriting threw doubt on earlier opinions that such evidence was insufficient in itself to justify conviction. Lord Walker 41 has noted that after the Criminal Procedure Act, 1887, "the emphasis has shifted to uttering as the principal crime, and forgery has dropped into the background."

Falsehood by Writ

This head of crime covers a wide variety of cases where the document is the genuine writ of a person who signed it, but where the statements contained in the writing are false: Fraser.42

Falsehood, Fraud and Wilful Imposition (Swindling)

This crime involves the three elements comprised in its description. The false representation may be made by words or by

37 (1842) 1 Broun 21; Barr, 1927 J.C. 51.
38 (1853) 1 Irv. 230 at p. 234.
39 (1850) J. Shaw 334.
40 1957 J.C. 7.
41 "The Growth of the Criminal law" (1958) Jur.Rev. 230 at p. 240. He has also discussed the problem of punishing the forger of banknotes who disposes of fabricated £1 notes as false to middlemen who paid 5s. for them.
42 Sunra, note 36.
conduct, and as to a past or present fact. A man's intention, however, is an existing fact: Macleod. In the usual case the false representation is made in order to obtain some money, property or advantage, but the deception may be designed to secure the acceptance by the person deceived of something done in performance of a contract. An instance of special importance in this respect is the case of J. and P. Coats v. Brown, where the false pretence was intentional delivery of inferior coal in purported fulfilment of contract. The false representation must be made fraudulently, with the intention of cheating. To complete the crime it must be shown that the person to whom the false representations were made was deceived, though it is not necessary to prove actual gain by the accused or financial loss by the person deceived. This is well illustrated by the case of Adcock. Here a miner, by putting a sign on a hutch of coal cut by another, made it appear that he himself had cut it. In fact, he derived no financial benefit, since the earnings of both miners had to be made up to a minimum wage scale by the employers, but it was held, nevertheless, that the full crime had been committed. Moreover, it is irrelevant that an article which has been sold as a result of fraud is in fact worth the money paid for it: Bannatyne. A familiar category of this crime is the "long-firm fraud"—perpetrated by ordering goods from merchants without intending to pay for them. The deception practised on the merchant to secure delivery must be established.

Poaching and Trespass

The Night Poaching Acts of 1828 and 1844 prescribe penalties for any person who shall by night unlawfully take or destroy any game (defined in the Act to include hares, pheasants, partridges, grouse, heath or moor game, black game and bustards) or rabbits in any land, whether open or enclosed, or shall by night unlawfully enter or be on any land, whether open or enclosed, with any gun, net, engine or other instrument, for the purpose of taking or destroying game. Proceedings are to be taken before the sheriff and not before justices.

43 Menzies (1849) J. Shaw 153; Witherington (1881) 4 Coup. 475.
44 (1897) 2 Adam 354.
45 (1909) 6 Adam 19.
46 This case is an instance of a private prosecution brought with consent of the High Court of Justiciary by means of Criminal Letters, despite the Lord Advocate's refusal of his concurrence in the prosecution. This procedure had become virtually obsolete in 1909, but was held to be competent. The background of the case is discussed in A Man of Law's Tale, by Lord Macmillan, pp. 110–114.
47 1925 J.C. 58.
48 (1847) Arkley 361.
49 Witherington (1881) 4 Coup. 475.
50 9 Geo. 4, c. 69.
51 7 & 8 Vict. c. 29.
52 Game Laws (Amendment) (Scotland) Act, 1877 (40 & 41 Vict. c. 28), s. 10.
“Night” is defined as the period between one hour after sunset and one hour before sunrise, according to local time.\textsuperscript{53} The being on land with instruments applies not only to the person who has the instrument, but to all who are with him and participating.\textsuperscript{54} By resisting apprehension, or offering violence with any offensive weapon, the offender aggravates the crime. If they knew a weapon was carried, its use implicates all concerned.\textsuperscript{55} The most serious form of night poaching, by a band of three or more persons who are armed may be punished by up to fourteen years’ imprisonment.\textsuperscript{56} The Deer (Scotland) Act, 1959,\textsuperscript{57} ss. 21–25, is designed to prevent the illegal taking and killing of deer. \textit{Inter alia}, killing at night or in the close season or otherwise than by shooting are made offences. The testimony of one witness suffices for conviction. Elaborate statutory prohibitions against poaching of salmon are contained in the Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 1951.\textsuperscript{58}

The Game (Scotland) Act, 1832,\textsuperscript{59} prescribes penalties on summary conviction for any person who commits trespass by day in pursuit of game. Daytime is from one hour before sunrise to one hour after sunset. The maximum penalty is increased from a fine of £2 to a fine of £5 when five or more persons act in concert. The Poaching Prevention Act, 1862,\textsuperscript{60} gives power to a police constable to search any person in any highway, street or public place, if he has good reason to suspect him of coming from land where he has been unlawfully in pursuit of game, and having in his possession any game, gun or net. A similar power is given to stop and search any conveyance. The penalty on conviction is a fine not exceeding £5 and forfeiture of the game, gun or net. An agricultural tenant, when there is no stipulation to the contrary in the lease, may kill rabbits, and may authorise anyone else to do so.\textsuperscript{61} Under the Ground Game Act, 1880,\textsuperscript{62} he has the right, of which he cannot deprive himself by contract, to kill hares and rabbits. While the principal importance of the laws relating to trespass is in regard to poaching, the Trespass (Scotland) Act, 1865\textsuperscript{63} imposes penalties upon persons who occupy private land or premises, or who light fires on or near a private road or cultivated land, without consent of the owner or legal occupier.

\textsuperscript{54} Granger (1863) 4 Irv. 432.
\textsuperscript{55} Mitchell (1877) 1 White 321.
\textsuperscript{56} 1828 Act, as modified by the Criminal Justice (Scotland) Act, 1949 (12, 13 & 14 Geo. 6, c. 94), s. 16 (1).
\textsuperscript{57} 7 & 8 Eliz. 2, c. 40.
\textsuperscript{58} 14 & 15 Geo. 6, c. 26.\textsuperscript{59} 2 & 3 Will. 4, c. 68.
\textsuperscript{60} 25 & 26 Vict. c. 114.
\textsuperscript{61} Crawshay v. Duncan, 1915 S.C.(J.) 64.
\textsuperscript{62} 43 & 44 Vict. c. 47, amended in detail, 6 Edw. 7, c. 21.
\textsuperscript{63} 28 & 29 Vict. c. 56; see Paterson v. Robertson, 1944 J.C. 166—squatters.
Highway Offences

The Road Traffic Act, 1960, in two hundred and seventy-one sections and twenty schedules, consolidates with minor amendments the law relating to road traffic—in particular the Road Traffic Acts, 1930 and 1956, and the Road and Rail Traffic Act, 1933. A further Road Traffic Bill, 1961, failed to reach the statute book because of an overcrowded Parliamentary programme, but became law in 1962. It is obvious that no good object is to be served by attempting in a work of the present compass a detailed consideration of traffic offences. Reference must be made to the authoritative treatises—in particular to the Encyclopaedia of Road Traffic Law. A few brief comments must suffice.

Section 1 enacts the offence of causing the death of another person by reckless or dangerous driving, because of the reluctance of juries to convict reckless drivers of culpable homicide, and the desirability of having an appropriate lesser offence. In serious cases, however, culpable homicide may be charged. A passenger in the accused's car may be “another person” for the purposes of the section. For the statutory offence the maximum penalty is two years' imprisonment. In describing reckless or dangerous driving the language of section 11 of the 1930 Act has been followed closely, and decisions under that Act and under section 8 (1) of the 1956 Act should often still be relevant. In England the test of guilt has been held to be objective, and irrespective of the state of mind of the accused. Though the “objective test” has not been undermined, it has been held competent, though undesirable, in England to prove that an accused charged under section 1 had been drinking, and it was observed in R. v. Macbride that a charge under section 1 should not include a charge under section 6 (driving when under the influence of drink or drugs). All these views would not necessarily be accepted in Scotland especially where the charging of both offences might be justified.

Under section 2 (1) of the 1960 Act, replacing, inter alia, section 11 of the 1930 Act, three separate offences are created—namely,

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64 8 & 9 Eliz. 2, c. 16.
65 20 & 21 Geo. 5, c. 43.
66 4 & 5 Eliz. 2, c. 67.
67 23 & 24 Geo. 5, c. 53.
68 Ed. Burke and Brand.
69 See comments in Dunn, 1960 J.C. 55, referring to s. 8 (1) of the 1956 Act which was in identical terms. In Dunn the accused was charged in the alternative and it would seem that conviction on the statutory charge can only follow if it has been expressly libelled.
70 [1957] Crim.L.R. 406; the accused may, however, establish that he was not in fact driving because in a state of “automatism”: Hill v. Baxter [1958] 1 Q.B. 277.
71 [1961] 3 W.L.R. 549.
driving \textit{recklessly}, or at a \textit{speed}, or in a \textit{manner} which is dangerous to the public, having regard to all the circumstances of the case. Though in Scotland the conjunctive “and” has often been substituted for the disjunctive “or,” thus libelling a comprehensive offence of three facets, such a course seems to be inconsistent with the opinions in \textit{Galloway v. Adair}.\footnote{1947 J.C. 7.}

Careless and inconsiderate driving are struck at by section 3 of the 1960 Act, replacing, \textit{inter alia}, section 12 of the 1930 Act. The wording “without due care and attention” or “without reasonable consideration for other persons using the road” indicates that two offences are comprised in the section. The mere fact that an accident has occurred is not to be construed as implying that the driver has been guilty of an offence.\footnote{Alexander v. Adair, 1938 J.C. 28; Farrell v. Feigham (1960) 76 Sh.Ct.Rep. 141—driver was found injured beside vehicle which had mounted the pavement. This was not held to prove negligence.}

The 1960 Act provides by section 6 (in place of section 15 of the 1930 Act) for the punishment of “a person who, when driving or attempting to drive a motor vehicle on a road or other public place, is unfit to drive through drink or drugs.”\footnote{As to procedure in seeking medical evidence in Scotland, see Reid v. Nixon, 1948 J.C. 68; Farrell v. Concannon, 1957 J.C. 12.} A person is considered as “driving” if the vehicle when moving is subject to his control and direction.\footnote{e.g., R. v. Kilson (1955) 39 Cr.App.R. 66.} A private field used as a car park during the Royal Highland Show has been held to be a public place within the meaning of the section.\footnote{Paterson v. Ogilvy, 1957 J.C. 42.}

Under section 110 it is provided that, if a person disqualified from holding or obtaining a licence nevertheless applies for a licence or drives while disqualified, he shall be liable on summary conviction to imprisonment unless the court thinks that “having regard to the special circumstances of the case” a fine would be an adequate punishment. It has been held in Scotland\footnote{Carnegie v. Clark, 1947 J.C. 74.} that though a university student thus flouting the law might be expelled from university this did not constitute any “special circumstance” why he should not be sent to prison. It is true that Lord Stevenson thought the student’s experience in the Services should have taught him discipline. Lord Mackay was less sympathetic: \textquote{The point is taken that imprisonment, as against the possibility of a fine, is harsh in respect of possible reflections on his career. He and he alone should have thought of that, when deliberately and without excuse breaching the law.”\footnote{At p. 71.}
The humbler users of the highway are also disciplined by the 1960 Act. Thus sections 9–13 enact a series of offences which may be committed by those riding pedal cycles—including reckless, dangerous, careless and inconsiderate cycling, and (no mean feat) cycling while under the influence of drink. By section 15 pedestrians are obliged under sanction to comply with directions to stop given by constables regulating vehicular traffic.
CHAPTER 7
CRIMINAL PROCEDURE AND EVIDENCE

General

The divergence between Scottish and English law is probably more pronounced in the field of criminal procedure than in any other. Scottish criminal procedure is for the most part statutory, being governed by the Criminal Procedure (Scotland) Act, 1887 ¹ (as amended), in solemn procedure, and by the Summary Jurisdiction (Scotland) Act, 1954, ² in summary proceedings. The Criminal Appeal (Scotland) Act, 1926, ³ and the Criminal Justice (Scotland) Act, 1949, ⁴ contain provisions of vital importance regulating procedure in criminal cases.

The High Court of Justiciary, the supreme criminal court in Scotland, comprises the Lord Justice-General, the Lord Justice-Clerk and fourteen Lords Commissioners of Justiciary, all of whom—or a less numerous “Full Bench”—may sit to determine questions of law of exceptional difficulty. Normally, however, trial on indictment is before a single Commissioner of Justiciary on circuit or before a sheriff (the resident territorial judge)—in either case assisted by a jury of fifteen, who give their verdict by majority vote. Appeal lies normally to a chamber of three or four members of the Justiciary Court sitting in Edinburgh. No appeal lies to the House of Lords from the High Court of Justiciary.

Except for certain cases where statute has conferred the right to prosecute on public bodies, such as the education authorities or fishing boards, private prosecution is seldom met in Scotland.⁵ There is a well-organised and efficient system of public prosecution ⁶ for which the Lord Advocate, assisted by the Solicitor-General and the Crown Office, is ultimately responsible. The routine administration of criminal justice is carried on in the Crown Office in Edinburgh by a small permanent staff and by a team of four Advocates-Depute appointed by the Lord Advocate from among members of the Bar of some standing. Two further Advocates-Depute are appointed who have no routine duties, but who, with the Law Officers and other Deputies, act as public prosecutors in the more serious or important cases. The Lord Advocate

¹ 50 & 51 Vict. c. 35.
² 2 & 3 Eliz. 2, c. 48.
³ 16 & 17 Geo. 5, c. 15.
⁴ 12, 13 & 14 Geo. 6, 94.
⁵ For a recent discussion of the law, see McBain v. Crichton, 1961 J.C. 25.

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also appoints permanent officials in each sheriffdom known as procurators-fiscal, who are responsible, under Crown Office guidance, for the investigation and prosecution of crime in the sheriffdoms. In short, the Lord Advocate has virtually complete control over the machinery of criminal prosecution. He himself or his Deputes decide whether to prosecute at all, the form of the indictment (such as whether to charge murder or culpable homicide), whether prosecution should be before the High Court or before a sheriff, and so forth. At every stage the Lord Advocate is "master of the instance," and, indeed, if he decided not to move for sentence after conviction, the accused would go free.

The system works with exemplary efficiency and fairness in Scotland, but it is not suggested that this centralised control which is suitable to a country of five millions would be equally appropriate in a country with a very large population. Further, though Parliament and (theoretically) the High Court of Justiciary are ultimate checks on the Lord Advocate, the manner in which he exercises his powers and discretion is even more powerfully controlled by professional tradition. These observations prompt the reflection that a study of comparative law need not lead to the conclusion that uniformity of method is ultimately desirable, since the methods which work well in one country may be quite unsuitable for export.

Powers of Arrest, Interrogation and Search

The initial writ in Solemn Criminal Jurisdiction, whether in the High Court of Justiciary or the sheriff court, is a petition for warrant to arrest the accused person and commit him to prison. It is illegal to apply for a general warrant, but if the name of the accused person is unknown the petition may allege "that a man to the petitioner unknown" has committed the crime, and supply such a description as will suffice to distinguish him. The same general principles apply regarding the statement of the charge as in the framing of an indictment, but it is accepted that at the stage of petition, when full investigation has not been possible, the charge may differ materially from that on which the accused is ultimately tried. Upon presentation of the petition duly signed by the appropriate public official, warrant to arrest is normally granted as a matter of course by the magistrate, who in practice is a sheriff (i.e., territorial judge) resident in the jurisdiction to which the

7 Neither the Lord Advocate, nor those acting in his name, are liable for acts done in the conduct of public prosecution: Hester v. Macdonald, 1961 J.C. 370.
8 A recent endeavour to circumvent the Lord Advocate's discretion through a Parliamentary Tribunal of Enquiry was both unfortunate and unnecessary—see Cmd. 718/1959, and "The Waters Tribunal Report," 1959 S.L.T. (News) 197; also 1959 S.L.T. (News) 220.
9 Hume, Vol. II, 78; Alison II, 123.
10 1887 Act, s. 16.
accused is subject. It is immaterial that the crime charged is too serious for the sheriff to try himself. In an emergency a warrant to arrest may be granted without a written petition.\textsuperscript{11}

While arrest with a warrant presents no difficulties, the law regarding arrest without warrant is less clear. As is rightly stated by Renton and Brown\textsuperscript{12} arrest without a warrant is always regarded as a step which calls for an explanation. Alison\textsuperscript{13} restricts the right of immediate arrest even in serious crimes to cases where "dispatch is indispensable" and where "without such an instantaneous stretch of authority there would be reasonable danger of the criminal escaping." In short, speaking generally, the police officer who arrests without warrant must have regard not only to the alleged crime, but also to the circumstances—particularly those personal to the suspect. Even where power of arrest without warrant would appear to be justified by common law or statute, it is doubtful if the courts would protect the police if a warrant (or citation in summary proceedings) would have been equally appropriate. In \textit{Peggie v. Clark}\textsuperscript{14} Lord Deas (who, it must be stressed, is discussing serious crime) indicated the considerations which might justify—or render illegal—arrest without warrant. "There are many exceptional cases in which police-officers or constables are entitled to apprehend without a written warrant, and for such cases no statute was required. If a policeman or constable sees a crime committed, it is his duty to apprehend the criminal at once; or if the criminal is pointed out to him running off from the spot, the same rule would apply. If, again, the criminal is in hiding, or the officer is credibly informed, or has good reason to believe, that he is about to abscond, the officer may \textit{de plano} apprehend him, to prevent justice from being defeated. The same thing would hold if the crime believed to have been committed was murder or the like, the very nature of the punishment of which would render absconding the probable and natural result of the crime itself. Still further, if a suspected individual belongs to a class of persons reputed to live by crime, or who have no fixed residence or known means of honest livelihood, in all such cases a police-officer or constable has large powers of apprehending without a warrant. But I agree with your Lordship that the officer is not entitled to overstep the necessity or reasonable requirements of the particular case; and there ought, moreover, in no case, to be undue delay in following out such summary apprehension, by obtaining the appropriate formal warrant for the offender's detention. If an individual, even although expressly charged with crime by an aggrieved party, be a well-known householder

\textsuperscript{11} Hume, Vol. II, 77; Alison II, 121.
\textsuperscript{12} Criminal Procedure According to the Law of Scotland, 3rd ed., p. 31.
\textsuperscript{13} Vol. II, 117.
\textsuperscript{14} (1868) 7 M. 89, at p. 93; also "Police Duties and Procedure" (Aberdeen), Sec. 3.
—a person of respectability—what, in our justiciary practice, we call a ‘law-abiding party,’ and where there are no reasonable grounds for supposing that he means to abscond or flee from justice, I find nothing ... to justify a police-officer or constable in apprehending him without a warrant.” It may be stressed that a constable, if he acts on information, should only rely on credible eye-witnesses of the alleged crime. Moreover, if the police do not choose to arrest forthwith without warrant, they lose the right to rely on the justification of emergency, and require to obtain a warrant should they later decide to make an arrest.

Further, it is accepted by Scots law that a constable may arrest, even where there is no positive evidence that a crime has been committed, if he finds a person in possession of goods known or believed to be stolen.15

There are numerous statutory provisions (well over forty) which provide for arrest without warrant in certain circumstances. Where power is conferred by statute, the requirements of the statute must be complied with strictly, and failure to do so will deprive the police of protection. There is clearly a very substantial difference between the power conferred (for example) by the Official Secrets Act, 1911,16 s. 6, which empowers the arrest of any person reasonably suspected of being about to commit an offence under that Act, and the power of arrest conferred by the Gun Licence Act, 1870,17 s. 9, which is conditional on the suspect’s failing to produce a licence and also failing to declare his name and address.

It is material when considering the topic of arrest to observe that, though section 86 of the Burgh Police (Scotland) Act, 1892,18 and corresponding sections of local Police Acts, might prima facie seem to confer very wide powers of arrest on suspicion, these sections have been construed by the courts to give no wider powers to the police than they already enjoy at common law or by the various statutory provisions referred to in the preceding paragraph.19

Interrogation

When a person is arrested in Scotland on any criminal charge, it is the duty of the police to warn him that anything which he may say in answer to the charge will be taken down in writing and may be used in evidence. As will be developed later, the courts will not listen to evidence of what an accused told the police if questioned after apprehension, nor should the police even invite him to make a

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16 1 & 2 Geo. 5, c. 28.
17 33 & 34 Vict. c. 57.
18 55 & 56 Vict. c. 55.
19 Peggie v. Clark (1868) 7 M. 89.
statement. If the accused wishes to make a statement he is entitled to do so at his judicial examination before a magistrate; and on arrest the accused is entitled to consult with a law agent before appearing at such an examination. The rules regarding questioning by the police seem to be rather stricter than the Judges' Rules in England, which are at present under review. In England, No. 3 of the Judges' Rules lays down that "persons in custody should not be questioned without the usual caution being first administered." In Scotland, as Lord Moncrieff observed in Stark and Smith v. H.M.A., "when a man has been arrested on a charge of crime, it is even elementary that all interrogation by the police must cease."

As has been stressed in a long series of leading Justiciary cases, the Scottish courts, before admitting or rejecting incriminating statements by an accused person to the police, ascertain in which of three categories he fell at the time when he made the statement; and apply the overriding principle of "fairness to the accused."

(a) Where a person has been charged with a crime and is in custody awaiting trial: in these circumstances there must be no interrogation. If an accused wishes to make a statement, he should preferably be taken before a magistrate (normally the sheriff) and should have been cautioned and advised of his right to consult with a law agent before making a declaration. Even an invitation to speak without questioning is prohibited as, for example, in the case of Wade v. Robertson. In this case the accused was in custody charged with stealing whisky. A constable called at his lodgings, and took possession of a bottle of whisky which he found there. Returning to the police station the policeman said to the accused, "Well, Wade, this is a bottle I have been given by your landlord and it contains whisky. I am going to ask you some questions, which you don't need to answer unless you like—they may be used in evidence against you." Without any questioning the accused then proceeded to make an incriminating statement. This was held on appeal to be clearly inadmissible, the Lord Justice-Clerk observing, 20

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20 See Archbold, 34th ed., § 1119, for construction.
21 1938 J.C. 170 at p. 175.
24 See, e.g., Stark and Smith v. H.M.A. supra. A spontaneous voluntary statement by a person in custody is not necessarily excluded (Manuel, 1958 J.C. 41), though a certain tendency to exclude on broad grounds of fairness is apparent. Fox, 1947 J.C. 30; Cunningham, 1939 J.C. 61; McSwiggan, 1937 J.C. 50; Olsson, 1941 J.C. 63.
26 At p. 120.
once a prisoner has been taken into custody and been cautioned and charged, and his answer, if any, to the caution and charge noted—after that, so far as investigating the particular charge in respect of which the man has been apprehended, the police are to all intents and purposes functi and they are not entitled to question him with regard to that particular charge.

(b) The second situation is where a person has been invited to remain at the police station while under suspicion, but has not yet been charged. This period cannot normally last longer than till the morning after the day of arrest, and the legality of any enforced detention in such circumstances is by no means clearly established. The courts are not favourable to this period of suspense since during this time an accused has not the benefit of the various safeguards made specifically for the protection of accused persons upon apprehension. Accordingly, as Lord Anderson said in Aitken,

It seems to me that the court should be more jealous to safeguard the rights of a prisoner in a case where a charge has not yet been made, but where the prisoner has merely been detained by the police on suspicion. In Aitken the accused, who was a boy of sixteen, was detained on suspicion of murdering his grandmother. He was sick and shivering, and on the morning after the arrest, during a conversation with an inspector of police, he made a statement. This was rejected by the court on the grounds that in the circumstances it would not be fair to admit it. Aitken was followed by Lord Justice-General Cooper (then Lord Justice-Clerk) in Rigg. In this case a boy of about seventeen years reported to the police that at about 3 p.m. he had found the body of a small girl in an air-raid shelter. He accompanied the police to the shelter and gave a statement. Later he was taken back to the police station by a superintendent, and gave a precognition at about 7 p.m. which contained nothing incriminating. He was kept at the station until the superintendent returned at about 9 p.m. and suggested to the accused that they might go over the statement. The accused, who was excited and in a partially collapsed condition, thereafter made a detailed precognition of some 700 words. This was excluded by the judge at the trial, who noted with disapproval (in 1946) a tendency for the Crown to support cases for the prosecution with alleged voluntary statements. It is believed that the warning has been regarded by those concerned. The author would venture the opinion that no person may be detained at the police station against his wishes unless the police are prepared to

27 A statement made in reply to an original charge of assault may be admissible even if the accused is later charged with murder, because the two crimes involve personal motive and are founded on the same species facti—but this may not extend to cases of capital murder; McAdam, 1960 J.C. 1; Graham, 1958 S.L.T. 167.

28 1926 J.C. 83 at p. 86.

29 1946 J.C. 1
make an arrest. The legal justification for detention in any other circumstances is not apparent.

(c) Where a person has not been detained or charged, but is merely questioned by the police in the course of their investigations, different considerations arise. Here the public interest requires that the police should be assisted by all responsible citizens by supplying such information as they can. At this stage if a person who ultimately comes under suspicion (even as a result of his statement) incriminates himself, there is no ground for excluding from evidence his answers to questions or fuller observations. The police cannot, however, compel any person to answer their questions.

In Chalmers a Full Bench of the High Court of Justiciary, after considering the practicability of laying down detailed rules for police questioning, concluded with regret that in borderline cases so much turns on exact circumstances that the laying down of detailed rules was impossible, but it appears that the law as set out in the previous paragraphs is substantially reaffirmed. A conviction of murder was quashed in this case on the grounds that evidence of what the panel, a youth of sixteen, had shown to the police after persistent questioning prior to his arrest, should not have been admitted at the trial. It was held that the suspect’s statements had been properly excluded as not truly voluntary, but that evidence had been wrongly admitted as to his actings in leading the police to a place where they found the purse of the murdered man. This conduct was regarded as too closely linked with the improper questioning, and therefore to be subject to the same objections to admission as the verbal statements. The Lord Justice-General seems, moreover, to support the view stated by the author that, unless a person is arrested and charged, he cannot be compelled against his will to “accept an invitation to visit a police station with a view to assisting the police in their inquiries.” The broad propositions on police questioning which can be extracted from the opinions of the Lord Justice-General and Lord Justice-Clerk, seem to be these:

(1) At the stage of initial investigation the police may question whom they choose with a view to acquiring information which may lead to the detection of the person guilty of a crime, but they cannot compel the giving of information, nor can they require any person to go with them to the police station against his will unless they have arrested him. No person can be lawfully detained on suspicion unless he has been arrested and charged.

31 See Bell, 1945 J.C. 61.
(2) After a person has been arrested, cautioned and charged with crime, and his answer (if any) to the caution and charge has been noted no interrogation whatsoever by the police on that charge will be admissible in evidence. If a suspect wishes to make a statement, it would be desirable to take him before a sheriff, after cautioning him and advising him of his right to the services of a law agent.33 On the other hand an entirely spontaneous statement volunteered by a person in custody may be admissible, and it may be observed that there is no reported instance of the police taking a suspect in custody before a sheriff to emit a statement after committal for trial. In the very recent case of Christie, however, Lord Walker ex proprio motu refused to accept evidence of an alleged confession from an accused who had not been taken before the sheriff after intimating the desire to make a voluntary statement.34

(3) At any stage when suspicion has become centred on a particular individual as the likely perpetrator of the crime, further interrogation by the police becomes dangerous from the viewpoint of admissibility of evidence. If questioning is carried too far, as by extracting a confession by cross-examination, the confession will be excluded. After an individual has come under serious consideration as the likely perpetrator of a crime, only his voluntary statement is admissible; this must be a statement made without pressure or inducement and not under cross-examination. The sometimes narrow distinction between "possible" and "probable" culprit, which is very relevant in deciding whether an individual is entitled to the safeguards provided for accused persons, arises in connection with the police investigation in Scotland, while in France it becomes relevant in proceedings before the juge d'instruction.

(4) A declaration made by a suspect before a magistrate, such as a sheriff, would be free from the suspicions which, justly or unjustly, may attach to allegedly voluntary statements made in a police station in the presence only of police officers. If an accused wishes to volunteer information, he should preferably be permitted to emit a declaration before the sheriff in the presence of his solicitor.

(5) It is not the function of the police to strive for confession. An excess of zeal in this respect cannot be purged by any number of cautions.

(6) If property is recovered as the result of questioning which would be inadmissible for the foregoing reasons, it is incompetent to link the finding of such property with statements made by the accused, and evidence of what the accused did, obtained as the result

33 1954 J.C. 66 at p. 79 et seq.
of improper questioning, would not be admissible.35 Thus in the Chalmers case it was held that the trial judge had wrongly admitted evidence that the suspect, after police interrogation, had led the police to a place where the wallet of the murdered man was found. On the other hand, if there is no linking of the finding with improper questioning, the prosecution might possibly produce an article, such as a knife bearing fingerprints, which was found after questioning, which could not be spoken of in evidence.

After Chalmers it was for some time doubtful to what extent a statement made by an accused in custody to the police—and not to a sheriff—could be admitted as evidence at trial. However, in Manuel,36 a case in which the accused was convicted of one non-capital murder and six capital murders, it was held that evidence of the accused's written statement (made while in police custody) and evidence of his conduct in leading the police to where he had admitted to concealing a body and shoes, was admissible evidence at his trial. The crucial passage in the opinion of the Lord Justice-General (Clyde) was as follows37: "The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police from any risk of being driven or cajoled or trapped into admissions of guilt, even though this may complicate the quite legitimate detection of crime by the authorities: so anxious is our law to secure that such persons fair under our system of criminal administration, and so firmly rooted in our law is the principle that no man is bound to incriminate himself. Although this is all true there is nothing to prevent a man who is so detained by the police or who has even been charged with a crime from making a voluntary statement to the police, if he chooses to do so. And it is perfectly proper that such a statement if made should be proved in evidence to the jury, as one of the features for them to consider in deciding whether the crime has been committed by the accused. But the test is always whether that statement was fairly obtained. To be a voluntary statement which can be proved before a jury the statement must have been freely given, not given in response to pressure or inducement and not elicited by questioning, other than what is directed simply to elucidating what has been said." The court were satisfied in this case that Manuel had been actively discouraged by the police from committing himself to paper; that they had warned him of the dangers involved; that they had gone out of their way to try to get a solicitor for Manuel before he made the

36 1958 J.C. 41.
incriminating confession to the officer whom he had asked to see. It may, however, be observed that they did not offer to take him before a sheriff so that, to quote the Lord Justice-General, he could "unburden his soul of the dark deeds which he narrated with such convincing detail." Lord Walker's recent action in Christie may, however, encourage the police to put the admissibility and voluntary nature of confessions beyond doubt by taking the suspect before a sheriff or magistrate if he wishes to make a statement while in custody.

Professor A. Dewar Gibb has recently criticised, in a trenchant article entitled "Fair Play for the Criminal," the "extreme tenderness" shown to suspects in modern Scottish law; and has also deprecated the undue handicaps which the present system seems to impose on the investigating authorities. He points out that, so far as physical interference with a suspect is concerned (e.g., examination of his person, clothing and the like), greater latitude is enjoyed by the investigating authorities after arrest, whereas the opposite is true regarding the eliciting of oral admissions. Further, he draws attention to the distinction—which he apparently deprecates—that, while irregularity in obtaining real evidence does not necessarily make it inadmissible, the converse seems to be the case regarding statements improperly procured. Gibb, of course, readily admits that courts should decline to receive confessions obtained by inducements or threats; but considers that the category of "unfairness" is in effect superfluous and dangerously vague. The present author, with respect, does not feel the same difficulty as Professor Dewar Gibb regarding the application of a general test of "unfairness to the accused," if construed on common sense principles; and regards threats and inducements as obvious aspects of the broader principle. On the other hand, the author fully supports Gibb's contention that the present system hampers unduly the vindication of justice. While an accused is entitled to remain silent during trial and pre-trial procedure, the temptation is considerable for the police to carry as far as possible the questioning of a suspect before arrest. A general, if often unjustified, suspicion attaches to confessions allegedly made in a police station. The remedy might well be to revive judicial examination as a compulsory aspect of pre-trial—or even of trial—procedure, while permitting refusal to answer particular questions. The recent decision of Lord Walker ex proprio motu to refuse evidence of an alleged confession by an accused who had not been taken before the sheriff may well point the way for reconciling public interest and the interests of an accused.

39 Ibid. and p. 231, post.
40 See note 34
Search and Entry

The law regarding search and entry cannot be expressed in a few dogmatic propositions, since often the decisions turn on a narrow balance of consideration for the vindication of justice on the one hand and for the liberty of the citizen on the other.

A constable who has seen a serious crime (e.g., murder, rape or robbery) committed, or who has received an immediate report of such a crime from a credible witness, may pursue the offender into a private house and there arrest him. A constable in possession of a warrant to arrest a suspect has a right of entry into private premises and to effect this purpose may break down the door or, in search of the suspect, break into lockfast places within the house. In exercise of their right to investigate violations of the law, the police have certain rights on land without the consent of the owner. These seem to be possibly more extensive in relation to public premises than in respect of a private house, and do not necessarily imply the right to insist on remaining on the premises against the owner’s will.

Where the authorities consider it necessary to search private premises for stolen property or for real evidence to support a charge already made, they should, in normal circumstances, apply for a search warrant, and, indeed, such a warrant is normally craved in the petition which initiates procedure. It is also competent to apply for a warrant to search certain premises, say for stolen property, irrespective of a charge made against a specific accused.

It is, however, justifiable in certain circumstances to search premises and to secure evidence without first obtaining a warrant. When an arrest has actually been made on a charge of serious crime, e.g., murder, and where there is such urgency that the purpose of search might be defeated were the police to delay their search until a warrant could be obtained, and if there is good reason to believe that immediate search would recover material evidence, the police may be justified in searching without warrant. This exceptional procedure was held justifiable in the case of McGuigan, by that master of the Scottish criminal law Lord Justice-Clerk Aitchison. In McGuigan the tent where the accused had been living was searched after his arrest for murder, but before a warrant had been obtained. Articles seized by the police in this search were held to be admissible evidence. This principle would probably not extend to arrest on a minor charge, for example shoplifting.

41 See Renton and Brown, Criminal Procedure, 3rd ed., p. 455; also regarding summary procedure Summary Jurisdiction (Scotland) Act, 1954, s. 17 (1).
42 1936 J.C. 16; McKay, 1961 J.C. 45.
It does not follow, however, that evidence recovered by improper and unwarranted search will, in all circumstances, be held inadmissible, and indeed Lord Justice-Clerk Aitchison in McGuigan stressed this very point. The attitude of the law may be illustrated by a few recent decisions.

In Lawrie v. Muir 43 a Full Bench of the High Court of Justiciary was convened to consider the competency of evidence obtained improperly in the following circumstances. The keeper of a dairy (the appellant) had been convicted of the offence of using, for the sale of milk, bottles belonging to other persons (contrary to S.R. & O. 1947, No. 2032, art. 16 (a)). The evidence against her was supplied by two inspectors of a limited company formed for the purpose of restoring milk bottles to their rightful owners. All contracts with the Milk Marketing Board and distributors contained a condition that the inspectors of the company, on production of their warrants, were entitled to inspect distributors' premises and examine milk bottles. The inspectors in this particular case had produced their warrant cards, and gained access to the premises of the appellant, who, as it happened, had no contract at all with the Scottish Milk Marketing Board. Thus the inspectors who discovered the misapplied bottles had gained entry illegally though in good faith. It was held, after considering the authorities including McGuigan, that no distinction could be drawn in this matter between a prosecution for a statutory offence and a crime at common law; and, further, that irregularity in the method by which evidence is obtained does not necessarily make the evidence inadmissible in criminal prosecution. Each case must be considered on its own facts, striving to reconcile two principles, neither of which can be insisted on to the uttermost—namely (a) the interest of the citizen to be protected from illegal or irregular invasion of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime should not be withheld from the courts merely on technical grounds. In the case under appeal the conviction was quashed, one factor which was allowed to tilt the balance being that the inspectors were not police officers but employees of a company associated with the Milk Marketing Board.

The principles of Lawrie were followed in Fairley v. Fishmongers of London, 44 though in the latter case evidence obtained irregularly but in good faith by the respondent's inspector was held admissible, and the conviction was sustained on appeal. The irregularity was "excused."

43 1950 J.C. 19; see also L. G. Murray, "The Admissibility of Evidence Illegally Obtained" (1958) 74 S.L.R. 73.
44 1951 J.C. 14; Hepper, 1958 J.C. 39; also Smith, Studies, pp. 283-284.
In the case of serious crime the same principles apply, but the court will lean against admitting real evidence obtained from an accused by the police while they refrain from arresting him. This may be illustrated by the case of McGovern.\textsuperscript{45} In this case the owner of a bicycle, which had been found by the police near an office where the safe had been blown, agreed to come to the police station to identify his machine, alleging that it had been stolen from him. While at the police station he came under suspicion of the safe-blowing, and the police took scrapings from his fingernails which showed traces of an explosive similar to that used for the crime. This vital evidence was adduced at the trial, but the conviction was quashed on the grounds that the police had no right to search the person of a suspect whom they had not arrested, and that the irregularity in the circumstances should not be condoned. Caution and charge as a preliminary even to voluntary medical examination was prescribed in Reid v. Nixon,\textsuperscript{46} where the court laid down the rights to be accorded to a person suspected by the police of being drunk in charge of a motor-vehicle contrary to section 15 of the Road Traffic Act, 1930.\textsuperscript{47} (It may be observed in passing that the Scottish and English courts take divergent views as to the function of the police surgeon—see Lord Goddard C.J. in R. v. Nowell.\textsuperscript{48})

When a person has been arrested his fingerprints may be taken without his consent,\textsuperscript{49} and he may be compelled to appear at an identification parade. He may be stripped and examined and, with his consent, specimens of his handwriting may be taken. Physical examination, however, must not compel active co-operation by the suspect, and this restricts the powers of the police to have a medical examination carried out on a person apprehended for being drunk in charge of a car. “Observation” by a medical witness, however, in other cases may include examining a wound (e.g., of a suspected safe-blower) with an instrument such as a probe.\textsuperscript{50} A person who has no criminal record is entitled to have the record of his fingerprints destroyed if he is acquitted.

The remedy of a citizen whose liberties are invaded by illegal search or entry is a civil action for reparation.

\textbf{PROCEDURE FROM LAWFUL ARREST UNTIL COMMITTAL FOR TRIAL}

\textbf{Judicial Examination}

In Scotland a suspect who has been arrested must be brought before a magistrate (in cases of serious crime almost invariably the

\textsuperscript{45} 1950 J.C. 33.
\textsuperscript{46} 1948 J.C. 68; explained Farrell v. Concannon, 1957 J.C. 12; McKie, 1958 J.C. 24.
\textsuperscript{47} 20 & 21 Geo. 5, c. 43; now Road Traffic Act, 1960, s. 6.
\textsuperscript{48} [1948] 1 All E.R. 794.
\textsuperscript{49} McGarry, 1933 J.C. 72.
\textsuperscript{50} Forrester, 1952 J.C. 28; cf. Reid v. Nixon, supra, where the crime was statutory.
sheriff) for judicial examination with the least possible delay. The prosecutor must disclose the charge at latest at this examination which, if possible, takes place not later than the morning of the day after the arrest. It is not now customary, however, to conduct a judicial examination on Sunday, and, if the accused has to be brought from (say) the Outer Hebrides or from an outlying island of the Orkneys or Shetlands, more than a day may elapse before judicial examination.

"Judicial Examination" in modern Scottish law is a somewhat misleading term. The older Scottish practice, which was changed by the Criminal Evidence Act, 1898, was to the effect that the accused could not give evidence at his trial but he was judicially examined prior to trial. Hume explains the procedure for preliminary judicial examination—which followed apprehension of a suspect.

In conducting the examination of the prisoner, it is the duty of the magistrate to take care that the man is in the due situation of mind for so serious a task; neither affected with liquor, nor disordered in intellect, nor under the influence of threats, or of promises, or persuasion, employed to induce him to confess. . . . For, as we shall afterwards see, his confession on this occasion is so far only a circumstance of evidence against him on his trial, as it is emitted soberly, and of his own free will; and nothing can follow in the way of punishment or severity against him, as for a contempt, though he decline to make any answer at all. On all those matters, it is the business also of the magistrate duly to inform the prisoner, who may not always know, or may sometimes be afraid to assert his privilege. Moreover, he ought to be warned that his declaration may and probably will be made use of against him on his trial. To be of any material service to the prosecutor on that occasion, the prisoner's declaration must be taken down at large, in writing; and it must be read over to the prisoner; and be signed by him and the magistrate, or, if he cannot or will not sign, by the magistrate, instead of him.

This stage in procedure gave an opportunity to the suspect to put his accounts of events before a judge; and, though he could be questioned, he was not compelled to answer specific questions.

In modern practice the accused is entitled to have a private consultation with a law agent before appearing for examination, and in Olsson a statement made by the accused to a detective was refused (among other grounds) because the accused had not been informed of his statutory right to consult a law agent before judicial examination. Unless the agent thinks that the accused can clear himself at once, he normally advises him to make no declaration at the examination. These proceedings are private and usually last only about

51 61 & 62 Vict. c. 36; and see p. 231, post.
52 Vol. II, 80.
53 1941 J.C. 63.
five minutes. Usually there are present only the sheriff, the sheriff-clerk, the procurator-fiscal, the necessary police officers, the accused and his law agent. This safeguards the accused against prejudicial publicity which seems to be a grave defect of the preliminary hearing in England. In Scotland the Press may only report the fact that a person has been brought before the sheriff on a particular charge. No details of evidence may be published prior to the trial. The presence of the law agent of the accused ensures the observance of all procedure designed for his protection, and, though the examination itself is now usually a formality, the procedure has the advantage that the accused is taken from police custody before a judicial officer at an early stage in proceedings. The suspect has the opportunity to make a statement if he wishes, and such a statement is free from the suspicion that it was elicited under pressure from the police. When a person is committed for trial, he is entitled to receive on the same day a full copy of petition and warrants obtained by the prosecution.

At the close of the judicial examination, or without any examination at the accused’s option, the accused may be committed to prison for further examination or until liberated in course of law (i.e., after trial). If the accused is committed to prison for further examination, this is designed to let the criminal authorities pursue their investigations—not so as to question the accused further. The interval between this stage and committal for trial should not normally exceed eight days, and the prison authorities keep a vigilant eye on the observance of this practice. The limit of incarceration is 110 days from the date of commitment until conclusion of the trial Act, s. 43. In very exceptional circumstances, e.g., illness or some factor outside the control of the prosecution, the court may, however, extend time even beyond 110 days: Bickerstaff. Normally, of course, trial takes place much sooner than 110 days after commitment, and procedure may be accelerated when the accused wishes to plead guilty —1887 Act, s. 31. Section 43 of the 1887 Act empowers a suspect after sixty days’ imprisonment to demand release or service on him of an indictment.

Bail

A person charged with any crime except treason or murder may apply for bail to a sheriff having jurisdiction to try the crime or commit until liberation in due course of law. The sheriff to whom

56 1926 J.C. 65.
57 50 & 51 Vict. c. 35.
58 See generally “Bail before Trial” in Smith, Studies, p. 252 et seq.
application is made must grant bail unless he is of opinion that this would be contrary to the public interest. The Lord Advocate or the High Court of Justiciary may admit to bail a person accused of a crime such as murder, which is not bailable under the normal procedure. The Summary Jurisdiction (Scotland) Act, 1954, s. 10, confers on senior police officers the right to admit an accused to bail before bringing him before a magistrate, but only where the charge can be tried in a magistrates' court (other than sheriff court), and therefore not, for example, the offence of being drunk in charge of a motor-vehicle (section 6, Road Traffic Act, 1960\(^{59}\)), which cannot be tried by a judge with less powers than a sheriff.

The tendency of modern Scottish practice is to allow bail in every case except where the Crown can show that it would be contrary to the public interest to do so.

The accused person has the right to ask for bail; he has the right to have his application considered, and unless the court has before it some good reason why bail should not be granted, bail ought to be allowed.\(^{60}\)

The public interest may be affected (a) if there is a risk of the accused absconding and so evading trial; or (b) if the release of the accused might lead to tampering with the evidence, interference with witnesses, or to a repetition of the crime charged; or (c) that the accused has already a substantial criminal record. The Crown are in a strong position to oppose bail if inquiries have not been completed, and where bail has been applied for and refused before commitment for trial, it is not likely that an appeal will succeed. The Crown has a statutory right of appeal against the granting of bail before commitment, while the accused's right of appeal at this stage would be to the nobile officium of the High Court: Milne.\(^{61}\) After commitment, appeal regarding grant or refusal of bail is competent both to prosecution and the accused.

Preparation for Trial

The Lord Advocate with the Solicitor-General, the Advocates-Depute and the Crown Office staff in Edinburgh are responsible for deciding whether the evidence justifies prosecution, the crime or offence to be charged, and also the court in which the prosecution is to be brought. In cases of homicide where there are obvious extenuating circumstances, the Lord Advocate will not frame the indictment for murder. The Lord Advocate also decides whether as a matter of

\(^{59}\) S & 9 Eliz. 2, c. 16.


public policy prosecution should be brought at all. As has been explained earlier, in Scotland it is very rare for a plea of insanity to be raised by the defence. If the Crown is satisfied by the opinion of experts that an accused person is insane, he will be dealt with as such and put at the disposal of the executive.

In a sheriffdom the procurator-fiscal has a wide discretion as to prosecution of lesser offences, while he receives guidance from the Crown Office regarding more serious crime. The procurators-fiscal send to the Crown Office precognitions 62 and reports of crime received from the police and private individuals, together with accounts of sudden and suspicious deaths. Thus Crown Counsel in Scotland—as well as deciding when to prosecute—also discharge the functions of coroners in England. After investigating the evidence bearing on deaths reported to them, they record their opinion in a schedule which is sent by the fiscal to the registrar in whose area the death occurred. If a Fatal Accidents Inquiry is ordered by Crown Counsel, this will take place at a date which will not, by giving premature publicity to the circumstances of death, embarrass the defence at any criminal trial. Scottish pre-trial procedure, in strong contrast to that of England, is screened from publicity, 63 and the functions of Crown Counsel and the procurators-fiscal in Scotland correspond more to those of the investigating judge in Continental procedure than to magistrates conducting a preliminary hearing in England. The accused, however, is not in Scotland entitled to attend the questioning of prospective witnesses. The procurator-fiscal has the duty to assemble the evidence to support the prosecution—as by making inquiries and precognoscing witnesses. 64

If the public interest has to be considered as well as the interests of the accused, it is clear that a trial will be most likely to result in a just decision if the defence is given fair warning of the prosecution’s case: and if the prosecution is also not liable to be surprised by an unexpected defence such as alibi or self-defence raised at the trial for the first time. The Criminal Procedure Act, 1887 65 (ss. 23–27

63 The strict rule prohibiting Press comment between arrest and trial of a suspect was reaffirmed in Macalister v. Assoc. Newspapers, 1954 S.L.T. 14; Stirling v. Associated Newspapers, 1960 J.C. 5; and see discussion, Smith, Studies, p. 286.
64 The main distinctive features of Scottish criminal practice are discussed in two valuable articles by Lord Normand, namely “The Public Prosecutor in Scotland,” 34 L.Q.R. 345; and “Scottish Judiciary and Legal Procedure,” Holdsworth Club, 1941. See also the Memorandum of Evidence of the Lord Justice-General (Lord Cooper) before the Royal Commission on Capital Punishment, Minute of Evidence (18th day) 1950. For the functions of the police acting on the directions of the public prosecutor, see Police (Scotland) Act, 1956, s. 4.
65 50 & 51 Vict. c. 35.
and 37), imposes a duty on the prosecution to provide the
defence with proper notice of the case against the accused.\textsuperscript{66} A
copy of the indictment must be delivered to the accused no later
than six days before the first diet of trial, and he must also be given
a list of Crown witnesses and productions. The defence may then
examine the productions and take precognitions from the Crown
witnesses. The Crown witnesses cannot be compelled to disclose their
evidence to the defence by legal compulsion, but if their refusal to
submit to precognition on behalf of the accused prejudices the
defence, the Crown will usually assist by persuading the witnesses or
by disclosing the Crown precognitions to the defence. Such disclosure
is established practice in the case of serious charges such as murder,
and it is pertinent to observe that here again a professional tradition
outside strict rules of law is of vital importance in the administration
of criminal justice in Scotland.\textsuperscript{67} It has been recognised judicially,
in \textit{Monson} \textsuperscript{68} and \textit{McGuire},\textsuperscript{69} that the duty of the citizen is to make
his testimony available to Crown and defence alike. The defence is
obliged to give notice not less than two days before the second diet
(that is, the trial diet) of any special defence (alibi, self-defence,
insanity, asleep when crime committed, or crime committed by
another person named and designed). If the accused intends to
attack the character of a person whom he is charged with injuring,
say to accuse of immorality a woman whom he is alleged to have
raped, or to accuse a person whom he is said to have assaulted of
quarrelsome disposition, he must likewise give notice of this line of
defence. Further, three days before the trial the defence must provide
particulars of witnesses and productions (other than those on the
Crown list) on which the defence intends to rely.

\textbf{The Trial}

The decision whether to prosecute by solemn procedure before
judge and jury (High Court or Sheriff Court), or whether to try an
accused by summary procedure rests in Scotland with the Crown. The
decision is reached after consideration of all relevant facts. Legal
assistance is made available to any accused person who cannot afford
to retain counsel and law agent.\textsuperscript{70}


\textsuperscript{67} The modern practice of the Crown making available to the defence information regarding witnesses and productions beyond what is necessary for the Crown's case is fully discussed in \textit{Smith}, 1952 J.C. 66.

\textsuperscript{68} (1893) 1 Adam 114.

\textsuperscript{69} (1857) 2 Irv. 620.

It was provided by the Act 1587, c. 91.

That all and whatsoever liegis of this realme, accused of tressoun or for quhatsoever cryme, salhaif their advocattis and procuratoures, to use all the lauchfull defences, quhome the Judge sal compell to procure for thame, incaiss of their refusal.

This was construed by Alison and others to imply that an accused was entitled as of right to have the services of counsel or law agent assigned to him by the court, but this view has been decisively rejected.\(^71\) Since that time, however, the profession itself has made arrangements for the representation of necessitous pannels. Indeed, the post-war legislation which introduced into Scotland a Legal Aid Scheme with remuneration on the social service model does not yet apply in criminal causes in Scotland, though in December 1961 it was stated that the Government had accepted in principle the recommendations of the Guthrie Committee\(^72\) that such a scheme should be introduced. Each year the Faculty of Advocates appoints certain of its number to be counsel for the poor, and provision is made by the Law Society of Scotland for the services of law agents to be rendered to those who cannot afford professional advice. One of the best traditions of the Scottish Bar is that when the charge against a poor accused is of exceptional gravity or importance, the advocate acting as poor's counsel will ask one of the leaders of the Bar to act gratuitously as his senior. Such a request imposes an obligation of honour, and many important cases in Scottish criminal law have been conducted in this tradition by leaders of the Bar.

The accused in Scotland is cited to appear at two diets, the first not less than six days after service of the indictment, the second not less than nine days after the first diet.\(^73\) The first diet, in any event, in solemn procedure is always in the sheriff court when the sheriff receives the plea of the pannel (or accused). A plea in bar of trial should be stated at this stage. The sheriff notes the pleas, recording any preliminary pleas, and also whether the accused pleads "guilty" or "not guilty." If he pleads "guilty," there may be resort to special procedure to expedite passing sentence. The second diet, according to the gravity of the alleged crime, takes place either in the sheriff court or before the High Court; and if in the latter, the High Court may review the proceedings of the first diet before the sheriff. If a plea to the relevancy of the indictment, or a plea in bar, such as tholed assize (*res judicata*) succeeds, the accused will be dismissed from the bar at the second diet. A motion may be made to separate

\(^{71}\) *Graham v. Cuthbert*, 1951 J.C. 25.

\(^{72}\) Cmnd. 1015/1960.

\(^{73}\) 1887 Act (50 & 51 Vict. c. 35), s. 25.
trials or charges if the interests of justice require such separation.\textsuperscript{74} If no preliminary plea is maintained successfully, the accused is tried before a judge (who is master of the law) and a jury of fifteen (who are masters of fact, and may return their verdict by majority vote). Selection of the jury is not a matter of great moment as in some systems. It is not the practice of the Crown to challenge jurors, while the defence may object, without showing cause, to five persons called to serve, and may object to any number on cause shown. After the jury have been sworn they are informed of the charge, and any special defence (\textit{e.g.}, self-defence or alibi) is read to them.

The prosecutor, without further ado, calls his evidence.\textsuperscript{75} It is considered by Scottish lawyers that the interests of an accused might well be prejudiced if counsel for the prosecution were permitted to make an opening speech to the jury, since even the most fair-minded prosecutor may overstate his case, and a jury may well be unduly impressed by an able speech even if it should not ultimately be supported by the evidence. Witnesses called by either party are examined, cross-examined and (where necessary) re-examined by counsel for the Crown and defence. While the judge may interpose questions of his own, he is expected to remain somewhat aloof from the process of eliciting oral testimony.

When the evidence for the prosecution has been heard and (where there are productions) examined, evidence is called for the defence, including the evidence of the accused himself if his advisers so decide. If he declines to give evidence, the prosecution must not comment on the fact, though it is possible that the judge may do so.\textsuperscript{76} The accused, if he gives evidence, usually testifies as first of the witnesses for the defence, and it is not necessary to give notice that he is to be a witness, as must be done in the case of other witnesses for the defence. It is not competent for the defence to submit "no case to answer" once the pannel (accused) has been remitted to the knowledge of an assize and evidence has been led, nor may the judge withdraw the case without the assent of the prosecution: \textit{Kent v. H.M. Advocate}.\textsuperscript{77} The Lord Advocate or his Depute may, however, accept a plea of guilty—if he wishes, on a modified charge—at any stage, but is not bound to accept a plea of guilty at any stage.\textsuperscript{78}


\textsuperscript{75} As to the prosecutor's right to recall a witness see \textit{Todd v. Macdonald}, 1960 J.C. 93, and comment thereon by H. MacLean, 1960 S.L.T.(News) 161.


\textsuperscript{77} 1950 J.C. 38.

\textsuperscript{78} See this practice discussed by Sheriff J. Aikman Smith [1955] Crim.L.R. 94; also "An Aspect of Criminal Procedure" (1956) 72 S.L.R. 221.
PROCEDURE FROM LAWFUL ARREST UNTIL COMMITTAL 227

When all the evidence has been set before the jury, counsel for the Crown makes his closing speech to the jury, a speech which is, by tradition, delivered in a restrained and moderate style. The final speech is invariably given by the defence. There follows the judge’s “charge,” that is his directions to the jury on questions of law, including in appropriate cases the withdrawal from them of certain questions, such as self-defence, when he thinks that there is not sufficient evidence in law to support them. The judge also reviews the evidence as he sees it, but the jury, while usually grateful for a lead from the Bench, are themselves masters of fact. The judge who comes to preside at the trial has no previous knowledge of the alleged facts of the case, and the author has heard a judge of great experience express regret that the present Scottish procedure does not provide some form of dossier for the preliminary information of the presiding judge at a criminal trial.

The jury may retire to consider their verdict, which they may deliver by a majority, and which may take three forms: “guilty,” “not guilty” and “not proven.” The effect of the two latter forms is that the accused goes free. The Scottish practice of accepting a majority verdict may be contrasted with the English requirement of unanimity. Undoubtedly it is a great advantage to eliminate the regrettable strain and publicity of retrial which is inevitable in legal systems which insist on unanimity. It is unusual for conviction to be by a bare majority, though juries may divide narrowly between murder and culpable homicide.

The history of the form of verdicts is possibly of general interest. Until the seventeenth century, it seems, the jury returned a verdict of “guilty” or “not guilty”—though the precise term used varied. Equivalent to “guilty” were “fylet,” “culpable” and “convickit,” while a verdict of “not guilty” might be in the form “clengit,” “free,” or “innocent.” Towards the end of the seventeenth century, however, the judges concerned themselves closely with the relevancy of the libel, with the result that the jury was virtually restricted to pronouncing on certain facts specified in the interlocutor of relevancy. This left to the judges the responsibility of applying the law to facts proved. Thus verdicts of “proven” and “not proven” came into general use. Arnot in particular has criticised most strongly several instances where the judges abused their powers, as by disregarding proof of self-defence, and he reports with enthusiasm the vigorous defence on an indictment for murder of Carnegie of Finhaven in 1728. Counsel in this case, despite judicial opposition,

80 Criminal Trials, pp. 190-191.
urged the jury successfully to reassert their unquestionable right to return a verdict of “not guilty,” and not to peril the life of the accused on the interpretation which the judges might place on a verdict that certain facts were proved. Since this time, juries have returned general verdicts of “not guilty” or “not proven” somewhat indiscriminately, though, strictly, a “not proven” verdict is appropriate where full legal proof is lacking, and where in England the accused would probably be convicted, as where the jury believe the evidence of one credible witness. Since the necessity for corroboration of evidence is a general rule in Scottish criminal law, a Scottish jury could not convict on the evidence of a single witness. It is not every Scottish Smith who would wish to claim Madeleine Smith as among his forebears, but it is not admitted that a “not proven” verdict implies an undeserved stigma. In somewhat exceptional circumstances where, due to an error in procedure, an accused was found “not proven” on summary complaint without the defence being heard, the High Court on appeal substituted a verdict of “not guilty” for one of “not proven.” Their Lordships gave little encouragement, however, to others who might in future wish to press a distinction which infers a dubious difference in law: *McArthur v. Grosset.*

After a verdict of “guilty,” the prosecutor moves for sentence. If he declined to do so, no sentence could be passed on the accused. Even where the death penalty is competent by law, it is competent for the Lord Advocate to “restrict the pains of the law.” The defence may always address the court in mitigation of sentence when this is a matter of discretion.

**Appeal**

By the Criminal Appeal (Scotland) Act, 1926, a right of appeal was given for the first time to persons convicted on indictment. The appeal lies to a Bench of at least three Lords Commissioners of Justiciary, and it may be observed that the court is not a separate court but a session of the High Court of Justiciary. Indeed, in questions of great importance, all the Commissioners of Justiciary may sit to settle the law, e.g., *Kirkwood* and *Sugden* (which disapproved the alleged doctrine of vicennial prescription of crime).

82 But the motion for sentence may be implied: Noon, 1960 J.C. 52; “Moving for Sentence” (1960) 76 S.L.R. 121.
83 In modern practice the prosecutor’s discretion is normally exercised before the jury consider their verdict.
84 16 & 17 Geo. 5, c. 13, extended by 17 & 18 Geo. 5, c. 26.
85 1939 J.C. 36.
86 1934 J.C. 103.
One of the most notable instances of this jurisdiction was in *Slater*, when Oscar Slater, who had been convicted of murder in 1909, had had his sentence of death commuted and thereafter served a "life" sentence, eventually appealed successfully and had his conviction quashed. It may be recalled that the House of Lords exercised and exercises no right of appeal from decisions of the High Court of Justiciary. Paradoxically, the judges of this court rather than those of the Court of Session required the supervision of an appellate court during the eighteenth century.

An appeal may be brought by a panel against conviction on any ground which raises a question of law alone, or (with leave) against conviction on any ground which raises a question of fact or a question of mixed law and fact, or (with leave) against sentence—1926 Act, s. 1. The court may allow the appeal and quash the conviction altogether if they consider the jury's verdict is unreasonable, or that it cannot be supported by the evidence, or there has been a wrong decision in law or a substantial miscarriage of justice. There are further powers vested in the court to substitute for the jury's verdict of guilty a verdict of guilty of another offence, to impose a different sentence (more or less severe), and to hear additional evidence. This last power is exercised only where the court considers that the effect of the additional evidence, if led at the time, would have resulted in a different verdict from that given. Where an irregularity has occurred which does not lead to a substantial miscarriage of justice, the appeal may be dismissed. The High Court in the exercise of its appellate jurisdiction has unfortunately no power to order a new trial. It is also competent for the Secretary of State for Scotland to refer a case to the High Court for an opinion—whether an appeal has been already heard or not. The prosecution has no right of appeal from acquittal on indictment.

A notable body of criminal jurisprudence has been built up by appellate sessions of the Justiciary Court, and it may be noted that there is no rule or convention which discourages dissenting opinions in the High Court (as in the Court of Criminal Appeal in England).

87 1928 J.C. 94.
88 16 & 17 Geo. 5, c. 15.
90 See Gallacher, 1951 J.C. 38.
91 Higgins, 1956 J.C. 69, and Gallacher, supra; Dr. G. H. Gordon concludes that the High Court is very reluctant to allow new evidence to be led, largely because of the "sacrosanct" function of the jury—see "New Evidence in Criminal Appeals," 1957 S.L.T. (News) 125.
92 See Professor Seaborn Davies's valuable paper "The Court of Criminal Appeal: The First Forty Years" (1951) 1 Journal S.P.T.L. (n.s.) 425, and comments thereon from the Scottish viewpoint, ibid. p. 462.
SUMMARY PROCEDURE

It is not intended to deal with summary procedure in detail. Fundamentally, the principles which govern summary trial are the same as those which govern solemn procedure. The Summary Jurisdiction Act, 1954,\(^9\) regulates the prosecution of offences which are not deemed to be serious enough to merit jury trial. Proceedings are instituted by complaint. The sheriff exercises a summary jurisdiction as well as a solemn jurisdiction, but there are other courts of summary jurisdiction, such as the justice of the peace or burgh police courts. Appeals are now usually taken to the High Court by way of "suspension and liberation" when the person convicted is in prison, and complains (say) that there has been a denial of the essentials of justice; or, alternatively, review may be by "stated case" on numerous grounds. Procedure by "stated case" is competent to prosecution and defence alike.

SOME SPECIALTIES OF EVIDENCE AT CRIMINAL TRIALS

As regards evidence, the burden of proof rests initially on the prosecution, though there are special circumstances where statutory provisions or common law presumptions aid the prosecution, e.g., the presumption of sanity and the presumption of guilt which may arise in certain circumstances from the possession of recently stolen property: Fox v. Patterson.\(^9\) Scots law applies somewhat strict rules of evidence: a consequence, presumably, of the use of juries in criminal proceedings. Thus, with certain exceptions, hearsay evidence is excluded. In the older law, extremely complex rules of exclusion applied—excluding numerous categories of witnesses because of interest, infamy, sex and so forth. Gradually strict exclusion was relaxed to permit the evidence of these suspect categories, but only cum nota. In 1693 an interlocutor\(^9\) discriminated between the weight to be attached to the testimony of women regarding domestic matters, and when their evidence ranged beyond this field. "The Lords allow the women to be received witness, cum nota, as to all things done without doors, but admit them simpliciter as to all things done within doors." By Hume's time this distinction had gone, and the uninterrupted trend of the law has been to extend the categories of admissible evidence, leaving to the jury the duty of assessing what credit to attach to the testimony of one whose veracity may be suspect. It may be convenient, therefore, to comment on certain categories of evidence before considering legal sufficiency of proof according to the present law of Scotland.

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\(^9\) 2 & 3 Eliz. 2, c. 48.

\(^9\) 1948 J.C. 104; Wightman, 1959 J.C. 44; and see p. 236, ante.

\(^9\) Quoted by Hume, Vol. 11, 339.
In the first place, it may be observed it is now competent for the accused and the wife or husband of the accused to give evidence at the trial. In certain cases specified in the Criminal Evidence Act, 1898, the spouse is not only competent but compellable. Until the Criminal Evidence Act, 1898, came into force, it was not competent for the accused to give evidence on oath at his trial. His opportunity to present his version of the facts arose at the stage of judicial examination. Since 1898 the accused has been permitted to give evidence at the actual trial, if he wishes, and thus the basic and primary purpose of judicial examination was virtually superseded. Accordingly in 1908 it was provided that it should no longer be necessary to take a declaration. The author will venture the view that the 1898 Act, which was primarily a measure designed for English procedure, has not provided a fully satisfactory solution in Scotland. The merit of judicial examination was that an accused could be questioned judicially regarding the circumstances of an alleged crime; though he could refuse to answer questions which might incriminate him. The jury at the actual trial would draw certain inferences from the declaration as a whole—which was read to them. Today an accused may throughout proceedings remain absolutely silent, and thus leave the jury to draw conclusions from an incomplete presentation of the facts. A good case might be presented for reviving compulsory judicial examination before trial, or possibly during the trial, and for abolishing the dubious privilege offered to an accused to remain silent.

The Criminal Procedure Act, 1887, s. 67, provided that previous convictions of the accused should not be disclosed to the jury before a verdict. Prior to the Act it was the custom to prove previous convictions as part of the case for the Crown, and this would still be done in the special case of the accused being charged as an habitual criminal. The accused, who is now a competent witness on his own behalf under the Criminal Evidence Act, 1898, is protected from cross-examination as to his previous bad character and convictions

except in the exceptional circumstances referred to in section 1 (f). Since the Act applies both to Scotland and England, it is of some interest to note that its application in practice seems to diverge, and the High Court of Justiciary does not seem altogether disposed to adopt the views of the House of Lords on the interpretation of the Act. While the enactment has often been relied on in England, the first decision reported in the Scottish Justiciary reports upon section 1 (f) was fifty years after the passing of the measure. This suggests that considerable restraint and concern for the interests of the accused must have been shown by those responsible for the public duty of prosecution in Scotland; but the lack of occasion to rely on the statute may also in part be due to the fact that in Scotland available procedure provides certain safeguards against the prosecution being taken by surprise by unexpected defences. Section 1 (f) of the Act provides, inter alia, that an accused person may not be cross-examined to show his bad character, or as to his previous convictions, unless "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." The import of this language fell to be construed in O'Hara v. H.M. Advocate. The essential facts relevant to the appeal were as follows: O'Hara, the appellant, had been charged with breach of the peace and assault upon two police officers. To the charge of assault he had lodged in advance of trial (as the law of Scotland requires if a special defence is to be made) special defences of provocation and self-defence. At the trial, the evidence upon which the Crown mainly relied was that of the two police officers who were said to have been assaulted; and these same witnesses were cross-examined by counsel for the defence on the line that one of them had been under the influence of drink and had been the aggressor. Later the accused himself gave evidence to like effect, whereupon the procurator-fiscal asked, and obtained leave from the sheriff, to cross-examine the accused on his past record—which included three convictions for assault and five for breach of the peace. The jury convicted by a majority, and an appeal was brought against conviction on the ground that on a proper construction of the Criminal Evidence Act, 1898, s. 1 (f), cross-examination to show bad character should not have been allowed. Counsel for the appellant contended that the defence by its very nature necessarily involved the leading of evidence which reflected on the police witnesses; and that counsel for the defence was entitled to cross-examine Crown witnesses along these lines, if such evidence was relevant to the issue, and was adduced.

3 1948 J.C. 90.
4 Supra.
for the sole purpose of establishing the facts and not with the ulterior motive of discrediting the witnesses.

There being no Scottish authority on the point, leading English decisions were cited as persuasive authority to the High Court of Justiciary, and these were carefully reviewed in the opinions of the Lord Justice-Clerk and of Lord Jamieson. The Lord Justice-Clerk dealt, *inter alia*, with the line of cases from *R. v. Marshall*⁵ to *R. v. Turner*⁶; *Stirland v. D.P.P.*⁷; *R. v. Jenkins,*⁸ and observed “The net result seems to be that the Court of Criminal Appeal in England adheres to *Hudson*⁹ with certain modifications in cases of rape and subject to the discretionary powers of the presiding Judge.” Regarding this compromise solution as somewhat unsatisfactory, the Lord Justice-Clerk proceeded to construe the subsection, unhampered by previous Scottish authorities and diverging from the interpretation adopted in leading English decisions. On the construction of the word “character” his Lordship said,¹⁰

In virtue of subsection (j) (ii) the accused loses the statutory protection in two events—(a) if he seeks to establish his own good character, and (b) if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. In the first of these instances “character” must mean character generally, and quite apart from the issue raised by the indictment. It seems natural, therefore, to read “character” in the latter part in the same sense as the general character of the prosecutor or the witnesses.

He then proceeded to distinguish possible cases into two broad categories. The first class comprises those cases where cross-examination of the Crown witnesses is restricted to what is necessary for the accused fairly to establish his defence to the indictment—albeit it involves an invitation to the jury to disbelieve the witnesses. In such cases the character of the accused is not put in issue. *Secus* in the second class, which comprises cases where the cross-examination attacks the general character of Crown witnesses. Even in the second class of case, however, though cross-examination of the accused as to his previous bad character is clearly competent, the fundamental consideration is a fair trial, and the judge has discretion to disallow such cross-examination if the fairness of the trial might be thereby

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⁵ (1899) 63 J.P. 36.  
⁹ [1912] 1 K.B. 464. If the defence makes imputations on the character of a witness, the section will operate, whether or not the imputations are necessary to develop a defence, according to the English interpretation.  
¹⁰ At p. 98.
On the particular facts before the court, the cross-examination fell within the first class, and did not put the appellant's character in issue. The position would have been otherwise had the defence sought to establish that the constable was from his general character and antecedents an unreliable witness or person of dissolute habits. It may be observed here that, though it is competent for the defence to attack the general character of the party allegedly injured (which may be necessary where sexual crimes are charged), particular instances of crime or immorality cannot be proved—except to show that a woman has previously misconducted herself with the accused himself.

Socii Crimini

In Hume's time it was competent to adduce the evidence of a socius criminis, though it was legitimate to comment on his credibility. The categoric requirement of Scottish criminal law (with a few statutory exceptions) is that there must be corroboration of the evidence for the prosecution. This has compelled the prosecuting authorities on occasion to resort to the tainted testimony of the accomplices of the accused to discharge the burden of proof. Possibly the most celebrated example of this was the notorious case of Burke and Hare. Burke was convicted of murder—to provide for payment subjects for anatomical dissection—partly on the testimony of his equally villainous associate. In such a case the prosecution can compel the socius criminis to testify—and indeed can keep him in prison till the trial—and the socius cannot decline to answer incriminating questions. After he has given his evidence, as Hume puts it 12 "the prosecutor discharges all title to molest him for the future." In short, by operation of law the prosecution is barred from instituting criminal proceedings against the socius in respect of the criminal conduct to which he has spoken—provided, of course, that the complicity of the socius was known to the prosecutor before the trial at which he gave evidence. This rule (which is absolute in Scottish law) led to intense public indignation in Scotland when Hare went free after securing Burke's conviction. 13 In Dow v. McKnight 14 it was held by a Full Bench (Lord Mackay and Lord Carmont dissenting) that the uncorroborated evidence of two socii may by itself suffice to convict, if such evidence is believed by the jury after explicit comment by the judge to the jury on the importance of

11 For an example of justifying cross-examination of an accused as to previous convictions, see Fielding, 1959 J.C. 101, cf. Daighan, 1961 S.L.T. (Sh.Ct.) 38.
14 1949 J.C. 38.
weighing such testimony with special care.\textsuperscript{15} Where two or more persons are actually tried together as \textit{socii}, the evidence which one gives on his own behalf is admissible for or against his associate. If the evidence of one \textit{socius} tends to incriminate the others, they are entitled to cross-examine him. One co-accused cannot call another accused as witness on his behalf unless the trials have been separated, or the proposed witness has pleaded guilty.

It would seem that a witness is probably not to be regarded as \textit{socius criminis} unless he has already been convicted of the crime which is charged against an accused, or is charged along with an accused, or gives evidence confessedly as an accomplice in the crime charged \textsuperscript{16}—or interrelated as in the case of theft and reset.\textsuperscript{17}

Though the presiding judge has a duty to caution the jury not to accept the evidence of a \textit{socius} against an accused unless fully satisfied that it is credible—in short to receive it \textit{cum nota}—this must not be construed to imply that the evidence of a co-accused giving evidence on his own behalf is to be regarded as less credible than that of any other accused entitled to the presumption of innocence in his favour.\textsuperscript{18}

\textbf{Corroboration}

It is a general rule in Scots law (qualified by a few statutory exceptions)\textsuperscript{19} that the material elements in the prosecutor's case which identify the accused with the commission of the crime must be established by the testimony of two credible witnesses. Thus, where an Act applicable to Scotland and England provided that an analyst's certificate “shall be evidence” of the facts stated therein, though such a certificate might suffice to secure conviction in England, by itself it could not suffice in Scotland: \textit{Bisset v. Anderson}.\textsuperscript{20} Corroboration is required even of an admission of guilt allegedly made prior to the trial. When, however, an accused person has made a confession, to justify conviction it is only necessary to prove that the crime charged has been committed and also such additional facts as, taking the evidence together, would satisfy men beyond reasonable doubt that the accused was guilty. In \textit{Connolly}\textsuperscript{21} the Lord Justice-Clerk (Thomson) observed,\textsuperscript{22} “A confession of guilt—short of a formal plea of guilty—is not enough. There must be evidence from some

\textsuperscript{15} On the judge's duty see \textit{Wallace}, 1952 J.C. 78.

\textsuperscript{16} \textit{Wallace}, 1952 J.C. 78, esp. \textit{per} Lord Keith at p. 83.

\textsuperscript{17} \textit{Murdoch}, 1955 S.L.T. (Notes) 57.

\textsuperscript{18} \textit{Martin}, 1960 S.L.T. 213.

\textsuperscript{19} \textit{e.g.}, \textit{Deer (Scotland) Act}, 1959, s. 25 (4). Gamekeepers are not normally escorted by credible witnesses.

\textsuperscript{20} 1949 J.C. 106.

\textsuperscript{21} 1958 S.L.T. 79.

\textsuperscript{22} At p. 80.
other source which incriminates the accused. . . . While it is necessary that there should be evidence from two independent sources, the weight to be attached to each source may vary. If one source is unimpeachable, the standard required of the other may be lower than if the first source carries less weight. It is the conjunction of the testimonies which is important.” Lord Patrick in the same case laid down that, “All that is necessary to justify a conviction is that in addition to proof of the accused’s confession of the crimes charged and proof of the corpus delicti, there shall be proof of additional facts tending to incriminate the accused and such that the whole proof will convince men beyond reasonable doubt of the accused’s guilt. One instance of such additional facts is undoubtedly that the accused is discovered, shortly after the commission of the crime, attempting to secrete the stolen goods. That is what was proved in the present case.” It has been held that when an accused had made admissions which cast suspicion on him in connection with a case of housebreaking, conviction was justified after proof of the actings of a tracker dog of established reliability which identified the suspect with the crime.24

Though the practice has been disapproved, it has been held sufficient for the prosecution to obtain corroboration of a single witness through an admission elicited in the course of cross-examination from an accused who elected to give evidence at his trial. On the other hand, corroboration by contradiction—i.e., where the accused can be shown to have made a false statement—is not admissible in criminal law: Wilkie.26

It is sometimes said that legal proof may be supplied either by two witnesses to the material facts or by one witness supported by facts and circumstances. Clearly, however, the facts and circumstances must be proved by witnesses, and so the general proposition stands that there must be corroboration by witnesses associating the pannel with the crime: Lambie.27

A Full Bench has recently considered the principles underlying the doctrine of corroboration, and unanimously approved a construction which might seem wider than what had previously been supposed by some to be the law.28 In Gillespie v. Macmillan 29

23 At p. 81.
26 1938 J.C. 128.
27 1934 J.C. 137; dicta in that case implying that a single witness may be sufficient for identification were disapproved in Morton, 1938 J.C. 50, and Mitchell v. Macdonald, 1959 S.L.T. (Notes) 74.
conviction on a charge of driving at an excessive speed was upheld after proof that two police constables stationed at either end of a measured distance had operated stop-watches independently—so that one only spoke to the moment of the accused’s car’s entry on the measured distance and one only as to the moment of exit. Although it was recognised by the High Court that two witnesses were required to identify and incriminate the accused, it was held that the evidence of single witnesses to each fact in a chain of circumstantial evidence was sufficient in law to establish the offence. The Lord Justice-General (Clyde) disapproved of the dictum of his predecessor (Lord Cooper) who in Bisset v. Anderson had interpreted the earlier leading case of Morton as meaning that “the evidence of a single witness, however credible, is insufficient at common law to establish the truth of any essential fact required for a criminal conviction.” In the other opinion delivered, the Lord Justice-Clerk observed, “I do not think that the sufficiency of proof of a criminal charge can be any more precisely defined than by saying that there must be facts emanating from at least two separate and independent sources.” The latter day Susanna may look wistfully to the past.

Evidence of complaints or statements made de recenti by women or children who have been victims of sexual assaults does not corroborate the testimony of the injured party, though de recenti statements are admissible to reinforce the credibility of the complainant’s story: Morton and Burgh. Otherwise, the rules against hearsay exclude evidence as to statements made by the injured party—unless they can be brought within the rule of res gestae.

The rule that the law requires two witnesses implicating the accused in the crime charged against him is relaxed where a series of similar crimes, interrelated by character, circumstance, and time, justify the inference that the pannel pursued a course of criminal conduct. In such cases the testimony of single credible witnesses to each crime in the series may be accepted as mutual corroboration of the course of criminal conduct: Moorov and Burgh. This doctrine is invoked with caution, and is excluded unless some substantial interrelation of separate crimes can be established: Ogg.

The most familiar aspect of the use of this doctrine is in cases of

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50 At p. 38.
51 1949 J.C. 106 at p. 110.
52 1938 J.C. 50.
53 At p. 39. It may be stressed that in the instant case the accuracy of the watches used was checked. In Grierson v. Clark, 1958 J.C. 22 it was held that the fact that a weighbridge was at a railway station raised no presumption of accuracy.
54 Supra.
55 1944 J.C. 77.
56 1930 J.C. 68.
57 Supra.
58 1938 J.C. 152; but see McCudden, infra.
indecency with girls, though it is also competent with regard to other criminal conduct. In Moorov, Lord Sands exemplified this by a hypothetical course of fraud, by a man getting food and lodging without payment on the false pretence that he was Mr. Bernard Shaw, and absconding in the morning with the family Bible. Evidence by single witnesses of successive incidents of this kind would afford mutual corroboration of each other. In McCudden, the separate incidents which created the nexus were attempts to bribe football players. This case has pressed the doctrine to questionable limits. Only two incidents were alleged—each consisting of conversations. The only real nexus was in the details of these disputed conversations; there was nothing very peculiar about their extrinsic circumstances. Previous cases had apparently depended on the adequate identification of the accused with crimes of which the actual commission by someone was not in dispute.

89 McQuade, 1951 J.C. 143—where the charges were of assault by razor slashing—seems however to have been the first reported extension of the doctrine beyond sexual crimes.
40 1952 J.C. 86; and see now Harris v. Clark, 1958 J.C. 3; Walsh, 1961 J.C. 51.
Part 3

PRIVATE LAW
PRIVATE LAW

ORDER OF ARRANGEMENT

The author has experienced no little anxiety in deciding upon the most suitable arrangement for a discussion of Private Law in contemporary Scottish practice. Continental influences are apparent in the layout of the institutional works, but these were all written before the systematic schemes of arrangement worked out by the Pandectists or codifiers were available for consideration. Gloag and Henderson's *Introduction to the Law of Scotland* seems to have been compiled so as to divide the whole field covered between the two learned co-authors according to their special interests and experience, and to a considerable extent it is therefore compiled upon an encyclopedic method. An endeavour has been made to present Private Law in the following chapters according to an arrangement which owes much to the earlier institutional writers (and indirectly to their European inspiration) but also is in debt to modern European models. None seemed altogether suitable for the treatment of Scots Private Law, and the fallibility of the author may well be apparent in the system upon which he has eventually decided.

Four points may be stated *in limine*. First, the topics to be discussed in this volume would fall within the scope of modern Civil Codes in legal systems where separate commercial and industrial codes have been enacted. These latter aspects of modern Scots law depend largely on consolidating statutes applicable, with modifications, to the United Kingdom as a whole, and are to be discussed by Professor J. J. Gow in a companion volume. Nevertheless, it must be appreciated that the statute law in these fields does not altogether supersede the general principles of Scots law—in particular the principles of contract and delict. Pressed as Professor Gow and the present author both are to make their books available as a matter of urgency, they have had no real opportunity to collate their labours so as to eliminate all overlapping of treatment. It is mutually agreed, however, that, though the present book may refer in passing to matters in the mercantile and industrial field, exposition and discussion of these topics is the province of the companion volume.

Secondly, there is the problem as to how certain general principles of law should be treated in a book of this kind. Doctrines such as personality and capacity, good faith, defects of the will, personal bar and prescription are relevant for many divisions of the law. Hitherto,
Scottish legal authors have not been inclined to generalise the treatment of such doctrines, and they have been dealt with somewhat fragmentarily under various headings. The solution which will be adopted in the present book is to discuss briefly certain selected concepts in the chapters on General Concepts. A particular legal doctrine, though encountered most frequently—as in the case of error—in the context of contract, may also be relevant wherever there is a voluntary creation of obligation or disposition of property. Yet the consequences are not identical in all circumstances, and analogy, though a useful aid, must be used with caution. Therefore, concepts dealt with generally in connection with General Concepts will be taken up again in the contexts to which they are most relevant and wherein their scope has been most clearly recognised and defined.

Thirdly, since non-patrimonial rights (such as those to liberty, bodily integrity and honour) are in practice vindicated either by the procedures of Public Law or by delictual actions, which, though penal in origin, now ostensibly seek reparation, it seemed unnecessary to deal with patrimonial and non-patrimonial rights separately. In matters of family law particularly, pecuniary and personal rights and duties are very closely associated.

Lastly, a complete statement of Private Law should, no doubt, include a Section on Private International Law, and also a Section dealing with the Enforcement of Rights. For a variety of reasons the scope of this book cannot be extended to treat of these matters comprehensively and systematically. They can only be mentioned briefly in the course of discussing other divisions of the law.

Private Law, then, will be considered under the following heads:

A. GENERAL LEGAL CONCEPTS
B. FAMILY LAW
C. SUCCESSION
D. LAW OF PROPERTY
E. TRUSTS
F. OBLIGATIONS

Succession (and Family Law, with which it is closely linked) is concerned with aggregates of rights and duties. The core of Private Law, however, is concerned with rules regulating the rights of persons (or Subjects of Rights) over the Objects of Law. These may be Real Rights (Property) or Obligations. Trusts may be regarded as a category deserving separate and special treatment.
Part 3

PRIVATE LAW

A

General Legal Concepts
CHAPTER 8
PERSONS AND PERSONALITY (SUBJECTS OF RIGHTS)

NATURAL PERSONS

The law distinguishes between "natural persons" and "juristic persons," the former being human beings and the latter entities upon which the law itself has conferred capacity to hold property and to be the subject of rights and liabilities. To a considerable extent the considerations applicable to these two categories vary, and therefore those appropriate only to "natural persons" may be first considered.

Existence of Natural Persons

Birth

In general personality begins at birth and ends at death, though for certain purposes the law recognises capacity for rights and duties beyond the limits of a human being's life. To acquire personality a child must have been born alive and acquired an existence separate from his mother. At this stage he becomes fully capable of rights, though death supervenes within minutes. Where a husband claims courtesy (a different interest in his deceased wife's heritage) a condition of his right is that he should prove that a child of the marriage was born alive. In this one case the old Proculeian rule, disapproved by Justinian, that for proof of live birth a child must have been heard to cry, has apparently been accepted into Scots law.

In Scots law the exact time of a child's birth may be an important consideration in questions affecting his capacity—as, for example, in determining when he becomes a minor or achieves majority. Lord Fraser laid down "The periods of age are computed de momento in momentum, so that if the minor were born at eleven o'clock at night on January 1 he would not be a pubes or a major, till eleven o'clock at night, fourteen or twenty-one years afterwards. The period must be calculated from the very moment of birth, to the

1 The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19, provides that "In this Act and in every Act passed after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."
2 Erskine II,9,53; Regiam Majestatem II, c. 58.
3 Hence the hour of birth has to be inserted in the Register.
4 Fraser, Parent and Child (3rd ed.), p. 200; see also Craig, 2,12,14; Stair, 1,6,33; Erskine, 1,7,36. In Drummond v. Cunningham-Head (1624) Mor. 3465, a person who was within 12 or 18 hours from his majority when he signed a bond of caution was held entitled to reduce it.

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same minute at the end of the pupillarity and minority. The maxim *dies inceptus pro completo habetur* is here therefore unsanctioned. This was following the rule of the Roman law." (It may be noted parenthetically that the English rule differs.) A child *in utero* may be regarded as being already born, and by fiction to have an expectancy of rights, though still part of his mother. This depends on the rule of Roman law "*nasciturus pro iam nato habetur quando de eius commodo agitur.*" In Elliot *v.* Joicey, a decision not itself binding on the Scottish courts but accurately summarising Scottish doctrine, Lord Macmillan stated the law in conformity with the *communis opinio* of the institutional writers, which has also been affirmed in recent Scottish decisions. He observed "From the earliest times the posthumous child has caused a certain embarrassment to the logic of the law, which is naturally disposed to insist that at any given moment of time a child must either be born or not born, living or not living. This literal realism was felt to bear hardly on the interests of posthumous children, and was surmounted in the Civil law by the invention of the fiction that in all matters affecting its interests, the unborn child *in utero* should be deemed to be already born." It may be stressed that this fiction is only applicable when it operates for the child’s benefit. The rule is usually invoked in questions of succession, and is particularly relevant where a posthumous child, unprovided for by his father’s will, relies on the *conditio si testator sine liberis decesserit.* It has, however, been held that a posthumous child can be awarded reparation in respect of the death of a parent killed through the defender’s fault, and there seems to be no reason in principle why a child should not recover damages for physical injury done to himself in a pre-natal state.

**Death**

*Eadem persona cum defuncto.* Though personality terminates at death, it is continued for some purposes through those who take or administer the estate of the deceased. At common law the heir was liable for the debts of his ancestor, though they exceeded the value of the estate. Means were devised to evade this liability, and by the Conveyancing (Scotland) Act, 1874, s. 12, it was provided that the heir shall not be liable beyond the value of the estate. So far as the executor is concerned, he is with regard to rights and duties,

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5 D. 1,5,7.
7 At p. 70.
8 See, e.g., *Elder’s Trs. v. Elder* (1894) 21 R. 704; (1895) 22 R. 505, also *post,* p. 420.
NATURAL PERSONS

eadem persona cum defuncto, subject to the limitations that his liability shall not (except in the case of a vitious intromitter 10) extend beyond the estate committed to his charge, and, further, that certain rights and obligations involving delectus personae are too personal to transmit at all.11

Presumption of Death

Until express provision had been made by statute, death could not in general be presumed under Scots law in the case of a person who had disappeared, unless it was clear that to suppose him to be still alive would be to regard him as older than those who had passed the allotted span.12 This caused great frustration to those prospectively entitled to property after the death of the person who had disappeared. It is now provided (in particular by s. 3 of the Presumption of Life Limitation (Scotland) Act, 1891 13) that, when any person has disappeared and has not been heard of for seven years or upwards, on petition by a person entitled under the statute the court may, after such procedure and inquiry as it may direct, find that the absent party died on some specified date within the seven-year period after the date when he was last known to be alive; and where there is no evidence that he died at any definite date, may find that he died exactly seven years after he was last known to have been alive. Those empowered to petition include persons entitled to succeed to any estate on the absentee’s death, or entitled to any estate contingent on the death of the absentee, or the fìar of an estate burdened with a liferent in favour of such absentee. Though the absentee’s property is released for distribution as a result of the court’s judgment, the Act keeps open the right of the absentee to recover the estate (or its price as surrogatum) from the person who obtained it under the Act or from his gratuitous alienee. This right to recover remains effective for a period of thirteen years from the date at which the title of the estate, if it admits of being registered in a public register, was so registered, or, in the case of any other estate, from the date when possession was taken of it. After the lapse of this thirteen-year period, recovery is barred. Rights of third parties preferable to that of the absentee or his representatives are not affected by the Act, nor does it apply to claims under policies of insurance.

It is further provided by the Divorce (Scotland) Act, 1938,14 s. 5, that a spouse who alleges that reasonable grounds exist for supposing the other party to the marriage to be dead may petition the court for

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10 See Erskine, III,9,49, also post, p. 455.
12 See Stair, IV,45,17; Greig v. Merchant Co. of Edinburgh, 1921 S.C. 76.
13 54 & 55 Vict. c. 29.
14 1 & 2 Geo. 6, c. 50.
a decree of dissolution of marriage on the grounds of presumed death. The court, if satisfied, may grant such a decree, and it is provided that, if the other party has been continually absent from the petitioner for a period of seven years, during which time the petitioner has no reason to believe that the other party has been living, the absentee shall be presumed dead unless the contrary is proved. It is submitted that the decree once granted (at all events in the absence of fraud) could not be reduced if the absentee returned subsequently. Further, it may be noted that the provisions of the 1891 Act and the 1938 Act are quite separate in their consequences, and decree under one cannot be relied on for the purposes served by the other.

Commorientes

In situations where two or more persons perish in a common calamity such as air accident, shipwreck, fire or enemy action, and it cannot be ascertained whether one in fact predeceased the other or others—and, if so, which—most legal systems invoke presumptions to solve the difficulties which emerge. Roman law and many Civilian systems base these presumptions on the respective ages, sexes and probable powers of physical endurance of the victims. The maxim of a cynic might well be “women and children last” in the struggle for survival. So far as Scots law is concerned, however, the Roman rules (likewise those of France and England) were considered but rejected in Drummond’s J.F. v. H.M. Advocate, a case which arose as the result of a German air raid on Clydebank, in which a house was totally destroyed, and all the occupants—father, mother, and two children—were killed. The Lord Justice-Clerk (Cooper) observed that it would be difficult to entertain the suggestion that, in relation to a problem which must have arisen on many past occasions, we should now for the first time adopt from Rome or from any other source an entirely new solution... It is not as if the only alternative to adopting the Roman (or some other) presumptions was to leave the problem unsolved and insoluble; for we have ready to our hand the simple alternative... that survivance is in every case a matter of proof, and that, when a claimant... is unable to establish the fact of survivance, his claim necessarily fails.” This view was followed in the subsequent case of Mitchell’s Exrx. v. Gordon’s Factor. It may, however, be observed that Lord

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15 See post, p. 336.
16 Sec. of State for Scotland v. Sutherland, 1944 S.C. 79; Fraser Petr., 1950 S.I.T.(Sh.Ct) 51.
17 D.34.5.9.3; cf. 36.1.18.7; also Voet, 34.5.3.
18 e.g., Code Napoleon, ss. 721-722.
19 1944 S.C. 298.
20 At pp. 301-302.
21 1953 S.C. 176.
Cooper, who was somewhat (and unusually) peremptory in his rejection of aid from Roman law, and was not invariably averse to judicial legislation, found the lack of presumption a regrettable impediment when he sat in the Outer House in *Ross's J.F. v. Martin.* His endeavours to solve the difficulties emerging in that case were eventually disapproved both in the Second Division and in the House of Lords; and in the ultimate appeal their Lordships expressed regret that no statutory presumption regarding survivorship—comparable to that of the Law of Property Act, 1925, s. 184, in England—applied in Scots law. In the Second Division the Lord Justice-Clerk (Thomson) made a very relevant point—"Now that the motor-car, the aeroplane and the bomb have increased the risk of common calamity, testators would be well advised to see that the language of their wills is sufficient to meet the possibility." Testation in an atomic age must move with the times.

"Civil Death"

In Roman law *capitis deminutio maxima or media* (which had far-reaching effects on personal and property rights) were regarded as equivalent to "civil death," and this doctrine has survived in some Civilian systems, particularly in relation to persons entering convents or monasteries. The last vestige of this status in Scotland was outlawry. Until the *Criminal Justice (Scotland) Act, 1949,* came into force, a sentence of fugitation deprived an individual of his status, and he was deprived of the benefit of law. In older practice, indeed, he was *caput lupinum* and could be slain without penalty. In modern practice persons under capital sentence, or undergoing certain punishments, are disqualified from exercising the franchise and from public office. Vestiges of *infamia,* disqualifying the testimony of certain categories of witness, have now virtually disappeared, though the evidence of a *socius criminis* is only to be received *cum nota.*

**Identification of the Person**

Various factors distinguish individuals from the generality of natural persons. In particular, the law identifies a person by sex, name, familial position and geographical location.

**Sex**

A child may be born either male or female or having the characteristics of both sexes. When the birth is registered, however,

23 *Ibid*.
25 15 & 16 Geo. 5, c. 20.
26 1954 S.C. at p. 25.
27 12, 13 & 14 Geo. 6, c. 94, s. 15 (2).
it must be designated male or female, which may not always be easy. Determination of sex is, however, of considerable importance, especially where questions of succession to property \(^{28}\) are concerned. In general, particularly in the past, women were subjected to greater disabilities than men; though in other cases—as in acquiring property rights on divorce and in securing alimentary protection by antenuptial marriage contract—they did, and do, enjoy certain advantages over males. Under Roman law a hermaphrodite was adjudged to belong to the sex which it resembled most closely, and in dubio was regarded as male. Though this question was discussed extensively in the Corpus Juris of Justinian,\(^{29}\) it has not attracted the notice of writers on Scots law, though Forbes, in his little known Institutes,\(^{30}\) in effect follows the Roman rule.

In rare cases the problem of change of sex may be encountered. If an error regarding the sex of a child has been made when registering the birth—a fact which may not come to light until years later—provision is made under the Births, Deaths and Marriages (Scotland) Act, 1854,\(^ {28}\) s. 63, for the sheriff to direct a corrected entry to be made in “The Register of Corrected Entries.” This does not, however, cover the case where the original entry was correct, but the person has actually changed sex.\(^ {32}\) If the medical evidence in such an instance were sufficiently strong, it might be thought that the (so far unprecedented) step would be competent of presenting a petition to the nobile officium of the Court of Session for declarator of change of status.

*Name and Designation*

The names by which a person is known distinguish him from other individuals. In Scotland either Christian (forename) or surname may be changed, except where this would affect a “name of dignity”—which is a proprietary right—or further a fraudulent purpose. Lord Adam has observed \(^{33}\) “Any person in Scotland may, without the authority of the court, call himself what he pleases,” and \(^{34}\) “The petitioner has a perfect right to change his name, and no one can prevent him from adding to or altering it.” It may, however, be desirable to record a change of name in the books of Council and Session, and in appropriate cases to secure the Lord Lyon’s certificate.

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\(^{28}\) See p. 413, post.
\(^{29}\) D.I.S.9.
\(^{31}\) 17 & 18 Vict. c. 80.
\(^{33}\) Johnston, Petr. (1899) 2 F. 75 at p. 76.
\(^{34}\) Robertson, Petr. (1899) 2 F. 127.
In the recent case of *Clark v. Chalmers* it was charged on complaint with obtaining a certificate of insurance under the Road Traffic Act, 1960, by making a false statement as to his name, the High Court held the charge relevant. The Lord Justice-General stated "To state your name is A when in fact it is B is obviously a false statement. . . . It is quite true that, except for persons holding a public office, people in Scotland are free to change their names without obtaining judicial authority for doing so. But they cannot have two names at the same time and if a man knows his name is A and states that his name is B, his statement is false." This observation, though appropriate to the instant case, may be rather broad for general application. It may well be that an individual, such as an author or actor, uses different names for different purposes, and an individual may open bank accounts in different names.

The practice whereby a married woman in Scotland has assumed her husband's surname and (except for formal legal purposes) discarded that of her father is a modern development. (The wife of Lord Kames was not even Mrs. Home, but Mrs. Drummond.) According to the present Lord Lyon "The modern practice arose from the upper classes adopting English custom, but even so, a married woman is formally described as 'Mrs. Elizabeth Mackintosh or Gordon of Glenbracken', thus preserving in every legal deed her maiden identity." This traditional Scottish practice occasioned much perplexity to English lawyers soon after the decision in *McAlister v. Stevenson*.

In Scots law a person is properly designated, not by the use of his names alone but in addition by stating his property or title, where appropriate, or his profession or trade—or in the last resort by reference to his residence.

**Familial Position**

The position of a person in relation to other members of his or her family will be discussed in the context of Family Law.

**Nationality, Domicile and Residence**

In Scotland today the nationality of a person is primarily of importance in the field of Public Law, whereas, in matters of Private Law, discrimination against aliens is seldom apparent—except in the case of enemy aliens during hostilities. The recent case of

36 At p. 326.
38 1932 S.C. (H.L.) 31; and see Lord Macmillan, "The Citation of Scottish Cases" (1933) 49 L.Q.R. 1; also (1945) 61 L.Q.R. 109.
39 Innes of Learney, *cit. note 37* at p. 151.
Att.-Gen. v. Prince Ernest Augustus of Hanover has reopened the question as to whether Scottish or English statutes regarding naturalisation remain effective after the Union of 1707, and it may be that a person is to be regarded as an alien in Scotland but not in England, or conversely. So far as Scotland is concerned, privileges of naturalisation were mainly extended to the French. However, this topic has been discussed sufficiently by the author elsewhere. The attributes of British nationality are dealt with generally in several statutes—and in particular by the British Nationality Act, 1948, as amended by the British Nationality Act, 1958. Three clear grades of status according to nationality appear to emerge from the jungle of statutory provision—British subjects, British protected persons and aliens. British subjects may be citizens of the United Kingdom and Colonies or of a country in the Commonwealth. Citizenship of the United Kingdom and Colonies may be acquired by birth, descent, registration, naturalisation or by incorporation of territory. Citizens of Eire, which is outside the Commonwealth, have been accorded quasi-British status so far, but the legislative policy of the Government in 1961, in particular with regard to the Immigration Bill, now before Parliament, indicates that generalisations on British nationality would be precarious and premature. Citizenship of the United Kingdom and Colonies may be lost by renunciation, and in certain cases by deprivation. Specialties regarding alien status will be noted presently in connection with modifications of status and capacity.

For present purposes no attempt will be made to summarise the vast literature and extensive case law on the subject of domicile, but merely to note the relevance of this concept for "individualising" a person—a subject of rights. In broadest terms "domicile," a concept separate from "nationality," implies "permanent home" of any person. Lord McLaren, after quoting Codex 10.39.7, continued:

"In this passage all the elements included in the notion of domicile are distinctly specified: (1) the actual residence in a locality as a home; (2) the intention not to sever the relation unless something unforeseen should occur and (3) the idea that the person is a foreigner (peregrinus) in any other locality in which he may have temporarily fixed his abode . . . Domicile may . . . be defined by its consequences, as denoting the relation which the person has to the locality by the law of which his status and the distribution of his personal (scil. moveable) estate are determined." Thus at common law—though statute now takes account of residence in certain cases—jurisdiction

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41 11 & 12 Geo. 6, c. 56.
42 6 & 7 Eliz. 2, c. 10. 42a See now Addenda.
in consistorial causes has been based upon the husband's domicile.\textsuperscript{44} and the law of a decedent's domicile is the law upon which the material validity of a will of moveable property depends. The question as to whether "legal rights" can be claimed has often made it material to establish whether a deceased spouse or parent had a Scottish or English domicile.

At birth a person acquires a domicile of origin—which in the case of a legitimate child is that of his father, while an illegitimate child acquires his mother's domicile. A married woman takes the domicile of her husband. Subsequently, however, a person may acquire a domicile of choice by settling in another country with the intention of making his home there. "A change of domicile from the domicile of origin must be made \textit{animo et facto}." \textsuperscript{45} If a new domicile is acquired by a married man, this affects also his wife and children. It may be observed that there seems to be no foundation for the assumption frequently made that a Scottish minor (after the death of his father or if otherwise forisfamiliated) is subject to the restrictions of an infant in England regarding the acquisition of a domicile of choice.

The fact of residence has importance in several respects in the field of private law. First, it is relevant in questions of jurisdiction. Residence in Scotland prior to the date of citation is sufficient to ground jurisdiction in the Court of Session except for consistorial actions and those affecting status. Though prima facie a man's wife and his children under majority are deemed to have the same residence for the purposes of founding jurisdiction, this presumption may be rebutted. The Sheriff Courts Act, 1907.\textsuperscript{46} s. 6, grants jurisdiction on the basis that a defender resides in the sheriffdom or, having resided there for at least forty days, has ceased to reside there for less than that time and has no known residence in Scotland.

Again, as will be discussed in the appropriate context, a residence qualification of fifteen days is essential for purposes of marriage in Scotland, while by the Law Reform (Miscellaneous Provisions) Act, 1949,\textsuperscript{47} s. 2 (1)-(3), jurisdiction is conferred on the Court of Session to grant divorce or decree of dissolution of marriage or declarator of nullity against a husband not domiciled in Scotland, if the wife is resident in Scotland and has been ordinarily resident there for three years preceding the commencement of proceedings.

Parliamentary and local government franchise depends on the voter's residence within a constituency, while aliens resident within

\textsuperscript{44} See post, p. 307.
\textsuperscript{45} \textit{Liverpool Royal Infirmary v. Ramsay}, 1930 S.C.(H.L.) 83, esp. \textit{per} Lord Dunedin at p. 87. If the domicile of choice is lost, the domicile of origin revives.
\textsuperscript{46} 7 Edw. 7, c. 51.
\textsuperscript{47} 12, 13 & 14 Geo. 6, c. 100.
the realm by the fact of residence acquire such rights in private law as are available to them.

Specialties of Status and Capacity

By a person’s status may be understood his personal condition and those rights which he has in his own personality or (as in the case of spouse or parent) his rights and duties regarding the persons of others. Capacity is concerned with a person’s patrimonial rights—his estate. It may be observed that capacity to acquire property is not identical with capacity to enter into legal transactions. The main modifications of full status and capacity may be noted briefly, and classified according to the grounds upon which the law imposes restrictions.

Age

Pupils. Pupillarity of children continues until the age of fourteen in the case of males and twelve in the case of females. Not only are pupils under the personal control of a guardian, but a guardian (tutor, tutrix or father as administrator in law) must act for them in all legal matters. Consequently, during pupillarity a person is incapable of transacting at all, though he may acquire property.

Regarding delictual liability, there is dearth of authority. In general, however, the principles of Roman law seem to have provided guidance. Liability for culpa or Aquilian fault could not be imputed to a furiosus or infans, but in the latter case over the age of seven—he might be liable if he could distinguish right from wrong. The test of ability to distinguish between right and wrong is echoed in the Civilian commentators and modern codes generally. Erskine expressly referred to it as the basis of liability in reparation. Guidance may be obtained from the law of South Africa, which of all systems is closest to the law of Scotland in this field. It has been observed, “A child below the age of seven years is irrebuttably presumed to be incapable of dolus or culpa. In the case of an older child, it is a question of fact whether the child was capable of dolus or culpa. As regards negligence, more particularly, the test is not the objective one of the standard of care to be expected of the bonus paterfamilias, but the capacity of the particular child to apprehend intelligently the duty, obligation or precaution neglected.”

Different considerations may apply with regard to contributory negligence on the part of pupils. This question when considered judicially hitherto has merely been as to how far the defender was

48 D.9.5.2.
49 III.1.13.
50 Hahlo & Kahn, South Africa, p. 378.
responsible for causing the injury. In such circumstances, though the courts (at a time when, had such a plea succeeded, the pursuer must have failed in toto) have discouraged the plea of contributory negligence, the question has been left to the jury as to whether a boy of six could possibly be regarded as guilty of contributory negligence.51

Minors. Over the age of puberty and under the age of twenty-one a child becomes a "minor," and may enjoy quite substantial legal capacity, especially if the father is dead and if no curator has been appointed. The patria potestas, which only the father may exercise, is weakened after a child has passed the years of puberty, and he may be emancipated from it by forisfamilization. A minor may make a will of his moveable estate, but never, except under the Wills (Soldiers and Sailors) Act, 1918,52 of his heritage. Moreover, he may marry without parental consent, though statute has now fixed the minimum age for marriage at sixteen years.53 When the father is dead or a child has otherwise been forisfamiliated, since tutor datur personae curator rei, a minor even with a curator is at common law entitled to choose his place of residence,54 and, it is submitted, his domicile. Certain provisions of statute law, which supplement without expressly abrogating the common law, impose control over some minors up to the age of sixteen thus extending the period of pupillarity for purposes of custody.55 Apart, however, from cases where factors such as care and protection or delinquency are involved, orders relating to custody and control cannot be made in Scotland after a minor has reached the age of sixteen, and probably cannot be enforced against the wishes of a minor over that age. A minor may make a valid will of his moveable estate, and on attaining the age of sixteen may marry without requiring parental or other consent.

Though a minor, acting entirely on his own account, may make reasonable purchases in ready money transactions; may in general contract personal liability for necessaries according to his station in life; and may probably enter into contracts of service or apprenticeship; if he has a curator, the latter must concur in other legal transactions if they are to be binding on the minor.56 Otherwise the transaction, though probably not a nullity, becomes negotium claudicans57 (a "limping" or one-sided transaction—unenforceable

51 See Stevenson v. Magistrates of Edinburgh, 1934 S.C. 226, and authorities there cited. There was clearly judicial reluctance to go thus far, and this question deserves further consideration after argument on relevant civilian principles.
52 7 & 8 Geo. 5, c. 58.
53 See post, p. 315.
54 See post, p. 372.
55 See p. 382, post.
56 McFeetridge v. Stewarts & Lloyds, 1913 S.C. 773; also generally authorities quoted Gloag, Contract, p. 82.
57 Erskine, 1. 7. 33; Gloag, p. 82; Wessels, Law of Contract in South Africa, Vol. 1, s. 799; Voet, 26,8,3.
against the *incapax*). If, however, the minor has held himself out as of full age or has engaged in business or trade, or has ratified after majority, he may be fully bound. After the age of twenty-one and before he reaches the age of twenty-five (which was the age of majority under Roman law) a person may seek reduction and restitution in respect of transactions clearly to his detriment. Reduction on grounds of minority and enorm lesion during the *quadrennium utile* is less likely to be granted if a curator concurred in the transaction. Hence parties should be reluctant to deal with a minor unless a curator has been appointed to him. Reduction on grounds of minority and lesion may be sought by the trustee in a minor’s sequestration, or after his death before the age of twenty-five by his representatives. If third parties have acquired a real right in good faith and for onerous consideration, then, though the transferor might have been bound to make restitution, they are secure in their title. It is otherwise in the case of personal rights, or where good faith is absent; in such circumstances restitution may be claimed on grounds of minority and lesion, even against those who derived title from a person to whom the minor had transferred his right.

What constitutes lesion depends upon the nature of the transaction. Lesion to the estate is apparent in cases of pure gift, cautionary obligations and discharges of debt for an inadequate sum. Where the minor has entered into a contract of sale or loan, there will be lesion if the terms were not reasonably fair, or if the minor had squandered the price, so that his estate at majority is diminished. Thus one purchasing from a minor is entitled to insist upon being assured of the beneficial investment of the price. Though section 2 of the Sale of Goods Act, 1893, applies to Scotland, its sole contribution seems to be to obscure rather than to alter the position at common law. It is a criminal offence under the Betting and Loans (Infants) Act, 1892, to send any document inviting him to borrow money, but contracts of loan to minors can apparently only be set aside on proof of lesion. Similarly in cases of compromise, reduction is granted only if, considering the whole consideration obtained by the minor, it is shown not to be reasonably fair.

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58 This is presumed in gratuitous transactions.
60 *Harkness v. Graham* (1833) 11 S. 760.
61 *Bruce v. Hamilton* (1854) 17 D. 265.
62 Erskine, 1,7,40.
63 Stair, 1,6,44.
64 *Harkness v. Graham*, supra.
65 56 & 57 Vict. c. 71.
67 55 & 56 Vict. c. 4.
A minor, it is submitted, is liable in delict, though account may be taken of his immaturity (especially in the early teens). As where a pupil over the age of seven is concerned, so also with a minor, the subjective factor is relevant in assessing fault.

Minority disqualifies a person from holding most public offices including sitting as a Member of Parliament, or voting, but a minor (with his curator's consent) may assume office as trustee.

Aliens

Formerly general disability attached to the status of aliens, and their capacity to transact was severely restricted. On the other hand, before the Union of 1707, Scotland, being European in outlook, and, no doubt, also anxious to encourage foreign wealth, and skill, was generous in its provision of privileges to the stranger through naturalisation. Thus, for example, by the Act 1558, c. 65, French subjects generally were naturalised in Scotland with the same privileges as were given to Scotsmen in France. The recent case of Att.-Gen. v. Prince Ernest Augustus of Hanover 69 has revived interest in the relevance for modern times of pre-Union legislation granting naturalisation to certain foreign nationals. This has been discussed in detail elsewhere by the present author.70

Aliens now enjoy, generally speaking, the same capacity to contract and hold property as do British subjects, except that they cannot be registered as owners of a British ship 71 or aircraft.72 The disabilities of aliens with regard to capacity have been removed by statute, without, however, it is thought, conferring on them those privileges which attach to the status of British citizenship—such as capacity for all public offices.73 Provided that jurisdiction may be established,74 an alien may be sued for delict in a Scottish court, and generally he has the same title to sue in respect of delict as has a Scotsman. He cannot, however, sue the Crown in respect of an act of State.75

Contracts with enemy aliens, unless a Crown licence has been obtained, are illegal, and for this purpose any person voluntarily residing or trading in enemy territory is regarded as an enemy alien irrespective of nationality.76 British prisoners of war in enemy hands

71 Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.
72 Air Navigation Order, 1960 (No. 972), arts. 21, 22 & 23.
73 Status of Aliens Act, 1914 (4 & 5 Geo. 5 c. 17), s. 17.
74 Thompson v. Whitehead (1862) 24 D. 331. As to the considerations applicable where the delict has been committed abroad, see McElroy v. McAllister, 1949 S.C. 110.
75 Poll v. Lord Advocate (1899) 1 F. 823.
are not, however, so regarded. Persons of enemy nationality resident in Britain do not lose their power to contract, though a company registered in Britain, but controlled by enemy aliens, may be regarded as an alien enemy.77

Bankrupts

Formerly the consequences of insolvency were extremely severe, and civil imprisonment with the compulsitor of squalor carceris was the lot of the debtor unless through cessio bonorum he reached accommodation with his creditors or found sanctuary in the Abbey of Holyrood. Though at the Reformation churches and religious houses generally ceased to be places of asylum for criminals and debtors alike, Holyrood retained the privilege, and remained an asylum for insolvent debtors, who were required to register. "Dyvours" wore a special dress to mark their status, and those who had failed to lay up (or retain) sufficient treasure upon earth could find that the gates of Heaven were not altogether closed against them. The introduction of the limited liability company in the nineteenth century, and the abolition in 1880 of civil imprisonment for debt in ordinary circumstances, marked the end of that epoch. Nevertheless, a man's reach may still exceed his grasp; and in Scotland the consequences of bankruptcy upon status and capacity are regulated in the main by the Bankruptcy Act, 1883,78 the Bankruptcy (Scotland) Act, 1913,79 and by the Local Government (Scotland) Act, 1947.80 A bankrupt is disqualified from sitting or voting in Parliament, from being elected a Member of Parliament or of a town or county council and he may not hold certain other offices.81 The bankruptcy statutes lay him under a number of duties, breach of which are punishable as criminal offences. So far as capacity to transact is concerned, a person on conviction is liable to be imprisoned for a period not exceeding two years if he obtains credit to the extent of £10 without disclosing that he is an undischarged bankrupt.82 No act or deed of the bankrupt is effectual without consent of his trustee, though the consequences of this rule are mitigated by statute to some extent in favour of bona fide third parties.83 Section 2 of the 1913 Act defines an "undischarged bankrupt" as including a person whose estate has been sequestrated and who has not been discharged by a competent court

78 46 & 47 Vict. c. 52.  
79 3 & 4 Geo. 5, c. 20.  
80 10 & 11 Geo. 6, c. 43.  
81 See Bankruptcy (Scotland) Act, 1913, s. 183, as amended in particular by the Local Government (Scotland) Act, 1947.  
82 Bankruptcy (Scotland) Act, 1913, s. 182.  
83 e.g., a purchaser who has received moveable property from or paid a debt to the bankrupt: ibid. s. 107.
in Scotland; and section 182, which prescribes the offence applies only to an "undischarged bankrupt" according to the law of Scotland—not according to English or other foreign law.84

*Interdiction*

Though Scots law did not appoint curators to prodigals, the interdiction of "lavish persons," as Stair describes them, provided some protection against their own folly. Now, by the Conveyancing (Scotland) Act, 1924, s. 44 (3) (b), interdiction, whether judicial or voluntary, has been made incompetent.

*Intoxicated Persons*

As a rule only such a state of complete intoxication as will temporarily deprive a person of his reason will diminish his capacity so as to render his transactions reducible.85 He should, it has been said, take prompt steps to pursue reduction when he recovers his senses and realises what he has done.86 A lesser degree of inebriation, which merely darkens the intellect, is insufficient. Nevertheless, "facility and circumvention" is a ground of reduction when advantage has been taken of a person whose faculties have been weakened by alcoholism, and who has been subjected to pressure or other unfair practices to transact against his interests.87 Moreover, in contracts involving good faith, it would seem contrary to principle to allow a partially intoxicated individual to be grossly overreached.88

*Mentally Deranged Persons*

There is a presumption in favour of sanity, and no person may be deprived of liberty or of the administration of his affairs without due process of law. Though cognition of the insane is now obsolescent, it remains competent. The Mental Health (Scotland) Act, 1960,89 Part IV, regulates procedure for admission to and detention in hospital or subjecting to guardianship of persons suffering from mental disorder. So far as administration of the affairs of an *incapax* is concerned, this is normally entrusted by a competent court to a *curator bonis*, whose powers are those of a judicial factor.90 Petition for the appointment of a *curator* may be at the instance of any person interested or of the Lord Advocate.

85 Stair, I,10,13; see Gloag, *Contract*, pp. 94–96.
86 Pollok v. Burns (1875) 2 R. 497; but see Gloag, p. 95, note 1.
88 See post, Chap. 36.
89 8 & 9 Eliz. 2, c. 61.
90 See post, p. 388.
It has been long recognised that an insane person has no contractual capacity, and that his ostensible transactions are null. Knowledge of the condition of the *incapax* by the other party need not be established. If necessaries are sold to an insane person he is obliged to pay a reasonable price. Continuing obligations entered upon by a sane person are not necessarily avoided by supervening insanity. Thus, though insanity is a ground for dissolution of partnership such dissolution does not take effect merely by the fact of insanity, nor is the mandate of a law agent automatically terminated.

**Women**

The whole tendency of modern law is to treat the sexes on a basis of equality. Formerly, however, married women in particular were treated like wayward children. Lord Cooper has aptly noted the change of legal climate in *Beith's Trs. v. Beith*. There are, however, certain vestigial doctrines discriminating between the sexes. Thus a woman, but not a man, may secure alimentary protection over her own property by ante-nuptial marriage contract, and the wife pursuer alone in actions for divorce may claim legal rights from the moveable estate of a divorced spouse. On the other hand, until the effects of the decision in *Laidlaw v. National Coal Board* are eliminated by legislation, a mother, while her husband is alive, is deprived of the right to sue for damages in respect of the death of her child.

**Rights and Attributes of Personality**

Certain personal (as contrasted with patrimonial) rights and liberties are vested in a human being at birth. These may often be asserted through the processes of public law—either by criminal prosecution of those who violate such rights or by judicial intervention in support of basic constitutional principles. So far as personal rights in this sense are protected by private law—apart from procedure by interdict—redress is given through the award of reparation or damages in actions based either on *culpa* or, where affront to personality is involved, on the *animus injuriandi*. Accordingly, the principles applicable to protect or redress infringements of rights of personality are appropriately discussed in the context of "liberties of the subject" or in that of the law of Delict. Nevertheless, certain basic rights and

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91 Stair, I,10,13; Erskine, III,1,16; and see discussion, Gloag, pp. 92–94.
93 *Ibid.*; also Sale of Goods Act, 1893, s. 2.
94 Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35.
95 *Wink v. Mortimer* (1849) 11 D. 995.
96 1950 S.C. 66.
97 1957 S.C. 49.
97a This was achieved by the Law Reform (Damages and Solatium) (Scotland) Act, 1962 (10 & 11 Eliz. 2, c. 42). See Addenda.
attributes of personality merit brief mention in this Part devoted to General Concepts of Law.

Right to Life and Bodily Integrity

It is trite law that to kill or injure a human being without justification or excuse incurs the sanctions of the criminal or civil law or both. The person "inhabiting" the body enjoys certain rights in respect of it, while certain duties and restraints are imposed by law upon the uses which a person may make of it—or permit others to make of it. A man does not "own" his body like a horse or a statue. "Brother Ass"—as St. Francis called the human body—is thus in a special situation so far as legal theory is concerned, and that theory has been strongly influenced by theological doctrines of traditional Christianity. Nevertheless, the law is concerned with persons, as the subjects of rights, and not with the salvation of souls, and this distinction is apparent in certain contexts.

The law indeed echoes the view of an eminent Roman Catholic theologian to the effect that man has "the use not the dominion" of his life. He cannot sanction its termination, though no medical practitioner is required to prolong by exceptional means the life of a patient suffering from an agonising and incurable disease; and the use of narcotic drugs in such circumstances is lawful, though life be shortened thereby. Suicide is no longer prosecuted as a crime in Scotland—but a man may not lawfully terminate his own life by—in Blackstone's phrase—"invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for." Attempted suicide may be prosecuted as a breach of the peace, while in the province of civil law suicide may affect claims under an insurance policy. So far as the taking of human life in circumstances where no legal sanction could possibly deter—comparable perhaps with those in R. v. Dudley & Stevens—it is a moot point whether in Scots law the accused should be convicted of murder.

Though, as has been discussed, a child in utero has an expectancy of rights so far as private law is concerned, and is protected from destruction in most circumstances by the criminal law, yet termination of pregnancy may be lawful in the interests of the life or health of the prospective mother. The existing persona of the woman is preferred to the unborn child who is not a persona.

98 The author is indebted to his colleague, Mr. M. R. Topping, for valuable references contained in the latter's unpublished paper, "The Right to Life and The Roman Catholic Church" (Columbia, 1961).
2 See ante, p. 182; also Rutherford, 1947 J.C. 1.
3 Vol. IV, 189 (18th ed.).
4 (1884) 14 Q.B.D. 273.
5 See ante, p. 141.
Linked with this question is that of bodily integrity. It is lawful to hazard life and limb for the protection of others and to salvage property—though if the interest in jeopardy is disproportionately trivial compared with the risk involved, the would-be salver may have no claim against one who wrongfully put property in danger. On the other hand no one may lawfully consent to injury or mutilation except for some purpose regarded by the law as proper. Participation in the manly—or womanly—sports is lawful, though some risk be involved. On the other hand, consent to injury is ineffective if given to gratify the lewdness of a sadist. Consent to interference with one's body is lawful in the case of medical or surgical treatment for the improvement of health or the alleviation of pain. Where removal of a bodily member or suppression of a function is concerned, the law would seem to accept the doctrine of "totality"—namely, that the well-being of the whole body should be regarded, though this involves the sacrifice of a part. Albeit there is little guidance on the question, it is submitted that mental and physical health are both comprehended in this doctrine.

Though, it is thought, a surgeon might lawfully operate on an unconscious patient on the principle of *negotiorum gestio* (unless he knew that the patient had conscientious objections to such treatment) no person may be compelled—even in his own interests—to submit to interference with his body by surgery. There is no equivalent in Scotland to the sterilisation laws of Virginia, which were considered by the Supreme Court of the United States in *Buck v. Bell.* It was held that the State had a right to sterilise an imbecile woman, herself the child of an imbecile mother and the mother of an imbecile child. Holmes J., giving the leading opinion, declared, "It is better for all the world, if, instead of waiting to execute degenerate off-spring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . Three generations of imbeciles are enough."

It may be noted in parenthesis that even vaccination is now no longer compulsory for residents in Britain—a situation which had serious consequences in 1961–62. Respect for the integrity of the human body is emphasised in a wide variety of situations. Though no man can be compelled to submit to operation, his refusal may limit a claim for damages against a defender responsible for injuring

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6 The author has in the following pages drawn on his article, "Law, Professional Ethics and the Human Body," 1959 S.L.T.(News) 245.
7 (1927) 274 U.S. 200.
8 Ibid.
him. As in actions of nullity a pursuer cannot found on her own impotence, if this could be removed without danger to life or pain plus quam tolerabile, so also a pursuer claiming damages for continuing incapacity may be met with the defence that this is due to his own unreasonable refusal to submit to operation. Account, of course, must be taken of the risks involved in each case, but the words of Lord Justice-Clerk Macdonald have often been quoted with approval. The person should “submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinary manly character would undergo for his own good, in a case where no question of compensation due by another existed.” In short, though the victim of injury cannot be compelled to submit to operation, he will not be allowed to capitalise his unreasonable refusal.

In the criminal process, though external examination of the body is permissible—as by the taking of fingerprints or even by the probing of wounds—no person is compelled to submit to medical tests by injection or abstracting substances. Thus—though there are cogent arguments in favour of the procedure—the suggestion has been so far rejected that compulsory blood tests should be made in the case of drivers suspected of driving under the influence of drink. The use of blood tests in civil proceedings has been discouraged judicially on several occasions. Moreover, in Scotland, no encouragement has been given to the practice of questioning suspects injected with a so-called “truth drug.” There would be general support for the view of the Paris Bar, expressed in 1948, that this practice constitutes “une atteinte au principe de l’inviolabilité de la personne humaine.”

Rights to Liberty

“Next to life is liberty,” said Stair, “and the delinquences against it are restraint and constraint. And though liberty itself be inestimable, yet the damages sustained through these delinquences are reparable.” Apart, however, from physical liberty, the law recognises—so far as they do not infringe the liberties of others—a wide variety of so-called “freedoms,” as of religion, expression, meeting, privacy of correspondence and the like. To preclude a person from making use of res communes omnium—such as sea water—which are not in patrimonio, would seem to be an infringement of personal liberty. It may be observed, however, that liberty to choose an occupation and the place to practise it has—as in the medical profession—been

31 1, 9, 4.
restricted by law, while national necessity has at times augmented by compulsion the profession of arms. The right, moreover, of an individual to cloister himself in the inviolable fortress of his own home has been whittled down by many legislative provisions authorising the intrusions of officials of various categories.

Rights to Honour

Affronts to the personality which may also interfere with personal liberty—as in the case of wrongous arrest—are punished by the criminal law, and curbed by interdict or solaced by reparation. In the field of private law the underlying principle of the actio injuriarum (in its proper sense) affords redress for infringements of such rights. Hence insult, assault—also it is submitted, masterful trespass and perhaps offensive and certain unjustifiable violations of privacy—are wrongs which the law will redress. These matters are considered in the context of Criminal Law and the law of Delict.

Juristic Persons and Voluntary Associations

The State alone has power to create corporations with legal personality apart from the aggregate of their members. The basic notions underlying these institutions are derived in Scotland both from Roman and feudal law. By “legal personality” it is not implied that such bodies have all the rights and duties of natural persons of full capacity. In particular juristic persons are excluded from most of the rights and obligations of Family Law and Succession. It is necessary for the law to take some account of certain aggregates of individuals who come together in voluntary association for purposes similar to those for which groups acquire legal personality by incorporation. Such voluntary associations, however, do not depend on the law for their creation. A voluntary association is not in general recognised by law as having any legal existence apart from the members of which it is composed. Whereas the creation of a corporate persona depends on an act of State, the creation of a voluntary society results from the agreement of its members. The rights of members inter se depend upon the law of contract and joint property or, where the property is held by trustees for the fulfilment of certain objects, upon the law of trusts.

Between these two legal concepts—the corporation, on the one hand, and the voluntary association, which has no persona, on the

12 But see Earl of Galloway v. Minister of Dairy, Feb. 22, 1810, F.C.
13 For background, see in general Stair, II,3,38; Bankton, 1,2,18 et seq.; Erksine, 1,7,64; III,3,28; Kames, Elucidations, art. VII; Bell, Commentaries, II, 157 & 545-546; Principles, § 2176. For valuable discussion of differences between Scottish and English law, see University of Glasgow v. Faculty of Physicians and Surgeons (1840) 1 Rob. 397.
other—there also exist certain other types of legal entity such as friendly societies, trade unions and Scottish partnerships, which may be described as quasi-persons or quasi-corporations.

Corporations

In modern times corporations may be created in one of two ways—either by grant of a Royal Charter of incorporation or by Act of Parliament. Thus the British Broadcasting Corporation was incorporated by Charter of Incorporation granted on December 20, 1926, by warrant under the Sign Manual. Corporations constituted by Act of Parliament may either be created directly by statute—as in the case of the British Transport Commission or National Coal Board—or they may be created under a more general power or authority given by statute. The most familiar type in this latter category is the company incorporated under the Companies Act, 1948. Certain corporations, such as royal burghs, act both under statute and under powers conferred by Act of Parliament.

The persona of a corporation is distinct from that of the individual who caused it to be called into existence. As Lord President Inglis observed, "The corporation being a separate person has its own estate and its own liabilities, and the corporators are not liable for the corporation, but only to the corporation within the limit of the obligation they have undertaken to subscribe to the corporate funds." Si quid universitati debetur, singulis non debetur; nec quod universitas debet, singuli debent. While this remains the fundamental rule, since the Lord President's day the impact of war and tax evasion, and the extensive commercial activities of limited liability companies have compelled a closer scrutiny of juristic personality. The basic problem, as Friedmann has put it, is as "to what extent it is necessary and permissible to 'pierce the veil' of legal personality, in order to look at the real persons, purposes, intentions covered by the legal form?" In English law the leading example of refusal to take this step is represented by Salomon v. Salomon, where the courts refused to identify a company with its controlling shareholder. Contrasted with it is Daimler Co. v.
Continental Tyre Co., where the House of Lords recognised a company registered in England as an alien enemy, because effective control was exercised by shareholders who were enemy aliens. There has been no fundamental analysis in modern Scottish practice. Consequently, on the one hand, there has been a tendency to follow the rather uncertain lead of English authorities; while, on the other hand, the way is open for rethinking the fundamentals and achieving a sound conclusion.

The powers of a chartered corporation are not, in general, restricted by any express provision, but on the principle that certain activities, being contrary to public policy, expenditure thereon may be disallowed. Thus a chartered body may not lawfully do anything within the powers of a private individual. Since corporations, unlike natural persons, do not die, provision has to be made for their dissolution—either by surrender of charter in the case of chartered corporations, by revocation of constituent statute or by winding up under the provisions of the Companies Act, 1948.

Ultra Vires

Corporate bodies created by statute, or exercising statutory powers, cannot contract, or dispose of property or funds in any way which is not authorised by such statute or unless a transaction is reasonably incidental to the powers conferred. A body established for one purpose cannot lawfully engage in any enterprise substantially different in method or beyond the geographical limits within which it is authorised to act. Though all persons interested in the corporate body have consented, this cannot validate an act which is ultra vires. Thus when a tramway company, incorporated by a private Act of Parliament, agreed to pay a lump sum to parties who had incurred expense in promoting the Act, the validity of the contract was held to depend upon such authority as was given in the Act, and, as no such authority had been given, the agreement could not be enforced.

A company authorised under the Companies Act, 1948, must register with the Registrar of Joint-Stock Companies a memorandum of association, and in it must state, inter alia, “the objects of the company.” The general law on such companies is to be discussed by Professor Gow in a companion volume. A few brief comments must suffice by way of general comment. Any contract which is not

20 [1916] 2 A.C. 307; where a company is “a mere cloak or sham” for an individual the “veil may be pierced”—see Jones v. Lipman [1962] 1 All E.R. 442.
24 Companies Act, 1948 ss. 1 and 2.
within the powers taken in the memorandum is ultra vires and void.\(^{25}\)

There is, however, no clear limit to the powers which a company may assume in its memorandum, and in modern practice these are often very wide. Though the law may be amended, it is thought that at present powers cannot be taken in the form of "a blank cheque."

The law of ultra vires applicable to bodies acting under statute (and more particularly in cases of companies under the Companies Act) may be divided into three categories. An act may be (1) ultra vires of the company; or (2) intra vires of the company, but ultra vires of the directors; (3) intra vires only upon condition that certain formalities are observed. In the first case the ultra vires act is void, and cannot be ratified even by the consent or approval of all the shareholders.\(^{26}\) A corporate body cannot be barred from pleading that it had no power to do that which it purports to have done.\(^{27}\) In the second case the contract may be ratified by a general meeting called for that purpose, or by the consent of all the shareholders. It will then be valid.\(^{28}\) In the third case the company may be barred from pleading the invalidity of its contract, if that invalidity be due to the fact that its procedure has not been regular. Third parties dealing with a company are entitled to assume that what has been called "the indoor management" of the company has been properly carried on. Thus when directors of a company had power to sell heritage, if sanctioned by a general meeting, it was held that the company could not challenge the sale on the ground that the notices calling the meeting at which it was sanctioned were irregular.\(^{29}\) This principle is known as the rule in *Royal British Bank v. Turquand*.\(^{30}\)

A contract which is ultra vires of a company, and therefore a nullity, may be reduced in an action at the instance of the company itself,\(^{31}\) or of any shareholder.\(^{32}\) Third parties, such as trade rivals, do not necessarily have title to sue, and there is no precedent for the intervention of the Lord Advocate.\(^{33}\) If the disputed contract is one which may be ratified, title to sue rests in most cases with the company alone, in effect with the shareholders who hold the majority of voting power.\(^{34}\) A minority, or an individual shareholder may, however, relevantly aver that the majority are using their power for


\(^{27}\) *General Property Investment Co. v. Matheson's Trs.* (1889) 16 R. 282.


\(^{29}\) *Hilton v. Waverley Hydropathic Co.* (1877) 4 R. 830.


\(^{32}\) *Balfour's Trs. v. Edinburgh and Northern Ry.* (1848) 10 D. 1240.


\(^{34}\) *Brown v. Stewart* (1898) 1 F. 316; *Foss v. Harbottle* (1842) 2 Hare 461.
the purpose of perpetrating, or condoning, a fraud upon the company.  

Persons acting on behalf of a company which has entered into an *ultra vires* contract are personally liable to the other party if they fraudulently misrepresented the powers possessed by the company. If their representation was not fraudulent, liability, it is submitted, rests on the general principles of contract and delict. Reference to the English authorities in this context may be misleading, as the Scottish law of *culpa* is not identical with the English tort of “negligence” and there is no compelling reason why the Scottish courts should not reassert the competency of awarding damages for financial loss caused by non-physical means.

**Liability of Corporations**

So far as contract is concerned and other obligations arising *ex voluntate*, the principle of *ultra vires* applies to the liability of such corporations as have limits set to their powers. Corporations are liable *ex delicto* for the wrongs of servants acting within the scope of their employment. Wilful wrongdoing, such as fraud or defamation may implicate a corporation under the doctrine *respondeat superior*, but it would seem that, since *dolus* is personal, it must be brought home to an identified wrongdoer for whom the corporation is responsible. In particular, where companies are concerned, the courts seem inclined to extend delictual liability beyond the limits of *ultra vires* (in its narrower meaning), especially when persons controlling the undertaking are acting as such and have authorised or ratified the illegal act. This problem is considered in the general context of Company Law in the companion volume by Professor Gow.

A corporation cannot as such be prosecuted for crime at common law, but may be proceeded against in respect of various statutory offences. Although sentence of imprisonment obviously cannot be imposed on a juristic person, a prosecution against it may lie even when the penalty provided for the contravention is a fine with the alternative of imprisonment. Apart from statute there is ample authority for punishing by fine newspaper companies guilty of interfering with the impartial administration of justice as by contempt of court.

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35 Hannay v. Murt (1898) 1 F. 306.
39 See ante, p. 223; also *Studies Critical and Comparative*, at p. 288.
Unincorporated Associations

General

Corporate bodies are recognised as possessing legal personality; but, although the courts may be called on to recognise, and adjudicate on, matters relating to a voluntary association, it is not in general regarded as having a legal existence distinct from that of its members. Such an association cannot at common law sue or be sued in its collective name alone; and the names either of all the members, or of responsible members such as office-bearers, must be added.40 In the sheriff court, however, an association may sue or be sued in its descriptive name without the addition of the names of any individuals.41

A court, moreover, will not take cognisance of the actions or resolutions of such bodies except in so far as these affect civil rights. Unless such rights are involved, an action for determining questions between a member and the association as to the validity of resolutions or decisions of the association will not be considered judicially.42

"Agreements to associate for purposes of recreation, or an agreement to associate for scientific or philanthropical or social or religious purposes, are not agreements which courts of law can enforce. They are entirely personal. Therefore, in order to establish a civil wrong from the refusal to carry out such an agreement, if it can be inferred that any such agreement was made, it is necessary to see that the pursuer has suffered some practical injury either in his reputation or in his property." 43

Voluntary associations may be founded, inter alia, for religious, social, economic, industrial, philanthropic, scholarly or scientific purposes. In practice trading associations are not comprised, since the Companies Act, 1948, s. 2, forbids the formation of unregistered associations of more than twenty persons for the purpose of carrying on business for the acquisition of gain.

A broad general distinction may be made between two classes of association. In the case of the ordinary social club the funds are contributed by the members and are to be applied for their benefit. Any questions which may arise are solved, therefore, by the application of the law of contract and joint property. Another type of association is that which exists for the promotion of some further

41 Sheriff Courts (Scotland) Act, 1907 (7 Edw. 7, c. 51), Rule 11, as amended by Sheriff Courts (Scotland) Act, 1913 (2 & 3 Geo. 5. c. 28).
purpose or object. Here the general principles of trust will control
the application of the funds contributed or subscribed.

**Clubs**

Most clubs are governed by rules drawn up by the members, and
any member who joins is understood to agree to be bound by those
rules; they form part of the contract between him and the other
members. If the rules contain a provision for their alteration, any
alteration made bona fide and in accordance with the rules is binding
on all the members unless the alteration is incompatible with the
fundamental purpose of the association. But where the rules make
no such provision, they may well be unalterable without the consent
of all the members.\(^4^4\)

The property of the club belongs to all the members, each
member having a right with all the other members.\(^4^5\) "The right of a member
of a club . . . in the property of the club is of a peculiar description.
While the club exists as a going concern, he is not entitled to insist
on a sale and division of the price. When he dies, his right, such as
it is, does not pass to his representatives, and if he retires from the
club his whole interest therein ceases. But as long as he remains
a member of the club his right is one of common property."\(^4^6\) Hence
it has been held that, while the wish of the majority of the members
will rule in the ordinary administration of the property of the club
it is not competent for the majority gratuitously to alienate club
property against the protest of a minority.\(^4^7\) If the club comes to an
end the property remaining after all the debts and liabilities have
been met is distributable among the members at the time.\(^4^8\)

No member of the club, as such, is liable to pay to it or to anyone
else any money beyond his subscription; and if he is to be made
liable by a creditor of the club, his liability must be established on
the ground that he has undertaken liability or has so acted as to
render himself liable under the ordinary rules of the law of agency.\(^5^0\)

A member who has been expelled from a club may apply to the
court to have the resolution of the club set aside; and the court will
entertain the action if the club possesses property, for the effect of
the expulsion is to deprive the member of his right in that property.

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\(^{4^4}\) See the observations of Lords Guthrie and Skerrington in *Wilson v. Scottish Typographical Association*, 1912 S.C. 534.

\(^{4^5}\) *Graff v. Evans* (1881) 8 Q.B.D. 373.

\(^{4^6}\) *Murray v. Johnstone* (1896) 23 R. 981 at p. 990. Perhaps "joint property" would be a more correct description, see *post*, p. 479.

\(^{4^7}\) *Baird v. Wells* (1890) 44 Ch.D. 661. These rules do not, however, apply to a
proprietary club, that is, one in which the club premises and what is necessary for
the members belong to and are provided by the proprietor, who receives the fees
of the members. In this case the members have no right in the property.


The court will not, however, review the merits of the club’s decision, and will interfere only if it is not authorised by the rules, or if it is contrary to natural justice (as, for example, if no opportunity were afforded to the member of defending himself against the charge on which the decision is founded), or if the decision was not arrived at in good faith.51

**Associations for Furthering Religious and other Objects**

Where subscriptions are contributed to an association or society formed for the promotion of a certain object, the sums so contributed are held in trust for that object.52 Every contribution is an irrevocable appropriation of the donor’s money to the purposes of the association, and, so long as these purposes are capable of being effected, the donor is not entitled to repayment of his contribution.53 Unless it is otherwise provided in the rules of the association or the terms on which subscriptions were invited, the purposes to which the money is to be applied cannot be altered without the consent of all the subscribers.54

If it becomes impossible to carry out the purpose for which the subscriptions were given, the disposal of the funds of the association may present great difficulty. Where that purpose is of a public or charitable nature, it would appear from the decision in Anderson’s *Trs. v. Scott*55 that the proper course is that a scheme should be prepared by the court in the exercise of the jurisdiction which it possesses in regard to such trusts. Otherwise the funds would apparently fall, as a rule, to be repaid to the subscribers. “Where parties join in a subscription to effect a particular object, and place the money subscribed in the hands of certain persons to carry out that object, I think the quasi trust, thereby created, is for the alternative purpose of either carrying out the object of the subscription, or, if that cannot be done, of paying back the money.”56 There may be great practical difficulties in this course: and if a subscriber could not be traced, it is possible that his share would fall to the Crown as *bona vacantia*.57 The terms on which the funds were contributed

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52 Ewing v. M’Gavin (1831) 9 S. 622; Connell v. Ferguson (1857) 19 D. 482.
54 M’Caskill v. Cameron (1840) 2 D. 537; Steedman v. Malcolm (1842) 4 D. 1441.
55 1914 S.C. 942; see post, Chap. 24; see also Gibson and Ors. Petrs. (1900) 2 F. 1195; Davidson’s *Trs. v. Arnott*, 1951 S.C. 42.
57 This was the decision of the Lord Ordinary (Cullen) in Anderson’s *Trs. v. Scott*, supra; see also Lord President Dunedin’s opinion in Incorporated Maltmen of Stirling, 1912 S.C. 887, and Lord Sands’ opinion in Caledonian Employers’ Benevolent Society, 1928 S.C. 633.
may, however, be such as to negative any quasi trust as, e.g., where the contributions are not purely gratuitous but have been finally paid over by the contributors as the consideration for benefits to be received by them, and in that case they would have no claim for the return of their contributions.\textsuperscript{58}

In the case of a dissenting church the funds contributed to it are held in trust, and in case of division among its members any question as to the right to these funds is determined by inquiring which of the parties is adhering to the original principles professed by the church. The constitution of the church may provide for the disposal of the property in the event of a schism or may give the church the power of altering its principles; but, in the absence of such provisions, where the property is claimed by different sections of those who formed the church, the property will be held to belong to those who adhere to those principles.\textsuperscript{59}

If a clergyman wrongfully expelled from a church or a member from an association applies to the court for redress, he must show that he has suffered some patrimonial loss: but under such loss is included the deprivation through the expulsion of some particular status, \textit{i.e.}, the capacity to perform certain functions or to hold certain offices.\textsuperscript{60} The court will award damages for any wrong done in this way, but will not pronounce decree ordaining the church or association to re-admit the expelled member.\textsuperscript{61} The court will not interfere with the judgments of an ecclesiastical tribunal, unless either the tribunal has acted clearly beyond its constitution and has affected the civil rights and patrimonial interests of a church member, or its proceedings have been grossly irregular.\textsuperscript{62}

\textbf{Quasi Corporations}

\textit{Friendly Societies and Building Societies}

There are certain associations which hold an intermediate position between corporate and unincorporated bodies. They have no corporate existence, but the legislature has intervened for their regulation and assistance. Friendly Societies provide the most important examples of this species of quasi-corporations. They are constituted for the maintenance and relief of members and their families in sickness or old age or distress, and also to a limited extent for certain methods of insurance.\textsuperscript{63} The Friendly Society Acts,

\textsuperscript{58} Smith v. Lord Advocate (1899) 1 F. 741.
\textsuperscript{59} Free Church of Scotland v. Lord Overtoun (1904) 7 F. (H.L.) 1.
\textsuperscript{60} Skerret v. Oliver (1896) 23 R. 468.
\textsuperscript{61} Ibid.; Gall v. Loyal Glenbogie Lodge of the Oddfellows' Friendly Society (1900) 2 F. 1187.
\textsuperscript{62} M'Donald v. Burns, 1940 S.C. 376.
\textsuperscript{63} For the definition of these see the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8, as amended by the Friendly Societies Act, 1908 (8 Edw. 7, c. 32), s. 1.
1896–1929, contain elaborate provisions whereby such societies may register and thus acquire the privileges and duties attached by the statutes to registration. But there are still some friendly societies which are not registered; their status is not altogether clear. Building Societies are incorporated under the Building Societies Acts, 1874–1960. Such societies are established for the purpose of raising by subscription of members a stock or fund for the purpose of making advances to members out of such fund upon the security of heritable property.

**Trade Unions**

A trade union is defined by the Trade Union Amendment Act, 1876, s. 16, as a combination, whether temporary or permanent, for regulating "relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business." At common law if the rules and objects of a trade union were in restraint of trade, the association was illegal. Consequently it could not sue or enforce contracts. The situation was altered by the Trade Union Act, 1871, which provided that a trade union should not be illegal on this ground. Trade Unions may still exist at common law, provided their objects are legal, but statute has prescribed procedure by which, on registration, such a trade union may enjoy certain privileges and becomes subject to certain duties. The constitution and powers of a registered trade union are apparently to be construed as if it had been incorporated—the Act of 1871 being regarded as its "charter of incorporation." Thus a rule of a union purporting to give it powers beyond those conferred by the Trade Union Acts has been held to be *ultra vires*. This doctrine may also restrict the freedom of action of an unregistered union.

The powers of a trade union over its members, including the jurisdiction of its domestic tribunals, are based on contract, but it is for the ordinary courts to construe the true meaning of that contract and

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64 Industrial Insurance and Friendly Societies Act, 1929 (19 & 20 Geo. 5, c. 28) s. 5. Unregistered industrial and provident societies are in the same pattern as an unregistered building society.

65 There is said to be one unincorporated Scottish building society, and there can be no new ones. Societies regulated by the Industrial and Provident Societies Acts, 1893 to 1928, are incorporated (56 & 57 Vict. c. 39), s. 21. The Building Societies Act, 1960 (8 & 9 Eliz. 2, c. 64), s. 3, provides that a new society must have at least ten members.

66 39 & 40 Vict. c. 22.

67 34 & 35 Vict. c. 31.


69 *Wilson v. Scottish Typographical Assoc.*, 1912 S.C. 534. The Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30) has, however, now extended the powers of unions regarding application of funds.
to maintain the principles of natural justice. By section 4 of the 1871 Act certain agreements are made unenforceable by action for damages. These include, *inter alia*, agreements between members of unions as to conditions upon which they will sell goods or enter into contracts of employment; agreements for the payment of subscriptions or penalties; certain agreements regarding applications of union funds; and agreements entered into between unions. The result of this legislation, as construed judicially, is that though a union member may not sue for payment of benefits provided for in the rules, he may interdict the disposal of funds in a manner inconsistent with the rules. Moreover, where rules provide for the making of advances to members, though these cannot be compelled, if they are in fact made, repetition may be enforced.

In *Bonsor v. Musicians' Union*, the appellant was held entitled to maintain an action for damages for breach of contract against a union from which he had been wrongfully expelled. In the House of Lords, in particular, the law regarding the juristic nature of trade unions was reviewed in detail. Unfortunately the division of judicial opinion has obscured rather than clarified that very question. Though Lord Morton of Henryton and Lord Porter did not regard a registered trade union as an incorporated body, they accepted that it was a legal entity distinct from its individual members. On the other hand, Lord MacDermott and Lord Somervell considered that, though a registered union was not a juristic person distinguishable at any moment of time from the members of which it was then composed, yet nevertheless it might be sued in its own name and damages, as in the instant case, were recoverable from its funds. Lord Keith, in a somewhat Delphic speech, seems to have associated himself with this latter view, but to have considered also that the legal characteristics which differentiate a registered trade union from other voluntary associations may entitle it to be called a legal entity, while at the same time remaining an unincorporated association. The author would suggest with some diffidence that the concept of quasi corporation may appropriately be invoked in such cases.

*Bonsor's* case may profitably be studied for discussion of many aspects of trade union law—such as the doctrine of *ultra vires* in the

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71 Aitken v. Associated Carpenters (1885) 12 R. 1206.
72 Amalgamated Railway Servants v. Motherwell Branch (1880) 7 R. 867.
context of contract, and also regarding the special privileges which a registered trade union enjoys in the field of delictual liability. After the decision of the House of Lords in Taff Vale Ry. v. Amalgamated Society of Railway Servants, in 1901, to the effect that a union might be sued for the wrongful acts of its officials, it was provided by the Trade Disputes Act, 1906, s. 4, that “an action against a trade union, whether of workman or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious (scil. delictual) act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.” Section 3 of the same Act provides that any act done in contemplation or furtherance of a trade dispute shall not be actionable only on the ground that it induces some other person to breach a contract of employment or is an interference with the trade, business or employment of another person, but it may well be that this section does not protect from liability those who combine to injure an individual primarily because of a personal grudge against him and not in furtherance of a genuine trade dispute.

Partnership

Partnership was defined by the Partnership Act, 1890, s. 1 (1), as “the relation which subsists between persons carrying on a business in common with a view to profit.” The Act preserves the rules of common law, except where inconsistent with it, and these continue to be of substantial importance for modern practice. The general law of partnership, however, is to be treated in a companion volume by Professor Gow. In the present context it is only necessary to touch upon the questions of personality and capacity. It was firmly established at common law that partnership—or joint venture, which is a transient form of partnership—is to be recognised as a persona or quasi-person distinct from the individuals who compose it. This doctrine was expressly preserved by the Partnership Act, 1890, s. 4 (2), and is the source of most of the distinctive rules of substantive law and procedure applicable in Scotland. By

76 6 Edw. 7, c. 47.
77 Huntley v. Thornton [1957] 1 W.L.R. 321, discussed by C. Grunfeld, “‘Trade Dispute’ and Personal Disputes in a Union” (1957) 20 M.L.R. 495. It is possible that Scots law would not be restricted to attack the problem on the ground of conspiracy. See post, Chap. 31.
78 53 & 54 Vict. c. 39.
79 By the Companies Act, 1948, ss. 429 and 434, banking partnerships with more than ten members and other partnerships with more than twenty members are prohibited.
contrast, English law does not recognise a partnership as a separate juristic person. It may be recalled that behind individual Scottish decisions 81 "there was from the first the background of a philosophical conception of a system of law governing the relationship, based on the principles of the Roman law of societas modified by Dutch and by French influences. For if the older decisions on questions of partnership . . . are to be properly understood, it must not be overlooked that prior to codification there existed in Scotland a well-developed law of partnership which was an indigenous growth, distinct in its origin from the corresponding branch of the law of England."

The separate personality of a Scottish partnership is clearly recognised, but the exact nature of that persona is less easy to determine. Though a degree of continuity is accepted for the sake of business convenience and tax liability, the attribute of perpetual succession is not imputed. Partnership property is held by means of trustees and not directly like a corporation. Clark, the principal writer on the Scottish law of partnership prior to the era of statutory semi-codification observed, 82 "As . . . a partnership or unincorporated company is only a quasi person, and not a proper person, like an individual or a corporation, it should seem that it cannot hold property directly. . . . Whatever, therefore . . . becomes the property of the company, must be taken as held in trust for the uses and purposes of the company. Heritable property is held in the names of one or more of the partners, or in those of third persons as trustees chosen for that purpose; moveables or personalty appear to be held by all the parties jointly or pro indiviso, as trustees for the concern." These basic rules regarding partnership are not affected by subsequent legislation.

The separate persona of a partnership is, however, recognised in various circumstances. On sequestration creditors rank in the first place for the full amount of their debt against the partnership estate. One firm may sue another, though some of the partners may belong to both firms. In Mair v. Wood, 83 where the fundamentals were re-examined, it was held, however, that, though the doctrine of confusio would not preclude a partner from suing the firm, he was not entitled to bring an action for injury or loss caused through the negligence of another partner, even if the latter were acting within his implied mandate. In this particular case a partner in a joint fishing venture had sustained injury as a result of dangerous exposure of machinery. The Lord President (Cooper) stressed the general position, 84 "One

81 Ibid. p. 3.
82 1948 S.C. 83.
83 At p. 86.
of the leading consequences of the doctrine of the separate *persona* is the principle that a firm may stand in the relation of debtor or creditor to any of its partners and the rule of process that a partner cannot be sued for a company debt until that debt has first been constituted against the firm, *Neilson v. Wilson*.85 . . . Partners are, of course, liable jointly and severally in a question with a firm creditor for the obligations of the firm, but the theory of Scots law views them as being liable only *subsidiarie*, the partners being in substance guarantors or cautioners of the firm's obligations, and each being entitled on payment of a firm debt for relief *pro rata* from the others.”

A firm is liable for any wrongful act or omission of a partner acting in the ordinary course of its business, or with the authority of his co-partners, to the same extent as the wrongdoer himself.86 Moreover, the firm is liable when a partner acting with apparent authority receives money and property of a third party and misapplies it, or when money received by the firm is misapplied by a partner.87 If a firm is *lucratus* through the wrongful act of a partner it will be bound to make restitution.88

The conclusion may, accordingly, be justified that a Scottish partnership is to be classified as a *quasi-persona* or quasi-corporation.
CHAPTER 9

OBJECTS OF LAW

In the first Stair Society publication Sources and Literature of Scots Law, Sheriff S. G. Kermack contributed an important chapter on "Jurisprudence and Philosophy of Law" in which he observed, "The development of legal philosophy is one of these subjects the Scottish contribution to which has been forgotten by her lawyers, to their own loss." One of the consequences has been that no modern work on Scots Law deals systematically with the interrelation of legal rules affecting various divisions of the law, and Scots lawyers are in consequence denied necessary apparatus to proceed from principle rather than from particular instances. The Scottish Universities' Law Institute plans, however, to publish a volume on General Principles in its series of Commentaries, and this—for the first time since the institutional treatises—should enable the system to be viewed as a whole. Though recognising his duty in this introductory work to present the law in such a way that legal theory is not siphoned off altogether from the rules of substantive law, it is not possible in the time and space available to deal with more than a few of the essential principles which underlie the whole system of private law. These can only be treated in briefest outline. It is no easy matter to see the jurisprudential wood through the felled timber of accumulated precedents. Even in matters of terminology there is the difficulty that judicial recognition has not yet been given to many of the expressions which must be used. As with the Founding Fathers of the Scottish legal system, a modern writer must acknowledge his debt to the lawyers of other civilian systems who have analysed them systematically.

OBJECTS OF LAW

The Objects of Law may either be Real Rights (or Property) which may be vindicated generally, or Personal Rights (Obligations) which may be created with a view to transferring Real Rights, but in general create rights and duties only between the parties or their assignees. Those rights which the law recognises and enforces are narrower in scope than the "rights" recognised by morality or social

1 Sources and Literature of Scots Law (Stair Soc., Vol. 1) p. 439.
2 Lord Macmillan, Law and Other Things, p. 84.
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custom. Moreover, legal rights in the stricter sense are to be distinguished from "liberties"—which can only be regarded as rights in the broad sense that they concern conduct, as to which the law maintains a neutral attitude. Legal liberties (or licences or privileges) are the benefits which a person enjoys from freedom from legal duties—where, in short, the law allows the individual to act as he pleases. Thus a person may publish or trade—but the law will not compel him so to do. Unwarrantable interference with the liberties of others is, however, struck at by the law. Rights in the strict sense are always correlative to duties, but the expression "rights" is often used more loosely to imply, not only liberties, but also "powers" and "immunities." Though no man is bound to make a will, the law gives him the power to make a legally effective testament. The law is thus not merely neutral as in the case of "liberties." By "immunity" is implied exemption from the power of another. He who is recognised by the law as holding a power may alter the legal relations of others; he who enjoys an immunity is exempt from having his own legal relations changed.

Real and Personal Rights

Though his language is that of the seventeenth century, many of the basic ideas regarding rights in the strict meaning are admirably expressed by Stair.3 "The formal and proper objects of law are the rights of men. A right is a power, given by the law, of disposing of things, or exacting from persons that which they are due. This will be evident, if we consider the several kinds of right, which are three, our personal liberty,4 dominion5 and obligation. Personal liberty is the power to dispose of our persons, and to live where, and as, we please, except in so far as, by obedience or engagement, we are bound. Dominion is the power of disposal of the creatures in their substance, fruits, and use. Obligation is that, which is correspondent to a personal right . . . and it is nothing else but a legal tie, whereby the debtor may be compelled to pay or perform something, to which he is bound by obedience to God, or by his own consent and engagement."

Those rights which are inherent in personality are protected by the processes of public law or by delictual action. Apart from such rights, which have already been discussed,6 the Objects of Law, therefore, as mentioned before, are either Real Rights (Property) or Personal Rights (Obligations). The interest of a beneficiary under a

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3 I,1,22. See also W. N. Hohfeld, *Fundamental Legal Conceptions.*
4 "Liberty" is here used in a broad sense.
5 i.e., "dominium," property or ownership—the principal real right. Ownership and possession are discussed, post, pp. 459-467.
6 See ante, p. 260.
trust is also a personal right, but is subject to certain specialties, as will be discussed later. The distinction between real and personal rights is well stated by Erskine.\(^7\) “The essential difference may be perceived between rights that affect a subject itself, which are called real and those which are founded in obligation, or, as they are generally styled, personal. A real right, or *jus in re*, whether of property, or of an inferior kind, as servitude, entitles the person vested with it to possess the subject as his own; or, if it be possessed by another, to demand it from the possessor, in consequence of the right which he hath in the subject itself: whereas the creditor in a personal right or obligation has only a *jus ad rem*, or a right of action against the debtor or his representatives, by which they may be compelled to fulfil that obligation, but without any right in the subject which the debtor is obliged to transfer to him.”

In short, a real right (*jus in re*) is asserted by vindication, that is the power to recover by action a *specific thing* (other than money) from any person whatsoever in unlawful possession. By contrast, a personal right, including claims for delivery of a specific object (*jus ad rem*), is asserted by an action directed against a particular individual who is bound to pay or perform.

In this connection it is important to stress the distinction between Contract, on the one hand, and Conveyance or *traditio*, on the other. The former creates only a personal right, while the latter transfer *jura in re*. *Traditionibus et usucapionibus dominia rerum, non pactis transferuntur*. Where the interests of third parties are in issue, the distinction may be most important. It does not follow that, because a contract could be reduced on grounds of fraud or (in some cases) because of error, real rights transferred in pursuance of such a contract are also vulnerable, if they have been subsequently transferred to an onerous third party.\(^8\) At common law, as in the Roman law of *emptio venditio* on which it is based, the contract to sell moveables did not transfer a real right, and, in considering the older Scottish decisions on matters such as error, it is important to remember that they were usually concerned with personal rights only. By the Sale of Goods Act, 1893, s. 17, however, the English rule was introduced but for the contract of sale of goods only that property (*jus in re*) might pass by agreement.

In English law the right of a beneficiary under a trust is a *tertium quid* between Real and Personal Rights, and may be regarded as a species of property—equitable estate. In Scotland, the interest of a beneficiary under a trust—despite some dicta influenced by English notions—is now clearly recognised as essentially a right *in personam*,
though trust property may be traced in the hands of those who have not received it in good faith and for value.\(^9\)

**Obligations Ex Lege, Ex Culpa, Ex Voluntate**

Besides the division of rights into those which are real and those which are personal, other methods of classification—which cut across, but do not invalidate the distinction between real and personal rights—may be useful. Though he recognised that certain rights and duties were created *ex lege*,\(^10\) Stair made his main distinction\(^11\) between rights and duties which were "obediential" and those which were "conventional." "The first principles of right are obedience, freedom and engagement."\(^12\) By obediential he implied that the law, by reinforcing some moral duty, such as that of restitution, restricts in another's favour an individual's freedom of action irrespective of his will. Beyond the orbit of "obediential" duty, however, a man was, he considered, free to act as he pleased, unless by his own will he restricted that freedom. The particular value of this distinction between "obediential" and "conventional" is that it stresses the proper hierarchy of rights and duties. A man's "obediential" rights or duties are supplemented, not superseded, by those which arise *ex voluntate*—unless, of course, the effect of an agreement has been to exclude rights which the law would otherwise have conferred.\(^13\)

A rather more detailed classification based on principles recognised by Stair may be suggested, namely:

1. Rights arising *ex lege*, *i.e.*, by force of law and quite independent of fault or will. The law may confer rights either (a) merely upon considerations of public policy or expediency or (b) by reinforcing with legal sanctions some obediential or moral duty.

2. Rights resulting from the Illicit Act or *culpa* of a person, who is on that account subjected to an obediential duty—usually of reparation.

3. Rights brought into being *ex voluntate* by the Juristic Act of the granter or person obliged.

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\(^10\) Stair, I,9,5. Stair's analysis was strongly influenced by Grotius, and what the former had in mind can be further elucidated by reference to the latter's *Inleidinge*, translated by R. W. Lee as *The Jurisprudence of Holland*, esp. Chaps. 32 & 38.

\(^11\) Stair, I,3,2; also Bell, *Principles*, § 6; Smith, *Studies Critical and Comparative*, p. 77 *et seq*.

\(^12\) Stair, I,1,18.

\(^13\) As to election, see *R. v. S.*, 1914 S.C. 193. It is hoped that a paper submitted to the Sixth Congress, at Hamburg, of the International Academy of Comparative Law (1962) by Mr. M. R. Topping, entitled "Cumulative Liability in Contract and Delict in the Law of Scotland," will be published shortly.
The relevance of this method of differentiating between rights is, perhaps, most important in the field of Obligations. First, irrespective of the will of the person obliged, an obligation may be imposed by force of law. Such obligations arising *ex lege* may be, as Stair put it, “obediential,” where the law reinforces some moral duty—as to support close relatives or to make restitution of the proceeds of unjustifiable enrichment. The law, moreover, also creates *ex lege* certain strict or absolute obligations as a matter of public policy, irrespective of moral considerations—such as cases of strict liability or quasi delict, using the term correctly (though in Scottish practice this term has frequently been misappropriated to imply negligence). Secondly, there are the obediential obligations based upon fault, of which delict or reparation is the principal category. Thirdly, there are obligations created by the will of the person obliged, whereby wider duties are assumed than the law would otherwise imply—or which restrict the scope of those duties which the law would imply in the absence of agreement.

It may be stressed that the categories of liability *ex lege* or those based on fault such as reparation or delict, restrict a person’s freedom of action irrespective of his will, and therefore logically take priority in the hierarchy of obligations. Though contract may, as between the parties, modify the duties which the law would otherwise impose, unless they are so modified, they are not superseded merely because parties have entered into a contractual relationship. A person sustaining damage as a result of *culpa* or fault may elect to base his action on reparation rather than on contract. Failure to appreciate this hierarchy of obligations has at times involved Scots law in the contract-tort controversies of English law, which fathered the fallacy that, if A owes a duty in contract to B, he cannot owe a duty in delict to B or to C in respect of the same act or subject-matter.

**Acts and Facts (Events)**

The creation, modification, transfer and extinction of a right depends either on human conduct (an Act) or on a Fact (or Event) to which the law gives effect, irrespective of the will of any person.

Certain Acts may be effectual when a person—without necessarily involving the interests of third parties at all—exercises his will directly over a thing as, for example, if a man destroys his own property, or alters it by industrial accession, or exercises control *animo possidendi*. The two principal categories of acts having legal effect may, however, be designated Illicit Acts and Juristic Acts.
Illicit Acts

The general concept of Illicit Acts comprises all acts or omissions which, through fault of the wrongdoer, cause loss, injury or damage to another. Apart from breaches of fiduciary duty, as by a trustee, Illicit Acts comprise breaches of contract and delicts. Culpa or fault in the execution of (or failure to execute) a contract presupposes a pre-existing obligation. Standards of care, disregard of which imply culpa, vary according to the type of contract under consideration. Where culpa in the execution of contract is established, this does not modify the principal obligation, but reinforces it with an additional duty to pay damages. Culpa in the field of delict, however, arises independent of any preceding obligation.\(^1\)

Delict

Liability in delict is based upon culpa (fault) which may imply dolus (intention) or culpa in its narrower sense (scil. negligence). When solatium is given for a deliberate affront to the personality of another, as by assault, insult, or by depriving him of access to res communes omnium, the basis of liability would seem to be the actio injuriarum of Roman law, in which animus injuriandi was an essential element.\(^15\) Solatium for wounded feelings may also be awarded in actions where the basis of liability is culpa in the sense of negligence, but the element of solatium in such an action (which is frequently and most misleadingly referred to as an actio injuriarum) in fact derives, as was the case in Europe generally, from the redress (or blood money) for killing or wounding provided by Germanic or Celtic customary law.\(^16\) Apart from cases of solatium based on the true actio injuriarum or upon customary law, the duty to make reparation for patrimonial or financial loss depends upon culpa or Aquilian fault, taken over and developed from the evolved actio ex lege Aquilia of Roman law. Culpa in this sense implies either dolus or culpa (in the narrower sense), and the measure of damages will normally be the same whichever type of fault is established. When, however, the harm inflicted was actually intended by the wrongdoer, he cannot be heard to say that his liability should be excluded because the reasonable man would not in the circumstances have foreseen the harmful consequences of the act in question. Where, as in some assaults or insult, patrimonial loss is involved as well as affront to the personality of the victim, the victim’s claim for reparation will combine elements derived from the actio injuriarum and from the Aquilian action.

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\(^{15}\) See British Justice: The Scottish Contribution, pp. 158–160, 165–166; Studies Critical & Comparative, p. 78 et seq.

Juristic Acts

The expression "juristic act" (acte juridique, negozio giuridico, Rechtsgeschäft) is somewhat cumbrous, but is now generally accepted by those systems with which Scots law was associated during its formative period. A comprehensive term is necessary to cover the many situations in which a declaration or manifestation of the will creates, modifies, transfers or extinguishes a right. Certain rules and principles apply to such declarations generally.

Juristic Acts may be classified in various ways. Thus they may be inter vivos (of which contract is the principal example) or mortis causa, as in testamentary dispositions. A distinction may also be made between acts which are gratuitous, such as donation and promise, or imply onerous title, as with sale. Certain rules regarding proof and reduction apply to one category and not to the other. Again, an important division is between unilateral and bilateral juristic acts. Within the first category (where effect is given to a single will) may be included renunciation of rights, wills and enforceable promises (pollicitations). The unilateral juristic act inter vivos in the form of enforceable promise has special importance in Scots law.\(^{17}\) Agreements, of which contract is the principal species, involve the concurrence of a plurality of wills. Contracts may be synallagmatic (involving reciprocal duties of performance) or unilateral, where one party alone is bound to performance. The essential distinction between the unilateral contract and the enforceable promise (which is a unilateral juristic act) is that no obligation is created in the former case until offer has been met by acceptance, and performance must thereafter be accepted. The person in whose favour an enforceable unilateral promise has been made is free to renounce the benefit in his favour. Lastly, it may be noted that certain juristic acts, such as conveyance or traditio, are effective to transfer real rights, while others, such as a contract to hire, create personal rights only.

Juristic acts depend on the manifestation of will.\(^{18}\) If this is expressed by persons of full capacity in the form required by law for the category of act in question, and contemplates a lawful object, the freedom of the declarant to act as he pleases thereafter is restricted to the extent he himself has willed in his declaration. There may, however, be discordance between the actual will and its external manifestation, and, in resolving the problems which result, no modern legal system confines attention to subjective considerations entirely. Nevertheless, the civilian approach to these problems is primarily concerned with the actual will rather than with its external

\(^{17}\) Ibid. p. 168 et seq.
\(^{18}\) e.g., Stair, 1,10,1.
expression. If the expression of will has been corrupted in transmission, as in an offer made by telegram, or a contract is drawn up in terms which do not correspond to what the parties agreed, effect will be given to the actual rather than to the ostensible will. Relief is given for error in expression. If an apparent concurrence of wills is shown to be due to a latent ambiguity (say) in a contract, the act will be null. Again, in cases of simulation the law has regard to the true will of the parties rather than to the form in which they express it—as if they seek to use the form of sale to effect a donation.

Vices of Will or Consent

More important, however, are those cases where, though a person may perhaps have manifested what was actually in his mind at the stage of formulation, his will or consent was influenced by vitiating factors. These factors, known as "vices of will or consent," comprise error, fraud and its extensions, also force and fear (vis ac metus). To be effective the will must be expressed freely, and, in general, with awareness of the facts relevant for determining consent.

Fraud

Only fraud which induces error is recognised as a vice of will or consent, but the element of fraud justifies a court in taking into account errors in motive which could not be accepted generally as cases of essential error. Unless fraud can be shown to have totally excluded consent, it is given effect only as a ground of relative nullity. That is to say steps must be taken by the party deceived, or by those claiming through him, to have the contract or other juristic act reduced. This right may be lost completely if onerous third parties have acquired real rights from the party who acquired them fraudulently. It may be stressed that such loss in no way affects the competency of an action against the latter for damages in delict in respect of the fraud. In most civilian systems the principle of bona fides (good faith) applies to many juristic acts—including most contracts. One of the meanings of dolus or fraud implies conduct inconsistent with good faith, though such conduct would not have justified an action in delict. This principle of bona fides comprehends those situations which in England are dealt with by the doctrines of (so-called) "innocent misrepresentation" and "undue influence." It may be thought that the concepts of fraud, error, and good faith

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19 e.g., Clydebank Engineering Co. v. Castaneda (1903) 5 F. 1016.
20 For detailed discussion, see Chap. 35, post.
21 Kames, for example, discussed the interesting situation where a donation or legacy is conferred by a person misled as to relationship or other qualities of a beneficiary: *Equity, 4th ed.*, p. 201 et seq.
22 Bankton, 1, 11, 65.
were sufficient for the purposes of Scots law to give relief to a party who had been misled or who had been taken advantage of by the other. Nevertheless, there has been some experiment with the English doctrines of "innocent misrepresentation" and "undue influence," though these to some extent may be regarded merely as particular aspects of the broader principle of good faith—disregard of which might properly have been regarded as "fraud" in the broad contractual (as opposed to delictual) sense. In modern practice, however, as a result of a bywind from the English case of Derry v. Peek, there has been a tendency to restrict the term "fraud" to imply such conduct as would found an action in delict. It may be stressed, nevertheless, that as Scottish institutional writers clearly discerned, the contractual and delictual effects of fraud are distinct. It may also be noted that non-fraudulent misrepresentation justifies reduction of a legal relationship in the same manner as does fraudulent misrepresentation. Though for historical reasons—associated with the distinct systems of common law and equity in England—English law does not give damages in delict for negligent misrepresentation, it is thought that the Scottish concept of culpis is probably broad enough to justify delictual damages in many such cases. This has, however, never been conclusively decided. The principle of fraud is apparent in the doctrine of reduction of juristic acts on grounds of facility and circumvention, which is particularly relevant in connection with acts mortis causa; while vestigial traces of a doctrine of "extortion" survive in connection with inter vivos acts.

**Force and Fear or Vis ac Metus**

There is little Scottish authority on this branch of the law. In certain cases—where the will was completely non-existent—the effect of this vice is to make the juristic act absolutely null or void. In other cases, where the pursuer consented unwillingly and can only say "coactus volui," force and fear may be only a ground of void-ability or relative nullity.

**Error**

Error as a vice affecting expression of the will implies that one party at least entering into a legal relationship has been mistaken as to an essential element and has supposed erroneously that the facts on which he resolved to act correspond to reality. Essential error

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going to the fundamentals of a legal relationship may, it is submitted, be a ground either of absolute or of relative nullity, according to circumstances. The decisions, however, are in a state of confusion largely as a result of incautious reliance at times on English precedents, where the underlying principles of contract in particular are not identical with those relevant for Scots law. Where there is dissenus— as in cases of latent ambiguity— it seems that the ostensible manifestation of wills is totally ineffective, and thus even third parties interested, such as creditors of one of the declarants, could bring an action to have the relationship declared null. In other cases, as when justus et probabilis error is established as to quality of a res sold, only the parties can assert a relative nullity (or voidability) and the appropriate action is one of reduction.

The widest formulation of the doctrine of essential error is contained in Lord Watson’s speech in Menzies v. Menzies: “error becomes essential whenever it is shown that, but for it, one of the parties would have declined to contract.” This definition would include certain errors of motive; and goes much further than his Lordship’s earlier attempt to restrict the concept of essential error to five specified categories, i.e., as to subject-matter, the identity of parties, price or consideration, quality of the res and nature of the contract or engagement. Error may be pleaded not only when it relates to a question of fact, but also, though in certain circumstances only, where it relates to a question of law. The circumstances in which error may be relied on as a vice of will or consent will be discussed more fully in the context of contract.

FACTS (EVENTS)

Facts or natural events may be relevant for the creation, modification or extinction of rights. Examples of the more important of such facts comprise birth, death, illness—especially mental illness— accidental destruction of a thing (rei interitus) and passage of time. Of these time alone need be discussed in the present chapter.

Time

Time is of relevance in many contexts. Its passage brings to each human being first the limited capacity and liabilities associated with minority, and later the full capacity of majority. If certain rights are not exercised over a period appointed by law, they are lost by virtue of the extinctive or negative prescription. Other rights, if exercised continuously in the context of possession, mature through

26 Stewart v. Kennedy (1890) 17 R. (H.L.) 25 at p. 28.
the positive prescription into full rights of ownership. Numerous statutory provisions,\textsuperscript{27} moreover, impose an additional burden of proof upon persons who have neglected to exercise their rights over certain specified periods of time, or, more generally, where the passivity of a party justifies a plea of \textit{mora} and taciturnity.

**Prescription**

The period of the negative prescription was reduced to twenty years by the Conveyancing (Scotland) Act, 1924, s. 17\textsuperscript{28}—except for servitudes, rights of way and public rights, for which the period remains that formerly generally applied, namely, forty years. Negative prescription cuts off obligations—other than real burdens—affecting land, but cannot create a positive title. So far as moveable property is concerned, possession on loan for the period of negative prescription bars the lender's action for recovery; quasi-contractual, also contractual and other voluntary obligations may be extinguished in the same way.\textsuperscript{29} In questions of trust, however, so long as the trust property remains in the hands of a trustee, no lapse of time will bar the beneficiaries' claim,\textsuperscript{30} though the negative prescription will be effective to protect trustees against a personal claim, and also against liability for alienation or destruction of any part of the trust estate. Except in questions of servitude or right of way the plea of \textit{non valens agere} does not avail to suspend the running of prescription, at least where the disability was intrinsic—such as minority.

The septennial prescription of cautionary obligations (contracts of guarantee) depends upon the Act, 1695, c. 5,\textsuperscript{31} which extinguishes such obligations after seven years unless steps are taken to renew them.

If heritable subjects have been possessed for the full period of the positive prescription on an "\textit{ex facie} valid irredeemable title duly recorded in the Register of Sasines," defects in the title will lose their effect, and possession will thus ripen into ownership.\textsuperscript{32} The periods are the same as those fixed for the negative prescription.

**Computation of Time**

The Calendar (New Style) Act, 1750,\textsuperscript{33} as amended by the Calendar Act, 1751,\textsuperscript{34} authorised the adoption of the Gregorian Calendar in Great Britain as a whole. By section 2 of the 1750 Act

\textsuperscript{27} See \textit{post}, p. 460.
\textsuperscript{28} See also \textit{post}, Chap. 21.
\textsuperscript{29} See \textit{post}, Chap. 38.
\textsuperscript{30} See \textit{post}, Chap. 25.
\textsuperscript{31} \textit{A.P.S. IX}, 366, c. 7.
\textsuperscript{32} See \textit{post}, pp. 466–467.
\textsuperscript{33} 24 Geo. 2, c. 23.
\textsuperscript{34} 25 Geo. 2, c. 30.
it was provided that every hundredth year (except the four hundredth) should be deemed a common and not a leap year. Special provisions for applying the statute to Scotland were made by section 4. It may, however, be observed that in Scotland New Year's Day had been fixed as January 1 as from the year 1600. In England until January 1, 1752, New Year's Day had been on March 25, a matter of some importance in considering the dating of legal documents and references to the years in which legislation was passed.

The computation of time in days, months, or years has made necessary the establishment of rules as to how time is to be reckoned. The Interpretation Act, 1889, s. 3, provides that in every statute the expression "month" shall, unless the contrary intention appears, mean calendar month. At common law "week" means calendar week, and "day"—unless where otherwise provided by statute—generally means a period of twenty-four hours between midnight and midnight.

Time may be reckoned by two methods, naturalis computatio and civilis computatio. According to naturalis computatio, time is reckoned de momento in momentum. Where time has to be computed in hours, this method seems appropriate, but where the period of time to be determined covers days, months, or years civilis computatio—or calculation de die in diem—is normally appropriate. On the other hand in ascertaining whether the ages of minority or majority have been attained, the rule is that calculation shall be de momento in momentum from the date of birth.

**CREATION, TRANSFER AND EXTINCTION OF RIGHTS**

Legal rights may be acquired either by original or by derivative title. Original title implies that the thing or right has been acquired ex novo, and does not derive from any right previously enjoyed by another. Derivative title, on the other hand, depends upon a pre-existing right vested in an author. Legal succession, where title is derivative, may depend upon a juristic act—such as sale—or may take place through operation of law, as in succession to an intestate decedent. Succession, moreover, may either imply transfer of an existing right or creation of one which had no previous existence. Thus on sale, the vendor's right is transferred to the purchaser, but in the case of pledge the debtor grants to the creditor rights which come into being for the first time. Succession may either be universal

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35 52 & 53 Vict. c. 63.
37 See, e.g., Drummond v. Cunningham-Head (1624) Mor. 3465.
or singular. Universal succession (successio in universum jus) implies the most comprehensive transmission of rights and liabilities, though in modern practice heirs, executors and trustees in sequestration are protected against personal liability beyond the value of the estate transmitted to them. By singular successors, is implied purchasers, disponees and other persons acquiring title either by judicial act or by act of parties. In questions of succession (in this broad sense) two general principles regulate the title of the transferee—namely “nemo plus juris ad alium transferre potest, quam ipse habet”; and “resoluto jure dantis, resolvitur et jus concessum.” Nevertheless, these principles are restricted in operation on grounds both of equity and expediency. Though a vitium reale attaches to stolen property, so that not even a bona fide purchaser for value may acquire good title in Scots law, in certain circumstances, as under the Sale of Goods Act, 1893, and the Factors Act, the law recognises that a transferee may acquire better title than that of his author. Moreover, a distinction must be made between succession to real and personal rights. It may well be that justa causa traditionis will suffice to support a real right, even though the causa underlying the traditio was a contract vulnerable to challenge. On the other hand, personal rights when transferred are almost always governed by the rule assignatus utitur jure auctoris.

Rights may be lost or extinguished in various circumstances. If the subject-matter is totally destroyed, rights over it are extinguished completely. If the subject is alienated to another, the transferor’s right is only completely extinguished when the transferee’s title is perfected. By renunciation—as, for example, of a legacy, gift or benefit under a pactum in favorem tertii—rights may be lost. Similarly by abandonment or derelictio a person may divest himself of a right which he has already acquired. The operation of the negative prescription has been considered already.

ENFORCEMENT OF RIGHTS

In broadest terms, and without discussing procedural questions, the principal methods of enforcing rights may be noted. Consistorial actions, which arise out of the relationship of husband and wife, are discussed in the context of Family Law. Other civil actions may be divided into the following main categories—though it is possible for an action to combine several of the characteristics specified:

89 In the case of negotiable instruments, persons receiving in good faith and for value acquire valid title notwithstanding defects in the title of the transferor or prior holders.
Actions of Declarator

In such actions the pursuer does not demand that the defender should pay or perform anything, but seeks to have declared in his favour some right of property, status or other kind of right (even though contingent) which is contested or imperfectly defined. This is a very comprehensive and useful form of action, but may not be brought to have a fact declared without any resulting legal consequences; nor is it competent to raise a bare action of declarator as to the meaning of an Act of Parliament.

Rescissory Actions

Actions of reduction are brought to annul or rescind any deed, decree of other written document or any illegal act done in prejudice of the pursuer's right. When the ostensible right challenged is in fact absolutely null (void), as in cases of forgery, the appropriate procedure is by declarator; where the right is only relatively null (voidable), as in some cases of fraud, it should be set aside in a rescissory action.

Petitory Actions

Petitory actions are so called because the pursuer makes some demand on the defender for money, property, or performance. Such proceedings comprise actions for restitution of moveables, actions of forthcoming, of count reckoning and payment, of implement and generally all actions in contract, quasi-contract and delict. All reipersecuratory actions (where the pursuer claims a res which is or ought to be his); penal actions (such as claims for damages in respect of insult) and "mixed" actions (as where defamation has also caused patrimonial loss) have petitory conclusions.

Possessory Actions

Formerly many nominate actions such as spuilzie were given to attain, retain, or recover possession without asserting an absolute right. In modern practice most possessory actions take the form of interdicts, suspensions and interdicts, or actions of removing.

Competitive Actions

Where two or more persons are claimants for the same right or on the same fund, the dispute between them is normally settled in an action of multiple poinding, in which the court, after listening to the competing claims, decides between them.

Actions relative to Diligence

By adjudication a creditor may have his debtor's heritable property adjudged to him for his debt, either in security or execution,
while by an action of poindings the creditor may have the moveable property of his debtor transferred to him. In an action of sequestration the whole of a bankrupt's estate is transferred to a trustee for equitable distribution among the creditors. Diligence (execution) may be stayed by suspension or suspension and interdict. In those rare instances where diligence has been personal, involving civil imprisonment, as in certain cases of refusal to pay aliment or to obtemper a decree ad factum praeitandum, this procedure may be stayed in an action of suspension and liberation.

**PERSONAL BAR**

Power to enforce legal rights and to resist claims may be affected by the principle of Personal Bar (*anglicé* "estoppel"). On grounds of equity a party may be barred from proving that facts are different from what he has induced another to believe. The ramifications of this principle in Scottish law are numerous and extensive, and apply, not only in the Law of Obligations, but also in Family Law and in the Law of Property. Rankine on Personal Bar remarks 40

It calls up in the mind of the pleader such terms as *rei interventus*, homologation, ratification, adoption, acquiescence, taciturnity, *mora*, delay, waiver, standing by, lying by, holding out, and other phases of conduct. . . . It may proceed by preventing disclaimer of title, or by preventing repudiation of an agreement *instructed aliunde* though informally; or it may lead to the inference of implied consent. In each case it operates by conclusively intercepting or shutting out all contrary pleas and proof.

A summary of the principle was attempted by the Earl of Birkenhead L.C. in *Gatty v. Maclaine,* 41

The rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.

*Rei interventus* has been defined by Bell in a passage 42 expressly approved in the House of Lords as follows:

*(Rei interventus)* is inferred from any proceedings not unimportant on the part of the obligee, known to, and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable. 43

41 1921 S.C. (H.L.) 1, at p. 7.
43 See also *Wight v. Newton*, 1911 S.C. 762.
This aspect of bar is often invoked to preclude a party from resiling from a contract on the grounds that some formality has not been observed. In cases of rei interventus, unlike other forms of personal bar, the actings relied on are those of the party who is seeking to submit himself to the obligation—as if a man, relying on an informal agreement to lease him a shop, had decoration and repair work carried out with the knowledge of the prospective lessor. It is sufficient that the actions be “not unimportant.”

Though pleas of rei interventus and homologation have generally been discussed in the context of personal bar, the present author wishes to reserve for argument the question whether this does full justice to these pleas. The origin of the doctrine of rei interventus may well have been derived from the innominate contracts re of Roman law such as do ut des, where locus poenitentiae continued until one party had barred it by part performance. Such performance brought the whole agreement into full force and made it reciprocally obligatory. After the Reception, and until Canon law and Natural law influences had secured recognition of the principle pacta sunt servanda, the doctrine of rei interventus or part performance survived. Eventually, however, the position was that stated by Groenewegen in his Tractatus de Legibus Abrogatis et Inusitatis; “Sed cum jure canonico et moribus nostris nuda pacta eandem, quam stipulationes vim habeant. ideo hodie ex quolibet contractu innominato efficax actio oritur. quae etiam re integra poenitentiam excludit, nisi aliud actum appareat.” In Scots law, however, the doctrine of locus poenitentiae is recognised in certain cases where though writ is essential for constitution of an agreement, the right to resile may be barred by rei interventus. It may be thought that when locus poenitentiae is thus excluded, the agreement becomes valid, not only so far as the reciprocal rights and duties of the parties are concerned, but also so far as the interests of strangers to the contract might be involved. These might be, for example, creditors of a party or persons with an option over the subject-matter. The effect of rei interventus may thus go beyond mere exceptio personalis or personal bar, which is an aspect of the law of evidence.

“Homologation” is similar in nature to rei interventus and, like it, is usually relied on in contract when it would be inequitable to allow one party to resile from an informal agreement on grounds of locus poenitentiae, because he had repented of his bargain, and desired to rely on the informality. Indeed the same actings viewed from

44 Walker v. Flint (1863) 1 M. 417.
45 Mitchell v. Stornoway Trs., supra; e.g., applying for authority to build, or registering a license agreement: Wilson v. Fenton Bros., 1957 S.L.T. (Sh.Ct.) 3.
46 ad. D. 12.4.5.
different angles might be regarded both as *rei interventus* and homologation.\textsuperscript{47} Bell\textsuperscript{48} states

Homologation (in principle similar to *rei interventus*) is an act (of the obligor or his legal representative) approbatory of a preceding engagement, which in itself is defective or informal, either confirming, or adopting it as binding. It may be express, or inferred from circumstances. It must be absolute, and not compulsory, nor proceeding on error or fraud, and unequivocally referable to the engagement; and must imply assent to it, with full knowledge of its extent, and of all the relative interests of the homologator.

A concise formulation of the principle involved may be quoted from Lord Moncreiff's interlocutor in *Gardner v. Gardner*.\textsuperscript{49}

The law of homologation proceeds on the principle of presumed consent by the party who does the acts, to pass from grounds of challenge known by him to exist, and *sciens et prudens* to adopt the challengeable deed as his own.

Thus if rent is paid or modifications are obtained by a tenant on a lease which might be set aside, or interest is paid on a voidable bond, the contracts will be held to be homologated as from their original date.\textsuperscript{50}

Homologation is relevant where an agreement is voidable (relatively null)—not where it is void. A totally null and ineffective deed may, however, be "adopted" by the person sought to be held liable, and will become valid as from the date of adoption. The contrast between homologation and adoption appears clearly from the case of *Gall v. Bird*.\textsuperscript{51} In that case the pursuer challenged an agreement as void *ab initio* on grounds of insanity, and also claimed to reduce it on grounds of facility and lesion. The defender pleaded homologation. It was held that, though this plea would be competent to meet averments of facility, which, if proved, would render the transaction merely voidable, it was ineffective to meet averments of insanity, which, if proved, would destroy the deed *in toto*. Adoption was not pleaded in this case.

"Acquiescence" is another aspect of personal bar.\textsuperscript{52} Its application is not closely defined, but it may be invoked in some cases where one who sees that his rights are being invaded abstains from taking any action to safeguard them, so as to raise the inference that

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\textsuperscript{47} See refs. note 45, supra.

\textsuperscript{48} *Principles*, § 27.

\textsuperscript{49} (1830) 9 S. 138 at p. 140.

\textsuperscript{50} Lord Advocate v. Wemyss (1899) 2 F. (H.L.) 1; McCalman v. McArthur (1864) 2 M. 678.

\textsuperscript{51} (1855) 17 D. 1027.

\textsuperscript{52} See Bell, § 946; also J. R. Scott, "Some Aspects of Acquiescence" (1957) 1 Conveyancing Rev. 85.
he agrees to what is being done. In Cairncross v. Lorimer, Lord Campbell L.C. observed 55

If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained—he cannot question the legality of the act he had so sanctioned—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

Thus, acquiescence may be an effective plea in answer to an action based on nuisance or interference with a servitude, 56 but since the bar is personal it does not operate in rem as does prescription. Consequently singular successors are not barred by acquiescence on the part of previous proprietors. 56 For the plea to be competent, it must appear that the person alleged to be barred had full knowledge of and power to stop the acts in which he is alleged to have acquiesced. 56 The plea is also relevant in contract where there is a foundation of circumstances or informal writing which would warrant the implying of an agreement. 57 Acquiescence merges without very clear differentiation into mora and taciturnity, with which it is often linked in pleading. 58 These pleas do not extinguish an obligation, but will avail if a person who has a right to repudiate a transaction stands by for an inordinate time; and will affect the onus of proof in other cases where, through passage of time, evidence has been lost. 59

“Holding-out” is that aspect of bar which precludes a party from denying that one whom he has allowed to pose as his partner or agent was, in fact, thus related to him. Bar by negligence may also arise in certain cases where there is a duty to take care.

As a rule a person acquiring property or a written obligation is entitled to assume that his author has title to transfer the right untrammelled by latent claims. If, however, he actually knew—or as a reasonable man ought to have known—that such claims existed, he may be barred from asserting, as against a third party, that his author was free to transfer the right in question. Thus, though

56 Muirhead v. Glasgow Highland Society (1864) 2 M. 420.
58 Earl of Kintore v. Pirie (1903) 5 F. 918.
generally speaking an intending purchaser of heritage is entitled to rely on a vendor’s title as it stands in the Register of Sasines, if such intending purchaser is aware of a prior contract affecting the subjects, he is not entitled to rely merely upon an assurance by the prior seller that the prior contract is no longer in existence. Such notice deprives him of the character of bona fide purchaser.60 On the other hand, a singular successor, despite notice of an agreement between author and third party, is not disqualified from impugning the validity of missives under which the third party claimed to be in occupation.61

**Bona et Mala Fides**

It is more practical and convenient to discuss the implications of bona fides and mala fides in the very many contexts where these concepts are relevant. A few of the principal effects of bona and mala fides may, however, be summarised briefly.

**Questions of Status**

The doctrine of putative marriage enables a child born of a void but ostensibly valid marriage to be regarded as legitimate, if one at least of his parents believed bona fide in the validity of the union.62 Thus the child of a woman who has gone through a ceremony of marriage with a bigamist may be recognised as legitimate.

**Bona fide Possession**63

A bona fide possessor is one who, although not proprietor of the subject which he possesses, yet believes himself upon reasonable grounds to be entitled. When the bona fide possessor is ejected, he enjoys certain rights with regard to the perception and consumption of fruits. Scots law goes further than the civil law maxim “*Bona fide possessor facit fructus percepitos et consumptos suos.*” Perception or ingathering of the fruits gives good title in them to the bona fide possessor. Moreover, he who sows crops in good faith is entitled to reap them on the principle *messis sementem sequitur.*64 A mala fide possessor is obliged to restore to the true owner not only the fruits which he has actually ingathered but also the value of those which through *culpa* he failed to ingather.

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60 Rodger (Builders), Ltd. v. Fawdry, 1950 S.C. 483. A purchaser is, however, apparently not bound to investigate suspicions that reservations may exist in feu charters affecting property which he has contracted to purchase: Mossend Theatre Co. v. Livingstone, 1930 S.C. 90.

61 Mann v. Houston, 1957 S.L.T. 89.

62 See post, p. 359.

63 See post, p. 466.

64 See post, Chap. 20.
Recompense and Bona Fide Possession

If a person has possessed heritable subjects in the bona fide belief that he was proprietor and has made improvements thereto, though on the principle inaedificatum solo solo cedit he must sacrifice his work to the true owner, a claim for recompense against the latter may be competent. The amount which can be reserved, however, is not necessarily that which has been expended, but depends on the extent to which the true proprietor is lucratus by the work done. A mala fide possessor has no claim for ameliorations.

Fiduciary and Contractual Relationships

Generally speaking, trustees and executors after six months from the deceased's death may distribute the estate even to legatees if they honestly believe that all debts have been satisfied. In such circumstances they are not made personally liable. It is provided by the Trusts (Scotland) Act, 1921, s. 32, that, if it appears to the court that a trustee who is or may be personally liable for a breach of trust has acted honestly and reasonably and ought fairly to be excused for the breach, then the court may relieve him either in whole or in part. In the case of public trusts, if the trustees have acted honestly but mistakenly, a more lenient standard is applied.

Certain relationships such as agency, partnership, cautionry and contracts of insurance require a particularly high standard of mutual faith. These have often been referred to as contracts uberrimae fidei—an expression borrowed from English law, which system does not recognise a general doctrine of bona fides in contract. It may, however, be observed that in the Scottish law of contract bona fides is a general concept—with the possible exception of certain agreements such as mutuum and transaction. The relevance of this general concept is not stressed by the institutional writers. When they wrote, sale, the master contract from which argument by analogy was frequently made, was, of course, governed in Scotland by the principles of the Roman law of emptio venditio, the leading example of contracts bonae fidei. It is thought that at the beginning of the nineteenth century the term uberrima fides in Scotland was in effect a synonym for bona fides, and that the proper approach for Scots law in questions of disclosure in the formation of contract is to regard contract law as a whole to be subject to a general doctrine of bona fides, though the degree of disclosure required in each case depends upon the nature of the particular transaction under

65 See post, Chap. 27.
66 11 & 12 Geo. 5, c. 58.
67 Kames, Equity, 4th ed., p. 246; Stair, I,11,6; Bankton, I,11,65; Stein, Fault in the Formation of Contract in Roman Law and Scots Law, p. 171 et seq.
consideration. Strangely, bona fides in the formation of contract is not discussed at all in Gloag's classic work—due perhaps to the impact of English mercantile jurisprudence and, in particular, the English law of sale upon Scots law at the end of the nineteenth and beginning of the twentieth century. It is perhaps significant that, though Gloag refers to Bell and to an opinion of Lord President Inglis in support of his contention that Scots law adopted the concept of uberrima fides from England, Bell does not in fact use the expression at all, but refers to "good faith," while in the case relied on by Gloag the judges are apparently using "uberrima fides" and "good faith" as synonyms. It may be stressed that it was by construing absence of good faith as dolus in its broad sense that Scots law was able to approach problems in the field of contract which fell within the scope of "equitable fraud" in the English Chancery Courts.

**Bona Fides and Real Rights**

A singular successor purchasing heritable property on the faith of the record takes free of the personal obligations of his author, provided that the transaction is onerous and the purchaser has acted in good faith, without knowledge of third-party rights. Gratuitous successors may, however, have their titles reduced on account of their author's fraud.

In the case of corporeal moveables, bona fides will not avail even a bona fide purchaser from one who was a thief, since a labes realis attaches to moveables. However, the remedy of the owner is by way of rei vindicatio and, if a bona fide purchaser has parted with goods before knowledge of his defective title, he is not personally liable except in so far as he may be lucratus. If an onerous purchaser has acquired moveables bona fide from an author who acquired them under a contract which was merely voidable, or relatively null—say on account of fraud—such third party may acquire good title. Under the Factors Act, 1889, statutory provision is

68 See generally M. A. Millner, "Fraudulent Non-Disclosure" (1957) 74 S.A.L.J. 177 at p. 188; "The expression uberrima fides is not derived from the civil law and the implication that the law requires varying standards of honesty is not a happy one. The Roman bona fides is a unitary concept. ... But just as the amount of care which [a man] exercises varies with circumstances, so does the amount of candour which informs his negotiations. The negotiations preceding a contract uberrimae fidel do not create a situation in which a man must be more honest than on other occasions, but one in which an honest man would be more candid."

69 Contract, p. 497.

70 Principles, § 474.

71 Life Assoc. of Scotland v. Foster (1873) 11 M. 351, esp. at pp. 359, 364, 376.


73 See post, Chap. 27.

74 52 & 53 Vict. c. 45.
made whereby, as regards sale or pledge, a mercantile agent who is in possession of goods with the consent of the owner may pass good title to a purchaser. Though the general doctrine in moveables is *nemo plus juris transferre potest quam ipse habet*, this rule is mainly applicable to personal rights and, as will be discussed later, a purchaser in good faith of corporeal moveables, like a holder in due course of a negotiable instrument, in general acquires good title.

Lastly, it may be noted that persons who acquire trust property in good faith and for value from trustees are secure in their title, even though the latter have acted in breach of trust.

75 See *post*, Chaps. 35 & 37.
Part 3

PRIVATE LAW

B

Family Law
CHAPTER 10

HUSBAND AND WIFE

SOURCES OF MARRIAGE LAW

ACTIONS which determine the status of spouses—such as divorce, nullity, and declarator of marriage—lie only within the jurisdiction of the Court of Session. This jurisdiction was exercised by the Consistoria (or Courts of the Officials) prior to the Reformation and these courts were staffed by clerical lawyers, acting by the authority of the bishops. They were succeeded by the Commissary Courts which functioned until 1830. The consistorial law of Scotland has been substantially based on the Canon law which was administered in these Courts of the Officials and of the Commissaries. Thus Lord Sorn in deciding a doubtful question on condonation, observed

The Canon law is certainly the basis of our consistorial law, and when, after the Reformation, jurisdiction was transferred to the civil courts, it was to the Canon law that our Commissaries looked for guidance, and it was there that they found most of the rules which went to make up our modern marriage laws.

Lord Sorn in his opinion had occasion to refer to such eminent Canonists as Voet, Sanchez and Carpzovius.

For the Officials sitting in the Courts of the Officials before their abolition at the time of the Reformation, the law to be administered was the Canon law, including the provisions of the Scottish Canons, which were, however, exiguous indeed compared with the main mass of Church law as contained in Constitutions of the Church, Papal decretais, Summae of the Canonists, and the various Commentaries. Lord Fraser's view, that the pre-Reformation Canon law in Scotland had a strong individuality distinguishing it from the general Canon law, has been rejected convincingly by writers such as Walton, and by the Court of Session with regard to sponsalia de futuro subsequeute copula, Mackie v. Mackie.¹ Succeeding to the Courts of the Officials were the Commissary Courts—the Commissaries themselves, especially in Edinburgh, often being members of the Faculty of Advocates, many of whom, like Lord Hermand, reached the Bench. The Pope's jurisdiction had been abolished in Scotland in 1560—three years before the establishment of the Commissary Courts, and also three years before the Roman Catholic Church, by its decree Tametsi, after the

¹ Annan v. Annan, 1948 S.C. 532 at p. 537.
² 1917 S.C. 276.
Council of Trent swept away, so far as this decree was promulgated, the whole fabric of clandestine and irregular marriages based on sponsalia de praesenti and sponsalia de futuro, copula subseqente. However, these decrees came three years too late to apply in Scotland, and therefore the Commissaries retained the old law of marriage with regard to verba de praesenti and verba de futuro. Thus, not only did the Commissaries seek in the works of eminent Canonists like Sanchez for guidance on consistorial matters, but they also ventured to apply doctrines regarding marriage which, though propounded by certain Canonists as Canon law, had been repudiated by the Church herself. In 1830 the Commissary Courts came to an end, and their consistorial powers were assumed by the Court of Session. The attitude of the Court of Session to Canon law—like that of the Commissaries after the Reformation—is one of selective adoption. Thus Lord Watson in Collins v. Collins,\(^3\) did not doubt that it was within the power of the court to reject or modify any rule or doctrine of the Canon law which appeared not to be in itself reasonable or expedient . . . and, if there were no authority to show that the plea of condonation has received the same effect in the law of Scotland as it was understood by Voet and Sanchez to have in the Canon law, I as little doubt that your Lordships would now have to determine, on general principles, whether their interpretation of the law ought to be followed.

**THE NATURE OF MARRIAGE**

By “marriage” in Scotland is implied the voluntary union for life of one man and one woman to the exclusion of all others, entered into in a form regarded by the lex loci celebrationis as sufficient. It is assumed, however, that the union may be dissolved before the death of either party by due process of law. Marriage is based upon mutual consent, a characteristic which it shares with contract in general. Stair describes it as the “conjunction of minds by mutual consent to the married state.”\(^4\) The mutual present consent to marry creates a status, the incidents of which cannot be varied by agreement of the parties.

*Consensus non concubitus facit matrimonium*—marriage consists primarily in consent to the conjugal society, and conjunction of bodies is not a prerequisite to conclusion of marriage.\(^5\) Further, the consent to marry must be genuine consent, freely and seriously given by persons of full capacity to consent. A lunatic cannot marry, nor a pupil at common law (now a person under sixteen years of age)\(^6\) because the

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\(^3\) (1884) 11 R. (H.L.) 19 at p. 33.

\(^4\) I,4,6.

\(^5\) See Stair, I,4,6; Erskine, I,6,2.

\(^6\) Age of Marriage Act, 1929 (19 & 20 Geo. 5, c. 36), s. 1 (1).
incapacities of their status render them incapable of consent. But marriage is more than mere contract, and the ordinary rules of contract are not to be applied indiscriminately to marriage. Thus it may be well to observe that the rule that fraud will vitiate consent is not fully applicable to the contract to marry. Certain frauds would, of course, preclude the possibility of common intention—such as personation. Such fraud would lead to error in the substantials which would exclude consent (unless subsequent consent supervened) as in the case of Jacob, who, supposing he had married Rachel, by mistake got Leah. But—as Stair pointed out—"errors in qualities or circumstances vitiate not." This doctrine, Lord President Clyde stated in *Lang v. Lang,* has never been questioned. In that case it was averred that a woman who was pregnant by a third party had brought about her marriage to the pursuer (the husband) either (1) by falsely or fraudulently inducing him to believe that he was the cause of her pregnancy, or (2) by fraudulently concealing from him the fact that she was pregnant by another at the time of marriage. These averments were held by Seven Judges not to constitute grounds for declarator that the marriage was null. The Lord President thus summarised the matter:

"But the promise *de futuro matrimonio* stands, in law, in a completely different position from the promise *de praesenti matrimonio*... The 'solemn act,' of which a promise... (*de praesenti matrimonio*) is the outward sign, is a definite act of choice—the mutual and irrevocable selection or taking, by a man and a woman, of each other as the life-long sharers of the privileges and burdens attached by law to the married state. Marriage is neither more nor less than that. No conditions can be attached to it. No qualifications can be made on its effect. 'Errors in qualities or circumstances,' says Lord Stair, in the same part of the chapter on Conjugal Relations, 'vitiate not; as if one, supposing he had married a maid, or a chaste woman, had married a whore.' This doctrine has never been questioned... But the whore, by allowing the man to marry her in ignorance of her mode of life, is guilty of fraudulent concealment of the grossest kind... Yet the law of Scotland, while (before marriage) it denies to the woman guilty of this fraud any right to damages for breach of the man's promise to marry her, does not admit (after the marriage—even though it has been induced by the fraud) any appeal by the man to the principles of the ordinary law of contract. On the contrary, it refuses to look behind the definitive act of choice by which the man and the woman took each other, once and for all, for husband and wife—as the phrase goes, 'for better, for

7 1.4.6.
8 1921 S.C. 44.
9 At p. 51.
The man's, or the woman's, choice is regarded as simply his, or her, own: and, while the law gives him, and her, unfettered freedom—rebus intregis—in ascertaining for himself, and herself, the truth of the apparent or pretended qualities of the other, it admits neither resilement or annulment once the act of choice is made. This I regard as the established rule of the law of Scotland."

Though Lang v. Lang purported expressly to overrule Stein v. Stein,10 in which concealed pregnancy per alium was held to be a ground for avoiding marriage, it may be observed that the facts of the two cases were not identical. In Lang the pursuer was aware of the defender's ante-nuptial pregnancy and believed erroneously that he was responsible. The pursuer in Stein married without knowledge of the fact that his wife was already pregnant, and without having had pre-marital sexual relations. Moreover, it is suggested with respect that Lord President Clyde went too far in suggesting 11 that if undisclosed pregnancy per alium were recognised as a ground for relief, it would be impossible to refuse it in cases of ante-nuptial unchastity not resulting in pregnancy. In the author's submission the justification of recognising concealed pregnancy per alium as a ground of nullity is, not so much because consent is vitiated on the grounds of the wife's unchastity, but because account must be taken of the third life in utero. This view was apparently also taken by the Royal Commission on Marriage and Divorce 12—the Morton Commission.

Subject to certain conditions with regard to the petitioner's knowledge and conduct, pregnancy per alium at the time of marriage is in England a ground for annulling a marriage by section 8 (1) of the Matrimonial Causes Act, 1950.13 A similar provision for Scotland is most desirable,14 and indeed was recommended by the Morton Commission in 1956. No action has, however, yet been taken by Parliament.

Jurisdiction in Consistorial Actions

The incidents attached by the law of the husband's domicile regulate the matrimonial duties and capacities of the spouses. The general rule, varying the older Scottish law, is that the courts of the husband's domicile alone have jurisdiction in actions for divorce. Lord Watson made much too broad an assumption in Le Mesurier v. Le Mesurier 15 when he observed that, according to international law, domicile of the

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10 1914 S.C. 903.
11 1921 S.C. at p. 53.
13 14 Geo. 6, c. 25.
spouses affords "the only true test of jurisdiction to dissolve their marriage." This is not true of many countries, and in modern times, when economic and other pressures cause movement of populations, domicile alone supplies an unsatisfactory basis for jurisdiction. The common law of Scotland makes an exception in favour of a wife whose husband is guilty of a matrimonial offence, and seeks to abandon his Scottish domicile, so as to compel her to seek her remedy in a foreign court. A further exception was made by the transient provisions of the Matrimonial Causes (War Marriages) Act, 1944. Now, moreover, the Law Reform (Miscellaneous Provisions) Act, 1949, s. 2, gives jurisdiction to the Court of Session in proceedings by a wife for divorce or nullity (though the husband is not domiciled in Scotland) provided that the wife herself has been ordinarily resident in Scotland for three years immediately preceding the commencement of proceedings; and provided that the husband is not domiciled in any other part of the United Kingdom. Thus a wife ordinarily resident in Scotland who had been deserted by a domiciled Canadian could bring her action in the Court of Session—but, if deserted by a domiciled Englishman, would have to petition the High Court in England.

The law regarding jurisdiction in actions of nullity is still somewhat uncertain. So far the Scottish courts have not drawn a clear distinction for purposes of jurisdiction between void marriages (e.g., on grounds of bigamy) and voidable marriages (e.g., on grounds of impotency), though in Aldridge v. Aldridge the Lord Justice-Clerk (Thomson) drew attention to the problem. He observed that "In the case of voidable marriages the modern tendency is to equate the situation to divorce, with emphasis on domicile and status." But in the case of void marriages, as the woman does not take the domicile of the man in virtue of a ceremony ab initio null, different considerations may apply. Accordingly he assumed jurisdiction to grant declarator of nullity against a domiciled Scotsman, though the pursuer was an Englishwoman who had been "married" bigamously and therefore had not taken her "husband's" domicile. "There can be little objection," his Lordship concluded, "to increasing the grounds of jurisdiction for entertaining an action for nullity, provided the court which accepts the jurisdiction is careful to see that the proper law is applied."

18 7 & 8 Geo. 6, c. 43.
19 12, 13 & 14 Geo. 6, c. 100.
20 1954 S.C. 58: as to jurisdiction where a marriage is merely simulated, see Orlandi v. Castelli, 1961 S.L.T. 118.
21 At p. 60.
In another important Outer House decision dealing with jurisdiction in actions of nullity, Lord Guthrie reviewed the authorities, which gave little clear guidance. He concluded that certain principles could, however, be stated. First, where the parties to an action have a common domicile, the court of that domicile has jurisdiction. Secondly, where the ground of action is that the marriage is void, and there is no common domicile, the court of the defender's domicile has jurisdiction, since it has power to determine his status. Thirdly, if the marriage has been celebrated in Scotland and the defender has been personally cited in Scotland, the Scottish courts have jurisdiction. Going further, he held himself entitled to grant declarator in the action before him—which concerned a void marriage—because a Scottish court was the *forum loci contractus* and the defender (a domiciled Englishman) had expressly accepted its jurisdiction.

It may be noted that the House of Lords, reversing the Court of Appeal in England, has recently held in *Ross Smith (orse Radford) v. Ross Smith* that the English courts had no jurisdiction to grant a decree of nullity to an Englishwoman who petitioned on the grounds of impotency of her husband, a domiciled Scotsman. The English judges in the Court of Appeal had assumed jurisdiction over this allegedly voidable marriage because the English court was the *forum loci celebrationis*. This attitude contrasted with the obiter opinion of the Lord Justice-Clerk in *Aldridge v. Aldridge* that jurisdiction in actions concerning voidable marriages is to be equiparated with actions for divorce, where domicile is the primary factor. Three of the Lords of Appeal in Ordinary in *Ross Smith* would have reversed the decision in *Simonin v. Mallac*, which recognised the doctrine of jurisdiction of the *forum loci celebrationis* in petitions for annulment, but the House of Lords was equally divided as to whether this doctrine should be retained in cases of marriages alleged to be totally void.

**CONSTITUTION OF MARRIAGE**

Dealing first with Regular Marriage. This may take one of two forms:

(a) *Celebration by a minister of religion* before at least two witnesses, after due proclamation of banns; or publication of notice of intention to marry in the Registry of Births, Deaths and Marriages

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24 The *lex loci celebrationis* is not in Scotland affected by the decisions of a Roman Catholic ecclesiastical tribunal holding a marriage void by Canon law: *Di Rollo v. Di Rollo*, 1959 S.C. 75.

25 (1860) 2 Sw. & Tr. 67.

26 See generally the Marriage (Scotland) Acts, 1834–1956.
(Marriage Notice (Scotland) Act, 1878) 27; or after licence from the sheriff (Marriage (Scotland) Act, 1939, s. 2) 28 which has the same effect as publication of notice. A Jewish rabbi or a person to whom the Society of Friends (Quakers) assigns the duty of celebrating marriage is a minister for this purpose but only proclamation of banns in the Church of Scotland is of legal effect. No form, place or hour of ceremony is required by law. It is assumed that the minister will solemnly ask the parties if they take each other for husband and wife, and that on their replying affirmatively, he will declare them to be married. “Proclamation of banns” consists in publishing the names and designations of the intended spouses after the congregation is assembled for worship, so that any person who knows of a lawful impediment to the marriage may object. The mode of proclamation is regulated from time to time by Acts of the General Assembly of the Church of Scotland—the present Act in force being that of 1931. Residence for fifteen days in a registration district prior to proclamation entitles a party to have banns proclaimed therein; if the intended spouses live in different districts, banns must be proclaimed in both. 29 Notice of intention to marry, if that course is chosen, is given to the registrar of the district or districts where each party has his or her residence or has resided for fifteen days. 30 The notice is exhibited outside the registrar’s office for at least seven days. If there is reasonable excuse for failure to obtain proclamation of banns or publication of notice, the sheriff may still grant licence for the marriage to take place, but such licence remains valid for ten days only. A marriage with a religious ceremony celebrated by one who is not a clergyman, or which, though celebrated by a clergyman, has not been preceded by banns, notice or licence, is termed clandestine. The celebrant is guilty of an offence under the Marriage Notice (Scotland) Act, 1878. To personate a clergyman is a crime at common law.

(b) Marriage before a registrar. This alternative form of regular marriage was introduced by the Marriage (Scotland) Act, 1939, 31 s. 1, to provide a satisfactory solemnity for those who did not wish a religious ceremony. The parties must produce a certificate of due publication of notice of the intended marriage or a licence from the sheriff. Thereafter they must declare in the presence of the registrar

27 41 & 42 Vict. c. 43; see also Marriage Act, 1939 (2 & 3 Geo. 6, c. 33) s. 2, and Marriage (Scotland) Act, 1942 (5 & 6 Geo. 6, c. 20), s. 2.
28 2 & 3 Geo. 6, c. 34.
29 Special provision is made for notices when one party resides in England and the other in Scotland: Marriage Act, 1939, as modified by Marriage Act, 1949 (12, 13 & 14 Geo. 6, c. 76) ss. 79 (1), 80 (2).
30 The Marriage (Scotland) Act, 1936 (4 & 5 Eliz. 2, c. 70), gives to a civilian outside Scotland, whose parents live in Scotland, the same facilities as exist for men and women in the armed forces and serving outside Scotland to give notice of intended marriage or have banns called without fulfilling the normal fifteen days’ residential requirement.
31 2 & 3 Geo. 6, c. 34.
and of two witnesses over sixteen years of age that they know of no legal impediment to their marriage, and that they accept each other as husband and wife.

Irregular Marriage

Irregular marriages, formerly an important aspect of Scottish consistorial law will be of decreasing importance for the future, since it was provided by the Marriage (Scotland) Act, 1939, s. 5, that no irregular marriage by promise subsequente copula or by declaration de praesenti might be celebrated after the Act came into force—July 1, 1940. It is, however, necessary to mention the essentials of irregular marriages, as questions thereon may arise with regard to succession or as to marriage by habit and repute (which is still a valid form of irregular marriage), or in general with reference to alleged marriages entered into before July 1940. Cases may be expected to arise out of precipitate unions formed prior to the husband going away on service during the first period of the Second World War.

Prior to July 1, 1940, an irregular marriage might take one of three forms:

(a) Declaration de praesenti

If it was established that (prior to that date) a man and woman exchanged consent to marry with genuine matrimonial intent, not in jest nor with ulterior motive, from the time when such consent was exchanged ipsum matrimonium was constituted even before the union was consummated. Proof may be by parole or by writing.

There need be no record in writing and no witnesses to the interchange of consent if there is corroboration by facts and circumstances, such as admissions to relatives or doctors, or widows' fund payments: Petrie v. Petrie. Lord Neaves, a well-known Scottish judge of the nineteenth century with a somewhat dry sense of humour; compiled in verse a Tourist's Matrimonial Guide through Scotland, to inform visitors to Scotland,

"How close you may come upon marriage
Still keeping the wind of the law."

On declaration de praesenti he observed,

This maxim itself might content ye
The marriage is made by consent,
Provided it's done de praesenti
And marriage is really what's meant.
Suppose that young Jocky or Jenny
Say "We two are husband and wife,"
The witnesses needn't be many
They're instantly buckled for life.

\(^{32}\) 1911 S.C. 360, per Lord Johnston, p. 374.
Later in his poem, his Lordship referred to the case of “a certain much-talked-about Major.” The reference is to Steuart v. Robertson,\(^{23}\) which is probably the cause célèbre on alleged marriage by declaration de praesenti. The Court of Session report covers 150 pages. Major Steuart, v.c., a very distinguished officer of the 93rd Highlanders and of ancient family, had fallen into dissipated habits and had become a boarder in the house of a maker of fishing tackle. His landlord’s daughter claimed that she and the Major (who at the date of the action was dead) had been married by consent de praesenti based on the following incidents: “After supper, according to the evidence of the pursuer’s brother and the hairdresser, the only surviving witnesses, the following scene took place: The pursuer’s father said to Major Steuart, ‘You will have to hook it. I am getting a bad name with your staying in my house among my three daughters.’ Upon which the Major said, ‘I will show you what I can do to shut up people’s mouths. I am poor now, and cannot marry, but I will marry her in the Scotch fashion,’ or words to that effect, and thereupon went down on one knee, took a wedding-ring from his pocket, put it on the pursuer’s finger, and said, ‘Maggie, you are my wife before Heaven, so help me, oh God!’ They then kissed, and the pursuer said, ‘Oh, Major!’ The health of the couple was then drunk. After some time the proceedings were closed by Major Steuart and the pursuer being ‘bedded’ according to an obsolete Scotch fashion.” The Court of Session gave the pursuer declarator of marriage she sought by a majority of the whole court. In the House of Lords the English and Irish judges unanimously reversed this decision.

(b) *Promissio subsequente copula*

Lord Fraser did not consider that this form of marriage was valid for all purposes, and the law of Scotland upon the matter was not settled until *Mackie v. Mackie*.\(^{34}\) Lord Fraser’s view that declarator was necessary to complete the marriage was then rejected. This form of marriage was taken over from Canon law, which provided that, if parties who had exchanged the promise *de futuro matrimonio* had sexual intercourse with each other, the effect of that sexual intercourse was to interpose a presumption of present consent at the time of the intercourse; thus converting the “engagement” into an irregular marriage, and producing all the consequences attributable to that species of matrimonial connection. Stair\(^{35}\) says—

The marriage itself consists not in the promise, but in the present consent, whereby they accept each other as husband and wife; whether that be by words expressly; . . . or by natural commixtion, where there

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\(^{23}\) (1874) 1 R. 532; (1875) 2 R. (H.L.) 80.

\(^{34}\) 1917 S.C. 276.

\(^{35}\) I,4,6; Erskine, I,6,4.
hath been a promise or espousals preceding, for therein is presumed a conjugal consent de praesenti.

Accordingly, if it is proved that the man promised to marry the woman, and that on the faith of the promise she allowed him to have sexual intercourse with her, there is a presumption of present consent to marriage as at the date of the intercourse. The promise must be proved by the man's writ. Though it does not need to be constituted by writing, the promise must be proved by writing, even if the writ be post litem motam—as terms of correspondence exchanged. The promise must be unconditional. Thus if a man says or writes "I promise to marry you if you become pregnant to me," and intercourse takes place thereafter, there is no marriage, though an action of damages would lie for breach of promise. The intercourse must be on the faith of the promise. Generally, if intercourse follows on the promise, it will be presumed to be on the faith of the promise. But this presumption may be rebutted. It may be shown that the parties did not intend marriage, and this may be inferred from their subsequent conduct, as when after the intercourse a considerable period of time elapses, during which the parties do not act as if, or suggest in any way, that they are married, N. v. C. Again, it may be proved that the intercourse did not take place on the faith of the promise—the typical example being prior illicit connection, then promise, then continuation of the connection. In such a case the presumption is that the intercourse after the promise is merely a continuation of that which went before, and that it did not take place on the faith of the promise, M. v. Y. This was a case in which a woman brought an action against a man to have it declared that she was not married—an action of putting to silence. In defence he averred marriage by promise subsequente copula. The pursuer stated in evidence that at no time had she ever placed any reliance on the promise, and had at no time the intention of becoming the wife of the defender. It was held that, although the promise and the intercourse both before and after the promise had been proved, the defender had failed to prove that the acts had taken place in reliance on the promise and that both parties had entertained a matrimonial purpose.

To establish marriage by promise subsequente copula, probably both promise and intercourse must have actually been in Scotland—and, of course, before July 1940.

(c) Marriage by Consent Inferred from Habit and Repute

Marriage may also be entered into when the consent is not expressed, but is established rebus ipsis et factis. In this way consent

56 1933 S.C. 492.
may be concluded or inferred from cohabitation of the parties at bed and board and being "habité" (held and reputed) man and wife. The basis of this presumption is the Act of 1503, c. 77, affirming the right of the ostensible widow to terce.

"Marriage by habit and repute" arises from matrimonial consent inferred from a man and woman cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are married persons. Such cohabitation must be for a substantial time—not, e.g., ten months: Wallace v. Fife Coal Co. The best evidence of repute is that of relations and friends in the same rank of life. The evidence of habit and repute must be substantially unvarying and consistent; of course, the mere fact that one or two witnesses say that they thought there was no marriage is not enough to cause the contention to fail.

Lord Moncreiff in Lapsley v. Grierson considered that the cohabitation must have begun with the deliberate intention of both parties to constitute marriage—an unsound view. If the cohabitation was illicit at the outset—perhaps adulterous—this will not necessarily be fatal to marriage when the parties become free to marry, nor will be the fact that to begin with the parties had no intention of marrying. Nor in such cases need there apparently be an unequivocal act which gives the cohabitation a new character, provided there comes a time when the parties themselves intend to constitute marriage, and when, moreover, both are so situated as to be able to give an unconditional consent to marriage. The court may pronounce a decree of declaration of marriage, though it cannot single out with certainty any particular date in the parties' association on which mutual consent to marriage was exchanged.

Though the logic of the Scottish doctrine of marriage by cohabitation with habit and repute may not be flawless, it seems too well established to be displaced by implication by the Marriage (Scotland) Act, 1939. In the very important case of Campbell v. Campbell it seems to have been clearly the view of the Scottish judges (though there are contrary dicta by English judges in the House of Lords in other cases) that proof of cohabitation with habit and repute establishes marriage by tacit consent of the parties, not by presumed declaration.

38 1909 S.C. 682.
39 (1845) 8 D. 34.
40 See also Lord Ardwall in Wallace v. Fife Coal Co. at p. 685.
42 Nicol v. Bell, supra; also Hendry v. I.A., 1930 S.C. 1027.
43 2 & 3 Geo. 6, c. 34.
44 (1866) 4 M. 867.
de praeenti. The appropriate form of conclusion in an action of declarator of marriage—both now and prior to the 1939 Act—is “For declarator that AB and CD were lawfully married to one another by cohabitation at . . . from . . . until . . . and the habit and repute arising therefrom.” In Nicol v. Bell, an action between living spouses, the Second Division held, in 1954, that marriage by habit and repute had been established by the wife despite the husband’s strong opposition. Subsequently, in AB v. CD Lord Guthrie has granted declarator of marriage based on consent implied from habit and repute. It would seem that the view which regards habit and repute as being a method of constituting marriage is erroneous. Habit and repute is a method of proving consent and this may not have been realised by the legislature in 1939.

DECLARATOR OF FREEDOM AND PUTTING TO SILENCE

Before passing from consideration of constitution of marriage, it may be mentioned that there exists a form of action in the Court of Session, which is seldom used, to establish that the pursuer is not married, and to restrain the defender or defenders from asserting that he is: M. v. Y. This is the counterpart of the action for declarator of marriage, and is known as an action for declarator of freedom and putting to silence.

REGISTRATION

Regular marriages must be registered under penalty within three days of the marriage by means of a schedule filled up and transmitted to the registrar, in compliance with the Registration of Births, Deaths and Marriages (Scotland) Acts, 1854-1938. A registrar must register all marriages contracted in his office—Marriage (Scotland) Act, 1939, s. 1 (2). By section 4 of this Act the validity of a regular marriage registered under the Acts 1854-1938 may not be questioned in any legal proceedings on the ground that the person by whom the marriage was celebrated was not competent to do so. Where irregular marriage is established by declarator, the Principal Clerk of Session must transmit particulars to the Registrar-General.
NULLITY

NULLITY

Except on grounds of impotency, an action of nullity can be brought, not only by the pretended spouses, but also by any person having an interest in the non-validity.

Marriages which may be declared null ab initio are either void or voidable. A void marriage cannot be cured by act of the partners, and can be challenged by third parties interested. The impediment in such cases excludes consent to marriage—such as subsistence of a prior marriage of either spouse. Impotence is a ground of voidability only.

Impediments

Nonage

The Age of Marriage Act, 1929, s. 1, provides that a ceremony of marriage involving a person under the age of sixteen years shall be void. The age of consent at common law in Scotland had been fourteen in the case of a male and twelve in the case of a female. In Scotland parental consent is not required for the marriage of persons who have reached the age of sixteen, though in the case of persons who have not a Scottish domicile it may still be argued that parental consent is not merely a matter of form, if required by the law of a person's domicile as a condition of valid marriage. In Bliersbach v. McEwen the First Division held that capacity to marry in Scotland fell to be determined by the law of Scotland; and that, because the absence of parental consent was an "impediment prohibitive" rather than an "impediment irritant" according to the lex domicilii of the parties wishing to marry, therefore they were not disqualified from marrying each other in Scotland. Nevertheless, it may be observed, the present situation is unsatisfactory and the judgments delivered in Bliersbach's case had a very limited range so far as comparative law was concerned. In 1961 the French courts set aside such a marriage, and it seems undesirable for the Scottish courts to countenance unions which can be set aside forthwith by the law of the parties' domicile. The deeper complexities of the effect of impediments in private international law still have to be probed, and it is difficult to appreciate why, in 1961, the Government refused to take any action on the request from

52 As to differences quaod jurisdiction see pp. 307-308, ante.
53 19 & 20 Geo. 5, c. 36.
54 Persons whose marriage under the Act is void may subsequently be married by consent established by cohabitation with habit and repute: see p. 313, ante.
56 1959 S.C. 43. In Scots law the expressions "impediment prohibitive" and "impediment irritant" correspond to the Canon law division of impediments into those impediment and diriment.
the Church of Scotland that legislation should be introduced requiring foreign minors to prove that they are entitled to marry by the law of their respective domiciles.

_Marriage Within the Forbidden Degrees_

This was a fruitful source of litigation in Scotland before the Courts of the Officials; and before the Reformation, though divorce was not recognised, the frequency of intermarriage among Scottish families gave ample grounds for decrees of nullity.

The Act of 1567, c. 15, incorporated the eighteenth chapter of Leviticus into the statute law of Scotland, and made lawful all marriages not forbidden by it. Marriage is forbidden between all persons related in the direct line of ascent, but is lawful at common law between all beyond the second degree by civil law computation, _i.e._, cousins german—and others more removed. No distinction is made between half-blood and full, nor between consanguinity and affinity or relationship by marriage. Statutory relaxation of these rules began with the Deceased Wife’s Sister’s Marriage Act, 1907,\(^57\) permitting marriage between a widower and his dead wife’s sister. This Act together with a number of subsequent statutes has been repealed by the Marriage (Enabling) Act, 1960,\(^58\) which now permits a valid marriage to be contracted between a man and a woman who is sister, aunt or niece of a former wife of his (whether living or not), or was formerly the wife of his brother, uncle or nephew (whether living or not). These provisions cover kinship of the half-blood, but do not validate marriages between persons in these categories of relationship if either party was domiciled in a country where such unions could not be lawfully contracted.

_Substinece of Prior Marriage_

If a man and woman, one of whom is married already, go through a ceremony of marriage, this is clearly null, though the subsisting tie be by irregular marriage.

_Pre-Nuptial Adultery_

The Act of 1600, c. 20, declared null all marriages contracted by divorced spouses with persons with whom they are declared by the judge to have committed the crime of adultery. The paramour’s name, therefore, in practice is always omitted from the decree of divorce, so as to leave the way open for the marriage of the defender and paramour. The Royal Commission on Marriage and Divorce recommended

\(^{57}\) 7 Edw. 7, c. 47.  
\(^{58}\) 8 & 9 Eliz. 2, c. 29.
nullity

in 1956 that the statutory bar should be removed, but no action has been taken so far.

Insufficient Residence Qualification

Lord Brougham’s Act, 1856—which applied only to irregular marriages—was directed against so-called “Gretna Green elopments.” Irregular marriage by exchange of consent could be contracted anywhere in Scotland, but Gretna was conveniently close to the Border for English couples. The Act provided that no irregular marriage contracted in Scotland should be valid unless one of the parties had had his or her usual place of residence there for twenty-one days preceding the marriage. The effect of this provision became apparent in 1951 when Mr. Fitzwilliam brought legitimacy proceedings in the English court alleging that his parents, who had an English domicile, were married by exchange of consent in Glasgow in 1886. But for the time qualification prescribed by Lord Brougham’s Act, Pilcher J. would apparently have had little difficulty in concluding that a valid irregular marriage by exchange of consent had been constituted.

Impotence

When either of the parties is incapable of sexual intercourse, the marriage may be annulled. In itself impotence does not bar constitution of marriage: L. v. L. and only a spouse is entitled to bring an action on this ground. It must be shown that impotence existed at the date of the marriage, and has not supervened at a later date. The impediment to intercourse may be due either to physical or mental incapacity. The incapacity need not be structural incapacity; incapacity may be created by invincible repugnance to sexual intercourse: G. v. G. From continuous refusal to consummate, impotence may be inferred by the court. An impotent spouse may himself bring the action on the ground of his own impotency. When a pursuer founds upon his or her own impotence, he or she must prove that that condition is irremediable. It may be noted, however, that in the case of aged persons no potentia copulandi is implied. No precise age limit has been laid down. In a quite recent successful action for nullity the pursuer was aged eighty-one. The older writers did not discriminate clearly between impotency and sterility, but unless possibly

60 19 & 20 Vict. c. 96, repealed by Marriage (Scotland) Act, 1939.
61 Reported The Times, March 15, 1951.
64 1924 S.C. (H.L.) 42.
66 Ibid.
67 Reported Scotsman, Feb. 12, 1954.
ante-nuptial sterility has been self-induced and fraudulently concealed, this would seem to be no ground of nullity. It has been held in the Outer House that a husband's action based on the impotency of his wife will be barred if he has approbated and adopted the marriage as valid by co-operating in the artificial insemination of his wife.

Absence of Genuine Consent

(a) If insanity is pleaded, the question is “whether the defender was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject.” The onus of proof is on the party averring insanity, unless permanent insanity at a date prior to the contract be proved—in which case the onus shifts.

(b) In the case law expounding irregular marriage, there was often doubt as to whether words capable of inferring consent to, or promise of, marriage were seriously intended, or were used merely in jest or with ulterior motive. This seems to have been the decisive factor with the House of Lords in Steuart v. Robertson. Where, however, a regular ceremony of marriage has taken place it will be almost hopeless to urge this ground of nullity.

(c) Intoxication—if one party was so drunk as to be bereft of reason when the supposed consent was exchanged, the ceremony may be null. But the marriage must be disclaimed speedily.

(d) Force or fear. Threats will certainly suffice to negative consent if they are sufficient to intimidate a reasonably firm-minded person—but this somewhat severe test will be relaxed in appropriate circumstances—as if a weak and impressionable girl is the victim. In the cases force, error and fraud are often associated, and not clearly severable. Where decree of nullity is sought on these grounds, absence of copula after the ceremony, unless otherwise explained, is material.

(e) Fraud or essential error. Unless there is error in persona, or as to the nature of the ceremony (e.g., believing a service of marriage to be a betrothal), essential error per se can rarely if ever suffice as a ground of nullity. In Lang v. Lang it was held insufficient that a man had been duped into marrying a woman in ignorance of the fact that her pregnancy was per alium and not per se.

71 (1874) 1 R. 532; (1875) 2 R. (H.L.) 80.
73 1921 S.C. 44; cf. ante, p. 75.
Effects of Decree of Nullity

The distinction between void and voidable marriages is recognised in Scotland, but in either case the effect of a decree of nullity is that the marriage is declared null ab initio for all purposes. If, however, one of the parties entered into a putative marriage in the bona fide but mistaken belief that it was legally valid (and such belief was not based on a misunderstanding of an established rule of law, e.g., as to prohibited degrees) the children of a putative marriage may be declared legitimate and enjoy the ordinary rights of succession. In Purves, where the parents knew their relationship to each other but were ignorant that persons so related were forbidden to marry, it was held that this was not such mistake as might entitle their child to declarator of legitimacy. Had they been ignorant of their relationship, it seems that declarator would have been competent.

Now by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4, it is further provided that, where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties if the marriage had been dissolved by divorce, instead of being annulled, shall be deemed to be their legitimate child, notwithstanding the annulment. This provision was shown to be necessary, at least for England, by the English case of L. v. L. The wife petitioner, after giving birth to a child as a result of artificial insemination, succeeded in obtaining decree of nullity. As the law of England then stood, the child was rendered illegitimate. Scots law would probably not have granted decree of nullity on the facts proved, and in the Outer House this view has been upheld. As will be discussed more fully in connection with divorce, the Matrimonial Proceedings (Children) Act, 1958, extends jurisdiction over "children" in consistorial proceedings, including actions for nullity, and requires the court to consider arrangements for such children’s welfare before granting decree. Moreover, section 14 confers powers on the court to make orders as to custody and access in actions for nullity.

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75 Stair III,42; Fraser, Parent and Child, 3rd ed., p. 27; Purves’s Trs. v. Purves (1895) 22 R. 513, authorities at pp. 524 and 534; Philip’s Trs. v. Beaton, 1938 S.C. 733.
76 (1895) 22 R. 513.
77 12, 13 & 14 Geo. 6, c. 100.
78 [1949] P. 211.
79 If a wife is impregnated with the seed of a donor against the husband’s wishes this does not constitute adultery. As to the legal implications of artificial insemination see Maclennan v. Maclennan, 1958 S.C. 105; Report of Departmental Committee on Human Artificial Insemination, Cmnd. 1105/1960; Smith, “Et Dona Ferentes” (1961) Jur.Rev. 179.
81 6 & 7 Eliz. 2, c. 40.
Marriage, according to Scottish law, is dissolved by death—or by divorce on one of the following grounds:

1. Adultery
2. Desertion
3. Incurable insanity
4. Cruelty
5. Sodomy or bestiality
6. The Divorce (Scotland) Act, 1938, also provides for dissolution of marriage on presumed death of a spouse.

Adultery

Adultery implies actual sexual intercourse *vera copula* between a married person and a person who is not the other spouse. Intimacies or practices which do not involve carnal connection do not come within the category of adultery, nor does artificial insemination of a wife with the seed of a donor without the husband’s knowledge or consent. Adultery must be proved, and since such proof can seldom be secured by direct evidence, the pursuer will often rely upon evidence of opportunity and familiarity. In certain cases the circumstances and character of the opportunity for the defender and the co-defender to commit adultery may be such as to establish the guilty nature of an association without independent evidence of familiarity. No decree in absence is granted in consistorial causes, since regard is had to the public interest as well as to that of the parties. If the pursuer holds a decree of judicial separation on the ground of adultery, the court may treat that decree as sufficient proof of the adultery in respect of which it was granted; but the judge must administer the oath de calumnia, and receive evidence from the pursuer. In an action based on adultery the pursuer may competently claim damages against a paramour, but such claims are rare and the damages awarded are normally small. It is no defence in Scotland to an action of divorce for adultery that the pursuer has himself committed adultery. There is no Queen’s Proctor in Scotland—though the Lord Advocate may intervene—nor any equivalent to the “discretionary bar” which is raised in England.

82 Apart from adultery (which rests on the common law) these grounds are statutory; the ground of desertion was based originally on the Act of 1573, c. 55, and now rests on the Divorce (Scotland) Act, 1938 (1 & 2 Geo. 6, c. 50), which is also the basis of the other grounds stated.
83 1 & 2 Geo. 6, c. 50.
by the petitioner’s own adultery—though it is rare that the discretion is refused: Blunt v. Blunt. Again, long delay or mora is not per se a bar to action, but may be an important element as showing remissio injuriae. Accordingly, as mora alone is no bar, in Johnstone v. Johnstone (a case in which there were no circumstances indicating condonation or acquiescence), a lapse of eighteen years after information of the defender’s adultery was held not to be a bar to action.

Desertion

The Divorce (Scotland) Act, 1938, by section 7, repealed the Act 1573, c. 55, which was the foundation of divorce for desertion, and also the Conjugal Rights (Scotland) Amendment Act, 1861, which had amended the earlier Act. Section 1 (1) (a) of the 1938 Act empowers the court to grant decree of divorce when the defender “has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years.” The Act of 1573 had laid down that “malicious and obstinat defectioun of the offender be the space of four years” was a sufficient cause of divorce; but before decree could be granted a series of previous steps had to be taken, starting with privy admonition, followed by an action of adherence—which in practice might be started a year after the desertion. The Act of 1861 abolished the necessity for the preliminary action of adherence and all other formalities, and enabled the action to be raised on the expiry of the four-year period. The term “desertion” was not used, but as Lord Thankerton said in Bell v. Bell, “it is established beyond cavil that desertion for the purposes of divorce is synonymous with non-adherence.” The majority of the House of Lords in Bell and Wilkinson v. Wilkinson, in particular Lords Thankerton and Macmillan, considered that the phrase “without reasonable cause” and the words “desert” and “desertion” are to be construed in the light of decisions anterior to the 1938 Act.

It is at present necessary to establish wilful non-adherence without reasonable cause for a continuous period of three years; and also that throughout the triennium the pursuer was desirous of cohabitation. The non-adherence must be for a full uninterrupted period of three years, during which time adherence must have been possible to the defender. If, however, a man who is already in desertion loses his freedom of movement, as if he goes to prison.

[86] [1943] A.C. 517.
[89] 1 & 2 Geo. 6, c. 50.
[90] 24 & 25 Vict. c. 86.
the *animus deserendi*, unless a change of attitude is established, is presumed to continue. It is now expressly provided by statute that in actions for divorce or judicial separation, the court may treat a period of desertion as having continued at a time when the deserting party was incapable through mental illness of continuing the necessary intention.

A genuine resumption of cohabitation, however short—even one night—will cancel out the preceding period of desertion: *Meiklem v. Meiklem*. If, however, there is an isolated act of intercourse during the *triennium*, and this interruption is a mere trick by the defender and not intended as a genuine resumption of cohabitation or consortium, the pursuer may not be barred from counting the preceding period as desertion: *Crawford v. Crawford*. Where there is cohabitation as distinct from intercourse, desertion is interrupted: *Beggs v. Beggs*.

There may be a rare case where the courts will find non-adherence, though the parties remain under the same roof. Until *Lennie v. Lennie* was decided in the House of Lords, it was thought that even refusal of sexual relations *per se* could constitute desertion. In this case, however, it was held that a wife pursuer, who wished to have children, could not succeed in an action for divorce on grounds of desertion by proving that, after two years of normal married life, her husband had for many years refused to have sexual relations with her again. In *Lennie* their Lordships, however, did not disapprove *Macdonald v. Macdonald*, where not only had there been refusal of sexual intercourse, but overt diversion from bed and board generally, though under the same roof. In *Wallace v. Wallace* the Lord Justice-Clerk (Thomson) made a number of useful general comments on the conception of desertion in Scots law and the factors to be considered in deciding whether a period of desertion had been interrupted by a temporary resumption of cohabitation. (He also added a warning against reliance on English authorities in this field of the law.)

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95 1949 S.L.T. 370; for the consequences of cohabitation outwith the *triennium*, see *Grant v. Grant*, 1961 S.L.T. 322.
97 1947 S.N. 182.
It is no defence to an action on grounds of desertion that the parties have been living apart under a voluntary separation. Such a contract is not enforceable by the court and is revocable at the instance of either party, AB v. CD. When parties are living apart by consent, desertion begins when one party intimates a desire to adhere, or when the other spouse disappears or breaks off communication so that intimation cannot be made. The pursuer must make it clear that he or she no longer acquiesces in the separation. Even judicial separation may not be a bar. When the parties are living apart by order of the court, the spouse in whose favour the decree was made may elect to waive it and resume cohabitation. Moreover, a “non-cohabitation order” granted by an English court to the wife of a domiciled Scotsman does not bar an action for divorce on grounds of desertion.

Non-adherence must be without reasonable cause. Cruelty, sodomy or adultery on the part of the pursuer would be reasonable cause for the defender’s non-adherence—as would any type of conduct already recognised as a consistorial offence. Though formerly there was support for the view that only conduct amounting to such an offence gave reasonable grounds for non-adherence, the courts have subsequently taken a more liberal attitude. The current standard seems to be that non-adherence may be justified by proving that the other spouse’s conduct was of such a character that it would shock the conscience of reasonable persons if the offended spouse were ordained to adhere. Thus a wife, whose husband while insane killed their child, was held to have reasonable grounds for refusing to adhere.

The pursuer in an action based on desertion must prove his or her willingness to adhere, and an action is only competent to a person who is entitled to demand adherence. A spouse who has committed adultery within the triennium is held to have demonstrated unwillingness to adhere in the true sense, and moreover to have given the other spouse reasonable cause for non-adherence: Wilkinson v. Wilkinson. But the right of action vests after the triennium, and therefore adultery after three years will not bar a pursuer’s right: Graham v. Graham. The best proof of willingness to adhere

2 (1853) 16 D. 111.
5 See in particular the law as explained in Richardson v. Richardson, 1956 S.C. 394. This reasoning was followed by the First Division in McMillan v. McMillan, 1961 S.L.T. 429, where the wife’s “reasonable cause” for non-adherence was grounded on her husband’s unexplained possession of contraceptives and other suspicious behaviour. Adultery could not be established.
7 1943 S.C. (H.L.) 61.
8 1942 S.C. 575.
consists in privy admonition or remonstrance by the pursuer to the defender—in short urging him to return to cohabitation. This is no longer, however, a necessary formality; but if it is absent the court will expect some reasonable explanation—as that the defender’s whereabouts cannot be ascertained despite a real effort to trace him, or that remonstrance would be vain: Bell v. Bell. A corollary of the pursuer’s continued willingness to adhere during the triennium is that the defender may at any time within the period offer to return—and unless the sincerity of the offer can be attacked, this concludes the period of wilful non-adherence.

So far there is no case which has excused the pursuer in an action based on desertion from averring and proving willingness to adhere throughout the triennium. This element of willingness by the deserted spouse to adhere throughout the entire period was laid down in categorical terms in Macaskill v. Macaskill. There has since been a substantial conflict of judicial opinion with regard to this case. In Borland the First Division by a majority, though expressing a hope that the law would be altered, followed Macaskill. Lord Keith would have granted divorce. The facts in Borland were that in an undefended action for desertion the pursuer stated that his willingness to adhere to the defender extended only to a date (within the three-year period) at which he heard that she had obtained a decree of divorce against him in Nevada (which was of no legal effect in Scotland). It is difficult not to sympathise with the pursuer’s situation, and to conjecture whether honesty is always the best policy. Lord Keith puts the problem well:

Under the law prevailing prior to the Divorce (Scotland) Act, 1938, and still operative, there were two recognised causes which would excuse a spouse from adherence. Desertion was never a matrimonial offence justifying non-adherence, the principle being that a deserting spouse had four years within which to repent and to resume cohabitation. If, however, a deserting spouse commits adultery within the triennium or some act of violence endangering the life or health of the deserted spouse, quid juris? Is the latter excused from the duty of professing willingness to adhere without thereby forfeiting the right to bring an action of divorce for desertion on the expiry of the triennium? It is not, I think, an answer to say that the injured spouse may raise an action of divorce for adultery or for cruelty. There might be reasons why he preferred not to bring such an action, e.g., for the sake of the children, or out of consideration for his wife or her relations.

9 Watson v. Watson (1890) 17 R. 736.
10 1941 S.C. (H.L.) 5.
11 1939 S.C. 187.
An added reason for preferring desertion to, say, cruelty as a ground of action in the circumstances suggested by Lord Keith may be mentioned. After three years a right to divorce for desertion is indefeasible; whereas, as the law at present stands, the tempus inspiciendum in actions based on cruelty is when the proof is heard: Dunlop v. Dunlop. The Royal Commission on Marriage and Divorce recommended that in cases such as Borland the law should not insist on willingness to adhere during the triennium irrespective of the defender's attitude, but that it should be sufficient that the court should be satisfied that there was separation against the wish of the pursuer, that desertion had continued for three years and at no time had the pursuer refused a reasonable offer by the deserting spouse to return. No legislative action has followed.

In England, as in Scotland, conduct which falls short of an actual matrimonial offence may be relied on as a defence to a petition based on desertion, since it may provide reasonable grounds for refusing to adhere. In England, however, there is a doctrine of "constructive desertion," by which a petitioner, who can prove that the respondent was guilty of serious misconduct short of a matrimonial offence, may found his petition on desertion. In Buchler v. Buchler Lord Greene M.R. observed: "In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to 'driving the other spouse away' from the matrimonial home." This doctrine is not accepted in Scotland, and it seems that only in one case in the Outer House, Gow v. Gow, has it received any favour. The Inner House in the same case preferred to rest their decision on the fact that the defender, by subsequently disappearing without trace, had deliberately made cohabitation impossible and thus had wilfully refused to adhere.

The present writer submitted to the Royal Commission on Marriage and Divorce that there would be justification for introducing into the law of Scotland a "general clause" to deal with cases of misconduct or harmful conduct in the no-man's land between cruelty and desertion when it would be unreasonable to require the spouses to resume cohabitation. Some cases do not seem to fit well into the accepted meanings of "desertion" or "cruelty," and an adoption of the English doctrine of constructive desertion would seem a makeshift and unsatisfactory solution. Disagreeable personal habits of a spouse which, though not "aimed at," cause a strong

13a Unless cohabitation is resumed. 14 1950 S.C. 227.
17 (1887) 14 R. 443.
18 Minutes of Evidence, 26th Day, November 4, 1952.
revulsion in the other, and violent conduct on the part of a spouse who, due to disease, has not control over his conduct, cannot satisfactorily be described as cruelty or as a species of desertion. Both as a defence to an action for desertion or as a substantive ground for divorce, a legal remedy for such conduct, if deemed justifiable, could better, it is submitted, be provided by a “general clause.” A substantial majority of the Morton Commission accepted this view and recommended that “intolerable conduct” should constitute both a ground of divorce and a defence.\(^20\) It was recommended that in Scotland conduct of a grave and weighty nature on the part of one spouse, which is such that the other spouse could not in the face of it reasonably be expected to continue the conjugal life, should be a ground of divorce, where it resulted in the separation of the spouses (other than by agreement) for a period of three years or more. It was considered that in such cases the court should take into account any bona fide offer of amendment made by the defender before the raising of the action, and should not grant decree if the pursuer had rejected such an offer unreasonably. So far, however, no legislative action has been taken on these recommendations.

The author’s personal opinion would go further, and adopt the dissenting view of Lord Walker,\(^21\) a Scottish judge of great experience, who sat on the Morton Commission. His Lordship appreciated more than did his colleagues the fact that the doctrine of the “matrimonial offence” as a basis for divorce is already undermined by anomalies and exceptions, and that for divorce (as contrasted with judicial separation) the principle of “dissolution on breakdown” should be the sole justification for ending the marriage tie.

**Incurable Insanity**

By section 1 (1) (b) of the Divorce (Scotland) Act, 1938,\(^22\) the incurable insanity of the defender is made a ground for divorce. Where the ground of action is incurable insanity the court is not bound to grant a decree of divorce if, in the opinion of the court, the pursuer has during the marriage been guilty of such wilful neglect or misconduct as to have conduced to the insanity,\(^23\) but adultery *per se* is no bar.

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22 1 & 2 Geo. 6, c. 50.

23 This judicial discretion is governed by the normal laws of evidence: *Aitcheson v. Aitcheson*, 1958 S.L.T. 47.
A defender is not held to be incurably insane unless it is proved that he is, and has been for a period of five years continuously preceding the raising of the action, under care and treatment as an insane person. "Care and treatment as an insane person" was defined in the Act, section 6, which has now been amplified by the Divorce (Insanity and Desertion) Act, 1958. For the purposes of the Divorce (Scotland) Act, 1938, s. 6 (3), a person is now deemed to be under care and treatment at any time when he is receiving treatment for mental illness (whether as a voluntary patient or otherwise) as a resident at certain approved institutions in the United Kingdom, Isle of Man, Channel Islands, or abroad. Moreover, in determining whether the care and treatment has been "continuous," any interruption of twenty-eight days or less is to be disregarded.

When divorce has been granted on this ground, the court may make an order for the payment by the pursuer of an allowance to maintain the defender and any children of the marriage. The normal effects on property rights following decree on other grounds are not here operative.

Cruelty

By section 1 (1) (c) of the Divorce (Scotland) Act, 1938, the court is empowered to grant a decree of divorce where the defender has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice of Scotland existing at the passing of the Act, the granting of a decree of separation a mensa et thoro. Section 4 (2) of the Act provides that if the pursuer holds a decree of judicial separation on grounds of cruelty, the court may treat that decree as sufficient proof of the cruelty in respect of which it was granted—but the pursuer must take the oath de calumnia and give evidence.

The classic definition of cruelty was formulated by Lord Brougham in Paterson v. Russell, and this definition was quoted with express approval by Lord President Inglis in Graham v. Graham. It runs as follows: "Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health. . . . Furthermore, any conduct towards the wife which leads

24 6 & 7 Eliz. 2, c. 54. If a person under care and treatment absents himself without leave from the institution where he is being treated for a longer period than twenty-eight days, this would interrupt the continuity for purposes of divorce: see Ironside v. Ironside, 1955 S.C. 471; cf. Peden v. Peden, 1957 S.C. 409, also Mental Health (Scotland) Act, 1960 (8 & 9 Eliz. 2, c. 61), s. 36.
25 But see Adamson's Trs. v. Adamson's C.B., 1940 S.C. 596.
26 (1850) 7 Bell's App. 337 at p. 363.
27 (1878) 5 R. 1093 at p. 1095.
to any injury either creating danger to her life or danger to her health, that too must be taken as . . . a sufficient ground for divorce.” In short—personal violence, or threats of violence inducing the fear of immediate danger to the person, or conduct which leads to injury causing danger to life or health (bodily or mental).

It is impossible to catalogue the kinds of conduct comprised in “cruelty.” They range from, at one extreme, the homicidal attack with a weapon, to refined and calculated forms of mental persecution at the other. A false charge of gross and criminal immorality, such as incest, deliberately made and persisted in may, if it results in injury or reasonable apprehension of injury to bodily or mental health, constitute cruelty justifying divorce or separation: Aitchison v. Aitchison. Threats, if mere idle abuse, do not amount to cruelty; but, if they are words of real menace, they may well do so. Threats or attempts by a husband to take his own life may, if they cause injury to the wife’s health, amount to cruelty: Dunlop v. Dunlop. Refusal of sexual relations if wilful may constitute cruelty, but if the refusal is involuntary, that is no ground of action by divorce.

Cruelty is cumulative in character; it must as a rule be sustained, and indicate a continued want of self-control. As a rule, therefore, a single act of violence will not amount to saevitia unless there is reason to believe that it may be repeated. Thus Lord Herschell L.C. said in Mackenzie v. Mackenzie:

If the assault did not cause any serious injury, if it were the result of sudden passion, and were repented of as soon as committed, and above all, if there were no reason to anticipate its repetition, the court might not regard it as amounting to saevitia or cruelty. On the other hand, a single act of violence has been regarded as sufficient to warrant a decree of separation, where there was reason to anticipate that it might be repeated. Further, Lord du Parcq observed, in Thomas v. Thomas.

There is no doubt that a blow may, in some circumstances, rightly be held to be so grave as to constitute sufficient evidence of cruelty or of saevitia, but the cases in which a single blow has been so regarded are, I think, exceptional.

In Jamieson the House of Lords expressed the opinion that the principles upon which saevitia or cruelty in Scotland and England had to be construed were similar. It may be, however, that they are not absolutely identical, and an examination of certain aspects of the law regarding cruelty may indicate why the author doubts that the same facts would lead to identical solutions in Scotland and England.

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32 (1895) 22 R. (H.L.) 32 at p. 36.
34 1952 S.C. (H.L.) 44.
Intention and Volition

When an action of divorce based on cruelty is brought against a defender who was capable of volition, there are still problems as to how far his intention may be relevant. It had seemed to be the better view that intention to injure need not be established, where it could be shown that the clearly foreseeable consequences of the defender's conduct would be to cause injury. Actual intention to hurt would, of course, in a doubtful case have decisive importance "because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference." Recent cases have, however, stressed that intention to injure the pursuer is virtually an essential element in actions based on cruelty, though, with respect, it may be suggested certain dicta go further than the authorities or sound social policy could justify.

In Jamieson v. Jamieson the wife pursuer averred that her husband's conduct had brought her to the verge of a complete nervous breakdown, and that, though aware of the effect of his behaviour, he persisted in it. She did not complain of physical violence or serious apprehension of it; in short, her action was founded on serious "mental cruelty." Her averments were held to be irrelevant by the First Division (Lord Keith dissenting) since they did not suggest that the cruel conduct alleged was "aimed at" the pursuer or that the defender was "unwarrantably indifferent" regarding the results. In the House of Lords it seems to have been assumed that intention to injure had been sufficiently averred, and indeed Lord Reid expressly reserved his opinion as to "whether or to what extent it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts." He did, however, clearly indicate his view that there were "many cases" where cruelty could be established without proof of the pursuer's intention to harm. Lord Normand considered that intention might have decisive importance in doubtful cases, which by implication recognises that the element is not indispensable. Lord Merriman expressly stated that proof of intention was not an essential element for success in an action based on cruelty, but that a man must be taken to intend the consequences of his acts. To a certain extent it was also recognised that in assessing whether conduct amounted to cruelty, the effect upon the particular pursuer

39 At p. 51.
40 At p. 56.
was to be taken into account rather than the probable effect upon a person of normal susceptibilities. This did not exclude the argument in appropriate cases that the pursuer was victim of his or her own hypersensitiveness rather than of cruelty inflicted by the defender.

Recent Scottish decisions upon mental cruelty have created considerable doubt as to whether a pursuer can succeed by proving injury to health as a result of callous or insensitive conduct on the part of the defender which, though not "aimed at" the pursuer, was persisted in despite realisation of its consequences. In Waite v. Waite the First Division held that a course of criminal conduct—persisted in despite the defender's knowledge of the fact that it injured the pursuer—was not sufficient to justify decree. The Lord Ordinary (Lord Walker) had considered that he was entitled to consider the natural and probable consequences of the defender's behaviour, even though no intention to injure could be established. In the Inner House the judges seemed to consider that conduct which did not strike directly at the matrimonial relationship did not amount to cruelty in law, unless it could be shown that the defender had intended to implicate or hurt the pursuer; though some of the dicta to this effect are clearly obiter. This view has, however, been reinforced by the decision—recently reported—in Hutton v. Hutton, where the wife pursuer complained of her husband's persistence in a life of dishonesty without regard to its consequences to her health. Lord President Clyde observed in this case: "To establish cruelty the facts must enable the court to infer that the defender's persistence in a course of crime was deliberately pointed at the wife." Lord Sorn was prepared to equate "reckless disregard" with intention. Perhaps, however, a more general attitude to cruelty will ultimately prevail. There is much to be said for Lord Tucker's approach in Jamieson. "Every such act must be judged in relation to its surrounding circumstances; and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of Lord Keith) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies." It may be suggested with respect that what is lacking in Scots law in the mid-twentieth century is a middle category such as "intolerable

42 At pp. 376-377.
43 Esp. at p. 379.
conduct”—though in the last resort there is much to be said for recognising breakdown of the marriage relationship rather than the “consistorial offence”—as justifying divorce. Particular acts of adultery or cruelty need not and do not necessarily destroy the marriage relationship. Conduct as in Waite or Hutton may well have that effect. As will be discussed presently, habitual drunkenness, though not aimed at the pursuer, is already recognised in law as “cruelty”—which recognises the facts of life.

In cases of alleged cruelty, where it can be established that the defender’s conduct was independent of volition, the Scottish and English law on cruelty does not coincide. The English Court of Appeal, in Swan v. Swan, held that the respondent could not be held guilty of cruelty when his conduct complained of took place at a time when he suffered from such disease of the mind as not to know the nature and quality of his acts. The court considered the Scottish case of McLachlan v. McLachlan and rejected the construction of the law of cruelty in that case which adopted the test of whether there was need to protect the pursuer. Hodson L.J. observed: “To treat cruelty in the light only of need for protection would be to take it out of the realm of matrimonial offences altogether, which is not, to my mind, consistent with the language of the legislature.” In McLachlan v. McLachlan (a case of separation and aliment though conditions are similar for divorce—see Dunlop v. Dunlop), it was proved that the defender on an isolated occasion used violence and threatening behaviour when in the throes of an epileptic seizure (which took the form of maniacal excitement amounting to insanity, though not certifiable). At the material time he was not responsible for his conduct, nor was his violence particularly directed against the pursuer. The wife (pursuer) was justifiably apprehensive of danger to herself in the event of a recurrence of such seizures, which, though transient, were liable to recur. The defender, founding upon Lord Anderson’s opinion in Inglis v. Inglis argued that, since the acts complained of were not the result of volition, the action should be dismissed. The First Division held that the defender’s violence, although not consciously directed by malicious intention, amounted in law to cruelty, and entitled the pursuer to

46 See (1953) 69 L.Q.R. 30 at p. 42 et seq.
48 It may be well to recall that the M’Naghten Rules are not part of the law of Scotland, and there is room for divergent interpretation on “responsibility.”
49 1945 S.C. 382.
51 Supra; cf. Dobbie v. Dobbie, 1955 S.C. 371, where it was held that a pursuer was not barred from founding on acts of cruelty prior to certification because the defender was confined as insane at the time when action was brought.
53 1931 S.C. 547.
decree of separation. The overriding consideration was protection of
the pursuer. It may be noted that the court suggested that, if the
defender had been actually insane and under restraint, decree would
not have been granted, because the wife would have already had
legal protection from harm by reason of the husband’s detention
under the Lunacy (Scotland) Acts. It is probable that in this case
justice was done on the facts, but it is regrettable that the decision,
which deliberately jettisons logic, was ever reported. To hold a
person “guilty” of cruelty when he has no volition with regard to
his conduct is difficult to justify on any ground except expediency.
It may be noted, moreover, that, though a pursuer may be called
on to contribute to the support of a defender divorced on grounds
of insanity, as the law stands, the defender found “guilty” of cruelty
is liable to pay to the pursuer her legal rights in his estate as at the
date of decree. This point was not argued in McLachlan. It is
submitted that such cases deserve special legislative provision, and
would be more suitably covered by a general clause granting divorce
in circumstances where it would be unreasonable to require the
parties to resume cohabitation—without introducing illogical
extensions of “cruelty.” Recently in Breen v. Breen,54 McLachlan
has been recognised to have been a very special case, which was
contrary to principle and could only be justified on the grounds of
expediency in special circumstances. Accordingly it was held
that insanity is a good defence to an action of divorce on grounds of
cruelty—and that, in defining insanity, the limitations of the
M’Naghten Rules (which are no part of the law of Scotland) were
not to be regarded. The pursuer in Breen could have secured
protection by refusal to adhere (a solution which, at the time when
McLachlan was decided, was not envisaged).

A very important statutory provision further emphasises protection
of the pursuer, rather than punishment of the defender, in the Scottish
law of cruelty. Section 73 of the Licensing (Scotland) Act, 1903,55
provides that habitual drunkenness as defined by section 3 of the
Habitual Drunkards Act, 1879,56 if established in a consistorial action,
shall be held to be the equivalent in law and have the same effects
as cruelty and bodily violence by the habitual drunkard towards his
or her spouse. Section 3 of the 1879 Act defines an habitual drunkard
as one who, not being amenable to any jurisdiction in lunacy, is, by
reason of habitual intemperate drinking, at times dangerous to him-
self or others, or incapable of managing himself or herself, and his
or her affairs. From this definition it is quite clear that no ill-treat-
ment of the habitual drunkard’s spouse is necessary to satisfy the

54 1961 S.C. 158.
55 3 Edw. 7, c. 25.
56 42 & 43 Vict. c. 19.
statute. In practice, where the defender is given to drinking to great excess, a summons is often drafted to include both "habitual drunkenness" under statute and also saevitia of the ordinary kind based on habitual drunkenness in the popular sense.57

Future Protection

Prior to the Divorce (Scotland) Act, 1938, there was no doubt that to obtain decree of judicial separation, not only had the pursuer to establish saevitia, but also that he or she would not be in safety to resume cohabitation with the defender.58 The 1938 Act, by section 1 (1) (c), empowered the court to grant divorce on grounds of cruelty where the defender has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice existing at the passing of this Act, the granting of a decree of separation a mensa et thoro.

Accordingly, in a series of decisions after the Act, the court construed the subsection as meaning that, unless according to the law and practice existing in Scotland at the passing of the Act a pursuer would have been entitled to decree of separation, no decree of divorce would be granted.59 In none of these cases was the point argued that there might be a distinction between divorce and separation, so as to ground a divorce for ill-treatment in the past irrespective of the question as to whether it would be safe to resume cohabitation. The first important agitation of this question was in Lord Simon's dissenting judgment in Thomas v. Thomas.80 While reserving his opinion on the point, Lord Simon thought it questionable whether, on a proper construction of the 1938 Act, consideration of future danger to the pursuer was relevant. He observed that in England on a construction of the Matrimonial Causes Act, 1937 61 (the language of which was not the same as the Scottish Act of 1938), the English Court of Appeal had apparently held in Meacher v. Meacher 62 that a decree of divorce on grounds of cruelty is based on past behaviour, and that it is not a condition of the remedy that the decree should be withheld "unless there is also a reasonable fear that further acts of cruelty will be committed." 63 Lord Simon's dicta were with other

58 See per Lord President Inglis in Graham v. Graham (1878) 5 R. 1093 at p. 1096, and per Lord Adam in Smeaton v. Smeaton (1900) 2 F. 837.
60 1947 S.C.(H.L.) 45.
61 1 Edw. 8 & 1 Geo, 6, c. 57.
63 Lord Merriman in Jamieson, 1952 S.C. (H.L.) 44 at p. 56 et seq., disapproved this construction of Meacher, but as his views were expressed in a Scottish appeal they can scarcely be decisive of English law.
arguments urged on the Second Division in Dunlop v. Dunlop. The facts were shortly as follows: The husband, while stationed with the Army of Occupation in Germany, began a course of excessive drinking which lasted for about two years. During this period he was proved to have struck his wife on two occasions, and also to have frightened her by threats of suicide, by firing off a revolver and by reckless driving of a car when she was in it. These were incidents in a general course of conduct which caused her physical and mental stress—such conduct, for example, including the narration of ghoulish stories of concentration camps and hangings, although he knew that such stories caused distress to his wife. Eventually, in October 1948, the pursuer decided to leave the defender, and raised her action in the Court of Session in March 1949. The Lord Ordinary held that saevitia was established, and the Division refused to upset that finding. The defender contended, however, that, even if he had ill-treated his wife, this was due entirely to his addiction to excessive drinking; and that since she had left him in October 1948 he had reformed and given up excessive drinking. Accordingly, he said, the pursuer (his wife) was in safety to resume cohabitation with him, and decree of divorce on grounds of cruelty should be refused. The Lord Ordinary and the Second Division (the Lord Justice-Clerk dissenting) upheld the defender's contention on the construction of the 1938 Act. The correct test, they said, was whether the pursuer could safely resume cohabitation with the defender, and they held that she could. The onus of establishing reform, of course, rests on the defender. The decision in Dunlop has since received acceptance in various decisions such as Jamieson. One can appreciate the sociological grounds of the Lord Justice-Clerk's dissent and of the distinction he would make between divorce and judicial separation quoad future risk. The practical moral seems to be not to sleep on one's rights if one seeks decree on grounds of cruelty.

The test of protection in cases based on cruelty was stated by Lord Justice-Clerk Aitchison in McDonald as "not whether the pursuer is, at the date of bringing the action or immediately prior thereto, in actual danger, but whether she would be in danger if cohabitation were to be resumed." In this connection the future probabilities have to be judged by reference to the personalities concerned and not according to abstract standards.
Sodomy and Bestiality

These grounds were introduced by section 1 (1) (d) of the Divorce (Scotland) Act, 1938.69 The crimes in question must have been committed since the marriage. An extract of a conviction applying to the defender is conclusive proof: section 1 (2). There is English authority supporting the view that a wife could found on sodomy committed on herself: Statham v. Statham.70 It would seem, however, to be the better view that this is not what is implied by the statutory provision—at all events in Scotland—though a husband who sought to subject his wife to such a relationship against her will might well be guilty of cruelty. The Matrimonial Causes Act, 1950,71 by section 1 (1) recognises certain grounds of divorce in England which are available to the wife—rape, sodomy and bestiality. It is not clear why the English law made special provision for cases of rape. In Scotland such cases would be covered by the ordinary law regarding adultery. Under the criminal law of Scotland sodomy and bestiality may well refer only to acts committed by males and not by females. Indeed the Royal Commission on Marriage and Divorce recommended that the sexes should be put clearly upon a basis of equality in these circumstances.72

Dissolution of Marriage on Presumed Death of Spouse

A married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may obtain decree of dissolution of the marriage if the court is satisfied that such reasonable grounds exist. Continuous absence for seven years, if the applicant has no reason to believe that the absent party has been living within that time, is evidence of his death, unless the contrary is proved: Divorce (Scotland) Act, 1938, s. 5.

The form of proceedings is by petition for dissolution, and not by action. This petition must not be confused with another form of petition which is relevant in questions of succession: namely, a petition under the Presumption of Life Limitation (Scotland) Act, 1891.73 Section 3 of the 1891 Act provides that “When any person has disappeared and has not been heard of for seven years or upwards, the court, on the petition of any person entitled to succeed to any estate on the death of such person . . . may . . . find that he shall be

69 1 & 2 Geo. 6, c. 50.
71 14 Geo. 6, c. 25.
73 54 & 55 Vict. c. 29.
presumed to have died exactly seven years after the date on which he was last known to be alive.”

The editors of Walton on Husband and Wife conclude that, as the law of Scotland stands, the court would be bound to reduce a decree pronounced under section 5 of the 1938 Act, if the person presumed dead were to reappear and were that person or the original petitioner to bring an action for reduction. They are of opinion that a second marriage subsequent to decree would thereupon be dissolved. The present writer ventures to question whether this view is sound, but considers that, in any event, the law should be clarified by legislation. A recommendation to this effect was made by the Royal Commission on Marriage and Divorce—but, yet again, no action has been taken by the legislature.

Bars to Divorce

The three principal defences in law to an action for divorce are:

(a) condonation
(b) connivance or lenocinium
(c) collusion.

Condonation

Condonation is a doctrine taken over from the Canon law, though non constat that the limits are the same in the law of Scotland as in the Canon law. Where condonation is proved, the pursuer is barred from insisting in the action. “Forgiveness” and “restoration” are the essentials underlying condonation. It may well be that repentance and desire by the offender for reconciliation is also material. The general principle has been expressed thus by Lord Blackburn, in Collins v. Collins:

It is in itself obviously both just and politic that a spouse (whether male or female) who has become fully aware of the misconduct of the other spouse, and has elected to forgive it, should not be permitted to treat the other as a spouse and to live together and yet to reserve a power to fall back upon the bygone forgiven offence as a substantive ground for redress. I think it is clear, on principle, that such a condonation, accompanied by cohabitation, ought to have the effect of being a complete release . . . .

74 An interesting attempt to use the second form of petition to avoid using the machinery of the 1938 Act is reported in the case of Fraser—Petitioner, 1950 S.L.T. (Sh.Ct.) 51.
75 3rd ed., p. 122.
79 (1884) 11 R. (H.L.) 19 at p. 24. In older Scottish practice, the term used was "remissio injuriae" or "reconciliation."
Condonation of Adultery

The doctrine of condonation in actions grounded on adultery implies full knowledge, or waiver of full knowledge, of all material facts regarding the adultery condoned; and therefore a pursuer is not necessarily barred from founding on acts of adultery other than those expressly condoned; a man might be willing to forgive a single act committed in circumstances of strong temptation, but not a course of profligacy. A husband, however, may condone a course of misconduct without precise knowledge of every act. Mere suspicion of a wife’s conduct is not enough. Lord Wark 80 considered that if a husband cohabited with his wife when convinced of her guilt, even though he might not have legal proof, this grounded condonation. Lord Fraser 81 thought otherwise. It should be noted also that condonation cannot be made conditional on future good behaviour. In Scotland, in contrast to the law of England, condoned acts of adultery cannot be afterwards founded on as grounds of divorce. They are not revived by subsequent misconduct or breach of conditions imposed. The leading case is Collins. 82

A husband condoned acts of adultery by his wife but, so he averred, upon condition that she should never speak or write to her paramour again. After five months’ cohabitation he raised an action of divorce against her, founding on the adultery which he had condoned, and contending that it had been revived by his wife’s conduct in meeting the paramour in suspicious circumstances several times during this period of cohabitation. There was, however, no proof of subsequent adultery. The House of Lords held that condonation of adultery followed by cohabitation is absolute, and conditions attached thereto are ineffectual; but that it was competent to lead proof of the condoned acts of adultery, to throw light upon the quality of the wife’s conduct subsequent to condonation. It is not, however, every kind of expression of forgiveness which amounts to express condonation. Forgiveness merely in the religious or moral sense is not tantamount to condonation—as if a man says that he forgives his wife but could not live with her again: Collins, 83 also Annan v. Annan. 84 There is no doubt that sexual intercourse by a husband with full knowledge of his wife’s adultery constitutes condonation. A wife may not so readily be barred by a plea of condonation on the husband’s part. Cohabitation—restoring the wife to her former position as praeposita rebus domesticis—is sufficient

82 (1884) 11 R. (H.L.) 19.
83 Supra, at p. 39, per Lord Watson.
84 1948 S.C. 532 at p. 533.
condonation: *Edgar v. Edgar.* Lord Fraser considered that the Canon law regarded condonation *per verba* as sufficient, but his citations of authority did not seem to support his propositions. In England condonation *per verba* has long been rejected, but the question was raised directly in Scotland for the first time in *Annan v. Annan.* Lord Sorn’s decision was in the Outer House, but his analysis of the authorities makes it an impressive opinion, and one with which other Outer House judges have expressed themselves in full accord. He said:

My conclusion therefore is that the doctrine of condonation *per verba,* if it ever was accepted in the Canon law, has never been adopted into the law of Scotland, and that the effect of this negative attitude persisting for so long a period is to indicate a rejection of that doctrine. If I am wrong as to this, and if it were open to adopt the doctrine now, I should decide that it ought not to be adopted.

**Condonation of Cruelty**

When an act of adultery is condoned, it is wiped out and cannot be referred to again, at least as a substantive ground of action. Where, however, a spouse forgives an act of cruelty, and goes back to live with the offender, the injured party is entitled for certain purposes to open up the entire past history, if the cruelty is repeated, and decree of divorce or separation is then sought. Thus in *Graham v. Graham* it was held that, while acts of cruelty prior to the reconciliation could not be made the *sole* foundation of an action of separation, they might be proved with a view to determining the real issue in the case—whether the pursuer would be in safety to health and person to resume cohabitation with the defender. Again in *Smeaton v. Smeaton,* it was laid down that even if acts of ill-treatment subsequent to condonation were not of themselves, standing alone, of such a character to warrant decree, yet, if they were part or sequel of a course of prior acts amounting to *saevitia,* they might acquire a character of sufficient seriousness to warrant decree. In this connection the length of intervening time will be a relevant consideration, and lapse of time is always material in cruelty cases when considering whether the pursuer at the time of hearing the action would be in safety to resume cohabitation.

**Condonation of Desertion and other Consistorial Offences**

It would seem that if condonation is relied on as a bar where an action for divorce is based on sodomy or bestiality, the scope of the

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85 (1902) 4 F. 632.
86 1948 S.C. 532.
87 At p. 538.
88 (1878) 5 R. 1093.
89 (1900) 2 F. 837.
doctrine should be analogous to that which applies in actions in respect of adultery. If (which may be doubted) an act committed on a wife could justify an action based on sodomy, the analogy for condonation might be with cruelty. Lord Wheatley has held in the Outer House that an action based on desertion may be barred by resumption of family life outwith the triennium, and considered that the pursuer had barred himself by mora and acquiescence, which in effect is tantamount to condonation.

Lenocinium (or Connivance)

In its primary sense lenocinium means whoremongering—making gain by the prostitution of another; but, as construed by the courts, it is not necessary that the element of pecuniary gain should be present. The courts have repeatedly refused to define this concept (which is pars judicis to notice) — but have given various descriptions:

I think there may be lenocinium without actual exposure of the wife to prostitution for hire, and there may be lenocinium where the husband's conduct is not proved to be directly connected with the particular adultery charged. But there must be conduct on the part of the husband which makes him the pander to his own dishonour—the wilful tempter and inciter of his wife to the commission of adultery,

per Lord Ardmillan, Donald v. Donald.91

When a husband is accessory to the crime of adultery by his wife, or is participant in the crime, or is the direct occasion of her lapse from virtue, per Lord Justice-Clerk in Wemyss v. Wemyss.92

Lord President Dunedin in Thomson v. Thomson93 declared: “There must be something on the husband's part of an active character, 'co-operari et positive concurrere,' says Sanchez, and I think that is an accurate description of our law.” The Lord President thus disclaimed Lord Fraser's view that passive acquiescence would suffice. The short facts in Thomson were that a husband, who had reason to suspect his wife's conduct, was told that she intended to visit a man at Gateshead with whom the husband knew she had been corresponding. The wife asked for permission to visit friends in Stirling and also for money. He gave her £2 and told her to go—then he had her followed. She went to Gateshead and committed adultery. It was held that there was no lenocinium.

A dictum of Lord President Inglis in Hunter94 was relied on unsuccessfully in one case to support the proposition that lenocinium can

91 (1863) 1 M. 741 at p. 748.
92 (1866) 4 M. 660 at p. 662.
93 1908 S.C. 179 at p. 185.
95 (1883) 11 R. 359.
only be established when a spouse has actually incited the other to commit adultery and when such incitement alone induces the misconduct. In *Gallagher v. Gallagher,*96 a husband sent a wife a letter in the following terms97: "Annie, enclosed you will find alimont. What about doing something so as we can be clear of one another. I'm fed up with this life. I no longer love you so it's up to you to do something. Hughie." This was construed by the court as a direct invitation to commit adultery. Three months later she committed adultery. Counsel for the pursuer denied lenocinium on the ground that the letter was not the true cause of adultery, but the court held that lenocinium was established. The Inner House considered that the letter had been a cause of the defender's adultery, and that, even on the test stated in *Hunter,* this was enough. The husband's incitement did not need to be the only cause. The Lord Justice-Clerk (Alness) doubted the necessity for the element of instigation mentioned by Lord President Inglis in his dictum. Other judges pointed out that the language in *Hunter* was adapted to the facts, and that Lord President Inglis did not mean to qualify what he had said earlier in *Wemyss.*98 Thus, as Lord Hunter observed, if a husband, without his wife's knowledge at all, procured someone to attempt her seduction, this would be lenocinium.98a

It is very rare for this defence to succeed. Further, it may be observed that the maxim "once connivance, always connivance" does not represent the Scottish view.

**Collusion**

In *Walker v. Walker*99 the Lord President (Lord Dunedin) emphasised the dangers of quoting English authorities on collusion in Scottish cases. He said:

Now, I wish to say most distinctly that I do not think that English authority upon such a matter is at all a safe guide for us . . . . I think collusion, according to our authorities, is the "permitting a false case to be substantiated, or keeping back a just defence."

The following year, in *Fairgrieve v. Chalmers,*1 the same learned judge was even more emphatic regarding the differences between English and Scottish law on this matter.

Again I must emphatically say that I think a reference to English decisions in these matters is very misleading and quite uncalled for. Our divorce law is centuries older, and their law depends entirely upon statute. . . . I can only say that there never can be collusion unless you can show

96 1928 S.C. 586.
97 At p. 587.
98 (1886) 4 M. 660.
facts which, if proved, would show that the oath of calumny had been falsely sworn.  

The oath is not of verity but of opinion. In Administrator of Austrian Property v. von Lorang, Lord Sands observed:

Mutual desire that a decree in a consistorial cause should be obtained, and mutual action to facilitate this end, are not collusion if there be no fabrication or suppression.

Lord Dunedin in the appeal to the House of Lords expressed his complete agreement with every word of Lord Sands’ judgment. It may be justifiable, pace Lord Fraser, to assume that collusion is only relevant in a Scottish action of divorce where there has been fabrication or concealment of evidence, though it may be observed that conduct which would not amount to collusion may give rise to the bar of lenocinium.

In certain circumstances lenocinium and collusion overlap, as appears from the authoritative discussion of these defences in Riddell v. Riddell, when it was emphasised by the First Division that lenocinium (anglicé connivance) and collusion did not necessarily mean the same in Scotland and England. Collusion, as has been observed, is restricted in Scotland to cases where there has been actual fabrication or concealment of evidence. Thus, if a spouse invites the other to commit adultery and he does so, there is no basis for a defence of collusion—but there might be for a defence of lenocinium. On the other hand, acquiescence (even tinged with relief) in the other spouse’s unilateral expression of intention to commit adultery would not seem to raise either bar in Scotland.

Protection of Children’s interests in Consistorial Proceedings

The Matrimonial Proceedings (Children) Act, 1958, contains provisions which impose on courts competent to grant decrees of divorce, separation or nullity certain duties with regard to children who may be affected by such decrees; and in general the statute extends jurisdiction to consider the interests of such children. Section 8 provides that a court shall in general not grant decree of divorce, separation, or nullity unless and until such court is satisfied that the arrangements made for the care and upbringing of any child over which it has jurisdiction are satisfactory or the best possible—or that it is impracticable for the party or parties appearing to make such arrangements. Nevertheless, if it appears that there are circumstances making

2 In Riddell v. Riddell, 1952 S.C. 475 at pp. 482-483, Lord President Cooper discussed the history of the Oath de Calumnia in Roman and Scots law (Gaius IV, 174; D. 12,2,34,4; Stair, IV,44,15; Erskine, IV,2,16).
2 1926 S.C. 598 at p. 628.
4 1927 S.C. (H.L.) 80 at p. 91.
5 1952 S.C. 475.
6 & 7 Eliz. 2, c. 40.
it desirable to grant decree without delay, this may be done after the court has obtained a satisfactory undertaking from the party or parties to bring the question of arrangements for children before the court within a specified time. The classes of children over which a court is given jurisdiction in consistorial proceedings (and whose interests have to be considered in granting decree) now include not only children of the marriage, but also illegitimate children of both parties to a marriage and the child of one party (including an illegitimate or adopted child) which has been accepted as one of the family by the other party. The Act confers powers to secure reports as to arrangements for future care and upbringing of children; and authorises a competent court to make provisions regarding children even if a consistorial action is dismissed or if a party fails to obtemper a decree of adherence. Moreover, a child brought within the court's jurisdiction in consistorial proceedings may be committed to the care of a local authority or individual or be placed under supervision. In appropriate cases, after a consistorial action has been commenced, the court may prohibit the removal of a child furth of Scotland or out of the control of a person having custody of him.

**Proposals de Lege Ferenda**

The Royal Commission on Marriage and Divorce recommended, inter alia, that certain new grounds of divorce should be introduced in Scots law and that the present law should be altered in a number of respects. Among the new grounds for divorce recommended were wilful refusal by a spouse to consummate the marriage, acceptance by a wife of artificial insemination by a donor without her husband's consent, and intolerable conduct. Moreover, it was suggested that it should no longer be necessary for a pursuer in an action based on cruelty to prove the need for future protection but only acts of cruelty already suffered. Proof of willingness to adhere throughout the triennium should no longer be required in actions on grounds of desertion, though the court should be satisfied that desertion had continued for three years preceding the raising of the action. Adultery of the pursuer, it was thought, should be a bar to divorce on grounds of desertion only where it was shown to have conduced to the desertion or to its continuance. Though it was also recommended that insanity should not be a bar to an action based on cruelty, it may be suggested that this would be an illogical solution designed to meet cases of

8 s. 11.
9 s. 9.
10 s. 12.
11 s. 13.
hardship, and that such cases could be better dealt with under the proposed new ground of intolerable conduct.  

Effect of Divorce on Property Rights

Consideration has already been given to the exceptional position which arises on divorce on grounds of insanity, and to the anomalous distinction where divorce is granted in respect of "cruelty" which was independent of volition. The 1938 Act applies to all grounds of divorce except insanity the same effects on property rights as arise at common law in the case of divorce for adultery. The consequences are that the guilty spouse loses all claim to his or her legal rights on the death of the other spouse, and the innocent spouse can forthwith claim legal rights (if these have not been excluded) as if the guilty spouse were dead. Owing to statutory oversight, however, a husband who divorces his wife does not become entitled to *jus relictii*. Where in cross actions of divorce both spouses succeed, neither may claim legal rights. The fiction of natural death of the defender is not, however, capable of universal application. Thus in *Selsdon v. Selsdon*, a wife obtained *jus relictae* in a liferent payable to the husband (who would, of course, not have enjoyed it if dead). Moreover the exclusion of a guilty spouse from participation in the pursuer's estate does not accelerate the benefit of children of the marriage who are entitled under a settlement to the fee after their father's liferent: *Dawson v. Smart*. In this case the father was divorced by the mother who, at her death, was survived by her ex-husband (whose liferent in her property was forfeited on divorce) and also by her daughter. The daughter was entitled under the settlement to the capital on the termination of the father's liferent. The House of Lords held that she must wait until her father's death. The mother's executors took the forfeited liferent.

One may well think that the provision which the present Scottish law makes for the innocent pursuer is not so satisfactory as the English system, under which permanent maintenance during the joint lives of the parties may be ordered. In present circumstances a man may earn and spend a substantial wage or salary, but own very little capital. Provision for the innocent pursuer depends in Scotland on rights out of the defender's capital. The court in England has also power to vary settlements for the benefit of the innocent spouse and children, and a majority of the Royal Commission on Marriage and Divorce proposed that legal rights on divorce should be abolished and instead the court should have power to adjust the nature and extent of any provision

12 See Summary of Recommendations, Scotland, and paras. of Report referred to therein; also pp. 330-331, ante.
14 (1903) 5 F. (H.L.) 24.
made for an innocent spouse—which might be by capital sum, annual payment or partly by each method.\textsuperscript{15}

**JUDICIAL SEPARATION**

The grounds recognised at common law for judicial separation are adultery and cruelty; by the Licensing (Scotland) Act, 1903,\textsuperscript{16} s. 73, "habitual drunkenness" has been added as a ground—\textit{i.e.}, such drunkenness as renders the defender "at times dangerous to himself or herself or to others or incapable of managing himself or herself, and his or her affairs."\textsuperscript{17} These conjugal wrongs, and the defences associated, have already been discussed in the context of divorce. Property which a wife acquires after she has been granted a decree of separation passes on her death intestate to her heirs and representatives as if her husband were dead. Though actions involving status in general are within the jurisdiction of the Court of Session alone, by the Sheriff Courts Acts, 1907–1913,\textsuperscript{18} actions of separation and aliment, or of adherence and aliment as between husband and wife, or regarding custody of children are competent in the sheriff court. On cause shown or \textit{ex proprio motu}, however, the sheriff may remit to the Court of Session at any stage in proceedings an action falling within these categories.

**LEGAL EFFECTS OF MARRIAGE**

**Duty of Adherence**

The spouses have a duty of adherence to each other and, as has been discussed, failure to implement that duty, if persisted in for three years, grounds an action for divorce. The courts will not, however, compel adherence, nor, on the other hand, will they enforce a contract for voluntary separation. Such contracts are revocable at any time unless the defender can aver grounds which would justify judicial separation: \textit{Macdonald v. Macdonald's Trs.}\textsuperscript{19} But the party seeking to revoke must be genuinely willing to adhere, and not merely wish to evade the financial arrangement. Moreover, offers of adherence generally may be scrutinised, and if an oblique motive is disclosed, the lack of bona fides will entitle the other spouse to reject it.\textsuperscript{20} As has been discussed in the context of desertion,\textsuperscript{21} the law now recognises that a spouse may be justified in refusing to adhere on grounds which would

\textsuperscript{15} Recommendation 51 and §§ 546 and 553.
\textsuperscript{16} 3 Edw. 7, c. 25.
\textsuperscript{17} s. 3 (3) (b), Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).
\textsuperscript{18} 7 Edw. 7, c. 51—2 & 3 Geo. 5, c. 28; also Maintenance Orders Act, 1950 (14 Geo. 6, c. 39).
\textsuperscript{19} (1863) 1 M. 1065.
\textsuperscript{20} Martin v. Martin, 1956 S.L.T. (Notes) 41.
\textsuperscript{21} p. 323, ante.
not amount to a substantive conjugal offence such as adultery or cruelty. Nevertheless, these must be of a grave and weighty nature, and a spouse cannot qualify his or her willingness to adhere by seeking to impose unreasonable conditions—such as insistence on the part of a wife that her husband should give up an innocent friendship with another woman.22

As head of the household the husband has the right to regulate it, and to fix the place of conjugal residence—and the wife must follow unless she has a reasonable excuse for not so doing as, for example, ill-health, or that the climate or accommodation is unsuitable: Darroch v. Darroch.23 There seems to be no current tendency in Scotland to whittle down the husband's right to choose the residence. Provided he or she is prepared to discharge the conjugal duties (which the courts have always refused to define narrowly) a spouse may exclude the other from his or her house, and even have the aid of the court in an action of removing.24 In such a case a spouse is merely exercising a right of property, and the matrimonial relationship is irrelevant. If a wife is thus removed from the matrimonial home, a duty will fall on the husband to provide a home for the wife elsewhere—but that is not relevant to the action of removing.

Aliment

As a legal consequence of marriage, a husband is bound to aliment his wife. This duty he may usually25 discharge by offering to maintain her at bed and board—unless he has given her just cause for living apart, or she does so with his consent. In these latter circumstances the aliment to be awarded by the court depends on the rank and manner of life of the parties.26 The husband has a right to determine the scale of living of the household. Where a wife pursuer does not seek decree of separation, the defender is only liable for aliment so long as he refuses to receive and entertain the pursuer. An action for aliment by a wife is often associated with an action either for adherence or for separation, but a claim for aliment may in certain cases succeed without a claim for other relief.27 A conclusion for aliment may be “permanent” in the sense that it is subsidiary to a crave or conclusion for adherence or separation. Alternatively, “interim” aliment may be claimed without asking the court to determine any issue of status.

26 Regarding factors to be considered in computing aliment see Alexander v. Alexander, 1958 S.L.T. 298.
Usually such claims have been made pendente lite, but the right is not limited to such cases, and the expression “interim aliment” is to be construed to comprise all awards of aliment other than those made following on the decision of a separate consistorial issue.

Aliment in the true sense is granted for present maintenance. The court will not grant decree for past aliment if the wife (not living apart under decree of separation or voluntary contract) has been able to support herself—the ratio being that the husband is liable to tradesmen who supply a wife with goods necessary for her aliment, and the wife’s allowance is not to be increased on account of debts for which the husband is liable: McMillan v. McMillan.

The obligation to aliment remains where the wife is justified in living apart because of the husband’s adultery or cruelty. Further, it also remains where the husband has with justification refused to live with his wife, as if the wife has committed adultery, and he holds a decree of judicial separation. The obligation to support is founded on the relationship of the parties as married persons, and is not affected by the conduct of the spouses, except as to the mode in which it is to be performed. The conduct of the wife may be such as to discharge the husband from his obligation to adhere, but it does not follow that he is discharged from his obligation to support. A distinction must be made, however, between claims for aliment by a wife who has been guilty of adultery on the one hand and cases where she is in desertion. In the former case she can claim aliment stante matrimonio despite her offence—but not in the latter. As Lord Guest put the matter in Jack v. Jack:

Adultery is a unilateral offence so far as the parties to the marriage are concerned, but desertion is a bilateral transaction which involves a spouse who deserts and a spouse who is simultaneously willing to adhere.... Willingness to adhere is thus a prerequisite of the right of a wife to be supported by her husband during the subsistence of the marriage.

By the Married Women’s Property (Scotland) Act, 1920, s. 4, a wife whose means are more than sufficient for her maintenance is liable for the provision of maintenance for her indigent husband.

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28 A wife who has stated a prima facie case in her summons and who is in need of support is entitled to claim interim aliment forthwith: Fyffe v. Fyffe, 1954 S.C. 1.
30 (1871) 9 M. 1067, per Lord President Inglis, p. 1068.
32 1961 S.L.T. 72 at p. 73. The jurisdiction of the sheriff court in such matters is regulated by the Sheriff Courts (Scotland) Act, 1907 (7 Edw. 7, c. 51), s. 5, as amended by the Sheriff Courts (Scotland) Act, 1913 (2 & 3 Geo. 5, c. 28). Payment of aliment out of the defender’s wages can be obtained through the machinery of the Wages Arrestment Limitation (Scotland) Act, 1870 (33 & 34 Vict. c. 65), and the Wages Arrestment Limitation (Amendment) (Scotland) Act, 1960 (8 & 9 Eliz. 2, c. 21).
33 10 & 11 Geo. 5, c. 64.
Jus Mariti

By common law the whole moveable estate of the wife passed on marriage by an implied universal assignation to the husband. This right might be renounced by the husband by ante-nuptial contract. For all practical purposes the *jus mariti* has been abolished by a series of statutes, the most important of which is the Married Women's Property (Scotland) Act, 1881,\(^\text{34}\) which excluded the *jus mariti* in the case of marriages after the date of the commencement of the Act—July 18, 1881.

Jus Administrationis

This was a husband's curatorial power over the wife's property to which the *jus mariti* did not apply, namely heritage or moveables from which the *jus mariti* was excluded. The wife could not dispose of such property without his consent, and obligations undertaken without the husband's consent were (generally speaking) null.

The *jus administrationis* was wholly abolished by the Married Women's Property (Scotland) Act, 1920,\(^\text{35}\) and the wife is given the same powers of disposal of her estate, heritable and moveable, as if she was not married. The husband's curatory of his wife is also abolished, except where, and only so long as, she is in minority. The Act also provides that a married woman shall be capable of entering into contracts, and incurring obligations, and of suing and being sued, as if she were not married, and that her husband shall not be liable in respect of any contract she may enter into on her own behalf.

The effect of these provisions is that a wife is *sui juris*, and her husband has in general no responsibility for her contracts, except in so far as he may have given her express or implied authority to bind him. It is, however, provided, by section 3 (2) of the Act, that if a married woman living apart from or deserted by her husband contracts for goods or furnishings for herself or children, though she is personally liable the suppliers may sue the husband for the price, if he would be liable under the present law.

Praepositura

By a wife's *praepositura* is meant the managership of a married woman in domestic matters. A wife is presumed to be *praeposita rebus domesticis*, and can therefore bind her husband for the price of food, clothing, medicine and furnishings for the household.\(^\text{36}\) This is really part of the law of agency, whereby a principal is liable for the acts of the agent done within the scope of the agency. In any transaction—say to buy a farm—a husband may expressly authorise his

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\(^{34}\) 44 & 45 Vict. c. 21.

\(^{35}\) 10 & 11 Geo. 5, c. 64.

\(^{36}\) Erskine 1,626.
wife or any other person to act as his agent (praeposita negotiis). In the case, however, of the wife’s domestic praepositura the law presumes that the wife is the agent for the husband in regard to domestic affairs; and therefore has implied authority to purchase necessaries for the household. Cohabitation raises a presumption of fact that the husband assents to contracts made by the wife for necessaries suitable to his degree and estate or to the style he permits her to assume. A similar presumption is raised where, for example, a widower’s house is managed by his daughter. The goods supplied must be suitable to the husband’s position in life. The question always is, had the wife, in fact, authority to pledge the husband’s credit? This has to be shown by the person seeking to charge the husband with the debts of the wife, for he is bound to inquire and satisfy himself with regard to the condition of the person with whom he contracts. Further, if a tradesman supplies goods, relying on the wife’s credit only, he cannot hold the husband liable.

Savings made by a wife from moneys handed to her as praeposita rebus domesticis by a husband remain his property. In Smith v. Smith Lord President Clyde said: “Her praepositura cannot entitle her to make savings for herself out of that of which she is only stewardess. If, therefore, any accumulations are made, they belong to the husband.” The principle was carried a stage further in Preston v. Preston. A husband while serving in the Army remitted sums to his wife for her support. This he did as an “other rank” in the form of a separation allowance, and later, when an officer, by voluntary allotments. The wife, who was in remunerative employment, subsisted on her own earnings and accumulated the sums remitted by her husband. The wife claimed that these were an alimentary payment which she was entitled to retain. It was held, however, that they were to be treated exactly like money handed over by a husband living with his wife in family, to be applied for housekeeping purposes. It must be stressed that, though the parties were divorced when the action was brought, there was no interruption of consortium by consent at the period when the sums for support were remitted—otherwise different considerations would have applied.

The Lord President (Cooper) made interesting comments in Preston on the present state of the law with regard to aliment since the emancipation by statute of a married woman and her property. He envisaged that legislation or judicial decision might yet introduce into Scotland a limited form of communio bonorum. This in essence would

37 Hamilton v. Forrester (1825) 3 S. 572.
38 1933 S.C. 701.
39 At p. 705.
probably mean the placing in a common fund of all moveables brought by the spouses on marriage, of immovable acquired during marriage for onerous consideration and of the revenue produced by all this property. Over these pooled resources the spouses might enjoy a right in the nature of co-ownership which would assert itself principally on the dissolution of the communion. The present law reflects superseded doctrines.42

The husband may at his pleasure terminate the praepositura. He may do so formally by means of Inhibition. This is a writ in the Sovereign’s name—obtained on petition to the Outer House of the Court of Session—inhibiting the wife on the one hand from disposing of the husband’s goods or contracting debts to his prejudice, and inhibiting the lieges, on the other hand, from receiving from her such goods and from advancing money or furnishing goods to her without her husband’s special authority. On being registered in the General Register of Inhibitions this writ has the effect of terminating the praepositura in dealings by the wife with all persons, whether they were or were not aware that the inhibition had been obtained. A husband is then free from liability under the wife’s contracts, except that, if he fails to provide her and his family with what is necessary for their support, he remains liable to a tradesman who has supplied necessary goods. Without using inhibition, a husband may, by notification to a tradesman, free himself from liability to that tradesman; but public advertisement does not have this effect, unless the tradesman was aware of the advertisement.

Donations

Grants arising out of mere liberality of the giver without antecedent cause or obligation were, at common law in questions affecting husband and wife, revocable by the donor even after the death of the donee. Since the Married Women’s Property (Scotland) Act, 1920,43 donations between husband and wife are irrevocable, except that a creditor may revoke if a donation is completed within a year and a day before sequestration of the donor’s estate: section 5.

Policies of Assurance

By the Married Women’s Policies of Assurance (Scotland) Act, 1880,44 it is provided that a policy, if taken out by a married man on

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43 10 & 11 Geo. 5, c. 64.

44 43 & 44 Vict. c. 26, as amended by 10 & 11 Geo. 5, c. 64. See Walton, 3rd ed., p. 225.
his own life and expressed on the face of it to be for the benefit of his wife or children or both, shall be deemed a trust for them. Such a policy does not require delivery to make it effective; it is irrevocable and may not be reduced. If, however, it was taken out with intent to defraud creditors, or if the husband is sequestrated within a year and a day from the date of the policy, the creditors are entitled to repayment of the premiums out of the proceeds thereof.

**Rights of Action between Husband and Wife**

Questions as to rights of action by one spouse against another while cohabitation continues have only in quite recent times reached the courts in pure form. Formerly, such questions were overlaid by the old law with considerations of *jus mariti* and donation *inter virum et uxorem*. These concepts have ceased to trouble, but the reduction of all aspects of litigation between spouses to a common principle is not finally achieved. For a stimulating discussion of the radical changes which have taken place in the legal position of married women since 1875, Lord President Cooper’s opinion in *Beith’s Trs. v. Beith* may be studied.

In the older law no action of damages could have been sustained as between spouses, for the simple reason that all a wife’s moveable property passed to her husband by virtue of the *jus mariti*—see per Lord McLaren in *Young v. Young*.45

In *Harper v. Harper,* a case decided after the Married Women’s Property (Scotland) Act, 1920, the Second Division refused as incompetent a wife’s action for reparation for injuries caused by her husband’s negligent driving; and, until the law is reviewed in a fuller court, possibly it must be accepted that actions in delict and quasi-delict may not in Scotland be brought by husband and wife against each other in respect of personal injury. *Harper* was, however, viewed without obvious enthusiasm in the House of Lords in *Cameron v. Glasgow Corporation*. Further, both the grounds on which *Harper* was decided are highly questionable. So far as it rests on public policy in maintaining conjugal harmony, it might have been thought that judicial notice would be taken of the fact that compulsory third-party insurance would tend to exclude the risk of tension between the spouses. The other ground, showing even stronger English influence than that of public policy, was that the spouses were *eadem persona*—a doctrine which in England was latterly partially circumvented in

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46 (1903) 5 F. 330.
47 1929 S.C. 220.
Curtis v. Wilcox, so as to permit a wife to sue her husband for damages caused by his negligence. In Horsburgh v. Horsburgh Lord Birnam refused to apply the reasoning of Harper to an action by a wife against her husband based on contract. He allowed the action, and indicated a strong and convincing view that the English doctrine of eadem persona was no part of Scots law. Moreover, he held that, since the 1920 Act, there was no requirement of public policy which would bar a right of action brought by one spouse against the other.

Marriage has not been regarded in Scotland as a bar to actions between spouses in respect of rights of property: Millar v. Millar; nor in respect of contract: Horsburgh. As regards actions in delict involving personal injury it had been decided in Harper that no action might be brought. This case, however, virtually borrowed English law to secure a result which English lawyers had themselves frequently deplored because it is difficult to accept as serious argument that conjugal strife would be fostered if spouses’ summons concluded for a remedy in delict (say for personal injury through negligent driving) but that concord would reign if their action were founded on breach of contract for safe carriage. On August 1, 1962, the Law Reform (Husband and Wife) Act, 1962 largely swept away the anomalies introduced by Harper into Scots law By section 2 of the Act spouses have been enabled to sue each other in respect of wrongful or negligent acts or omissions, though the court is empowered to dismiss such proceedings if it appears that no substantial benefit would accrue to either party.


51 See W.J.D., 1952 S.L.T. (News) 1, for an article discussing English and Scottish law regarding "Matrimony and The Motorist."

52 1940 S.C. 56.

53 Moreover, in Webb v. Inglis, 1958 S.L.T. (Notes) 8, a wife was held to be entitled to sue her husband’s employer in delict in respect of injuries allegedly sustained in consequence of the husband’s negligent driving.

54 10 & 11 Eliz. 2, c. 48.
CHAPTER 11
PARENT AND CHILD

GENERAL

After dealing in Title IV of his Institutions with Conjugal Obligations, Lord Stair proceeded in Title V to discuss obligations between parents and children—obligations which do not arise ex voluntate but which are obediential in their origin.

As Stair says 1:

Ere we can distinctly know the power parents have over their children, we must distinguish the capacities and ages of the children; whereof there are three—infancy or pupillarity, minority or less age, and majority or full age.

According to our law, pupillarity continues until the age of fourteen in the case of a male and twelve in the case of a female; minority continues from the end of pupillarity until the age of twenty-one. It may be noted, however, that statute law has introduced various age-classifications of children, cutting across those of the common law, such as sixteen years for such purposes as marriage and custody. In England (except for the Crown) infancy continues until the age of twenty-one, and a number of United Kingdom statutes do not instil confidence that the legislators have always been aware of the important differences between Scottish and English law regarding children. The essential distinction as regards legal capacity between minority and pupillarity in Scotland is as follows: “A pupil has no person in the legal sense of the word. He is incapable of acting, or even of consenting.” 2 A minor can act legally, though, to render certain transactions binding on him, a curator must act with him. Before discussing the rights and duties, capacities and disabilities of pupils and minors, it may be convenient to consider the general status of children in three categories: (a) legitimate children; (b) adopted children; and (c) illegitimate children.

PERSONAL STATUS OF CHILDREN

Legitimate Children

“A lawful child, according to the law of Scotland, is one born in wedlock, or within a certain time after the dissolution of the marriage:

1 I,5,2.
2 Erskine, 1,7,14.
or born of parents who, at the conception, were under no impediment to marry, and have since intermarried.”

There is a presumption (presumptio juris) expressed in the brocard “Pater est quem nuptiae demonstrant,” that any child born of a woman who was married at the time of its conception is the legitimate child of the man to whom the woman was married at that time. The presumption is a strong one, and is not rebutted merely by proof that the mother committed adultery about the time of conception, provided that the husband also had access. Proof of non-access by the husband does not require, as in former times, evidence that access was impossible, provided that the court is satisfied that intercourse did not take place between the spouses at the time of the child’s conception: Coles v. Homer and Tulloh. Ballantyne v. Douglas is a useful decision on the force of the presumption. Here the pursuer, a married woman, who had been living apart from her husband since January 1947, in an action of affiliation and aliment claimed that the defender was father of children born to her in October 1948 and September 1950. The defender, who was proved to have committed adultery with the pursuer at a period covering the dates of conception relied, however, on the presumption pater est quem nuptiae demonstrant to elide liability. Decree was given against him. The Lord Justice-Clerk (Thomson) declined in modern conditions to place too mechanical reliance on legal presumptions. He conceived that they increased the burden of proof, and precluded a judge from deciding on a balance of probabilities alone. Lord Patrick also expressed a view on the weight to be given to the presumption:

The presumptio juris expressed in the maxim is a strong one. It is based upon the fact that sexual intercourse between the spouses almost invariably occurs in the married state, unless one of them be impotent, and it is jealously maintained by the law since for many reasons it is desirable that the legitimacy of children born in lawful wedlock should not readily be in doubt. It is not an irrebuttable presumption. If it were so, it would be a fiction and contrary to experience. Married women do bear children to men other than their husbands, especially when they are living apart from them, and the large number of divorces thus occasioned which followed on the enforced separation of spouses during two recent wars shows that the event is not a rare one. I agree that the presumption will not be rebutted if the inference to be drawn from the facts is only that illegitimacy is more probable than legitimacy. That would be to ignore the presumption, which must also be thrown on the scales when the probabilities are being assessed.

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5 As regards legitimation per subseuens matrimonium, see post, pp. 357-359.
4 Bell’s Principles, § 1624, vide also Erskine, 1,6,49 and 52.
5 Stair, 11,3,42; Erskine, 1,6,49; Bell’s Principles, § 1626; see also H. Maclean, “Proof of Paternity,” 1939 S.L.T. (News) 209.
6 (1895) 22 R. 716; Brodie v. Dyce (1872) 11 M. 142.
8 At p. 11.
Sometimes the question arises as to whether the period between the last act of intercourse by the husband and the birth of the child is too long or too short to make the presumption pater est applicable at all. For the presumption to be invoked the child must have been born justo tempore. Birth justo tempore is laid down by Erskine 9 for legitimacy cases as between six and ten months from the last proved act of intercourse. A child may, however, be legitimate if born outside the period covered by the presumption. Adultery is not proved merely by establishing birth outside the period. 10 Glaister 11 states that law considers the normal period of gestation as about 280 days, but that evidence may be led to show reason why, in a given case, the period may be protracted or shortened. Proof of adultery rests upon the pursuer, and he cannot succeed merely by showing that the alleged period of gestation was probably inconsistent with his being father of a child born to the defender—provided that on the evidence the period was possible, albeit as a medical freak. It does not follow that the presumption pater est quem nuptiae demonstrant is to be applied to possible freak births. Lord Guthrie put the matter thus in Currie v. Currie 12 (a case in which the wife defender had given birth 336 days after the partners last cohabited):

When a child is born to a married woman to whom her husband has had access, the maxim pater est quem nuptiae demonstrant applies and the husband is presumed to be the father of the child. This presumption ceases to apply when the child is born after the lapse of such a period from the date of the husband’s last cohabitation with his wife as is greatly in excess of the normal period of gestation. The presumption is based upon general knowledge of the normal duration of pregnancy, and where the normal duration is greatly exceeded, the foundation for the presumption disappears. There is authority in Scotland for the view that, where the husband has not had access to his wife for a period which greatly exceeds the normal period of gestation, there is a presumption that he is not the father of the child, and that the onus is upon the wife in such circumstances to prove that he is. 13

In Currie, it was held that though 336 days was not an impossible period of pregnancy, it would go far to justify the court in inferring adultery when there was non-access for such a period and other evidence favoured the pursuer’s case. In the subsequent English case Preston-Jones v. Preston-Jones, 14 where a period of 360 days elapsed between the last act of intercourse and birth of a child, a somewhat similar result was reached by the majority of the House of Lords, and Lord Simonds expressed the view that when the period of gestation

9 1,6,49 and 50; cf. Stair, Ill.3,42; IV,45,20.
11 Medical Jurisprudence and Toxicology, 8th ed., p. 335.
14 1951 A.C. 391.
alleged diverges considerably from the normal, a slight onus of proof of adultery will rest on the petitioner. Lord Normand and Lord Morton of Henryton, who discussed relevant Scottish cases on the matter, favoured the view that where a period of 360 days had elapsed, this should be accepted as proof of adultery in the absence of expert evidence to justify a pregnancy of that duration. With respect, it may be hoped that these views (though in the minority on this point) will receive attention when the Scottish courts have to consider in divorce or legitimacy proceedings an alleged pregnancy of 360 days. The presumption *pater est* may, it is thought, be weakened if the wife has accepted artificial insemination with the seed of a donor. In such cases, if the spouses had been childless after many years of marriage, it is thought that the presumption should be that the husband was not the father of a child born to his wife.\(^{15}\)

It has been stated by Lord Maclaren in *Tennent v. Tennent*\(^{16}\) that statements made by the parents themselves are not sufficient to take away legitimacy. He says

> without going elaborately into the law of the subject . . . I may say that while it would be against principle to allow the presumption of legitimacy to be taken away by the direct evidence of a parent, yet statements of the parents made without reference to present or prospective litigation, and especially if those statements were made under circumstances which naturally called for explanation, are part of the history of the case, and as such are receivable in evidence.

In *Tennent* statements were admitted on the latter ground; therefore strictly Lord Maclaren's dictum was *obiter*. This dictum has been accepted as a statement of the law by the learned editors of Gloag and Henderson,\(^{17}\) and has been reinforced by the opinion of the Lord President (Clyde) in *Imre v. Mitchell*,\(^{18}\) founding on Scottish institutional authority and on the Canon law favouring the presumption of legitimacy. If this is the law of Scotland, it would seem to infringe the distinction now being more clearly made in Scottish law between questions regarding competency and those regarding weight of evidence. The present author submits that the evidence of spouses may in some cases be competent to overcome even the presumption *pater est*. The weight to be given to such evidence, of course, must always vary, and, if a child has been acknowledged as legitimate by his ostensible parents, testimony given subsequently by them, which would deprive him of legitimate status, should only be received "with the utmost reserve."\(^{19}\) Reference may also be made to the scholarly Outer House decision of

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\(^{15}\) Discussed " *Et Dona Ferentes* " (1961) Jurr.Rev. 179.

\(^{16}\) (1890) 17 R. 1205 at p. 1223.


\(^{18}\) 1958 S.C. 439 esp. at 464; also Bankton, I.2.3; Erskine, I.6.49.

\(^{19}\) This seems to have been Lord Sorn's attitude—1958 S.C. at pp. 474–475.
Lord Murray in *Burman v. Burman* 20 and to the opinions of the Second Division in *Lennie v. Lennie*. 21 In the former of these cases Lord Murray disposed of the contention that the former English rule in *Russell v. Russell* 22 (abolished by the Law Reform (Miscellaneous Provisions) Act, 1949 23) applied to Scotland. This rule was based on ideas of public policy which presumably prompted Lord Jowitt L.C. in *Weatherley v. Weatherley* 24 to decline to seek to discover or reveal the secret intimacies of the marriage bed unless “enjoined by statute.” In the corresponding Scottish case of *Lennie* the Lord Justice-Clerk (Thomson)—dealing with the competency of hearing evidence of spouses as to non-access when sharing a bed and room—observed 25:

> It is difficult to see why, if disclosure is so contrary to public interest, it should be permitted in cases other than desertion. But a more formidable objection is that there seems no reason why there should be anything more sacred than the ascertainment of truth and the doing of justice. 26

It appears that the presumption *pater est quem nuptiae demonstrant*—which is a *presumptio juris*—only operates when the marriage is *regular*, not *irregular*, e.g., by habit and repute. Further, there is no place for the presumption where the question to be decided is whether there was a marriage at all: *Deans' Judicial Factor v. Deans*. 27 In this case claimants for an intestate’s estate asserted that a marriage had taken place in 1810, of which their father was the legitimate offspring. As the *de quo quaeritur* was whether the grandparents had ever been married at all, there was no place for the presumption of legitimacy.

The presumption *pater est* does not apply where a child is born before marriage. It may, of course, be legitimated *per subsequens matrimonium*. Where an open and avowed courtship takes place with opportunities of access, and thereafter the man marries the woman in the knowledge of her pregnancy, there is a presumption *hominis et facti* that he is the father. This was discussed in *Gardner v. Gardner*. 28 In the Court of Session there was considerable discussion of French authority. In this case the pursuer sought declarator that the defender was not his daughter. She had been born less than two months after the pursuer’s marriage to the defender’s mother. It was held that the

20 1930 S.C. 262.
23 12, 13 & 14 Geo. 6, c. 100.
25 1948 S.C. 466 at p. 475.
26 A similar trend to extend the scope of competency of evidence is apparent in the criminal law: *Dow v. Macknight*, 1949 J.C. 38; and (1949) 12 M.L.R. 513.
27 1912 S.C. 441.
28 (1876) 3 R. 695, affirmed (1877) 4 R. (H.L.) 56; see also *Imre v. Mitchell*, 1958 S.C. 439, in which the competency of evidence of blood tests to establish illegitimacy was discussed and the evidence rejected.
presumption ""pater est"" which is a presumptio juris (not juris et de jure) did not apply, the child not having been born justo tempore; but in point of fact the pursuer failed to establish his case. His own actings in marrying a woman he knew to be pregnant, and in not repudiating the child at birth or at least within reasonably short time from birth, raised a presumption hominis et facti which his evidence had not rebutted.

Legitimation Per Subsequens Matrimonium

Legitimated children are those born out of wedlock and afterwards made lawful. Legitimation per subsequens matrimonium was taken over by Scottish law from the Canon law and Civil law. By this doctrine an illegitimate child is made legitimate by the subsequent marriage of its parents.29 The locus of the child's birth is immaterial. Hence a child born in Germany, whose father was a domiciled Scotsman and had subsequently married the mother in England, was legitimated by the marriage: Blair v. Kay's Trs.30 It must be observed that the material date for legitimation per subsequens matrimonium according to the law of Scotland is the date of conception, and not the date of birth. In England, under the Legitimacy Act, 1926,31 the tempus inspicieendum is the date of birth, and Lord Fraser 32 thought that it might still be an open question in Scotland. The weight of authority supporting the "date of conception" theory is, however, so formidable that, it is thought, only statute could displace it. Among the institutional writers Erskine,33 Bankton,34 and Bell 35 all express the view that there must have been no impediment to the marriage of the parents of the child, whose legitimacy is in question, at the date of the child's conception. Further, in Kerr v. Martin,36 where the point arose indirectly, at least nine of the thirteen judges seem to have expressly favoured this opinion of the institutional writers. The Lord Justice-Clerk, whose opinion was delivered on behalf of five of the judges, comments 37: "One point is on all hands agreed, that the parties must have been capable of marriage at the time of the procreation of the child; and therefore children of an adulterous intercourse cannot be legitimated."

29 In England this has only been so since January 1, 1927. The Barons of England in the Statute of Merton, 1236, proclaimed on this point—"Non numus leges Angliae mutare." For the historical background of the Scottish doctrine, see A. E. Anton, Introduction to Scottish Legal History (Stair Soc., Vol. 20) p. 117.
30 1940 S.N. 82.
31 16 & 17 Geo. 5, c. 60.
33 Institutes I,6,52.
34 I,5,54.
35 Principles, § 1627.
36 (1840) 2 D. 752.
37 At p. 771.
It is true that in *Munro v. Munro* L Lord Cottenham—an English Lord Chancellor—referred to the date of birth as being the material date for legitimation in Scotland, but this seems clearly to have been a misunderstanding. While there seems to be no doubt that the date of conception is the material period for Scots law, and that the doctrine was substantially derived from the Canon law, it may be noted that some modern Canonists have taken a different view regarding the relevant date by reference to which impediments must be removed. Further, since—as has been discussed in connection with the maxim "*pater est quem nuptiae demonstrant*"—medical opinion recognises wide variations from the normal period of gestation, concern with the date of conception rather than with that of birth may raise practical difficulties in particular cases.

There can be no legitimation where an impediment existed at the time of the conception which made marriage between the parents impossible, as, for example, if one or both were already married. Where the doctrine of legitimation applies, by a legal fiction, the marriage of the parties is deemed by a legal fiction to draw back to the date of the conception, but this is not so to all intents. An elaborate discussion of Continental Canon and Civilian authority is found in the case of *Kerr v. Martin.* It was established that an unmarried woman bore a child in 1780, the legitimacy of whom was the issue for decision. In 1781 the mother, Miss Bone, married one Taylor, by whom she had several children prior to his death in 1793. In the following year she married John Kerr, reputed father of her first child. The court, by a narrow majority, held that Kerr’s child was legitimate, and that the intermediate marriage was no bar. Dicta of the judges indicated the general view that the property rights of the children of Taylor were not to be prejudiced.

Legitimation *per subsequens matrimonium* is an equitable remedy intended to benefit the living and not the dead. Accordingly, it does not apply in the case of a child which has died before the marriage, unless that child left issue. Thus where an illegitimate child was killed before the marriage of its parents, and an action was raised by the father for damages, it was held that he had no title to sue the action unless the child had been legitimate at the date of the wrong. He claimed that the child had been legitimated on the marriage drawing back to the date of conception. The court held that the fiction was not inflexible, and that such legitimation was not attended with all the consequences of legitimate birth. In this case the rigorous application of the fiction could not have been for the benefit of the child but only

38 (1840) 1 Rob. 492.
39 (1840) 2 D. 752.
of the pursuer: McNeill v. McGregor. Nevertheless, the trend of modern law is to recognise that the ties of blood are stronger than those of matrimony in many cases, and, therefore, the Law Reform Committee for Scotland have recommended that the parents of an illegitimate child should have the same right to sue in respect of his death as if he were legitimate.

Children of Putative Marriage

Children born to a woman who was not married at the time of their conception are in general illegitimate. Where, however, one or both of the parties to a putative marriage contract in the bona fide but mistaken belief that they are free to marry, there is authority for the view that their children, procreated before the discovery of the impediment, are legitimate.

This doctrine was taken over from the Canon law. The ignorance of the parties, or the ignorance of the innocent party, to be effective, must as a rule be an error of fact, not an error as to a question of settled law. It would be an error of fact if a woman thought her husband was single; it would be an error of law if she thought that a foreign decree of divorce entitled a domiciled Scotsman to remarry.

This issue was raised in Purves's Trs. v. Purves—a case in which a woman had gone through a form of marriage with the husband of her deceased aunt. The marriage was invalid because within the forbidden degrees (this was before the Marriage (Prohibited Degrees of Relationship) Act, 1931). The question then arose—assuming that the parties were in bona fide in believing themselves free to marry—was the son of the marriage legitimate? It was held that he was not, because it was theoretically impossible to hold that anyone could be in bona fide in violating prescriptions of statute law. Everyone is bound to know as much of the law as is necessary to regulate his conduct in the ordinary relations of life. At least five judges sitting seemed to leave open the question whether there might be cases where error in law would not exclude legitimation, as where the error was as to a dubium jus. Of course, there was no dubium jus in Purves because what was done was contrary to statute, decisions and the institutional writers, and there was no general belief to the contrary.

40 (1901) 4 F. 123.
41 Cmd. 1103/1960. The Matrimonial Proceedings (Children) Act, 1958 (6 & 7 Eliz. 2, c. 40), s. 7, gives a court the same jurisdiction to safeguard the interests of an illegitimate child accepted by the spouses as may be exercised where a legitimate child's interests are in issue.
42 Stair, III.3,42; Erskine, 1,6,51; see also Law Reform (Miscellaneous Provisions) Act, 1949, s. 4 (1), discussed supra.
43 (1895) 22 R. 513.
44 21 & 22 Geo. 5, c. 31.
Adopted Children

Fosterage was a familiar institution in Celtic Scotland, but until the Adoption of Children (Scotland) Act, 1930,45 there was no general legal recognition of adoption in Scotland. De facto adoption was, however, not unknown, and Dr. I. D. Willock has encountered some references to fosterage in Burgh Court Records dating back to medieval times.

The law of adoption is now in effect codified for Scotland and England by the Adoption Act, 1958,46 which supersedes and consolidates earlier legislation and is concerned only with the adoption of persons under twenty-one years of age who are not or have not been married. Whereas in early law adoption may have been encouraged to ensure discharge of the religious rites due to an ancestor, or to govern succession to property, it may be suggested that adoption—as now introduced to Scotland by statute—is principally concerned with providing, during the lifetime of the adoptive parent or parents and child, a substitute for the natural parent-child relationship in a stable family environment. A secondary reason is no doubt to screen the fact of illegitimate birth by resort to the process of adoption.

Adoption is now governed by the 1958 Act, which is, in effect, a codification of the subject. The Court of Session, the sheriff court, or a juvenile court 47 is empowered to make an adoption order, the effect of which is to transfer to the adopter (or adopters if a husband and wife agree to apply jointly) the rights and duties of the natural parents or guardians of the adopted child as to future custody, maintenance and education.48 An adopter must be an individual (not a corporate body),49 and only in a case of joint application by husband and wife can an adoption order be made in favour of more than one person. The applicant (or one applicant where husband and wife apply) must in the normal case be aged at least twenty-five.50 Where the applicant is a "relative" 51 of the child, it is sufficient that the adopter is twenty-one years old; while no age bar applies where the applicant is father or mother of the child.52 It will be observed that these provisions of the Act enable a parent of an illegitimate child to adopt it. It seems, however, to be incompetent for parents to adopt their own child legitimatized per subsequens matrimonium, in order to obtain a clear birth

45 20 & 21 Geo. 5, c. 37. For previous law see, e.g., Kerrigan v. Hall (1901) 4 F. 10.
46 7 & 8 Eliz. 2, c. 5.
47 s. 11.
48 s. 13 (1).
49 It may be observed that assumption by a local authority under the Children Act, 1948 (11 & 12 Geo. 6, c. 43), s. 2, of parental rights over children deprived of proper home life is not adoption.
50 Adoption Act, 1958, s. 2.
51 As defined by s. 57.
52 s. 2 (1) (a).
PERSONAL STATUS OF CHILDREN

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certificate: Y. v. Y.\textsuperscript{53} Unless in special circumstances, such as close relationship, a male applicant alone cannot adopt a female child.\textsuperscript{54} For the purposes of the marriage law, an adopter and the child adopted are held to be within the prohibited degrees of consanguinity, and thus marriage between them is illegal. Marriage, however, with relatives of the other seems legal. This prohibition continues, even if another adopter is authorised by a subsequent adoption order to adopt the child.\textsuperscript{55} An adoption order may not as a rule be made in Scotland unless the applicant and the child reside\textsuperscript{56} in Scotland, but by section 12 of the Act this rule is modified in favour of persons not ordinarily resident in Great Britain, if they comply with the conditions prescribed.\textsuperscript{57}

The effect of an adoption order is to transfer from the natural parents or guardians to the adopting parent or parents all rights, duties, obligations and liabilities in relation to the future custody, maintenance and education of the child. For these purposes the child and its adopted parent or parents stand in the same relation to each other as a legitimate child to its parent or parents,\textsuperscript{58} and the child incurs the same liability to maintain its adoptive parents as would a legitimate child.\textsuperscript{59} Where an illegitimate child is adopted by anyone but its mother, the father's obligation to alimment ceases, but arrears may be recovered of sums due under decree or agreement.

It must be stressed that an adoption order in Scotland does not deprive an adopted child of rights of property to which it would otherwise be entitled (through its natural family); nor—which is normally more important—does the order give the child any right of succession in the property of the adopter. The 1958 Act by sections 16 and 17, expressly provided for treating adopted children in England as children of the adopter for the purposes of intestacies, wills and settlements; but by section 18 it is provided that these sections shall not apply to Scotland, and that an adopted child shall neither lose nor gain legal rights on adoption. Moreover, unless a contrary intention appears, references to "child," "children" or "issue" in dispositions are not, unless such an intention appears, to be construed as including

\textsuperscript{53} (1950) 66 Sh.Ct.Rep. 22. As to the effects of legitimation \textit{per subsequens matrimonium} on adoption orders and registration—see Adoption Act, 1958, ss. 26-27.

\textsuperscript{54} s. 2 (3).

\textsuperscript{55} s. 13 (3).

\textsuperscript{56} \textit{Ibid.} s. 1. On "residence" see \textit{XY Peters.}, 1954 S.L.T. (Sh.Ct.) 86.

\textsuperscript{57} See Adoption Act, 1958, ss. 52 and 53, for provisions governing the sending of children abroad.

\textsuperscript{58} s. 19. Where an adoption order is made in respect of a child who is not already a citizen of the United Kingdom and Colonies, then if the adopter (or, if the adopters are husband and wife, the male adopter) is a citizen of the United Kingdom and Colonies, the child acquires that citizenship from the date of the order.

\textsuperscript{59} s. 13 (1).
adopted children. In the summer of 1949 a committee had been nominated, under the chairmanship of Lord Mackintosh, to consider this question of rights of succession on adoption in Scotland among other matters; and though this committee reported, recommending that adopted children be placed in the same position as the children of the adopter born in lawful wedlock, no legislative action has yet been taken on this recommendation. The excuse that Parliamentary time cannot be made available has been reiterated again and again. It is therefore the moral duty of those giving legal advice in Scotland to a person desiring to adopt a child to emphasise that provision for the child should be made in the adopter’s will. The importance of making such provision appears from *Hutchison v. Hutchison’s Trs.* The facts here were that a girl aged eight at the time of the action, without means or estate of her own, had been adopted by a husband and wife. Her adoptive father, who alimented the child until his death, had made no provision for her in his settlement—by which he divided his estate between his wife and a son of a previous marriage. Under the 1930 Act, as under the 1958 Act, the adopted child had not the claim of a child born in wedlock to legal rights of succession out of a parent’s estate, but by the Act she had the same claim for aliment as such a child may assert. The child therefore brought an action against the testamentary trustees for payment of a weekly sum by way of aliment until she could maintain herself. For their part, the trustees were prepared to pay over the estate to the beneficiaries, and were only prevented by this claim. It was held on appeal that the trustees were entitled to distribute the estate forthwith, and were not bound to retain funds to meet the claim of the adopted child. Her right to aliment lay against the parties *lucratos* by the succession. The limits of the equitable liability of persons who have benefited by succession to another’s estate to meet claims for aliment *ex jure representationis* will be considered later. In some instances, however, an adoptive relationship does affect what patrimonial interest an adopted child has in the death of the adopter. Thus under the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, an adopted child is to be deemed the legitimate child of the adopter or adopters in a question of right to recover *solatium* in an action for reparation.

Subject to certain powers to dispense with consent, no order may be made by a competent court except with the consent of every person or

60 See *Hay v. Duthie’s Trs.*, 1956 S.C. 511.
63 20 & 21 Geo. 5, c. 37.
64 As to which see *post*, Chap. 13.
65 As to a child’s claim to aliment see p. 376.
66 See pp. 378–379.
67 3 & 4 Geo. 6, c. 42.
body who is parent or guardian of the child, and with the consent of both spouses in the case of a joint application. The grounds on which the court may dispense with consent are: that the person whose consent is in question has abandoned, neglected or persistently ill-treated the child; cannot be found; is incapable of giving consent; or withholds consent unreasonably. If the court is satisfied that a parent or guardian has persistently failed without reasonable cause to discharge his or her obligations towards the child, this constitutes sufficient grounds to dispense with consent.

Where an application for an adoption order is made, the court must appoint someone to act as curator ad litem to safeguard the interests of the child. The court itself must be satisfied that every person whose consent is necessary understands the effect of the order, that the order will be for the child’s welfare (due consideration being given to the child’s wishes, having regard to its age and understanding), and that no reward or payment for the adoption (except such as the court sanctions), is given. In the order the court may impose such terms and conditions as it thinks expedient in the child’s interests. As examples of the court’s exercise of discretion in these matters, the following cases may be cited. In G. and G an order was refused where the female applicant, who suffered from tuberculosis, wished to adopt a child less than a year old. This case was distinguished in K. and K. Here a husband and wife sought to adopt the latter’s illegitimate son, who was already residing with them, and who (the petition stated) would

68 Adoption Act, 1958, s. 4 (1). Though it has been held that the father of an illegitimate child is not a “parent” whose consent must be sought: A v. B, 1955 S.C. 378. See, however, s. 57 of the Act.

69 Ibid. but s. 5 provides for dispensing with the other spouse’s consent in certain circumstances.

70 s. 5.

71 s. 4 (2). See also A. Petr., 1936 S.C. 255.

72 s. 5 (3).

73 s. 4 (2).

74 s. 11 (4).

75 s. 7 (1)-(2). The health of the applicant is one factor for consideration.

76 s. 7 (3). These may include the making of provision for the child by bond or otherwise.

77 1949 S.L.T. (Sh.Ct.) 60.

continue so to do. Though the husband suffered from tuberculosis, the prayer of the petition was granted. Where a couple, who were each married to other persons, had lived together for twenty years and had had a child, permission was refused for the father to adopt the child on the grounds that this was contra bonos mores: J. S., Petitioner.79 In G.D., Petitioner,80 the question was one of age and financial provision. The grandparents of a legitimate child aged five years whose mother was dead wished to adopt it. The father was in good employment, and the curator ad litem pointed out that the prospective adopters, being much older than the father, had a lesser expectation of life, and that this might prejudice the child financially. Accordingly the petition was granted, subject to the father's undertaking to pay a weekly sum into the hands of the children's officer for disbursement to the child in the event of need.

As a further safeguard of the child's interests, provision is made for a probationary period of three consecutive months before an adoption order can be made, during which time the child must be in the care and possession of the would-be adopter—who must, moreover, give three months' notice to the local welfare authority of his intention to apply for an order.81

An adoption order once made cannot be varied or revoked if the adoption proves unsuccessful; but the court can make a subsequent order in respect of an adopted child, in which case the first adopters are treated as if they were the parents.82 It may be observed that adoption is not a contract between the natural and adoptive parents; nor is an adoption order a decree in foro or in absence which can be reduced subsequently. Adoption proceedings are sui generis, devised to effect a new statutory institution, and their effect is in rem. Thus, when a husband and wife adopted a three-month-old baby who, it was later established, would always be wholly mentally deficient, they failed to obtain reduction of the adoption order, which they sought on the grounds (inter alia) that the child had been adopted under essential error through misrepresentation as to its state of health: J. and J. v. C.'s Tutor.83 The general effect of an adoption order was admirably stated in that case by the Lord President (Cooper)84:

80 1950 S.L.T. (Sh.Ct.) 34.
81 Adoption Act, 1958, s. 3 (1) (2); A. Petrs., 1958 S.L.T. (Sh.Ct.) 61. Safeguards also apply to interim orders made under s. 8 of the Act, which may award custody for a probationary period of two years. Part IV of the Act is concerned with "protected children"—that is, children awaiting adoption or placed in the care and possession of strangers. The provisions of the Act regarding supervision thus extend to some children where no adoption proceedings are contemplated; cf. Children Act, 1958 (6 & 7 Eliz. 2, c. 65), Part I, which is concerned with the protection of foster-children.
82 Adoption Act, 1958, s. 1 (4).
83 1948 S.C. 636.
84 At p. 641.
The Adoption of Children (Scotland) Act, 1930, made a serious invasion upon the common law by introducing a novel institution which cannot easily be fitted into its setting. The expedient chosen was to empower the court on stated conditions to authorise an adopter to adopt a child, and the statute by section 5 attaches certain effects to the "adoption order" by which that authorisation is given. "The Act does not put the adopter and the child into the position of natural parent and child for all purposes. But, as to the matters enumerated in subsection (1), custody, maintenance and education, it does in the plainest language transfer from the natural parent to the adopter the whole of the rights and obligations that flow from parenthood; and places the child in the same position as if he were the lawful natural child of the adopter." (Coventry Corporation v. Surrey County Council, 85 Lord Atkin at p. 205.) In other words, the chief elements of the previously inalienable patria potestas were made assignable—not by a contract between natural parent and adopter, but by an act of the adopter authorised by the court. All that is required from the natural parent is his consent, and even that consent may be dispensed with. Indeed there may be no natural parent to consent. I stress this because there were occasions in the course of the debate when it appeared as if an adoption were a contract between natural parent and adopter for the sale of goods subject to a warranty of quality.

Regulations for registering Scottish adoptions are contained in sections 22-24 of the 1958 Act. The great object of these sections is to screen off from the curious the circumstances of birth of an adopted person. The Adopted Children's Register is maintained by the Registrar-General for Scotland, and every adoption order must contain directions to him to make certain entries as to date of birth, country of birth (if known), name and surname, sex, etc. The process is sent to him in a sealed envelope marked "Confidential." The Registrar-General also keeps registers and books to trace the connection between entries in the Register of Births and corresponding entries in the Adopted Children's Register, but these are not open to public inspection. Unless by order of the Court of Session or a sheriff, the Registrar-General must not supply any information from these books, except to an adopted person over the age of seventeen to whom the particulars relate. An interesting illustration of circumstances in which a sheriff might order unsealing of process in adoption proceedings is the Petition of B. and B.86 The adopted child had died leaving estate—to which, of course, under present law the adoptive parents had no right. They did not know the names or addresses of the natural parents; and their petition to have the proceedings unsealed to ascertain these particulars was granted.

Illegitimate Children—Status

Certain rights enjoyed by lawful children are denied to those born out of wedlock. These, in the phrase of the Scottish Bench in an old

case, were regarded by the law as "unlawful productions" which "are not to be encouraged"—Ker v. The Tutors of Moriston—though it is difficult to see how encouragement could affect those unfortunate persons most concerned. The relation between the father and the illegitimate child has not been regarded as in any proper civil or municipal sense the relation of parent and child. Both the mother and the father have been regarded as strangers in blood. Accordingly intercourse between a man and the illegitimate daughter of his wife does not constitute the crime of incest: Black.

Though the trend of modern legislation has been to ameliorate his condition, in the eyes of the law an illegitimate child is filius nullius. There are, therefore, no reciprocal duties and obligations between the illegitimate child and its natural father, no common law rights of custody or administration, no patria potestas. The relation between them has been that the father is to a certain extent and under certain conditions liable to aliment the child or, more correctly, to relieve the mother of a share of that burden. Differing from the case of legitimate children, this obligation is not reciprocal between parent and child.

At common law their is no right of succession in heritage or moveables either to or through illegitimate children. However, the Legitimacy Act, 1926, section 9 of which applies to Scotland, gives to an illegitimate child, whose mother dies intestate without legitimate issue, the same rights of succession to the mother as if the child had been legitimate. Further, if the child dies intestate, the mother is given the same rights of succession as she would have had if it had been legitimate and she were the surviving parent. As the present law of intestate succession precludes a mother from succeeding to heritage, a relative of the mother of an illegitimate landholder (whom she pre-deceased) was held to have no claim to succeed as heir-at-law to the illegitimate landholder: Grant v. Macdonald. If, however, a person born illegitimate marries, his widow or children have the ordinary rights of succession to his estate. At common law the illegitimate child is not liable to aliment either of its parents and it has no title to bring an action of damages for the death of either: Clarke v. Carfin Coal Co. and Clement v. Bell. But by section 2 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, an illegitimate child has now the same right to recover damages or solatium for the death of either parent as if he were legitimate, and

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87 (1692) Mor. 1363.
88 (1894) 1 Adam 312.
89 16 & 17 Geo. 5, c. 60.
90 Or his issue.
92 (1891) 18 R. (H.L.) 63, per Lord Watson at p. 66.
93 (1899) 1 F. 924.
94 3 & 4 Geo. 6, c. 42.
it is envisaged that by legislation the parent of an illegitimate child may soon be given the right to sue in respect of his death.  

There is a joint obligation at common law on both parents to maintain the child till it becomes capable of earning its own living. This obligation may continue even after majority. Where owing to mental or physical disability the child is incapable of supporting himself, the inability of either parent to support him casts the whole liability on the other. The mother usually supports the child, and has a claim of relief against the father for half of what has been expended. This claim is a claim for debt, and therefore transmits against the father’s estate even to the extent of taking priority over the legal rights in succession of legitimate children. A wife and legitimate children follow the fortunes of the father. If there is a large succession, they get the whole, while the illegitimate child gets nothing except his aliment. On the other hand, if the father becomes bankrupt, the wife and children get nothing, whereas illegitimate issue rank as creditors for aliment. Thus, in Gairdner v. Monro, an illegitimate child ranked for a dividend of 9s. in the £ with the other creditors. In Oncken’s Judicial Factor v. Reimers, after satisfaction of the other purposes of Oncken’s will, residue amounting to £1,296 was left for distribution between the widow, three legitimate children, and one illegitimate imbecile. A petition was presented to fix the amount to be retained by the judicial factor for the maintenance of the illegitimate imbecile. It was held that, since the illegitimate child’s claim was as creditor, £750 should be set aside for his aliment. This left only £500 for the widow and legitimate children.

Before the Illegitimate Children (Scotland) Act, 1930 came into force, the normal rate of aliment awarded to a mother in an action against the father of her illegitimate child was £11 14s. per annum (at 4s. 6d. weekly), and two guineas lying-in expenses. The 1930 Act made certain important changes in the law with regard to the aliment and custody of illegitimate children. The Act provided that the obligation of the father and mother of an illegitimate child to provide aliment (without prejudice to the common law obligation) should endure till the child attains the age of sixteen. Further, in awarding any sum to the mother in name of aliment, the court is directed to have regard

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94a This Act became law in July 1962, see Addenda.  
95 (1848) 10 D. 650.  
96 (1892) 19 R. 519; Hare v. Logan’s Trs., 1957 S.L.T.(Notes) 49.  
97 20 & 21 Geo. 5, c. 33.  
98 s. 1 (1). (By the Affiliation Orders Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 41), s. 3, it was provided that liability should continue beyond that age in certain cases where illegitimate children are engaged in courses of education or training.)

Though the 1952 Act has been repealed quoad England, it would seem still to be applicable in Scotland. See, regarding the chaotic state of legislation on aliment, H. McN. Henderson, “Aliment of Illegitimate Children,” 1958 S.L.T. (News) 85 and 136. Mr. Henderson’s opinion is now endorsed by the most recently published Chronological Table of Statutes.
to the means and position of the pursuer and defender and the whole circumstances of the case: Mottram v. Butchart. Thus decrees are frequently granted for aliment of £5 and over per week, while in a very exceptional case—as where the defender was a chronic invalid and unemployed, while the pursuer was in good employment—the court’s decree of aliment might even be for less than the former scale.

The Act also contains provisions making it competent in certain cases for the woman to raise an action before the birth of the child; and for the court to order that sums due under a decree for aliment shall be paid to an inspector of poor with the consent of the person in whose favour decree of aliment has been made. It is provided by section 26 (8) of the Children Act, 1948, that where a local authority has taken an illegitimate child into its care by virtue of section 1, the local authority shall have the same right as the mother to raise an action of aliment. Further, under the National Assistance Act, 1948, the National Assistance Board has like right with the mother to raise an action for affiliation and aliment, and the court may order payment to be made to the Board and not to the mother. There are other statutory provisions affecting illegitimate children, such as section 92 of the Children and Young Persons (Scotland) Act, 1937, which empowers the court to order the father of an illegitimate child to contribute to its upkeep if it is sent to an approved school or committed to the care of a fit person other than a local authority.

The father may no longer elide his obligation to pay aliment by offering to assume the custody of his illegitimate child, which, as a rule, he could do at common law when the child was aged seven or ten. On the other hand, section 2 of the 1930 Act (which in terms is very similar to section 5 of the Guardianship of Infants Act, 1886, applicable to legitimate children) has in some ways strengthened the natural father’s claim to the custody of his illegitimate child. At common law the father of a legitimate child and the mother of an illegitimate child had rights to custody which were paramount in normal circumstances—but might, in exceptional circumstances, be displaced in the child’s own interests. Section 2 of the 1930 Act has been construed to imply that now the court may confer custody on the father of an illegitimate child if the welfare of the child so requires, though the First Division has disapproved dicta of Lord Mackay which implied that the statute actually conferred a right to custody upon the natural father.

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1 11 & 12 Geo. 6, c. 43; see also s. 26 (1).
2 11 & 12 Geo. 6, c. 29, s. 44 (7) (a) (b).
3 1 Edw. 8 & 1 Geo. 6, c. 37.
4 See Fraser, Parent and Child, 3rd ed., p. 158 et seq.
5 49 & 50 Vict. c. 27.
Affiliation and Aliment

The liability of the natural father of an illegitimate child is fixed by an action of affiliation and aliment. To obtain decree, two things are necessary: the pursuer must be believed, and there must be some corroboration.

To constitute corroboration, mere opportunity is not enough, but the opportunity relied on may be of such a character as to introduce an element of suspicion. The circumstances and locality of the opportunity may in themselves amount to corroboration. Alternatively, the opportunity may have a complexion put on it by the defender’s false denial of a material fact—which introduces the doctrine known as corroboration by contradiction. Thus, if the defender, contradicting the pursuer’s account, states in evidence: “I never saw the woman on New Year’s Eve,” and there is clear proof that he was seen taking her home from a dance on that night, the false denial of this fact will be allowed to corroborate the pursuer’s story that the defender had intercourse with her on that occasion. Indeed, it has now been recognised that a defender’s false denials may be used as corroboration of the pursuer’s evidence that the parties had opportunity for sexual intercourse at the time of conception, as well as corroboration that they availed themselves of that opportunity. This doctrine of corroboration by contradiction applies only in affiliation cases.

Where the defender admits intercourse prior to the date of conception, little corroboration is needed of the act on which the pursuer founds; but it is otherwise when the defender’s admission is of an act of connection subsequent to that founded on by the pursuer. In that case there must be cogent corroboration of the pursuer’s evidence: Havery v. Brownlee.

Proof of intercourse with other men about the material date is a competent defence: Butter v. McLaren; because the question is to determine who is the actual father, and the woman is not allowed to choose her victim from several possible men. On the other hand, proof of her promiscuity, though a weighty consideration, does not necessarily bar a woman from succeeding against the defender whom she claims is father of her child: Sinclair v. Rankin.

Consequences of Legitimate Parent and Child Relationship

The relationship of parent and child creates reciprocal rights and duties in each. Though the guardianship of children under full age

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10 1908 S.C. 424.
11 1909 S.C. 786.
12 1921 S.C. 933.
is normally committed to the parents, guardianship of pupils and minors may also be exercised by tutors and curators, who exercise their office not by right of blood but by right of appointment. Accordingly guardianship generally, so far as concerned with administration of property rather than care of the person, will be considered as a separate topic, and will not be developed in the present context of the parent-child relationship.

It may be stated in limine that piecemeal legislation on the subject of custody, maintenance and welfare of children, together with statutory relaxation in favour both of mother and child of the father's unchallenged predominance in the family at common law, makes it difficult to state the present position with clarity. Since "infancy" in England extends to the age of twenty-one, it is relatively unimportant that statute should make various tutelary provisions for children in England under that age. In Scotland, on the other hand, where the minor's legal capacity at common law is considerable, it is often doubtful how far the legislature intended to supersede the common law.

**Patria Potestas**

*Patria potestas* is the general name for that authority which a father exercises over his children under full age. It is most fully recognised over pupil children, but is abated to some extent in relation to children who have reached years of minority (twelve years in the case of females; fourteen in the case of males). It comprises elements, *inter alia*, of custody and determining a child's place of residence; of control of education, upbringing, and religious training; of legal representation and guidance. *Patria potestas* may be controlled by the Court of Session in the interests of the children, and comes to an end on a child reaching the age of twenty-one, or becoming forisfamiliated—that is when a minor child, with the father's consent, sets out on an independent course of life, or marries, or when the father by his neglect or ill usage forfeits the right to exercise *patria potestas*. If a minor child comes to Scotland while his father lives abroad, the minor is deemed to be forisfamiliated, since, it is said, the father could not exercise protection and supervision over the minor, nor could persons dealing with the minor be aware of the father's existence: *McFeetridge v. Stewarts and Lloyds*. The father's *patria potestas* cannot be transferred—though certain aspects may pass by adoption, and he can be superseded in the exercise of certain of his powers. Even the mother, after the father's death or after a judicial award of custody, though she may be

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13 1913 S.C. 773.
14 See p. 365, *supra*. 
guardian of her pupil children, does not succeed to the full paternal authority, as well appears from the restriction of her statutory guardianship to the period of pupillarity. Moreover, though a local authority is authorised to vest in itself the rights and powers of parents over a child up to eighteen years of age who seems to have no fit parent or guardian, it does not seem that this can cover the full scope of patria potestas.

The full nature of paternal power over pupil children is described by Stair:

Infancy is, when the children are without discretion. And then they are wholly in the power of their parents, who not only may, but must, carry them whither, and keep them where, they will; and must also breed and order them according to their capacities, means and qualities. And this is rather an act of dominion in the parents than from any obligation of the children to submit to them.

When a child reaches puberty, however, and acquires to some extent a legal capacity of his own, the paternal power is weakened. In some respects a minor's liberty of action is more restricted during his father's lifetime than after his death—as, for example, his freedom to choose his place of residence; but in Scotland, even during the father's life, there are important legal acts which a minor can perform without paternal consent. He may make a will of his moveables or marry, and may even maintain an action for reparation against the father: Young v. Rankin.

A father is, however, administrator-in-law and curator to his minor children. Thus his consent is, in general, required as a prerequisite to his children entering into a binding obligation. The minor child cannot, unless forisfamiliated, engage in separate business or trade without his father's authority; and the latter, unless he forfeits the right, may choose his minor child's place of residence. Stair and Erskine both considered that a father was entitled to the profits of the labour and industry of his children while living in family with him; but, this attitude seems redolent of a Roman concept of patria potestas, which has no relevance for modern conditions. It may be reasonable for a father to expect his children with means or earnings of their own to contribute to their maintenance in family. Since, however, the exercise of patria potestas over a minor today is for the child's benefit and not for that of the father, it would seem

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15 Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 4 (1).
16 Children Act, 1948 (11 & 12 Geo. 6, c. 43), s. 2.
17 1,5,3; also Fraser, Parent and Child, p. 74 et seq.
18 Statute has raised the minimum age for marriage from puberty to sixteen years—see ante, p. 315.
19 1934 S.C. 499.
20 1,5,13.
21 1,6,53.
to be the better view that the application of a minor's earnings and emoluments should be for his benefit. When the father is dead, a minor at common law may choose his own place of residence against the will of other curators—who do not, of course, exercise the *patria potestas*: *Graham v. Graham.* Graham of Gartmore appointed his wife and certain others as curators to his daughters. After his death the children lived in family with the mother. She intended to marry a gentleman in Lisbon, and had arrangements made to have the girls boarded at a school in Edinburgh. The eldest of them, a few days after her twelfth birthday, addressed a letter to the guardians informing them that she intended to accompany her mother to Lisbon and not go to the boarding school. The guardians presented a bill of suspension and interdict, which was refused because *tutor datur personae curator rei*—a curator is appointed, not to the person, but to the estate of a child. There are now, however, numerous statutory provisions which supplement without expressly abrogating the common law and impose personal control over some minors up to the age of sixteen. Apart from cases when care and protection or delinquency are concerned, orders relating to custody and control cannot be made in Scotland after a child has reached the age of sixteen and probably cannot be enforced against the wishes of a minor.

In *Harvey v. Harvey* Lord Justice-Clerk Inglis (as he then was) formulated four general propositions regarding the exercise of *patria potestas* by a father over his minor children. These propositions remain the classical exposition of the law on the subject:

1. That the control to which a *minor pubes* is subjected does not proceed on any notion of his incapacity to exercise a rational judgment or choice, but rather arises, on the one hand, from a consideration of the reverence and obedience to parents which both the law of nature and the Divine law enjoin, and, on the other hand, from a regard to the inexperience and immaturity of judgment on the part of the child, which require friendly and affectionate counsel and aid.
2. That the power of a father, at this age, is conferred not as a right of dominion, or even as a privilege for the father's own benefit or pleasure, but merely, or at least mainly, for the benefit, guidance and comfort of the child.
3. That, therefore, the father's authority and right of control may at this age of the child be easily lost, either by an apparent intention to abandon it and leave the child to his own guidance, or by circumstances or conduct showing the father's inability or unwillingness to discharge rightly the parental duty towards his child.
4. That in all questions as to the loss of parental

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22 Cf. father's right to reimbursement for outlays on aliment and education out of separate estate of a child with estate of his own, *post*, p. 378.
23 (1780) Mor. 8934.
24 But see Custody of Children (Scotland) Act, 1939 (2 & 3 Geo. 6, c. 4).
25 (1860) 22 D. 1198.
26 At p. 1209.
control during puberty from any of these causes, the wishes and feelings of the child himself are entitled to a degree of weight corresponding to the amount of intelligence and right feeling which he may exhibit.

Custody and Access

At common law the father had a paramount right to the custody of his pupil child, controlled only in exceptional cases by the nobile officium of the Court of Session; but by the Conjugal Rights (Scotland) Amendment Act, 1861, a jurisdiction was conferred upon the court in actions of divorce or judicial separation to pronounce such orders as it considered just and proper as to the custody, maintenance and education of the pupil children of the marriage. By the Guardianship of Infants Acts, 1886 and 1925 it is provided that where in any proceedings before any court the custody or upbringing of a pupil child, or the administration of any property belonging to or held for such a child, is in question, the court shall regard the child’s welfare as the first and paramount consideration, and is not to consider whether from any other point of view the claim of the father is superior to that of the mother, or the claim of the mother is superior to that of the father. These statutory provisions on the one hand limit the patria potestas, by making the welfare of the child the paramount consideration in questions of custody; and further put the claims of father and mother on an equal footing where there dispute between them regarding the custody or upbringing of their pupil child, and would seem to give equal weight to the mother’s wishes in such matters as religious upbringing. By the Custody of Children (Scotland) Act, 1939, s. 2, it is provided that the powers of any court to make orders as to the custody, maintenance or education of, or access to, pupil children shall extend to minor children under the age of sixteen. This seems to involve the paradoxical situation that, unless there is some reason for invoking a court order with regard to custody, a minor child after his father’s death can still choose his own residence on the common law principle tutor datur personae curator rei. If, however, an order for custody has been made, a minor, so to speak, is, as regards person but not property, subjected to an extension of pupillarity. Though a mother by statute (Guardianship of Infants Acts, 1886 and 1925) may be tutrix to her pupil children, she is not, as mother, their curatrix.

24 & 25 Vict. c. 86, s. 9 extended to actions of nullity by the Matrimonial Proceedings (Children) Act, 1958, s. 14.
28 49 & 50 Vict. c. 27, s. 5; see also Children Act, 1948, s. 53.
29 15 & 16 Geo. 5, c. 45, s. 1.
30 Ibid.
32 2 & 3 Geo. 6, c. 4.
33 This might be very material if a child, whose father had died a domiciled Scotsman, wished to adopt a different domicile of choice.
Since the paramount consideration in questions of custody is now the welfare of the child, custody may be awarded in an appropriate case to the defender in a divorce action who has been found guilty of adultery (*Johnston v. Johnston*) or to a spouse in desertion.\(^5\)

Though custody is given to one party in a consistorial action, it is usual to permit some access to the child’s parent who is not awarded custody. This is, however, a matter of discretion: *McAllister v. McAllister*.\(^6\)

Where the welfare of the child would be equally maintained in the custody of either parent, the position of the father as head of the family is not infringed by the Guardianship of Infants Act—especially where the mother has been responsible for breaking up the home.\(^7\)

Moreover, the court in decreeing divorce or judicial separation may declare the culpable spouse to be unfit to have the custody of the children, and such spouse will accordingly not be entitled to custody on the death of the spouse to whom custody was awarded by the court.\(^8\)

A tutor appointed by a deceased parent may also apply to the court for an order regarding the custody of a pupil whose surviving parent seems to be unfit to be entrusted with its custody.\(^9\) Whether the mother of a child is residing with or apart from the father, she may ask the court for an order regarding the child’s custody and rights of access to it of either parent; and the court may make such an order as it thinks fit, having regard to the child’s welfare and the conduct and wishes of its parents.\(^10\)

The Matrimonial Proceedings (Children) Act, 1958,\(^11\) s. 14 (2), extends the court’s powers to make provision as to the custody of a child in consistorial proceedings; and custody may accordingly be committed to a person other than a parent.\(^12\)

Moreover, provision may be made as to access, whether or not custody is dealt with at all.

The prevalence of disputes between husband and wife as to custody of their children has in recent years created regrettable conflicts between the respective jurisdictions of the Scottish and English courts. Except where statute has conferred special jurisdiction, the attitude of the Scottish courts has been that the domicile of the child is the

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\(^35\) 1947 S.N. 41.
\(^36\) Guardianship of Infants Act, 1886, s. 7; cf. Niccol v. Niccol, 1953 S.L.T.(Notes) 67, where no such order had been made.
\(^38\) Guardianship of Infants Act, 1925, s. 5 (4).
\(^40\) *Ibid.* s. 3, and Children and Young Persons (Scotland) Act, 1932 (22 & 23 Geo. 5, c. 47), s. 73 (3). The father may also be ordered to pay a sum to the mother for the child’s maintenance, but this is not enforceable unless the spouses are living apart.
\(^41\) 6 & 7 Eliz. 2, c. 40.
\(^42\) Huddart v. Huddart, 1960 S.C. 300; see also ss. 10 (1), 14 (2) of the Matrimonial Proceedings (Children) Act, 1958.
primary basis of jurisdiction, while very large powers have been asserted by the Chancery Division of the High Court in England, which tends to consider the child's domicile as a subordinate consideration. The Court of Chancery has always shown itself avid of jurisdiction whenever children have been brought to England, and has seemingly disregarded principles of comity accepted elsewhere.43

There are now numerous statutory provisions which in certain circumstances override the natural rights of parents to custody in the interests of the child. The Custody of Children Act, 1891,44 for example, restricts the right of a parent whose child is withheld from him to secure an order from the court to have the child delivered to him. If the parent has abandoned or deserted the child, or let it be brought up at another person's expense for such a time and in such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court may refuse an order for the delivery of the child unless the parent satisfies the court that he or she is a fit person to be entrusted with the child's custody. Where, however, a widower has been compelled to entrust his very young child to another's care for several years, he will not lose his natural right to have it delivered to him merely because the change in the child's home background will cause it distress: Begbie v. Nichol.45 Moreover, the court refused to order (as it has power to do under section 2 of the Act) that the father should repay the cost already incurred in bringing up the child. Even when an order for delivery of a child is refused under the 1891 Act, by section 4 the court may make an order regarding the religious upbringing of a child who is being brought up in a different religion to that in which a parent has a legal right to require that it shall be brought up. The child's wishes will also be considered, and his welfare will be the paramount consideration.

By the Children and Young Persons (Scotland) Act, 1937,46 a child in need of care and protection may be committed by order of a court to the care of any fit person. Such an order may be revoked.47 If, however, a parent has forfeited the natural right to custody through his or her misconduct, restoration of the child will not be ordered merely on proof that the parent's reformation is complete. It must also be shown that the advantages which the child has acquired in its new life away from its parent or parents would not be destroyed or

44 54 & 55 Vict. c. 3, ss. 2-3; this Act applies where the issue of custody arises between parents and third parties: Campbell v. Campbell, 1956 S.C. 258.
46 1 Edw. 8 & 1 Geo. 6, c. 37, s. 66 (2); see also Mental Health (Scotland) Act, 1960 (8 & 9 Eliz. 2, c. 61), s. 56.
47 Children and Young Persons (Scotland) Act, 1937, s. 88 (6).
endangered if it were restored to parental custody: *Woods v. Minister of Pensions*.

Again, the Children Act, 1948, provides for the assumption by local authorities of parental rights over children up to eighteen years of age, in many circumstances which involve the welfare of the child and which would exclude the natural rights of the child’s parents if living. It is thought, however, that, though the statute provides that “all the rights and powers” of parents are to vest in the local authority, this cannot convey the full *patria potestas* of the child’s father, though he may be superseded in the exercise of certain aspects of the paternal power. Generally speaking, it is difficult to reconcile recent legislation with the Scottish common law regarding the legal status of minors.

**Aliment**

Children have a natural right during the father’s life to aliment, education and protection, and the primary obligation rests on him. Under the Education Acts a father is bound to have his children educated, and failure in this duty is punishable. Maintenance or aliment may be in the father’s house—or elsewhere if the father chooses to provide separate maintenance, or has by his misconduct forfeited the right to aliment his child in family. Indigent parents have a reciprocal right to maintenance from their children who are in circumstances to afford it.

In consequence of this obligation an action lies against a father for the price of goods supplied by tradesmen to his child who is not living in family with him, if such goods are necessary and suitable to the child’s station in life, unless it is proved that the father gave a child a separate allowance or that the child is provided for *aluinde*. The amount of aliment exigible was laid down by Kames. “I feel not that I am in conscience or in duty bound, to do more than to make my children independent, so as to preserve them from want; all beyond is left upon parental affection.” But “want” is a relative

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48 1952 S.C. 529.
49 ss. 2–4; see also Adoption Act, 1958 (7 & 8 Eliz. 2, c. 5), s. 15.
50 Children Act, 1948, s. 2.
51 Stair I,3,3 and I,5,6–7; Erskine I,6,53; Bell’s *Principles*, § 1629. A statutory obligation is also imposed by the National Assistance Act, 1948, s. 42; and the cost of assistance given by or applied for from the Board may be recovered after complaint to the court against anyone liable to maintain a person assisted: s. 43. Persistent refusal or neglect to maintain is an offence under s. 51 of the Act.
53 *e.g.*, *Thom v. MacKenzie* (1864) 3 M. 177. *Sagar v. National Coal Board*, 1955 S.C. 424; in an action for reparation for a son’s death patrimonial loss has been held to include the contingent right of support which a father might expect.
54 Stair I,5,7; Erskine I,6,57.
55 *Principles of Equity*, I,1,3, see 1800 ed., p. 80 and note.
term, assessed neither on the minimum necessary to relieve destitution, nor on a maximum calculated on the means of a rich father, but according to the status of life of the person alimented: Thom v. Mackenzie. In Dickinson v. Dickinson, which concerned aliment for a girl already being educated at St. Leonard’s School, the best known Scottish seminary for young gentlewomen, Lord President Cooper observed: “The primary liability for the aliment of the child is on the husband, irrespective of the wife’s means. Moreover, in relation to a topic such as this . . . legal technicalities should play little or no part, and . . . our concern is with the reality of the situation and with the duty of the court to see that an appropriate sum, consistent with the means of the husband (in this case very substantial) and the requirements of the child, is made available under an award of aliment, and is reviewed from time to time as circumstances may require.”

The obligation to aliment continues even after the child has reached majority, but there is a difference between the claims of a child who has been fully trained for a trade or profession and those of a child who is still learning. In the former case the court will be reluctant to award aliment, because one who has been fairly educated to a profession and fairly started in the world must, generally speaking, make his own way without further demands on his parents for assistance—though, even in such a case, the parent may still be under obligation to aliment the child under his own roof but not otherwise. Where a man of thirty-two was educated at the Universities of Edinburgh and Oxford and was called to the English Bar, it was held that he could not compel his father to aliment him while he acquired a practice in London. The father was prepared to aliment the son in his house in Stirlingshire, and was held to have no further obligation to maintain his son: Smith v. Smith. The full obligation may, however, revive if, through ill-health or misfortune, the child falls into indigence.

In Whyte v. Whyte, the pursuer, aged twenty, was learning the business of a stockbroker when his mother refused to have him in her house or to contribute to his support. The court awarded him a modest rate of aliment, which meanwhile would just keep him in the position in life in which his mother had agreed he should be established.

Aliment is regarded as a reciprocal obligation arising ex jure naturale between parent and child. The obligation falls first on the

56 (1864) 3 M. 177.
57 1952 S.C. 27 at p. 33; in this case the incident of taxation was specifically considered.
58 (1885) 13 R. 126.
59 (1901) 3 F. 937.
descendants of an indigent person, if they can afford to maintain him. The order in which forebears are liable to aliment is—father, mother, paternal ascendants, maternal ascendants. A child's claim for aliment—though a natural or obediential right and not an ordinary debt—transmits after the father's death against his representatives or against those who succeed to the estate by operation of law or disposition. Such persons are bound to aliment those whom the deceased was liable to aliment, to the extent to which they are *lucrati* by the succession.

In every case the representatives of a person deceased, whether the degree of relationship be nearer or more remote, and whether the succession by which they are *lucrati* consist of heritage or moveables, are out of this succession liable in aliment to those whom the deceased himself was under a natural obligation to maintain.60

Thus one brother succeeding to his father's estate is liable in aliment to others not provided for. But, except *ex jure representationis* to one under obligation to aliment, there is no duty on collaterals to aliment each other. The transmitted claim for aliment *ex jure representationis* has been described as based on equity. Accordingly, it would appear that collaterals may be under no such liability *inter se* even though *lucrati*, if in the division of the estate among the children substantial equality has been preserved. On this view a child taking *legitim* could not, generally speaking, be liable within the scope of Lord Ivory's note: *Beaton v. Beaton's Trs.*61 In this case the claim for aliment was made by an indigent man aged sixty-two for aliment out of his father's estate.62

If a child has separate estate, and is alimented by the father or mother, the parent is entitled to be reimbursed out of the income of the child's estate in respect of money expended in maintenance and education: *Ker's Trs. v. Ker.*63 Further, in *Polland v. Sturrock's Exors.*,64 the Lord Justice-Clerk (Thomson), giving the opinion of the court, held that there was no absolute rule that a father, with sufficient means of his own, may not encroach on his children's capital for their education and maintenance; and that the obligations of a father in 1952 regarding the education and training of his daughters are not to be construed according to eighteenth century concepts.

60 Lord Ivory's Note to Erskine, I,6,58, approved in *Anderson v. Grant* (1899) 1 F. 484. As regards the liability for grandparents, see also Parish Council of *Leslie v. Gibson's Trs.* (1899) 1 F. 601; *Gay's Tutrix v. Gay's Tr.*, 1953 S.L.T. 278.
63 1927 S.C. 52.
64 1952 S.C. 535.
“The rules of law relating to aliment and maintenance are necessarily fluid and vary with social conditions.”

*Legal Rights and Rights of Succession.*

Legal rights and rights of succession arising from the relationship of parent and child are discussed in subsequent chapters of this book concerned with these matters.
CHAPTER 12
GUARDIANSHIP

GENERAL

INCAPACITY, which the law seeks to protect, arises mainly from two causes—lack of age or mental infirmity; though absence and physical illness, which disable a person from attending to his affairs, may also justify legal intervention on behalf of the incapax. The offices of those who have charge of the interests of persons whom the law regards as unable to manage their own affairs are known as Tutory and Curatory. The general name for the guardian of a pupil is “tutor”; while that of the guardian for a minor is “curator.” The guardian of an insane person is known as “curator”—though subject to various exceptions. As Erskine states the matter,1 “Tutory, from tueri, is a power and faculty to govern the person . . . Curatory, from cura, is the power of managing the estate, either of a minor pubes, or of a major who is incapable of acting for himself through a defect of judgment.” Guardianship in its full sense extends to the person as well as to the estate of an incapax—and for this reason a factor loco tutoris (whose functions are restricted to administering the estate) cannot be appointed “to act jointly with” a tutrix.2 The purpose of guardianship is to protect the incapax, and consequently the powers of a guardian must be exercised for the benefit of the incapax and not for that of the person exercising them.

Though they may acquire title to property pupils have no legal capacity to transact. Accordingly, the distinction between a tutor and a curator is expressed by the brocard “tutor datur personae curator rei.” The tutor acts for the pupil; the curator acts with the minor; he concurs with him or consents to his deeds.3

FATHER AS ADMINISTRATOR-IN-LAW

The father is tutor, curator and administrator-in-law to a child who is not forisfamiliated—a position which is not an office in the strict

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1 I, 7, 1.  
2 Speirs, Petr., 1946 S.L.T. 203.  
3 The appropriate styles are as follows: T as tutor and administrator-in-law of P; M with the consent and concurrence of C. It may be noted that Scots law has assimilated the status of a pupil to that of an infans in Roman law, i.e., those under seven years old. In Roman law the capacity of pupils over that age and minors with curators was substantially assimilated: H. F. Jolowicz, Roman Foundations of Modern Law, pp. 116-118.
sense, but which arises from the very relationship of parent and child: *Robertson, Petr.*⁴ Though a father is a tutor within the meaning of the Judicial Factors Act, 1849,⁵ and a trustee within the meaning of the Trusts (Scotland) Act, 1921,⁶ the property of the pupil is not vested in him, and, in exercising the general powers conferred on trustees by section 4 of the 1921 Act, the trust purposes which he must maintain are those implied in the office of tutory. If acts of administration which seem desirable may be at variance with the general purposes of tutorly, it may still be necessary to present a petition to the Court of Session for extra powers: *Cunningham’s Tuttix.*⁷ A stranger donating or leaving an estate to a pupil in a will may nominate someone other than the father to manage it during the child’s pupillarity⁸; such a person is called a tutor, but he has no power over the pupil’s person—only over the subject of the bequest. The father cannot be deprived of his position, but may be superseded in the exercise of its powers, as if the father were an undischarged bankrupt and his children were entitled to the fee of an estate: *Robertson, Petr.*⁹ Moreover, if the court appoints a judicial factor to safeguard the interests of a pupil against his father, the appointment will not be recalled as a matter of course, even if the child after reaching minority concurs in the request.¹⁰

The father by the Act, 1696, c. 8, can nominate a tutor or curator to act after his death. This statutory power, which must be exercised in *liege poutie* (i.e., *legitima potestas* preventing challenge on ground of “deathbed”), does not apparently supersede the common law power to appoint tutors even on deathbed. The father’s rights in respect of the custody of his children have already been considered in the context of the parent-child relationship.¹¹

**Mother as Guardian**

At common law the mother was never the tutrix nor curatrix, nor could she nominate guardians. But now by the Guardianship of

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⁴ (1865) 3 M. 1077.
⁵ 12 & 13 Vict. c. 51.
⁶ 11 & 12 Geo. 5, c. 58. See Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 10.
⁷ 1949 S.C. 275; and cases there discussed; the Trusts (Scotland) Act, 1961 (9 & 10 Eliz. 2, c. 57), s. 2, validates certain transactions with third parties, though at variance with the trust purposes. The liability of trustees to “beneficiaries” is not affected by the Act. It may be questioned whether the statutory language is altogether apt, since only in a very loose sense may a pupil child be regarded as “beneficiary” of property in his own name. Nevertheless, s. 2 (2) really only reinforces the common law.
⁸ Or minority; *Erskine, I,6,54.*
⁹ *Supra,* a case of curatory, following a precedent in tutorly. Regarding administration of awards of damages to pupils, see *Falconer v. Roberison,* 1949 S.L.T. (Notes) 56.
¹⁰ *Balfour Melville, Petr.* (1903) 5 F. 347.
¹¹ *Ante,* p. 373.
Infants Acts, 1886 12 and 1925,13 on the death of the father the mother becomes the guardian of the pupil child, and acts jointly with any guardian appointed by the father. Her rights regarding custody have been discussed already in Chapter 11. She may also nominate a guardian after her death. If the surviving spouse refuses to act with the nominee of the dead spouse, the parent is sole guardian unless the nominee obtains an order from the court that he is to act jointly or alone. The Acts, however, do not make the mother curatrix of her child, nor do they enable her to nominate a curator. It may be noted, however, that for the purposes of the statutes regulating custody, "pupil child" is to mean child under sixteen years of age: Custody of Children (Scotland) Act, 1939,14 s. 1. A father can, moreover, by will appoint his wife as curatrix to their children, and, if a minor after his father's death petitions to have his mother appointed as curatrix, she does not become subject to the Accountant of Court, nor is she bound to find caution.15

Official Paternalism

In the preceding chapter reference has been made from time to time to various statutory provisions whereby the fundamental rights of parents to the custody of their children have been superseded. In connection with guardianship generally, the high-water mark of legislative encroachment on the common law is probably represented by the Children Act, 1948,16 and in particular section 2, which empowers a local authority by resolution to assume "all the rights and powers" of parents or guardians with respect to a child received into the authority's care. Such a resolution continues in force until the child attains the age of eighteen, unless it is successfully challenged by complaint to a competent court under section 4 of the Act. The language of the Act is difficult to reconcile with the general principles of patria potestas, curatory and tutory in the Scots law, and it may be questioned whether the intention was to vest all the administrative powers derived from these offices in a local authority. It may further be questioned how far—delinquency or need for care and protection apart—such an authority could detain under its control a child over sixteen years. No mother or guardian in Scotland can assert such a power, and even the father's power to fix the residence of his minor children at the age of sixteen is not firmly established.

12 49 & 50 Vict. c. 27.
13 15 & 16 Geo. 5, c. 45.
14 2 & 3 Geo. 6, c. 4.
16 11 & 12 Geo. 6, c. 43.
Tutor and Pupil

Tutors testamentar are those nominated by the parent in a testamentary deed. They have the preference over other claimants to the office, and enjoy certain privileges. Thus they do not require to take the oath de fidel or to find caution (security) for the faithful discharge of their duties. The office is gratuitous, being presumed to be undertaken from natural affection or considerations of friendship. Tutors, however, will be reimbursed for all reasonable outlays.17

Where a pupil has no tutors, as where both parents are dead and there is no nominated tutor prepared to act at common law, a tutor-of-law (the nearest agnate) or a tutor-dative may be appointed by the court. A tutor-at-law has, however, no right to custody of the pupil’s person. In practice, however, a factor loco tutoris is appointed by the court for the administration of the ward’s estate, though it is competent to resort to the common law procedure. This has, however, been discouraged for many years. As long ago as 1770 Lord Auchinleck observed 18: “I like factors loco tutoris, for they serve for hire, and consequently better than those who serve for conscience’ sake.”

Curator and Minor

For reasons of public policy, the law will not allow a minor to perform public duties such as sitting as a Member of Parliament, nor to alienate heritage gratuitously unless, under the provisions of the Wills (Soldiers and Sailors) Act, 1918,19 he be on active service. Nevertheless, in Hill v. City of Glasgow Bank,20 Lord President Inglis observed:

Incacity ends with the attainment of the age of puberty, and it may be said generally that after that time a minor is just as capable of contracting obligations, and of doing any other thing inferring liability, as a person of full age. This general statement of the law is subject to certain qualifications. In the first place, a minor who has curators requires their consent to do certain acts, but a minor who has no curators may do all those things that I have been mentioning, and the circumstance that he has no curators will not make his acts one bit the less effectual in law than if they had been done with the consent of curators. Again, every act of a minor is liable to be reduced after he attains majority and within four years after his attainment of majority upon the ground of minority and lesion.

When a curator is appointed to a minor he acts with the minor, by concurring with him or consenting to his deeds. Tutor datur personae

19 7 & 8 Geo. 5, c. 58.
20 (1879) 7 R. 68 at p. 74.
curator rei. It is not necessary for a minor to have a curator at all, as he is capable of consent, albeit he is of inferior judgment and discretion requiring protection of law. A curator may, however, be imposed on a minor during his father's lifetime with the consent of the father; or, in the event of a conflict of interest with or violation of duty by the father, another curator may be appointed without his consent: *Robertson, Petr.* One who leaves or donates property to a minor may also appoint a curator quoad that estate only.

The father by a deed in *liege poustie*—that is to say by a deed not executed on his deathbed—may nominate a curator to act after his death. According to the old law, deeds were reducible *ex capite lecti,* if the deceased at the date of the execution of the deed was ill from the disease from which he died. The rule of deathbed did not apply if he survived for sixty days, or went to Kirk or market unsupported. This rule was virtually abolished in 1871, but may still subsist quoad nominations of curators and tutors.

A factor *loco tutoris,* appointed to a pupil, becomes curator of the child when he attains minority, but the office terminates if the minor chooses curators: Judicial Factors (Scotland) Act, 1889, s. 11; *Ferguson v. Blair.* The action of choosing curators was abolished by the Administration of Justice (Scotland) Act, 1933, s. 12, which substituted the procedure of petitioning the Court of Session. This is an Outer House petition.

If a minor becomes involved in litigation, a curator *ad litem* may be appointed; and, by Rules of Court, damages recovered by a minor may be administered by a factor if the court so orders.

**Pro Tutors and Pro Curators**

These descriptions apply to persons who assume to act as tutors or curators without legal title to the office. They do not enjoy the active powers or privileges of the office, but are liable to all the obligations of a duly appointed tutor or curator. Sales of the ward's property carried through by such persons are null.

**Curators ad Litem**

A curator *ad litem* is not entrusted with administering the property of a person subject to incapacity, but is an officer of the court appointed in order that the court may be satisfied that litigation is

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21 (1865) 3 M. 1077.
23 52 & 53 Vict. c. 39.
24 (1908) 16 S.L.T. 284.
25 23 & 24 Geo. 5, c. 41.
26 Erskine, 1,7,28.
properly conducted. When proceedings are at an end, so are his functions. Though an *incapax* is normally represented or assisted in litigation by his guardian, circumstances may arise where, owing to the absence of the guardian, or to his unsuitability to act in the circumstances, it becomes necessary to have another guardian in the process. In such cases the court appoints a curator *ad litem*. Where a pupil is suing his guardian, or where his guardian has an adverse interest, such an appointment is necessary. Whenever a pupil appears before the court as pursuer or defender, the court will appoint a curator *ad litem* to protect his interests, and in the Whole Court case of *Drummond's Trs. v. Peel's Trs.*27 (where the authorities were reviewed in detail) it was held that an appointment may be made though no appearance has been entered for the pupil. Though a minor or pupil may in theory litigate without the concurrence of a guardian, the defender may object *in limine* until guardians concur or a curator *ad litem* has been appointed.

**Administration of Tutors, Factors Loco Tutoris and Curators**

The function of the tutor is to administer, and that of the curator to see to the administration of, the ward's estate with a view to its preservation.

As they are persons in a fiduciary position, the general rule applies to them that they cannot be *auctores in rem suam*. They must not use their office for the advancement of their private interests. Any benefit which they may acquire from their position must be held by them as trustees, and must be accounted for as if it were trust estate. They must take no personal profit from the estate, and must not transact with it as individuals.

In their administration, tutors, factors *loco tutoris*, and curatores *bonis* appointed to a minor28 are subject to the Judicial Factors Acts,29 and to the superintendence of the Accountant of Court. They must lodge with him a statement of the pupil's property. All debts must be recovered with due diligence (except such as are obviously hopeless), funds in trade should also be withdrawn, titles should be made up in the pupil's name. As trustees within the meaning of the Trusts (Scotland) Act, 1921, tutors are entitled to exercise the powers conferred by statute on trustees.30

Where a tutor is under a duty to perform acts in relation to the pupil's estate, a curator is under a similar duty to see that the minor does them,31 and insist on like standards of administration. The

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27 1929 S.C. 484.
29 See notes 5 and 23; also 43 & 44 Vict. c. 4.
30 See in particular ss. 2, 4 and 5, and Trusts (Scotland) Act, 1961, ss. 2-4.
31 Stair, I,6,56.

S.L.S.—13
Judicial Factors Acts do not apply to curators to minors in the usual sense, but, by the Trusts (Scotland) Act, 1921, s. 2, "trustee" is defined to include any tutor, curator, factor *loco tutoris* or judicial factor. If the minor will not follow the curator's advice, nor do what is necessary for the proper management of the estate, the curator may apply to be relieved of his office. It may be noted that a curator to a minor stands in a different relationship from that of a *curator bonis* if appointed to a minor. Not only is the latter category alone responsible to the Accountant of Court and bound to find caution, but his administrative duties generally are different. The matter has been put concisely by Sheriff Garrett: "The distinction between a *curator bonis* and a curator to a minor is that the former acts in place of the minor in administering the estate, and the administration is subject to the control of the Accountant until the minor attains majority or has the curatory recalled or replaced, while the latter acts along with the minor."

The father, as administrator-in-law, has never been liable for mere omissions. It has been propounded that the liability of tutors and curators depends on their category—the father only for gross negligence, while nominated tutors or curators must show the same diligence as in their own affairs, and curators chosen by a minor, tutors-dative and tutors-at-law must show the exact diligence of a provident man.

A deed executed by a curator alone is null; but when a minor who has curators acts without their consent, the extent of his liability depends on the nature of the contract. In general, the transactions of a minor having a curator, entered into without the consent of the curator, are unenforceable against the minor, if to his detriment, but are probably binding on the other parties, if to the minor's advantage. Because curators have no power over the person of the minor, the minor's promise of marriage and promise to marry are effectual without the consent of the curator. Further, he is liable for sums borrowed and profitably applied to his own use, and for clothes and other necessaries supplied: *Gordon v. Earl of Galloway,* also *Inglis v. Sharp's Exors.* The liability existed at common law, and is

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32 Bell's Principles, § 2096.
33 Maclean, Petr., 1956 S.L.T. (Sh.Ct.) 90; the sheriff's powers of appointing curators and *curatores bonis* are also considered. For *curatores bonis* see p. 388, post; see also Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. c. 4).
34 Fraser, *Parent and Child,* p. 392; Stair, I,6,21; Erskine, I,7,26.
36 Stevenson v. Adair (1872) 10 M. 919. In this case the cautioner for an apprentice who had entered into an indenture without his father's consent was bound when the apprentice deserted the master's service. The court expressed opinions that the contract *quoad* the minor was not void, but merely unenforceable against him. See Erskine, I,7,33; Gloag, *Contract,* p. 82; Voet, 26,8,3; Wessels, *Law of Contract in S. Africa*, Vol. I, § 799.
37 (1629) Mor. 8941.
38 Ibid.
now supplemented—if not clarified—by the Sale of Goods Act, 1893,\textsuperscript{39} s. 2. A minor’s contracts of service are not null because the curator did not consent, nor probably are contracts of apprenticeship.\textsuperscript{40} The minor may make a will of moveables, but may not grant any deed \textit{inter vivos} or \textit{mortis causa} by which he alters gratuitously the succession to his heritable property. Accordingly, a gratuitous disposition or settlement of land \textit{mortis causa} is null even with the consent of curators. A minor may, however, dispose by will of moveable property belonging to him as a surrogatum for heritage: Brown’s \textit{Tr. v. Brown}.\textsuperscript{41}

Where a minor has no curators, every deed done by him is as effectual as if he had curators and they had consented: McFeetridge \textit{v. Stewarts and Lloyds}.\textsuperscript{42}

In all cases, whether a minor has a curator or not, his contracts may be voidable on grounds of minority and lesion (\textit{i.e.}, serious prejudice) during his minority, and for a period of four years after he attains majority—known as the \textit{quadriennium utile}.

\textit{Termination of Office}

Tutory ends when the child attains puberty, curatory when the child attains majority. The office is also terminated by the death of the pupil or minor or of the tutor or curator.

At common law tutors and curators could not resign unless they could convince the court that there was sufficient cause, but power is now given by the Judicial Factors Act, 1880,\textsuperscript{43} s. 31, for the court to accept the resignation of a tutor and to appoint a factor in his place. The power of a trustee to resign under section 3 of the Trusts (Scotland) Act, 1921, possibly also applies to tutors and curators.

Tutors or curators may be removed by the court either at common law or, in the case of tutors, under the Judicial Factors Act, 1880, or under the Guardianship of Infants Act, 1886;\textsuperscript{44} on the grounds that they have failed in duty or are unsuitable through mental and physical incapacity, or on moral grounds. Tutors and factors \textit{loco tutoris} now obtain their discharge by means of a petition to the court.

When guardianship comes to an end, the person subjected to it—or his representatives in the case of death—may bring an action calling the guardian to account, and the guardian has also an action to recover what has been profitably expended for the minor in the course

\textsuperscript{39} 56 & 57 Vict. c. 71.
\textsuperscript{40} Gloag, \textit{Contract}, 2nd ed., pp. 81–82.
\textsuperscript{41} (1897) 24 R. 962.
\textsuperscript{42} 1913 S.C. 773.
\textsuperscript{43} 43 & 44 Vict. c. 4.
\textsuperscript{44} 49 & 50 Vict. c. 27.
of administration. Such actions prescribe if not raised within ten years of the minor attaining majority or of his death before majority.\textsuperscript{45} Tutors and factors \textit{loco tutoris} obtain their discharge by petition to the court.\textsuperscript{46}

\textbf{Curator of the Insane or other Incapable Persons}

Incapacity may result from mental illness or from other disabilities which prevent a person from managing his affairs—as in one case where the subject was deaf and blind. There is a presumption in favour of capacity, and persons of full age are not deprived of their rights to dispose of or manage their own property unless by judicial process.

Formerly the process was known as cognition, under which an inquiry was held before a jury into the sanity of the alleged \textit{incapax}. The nearest agnate (or the father or husband, if such were alive) of a person found insane was appointed as tutor-at-law. If the person appointed were heir-at-law (unless in the case of appointment of a father or husband) the appointment excluded the right to personal custody.\textsuperscript{47} Custody was then committed to a cognate. Without cognition, the nearest male agnate may be appointed tutor-dative by the court: \textit{Dick v. Douglas}.\textsuperscript{48} In this case the son of an \textit{incapax} was appointed tutor-dative to her person, while the estate continued subject to the administration of a \textit{curator bonis}. This is an unusual and in most cases an inconvenient arrangement.\textsuperscript{49} The Mental Health (Scotland) Act, 1960,\textsuperscript{50} and regulations made thereunder by the Secretary of State, now makes detailed provisions for guardianship of persons suffering from mental illness.

\textbf{Curatores Bonis}

So far as the administration of the estate of \textit{incapaces} generally is concerned, the normal procedure in modern practice is to appoint a \textit{curator bonis} after petition to the Court of Session at the instance of any person interested, such as his solicitor or the person with whom he resides or by the Lord Advocate. The petition declares that the subject of the petition is incapable of managing his affairs or of giving directions for their management because of insanity, facility or senility, or like cause, and this is supported by two medical certificates granted on soul and conscience.\textsuperscript{51}

\textsuperscript{45} Act, 1696, c. 9.
\textsuperscript{46} Judicial Factors Act, 1849 (12 & 13 Vict. c. 51), s. 34.
\textsuperscript{47} Erskine, I,7,7.
\textsuperscript{48} 1924 S.C. 787.
\textsuperscript{49} The son did not apply to be served as tutor-at-law.
\textsuperscript{50} 8 & 9 Eliz. 2, c. 61, esp. ss. 23, 33, 41.
\textsuperscript{51} For the appointment of a \textit{curator bonis} to a minor, see p. 385, ante.
The curator has no power over the person of the *incapax* who is not divested of his estate; the curator has a mere power of management. His powers are those of a judicial factor, and he is not empowered to change the succession—except as a matter of necessity; but if sale of heritage is necessary, conversion takes place in fact and in law: see McAdams' Exor. v. Souters,52 and Public Trustees of New Zealand, Pet.53 If, however, the proceeds of sale pass by succession on the death of an *incapax* to a third party, it ceases to be regarded as heritable estate.

The position of a *curator bonis* to an *incapax* was discussed in *I.R. v. Macmillan's Curator Bonis*54 and in *Skinner's Curator Bonis*,55 and was thus construed by Lord Kilbrandon in *Burn's Curator Bonis* v. *Burn's Tr.*56: “He supersedes the ward in the management of his estate, which remains vested in the ward. The ward is not the beneficiary of a trust estate vested in the *curator*; the *curator* is in the same category as an agent for the ward to manage his affairs and ingather his estate. Election between conventional provisions (under a will) and legal rights is an act of management . . . and will be exercised for him by the court where the exercise is necessary in the interest of third parties . . . The exercise has to be made as the ward would have made it for his own benefit, and not necessarily for the benefit of the estate.” Accordingly, the *curator bonis* was authorised to elect for a legacy of £300, instead of claiming legal rights amounting to £26,000, when a man of very substantial means, aged 88 years, was under curatory and, had he been *capax*, would have contemplated reducing rather than augmenting the capital value of his assets.

The curatory is terminated by the death or recovery of the *incapax*, and a petition for discharge is then presented to the court.

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52 (1904) 7 F. 179.
54 1956 S.C. 142.
55 (1903) 5 F. 914.
CHAPTER 13

LEGAL RIGHTS OF SPOUSES AND CHILDREN

The Scottish law of succession operates subject to certain claims to "legal rights" which are recognised in favour of the surviving spouse and children of a deceased person. A discussion of these is appropriate in the context of family law.1

On the death of a person domiciled in Scotland, his or her moveable estate or executry 2 is divided by operation of law into two or three parts. If the deceased leaves a widow or widower and children whose legal rights have not been discharged or renounced, the executry is divided into three parts. One-third, called jus relictae (or jus relicti),3 may be claimed by the surviving spouse; one-third, called legitim,4 or barn’s part, may be claimed by such children as have not been forisfamiliated 5 in equal shares 6; and the remaining third, the dead’s part, may be disposed of by will. If a widow or widower has survived the deceased but no children have survived, or if children have survived but no widow or widower, the executry is divided into two parts. Half of the moveable estate then becomes jus relictae (jus relicti) or legitim, as the case may be, and the remaining half is dead’s part. If a deceased leaves no surviving spouse or children, then the whole executry is dead’s part. The legal rights of surviving spouses and children cannot be excluded by testamentary deed, though, as will appear, they may be barred by antenuptial marriage contract, or a testamentary provision in lieu of legal rights may be offered. In the event of intestacy, the surviving spouse and children have also a right to participate in the dead’s part under the general law of intestate succession, as well as a claim to legal rights.

Legal rights over heritable property are “terce” and “courtesy.” The widow has a right to her terce, that is, to a liferent of one-third

1 For discussion of election between legal rights and testamentary provision, see p. 445, post.
2 Domicile governs capacity to test regarding moveables, lex loci sitae applies to heritage.
3 A corollary of the provisions of the Married Women’s Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), which removed property of a married woman from the control of her husband, was the granting to her husband—by s. 6—of a right in the executry of his deceased wife.
4 By the same Act legitim is due from a mother’s estate as from a father’s.
5 Erskine, III,9,23; forisfamiliation in this context implies the renunciation by a child of legitim.
6 An heir taking heritable estate on his parent's death may only participate in the legitim fund if he collates the heritage. This is collation inter haeredes.
Legal Rights of Spouses and Children

of her husband's heritable estate. It formerly attached only to the heritage in which the husband was infeft at the date of his death. This has been altered by the Conveyancing (Scotland) Act, 1924, which extends the right to all estate to which the husband had a personal title capable of being completed by infeftment or of being recorded in the appropriate Register of Sasines (including heritable estate held in trust for his behoof), or which could have been enforced by adjudication. Terce is not due from certain heritable subjects such as feu duties, leases, superiorities, or the revenue derived from minerals, nor from land which has been absolutely deponed on heritable securities or assigned for onerous consideration. A widow's right to terce may be established by action of declarator. Land burdened by terce could not be sold free of the burden without the widow's consent, but now the liability to terce may be redeemed at a capital sum to be determined by the court. The widow, proprietor, or a security holder postponed to the widow, may bring the action.

A widower may be entitled to the right of "courtesy"—the liferent of his deceased wife's heritable estate. It attaches to the whole of the heritage capable of infeftment, however acquired, belonging to the wife. The land can be disburdened and the land redeemed as with terce. It is a condition of the right that a child who has been heard to cry has been born of the marriage, and would be the mother's heir, and thus, as Erskine observed, it is due to him "as father of an heir, rather than as the widower of an heiress."

Nature of Legal Rights

The legal rights of surviving spouse and children are not, strictly speaking, rights of succession, but are claims in the nature of debt due from the estate of the deceased. But claimants for legal rights cannot compete on equal footing with onerous creditors of the deceased, and legal rights only attach to the free estate after other debts have been paid. Thus it has been observed that the widow and children are heirs in competition with onerous creditors, and are

7 See McLaren, Wills and Succession, Vol. I, p. 88 et seq. A right of lesser terce is due out of lands already burdened by a right of terce.
8 Carruthers v. Johnston (1706) Mor. 15846.
9 14 & 15 Geo. 5, c. 27, s. 21 (4), as amended by the Conveyancing Amendment (Scotland) Act, 1938 (1 & 2 Geo. 6, c. 24), s. 5.
10 But see post, p. 396.
11 Sand-pits have been held to be minerals: Grosset v. Grosset, 1959 S.L.T. 334.
12 s. 21 (3) of the 1924 Act.
13 II,9,53; cf. Intestate Moveable Succession (Scotland) Act, 1855 (18 & 19 Vict. c. 23), s. 7, as regards terce.
creditors in competition with heirs. As Professor Anton has rightly observed, "In the common law of Scotland there existed from medieval times until the nineteenth century a system of proprietary relations between spouses characterised by many of the distinctive features of a community system in its technical sense. That system has been abolished only in part, and some knowledge of its features is necessary for an understanding of the modern law." Thus, until its abolition by the Intestate Moveable Succession (Scotland) Act, 1855, s. 6, the executors of a wife who predeceased her husband were entitled to claim _jus relictae_ on his death. Because her _jus relictæ_ is in the nature of a _jus crediti_, a widow cannot demand a transfer _in forma specifica_ of a third of her husband’s estate; and, moreover, the value of the estate for the purposes of legal rights is fixed as at the date of death, so that an increase or decrease in value will not affect the amount of these claims. It has been held that since the right to _legitim_ vests _ipso jure_, the right thereto—or the option to elect between legal rights and testamentary provision—will transmit to an executor of a child which survived its parent but died without making a claim. On the other hand, there is no representation in _legitim_, and accordingly if a child predeceases its parent leaving issue, grandchildren cannot claim any share of _legitim_. Claims to either _jus relictæ_ or _legitim_ may be barred by the negative prescription, though a plea of _non valens agere_ may be competent.

**Discharge, Satisfaction and Exclusion of Legal Rights**

Though a person may not exclude legal rights by testamentary deed, during his lifetime he may deal with his property as he chooses, and alienate it _inter vivos_, though nothing be left for his family on his death. Further, a disposition will be good though the granter reserves a liferent, and though the express purpose of alienating the fee was to exclude legal rights. As Lord Justice-Clerk Moncreiff observed in _Boustead v. Gardner_, "If that (the objection to the arrangement)

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19. The Mackintosh Report on the Laws of Succession in Scotland, Cmd. 8144/1951, has recommended, by s. 20, that representation should be allowed per stirpes—see post, p. 396.
20. Campbell’s _Trs._ v. Campbell’s _Trs._, supra, note 15.
22. (1879) 7 R. 139 at p. 145.
only means that the object of the minutes of agreement was to divest the father of his moveable estate in his lifetime in order to defeat legitim, it is irrelevant.” If, however, the deeds alienating property are not truly absolute and irrevocable transfers inter vivos but testamentary deeds simulating the form of irrevocable transfers, they will be ineffective to exclude legal rights. It would, however, seem that legitim may be defeated by a deed inter vivos though payment is to be made after death, and legitim may also be diminished by “rational provisions” made for a spouse in that way by a decedent who could not provide otherwise. Similarly, such an arrangement in favour of children may affect jus relictae (jus relictii).

A man can defeat the rights of his widow and children to jus relictae and legitim by converting his estate into heritage or by investing in heritable bonds which, though moveable in succession generally, are heritable quoad the rights of relict and children.

Legal rights may be renounced or discharged by those prospectively entitled during the lifetime of the spouse or parent, against whose estate a claim is competent. The law regarding discharge of terce differs from that relating to other legal rights. The Act 1681, c. 10— as interpreted—casts on the wife the onus of establishing that her husband intended her to take her terce in addition to such other provision as her husband may have granted to her under a written deed, but only if she was party to the deed.

Legitim may be discharged by renunciation during the lifetime of the parent, and in this case the shares renounced fall to the other children (if any) as if those renouncing had predeceased the parent whose estate is to be distributed. Accordingly, in Hog v. Hog, when five children out of six had renounced legitim during the father’s life, the sixth child, who had not renounced, had a right to the whole legitim fund after the death of his parent. When, however, a child renounces or discharges legitim after the death of a parent, this discharge, since it relates to a right which vested immediately on death, does not enlarge the share of other children sharing the legitim fund, but benefits the general disponees.

Legal rights may be excluded by acceptance of a provision under a settlement which is inconsistent with a claim to legal rights. Legal

23 Lashley v. Hog (1804) 4 Pat. 581.
25 See Chap. 20, post.
27 (1791) Mor. 8193.
28 Fisher v. Dickson (1840) 2 D. 1121 at pp. 1138 and 1149.
29 Smart v. Smart, 1926 S.C. 392; but this will not bar a claim to legal rights over a part of the estate which falls into intestacy: Natsmith v. Boyes, supra; Petrie’s Trs. v. Manders’ Tr., 1954 S.C. 430.
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rights of spouses or children may also be expressly discharged in ante-nuptial contracts of marriage. Though in an ante-nuptial marriage contract the spouses are acting for onerous consideration, and their interests are usually considered carefully, this is not true with regard to children's claims to *legitim*. The only reason or apology advanced in support of the doctrine that children's *legitim* can be discharged by their parents' ante-nuptial marriage contract is that of Lord Mackenzie in *Maitland v. Maitland*, namely that children cannot "object to that contract by which they were brought into existence." This explanation has been criticised sharply in *Simpson's Trs. v. Taylor*, in *Galloway's Trs. v. Galloway*, and in the Report of the Mackintosh Committee on the Law of Succession in 1951. The Committee point out that, though some provision must be made in an ante-nuptial marriage contract for children of the marriage, this need not correspond in value to the *legitim* right discharged by it—especially if the parents' means increase greatly during marriage. In *Galloway's Trs.*, moreover, it was held that a child's *legitim* claim might be effectively discharged, even though she received nothing out of the parents' marriage contract. In this case the father had reserved power to appoint the fund provided in the contract as he should think fit among the children of the marriage, if there were more than one. He appointed the whole fund to one of his three children. It has been recommended by the Mackintosh Committee that it should no longer be possible to discharge the legal rights of children by ante-nuptial marriage contract, but that children should have a right of election between legal rights and ante-nuptial marriage contract provision—as at present they may elect between legal rights and provisions made in post-nuptial marriage contracts or in a testamentary writing.

*Legitim* may also be satisfied or compensated for by advances made by a parent to a child during the latter's lifetime. Thus if advances are made to set up a child in trade or for a settlement in the world, or for a marriage portion, they must, generally speaking, be collated or brought into account in computing the amount of the *legitim* fund and the balance, if any, still owing in respect of his share of *legitim* to a child collating. A provision made for a child by an ante-nuptial marriage contract which did not refer to discharge of legal rights has been held to fall within the scope of collation.

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30 *Legitim* may also be excluded by necessary implication: *McLaren*, Vol. I, p. 136 et seq.
31 (1843) 6 D. 244 at p. 247.
32 1912 S.C. 280.
33 § 22.
34 Ibid.
35 Ibid.
36 As to collation see Erskine III,9,24–25; *McLaren, Wills and Succession*, pp. 162–169.
37 *Elliot's Exrx. v. Elliot*, 1953 S.C. 43.
discharge, satisfaction and exclusion of legal rights

The doctrine of collation *inter liberos* is not, however, applied where sums have been received by a child upon contractual consideration—as for services rendered; nor *quo vad* advances for aliment and education *ex debito naturali* during pupillarity or minority; nor *quo vad* benefits conferred by way of heritable right or a legacy—benefits which would not affect the *legitim* fund at all; nor if it appears that the parent intended the child to take the advance as well as his *legitim*.

The doctrine of collation *inter liberos* applies only where more than one child claims *legitim*, and may be invoked only by competing children, since the doctrine is only intended to secure an equitable distribution of the *legitim* fund.38

Claims for legal rights may also be satisfied by testamentary provisions left to spouse or children in lieu of legal rights. In this case the spouse or child is put to election between testamentary provisions and legal rights.

**Legal Rights in Divorce**

Legal rights are exigible on divorce on analogy with the situation which would result were the guilty party to die on the day on which decree of divorce was granted. But the analogy cannot be pressed too far, and a wife has obtained *jus relictae* out of a liferent enjoyed by the husband whom she divorced.39 Owing to the restricted wording of the Married Women’s Property (Scotland) Act, 1881,40 s. 6, a husband cannot obtain *jus relictii* out of his divorced wife’s estate. The attempt to provide on divorce for the maintenance of an innocent spouse out of legal rights is unsatisfactory.41 The Mackintosh Committee 42 has recommended that this artificial system should be abolished, and that the court should have a discretion to adjust the nature and extent of provision to be made for an innocent spouse on divorce. Subsequently the Royal Commission on Marriage and Divorce 43 made similar but more detailed recommendations. No legislative action, however, has been taken.

**Recommendations of the Mackintosh Committee regarding Legal Rights**

The Report of the Mackintosh Committee makes important recommendations for the alteration of the law regarding legal rights. Since

38 *Coats’ Trs. v. Coats*, 1914 S.C. 744.
40 44 & 45 Vict. c. 21.
41 See ante, p. 343.
42 § 21.
the legislature may have opportunity to consider giving effect to them in the not too distant future, a summary may be of some value:

The Committee, having recommended 44 that on intestacy all property heritable and moveable should devolve according to the same rules (with certain suggested amendments) as govern intestate succession at present, had to consider what modification should be made in testate succession regarding legal rights which—except for terce and courtesy—are exigible only out of moveable estate. They rejected the suggestion that all distinction between heritable and moveable estate should be abolished for the purpose of legal rights, noting that this would often result in a substantial increase in legal rights to 66½ per cent. of the whole estate—not as at present two-thirds of the moveable estate only—and would correspondingly reduce a testator's freedom to dispose of his estate. Accordingly, it was recommended that legal rights should be continued as at present—subject to certain modifications—and that a right of income nature only, to be designated "the surviving spouse's terce," should be given to the widow or widower of a deceased person.45 This is probably one of the most controversial of the recommendations. It was also recommended that feu duties and ground annuals (like bonds and dispositions in security) should be made subject to terce but not to legitim nor jus relictae.46 Abolition was recommended of the doctrine of "equitable compensation," which applies when legal rights are claimed by spouse or children for whom provision has been made in a will, but without expressly putting them to election between the provision and legal rights. At present a claim may be made to the testamentary provision under deduction of legal rights. In future, it was suggested, the law should imply into any will providing for a surviving spouse or children a condition that the testamentary provision should be in full satisfaction of legal rights.47 The doctrine of election would then apply.

An important change in the law was recommended as regards representation in legitim. At present a claim to legitim is restricted to the surviving children only of the deceased, so that the issue of a predeceasing child takes no share. It was recommended that the issue of predeceasing children should be entitled to claim legitim per stirpes—irrespective of whether any children of the deceased were surviving at the time of his death.48 As has been observed already, it was urged that children's claims to legal rights should not be liable to discharge

44 § 7.
45 § 16. The "surviving spouse's terce" would eliminate the somewhat technical differences which at present exist between "terce" and "courtesy," noted briefly P. 391, ante.
46 § 17.
48 § 20.
by the ante-nuptial marriage contract of their parents, but that the children should have a right to elect between legal rights and the provision for them made by the marriage contract.\textsuperscript{49} Lastly, it may be noted, the Committee recommended that an adopted child should be given a claim to legal rights from the estate of his adoptive parents—but that he should have no right in the estate of his natural parents.\textsuperscript{50}

\textsuperscript{49} § 22.

\textsuperscript{50} § 24, see ante, p. 362.
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the law of Scotland is to be regarded as merely the stepbairn of the Mother of Parliaments.

**Intestate Succession to Heritage**

In heritable rights, males are preferred to females, and the rule of primogeniture applies. Accordingly, if the deceased leaves an eldest son, he is the heir-at-law and takes the estate; if he leaves only daughters, they take as heirs-portioners. If the intestate leaves no descendants, the estate goes to the collateral line—that is to his brothers and sisters. These succeed in the following order: Brothers have the first place, that is brothers of the full blood; but as the rule is that where possible heritage descends, the brother next youngest to the deceased succeeds to him and then the other younger brothers in order of seniority. Where the deceased is himself the youngest brother of three or more, the succession goes to the immediate elder brother and not to the eldest, because, when heritage may not descend, this is the least deviation from the general rule that it should ascend not *per saltum* but by the slowest degrees. If there are no brothers of the full blood, then sisters of the full blood succeed as heirs-portioners, even though there should be brothers consanguinean—that is, brothers by the same father only—but the full blood always excludes the half blood. Failing sisters of the full blood, brothers consanguinean succeed in the same order as brothers of the full blood, and failing them sisters consanguinean take as heirs-portioners. (The eldest heir-portioner is entitled to the principal mansion house as *praecipuum.*) Brothers and sisters uterine—that is, of the same mother but not of the same father—are at present incapable of succeeding to heritage, as are all relations of the deceased through the mother.

If the deceased leaves neither descendants nor brothers nor sisters, the succession ascends to the father, but, as stated, neither the mother nor any of her relations are capable of succeeding. If the father is

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3 Rights of succession may, of course, be qualified by the "legal rights" of spouses discussed ante, p. 390.

4 Where a male succeeds as heir to heritage the succession passes to him as an individual. If, however, females succeed to heritage, all of the same degree of propinquity take equally as heirs-portioners. The eldest heir-portioner, however, is entitled, without compensating the others, to claim certain subjects as her *praecipuum.* Stair, III,5,11: Erskine, III,8,5. These subjects comprise the family seat or principal mansion house with its necessary adjuncts (see Callander v. Harvey, 1916 S.C. 420); also a superiority with its casualties, or, if there is more than one, she has the right to close. Where, however, the superiority yields feu duties, she must make compensation to the other heirs-portioners—Erskine, III,8,13. A title of honour, being indivisible, passes to the eldest female, which prompts the reflection that had the law of England (which differs on this point) treated succession to the Crown according to the same rules as succession to a title, her present Majesty would have been Queen in Scotland on her father’s death, but not in England. Regarding the ownership of heirs-portioners, see post, p. 481.

5 But see Recommendations of the Mackintosh Committee, post, p. 410.
dead, succession goes to his brothers; and, failing them, to his sisters in the same order as it would have gone to the brothers or sisters of the deceased. Failing all these, succession goes to the grandfather or other direct ascendant, or to his brothers or sisters in the order described. If there is no agnate, the Crown takes as ultimus haeres.

Certain points may be noted. First, though a mother and her relatives cannot succeed to her child, the child is heir to the mother. Secondly, the rule that the full blood excludes the half blood holds only in the same degree of relationship. Accordingly, a brother consanguinean is preferred to the father’s full brother. Thirdly, there is an unlimited right of representation in succession to heritage, so that a person may succeed in the place of, and as representing, his deceased ancestor. Accordingly, where one dies leaving a younger son and a grandchild by an elder son predeceased, the grandchild succeeds in right of his father. This right obtains in the case of collaterals as well as descendants. So, if a man dies without issue survived by a nephew, the son of his immediate younger brother deceased, and also by two elder brothers, the nephew takes the heritage. Similarly, the child of a sister of the full blood excludes a brother consanguinean. Children take by right of representation the heritage which their mother would have inherited had she survived.

The numbers give the order of succession.

*Diagram supplied by Prof. F. MacRitchie and gratefully acknowledged.*
By the Conveyancing (Scotland) Act, 1874, a personal right to every estate in land vests in the heir by mere survivance. At common law no right vested to the effect of making it transmissible until the heir had taken the step of completing his title. Before doing this he was merely an heir apparent. Now, however, immediately upon the death intestate of an owner of heritage, his heir becomes owner of the estate under a complete personal right—a right to the lands as complete as any right can be without infeftment. He is in the same position as if he had obtained a disposition upon which he might have been infeft, but was not. He can sell or otherwise dispose of this personal right, and his creditors can attach it during his life or after his death, McAdam v. McAdam.

At common law an heir serving to his ancestor became liable for his debts irrespective of the value of the estate. By the Conveyancing (Scotland) Act, 1874, s. 12, the liability for these is limited to the value of the estate to which he succeeds, and although a personal right to the estate vests in him by mere survivance, he is not liable in the personal obligation of a bond granted by his ancestor unless he has completed title or taken possession of the estate, Fenton Livingstone v. Crichton's Trs. In such a case he incurs liability on account of the "passive title" which he thus assumes.

Intestate Succession to Moveables

Intestate succession to moveables, in its lines of descent, follows the same rules as in heritage. That is to say, that the succession opens first to descendants, then to collaterals, and, failing collaterals, then to ascendants. Relatives of the full blood exclude those of the half blood in the same line; but relatives of the half blood exclude the full blood in a more distant degree of relationship. The rule of primogeniture, however, has no application in the law of intestate succession to moveables, and the succession is equally divided among the next-of-kin. At common law, representation of one who, had he survived, would have succeeded as one of the next-of-kin, was not allowed; nor could the mother, maternal relations, nor those of the half blood uterine participate in intestate succession to moveables.

Important changes were introduced by the Intestate Moveable Succession (Scotland) Act, 1855. First, representation was introduced...
within certain limits—namely, limited to descendants of the intestate or of his brothers and sisters. Thus in a case not long after the Act, *Ormiston v. Broad*, when an estate was claimed by six cousins and by the children of deceased cousins, the six cousins were preferred to the whole succession as the next-of-kin at common law—whose position was unaffected by the 1855 Act, s. 1, which provided that "no representation shall be admitted among collaterals after brothers' and sisters' descendants." But the principle of representation only applies where there are next-of-kin and descendants of a person or persons who would have been among the next-of-kin had they survived. It does not apply when the corporation of next-of-kin is perfect. Thus when an intestate died leaving as her whole next-of-kin thirteen nephews and nieces, the issue of three sisters who had one, four and eight children respectively, the common law rule applied and the estate was divided per capita and not per stirpes. Secondly, by section 3 of the Act, if an intestate dies without issue but survived by brothers and sisters, the father is entitled to one-half of the moveable estate, and if the father is dead the mother now (by the Intestate Moveable Succession (Scotland) Act, 1919) also takes one-half in preference to brothers and sisters of the deceased. Thirdly, if the intestate is survived neither by issue, nor by brothers and sisters of the full blood or consanguinean, nor by parents, then brothers and sisters uterine—that is, of the same mother but not of the same father—take half of the moveable estate. Maternal relatives at present are not otherwise admitted to the succession. Failing heirs, the Crown is ultimus haeres.

As in the case of heritable estate, the succession to moveables did not at common law vest by mere survivance, but since 1823, rights of succession in moveables vest to the extent of being transmissible upon survival. Confirmation is, however, necessary to confer title upon the executor to recover and administer the estate.

It must also be noted that when a person dies intestate leaving no lawful issue, his or her surviving spouse has a preferable right as creditor to £5,000, charged rateably on heritage and moveables, in addition to legal rights in either or both. When there is partial intestacy, and the surviving spouse takes a legacy, this is deducted from the preferential claim to £5,000.

An illegitimate child has no claim to legitim, nor, except under the provisions of the Legitimacy Act, 1926, does he inherit the

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14 (1862) 1 M. 10.
15 Turner and Ors. (1869) 8 M. 222.
16 9 & 10 Geo. 5, c. 61, s. 1, altering s. 4 of the 1855 Act.
17 1855 Act, s. 5.
18 By the Confirmation of Executors (Scotland) Act, 4 Geo. 4, c. 98.
20 16 & 17 Geo. 5, c. 60, s. 9.
estate of either parent if they die intestate. Under the 1926 Act, if the mother of an illegitimate child dies intestate and without surviving legitimate issue, her illegitimate child is entitled to such interest in her estate as he would have taken had he been born legitimate. Moreover, if an illegitimate child dies intestate, his mother, if she survives him, is entitled to the same interest in his estate as if he had been born legitimate and she were the sole surviving parent.

**RULES OF DIVISION**, according to the **LAW OF SCOTLAND**, of the **MOVEABLE ESTATE** of a **PERSON WHO HAS DIED INTESTATE** 23

If the Person die, leaving

| Wife | His Moveable Estate is divided in the following proportions: | Half to wife, other half to heirs in moveables.22 |
| Wife and child or children | | One-third to wife, remaining two-thirds to child or among children equally. |
| Wife and children and issue of predeceasing children | | One-third to wife, one-third to children equally, and the remaining third between the children and the issue of the predeceasing children. The children taking *per capita*, the latter *per stirpes*.23 |
| Wife and grandchildren | | Half to wife, and half to grandchildren equally among them. |
| Wife and his children by former marriages | | One-third to wife, two-thirds to children equally. |
| Wife and her children by last and prior marriages | | One-third to wife, remaining two-thirds to deceased's children. |
| Children | | Whole to children. |
| Children and issue of predeceasing children | | Half to children, remaining half between children *per capita*, and issue *per stirpes*. |
| Grandchildren | | Equally to all. |
| Children by two or more marriages | | Equally to all. |
| Father | | Whole to father. |

21 Reproduced with acknowledgment from the Parliament House Book.
22 Widow to be a creditor for £5,000. See note 19 supra.
23 *Per capita*, i.e., by the head; *per stirpes* (by descent), i.e., through their parent and not in their own right; where property divides *per capita*, it is divided into as many shares as there are children; where *per stirpes*, the share which would have fallen to the predeceased parent, if alive, is divided equally among his children.
Mother ........................................ Whole to mother.
Father and Mother ........................... Whole to father.
Father and mother and brothers and sisters ........................................ Half to father, half to brothers and sisters equally.
Mother and brothers and sisters ......................................................... One-half to mother, remaining one-half to brothers and sisters.
Father, mother, brothers or sisters, and issue of deceased brothers or sisters ........... Half to father, half to brothers and sisters per capita, and issue per stirpes.
Mother, brothers or sisters, and issues of deceased brothers or sisters .................. Half to mother, remaining half as in last example.
Father and mother and their grandchildren ........................................... Half to father, other half to grandchildren equally.
Mother and grandchildren ............... Half to mother, other half to grandchildren equally.
Father, mother, children and grandchildren of deceased brothers or sisters .............. Half to father, other half between children per capita, and grandchildren per stirpes.
Mother, children and grandchildren of deceased brothers or sisters .................... Half to mother, other half among children per capita, and grandchildren per stirpes.
Brothers or sisters ........................................ Equally among them.
Brothers or sisters and nephews or nieces ........................................... Brothers or sisters per capita, nephews or nieces per stirpes.
Nephews and nieces .......................... Equally.
Grandnephews or nieces ..................... Equally.
Brothers or sisters of full blood, and brothers or sisters of half blood ................... Whole to brothers and sisters of full blood.
Brothers or sisters consanguinean (that is, by same father, but not same mother), and brothers or sisters uterine (that is, by same mother, but not by same father) Brothers or sisters consanguinean, and uncles or aunts ............................... Whole to brothers and sisters consanguinean.
Brothers and sisters uterine, and uncles or aunts ....................................... Whole to brothers and sisters.
Father, mother and uncles and aunts .................................................. Half to brothers and sisters, other half to uncles and aunts.
Father and cousins of full blood ........................................ Whole to father.

\(^{24}\) See Intestate Moveable Succession (Scotland) Act, 1919 (9 & 10 Geo. 5, c. 61), for mother's right of succession.
Mother and uncles or aunts ...... Whole to mother.
Mother and cousins of full blood Whole to mother.
Grandfather and uncles and aunts Whole to uncles and aunts.

Where a wife dies, survived by:
Husband .................................. Half to husband, other half to heirs in moveables.25
Husband and children .................. One-third to husband, rest to children.
Children only ............................ Whole to children.
Children and issue of deceased children .......................... Half to children, other half among children per capita, and issue per stirpes.
Children by two or more marriages Equally to all.

The right of an illegitimate child and mother of an illegitimate child to succeed on the intestacy of the other is provided for by the Legitimacy Act, 1926,26 s. 9.

Collation inter Haeredes

When the estate of an intestate comprises both heritage and moveables, the heir-in-law, if one of the next-of-kin, may not participate in dead's part or legitim, except upon condition of collating the heritage to which he succeeds in law. If effect is given to the recommendations of the Mackintosh Committee on Succession, the doctrine of collation inter haeredes will be abrogated. For the time being, however it retains its importance. The history of collation inter haeredes—which goes back at least to the sixteenth century—is traced by Lord Medwyn in Anstruther v. Anstruther.27 The rules 28 enumerated by the consulted judges in that case have always been regarded as the most authoritative formulation of the law—subject, of course, to the modifications introduced by the Intestate Moveable Succession (Scotland) Act, 1855,29 which, for the first time, permitted representation in succession to moveables. Formerly the only heirs in mobilibus were the next-of-kin, and, if a person who would have been one of the next-of-kin predeceased the intestate, his issue took nothing.

The purpose of collation is to avoid or mitigate the inequality which would result if the heir to heritage were permitted to participate as

25 Husband to be a creditor for £5,000; see note 19 supra
26 16 & 17 Geo. 5, c. 60.
28 Ibid. at p. 282; and see generally McLaren, Wills & Succession, Vol. I, p. 150 et seq.
29 18 & 19 Vict. c. 23.
next-of-kin (or jure representationis) in the moveable succession without aggregating the heritage with the moveables. Accordingly the law gives him—or his testamentary representatives if he is dead—an option between keeping the heritage without any claim to share the moveables, or by collation, aggregating the heritage or its value with the moveables. If he elects to follow the second alternative he is then entitled to receive an aliquot share of the aggregate with the other next-of-kin or their representatives.

The basic rules are laid down in Anstruther as follows:

"With regard to the persons who are entitled or bound to collate, the following propositions are indisputably established:

1. If the heir-at-law claim a share of the moveable estate as one of the next-of-kin, he is bound to collate the heritage. This is the general and fundamental rule.

2. If the heir-at-law is himself next-of-kin, and if there are no kindred in the same degree, there is no place for collation, for he is both heir and executor.

3. In the case of heirs-portioners being themselves exclusively next-of-kin, there cannot be collation, for they are all heirs, and all executors.

4. Heirs-portioners being in the same degree of kindred with others not heirs-portioners, the former claiming a share of the moveables, are bound to collate with the latter.

5. One of the next-of-kin, not being heir-at-law, may take his share of the moveables, and is not bound to collate, though he should succeed to the whole heritable estate by destination.

6. The heir-at-law, not being one of the next-of-kin, is not entitled to collate."

These rules, as has been said, must now be read with the gloss that in certain degrees of relationship representation is permitted. In Couper's Trs. v. Lord Advocate, Lord Reid illustrated the application of rule 4 by the hypothetical case of an intestate dying, having been predeceased by two daughters (his only children) but survived by grandchildren of both sexes born to each daughter. The eldest sons of each daughter would be the heirs-portioners, and all the grandchildren would be next-of-kin. In the same case it was held that the

31 Ibid. Fisher's Trs. v. Fisher (1850) 13 D. 245; Couper's Trs. v. Lord Advocate, 1960 S.C. (H.L.) 74, per Lord Reid at p. 82. But, after selling the heritage, the heir cannot offer to collate the price received. McCall's Tr. v. McCall's C.B. (1901) 3 F. 1065.
32 (1836) 14 S. at p. 282.
33 Intestate Moveable Succession (Scotland) Act, 1855, s. 1 limits representation to descendants of the deceased or of his brothers and sisters, and see supra. S. 2 provides that, where the person predeceasing would have been the heir in heritage of an intestate who left heritable and moveable estate had he survived him, the child of such person shall be entitled to collate the heritage to the effect of claiming for himself and other issue of the ancestor such share of the moveable estate as the latter might have claimed.
34 1960 S.C. (H.L.) 74 at p. 82.
1855 Act, which, in some respects, is notoriously badly drafted, gave no greater right to those claiming *jure representationis* than their ancestor would have enjoyed. Thus one of two heirs-portioners was entitled to half of the intestate's moveables as well as the heritage, and could not be compelled to collate by a nephew and niece, children of her deceased sister.

The heir-at-law is bound to collate not only the heritage to which he succeeds on intestacy, but also any property which he has received under deed *inter vivos* or by testamentary settlement, provided that in any event he would have taken such property as heir.35

**Liability of the Estate**

The same general rules regarding the liability of a deceased's estate for his debts apply in testate as well as in intestate succession, unless the testator has expressed a contrary intention. A creditor of the deceased may demand payment either from the heir to the heritage or from the executor administering the moveable estate. As between heir and executor, however, the former is liable for debts which are heritable or secured over heritage, while the latter is liable for moveable debts.36 Accordingly, if the heir has been compelled to pay a moveable debt, or if the executor has paid a heritable debt, either can demand relief from the other.37 The executor is *eadem persona cum defuncto* so far as the carrying out of his contractual obligations is concerned. Thus if the deceased had contracted before his death to purchase heritage, the heir is entitled to it, but the executor must pay the price.38 Conversely if the deceased had contracted to sell heritage, the heir must grant the necessary disposition, and the executor is entitled to the price.39 Since heritable securities and annuities granted by the deceased remain heritable in the succession of the debtor, the heir is liable therefor.

**RECOMMENDATION OF THE MACKINTOSH COMMITTEE REGARDING INTESTATE SUCESSION.**

It is apparent that the Scottish law of intestate succession is unsatisfactory, especially in that it perpetuates with regard to heritage or immovable feudal rules which are out of keeping with the present social structure, in which there can be few large landowners but a wide distribution of small properties in town and country. The justification

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36 Erskine III.9.48; *Duncan v. Duncan's Trs.* (1882) 10 R. 1042.
37 Act 1503, c. 76; *A.P.S. II*, 251, c. 21; Erskine, *ibid*.
advanced by Stair 40 and Erskine 41 for the rule of primogeniture is no longer convincing. Large estates are being forced out of existence by taxation, the smaller landed estates seldom if ever devolve except under a will, while shops, houses and small pieces of land—which often represent the bulk of the estates of ordinary men and women—are still governed by anachronistic rules applicable to an era of constant unrest and warfare, when maintenance of feudal power was vital for national defence. The Mackintosh Committee was charged with recommending alterations in the law of succession to bring it into line with modern requirements. Its main recommendations 42 were—subject to special provisions regarding agricultural lands—that the rule of primogeniture should be abolished; that all differentiation between the sexes in succession should be eliminated; and that all property, whether heritable or moveable, should devolve substantially according to the same rules as at present govern intestate moveable succession.

Though these proposals have been strenuously opposed by the Scottish Landowners' Federation, it may be suggested that members of the Federation would not suffer any serious hardship were they to be implemented. The larger landowners usually arrange the succession to their properties by will after taking expert legal advice, and it is not suggested that freedom of testation regarding heritage should be restricted. On the other hand, the man who spends his life's savings purchasing a house through a building society may well fail to appreciate that the law of the land would arrange his succession, were he to die intestate, so as to leave the one asset of value to the eldest son, to the exclusion of other children.

The Mackintosh Committee was not disposed to adopt altogether the solution of the legislation reforming the English law of succession—in particular of the Administration of Estates Act, 1925 43—which, in effect, assimilated without qualification the rules governing succession to real and personal property. Accordingly, regarding questions of legal rights, the Committee recommended that a distinction should be maintained between the heritable and moveable estate. Further it seemed to the Committee that the social structure of the countryside—in particular maintaining family roots in the country—and good farm management could not be maintained if a farm were liable to division among an indefinite number of co-heirs, or forced into the market for sale. The Committee's solution was modelled on the German system of the Erbhof, whereby the option to take the Hof (agricultural or forestry holding) as a unit devolves on one heir only at a time, and on

40 III, 4, 22-25.
41 III, 8, 6.
42 s. 7 of the Report.
43 15 & 16 Geo. 5, c 23.
his disclaiming, passes to the next heir in succession—always upon condition that the Hoferbe shall pay out his co-heirs upon a tax valuation of the lands, and be subject to certain claims if he sells within fifteen years to one who would not have qualified as Hoferbe. The actual recommendation made was that where property in a farm forms part of the estate of an intestate, the children (irrespective of sex) in order of seniority should be given the option of acquiring it at the valuation put on it for death duty purposes, and, failing children, the further descendants, if any, should be given the option in like manner. The person exercising the option would be obliged to pay out or otherwise settle the interests of other members of the family who, had the property not been agricultural land, would have been entitled to share in the succession; and, further, if the person who had taken advantage of the option were to sell the farm to an outsider within seven years, he should be accountable to his co-heirs for any excess of price above the valuation at which the farm had been acquired.45

Leases, other than long leases registerable under the Registration of Leases (Scotland) Act, 1857,46 were, however, excluded from the changes proposed in the general law of succession, as were questions of succession to titles of honour and similar rights. Succession to leases and tenancies under the Agricultural Holdings (Scotland) Act, 1949,47 is governed by sections 20-21 of that Act which vests in the Land Court the right to scrutinise a landlord’s objection to the heirs-at-law or successor under a deceased tenant’s will. The Land Court also decides regarding claims to succeed to leases and holdings under the Small Landowners Acts, which are designed to uphold the claims of family in cultivation of the land.48

As a consequence of the recommendation that, subject to specialties regarding agricultural land, heritage and moveables should be assimilated for purposes of succession, it was recommended that heritable property should vest in one or more executors for administrative purposes, instead of passing as under the present system, whereby the heir completes title to the heritage by service and the executor completes title only to the moveable estate by confirmation.49

Another important recommendation—now implemented 50—was that, where there were no issue of a marriage, the surviving spouse

44 Unit of agricultural land as defined in s. 1 (2) of the Agricultural Holdings (Scotland) Act, 1949 (12, 13 & 14 Geo. 6, c. 75).
45 s. 8 of Report.
47 12, 13 & 14 Geo. 6, c. 75.
48 See Crofters’ Holdings (Scotland) Act, 1886 (49 & 50 Vict. c. 29), ss. 16 and 19; Small Landholders (Scotland) Act, 1911 (1 & 2 Geo. 5, c. 49), ss. 20 and 22; Land Settlement (Scotland) Act, 1919 (9 & 10 Geo. 5, c. 97), s. 13.
49 s. 9 of Report.
should have a preferential claim to the furniture and plenishings and to £5,000 free of death duties; and, further, that if an intestate is survived both by a spouse and issue, the surviving spouse should take the furniture and plenishings absolutely, and also have a preferential claim to £1,000 free of death duties. Legal rights would be exigible from the rest of the estate.51

Proposals were also made which would carry much further the alterations in the common law made by the Intestate Moveable Succession (Scotland) Act, 1855.52 In the first place succession of and through the mother, it was thought, should be on an equal footing with succession of and through the father. Accordingly, the Committee recommended that when both parents survive, the mother should share equally with the father—each taking one-quarter, if the intestate died without issue but survived by brothers and sisters; and each taking one-half, if there were neither brothers nor sisters nor issue of the intestate. Further, when one parent alone survives the intestate, it was considered that he or she should take the whole share which would have been divided equally among the parents had both survived; and, if both parents were dead, and the intestate had neither spouse, descendants nor collaterals, then maternal relatives should share equally with paternal relations in the same degree of relationship—with right of representation.53 In addition, it was urged that in succession of collaterals, though the whole blood should continue to be preferred to the half blood in the same degree, when the half blood is admitted to the succession, consanguinean and uterine collaterals should share equally.54

Lastly, it may be recalled that representation which is unrestricted in succession to heritage was only admitted within limits by the Intestate Moveable Succession (Scotland) Act, 1855, and was confined to the direct line of descent and to descendants of brothers or sisters of the intestate. The Mackintosh Committee now recommend 55 “That there should be representation in every line of succession and so far as the succession extends.”

51 s. 10 of Report.
52 18 & 19 Vict. c. 23
53 s. 11 of Report
54 s. 12.
55 s. 13.
CHAPTER 15

TESTATE SUCCESSION

DISPOSAL OF PROPERTY MORTIS CAUSA

The most usual means of regulating succession to property after death ¹ is by will, but other methods are also available. Thus, for example, marriage contracts—now fallen from favour because of their vulnerability to fiscal exactions—² have usually contained provisions for the devolution of property after the death of the spouses. Again title to heritage may be taken under a "special destination"—such as "to A and B and to the survivor of them." Such a destination operates "as a quasi-testamentary direction, although of course, strictly speaking, a destination in a disposition is not a writing of a testamentary nature."³ By this device it was possible before 1868 to circumvent the prohibitions which then prevailed as to wills of heritage, but such special destinations in modern times, as Lord Cooper has observed,⁴ "are more likely to be productive of litigation than of any compensating advantage to the parties concerned." Special destinations may also be contained in documents of title such as stock or share certificates in limited companies, debentures, bonds and the like.⁵ The effect is stated succinctly by the first Lord President Clyde,⁶ "The doctrine of special destination is that (1) if anyone takes the documentary title to property or securities (including shares), which he has acquired in his own right or out of his own means, in favour of some other person (either solely or jointly with himself, and—in the latter case—either with or without a clause of survivorship), and (2) if such title remains in the possession of the acquirer undelivered to such other person during the acquirer's lifetime, then such title is held to constitute a valid nomination of such other person as successor of the acquirer in such property or securities." It has,

¹ In this chapter the author acknowledges specially his debt to the writings of Prof. R. Candlish Henderson.
² e.g., Forbes v. Forbes' Trs., 1957 S.C. 325.
³ Hay's Tr. v. Hay's Trs., 1951 S.C. 329, per L. P. Cooper at p. 333. A "destination" is a direction, usually by the owner of property as to the persons who are to succeed to it.
⁴ Ibid. at p. 334.
however, been firmly established that to take a deposit receipt in joint names does not give it quasi-testamentary effect. Under various statutory provisions, such as the Post Office Savings Bank Act, 1954, s. 7 (1) (i) and the Friendly Societies Act, 1896, s. 56, persons not under the age of sixteen are empowered to dispose by “nomination” to take effect after death of sums due to them. Lastly, by donation mortis causa a person may in his lifetime make a gift which will be effective after his death.

WILLS

Erskine defines a will or testament as “A declaration of what a person wills to be done with his estate after his death.” Where, however, a person is survived by a spouse or children who may claim their legal rights from the estate, the power of an individual to dispose of his property by will is limited by such claims. Moreover, as will be considered presently, the law on grounds of public policy imposes certain limitations upon the validity of declarations of will mortis causa. It must also be stressed that testamentary powers may not be delegated—though powers may be conferred on trustees or on some other person in whom the testator has confidence to select beneficiaries from among a specified class of persons or objects, provided the class is adequately defined. Even a judicial factor may effectively exercise an administrative discretion. Since a man’s heirs or next-of-kin are not to be held divested except by a valid disposition in favour of third parties, if the declared purposes are too vague to have effect, and if it is impossible to ascertain who the intended beneficiaries are, a purported but ineffectual testamentary gift will fall into residue—and, unless the residue is otherwise disposed of, will devolve as in intestate succession.

Capacity

For the declaration of will to be a valid testament, the testator must have had the capacity to test. A purported will by a pupil is

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7 Crosbie’s Trs. v. Wright (1880) 7 R. 823; Dinwoodie’s Ex. v. Carruthers’s Ex. (1895) 23 R. 234.
8 2 & 3 Eliz. 2, c. 62; as to revocation of such nominations see Clark’s Exors. v. Macaulay, supra.
9 59 & 60 Vict. c. 25.
10 See post, p. 446.
11 III, 9, 5.
12 See ante, p. 390 et seq.
13 Angus’s Ex. v. Batchan’s Trs., 1949 S.C. 335.
altogether without effect, but a minor may make a valid will of his moveable estate without the concurrence of his father or curator. Even with such consent, however, a minor cannot alter gratuitously the succession to his heritable estate, except when, as a soldier or airman on active service, or as a seaman at sea, he enjoys the special statutory power conferred by the Wills (Soldiers and Sailors) Act, 1918. Capacity may also be negatived on proof of insanity, or of facility with fraud or circumvention—as where the testator’s willpower is so reduced through illness or senility that he is not able to withstand the machinations of interested parties who take advantage of his state. It is not certain if, or how far, the doctrine of undue influence is admitted to challenge *mortis causa* dispositions. The will may also be ineffectual, despite the terms of the declaration, if the testator can be shown to have acted under the influence of essential error.

**Form**

No particular form of words is required to dispose of property *mortis causa*, but it must be clear that the deceased intended to make an actual will, and had passed beyond the stage of deliberation as to how to dispose of his estate. It is permissible to consider extrinsic circumstances to determine whether a document was in fact of a testamentary nature. This kind of problem has frequently arisen when the deceased is shown to have prepared a statement which may, on the one hand, be merely instructions for a legal adviser, or, on the other hand, be intended in itself to have testamentary effect. Thus in *MacLaren’s Trs. v. Mitchell & Brattan*, Lord Guest, after consideration of extrinsic circumstances, upheld as a testamentary writing a document which began with the words “I want to add some additional clauses to my will” and was found contained in an envelope addressed to the deceased’s solicitor by name only. This writing had been subscribed and witnessed. On the other hand in *Munro v. Coutts*, testamentary effect was refused to a holograph signed document actually sent to the testator’s law agent, and beginning with the words “I wish a codicil to be made to my last will and settlement in the following manner.” A document executed in a form which satisfied

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16 7 & 8 Geo. 5, c. 88.
21 (1813) 1 Dow 437.
Nuncupative or verbal legacies are valid if they do not exceed £100 Scots (£8 6s. 8d.) and a verbal legacy of a greater sum than £100 Scots is good up to that amount. Though the Roman law giving effect to the testamentum militare has not been specifically repudiated in Scotland, it has not been viewed favourably by dicta in Stuart v. Stuart,24 and in view of the liberality shown by Scottish law to holograph testamentary writings, is probably an unnecessary doctrine to adopt. Small verbal legacies and donations mortis causa apart, testamentary powers must be exercised in writing. A will may either be subscribed and attested in accordance with the general law governing executions of deeds; or it may be holograph of the deceased—that is to say, in the testator’s handwriting and signed by him; or it may be signed and “adopted as holograph” by the testator. In such a case the body of the will may be typed or written by another, but the testator must in his own handwriting “adopt” the writing as his own.25 A will typed by the testator and signed in ink has been held valid where the document itself bore to be typed by him, M’Beath’s Trs. v. M’Beath26; but where a typed will signed by the testator did not expressly bear to be typed by him, it was held insufficient to prove that he had in fact typed the document, Chisholm v. Chisholm.27 A valid testamentary writing may adopt earlier writings which by themselves could not be given effect because of defective execution28; and, furthermore, a testator may provide in his will that future informal writings—even unsigned documents—shall be deemed to be incorporated in his will and take effect accordingly.29 It may be stressed that the rule “no subscription, no will.” is strictly enforced. As Lord President Clyde observed,30

25 Gavine’s Trs. v. Lee (1883) 10 R. 448; see also Maclaine v. Murphy, 1958 S.L.T. (Sh.Ct.) 49. Where the essential parts of a will are holograph, it will receive effect, though these are inserted in a printed will form which, being neither adopted nor witnessed, could not be accepted otherwise as a valid testament, Gillies v. Glasgow Royal Infirmary, 1960, S.C. 438.
26 1935 S.C. 471—by a bare majority after a hearing by seven judges.
27 1949 S.C. 434.
28 Macphail’s Trs. v. Macphail, 1940 S.C. 560; Callander v. Callander’s Trs. (1863) 2 M. 291.
30 Robbie v. Carr, 1959 S.L.T. (Notes) 16; Taylor’s Ex. v. Thom, supra. In holograph writings the “signature” may be a Christian name or even initials—Draper v. Thomason, 1954 S.C. 136. For recent cases on “Authentication of Writs” see F. MacRitchie (1959) 1 Conveyancing Rev. 207; Ferguson Petr., 1959 S.L.T. (Notes) 4; Notarial execution is competent when the testator is unable to write. The formalities are strictly enforced. Hynd’s Tr. v. Hynd’s Trs., 1954 S.C. 112. In this case the history of notarial execution is fully considered in the

S.L.S.—14
after reviewing the authorities, "It is now well settled in Scots law that in the case of a holograph will, it is only a subscribed signature which will validate it, that is to say a signature placed at the bottom of the termination of the will. . . . Hence a signature only at the beginning of a holograph will cannot validate it." Yet, the rigid statutory rules applicable in cases of attestation of deeds designed to protect parties against fraud, have no place in regard to a holograph document where the writing and signature are admittedly those of the grantor." Accordingly the Lord President upheld as a valid will five separate pages of paper folded up together, the final page having been signed by the deceased.

The material validity of a will of moveable property is determined by the law of the testator's domicile, while a will of heritage is governed by the lex loci rei sitae. It is provided by the Wills Act, 1861, that in the case of British subjects wills affecting moveables shall be regarded as validly executed if executed in accordance with (1) the lex actus or (2) the law of the testator's domicile at the time of making the will or (3) "the laws then in force in that part of Her Majesty's Dominions where he had his domicile of origin." The need to invoke the statutory provisions seldom arises in Scottish practice, since at common law a will is regarded as valid if executed in accordance with the lex actus or lex domicilii of the testator at the time of making his will.32

Revocation

Voluntary Restrictions

Since, apart from questions of legal rights of spouses and children, the law recognises the freedom of testators to dispose of their property mortis causa as they wish, it follows that any alleged restriction on powers of revocation will be scrutinised critically. Generally speaking, a will may be revoked at any time before death. Nevertheless, a person may bind himself by unilateral 33 or contractual 34 obligation to dispose of his property in a particular way, and a purported will or revocation in breach of such an obligation may be reduced. This question has frequently been litigated in cases of mutual settlements 35 whereby two or more persons dispose of their estates mortis causa in a single deed.


33 Smith v. Oliver, 1911 S.C. 103; see post, Chap. 32.
34 Paterson v. Paterson (1893) 20 R. 484.
Such settlements have created many difficulties and are to be discouraged. Nevertheless, if the true construction is to the effect of limiting by contract the power of revocation, the restrictions will be upheld. As a rule a mutual settlement will be construed as no more than two wills contained in the same deed, and, consequently, these wills will be regarded as revocable, leaving the survivor free to revoke *quoad* his own estate. Where the parties are spouses, provisions in favour of such spouses or their children are more readily construed to be contractual than where the parties to a mutual settlement are strangers. *Stante matrimonio*, however, the presumption is in favour of revocability.38 A survivor who is given the fee of the whole estate—though the presumption is against it—be precluded from altering the deed,$^{39}$ but restrictions on the power of revocation are more readily recognised when the interest to which he succeeds under the predecessor's direction is limited to a liferent.$^{38}$

**Methods of Revocation**

Revocation *in toto* or in part of a will may be by destruction, mutilation or obliteration of the will, *animo revocandi*; by express declaration in a subsequent testamentary writing; or by implication. Destruction by accident or by the testator when of unsound mind will not revoke a will, and it may be set up in an action to prove the tenor. On the other hand, there is a presumption that a will known to have been in the custody of the deceased but not forthcoming at his death, was destroyed by him *animo revocandi*; and to rely on the doctrine of *casus omissionis* in an action to prove the tenor it is not sufficient for a person prospectively benefited by such a will to prove that the deceased intended to benefit and was benevolently disposed towards him. As has been observed judicially$^{38}$ *casus omissionis* "means not only that the writing has been actually destroyed or lost, but that its destruction or loss took place in such a manner as implied no extinction of the right of which it was the evidence." When it is asserted that a testamentary provision has been revoked by cancellation, then—unless the provision is so obliterated as to make it indecipherable the alteration must be authenticated.$^{40}$

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37 See note 35, supra.
40 Pattison's Trs. v. Edinburgh University (1888) 16 R. 73; Manson v. Edinburgh Royal Institution, 1948 S.L.T. 196. Though cutting out clauses from a copy of a will is *per se* ineffective, if this is associated with writing and signed, the whole expression may be construed as a valid revocation: Thomson's Trs. v. Bowhill Baptist Church, 1956 S.C. 217.
Revocation by testamentary writing is effective only when that writing is validly executed, otherwise an earlier will remains valid and can be set up, if destroyed, by an action to prove the tenor.\textsuperscript{41} If a testator who has already made a will subsequently executes a valid testamentary document, he may expressly revoke in general terms all previous testamentary writings, but such terms do not necessarily cancel a bequest of a specific subject given under separate writing and delivered to the beneficiary.\textsuperscript{42}

When a testamentary document does not expressly revoke previous wills, they are superseded only in so far as they are inconsistent with it—upon the doctrine that, by implication, provisions which are contradicted by a later declaration cannot stand. Where the various testamentary documents can be so construed as to be harmonised in their effect they will collectively be accepted as the will of the testator.\textsuperscript{43}

\textbf{Conditio si Testator sine Liberis Decesserit}

When a child is born to a testator after he has made his will, and no provision is made for the child in question, it may be presumed that the testator would not wish his will to be given effect in the altered circumstances. Accordingly, it may be revoked by the \textit{conditio si testator sine liberis decesserit}.\textsuperscript{44} The presumption is strongest when the testator dies childless, but is not displaced if it can be established that he was survived by other children who were living when he made his will\textsuperscript{45} nor by the fact that after the birth of the child unprovided for the testator failed to alter his will.\textsuperscript{46} This ground of challenge is personal to the child excluded from participation in the will, yet, if successful, will revoke the will completely—but not so as to revive an earlier will if that has been expressly revoked by the will challenged under the \textit{conditio}.\textsuperscript{47}

\textbf{Revocation of Special Destinations}

The terms of a special destination—as “to A and B or the survivor of them”—may have quasi-testamentary effect and may exclude the power of revocation. Thus if it is contractual, such a destination may only be varied by consent. When, however, property is held by a testator under a special destination, and is unaffected by contractual

\textsuperscript{41} Cullen’s Ex. v. Elphinstone, 1948 S.C. 662.
\textsuperscript{42} Clark’s Ex. v. Clark, 1943 S.C. 216.
\textsuperscript{43} Stoddart v. Grant (1852) 1 Macq. 163; Gordon’s Ex. v. Macqueen, 1907 S.C. 373; Mitchell’s Adminx. v. Edinburgh Royal Infirmary, 1928 S.C. 47. The onus of establishing revocation rests on the party asserting it.
\textsuperscript{44} Elder’s Trs. v. Elder (1894) 21 R. 704; (1895) 22 R. 505.
\textsuperscript{45} Knox’s Trs. v. Knox, 1907 S.C. 1123.
\textsuperscript{46} Nicolson v. Nicolson’s Tutrix, 1922 S.C. 649.
\textsuperscript{47} Elder’s Trs. v. Elder, supra. It is otherwise where there has only been implied revocation of an earlier will. Nicolson v. Nicolson’s Tutrix, supra.
restrictions, a subsequent general settlement which does not expressly refer to it may in certain circumstances revoke that destination, and include the property carried by the provisions of the testator's general settlement. Much depends upon who determined the terms of the destination.

If a testator holds property under a destination taken by another, a subsequent general settlement by the former will revoke the destination. When, however, the testator himself has prescribed the terms of the destination his subsequent general settlement will not necessarily revoke it, since there is a certain presumption that both the settlement and the destination are to be construed together as declarations of his will. This general presumption, however—which has only qualified scope—cannot prevail if the settlement could not be given effect were the destination to remain operative, though, of course, if the destination were taken subsequent to the settlement the later expression of intention must prevail.49

Invalid Provisions and Conditions

Apart from cases of invalidity resulting from the defective will or incapacity of the testator, the law for reasons of public policy refuses effect to certain testamentary declarations.

A gift which is uncertain, impossible or illegal, cannot receive effect, but if a bequest is made subject to a condition which is in its nature impossible, uncertain,49 illegal, contra bonos mores or against public policy,50 the condition is held pro non scripto, and the bequest is effectual.51 Thus, a legacy given ob turpem causam, or subject to a condition amounting to an absolute and general restraint of marriage by the legatee, or to a young child on condition that he shall not reside with his parents (of unobjectionable character), is treated as an unconditional legacy because such conditions are not sanctioned by law.52 Moreover, testamentary directions requiring that the testator's estate should be disposed of in an unreasonable manner which conferred no benefit on any person or on the public have been refused effect as involving an abuse of the power of testation. Thus in M'Caig
v. University of Glasgow,53 and in Aitken's Trs. v. Aitken54 the expressed desire that the testators or their relatives should be commemorated in "colossal statuary" was regarded as contrary to public policy. A legacy may not lawfully be paid to an enemy alien—a status which depends on technical considerations.55 Because "an act which, if done, can be at once undone by the person having an interest, will not be directed by the court to be done," should trustees be directed to purchase an annuity payable to a person (who could sell the annuity if it were bought) he may claim the purchase price of the annuity in lieu.56 Again, where a vested, unqualified, and indefeasible right of fee in a bequest is given in a trust disposition and settlement to a beneficiary of full age, he is entitled to payment of the bequest notwithstanding any direction to the trustees to retain the capital and to pay over the income to him or to apply the capital or income in some way for his behalf.57 Such a direction is considered to be repugnant to the right of fee vested in the beneficiary and, therefore, nugatory. If, however, there are other trust purposes which require that the subject of the bequest shall be retained by the trustees the direction will be effective, as also if the trustees are not merely directed to retain the bequest, but are given power in their direction to withdraw the fee from the beneficiary and to settle the bequest on him in liferent and on others in fee.58 In such circumstances the beneficiary cannot call on the trustees to denude.

By the Trusts (Scotland) Act, 1961,59 accumulation of income is prohibited for any longer term than any one of the following periods: (1) the life of the grantor; (2) a term of twenty-one years from the death of the grantor or testator; (3) the duration of the minority or respective minorities of any person or persons living or in utero at the death of the grantor or testator; or (4) the duration of the minority or respective minorities of any person or persons who under the terms of the will, settlement or other disposition directing accumulation would, for the time being, if of full age, be entitled to the income directed to be accumulated.60 In Carey's Trs. v. Rose61 it was

54 1927 S.C. 374. See also post, pp. 562–563.
58 Chambers' Trs. v. Smiths (1878) 5 R (H.L.) 151.
60 This period differs from (3) in that the minor need not have been alive at the date of the grantor's death—see Re Cattell [1914] 1 Ch. 177; Henderson on Vesting, 2nd ed., p. 313 et seq. Moreover, a. 5 (4) declares that a direction in an inter vivos deed for accumulation during this period shall not be void solely because it begins during the life of the grantor and ends after his death.
61 1957 S.C. 252, esp. per the Lord President at p. 259.
observed that, though the second period controlling accumulation contemplated accumulation *a morte testatoris*, the fourth period contemplated a situation where accumulation is to begin after the termination of an intervening interest (which may occur subsequent to the testator’s death). Accordingly, in the opinion of the First Division, *Henderson on Vesting* had summarised the effect of the Accumulations Act too broadly. Though the statute prohibits accumulations beyond the statutory periods, it does not otherwise affect the construction of the will or alter the dispositions of the testator’s property. Income directed to be accumulated contrary to the provisions of the Act, must be paid over to the person who would have been entitled had the direction not been made. The Accumulations Act, 1892, restricts the period permitted for accumulation of income under the provisions of a will for the purchase of land to the minorities of persons who, if of full age, would be entitled to the income. Under the Trusts (Scotland) Act, 1921, s. 9, it is made competent to reserve, by trust or otherwise, a liferent interest in moveable estate only in favour of a person in life at the date of the deed constituting the liferent. Where moveable estate is given in liferent for behoof of a person of full age born after the date of the deed, the Act provides that the estate shall belong to such person absolutely. By the Entail Amendment Act, 1848, s. 48, where a liferent in heritage is left to a person not in life when the deed creating the liferent was made, such liferenter, if of full age, is empowered to acquire the fee by petition.

**CONSTRUCTION OF TESTAMENTARY WRITINGS**

In construing a will the courts’ great object is said to be the ascertainment of the testator’s intention. There is possibly no more fruitful source of litigation—the outcome of which must often cause heartburning on the further shores of the Styx. The primary duty of the court is to give to each word used its natural ordinary meaning, unless it appears from the context that the words cannot have been intended in that sense. However—whatever the theory of the matter may be—the cynic may recognise that there is often more than a little truth in the plaint of Mr. J. F. Strachan, k.c. (now Lord Strachan) *arguendo*—"If there is one principle which emerges clearly from the cases in this branch of the law, it is that plain, simple words used by a

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62 Elder's Trs. v. Treasurer of the Free Church of Scotland (1892) 20 R. 2; Henderson, *sup. cit.*
64 55 & 56 Vict. c. 58.
65 11 & 12 Geo. 5, c. 58, re-enacting Entail Amendment (Scotland) Act, 1868, 31 & 32 Vict. c. 84, s. 17.
66 11 & 12 Vict. c. 36.
testator are not to be taken in their plain simple sense." The detail of the law must be studied in such treatises as McLaren's *Wills and Succession*, in Henderson *on Vesting*, in Murray's *Law of Wills in Scotland* and in the myriad decided cases. Since the terms and circumstances of two wills are seldom identical it must, however, be stressed that rule of thumb invocation of precedent is more likely to frustrate than to further implementation of a testator's wishes.

**Extrinsic Evidence**

The court in construing a testamentary writing has the duty to ascertain and give effect to the testator's intention. This intention, however, must be deduced from the language of the deed itself 68 read in the light of those circumstances which were known to the testator and which he may therefore be presumed to have had in mind when he drew up his will.69 It is not legitimate to call evidence to establish *ex aliunde* what the testator considered was the meaning of his will,70 while whether the court may take into consideration the terms of revoked writings as an aid to construction remains an open question.71 In rare cases the courts may be willing to read words into or ignore words in a will if the will as a whole discloses an intention which would be frustrated if such words were not added or ignored. This unusual step may be taken more readily if the testament is holograph of the testator prepared without professional advice.

Discussing the fundamental principles of legal construction as applied to testamentary writings, Lord Carmont stressed an important distinction which may be quoted at length.72 "The difference between saying that the court does not allow parole evidence to show what a testator intended, but that it does allow, in suitable cases, investigation by parole into what the words used by the testator were intended to mean, although fine, is a very real one. In the latter case a testamentary writing is being construed to find the testator's true testamentary intention from the written words he has used, whereas in the former case an individual's intention as expressed in terms of parole evidence would be set up as testamentary. This latter position would simply mean that an individual's testamentary intention might be expressed without a testament and that would be contrary to all our established principles. There is no doubt that certain investigations are usually allowable, as to the state of the testator's family and the surrounding

71 Ibid., at p. 32.
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circumstances of the making of the will. This is often absolutely necessary for the proper understanding of the will, and it has been for generations accepted that proper exposition of a testament requires that the interpreting court should be put, as it were, into the testator's chair and given an outlook based on his knowledge—his actual proven knowledge, with its actual limitations so far as known. But in so doing the courts have always been astute to guard against attempts to introduce parole evidence as to what the testator intended under guise of evidence of the surrounding circumstances. The most subtle way, I think, to pass from the proper investigation of a testator's meaning into the realm of his intention is by presenting the case as one of latent ambiguity so that advantage can be taken of the special rules which take investigation into the realm of proof of the testator's intention."

A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense. Where there is nothing in the context of the will from which it is apparent that the testator used words in a sense other than their strict or primary meaning, but if the words thus interpreted are meaningless with reference to extrinsic circumstances, the courts may examine these circumstances to ascertain whether the words are sensible in a secondary or popular sense. The situations in which extrinsic evidence is admitted in explanation of testamentary writings has been classified by Lord McLaren,\(^73\) who relied substantially on Wigram on the Admissibility of Evidence. These categories may be noted briefly.

(a) For the purpose of enabling the court to read a will

For this purpose the court may require the will to be transcribed into legible characters or to be translated from a foreign language; and may receive evidence regarding the meaning of terms of art or rules of foreign law relevant for interpretation of the will.

(b) For the purpose of identifying the Persons, Institutions or Things named in the Will

If an ambiguity is patent on the face of the document it can be solved only by interpreting the language of the will read as a whole, and if no clear meaning can be deduced, the will will fail for uncertainty. Where, however, the ambiguity is latent, extrinsic evidence may be admitted, and in this connection the maxim falsa demonstratio non nocet is frequently invoked. Thus when a legacy was bequeathed \(^74\) to

\(^{73}\) Wills and Succession, Vol. I, Chap. 20.
\(^{74}\) Keiller v. Thomson's Trs. (1826) 4 S. 724.
William Keiller, confectioner, Dundee, and there was in fact no such person, evidence was admitted to determine whether the legatee intended was William Keiller, confectioner of Montrose, or James Keiller, confectioner in Dundee. Again, when residue had been gifted to the children of "General Alexander Fairlie Bruce," and, like the celebrated John Doe "there was no such person," extrinsic evidence of a letter of instructions to the testator's solicitors was admitted to identify the beneficiaries contemplated.75 Evidence of statements made by a testator as to his intention is not, however, admitted except in the restricted type of case where the description of a legatee or of the thing bequeathed is equally applicable to two persons or to two things.

Where it is alleged that the testator has used words which accurately describe one beneficiary, but in fact he contemplated another, it is more difficult to invoke extrinsic evidence to explain ambiguity. Thus in Nasmyth's Trs. v. National Society for Prevention of Cruelty to Children76 it was contended that, though the testator, a Scotsman, had left a legacy to a society thus designated (which claimed the legacy) in fact he had intended to benefit the "Scottish National Society for Prevention of Cruelty to Children." The House of Lords held in favour of the English society on the grounds that where there is "an accurate description of one person and a description which is admittedly not quite accurate of the other, you must have positive evidence of some cogent sort to make you prefer the latter to the former." Lord Dunedin stressed,77 however, that it would not suffice to say "so long as you had an accurate description of one person, and that accurate description did not exactly fit in its terms another person, no ambiguity could arise. I do not think that is the law."

Ambiguity may likewise arise in connection with the subject-matter of a legacy—as if a man bequeathes his car to his son, but at the time of death owns a Jaguar and a Morris Minor. Words of comprehensive meaning may also have to be construed to ascertain what a person in the testator's circumstances intended.78 Thus a gift of "stock" would receive a different interpretation according as to whether the testator was a merchant, a farmer, or the holder of securities.

(c) Where the words of the Will are insensible with reference to Extrinsic Circumstances

When the testator's language, construed in its strict and primary sense is insensible with reference to extrinsic circumstances, it may

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75 Cathcart's Trs. v. Bruce, 1923 S.L.T. 722.
76 1914 S.C.(H.L.) 76.
77 At p. 82.
78 Thus expressions such as "belongings" and "money" have been given very extended meaning in appropriate cases, e.g., Lawson's Ex. v. Lawson, 1958 S.L.T. (Notes) 38; and a gift of "money" has been held even to carry heritage, Fraser's Ex. v. Fraser's C.B., 1931 S.C. 530.
be construed in a secondary or popular sense. A testator is presumed to contemplate real persons and things rather than to perpetrate a post-mortem prank at the expense of his executors. Thus if a legacy is left to the “children” of A, and it is shewn that he had no child but had a grandchild at the date of the will, it may be inferred that the latter was the intended legatee. Again, though the expression “children” is usually construed to exclude illegitimate children, where it appears that the testator was aware that his gift to “children” of a particular person could only receive effect if illegitimate children were included, his language will be construed accordingly.

(d) Proof of the Testator's knowledge of Facts Material to the Construction of his Will

Wherever facts of family history, or facts connected with identification of objects or the estate which the testator possessed or professed to dispose of are competently before the court, it would seem that evidence of the testator’s knowledge of these facts is also competent. A leading example concerns legatum rei alienae. If a person purports to bequeath a subject which in fact does not belong to him, the validity of the bequest depends on his knowledge. When the testator believed erroneously that he owned the subject bequeathed, the gift will fail. Unless the contrary is proved, it will be presumed that the testator laboured under error. When, however, it can be shown that the testator knew that the subject-matter of the legacy in fact belonged to a third party, his bequest will be construed as a direction to the executors to acquire the subject for the legatee, or, if it cannot be purchased, to pay its value to him.

(e) Evidence in Disproof of the Presumption against Double Provisions

There is a presumption, which may be displaced by evidence, that a person intends all his testamentary writings to receive effect. Thus if two legacies of the same amount are left to a beneficiary in separate testamentary documents, both will usually be payable. When, however, more than one legacy is left to a beneficiary in one deed, there is a presumption, if these legacies are of the same amount, that the testator through forgetfulness has merely repeated the original gift. Accordingly, unless the will itself makes the intention clear or unless extrinsic evidence displaces the presumption, the legacies will not be construed as cumulative. Where the legacies, whether contained

79 Ranken (1870) 8 M. 878; cf. Stewart’s Trs. v. Whistlewy, 1926 S.C. 701.
80 Scott’s Trs. v. Smart, 1954 S.C. 12; nor adopted children unless the contrary intention appears. Hay v. Duthie’s Trs., 1956 S.C. 511; Adoption Act, 1958 (7 & 8 Eliz. 2, c. 5), s. 18 (2).
81 Erskine III,9,10; Meeres v. Dowell’s Ex., 1923 S.L.T. 184.
in one or more testamentary documents are different in amount, they are construed, not as substitutional, but as cumulative.88

(f) To establish Whether Deed represents Last Will of Testator

Extrinsic evidence is also admitted to establish whether or not a deed in fact represents the last will of a testator. Thus there may be doubt as to whether a holograph writing is to be regarded as a will or merely as instructions or notes for preparation of a will in futuro.84 Again, when a testamentary document has been destroyed or obliterated, extrinsic evidence is admissible to shew whether this was done animo revocandi or by accident.85 In the latter case, it will be competent to set up a will by an action of proving of the tenor.

CLASS GIFTS—DESCRIPTION AND DISTRIBUTION

Though the intention of the testator in selecting legatees, if clearly expressed, must always prevail, the courts have often had to construe the meaning of gifts to a class. As Lord Justice-Clerk Thomson observed86 “A testator may give his own meaning to the words which he uses. His will becomes the dictionary from which the meaning of terms used in it is to be ascertained. If he clearly shows that he used words which ordinarily have a technical meaning in a non-technical sense, the courts will accept the meaning which the testator has given to the words.” Thus, though the expression “next-of-kin” has a technical meaning which would exclude the mother and maternal relatives, a testator may use these words effectively in a non-technical sense so as to include maternal relatives.87 A gift to “issue” of a person prima facie includes not only his children but remoter direct descendants,88 though the context may exclude this broad meaning. A gift to “children” does not usually include grand-children89 nor illegitimate children,90 while, unless the contrary intention appears, adopted children cannot claim to participate.91 A gift to “heirs” infers the heir-in-law so far as heritage is involved; and the heirs in mobilibus so far as the estate bequeathed consists of

85 Fotheringham’s Tr. v. Reid, 1936 S.C. 831.
87 Ibid.
88 Stewart’s Trs. v. Whitelaw, 1926 S.C. 701; Turner’s Trs. v. Turner (1897) 24 R. 619; Boyd’s Tr. v. Shaw, 1958 S.C. 115, esp. per L.P. Clyde at p. 120; and contrast Murray’s Trs. v. Mackie, 1959 S.L.T. 129 with Stirling’s Trs. v. Legal & General Ass. Soc., 1957 S.L.T. 73.
89 Adam’s Ex. v. Maxwell, 1921 S.C. 418; cf. Lindsay’s Trs. v. Lindsay, 1954 S.L.T. (Notes) 51.
90 Scott’s Trs. v. Smart, 1954 S.C. 12.
91 Adoption Act, 1958 (7 & 8 Eliz. 2, c. 5), s. 18 (2); Hay v. Duthie’s Trs., 1956 S.C. 511.
moveables.92 The expression "heirs" includes heirs who are given the right of representation under the Intestate Moveable Succession (Scotland) Act, 185593; but they have no claim if the gift was to the "next-of-kin."94 A bequest in favour of the "heirs or next-of-kin" of a testator is usually construed to benefit only those living at the date of his death.95

When a bequest is left to a number of individuals, and the testator is silent as to how they are to share it, the presumption is that they take equally. If, however, they are called as members of a class—as a bequest to the children of A and the children of B—there may be doubt as to whether they are called as individuals (per capita) or as qualifying through the class (per stirpes). If A has two children and B has three, if the division is per capita each child will take one-fifth; if division is per stirpes, each of A's children will take a quarter and each of B's one-sixth of the bequest. The presumption is in favour of per capita distribution.96 A stirpital construction has, however, been preferred when a bequest was made by a testator of the residue of his estate to be "equally divided between his nephews and nieces and their children."97 Moreover, since the word "issue" indicates that those called are to represent their parents, a destination over to "issue" equally among them has been construed to imply distribution per stirpes.98

When a testator has bequeathed a legacy to a class, this factor, unless he clearly directs otherwise, restricts the effect of words of severance in the gift. In the case of joint legacies to two or more persons the share which would have been payable to a beneficiary had he lived to take a vested interest, passes after his death to the survivors by the doctrine of accretion,99 and such survivors, unless the contrary is provided, will take such share free of conditions imposed by the original gift. If, however, the testator has used words of severance such as "equally" or "share and share alike" or "divide amongst," accretion is excluded except in the case of class gifts and the gift of a predeceasing beneficiary falls into residue or lapses. Lord President Inglis laid down the general rule as follows, "When a legacy is given to a plurality of persons named or sufficiently described for

92 Grant's Trs. v. Simion, 1925 S.C. 261.
93 18 & 19 Vict. c. 23.
98 Stair III, 827; Andrew's Exors. v. Andrew's Trs., 1925 S.C. 844.
identification 'equally among them,' or 'in equal shares,' or 'share and share alike' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue or a sum of fixed amount or corporeal moveables. The application of this rule may, of course, be controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees."

In the case of gifts to a class, the law presumes that the principle of accretion will apply, despite the use of words of severance such as "equally among them" or "equally among my whole children." As Lord President Normand (as he then was) observed in McDonald's Trs. v. McDonald's Ex.,2 where the latter formula was used, "I construe the codicil . . . as making a bequest to the class indicated, with accretion in favour of those who survive if one of their number predeceases the period when payment of a particular surplus falls to be made. Since it is a gift to a class, the direction to divide among the whole children equally does not prevent accretion."

**CONDITIONAL INSTITUTION AND SUBSTITUTION**

When a destination-over is attached to a gift—such as "to A, whom failing, to B," or "to A or B," it is necessary to ascertain whether B is a "conditional institute" or a "substitute." The person first called in a destination of property is the "institute"—in the present case A. A "substitute" is one who will take after the institute on the latter's death, unless the destination is not by that time defeated. Thus, if B is a substitute, his expectation of succeeding is not frustrated merely by A acquiring a right to the property—though A himself can, on acquiring right, dispose of the gift and defeat the substitution; or, if the subject is a corporeal moveable, substitution will be defeated by its coming into A's possession.3 On the other hand, if B is a "conditional institute," he can only take in place of A, and once A, the institute, has acquired a right, the destination-over to B flies off.4 A "conditional institute" is one called as an alternate to the institute in such terms that, if the institute survives the granter, the conditional institute can never take, irrespective of the actings of the institute.

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3 *Robertson v. Hay Boyd,* 1928 S.C.(H.L.) 8, at p. 13; but see also as to the effect of a clause of return.

A “substitution” includes a “conditional institution,” so that if A never acquires right to the gift, though B’s right is construed as that of substitute, he will take the gift as conditional institute. There is a strong presumption against substitution in moveables, while, in the case of heritage, the presumption is in favour of substitution.5

Conditio si Institutus sine Liberis Decesserit

In some cases a condition is grafted by construction onto a gift to a legatee so as to benefit his issue, though unnamed. This is known as the conditio si institutus sine liberis decesserit. If the testator has left a bequest to his descendants, or—as in the case of an uncle providing for nephews or nieces or their descendants—has made a settlement such as a parent might make for them and is thus deemed to have placed himself in loco parentis to them, then, though the legatee may die without acquiring a vested interest, his issue may take the legacy in preference to a conditional institute, residuary legatee or heirs ab intestato of the testator.

In the leading case of Knox’s Ex. v. Knox,6 Lord President Normand explained the evolution of the law as follows—“The conditio si institutus sine liberis decesserit originally applied only to bequests in favour of direct descendants. It is an equitable exception to the rule of strict construction, and it proceeds upon the assumption that, where a provision is made by a parent in favour of a child or grandchild without mention of the legatee’s issue, the testator has overlooked the contingency of the death of the legatee before vesting, leaving issue. On this assumption the issue are given the benefit of an implied conditional institution. The equity was artificially extended to bequests in favour of collaterals, and it may be questioned whether the extension was justified either in principle or by expediency . . . the conditio applies only to the testator’s direct descendants or to his nephews and nieces and their descendants, and . . . no extension beyond this should be allowed. This limited extension to collaterals rests on the notion that an uncle or aunt may assume a parental relationship towards nephews and nieces or their descendants, and, therefore, that such bequests may be construed in accordance with the same rules, and may be subject to the same implications, as those which apply to bequests to direct descendants. Accordingly, when collaterals claim the benefit of the equity, it may be a crucial question whether the testator had assumed a parental relationship towards the legatee. The question whether the provision is of the nature of a family provision is a separate question from this, and although the two questions are

5 Watson v. Giffen (1884) 11 R. 444.
so closely connected that in many cases the answer to both depends on the same considerations, it is the question whether the testator had assumed a parental relationship to the legatee that has occasioned the greater difficulty."

Though the degrees of relationship which will justify invocation of the *conditio* have been settled, the courts have shown increasing readiness to imply the *conditio* when a recognised relationship is established. Thus the beneficiaries, who need not constitute the whole class of nephews and nieces, may in fact be called *nominatim* provided that there is no decisive element of *delectus personae*; the settlement need not be universal nor wholly a family provision; while a testator making provision for nephews and nieces will seemingly be regarded as acting *in loco parentis* unless he clearly indicates that his bequest was made, not on account of relationship, but from personal favour to selected legatees. The onus of establishing that the testator or settlor did not act *in loco parentis* rests upon those who oppose the application of the *conditio*.

It may be observed that in *Mitchell's Ex. v. Gordon's Factor*, Lord President Cooper reserved his opinion as to whether the *conditio* could apply in any case where the institute had not predeceased the testator. His Lordship indicated several grounds, however, upon which he would have been unwilling to apply the *conditio* in these circumstances. Professor Candlish Henderson, however, who speaks with special authority in this field of the law, has written forcibly against this opinion, and has cited cogent precedents in support of his own view.

**VESTING**

It is of great importance to ascertain when a legacy "vests"—that is when the legatee acquires right to it—since from that date it becomes his property, and on his death it will form part of his estate. The time of vesting does not necessarily coincide with the date when the beneficiary under a will is actually entitled to payment or possession of the legacy. The time of vesting depends upon the presumed intention of the testator as disclosed in his will, and this is the overriding principle to which other presumptions and rules are subordinate. When a testator has expressly declared the date at which a legacy is to vest, this will usually receive effect, though even in such a case the court may disregard it if it cannot be reconciled with the terms

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8 1953 S.C. 176, at pp. 182-183.
of the bequest. Moreover, the courts are not favourably disposed towards artificial vesting dates. Most of the litigation concerning questions of vesting has resulted, however, from doubt or alleged doubt as to the date of vesting intended by a testator, and in solving such questions the courts have developed certain rules or presumptions. The treatise on vesting by Professor Candlish Henderson has done much to clarify this branch of the law, and must indeed be perused in any serious study of the problems involved. Within the compass of the present book it is possible to state only the leading principles. It is not possible to deal with the many fine distinctions which have been made in numerous reported decisions.

First, it may be observed that if a testator has purported to dispose of his whole estate, the courts favour whenever possible a construction which would avoid total or partial intestacy. Another presumption, which has several aspects, is in favour of early vesting. The earliest possible date for vesting is that on which the will takes effect—in short \textit{a morte testatoris}. As Lord Colonsay observed in the leading case of \textit{Carleton v. Thomson}, "It is \textit{quaestio voluntatis}. That is the cardinal rule and guide. The task of discovering the testator's intentions is sometimes perplexing, and in such cases aid may to some extent be derived from the application of general rules or presumptions. . . . The general rule of law as to bequest is, that the right of fee given vests \textit{a morte testatoris}. That rule holds although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual \textit{nominatim} or to a class." On the other hand, if the testator provides for a destination-over which in terms refers to a date later than his own death—as on the expiry or termination of a liferent—this will be construed as a direction to postpone vesting until that time. Even renunciation by the liferenter does not (unless the testator so desired) accelerate the date of vesting, since the act of third parties cannot \textit{per se} alter the trustee's dispositions.


13 (1867) 5 M. (H.L.) 151, at pp. 153–154. Even power to encroach on capital need not postpone vesting.


15 \textit{Muirhead v. Muirhead} (1890) 17 R. (H.L.) 45, per Lord Watson at p. 50. Should the liferenter renounce, the income released falls to be accumulated until the vesting date: \textit{Ross's Trs. v. Ross} (1894) 21 R. 927; \textit{Middleton's Trs. v. Middleton}, supra.
When a bequest is left to members of a class, such as the children of a specified person, the presumption is that only those members of the class who were in existence at the time appointed for payment are entitled to participate. Thus if a legacy has been bequeathed simply "to the children of X" and there is nothing in the will which would postpone the time of vesting or payment, the bequest will take effect on the testator’s death. Accordingly, only those of X’s children alive or in utero at the date of the testator’s death are entitled to participate—to the exclusion of children who may be born subsequently. Similarly if the legacy is to X in liferent and the children of Y in fee, the beneficiaries will be those children alive or in utero at the date of X’s death, such date being the date of payment. In certain cases, however, as is explained presently, there may be immediate vesting subject to defeasance although payment is postponed. This doctrine is practically confined to those cases where the contingency is the emergence of issue of the liferenter or legatee—as in a gift to X in liferent and to his children in fee. Thus vesting is not postponed, but all the children born prior to the death of the liferenter are entitled to share. If there are children in life at the date of the testator’s death, these will acquire a vested right subject to partial defeasance to secure equality of distribution among members of the class born subsequently. If X has no children at the time of the testator’s death, the first child born to him thereafter will likewise take a vested right subject to partial defeasance if he has younger brothers or sisters.

The presumption that always exists in favour of immediate vesting has been applied even when the possibility of the gift taking effect at all depended on a liferentrix being survived by issue. In Hickling’s Trs. v. Garland’s Trs., trustees were directed to divide a capital sum amongst the issue of a testator’s daughter in the event of the daughter “leaving lawful issue.” The daughter was survived by two of her children and was predeceased by two others. The House of Lords held by a bare majority, reversing the Court of Session, that, although the gift to the daughter’s issue was contingent on her leaving issue, it was not limited to the issue who survived her, and that the contingent right vested at the testator’s death in the issue as a class, including all the children then alive. Accordingly those representing the respective estates of the deceased’s predeceasing children were entitled to participate in the distribution. It may be observed, however, that the subsequent trend of decisions has been to restrict the application of

10 Hayward’s Exors. v. Young (1895) 22 R. 757; Stopford Blair’s Exors. v. Heron Maxwell’s Trs. (1872) 10 M. 760; Cox’s Trs. v. Cox, 1950 S.C. 171.
11 Hickling’s Trs. v. Garland’s Trs. (1898) 1 F.(H.L.) 7; Murray’s Tr. v. Murray, 1919 S.C. 552; Scott’s Trs. v. Scott, 1909 S.C. 773; Wood v. Wood (1861) 23 D. 338.
12 Supra, note 17.
this case; and where the courts can construe the testator's intention to imply that vesting in a class shall not take place until the death of a liferenter—as may be inferred from a clause of survivorship—they are disposed to do so. Thus, where a gift contained a destination-over in the event of failure of issue to survive the liferenter, vesting was held to be postponed. Lord Dundas distinguishing Hickling's Trustees observed, "Upon a question of intention and construction such as this, a copious reference to authority tends, I am afraid, to complicate rather than elucidate a solution of the problem."

In the case of a bequest to children as a class, payable as and when they respectively achieve majority, the subject vests when the first of the class reaches majority. On the principle that "the only way in which the matter can be worked out is by holding that the class of beneficiaries is to be determined at the time when the first payment comes to be made," children born after that time have been excluded from participation. The law on this matter cannot be regarded as finally settled.

**Vesting of Conditional Bequest**

When a bequest is given unconditionally, vesting takes place forthwith, even though the time of payment may be postponed until a time comes or an event, which must happen, takes place—such as the death of a specified person. Here in civilian terminology dies cedit sed non venit. When payment of the gift depends on the occurrence of an event which may never happen, such as A marrying, the legacy is regarded as conditional since dies incertus pro conditione habetur. Accordingly dies nec cedit nec venit nisi conditio exititer—the gift neither vests nor is prestable until the condition is purified.

A legacy which depends upon the occurrence of an uncertain event is known as a conditional legacy. Suspensive conditions, which depend upon factors personal to the legatee—such as attaining majority or survivorship—usually postpone vesting until the occurrence of the stipulated uncertain event. On the other hand, resolutive conditions (which are not personal to the legatee) do not postpone vesting, but make vesting liable to defeasance if the uncertain event contemplated by the testator takes place. The same bequest may be affected both by a suspensive and by a resolutive condition. In such a case, until the personal condition is purified, there cannot be vesting of the gift, but, after purification, it may vest subject to defeasance.

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21 But see Henderson on Vesting, 2nd ed., at p. 199.
22 Moss's Tr. v. Moss's Trs., 1958 S.C. 501, esp. per L.J.C. Thomson at p. 509.
23 e.g., Taylor v. Gilbert's Trs. (1878) 5 R.(H.L.) 217. In this case, a personal or suspensive condition (i.e., attaining majority or marriage) was attached to the gift, but it was also subject to defeasance.
If the personal condition adjoined to the gift requires the prospective beneficiary to achieve majority or to survive a particular event, the gift fails unless the condition is purified. If, however, a testator directs that a legacy shall be paid to a legatee when he attains majority, vesting takes place forthwith and payment only is postponed because that condition relates only to the time of payment.\(^\text{24}\) Words of survivorship are normally construed according to the time appointed for distribution.\(^\text{25}\) Accordingly, if distribution is to take place at the testator’s death, those prospective beneficiaries who survive him will take a vested right. On the other hand, when a testator directs that division shall take place among the survivors of a number of persons after the expiration of a liferent or occurrence of some other event then there is vesting only in those who survive that date. When, however, a conditional institute is called, then should the prospective legatee, namely the institute, fail to survive the date of distribution—such as the termination of a liferent—the gift vests after the institute’s death in the conditional institute, even though the latter may fail to survive the liferenter. Conversely, if the bequest is by way of substitution, the conditions regarding survivorship apply also to the person called after the legatee first instituted.\(^\text{26}\)

**Vesting Subject to Defeasance**

Although, as Lord Justice-Clerk Thomson has observed,\(^\text{27}\) “sporadic illustrations of the operation of the doctrine of vesting subject to defeasance” are encountered in Scots law prior to 1878, the real reception of vesting subject to defeasance as elaborated in English practice dates from that time. He also commented that “The doctrine has had a rather mixed reception and there has been a marked tendency to limit the sphere of its activities.” However, it has the tenacity of tares among the wheat, and as Professor G. L. F. Henry has concluded,\(^\text{28}\) “It is not to be anticipated that any future reform of the law of Scotland will embrace the abolition of this long established principle, but there will be unanimous endorsement of the opinion uttered frankly in and out of court that it is not readily to be extended. One would like the word ‘readily’ omitted from this pious hope.”

The doctrine turns upon the distinction between conditions personal to the legatee, which suspend vesting, and resolutive

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\(^{24}\) *Alves’ Trs. v. Grant* (1874) 1 R. 969.

\(^{25}\) *Young v. Robertson* (1862) 4 Macq. 314; *Playfair’s Trs. v. Stewart’s Trs.*, 1960 S.L.T. 351.

\(^{26}\) *Robertson’s Trs. v. Mitchell*, 1930 S.C. 970.

\(^{27}\) *Moss’s Tr. v. Moss’s Trs.*, 1958 S.C. 501, at p. 508.

\(^{28}\) (1959) *Conveyancing Rev.* 173 at p. 178. This article, which was written before *Moss’s Tr.* was decided, contains a valuable analysis of the law.
Vesting

conditions, which do not. Though there are rare cases which do not depend upon the birth of possible issue, the law of vesting subject to defeasance can be summarised in the proposition that, if there is nothing to stop vesting but the birth of possible issue to the liferenter or legatee, vesting will take place a morte testatoris subject to defeasance if issue are born. Lord Kyllachy concluded that it is "an established rule of construction that a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition."

There are three types of cases in which the application of the doctrine is now definitely recognised:

(1) *Executors Directed to hold a Fund for A with the Provision that if he predeceases the Expiry of a Liferent or other Event leaving Issue, such Issue shall take.*

A will take a vested right, subject to defeasance, if he predeceases the event and leaves issue. If he does not so predecease (whether he has issue or not) or if he predeceases but does not leave issue, his right is not defeated. The only event on which divestiture of his right takes place is if he does predecease and is survived by issue.

(2) *To A in Liferent and Issue in Fee and failing Issue of A, then to B in Fee.*

If A has no issue at the testator's death, then B takes a vested right subject to defeasance if A subsequently has issue.

Should A never have issue, B's right is treated as having been from the first absolute, and it matters not that he predeceases the liferenter.

On the other hand, if the bequest to A's issue comes into effect, B's right is wholly defeated.

(3) *To A with a subsequent Direction to Executors to hold for him in Liferent and his Issue in Fee.*

The fee will remain with A as an initial gift if he has no issue; but the doctrine does not apply if on the construction of the deed it appears that nothing more than a liferent was in any circumstances given to A.

In all these cases there is this common feature, that the legatee's interest is liable to be defeated only by the contingency that there may be issue born to the liferenter or legatee.

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29 e.g., Yule's Trs. v. Deans, 1919 S.C. 570; Coulson's Trs. v. Coulson's Trs., 1911 S.C. 881.
30 Wylie's Trs. v. Wylie (1906) 8 F. 617 at p. 619.
31 Allan's Trs. v. Allan, 1918 S.C. 164; Gibson's Trs. v. Gibson, 1925 S.C. 477.
33 Tweeddale's Trs. v. Tweeddale (1905) 8 F. 264; Livingston's Trs. v. Livingston's Trs., 1939 S.C.(H.L.) 17.
Until the leading case of Moss's Trs., it had been generally supposed on the basis of certain dicta that the doctrine of vesting subject to defeasance would be excluded if vesting depended upon a “double contingency.” This expression had, however, been used in an ambiguous sense. In the instant case, a testator had directed his trustees to pay the income of residue to his three daughters, and ultimately to distribute the capital to the daughters’ issue per stirpes, and should there be no such issue, then to his own heirs. After two of the daughters had died without issue and none had been born to the third daughter, a petition for directions was presented to the court to ascertain the time at which the residue vested. It was trite law that had the contingency upon which vesting in the heirs depended been the birth of issue to one daughter, then the doctrine of vesting subject to defeasance would have applied. The court rejected the contention that the possibility of issue emerging to any of the three liferentrices was a threefold contingency. It was held that there was only one single contingency—the emergence of issue to daughters—though this contingency had three possible aspects. Accordingly vesting in the heirs had taken place a morte testatoris, subject to defeasance in the event of issue being born to any of the liferentrices. The Lord Justice-Clerk, however, went further, observing and concurring in a view expressed by Lord Normand in an earlier case, that it was not necessarily fatal to the application of the presumption in favour of early vesting that the testator had introduced more than one resolutive condition.

It seems clear, however, that if a legatee’s own right is subject to a destination-over to a stranger, vesting will be postponed—as if the gift were “to A in liferent and his issue in fee, whom failing to B or C.” Again a “double contingency” in the sense of Lees’ Trs., as explained in Moss’s Trs., will postpone vesting. The present state of the law has been admirably condensed by Professor Henry as follows:

“To sum up, by example, the rules discussed regarding contingencies and their effect on vesting subject to defeasance:

34 Supra.
36 At pp. 510-511.
37 In G.’s Trs. v. G., supra.
38 Lees’ Trs. was expressly reaffirmed in Nicolson’s Trs. v. Nicolson, 1960 S.C. 186.
39 (1959) Conveyancing Rev. at p. 177. A minor amendment to the fifth illustration has been made on the learned author’s suggestion; and a sixth illustration has been omitted, as it might be debated at length. The essence of vesting subject to defeasance is that the importing of issue into a destination does not postpone vesting, but the importation of issue will not enable vesting to take place where it would otherwise not have done so. This can be tested by considering the destination after deleting the reference to issue, and this test might on one view create difficulties regarding the example omitted. In this field of law dogmatic pronouncements are dangerous, and the author has preferred to reserve his opinion.
"To A in liferent and his issue in fee, whom failing to B—a single contingency allowing vesting subject to defeasance in B.

"To A in liferent and his issue in fee, whom failing to B if he attains 21 years—suspended vesting in B until he comes of age and then vesting subject to defeasance.

"To A in liferent and his issue in fee, whom failing to B—a double contingency but affecting only issue called before the legatee, C, in whom there is vesting subject to defeasance.

"To A in liferent and his issue in fee, whom failing to B, whom failing to C—a double contingency affecting C, who cannot claim to be vested subject to defeasance.

"To A in liferent and his issue in fee, whom failing to B or his issue—allows vesting subject to defeasance in B."

POWERS OF APPOINTMENT

A power or faculty is an authority reserved by or conferred upon a person to dispose, either wholly or partially, of property either for his own benefit or for that of others. If the power be general, the donee thereof may dispose of the property as he chooses; a special power is subject to limitations, as when the donee may appoint a fund among members of a specified class.40

If a person settles his property, or takes a disposition, in favour of himself in liferent and at the same time reserves to himself a general power of disposing of the property, this is regarded as equivalent to a fee. His right to the property does not depend on the settlement or disposition, and if he reserves to himself the enjoyment of the liferent and the power to dispose of the property at pleasure, he exercises the rights of a proprietor.41

When a power is conferred upon another the donee of the power is owner of the property if the power be general.42 If, however, a liferent is given together with a power of disposal, this cannot be regarded as a gift of the fee unless both the liferent and the power are given in unqualified terms.43 Thus, if the liferent is declared to be alimentary, whatever may be the extent of the power, or, although the liferent be unqualified, if the power is to be exercised in a particular manner, as by will or mortis causa deed only, or if there is a destination-over,44 the donee of the power is not in right of the fee of the property.

42 Pursell v. Elder (1865) 3 M. (H.L.) 59, esp. per Lord Westbury L.C. at p. 68.
43 Rattray's Trs. v. Rattray (1899) 1 F. 510; Mackenzie's Trs. v. Kilmarnock's Trs., 1909 S.C. 472.
45 Howe's Trs. v. Howe's Judicial Factor (1903) 5 F. 1099.
A power must be exercised in accordance with the terms in which it is conferred. If these prescribe that the power shall be exercised by will, it cannot be exercised by an *inter vivos* deed.\(^{46}\) In interpreting a power there is no presumption that the objects should be the persons who would take failing its exercise.\(^{47}\) A deed exercising a power need not expressly refer to it and if there is no such reference, it becomes a question of construction as to whether the donee intended to exercise the power.\(^{48}\) In this connection, words of general conveyance in a settlement are, unless a contrary intention appears, to be construed as including any estate over which the testator possessed power to appoint "in any manner he may think proper."\(^{49}\)

In the leading case of *Hyslop v. Maxwell's Trs.*\(^{50}\) a testator gave a power to his niece, who enjoyed an annuity under his will, to dispose of the sum securing the annuity by will or other deed after her death as she might think fit. This power was held to be exercised by her general settlement although it made no reference to the power and was executed before the death of the testator. The power in this case was a general one, but though doubt has been expressed as to whether a special power is exercised by a general settlement which does not notice the power or purport to include property subject to disposal by the testator,\(^{51}\) the law is probably settled in favour of its exercise.\(^{52}\)

The purported exercise of a power may be challenged on the grounds that it is a "fraud on the power" or is *ultra vires*.\(^{53}\)

The term "fraud" in this context (which is a term of art derived from English law) does not imply *dolus*, but that the appointer has exercised the power conferred on him for a purpose, or with an intention, beyond the scope of, or not justified by, the deed creating the power.\(^{54}\) Thus, it is a fraudulent exercise if the donee of a special power makes an appointment with the intention of benefiting himself or some other person who is not an object of the power; or if the fund subject to the special power is appointed wholly to one object of the power in consequence of a bribe. Again, as was decided in the

\(^{46}\) The words "any writing under her hand" have been held wide enough to include an *inter vivos* deed, though distribution was to be after the donee's death, *Stirling's Trs. v. Legal & Gen. Ass.*, 1957 S.L.T. 73; and, though the power may refer to the donee's death, this does not necessarily restrict him to choosing among his survivors; *Stainton v. Forteviot Trust*, 1948 S.C.(H.L.) 115.

\(^{47}\) *Stainton v. Forteviot Trust*, supra.

\(^{48}\) *Smart v. Smart*, 1926 S.C. 392.

\(^{49}\) *Bray v. Bruce's Exors.* (1906) 8 F. 1078; *Cameron v. Mackie* (1833) 7 W. & S. 106, per Lord Brougham at p. 141.

\(^{50}\) (1834) 12 S. 413.

\(^{51}\) *Alexander's Trs. v. Alexander's Trs.*, 1917 S.C. 654; but see *Tarratt's Trs. v. Hastings* (1904) 6 F. 968.


\(^{55}\) *Dick's Trs. v. Cameron*, 1907 S.C. 1018.
leading case of Smith-Cuninghame v. Anstruther's Trs.,59 a parent
cannot in exercising a power appointing a fund among his children
bargain with them for the purchase by him of other interests belonging
to them.

Appointments in fraud of a power are in general void, but if the
exercise of a power is only partially invalid, this is not fatal to an
appointment which the appointer would have made in any event,
even had he been aware of the invalidity of the rest.57 Where the
invalid exercise of a power is an integral part affecting the whole,
the invalid part may destroy the validity of the whole appointment.
Invalid conditions may be regarded as pro non scripto. The position
is summarised in McDonald v. McDonald's Trs.58: "If you cannot
disconnect that which is imposed by way of condition or mode of
enjoyment from a gift, the gift itself may be found to be involved
in conditions so much beyond the power that it becomes void. But
where that is not so, where you have a gift to an object of the power,
and where you have nothing alleged to invalidate that gift but
conditions which are attempted to be imposed as to the mode in which
that object of the power is to enjoy what is given to him, then the
gift may be valid and take effect without reference to those conditions."
When a power has been conferred to apportion a fund among a class
the Powers of Appointment Act, 1874,39 provides that it shall not be
an objection to the exercise that certain members of the class are
omitted or receive only illusory shares. It is competent to appoint
the whole of the fund to one of the class, but in so far as the exercise
purports to give any share of the fund to one who is not a member
of the class it is bad.60 The donee of a power, however, may bind
himself not to exclude an object or to reduce his share below a specified
amount.

The existence of a power of appointment over a fund bequeathed
to a class does not suspend vesting in the members of the class.61
These take a right to an equal share of the fund, which may be
defeated in whole or in part by an exercise of the power. If, however,
it is not exercised, or if the exercise is wholly invalid, the members
of the class remain vested in equal shares of the fund. Since, as is
usual, the donee of a power of appointment is not bound to exercise

55 (1872) 10 M.(H.L.) 39. In this case there is a full discussion of the effect of a
parent bargaining with his child; see also M'Donald v. M'Grigor (1874) 1 R. 817.
57 Coats' Trs. v. Tillinghast, 1944 S.C. 466; Middleton's Trs. v. Borwick, 1947 S.C.
517; Cathcart's J.F. v. Stewart, 1948 S.C. 456; MacLaren's Trs. v. Wilkie, 1948
58 (1875) 2 R.(H.L.) 125, esp. per Lord Cairns L.C. at p. 132.
59 37 & 38 Vict. c. 37. This act was repealed quoad England by 15 & 16 Geo. 5,
c. 20, and is unfortunately omitted from the third edition of Statutes Revised.
Comment is superfluous.
60 Mounbray's Trs. v. Mounbray, 1929 S.C. 254.
61 Romanes v. Riddell (1865) 3 M. 348.
it, the donee may renounce it in whole or part. When a liferentrix was also donee of a power over the fee, she was held to be entitled to renounce both with the result that the fee vested in the objects in terms of the deed creating the power.\(^6\)

### Classification of Legacies

Legacies are usually classified as **General**, **Special** and **Demonstrative**.\(^6\) A legacy is general if it bequeaths a sum of money or a quantity of articles described generically, and may be contrasted with a special legacy where the subject is a determinate article such as a watch or a picture. A special legacy takes effect as a *mortis causa* assignation to the legatee who may, accordingly, claim it from any person possessing it at the death of the testator.\(^6\) A demonstrative legacy is one in which the testator has indicated that it should be paid, if possible, from a particular source or fund.\(^6\) Nevertheless, as is considered in connection with abatement, a person to whom a demonstrative legacy is bequeathed may claim against the general estate, should the specified fund have disappeared or prove insufficient.

Where it is alleged that a condition or *modus* has been annexed to a legacy bequeathed to a beneficiary, this must be established by clear language. Words which would create a precatory trust sufficient to bind an executor will not suffice if the estate is left, not to an executor, but to a beneficiary.\(^6\)

### Ademption of Legacies

If the subject of a specific legacy perishes or is disposed of by a testator before his death, it is regarded as “adeemed,” and the legatee takes neither the legacy nor its value unless a contrary intention is expressed. The doctrine of ademption both in Scotland and England was originally derived from the Roman law, where it was a clear principle of jurisprudence, being a form of revocation requiring proof of the testator’s intention to revoke.\(^6\) In English law, however, it was eventually decided that proof of intention to revoke was to be disregarded, and an objective test alone was applied—namely, whether the testator at the time of his death owned the subject of the legacy—though perhaps in a different shape. In a series of Scottish cases in which the Roman law and English law were alike misunderstood

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\(^6\) *Erskine, ibid.* The executor must be called in such an action.
\(^6\) *Douglas’s Exors.* (1869) 7 M. 504.
and the latter was imitated, it was held that the element of *animus adimendi* was to be ignored.88 This result provoked Lord Justice-Clerk Moncreiff to expostulate at the result to which he was compelled by authority to submit. After expounding the position in Roman law, he observed 89: "Now, it seems to me that that exposition of the judicial rule is founded on the clearest grounds of equity and justice. In the English cases, however, it has been decided that the intention of the testator is to be disregarded and this view seems to have been followed in this court, and very notably so in the cases of *Pagan*70 and *Chalmers*.71 I can only say that these decisions appear to me to be utterly at variance with any principle of jurisprudence. To my mind the intention of the testator should be the sole rule. We are bound, however, by these judgments."

The present law is summarised by Lord President Clyde in *Ogilvie-Forbes's Trs. v. Ogilvie-Forbes* 72:

"In the law of Scotland the ademption of legacies is a species of revocation by legal implication, and operates in the case of special legacies. . . . Moreover it is now well settled that, in determining whether the doctrine applies or not, any consideration of *animus adimendi* is irrelevant (*M'Arthur's Exors. v. Guild*, per the Lord President at p. 746). The test is an objective one, and the doctrine can operate either in a case where the change in regard to the subject-matter of the legacy has taken place owing to the actings of the testator himself (*Tennant's Trs. v. Tennant*74) or where that change is due to causes independent of the actings or *animus* of the testator altogether (*Macfarlane's Trs. v. Macfarlane* 75). On the facts of these two cases it was held that ademption did not operate, but the test for its operation was treated as the same in both. . . . "The question is, whether a testator has at the time of his death the same thing existing, it may be in a different shape—yet substantially the same thing."

In the case under consideration the First Division held that there had been ademption when, after making *inter alia* certain bequests to his daughter of liferent occupation of and income from "my lands and estate of Boyndlie," the testator had subsequently sold this estate to a private company in which he held 14,700 of the 15,000 shares. Ownership of the property had passed to a different *persona* and holding shares in the company could not be regarded as "having the same thing in different shape."

Ademption by act of the testator may result from his alienation of the subject-matter—as if he realises an investment specially

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88 Ibid.
89 Ibid. at p. 1111.
70 (1838) 16 S. 383.
71 (1851) 14 D. 57.
72 1955 S.C. 405 at pp. 410-411, adopting the criterion formulated in *Oakes v. Oakes* (1852) 9 Hare 666.
73 Supra.
74 1946 S.C. 420.
75 1910 S.C. 325.
bequeathed or if, when the legacy is a sum of money in a particular bank, he transfers the money to another bank. Ademption may, however, result from destruction of the subject or by actings of others, as if a debt due to and bequeathed by him is repaid, or if land is taken under compulsory powers. Alteration by a company of the designation or form of shares specifically bequeathed does not, however, adeem the legacy if the subject remains substantially the same at the testator's death.

It would seem that, though Scots law has been heavily influenced by English doctrine on the subject of ademption, and has accordingly surrendered certain principles of Roman law, in one respect at least the solutions of Scots law and English law conflict. In Roman law, which Scots law followed, property did not pass by contract, and thus before delivery the object of the agreement remained part of the estate of the vendor. In English law it has been held that a contract of sale entered into after the date of a will and binding on the testator at his death is sufficient to cause ademption. In Scotland the converse would seem to be true, and mere agreement would not operate ademption. In short, unless there is passing of legal title inter vivos, a special legacy is not adeemed though the testator had agreed to sell it. This view seems to be supported by the decisions, though the rationes decidendi could be formulated more narrowly.

**Abatement**

Should a testator's estate prove insufficient for the satisfaction of all legacies bequeathed by him, the order in which they must abate is important. Unless the testator has directed otherwise, residuary legatees take nothing until prior legacies have been settled in full; and, as between prior legatees special legatees come first, they must be satisfied in full, though this should exhaust the estate, leaving nothing for general legatees. General legacies abate pari passu. Demonstrative legacies partake of the nature of general legacies in that, if necessary, they will be paid out of the general estate, yet they resemble special legacies in that they do not abate with general legacies until the fund indicated by the testator is exhausted.

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76 Anderson v. Thomson (1877) 4 R. 1101.
78 Maclean v. Maclean's Ex., 1908 S.C. 838.
79 Chalmers v. Chalmers (1851) 14 D. 57.
The doctrine of Approbate and Reprobate in Scottish law is equivalent to the doctrine of Election in English law. No person can accept and reject the same instrument.83 Thus beneficiaries who claim to take provisions under a will cannot at the same time challenge as invalid a testatrix’s appointment of a fund to others so as to benefit from that fund in default of valid appointment.84 For the doctrine of approbate and reprobate to operate, however, a person must have a free choice and be fully informed as to the rights available to him. He must have been put to election by the will itself, so that his choice will give legal effect to the purposes of the will, and that which he has chosen must not be liable to challenge by third parties.85 The associated doctrine of forfeiture and equitable compensation arises when a spouse or child claims legal rights against the provisions of a will. If the will does not expressly provide that the provision given to a surviving spouse or child shall be in full of legal rights, or that forfeiture of benefits under the will shall be the consequence of a claim for *legitim* or *jus relictae* (or *jus relictii*), then a beneficiary under the will who claims legal rights forfeits the express provision in his favour but only to the extent required to restore to the estate what was taken out to satisfy the claim of legal rights.86 This is the doctrine of equitable compensation. Where, however, a provision in a will is expressly stated to be in full of legal rights, any beneficiary who claims legal rights surrenders all benefit under the conventional provisions of the will.87 Where there is a clause of forfeiture confiscating a provision made in favour of a person or other related beneficiary, then if that person shall in defiance of the will claim legal rights, this clause will only come into operation so as to bar the rights conferred by the will on the issue provided that at the time the will takes effect, there are in existence beneficiaries (other than the claimants of legal rights and their issue) who would benefit by such forfeiture.88 In effect, children cannot in such circumstances, by claiming legal rights, deliberately create intestacy forfeiting the rights of their own issue and thus take the whole estate themselves.89

83 Ker v. Wauchope (1819) 1 Bligh 1; Crum Ewing’s Trs. v. Bayly’s Trs., 1911 S.C. (H.L.) 18.
87 Rose’s Trs. v. Rose, 1916 S.C. 827.
88 Gillies v. Gillies’ Trs. (1881) 8 R. 505; Hannah’s Trs. v. Hannah, 1924 S.C. 494.
89 Macnaughton v. Macnaughton’s Trs., 1954 S.C. 312.
Where, on the other hand, the forfeiture is not conditional on the existence of persons who would benefit by destination-over, if the will were to be challenged, then children may, by claiming legal rights, bring into operation the clause forfeiting conventional provisions made in favour of their issue—and, as a result, may share the estate in the resulting intestacy.\(^{90}\)

In Nicolson's Trs. v. Nicolson\(^ {91} \) there was no express forfeiture clause, but merely a clause stating that the conventional provision was to be in full satisfaction of legal rights. It was held that though the testator's son by electing to take legal rights forfeited all claims on his own account, nevertheless this did not involve forfeiture of a separate liferent provision in favour of his widow. The Lord President in this case analysed and summarised the effect of various types of forfeiture clause in common use.\(^ {92}\)

The Mackintosh Committee recommended\(^ {93} \) that the doctrine of equitable compensation should be abolished, and that in all wills containing provisions for the testator's wife or children, the law should imply a condition that these provisions are in full of legal rights—so that the question would become one of approbate and reprobate.

**Donation Mortis Causa**

The institution of *donatio mortis causa* in Roman law was the foundation of the Scottish law, though the scope and rules in the two systems are not identical. A valid donation *mortis causa*, which is very similar to a legacy in effect, may be proved by parole evidence. Such a donation has been defined\(^ {94} \) as a "conveyance of an immovable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the grantor so long as he lives, subject to his power of revocation, and, failing such revocation, then for the grantee on the death of the grantor." Actual delivery is, however, not indispensable in every case\(^ {95} \)—provided there is proof of intention to donate.\(^ {96} \) The onus of providing *animus*

\(^{90}\) Tindall's Trs. v. Tindall, 1933 S.C. 419; Walker v. Orr's Trs., 1957 S.L.T.(Notes) 41—the executors of a deceased widow may claim *jus relictae*, if children's claims of *legitimit* intestacy consequent on forfeiture.

\(^{91}\) 1960 S.C. 186.

\(^{92}\) At pp. 192–193.

\(^{93}\) (1951) Cmd. 8144, para. 19.

\(^{94}\) Morris v. Riddick (1867) 5 M. 1036 at p. 1041.


\(^{96}\) Macpherson's Ex. v. Mackay, supra.
Donation mortis causa always rests on the party who claims as donee. Though the gift must have been made in contemplation of death, the granter need not have regarded his demise as imminent.\(^9\)

Donation mortis causa confers forthwith on the donee a qualified ownership in the subject-matter of the gift. Not only is it revocable during the lifetime of the donor, but it fails also should the donee predecease the granter.\(^8\) Accordingly it is only on the death of the latter that the right of the receiver of the gift becomes effectual. Before that time creditors of the granter are preferred to the donee; after the donor's death the gift is liable for his debts if there is a deficiency of funds for their payment and the legal rights of a surviving spouse or children are not affected by the donation.\(^1\)

As was made clear in the leading case of Morris v. Riddick,\(^2\) donatio mortis causa differs from legacy in the method by which it can be proved, and is preferable to all legacies. On the other hand it resembles legacy in that it is revocable before death, is liable for the deceased's debts and is subject to estate duty.

Special mention may be made of donation through the means of deposit receipts, since certain specialties affect such documents.\(^3\) As Lord Rutherford Clark observed in Crosbie's Trs. v. Wright,\(^4\) where the deceased had taken a deposit receipt in the names of himself, his sister and brother-in-law "to be paid to any, or survivor or survivors, of them," "Deposit receipts do not operate as wills or contain operative destinations. It is difficult to distinguish such documents and ordinary personal declarations which do receive effect. But it is not necessary to inquire into this, for the court has refused to give to these the same effect as to heritable titles, moveable bonds or titles to shares. The document alone, therefore, is not sufficient to entitle the defenders to prevail." Such a document is not conclusive as to the ownership of money, but merely gives the holder a right to demand payment from the bank. Its terms \(^5\) "may prove nothing more than this, that the true owner has deposited money under an arrangement with someone, by which that party, it may be the wife or child or agent of the depositor, is empowered to uplift the money." Nevertheless, it is competent to prove that the money in the bank represented by the receipt has been validly donated inter vivos or

\(^9\) Ibid.; see also Blyth v. Curle (1885) 12 R. 674.

\(^8\) Morris v. Riddick (1867) 5 M. 1036; L.A. v. Galloway (1884) 11 R. 541.

\(^9\) Bankton 1, 9, 18.

\(^1\) Morris v. Riddick, supra.

\(^2\) Ibid.

\(^3\) See discussion by D. G. Antonio, "Mortis Causa or Inter Vivos Donation?" 1954 S.L.T.(News) 121.


\(^5\) Anderson v. North of Scotland Bank (1901) 4 F. 49, per Lord M'Laren at p. 54.
mortis causa to a donee. In Crosbie’s Trs. donation mortis causa was held to be sufficiently proved, though the deposit receipt had not been delivered to the surviving sister and brother-in-law, and the terms in which it had been taken (though not in themselves conclusive) were held to be “a very important article of evidence” as to whether a gift mortis causa could be inferred. Where the fact of gift was not itself in dispute deposit receipts in “either or survivor” form have been held to constitute valid gifts inter vivos. In Lord Advocate v. King the Inland Revenue claimed duty on gifts partly evidenced by deposit receipts in these terms, contending that they operated only mortis causa. The donee, however, asserted successfully that the gifts operated inter vivos, and, having been made outwith the five-year period preceding the donor’s death, were not liable to duty. It is thought, however, that this decision, which raises a number of consequential difficulties and cannot easily be reconciled with other authorities, will not father a principle for general application.

6 (1880) 7 R. 823.
7 Supra.
CHAPTER 16

EXECUTORS

In pre-Reformation times suits concerning wills and intestate succession in moveables were handled in the Courts of the Officials administering the general Canon law and such specifically Scottish canons as had been enacted.¹ These courts were swept away at the Reformation. By Royal Charter of Queen Mary of February 5, 1563, a Commissary Court was set up in Edinburgh to exercise the jurisdiction formerly vested in the Officials, and inferior Commissaries were established throughout Scotland with jurisdiction in the confirmation of testaments. Until the early nineteenth century, the Commissaries in Edinburgh entertained most litigation concerning succession, either as court of first instance or as an intermediate appellate court under the Court of Session. The ministerial powers of the inferior Commissary Courts were, however, transferred to the sheriffs acting as Commissaries in 1823,² except, for the time being, the inferior commissary jurisdiction of the Commissary Court of Edinburgh; but in 1836 that jurisdiction also was vested in the Sheriff of Edinburgh. In 1876³ the Commissary Courts of the sheriffs were abolished and the ministerial powers of confirmation were vested in the sheriffs as such.⁴

An executor is the person who has the legal title to uplift and ingather the moveable estate of a deceased person and to distribute it to the persons entitled thereto. Since the whole moveable estate passed to the executor, and there was danger that he might fail to distribute it according to the intention of the deceased, the Act, 1617, c. 14,⁵ was passed "anent executors," obliging them to account to the wife, children and nearest of kin for the goods of the deceased, but granting to the executor for his pains a third of the dead's part. This right was abolished by the Intestate Moveable Succession (Scotland) Act, 1855, s. 8, and accordingly the executor now receives no remuneration for his services qua executor.

² By the Act 4 Geo. 4, c. 97.
³ By 39 & 40 Vict. c. 70, s. 35.
⁵ A.P.S. IV, 545, c. 14; see also Smith, Studies Critical & Comparative, p. 200 et seq.
The Office of Executor

The office of executor may differ in theory from that of trustee. The executor's primary duty is to realise and distribute the estate of the deceased, while that of the trustee is to hold and administer it for the purposes of the trust. A testator, however, usually appoints his trustees to be his executors as well; the Executors (Scotland) Act, 1900, s. 2, provides that, unless otherwise provided, all executors nominated shall have the same powers and restrictions as gratuitous trustees have; and by the Trusts (Scotland) Act, 1921, s. 2, the expression "trustee" includes an executor-nominate. Accordingly it can rarely be relevant to distinguish between the office of executor and that of trustee.

An executor derives his authority either from appointment by the deceased or from the decree of the commissary judge. Application is made to the court of the sheriffdom in which the deceased was domiciled, or if he had no fixed domicile in Scotland, to the Sheriff Court in Edinburgh as forum commune. An executor who is appointed expressly or by implication by the deceased is known as an "executor-nominate." Executors-nominate comprise not only persons specifically appointed as executors, but also testamentary trustees, nominated, assumed or appointed by the court, or failing these, any general disponee, or universal or residuary legatee. Failing such appointment, or on the failure of such appointment, an executor—known as an "executor-dative"—is appointed by decerniture of the sheriff on application by relatives of the deceased or by persons directly interested in the estate. All persons having an equal right in the estate are entitled to be conjoined in the office of executor. The order of preference observed in appointing an executor-dative is as follows: (1) Next-of-kin, whom failing representatives of next-of-kin who have died after the deceased; when the father or mother of a deceased have a right to share in the estate, they rank pari passu with the next-of-kin; (2) the surviving spouse; (3) children or descendants of persons who, had they survived the deceased, would have been next-of-kin; (4) creditors; (5) special

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7 63 & 64 Vict, c. 55.
9 11 & 12 Geo. 5, c. 58.
10 Executors (Scotland) Act, 1900, s. 3.
11 Currie, Confirmation, p. 80; Gloag & Henderson, 6th ed., p. 57. Opinion has been reserved as to whether, in considering appointment to the office of executor, the court should consider the capacity or incapacity of an applicant—Crolla Petr., 1942 S.C. 21.
12 Currie, op. cit., pp. 85-86. Though a surviving spouse entitled to jus relictæ (relictis) is entitled to the office of executor, his or her claim is normally postponed to that of the next-of-kin of the deceased. See, however, note 24, infra.
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legatees; (6) a judicial factor; (7) the procurator fiscal—though this is very rare. If the total value of an estate does not exceed £5,000 and there are no issue, the surviving spouse of an intestate leaving such estate is entitled to claim the sole right to confirmation as executor- (executrix)- dative.13 If no executor-nominate or executor-dative is appointed to the estate as a whole, then a creditor of the deceased may be confirmed as executor-creditor to as much of the estate as will enable him to make good his debt. Confirmation as executor-creditor, which is in effect a form of diligence, is available only to a creditor whose debt has been constituted during the lifetime of the deceased. If this has not been done (during the lifetime of the deceased) the creditor’s remedy is to charge the next-of-kin to confirm. They are then free to renounce the succession within twenty days, and, if they fail to do so, become liable as vitious intromitters for the debt. If they do renounce, the creditor may constitute his debt against the hereditas jacens and then obtain confirmation as executor-creditor.14

Confirmation

Appointment of a person as executor confers merely a personal title; it does not in itself give him authority to deal effectively with the estate. He has title to sue under the personal right he acquires on appointment, but subject always to obtaining confirmation to the debt before extract of the decree is granted. An unconfirmed executor has no title to discharge a debt and a debtor who pays to an unconfirmed executor may be compelled to pay another creditor.15 To acquire full authority and complete his real right the executor must obtain “confirmation,” that is he must obtain from the sheriff a decree authorising him to uplift, receive, administer and dispose of the estate, and to act in the office of executor. It has been pointed out that confirmation in Scotland is of an administrative and tentative nature.16 The effect of confirmation is merely to give a title to the executor to administer the estate of the deceased, and he is liable to have the will set aside at a future time.17 The sheriff as commissary judge merely decides who, according to the will or relationship, is entitled to the office of executor.18 A confirmation of an executor-nominate is called a confirmation of a “testament-testamentar”; confirmation of an

14 Erskine, III, 9, 34, 35. Moreover, a creditor or other person interested in the succession may petition for the appointment of a judicial factor where a deceased has not appointed persons willing or able to manage his estate. Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. 5, c. 20), s. 163.
15 Buchanan v. Royal Bank of Scotland (1842) 5 D. 211.
16 See refs. Currie, Confirmation, pp. 4–6; also Smart v. Smart, 1926 S.C. 392.
18 Martin v. Ferguson’s Trs. (1892) 19 R. 474.
executor-dative is described as confirmation of a “testament-dative.” Caution—that is security—is required of executors other than executors-nominate, and all executors are required to give in on oath a full inventory of the moveable estate known to have belonged to the deceased on which estate duty is payable.\(^{19}\) Except in the case of an executor-creditor, confirmation of part only of the moveable estate of a deceased person is not permitted; but if part of the estate is omitted or undervalued through error this may later be confirmed by “an eik,” while a creditor or other person interested may, where estate is omitted from an executor’s confirmation, apply for confirmation thereto *ad omissa vel male appretiata.* If there has been no fraud on the part of the original executor the property which had been omitted will be added by the sheriff to the original confirmation.

Executry does not descend to heirs, and where one executor alone is appointed the office dies with him; but if more than one is appointed, the office accresces to the survivors. Where a sole or last-surviving trustee or executor-nominate dies holding funds in Scotland, his executor-nominate may confirm,\(^{20}\) but, in other cases where confirmation becomes ineffective by death or disability of executors to whom it had been granted, no title transmits to their representatives. Confirmation *ad non executa* may, however, be obtained by creditors or other parties interested in the estate to complete the administration.\(^{21}\)

**Small Estates**

Special provision is made by statute for grants of representation in the case of small estates. By the Small Estates (Representation) Act, 1961,\(^{22}\) s. 1, amending the Intestate Widows and Children (Scotland) Act, 1875,\(^{23}\) and the Small Testate Estates (Scotland) Act, 1876,\(^{24}\) it is provided that, when the net estate does not exceed £1,000 and the gross estate is less than £3,000, then, if the deceased owning such estate died after April 10, 1946, application for a grant of representation may be made to a customs officer under the Customs and Inland Revenue Act, 1881,\(^{25}\) or to the sheriff clerk.

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\(^{19}\) Property outside Scotland must be included, though confirmation *per se* will not give title to recover property beyond the jurisdiction of the Scottish courts. The confirmation may, however, be resealed in the probate courts of England and Ireland to receive effect there: Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), ss. 9–14; Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), ss. 41, 42; Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 168. Certification of grants of probate made in England and Northern Ireland may, under these Acts, be made in Scotland—but see Baines’s *Ex. v. Clark,* 1957 S.C. 342.

\(^{20}\) Executors (Scotland) Act, 1900 (63 & 64 Vict. c. 55), s. 6.

\(^{21}\) Ibid. s. 7.

\(^{22}\) 9 & 10 Eliz. 2, c. 37.

\(^{23}\) 38 & 39 Vict. c. 41.

\(^{24}\) 39 & 40 Vict. c. 24.

\(^{25}\) 44 & 45 Vict. c. 12.
Duties of Executors

The first duty of an executor is to ingather the estate shown on the inventory so as to be in a position to pay the debts of the deceased, and thereafter his duty is to pay the balance to the persons entitled. A debtor cannot in general safely pay a debt due to a deceased except to his executor duly confirmed. Towards the creditors of the deceased an executor stands in the shoes of the deceased; he is eadem persona cum defuncto, and has vested in him the moveable estate under burden of the debts owed by the deceased. By confirmation he acquires passive representation limited to the value of the estate confirmed. He does not, however, acquire any liability beyond the estate which is delivered to him to administer, nor is he a trustee for the creditors.

At common law creditors of the estate gained preference according to the priority of their diligence against the estate after the debtor’s death, on the basis of the brocard qui prior est tempore potior est jure. This led to injustice in cases where creditors, being at a distance or for other good reasons, were later in learning of the death of the debtor than creditors who lived close at hand and had done diligence immediately. Therefore, by an Act of Sederunt of February 28, 1662, re-enacting a law passed during Cromwell’s Usurpation, it was provided that all creditors who used legal diligence (anglicé “execution”) within six months of the debtor’s death by citing executors, or by being themselves confirmed executor-creditors, were entitled to pari passu preference with those who had used more timely diligence. Accordingly, an executor cannot be compelled to make payment of a debt until after the expiry of six months from the date of the deceased’s death, nor is he in safety to do so unless he is certain that the estate is solvent. Certain privileged debts may, however, be paid—such as deathbed and funeral expenses, mournings, rates and taxes, and servants’ wages. After six months have expired the executor may pay creditors primis venientibus, and will not be liable if creditors appear to make claims of which the executor had no knowledge, after the executor has distributed all the estate. In cases of doubt the executor may require the creditor to constitute his debt by decree. While the executor retains funds in his hands he may be sued by creditors, but if he has distributed all the estate in good faith after the six months’ period, in ignorance of further claims, the remedy of the creditor who comes late must be against the gratuitous beneficiaries, if any—

26 Buchanan v. Royal Bank of Scotland (1843) 5 D. 211; as to the rare cases where an heir or residuary legatee may have title to sue, see Morrison v. Morrison’s Ex., 1912 S.C. 892. Normally, if the executor declines to sue, a legatee may require the former to grant the use of his name, provided he is indemnified against the risk of expenses.
28 Erskine, III, 9, 41; Bell’s Principles, § 1916.
29 Erskine, ibid.
If, however, the executor has reason to believe that the estate is insolvent, he would be at fault in distributing *primo venienti* even after six months. Moreover, an executor is not entitled to pay away the estate to beneficiaries in the knowledge of outstanding debts, and, if the claims of creditors cannot be met eventually because of such distribution, the executors will be personally liable. Thus in *Heritable Securities Investment Association v. Miller's Trs.*,\(^3^1\) testamentary trustees were held liable in the following circumstances. The testator, when he died in 1876, was debtor to the pursuers for the balance on two personal bonds for £40,000 and £15,000 respectively. Payment was secured by certain heritable properties which were believed to be of considerable value, and the pursuers agreed to disburden part thereof. The remaining property subsequently diminished greatly in value, but meanwhile, in the belief that the pursuers' debt was well secured, the trustees paid away large sums to the beneficiaries. Ultimately, when the heritable security had proved inadequate to meet the debt owing to the pursuers, they sued the trustees on the personal bond. The trustees were held personally liable for distributing the estate to the beneficiaries, while aware of the pursuers' claim on the estate. Lord President Robertson observed\(^3^2\): "Suppose an estate of £50,000 and a debt of £5,000 amply secured and not payable till ten years after the death, and of which the creditor cannot be forced to take payment till then, is the execution of the trust, it is asked, to be paralysed and nothing to be allowed to be given to beneficiaries until the creditor is satisfied? My answer is, that the rule is peremptory and applies to that case, and if the trustees choose to part with any portion of the estate, they do it at their peril." Creditors may, of course, expressly or by implication consent to attach their claim to a specific security, and, if it diminishes in value, cannot then look to the executors for payment of the balance.

After the claims of creditors have been met, the executor must account for the remainder of the estate to those who are entitled to it, and is subject to general fiduciary duties such as are applicable to trustees.

Though at present the executor as such has vested in him only the moveable estate of an intestate, if effect is given to the recommendations of the Mackintosh Committee on Succession,\(^3^3\) heritable property will also vest in one or more executor-dative. Even at the present time it appears that an executor to whom there is no conveyance in a will can nevertheless regard himself as having a title to the heritage, by virtue of the Conveyancing (Scotland) Act, 1924.

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\(^{30}\) (1871) 9 M. 810; Stair, III, 8.70, and see Erskine, III, 9, 46.

\(^{31}\) (1893) 20 R. 675.

\(^{32}\) At p. 694.

\(^{33}\) s. 9.
s. 5 (1) and the Conveyancing (Scotland) Act, 1874, s. 46. This view is founded upon the fact that the former section provides that any deed on which a notarial instrument can be expede may be used as a link in title, while by the latter section a notarial instrument can be expede on a will appointing an executor, even though there is no trust conveyance in the will.

**VITIOUS INTROMISSION**

"The only passive title in moveables is vitious intromission, which consists in apprehending the possession of, or using, any moveable goods belonging to the deceased unwarrantably, or without the order of law." If any person other than the duly authorised executor presumes to meddle with the estate of a deceased, he may be subjected to liability to pay all the debts owed by the deceased. The reason for imposing this liability, as Erskine explains, is that those who are in the house of a deceased have special opportunities of carrying off moveable estate unwarrantably. Formerly the rule was applied strictly, as in Archibald v. Lawson; Scott v. Belhaven and in Cunningham and Bell v. McKirdy; though, in more recent times, the court has not usually imposed the full penalty of universal liability, but, after investigation of the circumstances, has restricted liability to the amount of the intromission—Wilson v. Taylor. If the intromitter had a probable title, even though legally imperfect—as if a general disponee without confirmation interfered with the estate—he would escape universal liability. Moreover, necessary intromission by the widow or next-of-kin, for the sake of preserving the estate on behalf of all persons interested, will not infer liability at all. If, after intermeddling with the deceased’s goods, the intromitter obtains confirmation before action is brought against him, or within a year and a day, this purges the wrongfulness of his actings. The remedy against vitious intromitters was introduced for the benefit of creditors and savours of delict. The heirs of the intromitter are liable only if lucrati. Liability of joint vitious intromitters is in solidum, and each may be such without calling the others—though the intromitter who pays the debt may claim relief from them.

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34 Erskine, III, 9, 49—"passive title" is contrasted with "active title" since it infers liability only.
35 (1705) Mor. 9829.
36 (1821) 1 S. 30.
37 (1827) 5 S. 315.
40 Erskine, III, 9, 52. It is not, however, sufficient to confirm as executor-creditor: ibid.
41 Erskine, III, 9, 54–55.
Part 3

PRIVATE LAW

D

Law of Property
CHAPTER 17

REAL RIGHTS OVER PROPERTY

The nature of Real Rights has already been discussed\(^1\) in the context of General Legal Principles. Such rights have as their immediate object some *res*, corporeal or incorporeal, and can be vindicated against any person who interferes with their enjoyment. In this they differ from Personal Rights created by Obligation which can be asserted only against the debtor.

Ownership, "Property" or *dominium* is the most extensive of real rights which can be exercised over a *res*, the owner being, subject to important qualifications, free to enjoy it and dispose of it at will. Possession alone of a real right depends upon a state of fact, the law in many circumstances giving protection to the possessor as if he were owner without requiring him to prove title if exercise of his right is interfered with by persons other than the true owner. Other real rights known as *jura in re aliena* may be exercised over a *res* belonging to another and even against his will. Such rights may contemplate some use of the *res* itself, as in the case of servitudes or registered leases. Again, *jura in re aliena* may be "rights in security," such as pledge or hypothec, which are designed to reinforce obligations such as the contracts of lease or loan and thus provide a point of contact between real and personal rights.

"Ownership" or "Property"

The term "property" is used by Scottish writers both to denote the most extensive right which the law recognises over heritage and moveables—namely, "ownership"—and also as meaning the subjects of ownership. Stair\(^2\) contrasts "dominion" or "property" with the personal right of obligation. Dominion, a real right, is a power of disposal of things in their substance, fruits or use; obligation, a personal right, "is a power of exacting from persons that which is due." Of property (meaning ownership) Erskine states,\(^3\) "The sovereign or primary real right is that of property: which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction." The qualifications imposed by law on the free exercise of the rights of ownership are today much more extensive.

\(^1\) At pp. 279-280.
\(^2\) II, 1, pr.
\(^3\) II, 1, 1.
than in the late eighteenth century. Apart from questions of lease, trust, servitudes and the law of nuisance, Town and Country Planning Acts⁴ restrict free use of land. Moreover, extensive powers are conferred by statute on public authorities to acquire land for certain purposes against the owner's wishes—as for example, under the Acquisition of Land (Authorisation Procedure) (Scotland) Act, 1947.⁵ By the Agricultural Land (Removal of Surface Soil) Act, 1953,⁶ even the owner of land is forbidden to remove surface soil without planning permission. "Ownership" or "property" in the last resort then is the ultimate residual right to use and dispose of a thing within the limits permitted by law or act of authors in title. The owner is the person who enjoys the residual right when all other lesser rights are excluded.

A full discussion of the theory of ownership is appropriate to a work on analytical jurisprudence. It must, however, be observed that Scottish law has construed in a very liberal sense the Roman rule⁷ duorum quidem in solidum dominium, vel possessionem esse non posse—or as Erskine states it⁸: Duo non possunt esse domini ejusdem rei in solidum. Since Scottish law has not been codified, it has never been confined—especially in questions affecting heritable property—by the concept of autonomous and indivisible ownership as defined by the codes of Justinian and Napoleon. A plurality of persons may own the same property with equal or different rights. Feudal land tenure involves a severance of the dominium directum and the dominium utile. In an article of great interest to Scottish lawyers,⁹ Dr. Vera Bolgár has explained how codification of the Continental systems revived the concept of autonomous and indivisible ownership pronounced by Justinian, but which in the Roman law of the Reception had been set aside. The learned author observes¹⁰:

"These ideas (i.e., the feudal doctrine of estates), at a later date, influenced Grotius to describe ownership as including the possibility for two or more persons to own the same property together with either equal or different rights. His views on complete and incomplete ownership and on feudal tenure as a sum total of legal relations divided into reciprocal rights, duties, and privileges, and not as mere derivatives of unitary power, anticipated the most significant analyses of legal relations in modern times. This tradition of flexible divisibility and duplication in the conception of property was interrupted by the Code Napoléon."

⁵ 10 & 11 Geo. 6, c. 42.
⁶ 1 & 2 Eliz. 2, c. 10.
⁷ Celsus D. 13, 6, 5, 15.
⁸ If, 1, 1.
⁹ "Why No Trusts in the Civil Law" (1953) 2 Am.J.C.L. 204. As will appear, the present author, unlike Dr. Bolgár, considers that Bell's analysis of the Scottish trust is not adequate today. Moreover, though Scots law assimilated certain trust doctrines from English law, trusts were recognised in Scots law long before the period of English influence.
¹⁰ At p. 207.
¹¹ Present author's insertion between brackets.
It is highly significant that those civil law countries, which for historical reasons had remained unaffected by the revolutionary changes introduced by this codification in the field of property relations, upon close contact with the English law, have readily assimilated the trust concept. Such was the case in South Africa and Ceylon, territories of Roman-Dutch law, in the Province of Quebec in Canada, and in Scotland.

In Scotland in short, there has been considerable "fragmentation" of the concept of ownership both in time and in space. Apart from cases where ownership is shared concurrently by several persons, such as heirs portioners, or in relationships such as joint or common property, ownership may be divided between liferenter and fiar or between a line of heirs of entail. Successive rights to property by substitution may be created by destinations over—and (though this is rare) substitutions may affect moveables as well as heritage. Nevertheless, it is in connection with heritable property (including heirship moveables) that fragmentation of ownership is normally encountered. Through the device of the trust, ownership of property may be vested in trustees who are bound to administer it for the benefit of others and have themselves no right to enjoy it. Though the beneficiary's right in Scotland is a jus in personam, and not as in England an "equitable estate," the trust relationship in Scotland could not readily be reconciled with a theory of autonomous and indivisible ownership.

Possession

It is neither necessary nor desirable to examine in detail the relevance to Scottish law of the various theories of possession advanced by legal theorists at different times. The law of Scotland regarding possession is firmly based on Institutional authority. Possession in Scots law is to be distinguished from custody, when one person holds on a conditional or limited right without the animus possidendi: on the other hand, actual physical control—"possession in fact"—is not necessary, since the right of possession recognised by Scottish law may either be "natural possession" or "civil possession." Natural possession exists where the possessor has actual physical control of the subject with the animus possidendi—as when a house is occupied or jewellery is kept in a jewel case at home for wear as occasion requires. Civil possession is possession through another, as where a man continues to possess, though the actual physical control is entrusted to another

12 The Scottish trust, though latterly influenced by English law is, however, indigenous, and trusts were clearly established long before the influence of English law was felt. See post, Chap. 23.
13 See post, Chaps. 23–24.
14 See Stair, II, 1, 17 et seq.; Erskine, II, 1, 20 et seq.; Bankton, II, 1, 26 et seq.; Bell, Principles, § 1311 et seq. But see also Rankine on Landownership, Chap. 1.
such as a servant, factor, depository or representative. Thus a landlord continues in civil possession of a house, though the tenant under a lease has also natural possession for his own interest, and, if a lady lends a necklace to a friend or deposits it at the bank, she still retains civil possession. Thus, though two persons cannot enjoy full possession at the same time, there can be two possessors on different rights.

The right of possession is established by showing the elements of corpus and animus possidendi. The animus or "act of the mind" will only suffice where it is manifested in a sufficient environment of fact—corpus. This aspect of corpus, or "act of the body," involves an inquiry into the relation between the alleged possessor to other competing claimants and also to the res itself. It may be accepted that "that occupation is effective which is sufficient as a rule and for practical purposes to exclude strangers from interference with the occupier's use and enjoyment." This depends very much on evidence of circumstances, as does determination of whether the alleged possessor has established sufficient physical control over the res.

Stair defined possession as "the holding or detaining of any thing by ourselves, or others for our use," and continued:

"To possession there must be an act of the body, which is detention and holding; and an act of the mind, which is the inclination or affection to make use of the thing detained; which being of the mind, is not so easily perceivable, as that of the body; but it is presumed whenever the profit of the detainer may be to make use of the thing detained; but where it may be wrong, or hurtful, it is not presumed."

Stair's examination of the relation between the factors of corpus and animus is instructive. He stresses the necessity of corporal possession to gain the right of possession—though physical detention by itself will not create the right; and proceeds to stress the relatively greater importance, after the right of possession has been acquired, of the "act of the mind." He says indeed, "Possession being once begun, it is continued not only by reiteration of possessory acts, but even by the mind only... so that though the thing once possessed be void as to outward acts, yet it is held as possessed by the mind." This must be read with the following section, however, when Stair, in discussing the circumstances in which possession may be lost, instances cases where possessory acts have been long abstained from—stressing that the presumption is against loss of possession, but conceding that in

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15 It is a question of fact as to whether a husband has retained possession of a house under the Rent Restrictions Acts, and thus if he is in desertion and has no animus revertendi he ceases to possess, and his wife cannot claim to represent him.

16 Pollock and Wright, Possession, p. 13.

17 II, 1, 17.

18 II, 1, 19, and see Lawson v. Heatly, 1962 S.L.T. 53—where a woman was held to be relevantly charged with theft by appropriating a £1 note dropped by a milk roundsman in the street. He had not abandoned animus possidendi.
exceptional cases the matter may rest *in arbitrio judicis*. At all events Stair recognised that the importance of *corpus* or “act of the body” as an element in possession is very substantially diminished after possession has actually been acquired.

As regards the nature of the “act of the mind” or *animus possidendi*, certain observations must be made. Erskine and Bell seem to have held the view that there must be the *animus domini* or *animus sibi habendi*—the intention of the holder to deal with the thing as though it were his own. Stair, in his analysis, referred to “detaining . . . by ourselves, or others for our use.” This seems to ignore the factor of intent to exclude others from possession. Intent to exclude other aspirants to possession on the same right as the holder may now be accepted as of comparable importance to the intention to use.

A further question, which has caused considerable controversy in England, is as to what the *animus possidendi* includes. A general intention to possess is normally sufficient, and a man is held to possess the contents of his house, though he would fail lamentably if he attempted to make an inventory from memory. To what extent can an occupier of heritable property—such as a house or shop—claim the right to possess articles found on his premises, as to the presence of which articles he was in fact ignorant? It is submitted that the occupier of premises is deemed in law to have the intention to possess articles “within the protection of the house,” whether in fact he was aware of their presence or not. In England, this seems to be the general rule as laid down in the line of cases such as *S. Staffordshire Water Co. v. Sharman*; *Elwes v. Brigg Gas Co.*, and *Re Cohen.* Though in these cases the possessor of the ground was held to have the right to possess things found on the ground, a different view was taken in *Bridges v. Hawkesworth* when the finder of banknotes which had apparently been dropped inadvertently in the public part of a shop was held to have a preferable claim to that of the shopkeeper. Though this decision has been strongly criticised by writers of high reputation, it was followed in *Hannah v. Peel*.

There is no authoritative decision on this question in Scottish law, but it is observed that the editor of the tenth edition of Bell’s *Principles* quotes *Bridges v. Hawkesworth* with apparent approval.

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10 II, 1, 20.
20 *Principles*, § 1311.
21 [1896] 2 Q.B. 44.
22 (1886) 33 Ch.D. 562.
23 [1953] Ch. 88.
24 (1851) 21 L.J.Q.B. 75; (1851) 15 Jur. 1079.
27 At § 1291.
and the learned authors and editors of Gloag and Henderson refer to the case without express disapproval. It seems to the present writer, however, that this decision is wrong in principle, is not binding on a Scottish court, and should not be adopted as persuasive authority when a Scottish court has to decide the law applicable to facts in pari materia with Bridges v. Hawkesworth. It seems not unreasonable to conclude that an occupier of premises, by intending to exclude unauthorised interference, exercises the "act of mind" to possess property thereon—even though unaware of its presence—in preference to servants or strangers. In the case of articles left behind inadvertently—as in the case of Bridges v. Hawkesworth, where the banknotes were dropped in the shop—it would also seem consistent with public policy that possession should be given to the person occupying the premises—where the owner would be most likely to seek his lost property. The "protection of the house" would thus avail the true owner in seeking to recover the property, and also the occupier of the premises if the true owner of lost or abandoned property were never found. This view was applied in one Glasgow Sheriff Court case decided in 1921, where sheriff-substitute and sheriff principal concurred in preferring the claims of cab hirers to those of their driver, who had found articles left by customers in the cab which he drove: Corporation of Glasgow v. Northcote. The action had been raised by the custodier of lost property under the Glasgow Police Act, 1866, s. 75, with whom as the Act required (and as the Burgh Police Scotland Act, 1892, s. 412 requires where no local Act operates), lost property must be deposited. If the true owner does not prove his claim within the statutory period (six months under the 1892 Act) the magistrate may award possession to the "finder," a term, it is suggested, which includes restaurant proprietors, shopkeepers and theatre proprietors on whose premises "lost property" is "found." Such property is "within the protection of their premises," and, it is thought, cannot be regarded strictly as "lost" within the meaning of the Police Acts until such time has elapsed as would give reasonable opportunity to the true owner to make inquiries for his property at the place where he left it inadvertently.

It is possibly remarkable that the Scottish courts have not been required to examine the legal consequences of the discovery in a receptacle which has been transferred from one person to another of an article of exceptional value of which neither transferor nor transferee was aware at the time of tradition. In England the "secret drawer in

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29 (1921) 38 Sh.Ct.Rep. 76.
30 29 & 30 Vict. c. cclxiii.
31 55 & 56 Vict. c. 55.
32 Quoad third parties such property is possessed by the proprietors of the premises.
bureau" cases have caused much argument. In one Scottish case, *Dawson v. Muir*, there was some obiter discussion of the problem. Certain vats were sold as they stood for £2. They turned out to contain white lead, said to be worth £300, and the vendor argued that the purchaser was not entitled to the lead. It was held that the purchaser's title was good, though neither party at the time of the sale had been aware of the existence of this quantity of white lead in the vats. The sale had been a slump sale to clear premises, and thus being *per aversionem*, was not comparable with the hypothetical cases, instanced by Lord Cuninghame, where a garment had been sold with a bank-note or voucher in the pocket, or a cabinet had been sold in which a jewel had been left. In such cases it was indicated there would be no sale of the article "given away palpably by mistake." It seems reasonable, however, to assume that the purchaser of the coat or cabinet would acquire possession of the contents subject to the vendor's right in certain circumstances to claim restitution—as if he had given away by mistake an article of value which he had known to be in his possession. The elements both of *corpus* and *animus* would have been sufficiently manifest. But, if the vendor had never been aware of the existence of the article of value unexpectedly found by another in a receptacle transferred to him, it is thought that the right to the possession of it—unless the true owner vindicated his claim—would vest in the purchaser rather than in the vendor. If (say) an old coat were given to a rag merchant, and the transferee were to find a bank-note in the pocket, he would clearly, it is thought, be required by law to treat his find initially as lost property.

**Value to Possessor of his Right**

Unless supported by another right, such as ownership or a right derived from ownership, the right of possession is somewhat precarious, since the possessor may be evicted by someone with better title. The possession of a thief, for example, may be very insecure; but is nevertheless possession in law, since lawfulness is not essential for the acquisition of the right. There are several definite legal advantages which accrue to the possessor. In the first place there is a presumption that the possessor is owner, and an adverse claimant will usually be under burden of proving that he has a better title to the subject-matter. Erskine thus expresses the position:

"Such is the natural connection between property and possession, that in moveables, even where they have had a former owner, the law

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34 (1851) 13 D. 843.
35 At p. 852.
37 II, 1, 24.
presumes the property to be in the possessor; so that, till positive evidence be brought that he is not the right owner, he will be accounted such by the bare effect of his possession, July 26, 1673, *Hamilton.*

A claimant will not succeed merely by proving that he had lost possession; he must also prove that he lost possession in some way which is consistent with retaining the ownership—as if the goods had been stolen or deposited with or lent to the defender. In certain cases, however, as in questions with a carrier who in the course of his business has control of the goods of others, the presumption of ownership rising from possession is virtually eclipsed. A corollary of this presumption is the doctrine of "reputed ownership" which was intended to afford protection to creditors by barring the owners of property from claiming it as against creditors who had been induced to give credit to a mere possessor in the belief that he was owner. Changes in the law have deprived this doctrine of much of its former importance. Today, to invoke the doctrine of personal bar against an owner of property, a creditor of the possessor must show other circumstances than merely that the owner allowed the possessor to remain in control of property.

Again, in questions of heritage, possession may have important practical consequences. A peaceful possessor for seven years has the right to maintain or recover possession by availing himself of the possessory remedies—interdict to defend his possession, and the action of removing to recover lost possession. Some prima facie title must be shewn. If a person possesses heritage in the bona fide but erroneous belief that he is proprietor, he is entitled to claim recompense for improvements made by him on the property before he was ousted. He is permitted, moreover, to retain the fruits severed by him while possessing bona fide; and is not liable for "violent profits"—which may be exacted from an intruder who has not possessed bona fide, on a basis of strict accounting for all the profits which the owner might have made if in possession, and also for any damage caused to the subjects by a wrongful possessor. In conclusion, it may be observed that in the case of possession of subjects which is founded on an "ex facie valid irredeemable title duly recorded in the Register of Sasines," such possession having continued for the full period of the positive prescription, title to the subjects will be fortified, so that possession thus will ripen into ownership. The normal period for the positive prescription is twenty years, but in the case of a servitude, right of

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38 Erskine, *ibid.*
40 And see discussion by Sheriff (now Lord) Guest in *Jute Industries v. Wilson & Graham*, 1955 S.L.T. (Sh.Ct.) 46.
41 See Act 1617, c. 12; *Conveyancing (Scotland)* Act, 1874 (37 & 38 Vict. c. 94); *Conveyancing (Scotland)* Act, 1924 (14 & 15 Geo. 5, c. 27).
42 1924 Act, s. 16.
way, or public right, the period of forty years—which was formerly of general application—is retained. Provided that the title is *ex facie* valid, it appears that a plea of prescription cannot be met with averments that the possessor did not hold bona fide.

**Jura in re aliena**

As has been noted, *jura in re aliena* comprise relationships in which the owner of the subordinate real right is intended to make or restrain some use of the property of another and also relationships where no such use is contemplated but rather the reinforcement of a personal obligation by securing its payment. It will be more convenient to discuss leases and servitudes in the general context of landownership. Delivery of a thing under contract of hire (which is discussed elsewhere) may be thought to create a limited real right, since the hirer is entitled to exclusive possession and enjoyment for the agreed period, and may assert this right at least against creditors of the owner, and perhaps also—which has not been conclusively decided—against singular successors of the owner acquiring in good faith. Some consideration, however, may be given at the present stage to Real Rights in Security. Detailed discussion, however, of such rights affecting land is appropriate to a treatise on Conveyancing, while security in Mercantile transactions is to be more fully considered by Professor Gow in his treatise on Mercantile and Industrial Law which is designed to be complementary to this book.

**General**

A real right in security gives to a creditor, in addition to his contractual right to payment, a *jus in re* over certain specified property of the debtor to enforce payment of his debt. Such a right is to be distinguished from a personal right of security such as cautionry or guarantee. The ultimate test of the validity of a real right is whether on the debtor's bankruptcy, the creditor may satisfy his debt from the subject of security in whole or in part instead of ranking with the unsecured creditors.

In Roman law real securities could be in three forms. In *fiducia* (which was obsolete in Justinian's time), ownership (*dominium*) of the subject given in security was transferred to the creditor subject to the obligation to re-transfer it when the debtor had fulfilled his undertaking. Possession, but not ownership, of the pledge was transferred in the case of *pignus*, while by *hypotheca* a charge could be created over property without transfer either of ownership or of possession to the

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43 Post, Chap. 33.
44 Bell, *Commentaries*, p. 482.
creditor. *Fiducia, pignus* and *hypotheca*, so far as they created real rights, were aspects of the law of property but they were also important institutions in the law of obligations in so far as the relationship between debtor and creditor was regulated by agreement. Though parties were in general free to make their own terms regarding securities, Constantine refused effect to any *lex comissoria* (forfeiture clause) providing that the creditor should become owner of a pledge if the debtor failed to redeem it. All these concepts have their counterpart in modern Scots law.

Real rights in security may be constituted over the whole estate of the debtor, over heritage, over corporeal moveables and over incorporeal moveables. Such rights may be acquired by implication of law, by diligence or by express contract. The general rule, however, is that a real right cannot be created by mere contract, and consequently delivery to and possession by the creditor are essential to complete the security. To this general rule there are, however, exceptions. In a few cases hypothecs are implied by law or may be constituted by agreement. These give an effective charge over property of the debtor though the creditor has not had possession delivered to him. The general attitude of the law of Scotland has been unfavourable to latent charges over property without possession, but commercial and agricultural considerations have justified limited exceptions to the requirements of delivery and possession. Thus, the Companies (Floating Charges) (Scotland) Act, 1961, 45 in effect recognises a statutory form of hypothec or floating charge over the assets of a registered company. Moreover, by the Agricultural Credits (Scotland) Act, 1929, 46 and the Agricultural Marketing Act, 1958, 47 various agricultural charges may be created without delivery. When charges over property without possession are authorised by statute, they are governed by the terms of the relevant statute rather than by the principles of the common law.48

The contract by which a right in security is constituted may take the form either of an *ex facie* conveyance of ownership to the creditor or of a transfer to him of the subject in security. In the former case, since his title is qualified only by a personal obligation to reconvey, the creditor may sell the subject without notice to the debtor; and, though, if carried out in disregard of the debtor's rights and interests, such sale may justify the debtor in bringing a personal action for damages, a bona fide purchaser's right will be beyond challenge. On the other hand, it is settled that the trustee in bankruptcy of a security holder upon an *ex facie* absolute title, is bound to fulfil the latter's

45 9 & 10 Eliz. 2, c. 46.
46 19 & 20 Geo. 5, c. 13.
47 6 & 7 Eliz. 2, c. 47.
48 *Lord Advocate v. Earl of Moray’s Trs.* (1905) 7 F.(H.L.) 116.
obligation to reconvey.\textsuperscript{49} When the creditor holds upon absolute title, his security covers not only the debt for which it was granted but also debts incurred subsequently. Such debts are covered by the creditor’s right of retention, unless this has been limited or excluded by the terms of the contract between the parties or unless the creditor receives notice that the right to reconveyance of the subject is no longer vested in the party who granted the security.\textsuperscript{50} When a subject is expressly transferred in security—as by bond and disposition in security or by pledge—the creditor has no \textit{jus disponendi} as proprietor, and can sell only by virtue of a contractual power or by order of the court. Moreover, such a security covers only the debt for which it was granted, and gives no preference in respect of debts incurred after the date of the grant.\textsuperscript{51}

The law has always recognised that in contracts concluded between debtor and creditor, the latter may be disposed to exploit unduly the exigency of the former. The law of Scotland, unlike the law of Venice, as expounded by Portia, will not enforce every bond according to its terms. In particular, if a subject is given in security—even though in terms an \textit{ex facie} absolute conveyance—the law will refuse effect to any clause which would cut off the right of redemption after the lapse of time and forfeit the subject to the creditor. Unless through operation of the negative prescription “The rule is quite fixed that if a transaction is only a security it cannot be converted into a right of property without a declarator of the extinction of the former proprietor’s right.”\textsuperscript{52} At any time before judicial declaration of extinction of the right to redeem has been pronounced, the debtor may offer payment. Stair thus states the law \textsuperscript{53} “In impignoration either of heritable or moveable rights, the civil law rejected \textit{pactum legis commissoriae}, which we call a clause irritant, whereby it is provided ‘That if the debt be not paid at such a time, the reversion shall be void.’ Our custom doth not reject such clauses . . . yet they are so far disallowed, that though they bear to take effect summarily, without declarator, the clause irritant must be declared, and the lords allow such clauses to be purged by performance before sentence.” Special provision is made for a security holder over lands to become proprietor by judicial decree if, after exposing the lands for sale, no purchaser is found willing to pay a price which would clear the incumbrance or to pay a lower price if exposed for less than the full amount due. The details are regulated by the Heritable Securities (Scotland) Act, 1894, s. 8.\textsuperscript{54} Though the

\textsuperscript{49} \textit{Heritable Reversionary Co. v. Millar} (1892) 19 R.(H.L.) 43.

\textsuperscript{50} \textit{National Bank v. Union Bank} (1886) 14 R.(H.L.) 1; \textit{Callum v. Goldie} (1885) 12 R. 1137; \textit{Anderson’s Tr. v. Somerville} (1899) 36 S.I.R. 833.

\textsuperscript{51} \textit{Colquhoun’s Tr. v. Diack} (1901) 4 F. 358.

\textsuperscript{52} \textit{Smith v. Smith} (1879) 6 R. 794, \textit{per L.P. Inglis} at p. 800.

\textsuperscript{53} J. 13, 14.

\textsuperscript{54} 57 & 58 Vict. c. 44.
right of redemption cannot be excluded by contract, it may be postponed, though not to such a time as would make the right valueless—as by the exhaustion of a lease. In principle, it is suggested, any collateral stipulation in a contract regulating security which would impede the right of redemption cannot be enforced.55

Penalty clauses to enforce punctual payment, if adjudged to contracts regulating the relationship of debtor and creditor, are no more valid than in contractual relationships generally, though indirectly the same result may be achieved by providing that, if the interest due is paid punctually, a lower rate will be acceptable than that stipulated for in the bond.56

Catholic and Secondary Securities

When one creditor has a prior security over two subjects belonging to the debtor, and a second creditor has a postponed security over one of these subjects, the former security holder is termed the catholic and the latter is designated the secondary creditor. If in these circumstances the former elects to obtain payment of his debt by realising the subjects over which the secondary creditor extends he is bound to assign to the latter his security over the other subject.57 If both subjects are realised and the amount is greater than the debt due to the catholic creditor, should the debtor be bankrupt it will be assumed that the catholic creditor exhausted first the subject over which the secondary bond did not extend, and that therefore the secondary creditor in a question with the general creditors of the debtor has a preferable right to the balance of the sum realised from both subjects.58 The secondary creditor cannot, however, directly control the acts of the catholic creditor, and thus cannot object to the latter discharging a bond over subjects not covered by his own security.59 Moreover, the catholic creditor is justified in disregarding the interests of the secondary creditor, provided that he acts in furtherance of his own legitimate interests. Thus if he holds a bond for another debt over the subjects not covered by the secondary creditor's bond, he is entitled, in realising, to exhaust first the subjects covered by the secondary bond, so as to leave the largest possible surplus to meet his own postponed bond.60 Should there be secondary securities over both subjects, then in a question between the secondary bondholders the burden of the catholic bond is to be apportioned rateably, according to the value of each subject, and not according to the dates on which the secondary

55 Cf. Stewart v. Stewart (1899) 1 F. 1158.
57 Bell, Commentaries, II, p. 417.
59 Morton (Liddell's Curator) (1871) 10 M. 292.
60 Preston v. Erskine (1715) Mor. 3376.
bonds were granted.\(^8\) The principle is of general application. Thus in a situation where a catholic bond covered two estates, one of which was burdened with a secondary bond and the other had been sold, on the debtor’s bankruptcy the burden of the catholic bond was held to be apportioned rateably between the secondary creditor on the one estate and the purchaser of the other.\(^8\)

Heritable Securities

There are three ordinary methods of creating a real security over heritable property, namely the bond and disposition in security, in the first place; secondly, the absolute disposition with a back bond stating that it is in reality a security; and thirdly, the real burden. Certain leases may be registered in the Register of Sasines and these may be dealt with as a subject of security very much as if they were rights of absolute property. Leases may be granted as security or, whether registered or unregistered, may be assigned. While the bond and disposition in security consists of a personal obligation to pay the debt and interest and grants land in security, the absolute disposition is ostensibly an out and out conveyance—though the “back letter” given by the creditor qualifies what purports to be his absolute right. The ultimate remedy of a creditor under a bond and disposition in security is to exercise his power of sale after conforming with the prescribed formalities.\(^8\) When the disposition is absolute, the creditor can give good title to a bona fide purchaser, even though his act is fraudulent; since by investing the creditor with the indicia of ownership the debtor cannot challenge rights acquired for onerous cause by third parties from the disponee.\(^8\) Heritable securities must not be for an indefinite amount and the creditor’s real right is dependent upon registration in the Register of Sasines. While the bond and disposition in security clearly confers a \textit{jus in re aliena}, the \textit{ex facie} absolute disposition apparently divests the granter completely of his feudal title and vests it in the creditor as \textit{jus in re propria}. The true legal position is, however, disputed in cases where the granter of an absolute and unqualified disposition has been infeft and no back letter has been recorded. The traditional view is that, when the \textit{ex facie} absolute disposition has been recorded, the granter is completely divested feudally and has no more than a \textit{jus actionis} against his creditor to require a reconveyance upon repayment of the advance.\(^8\) It was, however, held in effect in \textit{Edinburgh Entertainments Co. v. Stevenson} \(^6\) that, though in questions

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62 \textit{Earl of Moray v. Mansfield} (1836) 14 S. 886.
63 Bell, \textit{Principles}, § 207.
66 1926 S.C. 363.
with third parties the *ex facie* absolute disponee (creditor) is feudal proprietor and alone entitled to grant a valid conveyance, in a question with the debtor he is merely a security holder and the latter is not divested feudally. Professor J. M. Halliday—who with his fellow contributors to the *Conveyancing Review* has done so much recently to illumine the technicalities of feudal conveyancing—argues attractively that the logic of the older decisions is to be preferred.

The term “real burden” is used in two different senses. When by “real burdens” are implied inherent conditions of the feu—*i.e.*, conditions upon which the proprietor holds the land—no question of security rights arises. On the other hand “real burdens” can be created over heritable property so as to become *debita fundi*. Such rights are analogous to hypothes in the law of moveables, since no feudal estate is vested in the creditor, but merely a qualification or burden on the estate of the debtor. The creditor may enforce his right by poinding the ground or by attaching the subjects by adjudication. A power of sale is not implied, but may be conferred expressly.

By the Companies (Floating Charges) (Scotland) Act, 1961, an important innovation was made empowering an incorporated company to give security by way of floating charges “over all or any of the property, heritable or moveable” which may from time to time be owned by the company. Such a charge is to be effective over heritable property, notwithstanding that it is not recorded in the Register of Sasines—provided, of course, it is registered as the Act requires with the Registrar of Companies (Scotland). A floating charge does not affect such property as ceases in the ordinary course of business to be comprised in the company’s property, but on crystallisation—*i.e.*, upon the commencement of winding up—attaches to it as though it were fixed security over the company’s property. When a company is wound up and its property is subject to a fixed security and a floating charge, the former has priority except in the cases specified in section 5 (2) of the Act. When property is subject to two or more floating charges these rank according to the time of registration unless it is provided that they are to rank equally or unless application for registration is received by the Registrar by the same postal delivery.

**Real Securities over Moveables**

The law of Scotland relating to moveables is founded largely on principles of the Roman law, especially as mediated through the

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67 "The Ex Facie Absolute Disposition" (1957) 1 *Conveyancing Rev.* 5.
69 9 & 10 Eliz. 2, c. 46, s. 1; for discussion of practical problems concerned with "Registration and Ruling of Floating and Other Charges," see 1962 S.L.T. (News) 73.
practice of the Netherlands and France during the formative era of the Scottish system. In the Roman law of Justinian's time extensive use was made of hypotheca as contrasted with pignus. (In the former case, possession of the property given in security might remain in the possession of the debtor; in the latter case possession was delivered to the creditor.) Real rights of security without possession took many forms. They could be acquired over moveable and immovable property; they might be general or special; and they might be tacit or conventional. These various hypothecs might constitute embarrassing and unreasonable clogs upon property. They seem to have disappeared in the Barbarian kingdoms, and to have been revived in Europe only to a certain extent with the renewed interest in Roman legal studies from the twelfth century onwards. So far as land was concerned, no insuperable difficulty was experienced in constituting security without the creditor actually taking possession. In the law of moveables, however, though a number of tacit hypothecs derived from the Roman law gained recognition in the legal systems of Europe, there was stronger resistance to the general revival of the idea of conventional hypothecs over moveables. Nevertheless in the practice of the Netherlands conventional hypothecs over moveables could be made binding on third parties, if executed with the necessary notarial formalities, and this practice was also received in South Africa.

Pre-Revolution French law recognised general and tacit hypothecs derived from Roman law over moveables; but the French law of security prior to the Revolution lacked adequate machinery to secure publicity, while the multiplicity of general hypothecs constituted by notarial act might create uncertainty regarding ownership of property. Two celebrated Revolutionary laws preceded the formulation of the codified system which now is the basis of French law.70 This system, while recognising hypothec over land and certain tacit hypothecs over moveables, rejected other types of security over moveables without transfer of possession. It was believed that it would not be possible to carry out efficiently registration of express hypothecs over moveables, and, therefore, such rights were not recognised. Eventually, however, it was found impracticable to apply this doctrine too strictly, and, since the early part of the twentieth century, gage sans dessaisissement has been permitted—as over the plenhishings of hotels, over stocks of petrol and, in certain cases, where constituted by a commercial or agricultural enterprise. The French approach to real security has influenced many modern systems, though Danish law, like English law, has long expressly recognised a general doctrine of hypothec over moveables, provided certain formalities are observed.

70 See in particular, Code Civil, s. 2119.
In German law, though the code excludes the doctrine of security over moveables *retenta possessione*,\textsuperscript{71} the provision seems to be circumvented in practice. In trade and commerce, in particular, it has been found possible to secure recognition by the courts of an arrangement whereby the borrower transfers ownership by way of security, but retains possession *constitutum possessorium*. Economic conditions have compelled legal recognition of what theorists may regard as a clear evasion of the provision of the code. The great defect of the German system is that there has been no machinery to secure adequate publicity, and German jurists have urged that legislation should be introduced to recognise security over moveables *retenta possessione*, but to require registration.

Scots law, in its formative period, like the systems of France and the Netherlands accepted certain doctrines of tacit hypothec over moveables based on the Roman rules; but declined to accept the idea that by agreement (even evidenced notarially) a debtor could hypothecate his goods without delivery. Stair \textsuperscript{72} puts the matter clearly: "Impignoration is either express by the explicit consent of parties, or implicit, which is introduced by law, without consent of parties; of which tacit hypothecations, there have been many in the civil law. . . . But our custom hath taken away express hypothecations, of all, or part, of the debtor's goods, without delivery, and of the tacit legal hypothecations hath only allowed a few." This statement of the law, confirmed by many decisions, remains as true today as in the seventeenth century, and, as Gloag and Irvine observed,\textsuperscript{73} "It is a cardinal rule of the common law of Scotland that no real right to corporeal moveable subjects can be transmitted by a voluntary conveyance, assignation, or other transfer, unless and until the transfer is completed by delivery of the subjects in question to the transferee." Though this is clearly an accepted rule of Scots law, it does not necessarily represent an absolute principle of justice valid for all times and circumstances. In particular, the means of securing adequate publicity for real security have greatly improved since the time of Stair. Modern social and economic conditions have compelled modifications of the rules regarding real security accepted in other legal systems which have a similar background to Scots law; and, it is clear that hypothecation *retenta possessione* is a doctrine fully acceptable to Roman law itself. Accordingly recognition in 1961\textsuperscript{74} of the right of incorporated companies to create floating charges over their assets was quite consistent with the Civilian tradition of Scots

\textsuperscript{71} B.G.B., s. 1205.
\textsuperscript{72} I, 13, 14.
\textsuperscript{73} Law of Rights in Security, p. 188.
\textsuperscript{74} Implementing the recommendations of the Eighth Report of the Law Reform Committee for Scotland (1960) Cmnd. 1017.
law—in particular, since no attempt was made to incorporate the technicalities of English equity jurisprudence. It would, moreover, have been most inexpedient to adopt the English bill of sale whereby a real right may be created over corporeal moveables such as furniture without delivery.

**Hypothecs**

Hypothec denotes real security without the transfer of possession to the creditor. These may be either legal (implied by law in the circumstances) or “conventional” (created by agreement). The recognised legal hypothecs are those of a superior, landlord, solicitor and certain maritime liens or hypothecs. A superior has a hypothec for feu duty analogous to the landlord’s hypothec for rent over the *insecta et illata* (i.e., the effects of a vassal or tenant brought onto the premises subject to the hypothec). Though the landlord’s right has been excluded by the Hypothec Abolition (Scotland) Act, 1880, so far as agricultural leases are concerned and has been restricted by the House Letting and Rating (Scotland) Act, 1911 (as amended), in respect of “small dwelling-houses,” the superior’s hypothec would seem to be unaffected. Maritime hypothecs will be considered in the complementary volume by Professor Gow, which will deal generally and in detail with rights in security.

At common law a solicitor who has defrayed the costs of an action has a right in the nature of a hypothec over any expenses to which his client may be found entitled, and may enforce it by moving for decree in his own name as agent disburser. Thereby he acquires a right preferable to that of any creditor of his client. Moreover, in certain cases a solicitor may be sisted as party to an action to make his hypothec over expenses effectual. Should he allow decree to be pronounced in favour of his client, a solicitor may still exercise his right in security over the expenses, and by intimating his claim to the other party gains preference over the trustee in his client’s sequestration. His claim does not, however, prevail over an arrestment or duly intimated assignation and may be met by a plea of compensation in respect of any debt due by his client to the third party. Though the solicitor’s hypothec at common law was restricted to what was due to his client by way of expenses, it is now provided by the Solicitors (Scotland) Act, 1933, s. 43, that the court in any action

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75 43 Vict. c. 12.
76 1 & 2 Geo. 5, c. 53.
79 *McTavish v. Pedie* (1826) 4 S. 704; (1828) 6 S. 593.
80 *Stephen v. Smith* (1830) 8 S. 847; *Fleeming v. Love* (1839) 1 D. 1097.
81 23 & 24 Geo. 5, c. 21.
may declare that a solicitor employed in an action shall for his taxed expenses be entitled to a charge upon and a right to payment out of property of whatsoever nature recovered or preserved on behalf of his client by the solicitor.

The conventional hypothecs of bottomry and of respondentia over ship and cargo respectively are not of importance in modern conditions. On the other hand, the "floating charge" which may now be created by an incorporated company over its assets is of very great importance. Full discussion of the terms and implications of the Companies (Floating Charges) (Scotland) Act, 1961, may be left to Professor Gow. It may suffice to observe that the Act itself was passed in response to powerful economic pressures which overcame the habitual reluctance of Parliament to spare the necessary time for vital Scottish legislation. A floating charge on the undertaking or property of the company only attaches to assets owned by the company at the commencement of winding up, and it was not considered expedient to introduce the "receiver and manager" familiar to the English company lawyer. To have done otherwise would have involved a statutory codification of English equity jurisprudence for application in a Scottish legal environment—a task which (even were such a course desirable) would have daunted most draftsmen.

Security Constituted by Delivery

In general a real right must be created by delivery and many attempts to circumvent this rule have failed. Traditionibus non nudis pactis transferuntur dominia rerum. The typical security over corporeal moveables is by way of pledge. A contract of pledge itself confers no preferential right; this depends upon delivery of the subject to the creditor—at least when the subject is capable of delivery. If delivery is in the nature of things impossible, as when pipes are sunk in the ground, an assignation in writing may create a right which will be effective to secure preference in the event of the debtor's bankruptcy. Pawnbroking is regulated by the Pawnbrokers Acts, 1872 and 1960 which apply to loans of £5 or under and, subject to certain exceptions, to loans not exceeding £50. The provisions of these statutes provide safeguards against exploitation of borrowers,

82 9 & 10 Eliz. 2, c. 46.
83 See post, p. 538.
84 Jones & Co.'s Tr. v. Allan (1901) 4 F. 374; Hepburn v. Law, 1914 S.C. 918 (attempts to disguise security as sale); Orr's Tr. v. Tullis (1870) 8 M. 935 (affixing labels to goods left in borrower's possession). If, however, the borrower wishes to use certain property, e.g., furniture, and the lender, as owner, gives him possession of such property, the lender's right of ownership prevails over the right of the borrower's trustee in bankruptcy, Duncanson v. Jeffers' Tr. (1881) 8 R. 563.
85 Darling v. Wilson's Tr. (1887) 15 R. 180.
86 35 & 36 Vict. c. 93, and 8 & 9 Eliz. 2, c. 24.
but also assist pawnbrokers by providing for the forfeiture of unredeemed pledges pawned for up to the value of forty shillings and for the sale by auction of unredeemed pledges pawned for over that amount. Pledges covered by the Acts are redeemable for a period of six months with a further seven days grace.

**Liens**

In certain circumstances the law implies a right of lien—which implies the right to retain some property belonging to another until some debt or other obligation is satisfied. The right depends upon possession and is lost—if possession is relinquished. A special lien entitles the creditor to retain the subject until a specific debt is paid, while under a general lien the right to the balance of payment under a contract of employment may be secured. It is a general rule implied from the principles of mutual contract, that a person placed in possession of an article belonging to another has a right to retain it until paid for his work. Thus a person given shoes or a watch to mend, may hold the goods until he is paid for his work. Mere custody as opposed to possession will not suffice, but it is not necessary that the person exercising the lien should actually have worked on the subject put in his possession.

By custom a general lien is recognised in various professional, commercial and trade relationships—including *inter alia* the relationships of solicitor and client and innkeeper and guest. Since the main purpose of lien is to secure payment of a debt, this right may be of limited value if the debtor cannot or will not pay. Accordingly provision is made by statute in certain cases—as under the Innkeepers Act, 1878, and the Disposal of Uncollected Goods Act, 1952, for the sale under proper safeguards of moveables subject to lien.

**Securities over Incorporeal Property**

Debts due to a borrower and other incorporeal property may be given in security by written assignation duly intimated to the debtor. Except in the case of a negotiable instrument mere transfer of a voucher of debt cannot create a real right, and an unintimated assignation—as of an insurance policy—is equally ineffective. A

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87 The right of lien is a right to remain in possession; and thus may be contrasted with a right of retention, which is founded upon property. Though the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6, states that “lien in Scotland includes right of retention,” this is merely a further illustration—if such were needed—of the failure of the draftsmen of this Act to understand the fundamental principles of the law of Scotland regarding moveables.

88 If the article is restored to its owner under an agreement whereby he is constituted the agent of the holder of the lien for the purposes of selling the article.

89 41 & 42 Vict. c. 38.

90 15 & 16 Geo. 6 and 1 Eliz. 2, c. 43.

91 Wylie’s Exrx. v. McLennan (1901) 4 F. 195.
valid security can be created by transferring shares in a company to the creditor, subject to his personal obligation to retransfer on payment of the loan. This method is, however, inconvenient. Deposit of share certificates with the creditor gives him no security in the debtor's bankruptcy unless he has received a duly executed transfer with the certificates. Even in the latter case until the creditor has been registered,92 his right may be defeated by arrestment used by another creditor or by a subsequent fraudulent transfer by the debtor. It is doubtful whether delivery of share certificates to a creditor with transfers in blank could be challenged under the Act 1696, c. 25, which, to avoid fraud, provides that writs subscribed and delivered blank are to be null.

92 And see Morrison v. Harrison (1876) 3 R. 406.
COMMON PROPERTY

CHAPTER 18

COMMON PROPERTY AND COMMON INTEREST

As has been observed, the law of Scotland does not exclude the possibility of dividing the right of ownership; and, naturally, also recognises sharing of the right. The concepts of "common property" and "joint property" as distinguished from each other have not always been clearly understood. Bell's Commentaries and Principles have substantially clarified the position. Nevertheless, a certain confusion still persists through the continued use of the terms "common property" (or "ownership in common"), on the one hand, and "joint property" (or "joint ownership") on the other hand, both in a broad and in a narrow sense. In the broad sense "joint" has been used as the synonym of "common" or "in common"; in the narrow sense "joint property" has been used as signifying that kind of common property which exists in ownership of a subject by several people—such as trustees, club members, and joint liferenters—where the jus accrescendi excludes the possibility of severance of the ownership except by dissolution of the relationship on which joint ownership rests.

In Magistrates of Banff v. Ruthin Castle, Ltd. the Lord Justice-Clerk said:

"I have found no more exact summary of the law than that contained in Gloag and Henderson's Law of Scotland, ... and with these learned authors I use the term 'joint' to describe the class of right typified by the ownership of co-trustees, and the term 'common' to describe that typified by the ownership of two or more persons in whom the right to a single subject has come to be vested, and each of whom is entitled by his separate act to dispose of his separate share."

1 See per Lord Dunedin in Grant v. Heriot's Trust (1906) 8 F. 647 at 658.
2 I, p. 62.
3 §§ 1071-1085.
4 See on this Cargill v. Muir (1837) 15 S. 408; Grant v. Heriot's Trust (supra—especially per Lord President Dunedin, p. 658, and Lord Kinnear, p. 668); Schaw v. Black (1889) 16 R. 336; and Magistrates of Banff v. Ruthin Castle, Ltd., 1944 S.C. 36 at pp. 56-57, 64-65 and 67-69.
5 Supra, at p. 68.
6 Reference in 6th ed., p. 519, but contrast definitions collected by J. A. Inglis, Encyclopaedia of the Laws of Scotland, Vol. 3, p. 589. Whereas Gloag and Henderson include heirs portioners among "common owners" Inglis holds that this relationship is not one of "common property."
Lord Mackay is probably correct, however, when in *Magistrates of Banff* he states that “common property” is not a phrase exclusive of “joint property” but is the universal phrase in Scots law. Mr. J. R. Scott rightly stresses that “the static definitions of the different modes of holding tend to be misleading and . . . the actual living relationship of the various proprietors within the community is the factor determining the species to which a particular plural holding belongs . . . there is no radical cleavage between the two types of holding but rather that they are fundamentally all holdings in common; in the case of a joint holding the situation has been crystallised by the superimposition of some form of independent relationship between the proprietors, which—so long as it lasts—binds them together in an indissoluble tie.” Still, it assists clarity of thought to conform to Professor Rankine’s note—“. . . it may be well to avoid the use of ‘joint owners’ to describe *pro indiviso* proprietors having no *jus accrescendi.*” The specialties of “joint property” (in the narrower sense) are not so much the incidents of the joint right as the consequences flowing from the relationship existing between persons who have the joint right. This relationship invariably arises under a trust or under a contractual or quasi-contractual bond (such as partnership or membership of an unincorporated association). Where such a relationship exists, the distinctive features of “joint property” (in the narrower sense) are the *jus accrescendi,* the exclusion of the right of severance at will and the abeyance of the rule *nemo in communione invitus detineri potest.* Following this interpretation of the law, it may be convenient to consider the rights and duties arising in “common ownership”—using that term comprehensively; and then to note the specialties of “joint ownership”—using the latter term as a species of “common ownership” but having certain characteristics contrasting with “common ownership” (or “ownership in common”) in the narrower sense.

**Management of Common Property**

Each co-owner is entitled to the uses and services derivable from the subject, and also to participate in the management of property. This rule is *in re commun melior est conditio prohibitiss.* Accordingly, one co-proprietor may veto any alteration in the condition of the property or any extraordinary use thereof. There is, however, an exception to the rule where rebuilding or repairing are necessary; such operations may not be stopped by any one of the co-owners. One co-proprietor may prevent another from removing

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7 At p. 56.
8 See “Property Called Joint” (1957) 1 *Conveyancing Rev.* 17, at p. 19.
10 Bell’s *Principles,* § 1075, approved in *Deans v. Woolfson,* 1922 S.C. 221.
tenants holding under a lease granted by all; and in general all proprietors must concur in actions brought against other persons in respect of the common property, though an individual proprietor may take proceedings to protect the subject from nuisance, encroachment and trespass—Aberdeen Station Committee v. N.B. Ry. In Price v. Watson the majority of the court seemed to consider that one pro indiviso proprietor might even sue the other in respect of “encroachment,” but the difficulties inherent in this view were put clearly in the opinion of Lord Keith, who doubted.

**Division of Common Property**

It is obvious that where co-proprietors have discordant personal interests, and yet each has an equal voice in management, public policy requires that they should not be compelled to continue the community against their will. Accordingly the brocard applies nemo in communione invitus detineri potest. As Lord Dunedin expressed the position in Grant v. Heriot's Tr., “The position of common property is very peculiar, because all the owners hold together in common, and they have, if I may so express it, a metaphysical right in every minutest atom of which the property is composed; and as this would be, from the motive of public policy, an absolutely cumbrous state of matters to keep up for perpetuity where the particular joint proprietors may in time coming be each represented in their interests by a plurality of persons, the law of Scotland has always held that the state of joint property may be brought to an end at the instance of any one of the joint proprietors pursuing a division or a division and sale.” Accordingly, where the subject is divisible, any one proprietor may insist that the division be made. Where the subject is indivisible it may be sold at the instance of any of the parties, and the price divided among those entitled. The sale must have regard to the interests of all the proprietors.

**Right to Dispose of Share**

In the ordinary case of common property (or property held in common)—but not in cases of joint property—each proprietor has a title to his own share which he may alienate or burden as he chooses. If he has not disposed of his share inter vivos or mortis causa, it will pass to his heirs. A common example is that of heirs portioners. If daughters or sisters succeed ab intestato to heritage they are heirs portioners and entitled to equal shares, except that, where there is

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11 (1890) 17 R. 975; cf. the position of part owners, such as heirs-portioners and part owners of vessels; Maclaren, *Court of Session Practice*, p. 223.
12 1951 S.C. 359.
14 “Joint” is here used as a synonym for “common.”
15 See note supra.
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a right which in its nature, exercise or use is not capable of division, such as a peerage, an office, or the mansion house and garden of an estate, it goes as a praecipuum to the eldest. Superiorities go to the eldest daughter, since the vassal has the right to hold of one superior, but she takes them under burden of paying compensation to her younger sisters.

Joint Property

The specialties of joint property (in the narrower sense) are as follows: This right only exists by virtue of trust or some contractual or quasi-contractual bond such as partnership or membership of an unincorporated association. Among the joint owners the jus accrescendi operates, which excludes the division of the property and severance of the pro indiviso ownership except by dissolution of the relationship upon which such joint ownership rests. Since the subjects are not held by the joint owners for themselves as individuals, the rule that no one can be compelled to remain in communion against his will has no place. 16

COMMON INTEREST

Another right of a proprietary character is that of “common interest,” though—as distinct from common property—it implies a sharing of some of the rights of property rather than a sharing of the whole content of the right of property. In practice this branch of the law has not been the subject of extensive judicial scrutiny, since conveyancers usually provide expressly in dispositions or deeds of conditions for situations which the common law would otherwise regulate.

The law regarding common interest is well stated by Bell, 17 “A species of right differing from common property takes place among the owners of subjects possessed in separate portions, but still united by their common interest. It is recognised in law as ‘Common Interest.’ It accompanies and is incorporated with the several rights of individual property. In such cases a sale or division cannot resolve the difficulties which may arise in management; but the exercise and effect of the common interest must, when dissensions arise, be regulated by law or equity.” The most familiar examples of common interest arise in relation to large tenements consisting of many flats belonging to different proprietors. In such cases there is no common property among the owners of the several floors, but a combination of individual

16 See refs. note 4, supra.
17 Principles, § 1086.
property with common interest. In such forms of property the law of the tenement as between the different owners is regulated by the terms of the original title as interpreted by possession following upon it. As Lord Justice-Clerk Thomson has aptly expressed it,18 "Custom has hallowed what convenience dictated." In the absence of express stipulation, the general rule is that the ground on which the tenement is built with the area, courts or greens attached to it belongs to the lowest heritor. The uppermost heritor is the owner of the roof, subject to the limitations arising from the common interest of the lower proprietors.19 The boundary between the flats is an imaginary line drawn through the centre of the joists—which must not be unduly weakened in deference to the common interest of other proprietors. The close, stair and staircase are the common property of all the owners of the tenement.20 Each is the proprietor of the wall of his own floor and can prevent all encroachments upon it, but he is bound to the others having a common interest in it to maintain it in repair so as to provide support 21; and, although he is entitled to alter it, as by opening a door, he is not entitled to do so to such an extent as to endanger the common interest.

This common interest differs therefore from servitude, since each person is bound by the common interest to maintain his own wall, which in servitude he would not be bound to do, since the essence of servitude is in patiendo. It differs also from property, since no one having merely a common interest in part of a building is entitled to alter that part. He has only the right to prevent injury and insist on support, while the proprietor of that part—unlike a proprietor of common property—is entitled without the consent of other persons interested to alter the state of the subject. These principles are applicable where neighbouring owners or tenants have a common interest in anything such as a road giving common access, or an area for light or common use, or water supply. Or, again, the owners of property in a square may have a common interest in the garden, though they have no right of property therein.

19 The latter have no right to carry out repairs to the roof at their own hand, since they are not "owners": Duncan Smith & MacLaren v. Healy, 1952 J.C. 61. For discussion of common law and conveyancing practice regarding rights and duties concerning the roof of a tenement see J. G. S. Cameron, "The Law of the Tenement and Roof" (1958) 1 Conveyancing Rev. 105; A. G. M. Duncan, "Maintenance of Tenement Roofs in Conveyancing Practice," ibid. 143. For discussion of "The Law of the Tenement—Ground Floor," see J. G. S. Cameron (1959) 1 Conveyancing Rev. 248.
20 For a statement of the present law see J. G. S. Cameron, "The Law of the Tenement—Walls, Passages, Stairs, etc." (1960) 2 Conveyancing Rev. 102; also McCallum v. Gunn, 1955 S.L.T.(Sh.Ct.) 85, per Sheriff C. J. D. Shaw (now Lord Kilbrandon) at p. 89.
21 See generally "The Limitations of Common Interest" (1959) 1 Conveyancing Rev. 261.
In the case of common gables erected on a boundary between two properties, each of the proprietors has a right of property in his own share, with a common interest in the whole. The person who first builds the gable is, in the absence of agreement to the contrary, entitled to recover one-half of the cost from the owner of the adjoining property when the latter begins to make use of the wall.

The authorities on common interest were fully discussed in Smith v. Giuliani,\textsuperscript{22} where Bell's statement of the law\textsuperscript{23} was expressly approved. In that case the Glasgow Dean of Guild authorised the Fiscal to take down to the level of the first floor a building, the upper stories of which were in a dangerous condition. On completion of the work, he apportioned the cost of the demolition among all the proprietors, including those on the ground floor. The latter appealed on the ground that their premises were not defective. It was held, however, that liability fell upon all those interested in the property, and that the appellants had been properly charged. Had the foundations subsided, and the safety of the premises had required the ground floor proprietor to underpin the building, he could have recovered a proportionate part of his expense from the proprietors of the upper floors.\textsuperscript{24} As Lord Dunedin said,\textsuperscript{25} "If equity has anything to do with it, I cannot see why the contribution to the operation which makes a whole house safer should not be a general contribution." Discussion of common interest has for the most part concentrated on the negative side of the doctrine—namely the restraints which it imposes on the use which a proprietor may make of his own property. The positive side has been discussed authoritatively in the recent case of Thomson v. St. Cuthberts Co-operative Association.\textsuperscript{26} Here the proprietor of a second floor flat in a tenement sought reparation against the proprietors of the ground floor in respect of damage caused to her flat as the result of the fracture of a supporting beam situated in the ground floor premises. She asserted \textit{inter alia} that there was an absolute duty to provide support. The Second Division held that the law of the tenement did not impose an absolute duty of support, and to establish liability it would be necessary to prove negligence. No one is responsible \textit{ex dominio solo}. In the opinion of the Lord Justice-Clerk (Thomson)\textsuperscript{27} "the obligation on one member to play his part in the communal scheme is to neglect

\textsuperscript{22} 1925 S.C.(H.L.) 45.
\textsuperscript{23} \textit{Supra}, notes 2 and 3.
\textsuperscript{24} But if a dangerous structure such as a balcony is neither common property nor the subject of common interest, other proprietors in a tenement have no duties in respect of it: Musselburgh Town Council v. Jamieson, 1957 S.L.T.(Sh.Ct.) 35.
\textsuperscript{25} At p. 61.
\textsuperscript{26} 1958 S.C. 380.
\textsuperscript{27} At pp. 390–391.
nothing that is necessary and proper for the maintenance and upholding of his particular section as part of the tenement as a whole." He also pointed out that when by lapse of time part of a tenement in which there is common interest becomes ruinous, reconstruction is a communal affair rather than a burden imposed on the owner of that part. As a learned author has observed, "the question of where repair ends, and reconstruction begins opens up a vista of new and difficult problems." 28

CHAPTER 19

LIFERENT AND FEE

The institutional writers regarded liferent as a mere burden on the fee, and as the only personal servitude known to Scottish law. The more modern view is to treat the rights of liferent and fee as forming two separate and coexistent estates, limited in their nature, and creating mutual restraints on each other. The owner of the fee is called fiar; the owner of the liferent is known as the liferenter. In this view, the liferenter is not regarded as a mere burdener, but as an interim proprietor of the subjects.

Liferent may be defined as the right to enjoy the use or the fruits of a subject without destroying or encroaching upon the substance or corpus.\(^1\) As the subjects are to be enjoyed salva rei substantia, it follows that the term is strictly inapplicable to subjects of a wasting nature. Heritable property used to be the most common subject of liferent, but in modern practice the type of liferent most frequently encountered is the trust liferent of a universitas, or of the residue of a mixed estate which may be partly heritable and partly moveable. A liferent may be given of a farm with its stock, and in such a case the liferenter must keep up the stock which is accessory to the heritage—Rogers v. Scott.\(^2\) Fungibles, such as wine, which must perish in the using, cannot be the subject of a true liferent, but an analogous right of enjoyment in fungibles may be created—Miller's Trs. v. Miller.\(^3\) The term "liferent" is primarily applied to a right which expires on the holder's death, but is also used to denote other temporary periods of enjoyment which may terminate on the happening of some other event, e.g., marriage, majority, or expiry of a fixed period of time.\(^4\)

Liferents are normally classified as legal or conventional. The "legal" liferents are terce and courtesy.\(^5\) Conventional liferents may arise either by constitution or by reservation. Liferents by constitution (or simple liferents) are created when the owner of subjects grants a liferent over them in favour of a third party, or conveys the whole subjects to separate persons as fiar and liferenter. A liferent by reservation arises when the owner of subjects conveys the fee to

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\(^1\) Stair, II,6,4; Erskine, II,9,39; Dobie, Liferent and Fee, p. 1.
\(^2\) (1867) 5 M. 1078.
\(^3\) 1907 S.C. 833.
\(^4\) Dobie, loc. cit.
\(^5\) See ante, pp. 390–391.
another, reserving a liferent to himself. In the case of heritage no
title to a reserved liferent need be completed, for the owner’s previous
title still subsists as to the reserved liferent.

Another division of liferents is into “proper liferents” and trust
(or beneficiary) liferents. In older practice, liferents, usually of heri-
tage, were created so as to create separate legal estates of fee and
liferent. In modern practice, however, it is the custom in *inter vivos*
or *mortis causa* settlements to vest the full legal ownership in trustees
in trust for the beneficiary liferenter, and on the expiry of the liferent,
in trust to convey the legal estate to the fiar or fiars. Where a
beneficiary liferent is created, the liferenter has not a direct right
in the subjects, but a *jus crediti* or beneficial interest under the trust,
which by its terms may confer more or less than would have fallen
to a proper liferenter. Where, however, a liferent is given *simpliciter,*
the obligations resting on the liferenter are the same whether the
liferent is given directly or through the medium of a trust—*Miller’s
Trs. v. Miller.*

**Construction of the Gift**

In some cases, especially where home-made wills are involved, there
is doubt as to the construction of the gift. Does the beneficiary take
the fee, or a liferent, or a mere right of occupancy? Until 1947 it
might also have been queried whether the interest did not lie between
fee and liferent.

First, as to “occupancy.” In *Clark & Ors.* a testator directed
his trustees to give “the use of” his house to his widow, and it was
held that this did not give her a liferent, but a right to occupy. Accord-
ingly, she could not let the subjects, but was liable only for the charges
which properly fall on an occupier and not for the more extensive
burdens such as feu duty which fall on a liferenter. In a number of cases, particularly in *Heavyside v. Smith* and
*Denholm’s Trs. v. Denholm’s Trs.*, the concept of a “restricted fee”
—a right intermediate between liferent and fee—had been recognised.
In *Cochrane’s Exrx. v. Cochrane* (a seven judge case) the quietus
was given to the idea of such a right, described as a right “restricted to
a right of sale, administration and consumption.”

6 *Supra*, note 3.
7 (1871) 9 M. 435; see also *Cumming’s Trs. Petrs.*, 1960 S. L. T. (Notes) 96. Contrast
*Johnstone v. Mackenzie’s Trs.*, 1912 S.C.(H.L.) 106, where a gift of “liferent
use and enjoyment” of a house was held to confer a liferent and not a mere
right of occupancy. One of the considerations which weighed with the House
of Lords was the fact that the testator had left no fund out of which his trustees
could pay annual charges.
8 1929 S.C. 68.
9 1908 S.C. 255.
10 1947 S.C. 134.
In Ironside's Ex. v. Ironside's Ex.,\textsuperscript{11} it had been suggested by Lord President Clyde that "it is an elementary principle in the construction of wills that a right of fee once conferred upon a beneficiary is not withdrawn by a subsequent provision as to the disposal of the subject after the death of the fiant." This would mean in effect that, after encountering the conferment of the fee, a court should shut its eyes to the rest of the document. In Cochrane's Ex.\textsuperscript{12} this view was also disapproved, and Lord Justice-Clerk Cooper's opinion explains that there are in fact a number of rules which cannot be condensed into the oversimplified version suggested in Ironside's Ex.\textsuperscript{15} These rules retain their independent validity, but certainly go far to favour in dubio the construction of a gift as one of fee, despite provisions which might seem to restrict it.

In Miller's Trs.,\textsuperscript{14} and in Yuill's Trs.\textsuperscript{15} (a decision of the whole court), it had been affirmed that

"When a vested, unqualified and indefeasible right of fee is given to a beneficiary of full age, he is entitled to payment of the provision notwithstanding any direction to the trustees to retain the capital of the provision, and to pay over the income periodically, or to apply the capital or income in some way for his benefit."

Thus, if a gift of fee is left (say) to a son, but the trustees are directed to pay over only the income until he reaches the age of twenty-five, unless there are further trust purposes to be served by retaining the beneficiary's interest in the hands of trustees, the beneficiary, on reaching majority, can call on the trustees to hand over the fee. The direction not to pay over the capital until the beneficiary reaches the age of twenty-five will be construed merely as a purported qualification on the enjoyment of the gift and not as limitations of the gift—and therefore in the circumstances is unenforceable. A corollary to the rule in Miller's Trs. is that when an apparent initial gift of fee is followed by provisions which are prima facie repugnant to that initial gift, these subsequent provisions are to be construed in dubio as intended only to fetter the enjoyment of the gift, not to enlarge or abridge it; and will, therefore, so far as repugnant to the gift, be ineffectual.\textsuperscript{16} A third case, where the original donee takes the fee despite a limiting provision subsequent to the conferment on him of the fee, arises in cases of vesting subject to defeasance. This principle,

\textsuperscript{11} 1933 S.C. 116 at p. 119.
\textsuperscript{12} Supra, note 10.
\textsuperscript{13} Supra.
\textsuperscript{14} (1890) 18 R. 301.
\textsuperscript{15} (1902) 4 F. 815 at p. 819.
\textsuperscript{16} See authorities collected Dobie, Liferent and Fee, pp. 13–14; e.g., Watson's Trs. v. Watson, 1913 S.C. 1133; Graham v. Graham's Trs., 1927 S.C. 388.
which has already been discussed in the context of succession, was formulated in *Hancock v. Watson* by Lord Davey as follows:

“If you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed. . . .”

When the income of an estate is given to a beneficiary, this does not imply a conveyance of the capital to the donee of the income in the absence of any disposition of the capital. Moreover, if an unqualified liferent is conferred upon a person together with a power to dispose of the *corpus* of the estate by testament or *mortis causa* deed, the donee cannot, by making an appointment in favour of himself, convert his right into one of fee. Indeed, unless both an unlimited liferent and an absolute power of disposal (as opposed to a testamentary power of disposal) have been conferred on a donee, the court will not declare his right to be one of fee. Though the exposition by the First Division of these general principles of law was not disapproved by the House of Lords in *Baird v. Baird's Trs.*, the actual interlocutor was reversed. In this case by ante-nuptial contract of marriage provision was made *inter alia* for the payment to the husband of an unqualified liferent, while, in the event of his being the survivor of the spouses, the capital was to be made over to his testamentary trustees or executors, to be administered by them in accordance with any will or other deed which might be executed by him. The wife, having predeceased the husband, and there being no other trust purposes to fulfil except payment of the income to the husband and ultimate payment of the capital to his trustees or executors, the husband called on the marriage contract trustees to denude in his favour. The House of Lords held that the fee had vested in the husband, and that he was entitled to immediate payment, since, as Lord Sorn had discerned in the court below, more had been conferred on him than an unrestricted liferent combined with a power of appointment. As Lord Simonds observed, “The income is given to the appellant during his life; the capital is given to him at his death. No other person has any other interest. As Lord Sorn truly

17 *Ante*, p. 436.
18 [1902] A.C. 14 at p. 22.
19 See also *Livingston's Trs.*, 1939 S.C.(H.L.) 17; and *Tweeddale's Trs.* (1905) 8 F. 264.
20 *Sim. v. Duncan* (1900) 2 F. 434. But this need not result in intestacy if the capital is to be held in perpetuity by trustees, *Craig's Trs. v. Hunter*, 1956 S.L.T. (Notes) 15.
23 *Sup. cit.*
LIFERENT AND FEE

sends, here is something more than a power of appointment. The complete proprietary right in both income and capital is his. Of that right a *jus disponendi* is itself an incident."

**ENJOYMENT OF THE GIFT**

In proper liferents, which were formerly the normal form and usually were of heritage, the liferenter—subject to the limitation of his lifetime and to the condition *salva rei substantia*—was virtually in the position of an ordinary proprietor. Such liferents are still encountered occasionally, but today the normal type of liferent, as has been observed, is usually a beneficiary interest in a moveable or mixed estate under a trust. In such cases the estate is vested, not in liferenter and fiar, but in trustees; and the terms of the trust itself may regulate or modify the rights of fiar and liferenter.

The liferenter is entitled to the fruits of the subject, but not to anything which is part of the *corpus* or capital. Difficult questions sometimes arise as to whether a particular payment or thing forms part of the fruits or not. Thus questions may arise between liferenter and fiar where a company declares a bonus, or makes an extraordinary distribution among its members from a source which originally consisted of profits. There may be doubt as to whether the distribution is capital or income. With regard to returns from mineral workings, the position varies according as the working of the minerals has commenced before or after the death of the testator: if before, a gift of liferent includes the rents and royalties from mines; if after, these are not included unless the testator has directed the trustees to work the minerals. Like minerals, trees are *partes soli*. Generally speaking, timber on an estate belongs to the fiar, but the liferenter has a right to use timber for estate purposes, to cut coppice wood at appropriate intervals, and to receive the proceeds of ordinary windfalls.

Liferenters have to meet the annual burdens of the subjects such as feu duties, taxes and ordinary repairs, insurance premiums (at all events for their interest) and interest on bonds. Extraordinary repairs

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25 See Ross's *Trs.* v. Nicoll (1902) 5 F. 146; *Vallambrosa Rubber Co.* v. *Farmer*, 1910 S.C. 519. An asset which would be an income right in the hands of a trustor had he lived, does not necessarily remain such a right after his death; and may (like arrears of salary and certain distributions of stock) pass to his trustees as capital and not to the beneficiaries entitled to a liferent of income under the trust. *Macdowall v. Thomson's Trs.*, 1938 S.C. 147; cf. Thomson's *Trs.* v. Thomson, 1935 S.C. 476.


29 *Glover's Trs.*, sup. cit.
are chargeable against capital.\textsuperscript{30} Liferenters are not liable for ordinary wear and tear, nor for accidental loss or \textit{vis major}. At common law, though interest on money and profits vested \textit{de die in diem}, annuities, rents and similar payments connected with land only vested when the time for payment arrived.\textsuperscript{31} This rule operated to diminish the interest of a liferenter who died before the date of payment. It is, however, now provided that in respect of payments to which the Apportionment Act, 1870,\textsuperscript{32} applies, periodical payments shall be considered as accruing from day to day, and be apportionable accordingly. Such payments include \textsuperscript{33} "rents, annuities, dividends and other periodical payments in the nature of income," but the Act does not apply when apportionment is expressly excluded \textsuperscript{34} by the terms of a will or trust, nor to sums due under policies of assurance,\textsuperscript{35} nor to liability for income tax.\textsuperscript{36}

**Alimentary Lifere rent**

A beneficiary liferent or a gift of income under a trust is often protected by being declared alimentary, so that the creditors of the beneficiary cannot attach the right, and so that the beneficiary himself is prevented from assigning his interest in the income so far as it has not been actually reduced into possession. The provision of aliment for a person is strictly personal, and cannot be assigned or attached. A right of fee cannot be made alimentary, and any provision to that effect in a gift of fee is void.\textsuperscript{37} No particular words are required to make a liferent provision alimentary. The beneficiaries' power to assign must, however, be restrained as well as creditors' diligence be excluded.

The consequences of imposing alimentary protection on a gift of liferent may now be very different in practice from those which could not be evaded prior to the Trusts (Scotland) Act, 1961.\textsuperscript{38} Before that Act the courts had no power to vary trust purposes so as to enable an alimentary liferenter to renounce her liferent once she had begun to enjoy it. \textit{Stante matrimonio} standard alimentary provisions in marriage contract trusts—which in the past had conferred advantages—might impose the torments of Tantalus \textsuperscript{39} on the beneficiaries.

\textsuperscript{30} Shaw's Trs. v. Bruce, 1917 S.C. 169.
\textsuperscript{31} Erskine, II.9,64–66.
\textsuperscript{32} 33 & 34 Vict. c. 35; see also Andrew's Trs. v. Hallett, 1926 S.C. 1087, for apportionment of income independent of the Act.
\textsuperscript{33} Ibid. s. 2.
\textsuperscript{34} Ibid. s. 4.
\textsuperscript{35} Ibid. s. 6.
\textsuperscript{38} 9 & 10 Eliz. 2, c. 57.
\textsuperscript{39} See e.g., Kennedy v. Kennedy's Trs., 1953 S.C. 60, discussed infra.
under the trust, and deliver over the trust estate to the merciless exactions of the Revenue authorities. The 1961 Act does not alter the law regarding alimentary trusts, except to give the courts a discretion to vary trust provisions in certain circumstances. Accordingly, the law regarding such trusts will be considered in the present chapter, and the general effect of the new statutory powers will be considered in a subsequent chapter.

For the valid constitution of an alimentary right to income, certain conditions are essential. First: there must from the start be a continuing trust, whether the estate is of heritage or moveables—Forbes' Trs. v. Tennant. Accordingly, a proper or direct liferent cannot now be made alimentary.

Secondly, the alimentary right must be created by some person other than the alimentary beneficiary, and in no case can a man constitute an alimentary provision for himself out of his own funds—Kennedy v. Kennedy's Trs. The one exception to the rule that persons cannot settle alimentary provisions on themselves is that a married woman, by antenuptial marriage contract, may make an alimentary provision in her own favour out of her own property. The restriction applies during the subsistence of the marriage, but after its dissolution, flies off to allow of claims by creditors and of renunciation. Where the husband is dead, and there are no children of the marriage and the fee is indefeasibly vested in the wife from whom the funds came, and who has the radical right, then the alimentary protection will be allowed to lapse. This was so held in Dempster's Trs. v. Dempster (a seven judge case). In this case the trustees under an antenuptial contract of marriage were directed to hold a fund contributed by the wife, and to pay the income “to her during all the days of her life for her alimentary use only.” The fund was payable to her heirs and assignees on her death, in the event of there being no children of the marriage. The husband having died, and there being no children of the marriage, the wife called on the trustees to denude in her favour. The trustees contended that the alimentary restrictions continued during viduity, but this was repudiated by the court, which also disapproved the opinion of the majority of the court in Burn-Murdoch's Trs. v. Tinney, which was to the contrary effect. In Sturgis's Tr. v. Sturgis, the widow was held entitled to

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40 See e.g., the situation in Forbes v. Forbes's Trs., 1957 S.C. 325.
41 Post, Chap. 23.
42 1926 S.C. 294; see also (1955) 71 S.L.R. 129. This is a modern development and not in accordance with the view of the Institutional Writers or with decisions up to 1852. See Henderson on Vesting, 2nd ed., p. 325.
43 1953 S.C. 60.
44 1949 S.C. 92.
45 1937 S.C. 743.
46 1951 S.C. 637.
renounce her alimentary liferent and appoint the fund among her children, in whom the fee was vested. In such a case the alimentary protection ceased to bind after the husband's death.\textsuperscript{47} There is a definite trend in judicial decision away from the past practice of treating married women like wayward children so far as their own property is concerned. Indeed formerly, in \textit{Menzies v. Murray},\textsuperscript{48} it had been laid down by seven judges that when in an ante-nuptial contract a liferent provision was made for a wife out of her own funds, she could not bring it to an end, even though it was not stated to be irrevocable or alimentary, and even though there were no other objects of the trust. This case was, however, stated by the majority in \textit{Beith's Trs. v. Beith} \textsuperscript{49} (where the liferent was not alimentary) to be no longer a binding authority in view of the great changes in the law's attitude to questions of married women's status and capacity since 1875.\textsuperscript{50} In \textit{Beith's Trs.} it was laid down that, as no useful purpose could be served by continuing the trust (since the only possible objects were children and the wife was beyond the age of child-bearing), the wife was entitled to immediate payment of the corpus of the settled fund. The First Division in \textit{Kennedy} \textsuperscript{51} refused, however, to extend the principles acted on in \textit{Beith's Trs., Dempster's Trs.} and \textit{Sturgis's Tr.} so as to permit revocation of an alimentary liferent \textit{stante matrimonio} by the wife who had settled a fund on herself and then for other purposes. In \textit{Dempster's Trs.} and \textit{Sturgis's Tr.}, revocation had been allowed of an alimentary liferent during viduity, while in \textit{Beith's Trs.} where revocation of a liferent had been permitted during the joint lives of the spouses, the liferent was not alimentary. The Lord President\textsuperscript{52} observed that,

"There is a world of difference between a simple liferent and an alimentary liferent, and the legal effects in a question with creditors of a properly constituted alimentary liferent of not excessive amount depend on considerations unconnected with, and much wider than, the status and capacity of married women."

Thus the principle of \textit{Beith's Trs.} did not apply, and the view of Dobie\textsuperscript{53} was affirmed that "the combined action of all parties interested will not avail to cancel the alimentary restriction, or to terminate

\textsuperscript{47} In Neame \textit{v. Neame's Trs.}, 1956 S.L.T. 57, following Martin \textit{v. Bannayne} (1861) 23 D. 705, it was held that funds provided by the wife's father were to be treated like funds provided by herself. See, however, Lord Sorn's opinion at p. 67.

\textsuperscript{48} (1875) 2 R. 597.

\textsuperscript{49} 1950 S.C. 66.

\textsuperscript{50} The Lord President's reasoning is instructive as to how obsolete authority can be circumvented by the argument of \textit{cessante ratione legis cessat lex ipsa}. See also \textit{Douglas-Hamilton v. Duke & Duchess of Hamilton's Trs.}, 1961 S.L.T. 305.

\textsuperscript{51} 1953 S.C. 60.

\textsuperscript{52} Ibid. at p. 63.

\textsuperscript{53} \textit{Liferent and Fee}, p. 235.
the trust upon which its efficacy depends." Lord Carmont in Kennedy's *Trs.*,54 it may be noted, concurred after having "struggled hard to avoid the conclusions" reached by the Lord President and Lord Russell. He no doubt felt sympathy for the parties who found the income from the trust, which had been created in 1921, to be inadequate in the conditions of 1953. In Douglas-Hamilton v. Duke & Duchess of Hamilton's *Trs.*,55 however, the majority of the First Division, distinguishing Kennedy's *Trs.*, held that a wife could *stante matrimonio* renounce an alimentary liferent conferred under an antenuptial marriage contract, provided that she had not entered into enjoyment of it.

Thirdly, with regard to the essentials for creating an alimentary liferent—not only must there be a continuing trust created by a person other than the beneficiary (with the exception in favour of married women entering into antenuptial marriage contracts)—it is also a condition that an alimentary liferent must be reasonable in amount. To the extent to which the provision is excessive, in relation to the station and circumstances of the beneficiary, it may be made available for the benefit of creditors—Livingstone v. Livingstone.56

Where the proper conditions for creating an alimentary liferent have been observed, if fee and liferent come to be vested in the same person, the liferent does not terminate by consolidation. Moreover, at common law, the liferent cannot be assigned or discharged, as may be done in cases of liferent which are not alimentary. The trustees may not denude of the estate committed to them for the purpose of alimenting the beneficiary—White's *Trs.* v. Whyte.57 In that case a testator left an alimentary annuity to his sister. The whole purpose of the trust had been fulfilled except for the payment to the annuitant, an old lady then seventy-six years of age. The residuary legatee, who was entitled to the residue of the trust estate, which consisted entirely of heritable property, desired to terminate the administration of the trust, and called upon the trustees to denude in his favour, offering to grant a bond over the heritable estate in favour of the annuitant. The annuitant was willing to accept such a bond of annuity. It was held that she was not entitled to renounce the security which she held under the trust deed. In ordinary circumstances, where there

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54 Ibid. at p. 64.
55 1961 S.L.T. 305. This decision, from which Lord Guthrie dissented and which reversed the Lord Ordinary (Guest), has not passed uncriticised. The present author would, with respect, question the Lord President's observation, at p. 311, "No one can be forced to take a benefit under a contract where his own interest only is involved." Whatever right of rejection may be enjoyed by the prospective beneficiary of a donation or *policitatio* (unilateral promise), it is submitted that in contract a party is bound by his acceptance to receive even a white elephant.
56 (1886) 14 R. 43.
57 (1877) 4 R. 786; Miller v. Miller's *Trs.*, 1953 S.L.T. 225; also Coles Petr., 1951 S.C. 608.
is left only one special interest to be provided for, for which alone it is necessary that a trust should be kept up, and that interest is of a partial kind and may be provided for just as effectually in some other way, the estate may be liberated from the trust and set free, so as to be conveyed directly to the residuary legatee or heir-at-law. This may, of course, only be done when all parties interested consent, and all parties interested have power to consent. In the case of an alimentary liferent, however, such consents could not avail to free the trust. As will be discussed in the general context of trusts, however, an extensive jurisdiction has been conferred on the courts by the Trusts (Scotland) Act, 1961, to vary the trust purposes, and this jurisdiction extends to alimentary trusts. In the case of such trusts, however, the court may not authorise an arrangement varying or revoking the trust purposes unless satisfied as to certain specified safeguards for the alimentary beneficiary.

58 Post, Chap. 23.
59 9 & 10 Eliz. 2, c. 57.
60 See esp. s. 1 (4).
CHAPTER 20

CLASSIFICATION OF PROPERTY

The expression "property" in the sense of right of "ownership" or *dominium* has already been considered. "Property" is, however, more generally used in Scottish legal language today to denote the *subjects* of ownership. Things which have material value and which can be owned are described as "property." Property, in this sense, can be classified in various ways.

In the first place a distinction may be made between Fungibles and Non-Fungibles. The category of Fungibles comprises things which are estimated by weight, number, or measure, and can be replaced by equal quantities of like quality—such as money or grain. All things which have specific individual value, and cannot be replaced by others of the same kind, are classified as Non-Fungibles—as for example a picture or a horse.

Secondly, property may be classified as Corporeal and Incorporeal. Though in ultimate analysis only rights over things may be owned, a broad practical distinction based on the nature of the things is firmly established. Corporeal property comprises such tangible objects as houses, fields, a watch or money in cash; incorporeal property comprises rights such as goodwill, lien, patent or copyright, a *jus crediti*, or a claim for damages arising *ex contractu* or *ex delicto*. *Jura in rem aliena* are always incorporeal, even though over a corporeal subject—for example, a shoemaker's lien.

The third method of classifying property is by the distinction between Heritable and Moveable property. In Scotland this distinction, based on the legal rights of heir and executor rather than on the nature of the subjects themselves, has been accepted in place of the Roman law classification, moveables and immoveables. "Heritable property," generally speaking, comprises all rights in and connected with land, and thus is practically the equivalent of "immoveables." Fundamentally, however, it is descriptive of the method of succession—inferring the type of property which passes on intestacy to the heir-at-law and not to executors. "Moveable property" comprises anything which "by its nature and use is capable of motion," and which passes on death to the executors. The distinction between heritable

1 *Ante*, p. 459.
2 Stair, Inst. II, 1, 2.
and moveable applies to corporeal and incorporeal property. Since the category of “heritable” refers to succession, as will appear, moveables can be notionally converted into heritage for that limited purpose—which is a somewhat inconvenient concept. Moreover, if, as seems probable, the privileged position of the heir-at-law is virtually abolished by legislation proceeding on the recommendations of the Mackintosh Committee on Succession, the designation “heritable” will be even more of an anachronism than at present, but is probably too well established in the law to be supplanted by another term such as “immoveable.”

**DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY**

—CONVERSION

There are many occasions when it is most important to distinguish between heritable and moveable property. One may instance questions of succession or diligence (anglice execution). The relevant rules affecting heritage and moveables are very different in most chapters of the law. As Bell observes,

“A double system of jurisprudence, in relation to the subjects of property, has thus arisen in Scotland, as in most European nations: the one, regulating Land and its accessories, according to the spirit and arrangements of the Feudal system; the other, regulating the rights to moveables according to the principles of Roman jurisprudence which prevailed before the establishment of feus.”

Moveables go to executors and not to heirs in succession; they remain with the seller of land or houses; they are removable by the tenant at the end of his term; they are attached by arrestment and carried by poinding. Things heritable pass in succession to the heir; they pass to the buyer of the land: they are affected by inhibition and are attached and carried by adjudication.

“The character of any subject or fund, as, in these important respects, heritable or moveable, may be either: (1) By its nature, as being immoveable, like lands or houses; or as moveable, like furniture or cattle; or (2) By connection or accession to some subject which has by nature the character of moveable or immoveable; or (3) By destination of the owner, either as in connection with something else, or in regard to succession. But in some respects a distinction is to be observed between the character of heritable or moveable, considered as in a question of succession, or as in a question of the competency of diligence.”

Though corporeal or incorporeal subjects are in general heritable or moveable according to their character, by the doctrine of constructive

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4 (1951) Cmd. 8144; see ante, Chap. 14.
5 *Principles*, § 636.
6 *Ibid.*, § 1470; Bell’s references to “the heir” imply “heir in heritage.”
conversion a subject may for certain purposes—as a result of something done by its deceased owner—be deemed to have been converted from its original character into the opposite character. The dead hand may, so to speak, in ghostly fashion turn chalk notionally into cheese—or conversely. Thus if the deceased had contracted to purchase heritage, or to have a house built for him, and he died before completion, the money to pay is taken from the moveable estate, though the heir benefits. Conversely, if the deceased had contracted to sell heritage, the heir after his death is bound to grant a disposition, though the purchase price augments the executry.

Again, a testator may by will direct conversion of his property, and imprint the character of heritable or moveable on the property, so far as is necessary to carry out the purposes of the will. As a result, those who succeed to the estate of a beneficiary under the will may have their respective rights determined according to the notional character of the property affected by the doctrine of conversion. The consequent problems which arise are relevant particularly to the law of trusts, and may appropriately be discussed later in that context.

**Corporal Subjects**

Corporal subjects are heritable or moveable by nature, by accession or by destination.

**Heritable or Moveable by Nature**

The typical instance of property heritable by nature is land and its pertinents. Stone and minerals, as constituents of the land, are heritable until they are removed from the land, when they become moveable.

So far as fruits of the earth are concerned, the institutional writers, and Erskine in particular, could be read to the effect that industrial crops—as contrasted with trees which require no constant cultivation—are moveable property of the tenant, since he, or those claiming through him, had the right to sever the crop even after the term. Erskine’s statement of the law was expressly approved by the Whole Court in Paul v. Cuthbertson; though, as this case concerned trees, the approval was obiter. Subsequently, in Chalmer’s Tr. v. Dick’s Tr., Lord Johnston and the Second Division, who were dealing with

9 *Malloch v. McLean* (1867) 5 M. 335.
11 See post, Chap. 23.
12 II, 2, 4.
13 (1840) 2 D. 1286.
14 1909 S.C. 761.
competing rights to the corn crop of a bankrupt, took the view that such a crop was *pars soli* and, therefore, until severance, heritable. Nevertheless, upon principles of equity a tenant who had sown the crop might sever and remove it unless he had contracted not to do so—"messis sementum sequitur." This construction is certainly logical, though Lord Low's ability to construe Erskine to this effect has exceeded that of the present author and Lord Kinnear in the subsequent case of *Morison v. Lockhart* 15 pays no attention to the dicta of Lord Low which have also been criticised in *McKinley v. Hutchison's Tr.* 16

On the other hand, institutional authority and the Whole Court in *Paul v. Cuthbertson* 22 and many other decisions clearly (and logically) regarded trees as *pars soli* and heritable property until after severance. Considerable confusion has, however, resulted from the extension to Scotland of the Sale of Goods Act, 1893 18—which was drafted primarily to codify principles of English law. (It may be stressed that this Act affects only the law of sale of goods 19 and not the general common law of Scotland in fields such as, for example, bankruptcy.) For the purposes of the Act only section 62 (1) gives to things "attached to or forming part of the land," apparently including trees, the character of "goods," if these are to be severed before sale or under the contract of sale. Thus by a fiction, which has no relevance for other branches of the law, in the case of sale alone those things which are *partes soli* by nature, become moveable. With respect to contrary opinions, 20 it is submitted that, since trees are "goods" for the purposes of the contract of sale, the formalities appropriate to sale of heritage do not apply. On the other hand, with equal respect to Professor Gow, 21 who has analysed this tract of law with critical insight, the decisions 22 which have treated contracts for the sale of timber as "agreements to sell" 23 conferring no *jus in rem* can be supported on the grounds that there cannot be passing

15 1912 S.C. 1017 at p. 1028.
17 Supra.
18 56 & 57 Vict. c. 71.
19 The common law of sale in Scotland like that of Rome did not distinguish between heritable and moveable property, and corresponded to an "agreement to sell" under the Act. It did not effect a conveyance, as a contract of sale (bargain and sale) may now effect in the case of "goods" within the terms of the statute.
21 "When are Trees Timber," 1962 S.L.T.(News) 13, an article which gives an invaluable background to the problem and discusses the main authorities.
22 Discarding the obiter references to English law, where the background to the problem differs, the author would respectfully adopt the reasoning of Lord Johnston in *Morison v. Lockhart*, 1912 S.C. 1017 at p. 1025, and L. P. Cooper in *Munro v. Liquidator of Balnagown Estates*, 1949 S.C. 49 at bottom of p. 54 and top of p. 55.
23 See Sale of Goods Act, 1893, s. 1 (3); cf. s. 62 (1).
of property in trees until the goods, even though specific, have been put in a deliverable state. The Act deals expressly with cases where the seller has to do some act to put the goods in a deliverable state but does not expressly refer to situations where the buyer is to take this step.

Subject to the qualifications to be stated with regard to accession (or annexation) and destination, whatever "by its nature and use is capable of motion" is moveable.

Heritable or Moveable by Accession (Fixtures)

When a thing which is moveable by nature is brought into contact with heritage, the moveable may become part of that heritage upon the principle of accession. Whether this change of nature results is the concern of that chapter of the law known as "The Law of Fixtures." In this chapter English decisions are frequently cited and relied upon in Scotland, and the House of Lords has substantially assimilated interpretations, though dicta in the recent case of Christie v. Smith's Ex. have unsettled the law to some extent.

Unfortunately the term "fixture" is used in two completely different senses. The sense in which it is preferable to use it is that defined by Lord Chelmsford in the leading case of Brand's Trs. v. Brand's Trs.27

"The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes party of the realty (heritage) and the person who was owner of it when it was a chattel (moveable) loses his property in it, which immediately vests in the owner of the soil."

This is according to the maxim "inaedificatum solo, solo cedit." The other sense in which the term "fixture" is used is that given in Amos and Ferrard on Fixtures.28

"Personal chattels (moveables) which have been annexed to land so as to become part of it, but which may afterwards be severed or removed therefrom by the person who has annexed them or his personal representative against the will of the owner of the 'freehold.'" 29

Rankine on Landownership observes

"The word 'fixture' has come to have two different meanings: one, its natural and obvious sense viz., anything which is infixed into or annexed to an immovable, that is, directly or indirectly to the soil; and the other, a technical sense—viz., a moveable which has been annexed

24 s. 18, rule 2.
25 But see s. 17.
26 1949 S.C. 572.
27 (1876) 3 R.(H.L.) 16 at p. 23.
28 p. 2.
29 See also Re de Fathe [1901] 1 Ch. 523 at pp. 530 and 538.
30 4th ed., p. 117. Chap. 8 of this treatise may be consulted on "fixtures" generally.
to the soil, but may be removed in certain circumstances at the will of the
person who annexed it, or of his personal representative—a curious per-
version of the term, whereby fixture denotes removeability."

There is unfortunately a conflict of judicial opinion as to whether
moveables which can eventually be disannexed from heritage are ever
strictly heritage at all. The view of Lord Justice-Clerk Moncreiff in
Dowall v. Miln seems to have been that an article fixed to land or
to a building—if it may be lawfully disannexed at any time—never
loses its identity as a moveable thing, but that the right to remove it
depends upon the question "what is the relation between the parties
who assert and deny the right of removing?" This is also the inference
to be drawn from dicta expressed by the Second Division in Christie
v. Smith's Ex. In this case an action was brought by the purchaser
of a farm for the restoration and replacement of a summer-house,
which had been removed in somewhat clandestine circumstances by
the seller. The summer-house which weighed two tons had rested
for eleven years on stones on a levelled site, and had formed part of
the boundary between a field and the garden of the farm-house. The
Second Division upheld the pursuer's claim, recognising the summer-
house to have been heritage; and with this decision there would
probably be fairly general agreement. There may be more doubt
regarding one of the propositions included among their grounds of
decision—namely that the test whether any subject is heritage or
moveable depends on the legal relationship in which the rival claimants
stand to each other. The present writer is disposed to agree on this
point with the contentions of Dr. J. C. Gardner that the question
whether a subject is heritage or moveable should be determinable by
some rule in the law of Things relating to the nature of the subject
itself, instead of requiring an investigation of the law of Persons as
well. It is suggested that the dicta in Christie v. Smith's Ex. may be
compared with the subjective test, now discredited, which was applied
by the institutional writers to the question of growing crops. A lead-
ing Scottish authority, Brand's Trs., offers a very different interpreta-
tion from Christie v. Smith's Ex., and, it is submitted, a preferable
one. The locus classicus is in the judgment of Lord Chancellor Cairns
in Brand's Trs.

31 The reason for this change in meaning was explained by Martin B. in Elliott v.
Bishop (1854) 10 Ex. 496. To avoid confusion the term "fixture" in this chapter
will be used exclusively in Lord Chelmsford's sense—i.e., anything so annexed as
to become part of the heritage.

32 (1874) 1 R. 1180; see also Buckley J. in Re House [1905] 1 Ch. 406 and Lord

33 1949 S.C. 572.

34 (1950) 62 Jur.Rev. 136 et seq. Dr. Gardner surprisingly doubts whether the
summer-house should have been deemed heritage.

35 Supra.

36 Esp. Erskine, II,2,4.

37 (1876) 3 R.(H.L.) 16.

38 At p. 20.
"Looking at it in that way, I would remind your Lordships that there are with regard to matters of this kind, which are included under the comprehensive terms of 'fixtures,' two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of these rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or the inheritance. The other is quite a different and separate rule. Whatever once becomes part of the inheritance cannot be severed by a limited owner. . . . Those, my Lords, are two rules—not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of the fixtures which have been attached to the inheritance for the purpose of trade, and perhaps in a minor degree for the purpose of agriculture. But I repeat, the exception is not to the first of these rules, but the exception is to the second. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy."

This passage has frequently been relied upon in subsequent Scottish decisions.39

On the law as previously generally accepted, the legal questions which might arise regarding an alleged fixture were twofold: one, whether the particular subject had or had not been annexed to the solum in a manner which the law regards as constituting fixture; the other whether, assuming an affirmative answer to the first question, the claimant had a right as against the owner of the solum to have the fixture disannexed and removed. Though the right of removal was more extensive in some relationships than in others, the moveable or immoveable character of an article which had become a fixture did not—it was thought—depend upon the relationship inter se of the parties between whom the question as to its ownership was raised. Whether these relationships were of heir and executor, of landlord and tenant, or of heritable creditor and unsecured creditors, might, however, according to Lord Cairns, have a most important bearing upon the second question—namely, whether there was a right to disannex and remove.

In considering the questions as to whether a moveable has been annexed to the solum so as to become a fixture; and, if so, whether there is a right to remove—the courts apply the tests of degree and

39 Pace, however, Christie v. Smith's Ex., supra.
purpose of annexation. These tests would also be relevant even in the more subjective approach apparent in Christie v. Smith's Ex.

In deciding whether the moveable becomes on annexure part of the heritage, the court seeks to ascertain whether what was aimed at was the improvement of the heritage or the better enjoyment of the moveable. This depends upon the particular facts of each case, but it is relevant to consider whether some special advantage accrues to the estate from the annexation; also whether the article is necessary or specially adapted for the heritage. The degree and extent of attachment are to be considered in association with the motive of annexation. Can the thing be removed integre, salve et commodum—that is, without the destruction of itself as a separate thing or without causing irreparable injury to the fabric of the heritage? Is the annexation of a permanent or quasi-permanent character?

As a rule there must be some attachment to the heritage before a moveable can become a fixture, but this is not invariable. In the case of "constructive fixtures," where a moveable such as a key or factory bell or driving belt for fixed machinery becomes accessory to a heritable principal, the moveable by accession becomes part of the heritage. Apart from these cases, articles retained in position by their own weight may, if specially adapted to the building or ground, become part of the heritage. In Howie's Trs. v. McLay, a heritable security over a factory was held to include five lace looms which were bolted to an iron sole plate attached by its own weight to the floor. Lord McLaren said,

"In the case of machinery it cannot be of great importance to consider the degree or manner of attachment, because this is determined, not at all by the animus to make or not to make an addition to the heritable subject, but by the nature of the machine itself as requiring a greater or less degree of support to fit it for use in its habitation. In the case of a steam engine, it may be necessary that the boiler should be built into solid masonry. Again, the great planing-machines and lathes which are used in iron and steel works are not physically attached, because they remain fixed by their own weight, provided they are placed on a carefully prepared and perfectly level concrete bed. In either case the machine is affixed by being adapted to its environment, and I cannot see that it is of the least importance whether the adaptation consists in building up or in levelling down, in steadying by bolts and nuts, or in making use of the weight of the machine itself, where weight is sufficient to secure the requisite stability." Conversely, it is not any attachment that will give to a moveable the initial character of a fixture. Thus fixtures do not include carpets

40 See Rankine on Landownerships, 4th ed., pp. 118-120.
41 See Fisher v. Dixon (1843) 4 Bell's App. 286.
42 Christie v. Smith's Ex., supra; D'Eyncourt v. Gregory (1866) 3 Eq. 382.
43 (1922) S. F. 214. 44 At. p. 219.
45 Cf. Dowall v. Miln (1874) 1 R. 1180.
46 In the first sense stated by Rankine, 4th ed., p. 117.
nailed to floors, or pictures or tapestry hanging on the wall from nails or hooks.

It would appear that the degree of annexation is to be considered in the light of the object of annexation. Thus a degree of annexation by an owner of heritage and moveables might result in the moveables being regarded as fixtures—though similar annexation by persons with merely transitory right to use the heritage might not have that result. A contrast might be made between seats screwed into the floor of a cinema by the proprietor, and seats similarly fixed to the floor of a hall for one night's boxing only. If this rationalisation of the decisions is pressed too far, however, an objective test of heritable and moveable must be sacrificed.

**Right of Removal**

It is within the power of anyone who has affixed a moveable subject to land to stipulate by express contract for the right to remove it. A man cannot, however, by any such stipulation prevent a definite fixture from becoming part of the land and the property of the landlord. The result of this is that a right to remove, though possibly valid in a question with the landlord or his personal representative, might not be enforceable in a question with a singular successor in the lands.47 So, when a person erected a gas-engine in a sawmill, on a contract for payment by instalments, and under an agreement that he should have the right to remove it if any instalment was not paid, it was held that the mortgagee of the mill was entitled to the engine as against the seller thereof. The agreement between the seller of the machine and the mill-owner was of no avail against the mortgagee.48

Apart from cases of contract—such as sale or lease—which deal specifically with the right of removal, the right to remove a fixture depends upon the character in which the right is asserted; and in this connection the degree and the purpose and object of annexation are again very relevant. In some cases removal may be permitted, though there has been substantial annexation and removal will cause quite substantial damage to the heritage. Such questions may arise in the following relationships:

**Heir and Executor**

In cases between heir and executor the rule which sinks the fixture in the heritage is applied most strictly. Since both derive title from the deceased owner of the heritage, there is no reason to prefer the one to the other. It is the owner himself who has annexed the

47 Howie's Trs. v. McLay, supra.
48 Hobson v. Gorringe [1897] 1 Ch. 182, approved as applicable to Scotland in Howie's Trs. v. McLay, supra.
moveable to the heritage. The leading case is that of Brand's Trs. v. Brand.49 It became necessary to decide in that case whether certain fixed machinery was heritable property. In the course of his judgment Lord Cairns distinguished the right of an executor from that of a tenant who would have a right to remove trade fixtures. He said 50

"the moment the fixture is placed in the soil ... it does become attached to the inheritance; it does become part of the inheritance; it does not remain a moveable guad omnia; there does exist on the part of the tenant a right to remove that which has been thus fixed; but if he does not exercise that right it continues to be that which it became when it was first fixed, namely a part of the inheritance."51

Seller and Purchaser

In questions between seller and purchaser the terms of the contract may show what is included, and the advisers of these parties should be vigilant to stipulate expressly so that dispute may not arise. If the right to remove a particular fixture is not covered by contract, decision must be according to the general rules of law. A guiding principle is whether the fixture can be removed without injury to itself and the heritage.52 In Nisbet v. Mitchell Innes 53 grates, lustres and mirrors were held to be removable by the seller. In Christie v. Smith's Ex. 54 it was laid down that the tests to be applied in cases between heir and executor and in cases under the Lands Valuation Acts were generally applicable to questions between seller and purchaser. Similar rules apply in cases which arise between heritable creditors and the general creditors or a trustee in bankruptcy; and in determining the appropriate diligence to be used in respect of fixtures.

Landlord and Tenant

In questions between landlord and tenant, public policy has had the effect of giving to tenants a more liberal right to remove fixtures—in order to encourage them to improve the property which they occupy; and because it would be inequitable to confiscate in effect such improvements. Fixtures removable by a tenant may be divided into trade fixtures, ornamental fixtures and agricultural fixtures. It has long been decided that a tenant may remove fixtures attached by him for the purposes of his trade, even though they may have to be dismantled—provided that they can be reassembled and that complete destruction of the thing is not the inevitable consequence of removal. A tenant may also remove such article as he has annexed for ornament

49 (1876) 3 R.(H.L.) 16.
50 At p. 22.
51 See also Fisher v. Dixon (1845) 4 Bell's App. 286.
52 Cochrane v. Stevenson (1891) 18 R. 1208; Jamieson v. Welsh (1900) 3 F. 176.
53 (1880) 7 R. 575.
54 1949 S.C. 572.
or for the better enjoyment of the article itself. The English case of Spyer v. Phillipson\(^5\) provides a useful illustration. The executors of the lessee of a flat, leased for twenty-one years were held entitled to remove valuable antique panelling, ornamental chimney-pieces and so-called “period” fireplaces, which the lessee had had installed. Some slight structural alteration had been involved in affixing the chimney-pieces and fireplaces, and quite substantial damage was inevitable in removing these fixtures—though such damage would be reparable and would not affect the structure of the premises. In this case, of course, the tenant exposed himself to a claim for breach of covenant in respect of the damage he had done, and to the risk of incurring considerable liability in respect of replacement. Nonetheless he had not lost the right of removal. A tenant would not, however, be entitled to remove a greenhouse, on the grounds that it was an ornamental fixture—though, were he a market-gardener growing tomatoes, he would be entitled to remove it as a trade fixture.\(^5\) In leases of agricultural subjects the common law was less favourable to the tenant than in questions with tenants plying a trade. It is now provided by the Agricultural Holdings (Scotland) Act, 1949,\(^5\) s. 14 (re-enacting earlier statutory provisions), that any engine, machinery, fencing or other fixture affixed by a tenant, and also certain buildings erected by him, remain the tenant’s property and may be removed.\(^5\)

\textit{Liferenter and Fiar}

In questions between liferenter and fiar, the right of the liferenter’s executors to remove fixtures is more extensive than that of an executor against the heir. The tendency is to assimilate the case of the liferenter to that of the tenant, and to permit removal of articles annexed for purposes of trade or ornament.

\textbf{Heritable or Moveable by Destination}

Rights originally moveable may become heritable by destination, in effect by a legal fiction applicable in questions of succession.

An old example is the case of Johnston v. Dobie.\(^5\) At the time of Johnston’s death he was building a house, for which a set of doors and windows and other articles were then lying ready in order to be fixed to their proper places in the building. A question arose with regard to these as to whether they were heritable or moveable. It was held that they were heritable, the opinion of the majority of the

\(^5\) [1931] 2 Ch. 183.


\(^5\) 12, 13 & 14 Geo. 6, c. 75; see also 6 & 7 Eliz. 2, c. 69, Sched. VII.

\(^5\) Rights of compensation for improvements are also given.

\(^5\) (1783) Mor. 5443.
court being that where the will of the proprietor was so strongly marked and was actually carried into execution by overt acts such *animus* should have full effect. It was held, therefore, that the unfixed articles destined for the house fell to the heir.

On the same principle it has been held that, when a person died in the course of erecting a house that portion of his moveable estate which was required to complete the house according to the plans adopted by him was heritable by destination, and in a question with a child claiming *legitim* fell to be deducted from the moveable estate out of which *legitim* was payable, *Malloch v. Maclean.* The reasoning in *Malloch v. Maclean* was, however, doubted by Lord President Clyde in *Fairlie's Trs. v. Fairlie's Curator Bonis,* and he clearly would have considered it more appropriate to regard the sum required for completion as a personal debt of the deceased. His Lordship also considered that only by accident were cases such as *Johnston v. Dobie* not treated as cases of constructive annexation. The principle of converting moveables into heritage *destinatione* is, however, clearly established within limits—but for purposes of succession alone. As Bell observes "The character thus accidentally impressed on subjects by destination, although it has ruled questions of succession, is not admitted to change them in respect to diligence.”

**INCORPORAL SUBJECTS**

Incorporeal subjects are heritable or moveable, according to the subject-matter. Rights connected with land, such as leases and servitudes, are heritable; on the other hand, claims of money, even when relating to loss on heritable property, are moveable. Personal debts, shares and legacies are all moveable. Shares in companies and in partnerships are moveable, although the property of the company or partnership may include heritable estate. Rights of patent or copyright are moveable. The question whether goodwill is heritable or moveable depends upon the circumstances of the case. Thus the goodwill of premises licensed for the sale of intoxicating liquors would generally be heritable, because the connection of the customers usually depends less on the character and reputation of the lessee than on the convenience of the site, *Muirhead's Trs. v. Muirhead.* In other types of business the goodwill may be moveable, as if it consists of the advantage deriving from the reputation and connection of the firm

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60 (1867) 5 M. 335. See also *Robson v. Macnish* (1861) 23 D. 429.
61 1932 S.C. 216.
62 *Principles,* § 1475.
63 See Erskine, Inst. II, 2, 14; Bell's Comm. II, pp. 2-3; *McLaren on Wills and Succession,* I, p. 198.
64 Bell’s *Principles,* § 1477.
65 (1903) 7 F. 496.
which may have been built up by years of honest work or gained at lavish expenditure of money.

Feud duties and rents, as the produce of heritable subjects, are heritable, but arrears of feu duties or rents are moveable; they are considered as being paid when due to the creditor, and therefore as part of his moveable estate.

"The law in splitting the estate of a deceased betwixt his heir and executor suffers not chance to govern. It supposes every thing to be performed which ought to have been performed; and will not put it in the power of a dilatory debtor to hurt the executor."

In the same way the liabilities for arrears of feu duties or rents fall on the executor and not on the heir of a deceased vassal.

At common law heritable securities were heritable in the succession both of debtor and creditor, but by the Titles to Land Consolidation (Scotland) Act, 1868,67 heritable securities as defined in section 3 were made moveable *quaod* the succession of the creditor and pass to his executors *in mobilibus*, though remaining heritable *quaod* the legal rights of spouses and children and also *quaod fiscum*. The statute alters the law only *quaod* the succession of the creditor. Such debts still remain heritable in questions affecting the succession of the debtor. Accordingly, where a property over which a bond has been granted has been sold, and the proceeds are insufficient to pay off the bond, the balance remaining due forms a debt against the heritable estate of the granter of the bond, and does not fall to be paid out of his moveable estate so long as there is heritable estate available to pay the debt, *Bell's Trs. v. Bell*.68 Bonds may still be made heritable *quaod* the succession of the creditor if they are taken to him and his heirs excluding executors, or if he executes a minute excluding executors.

Personal bonds bearing interest were, by general rule of the older law, accounted heritable because by the fixed yearly profits arising from them they bore some resemblance to rights properly feudal. The Act of 1661, c. 32, made these obligations moveable, but left them heritable *quaod fiscum* and *quaod* the widow's *jus relictae*; but this latter exception has now been abolished by the Conveyancing (Scotland) Act, 1924,69 s. 22, which assimilates the law as regards *legitim* and *jus relictae*.

Due to analogies formerly drawn from feudal law, rights involving a tract of future time, such as a yearly pension or annuity which cannot at once be paid or fulfilled by the debtor, but continue for

66 *Martin v. Agnew* (1755) Mor. 5457.
67 31 & 32 Vict. c. 101, s. 117.
68 (1884) 12 R. 85.
69 14 & 15 Geo. 5, c. 27. *Legitim* and *jus relictae* are discussed *ante*, Chap. 13.
a number of years and carry a yearly profit to the creditor without relation to any capital sum, are heritable. Whatever arises de anno in annum as a matter of emerging substantive right without reference to a stock or capital is, in accordance with this old rule, treated as heritable; but where there is a fundamental right of property out of the use of which profits may or may not be realised, it matters not for what length of time such profits may continue to be levied, the heritable or moveable character of the subject is to be settled with reference to the subject itself. Accordingly the income of a sum of money is always moveable.

70 Erskine, Inst. II,2,6.
CHAPTER 21

HERITABLE PROPERTY

"Heritable property" may, generally speaking, be regarded as an equivalent for immovables though heirship moveables are governed by the same rules as heritage. The law of land in Scotland as regards tenure and conveyancing is, with certain exceptions, feudal law modified by successive enactments, and its somewhat technical detail can only be studied properly in the standard works on conveyancing. It is expedient, however, to describe the system of landholding in outline.

THE FEUDAL SYSTEM AND FEUDAL LANDOWNERSHIP

The essence of the feudal system is well expressed by Bell as follows:

"The property of land in Scotland is held either directly or immediately under the Crown as paramount superior of all feudal subjects; or indirectly, either as vassal to some one who holds his land immediately from the Crown, or as a sub-vassal in a still more subordinate degree. The two separate estates of Superiority and Vassalage, are held reciprocally either by the Sovereign and his immediate vassal; or by the Crown's immediate vassal, and his vassal under him; or successively by vassals still lower, down to the last step of the ownership of land."

A feudal grant either by the Crown, or by a vassal, or by a sub-vassal is not a total cession and does not deprive the granter of all legal estate in the lands granted. The granter (superior) retains a radical right to the subjects. Thus when the Crown grants land to a vassal by feu, it retains the dominium directum or "superiority," transferring the dominium utile to the vassal. In each stage of subinfeudation, the granter of a feu right retains a dominium directum or superiority over the lands, and the grantee acquires the right of property or dominium utile. The dominium directum or superiority is in the feudal sense the more eminent right, and the grantor of it is known as the "superior," since in relation to the vassal he stands in a higher rank; but the dominium utile held by the vassal is much the more

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1 See p. 496, ante.
2 It may be convenient to explain that the term "conveyancing" in the law of Scotland comprises both "real property" and "conveyancing" in the English sense.
3 Principles, § 675.
4 Erskine, II,3,7.
5 Ibid. II,3,10.
The feudal system, as is well known, was based on the theory that all land in the country belonged to the king, and all rights to land were derived from his grant—either immediately, as in the case of magnates, or mediatel2 under the grant of a superior or intermediate lord who himself held of the king. The vassal in an ordinary fief owed to his superior certain services, which would usually be “not pecuniary and periodical” but “military and occasional.”

The money relations between superior and vassal arose out of the feudal incidents, known in Scotland as “casualties”—such as relief, wardship and marriage. The ordinary feudal tenure in Scotland—corresponding to “Knight Service” in England—was known as “Ward Holding,” which has been described, as “a modified kind of military tenure, gradually relaxing in rigour as the country acquired repose and civilisation.” Whereas the tenure of knight service was in England converted into free socage tenure in the mid-seventeenth century, ward holding was not brought to an end in Scotland until the mid-eighteenth century. After the suppression of the Jacobite Rising of 1745, the statute of 20 Geo. 2, c. 30, abolished the tenure of ward holding and its casualties. Existing ward holdings held direct from the Crown were converted into blench holdings—that is, a free tenure for payment of a penny Scots or performance of some nominal service if asked only. Ward holdings held of subject superiors were converted into feu holdings for payment of a feu duty of “Money, Victual or Cattle or otherwise.” The tenure of “feu” corresponds in feudal theory with the tenure of socage in English law, though socage tenure does not usually imply payment of feu duty. As Professor Wood has observed, therefore while socage is legally the parallel of our feu tenure, it is practically equivalent to our blench tenure.”

Feu holding, on condition of making periodic payments of money, has, accordingly, come to be the prevailing and practically universal tenure in Scotland. Tenure by Mortification—that is holding for

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6 Stair, II,3,7.
7 Erskine, II,3,10.
8 Wood, Conveyancing, p. 120.
9 Duff, Conveyancing, p. 48.
10 Though it was modified by the Act 1 Geo. 1, c. 54, after the Jacobite Rising of 1715.
11 The judicial powers of feudal superiors were struck at by the Act 20 Geo. 2, c. 43, which abolished the heritable jurisdictions.
12 Conveyancing, p. 123.
religious or pious uses—was abolished at the Reformation; socage is also extinct; blench tenure is seldom encountered; and the distinction between burgage and feu tenure was virtually eliminated in 1874.¹³

To quote Wood ¹⁴ again,

“...It is curious to observe that feu-holding, which now is the prevailing tenure, should have taken the name applicable to the whole feudal system, for the words ‘feu’ and ‘feudal’ have the same derivation and meaning, and that this tenure should be in its nature in complete contrast to the original idea of the feudal system, which had nothing to do with money payments at fixed dates.”

It was essential to the working of the early feudal system that lords who had received a large grant of land from the king should be at liberty to grant sub-feus to vassals of their own; and that these in their turn should be free to subinfeudate—and so forth. Land could be subfeud any number of times, and many superiors be interposed between the Crown and the vassal in actual possession of the land. In Scotland there has never been any general legal restriction on this liberty to grant feus, and indeed the Conveyancing (Scotland) Act, 1874,¹⁵ s. 22, and the Conveyancing Amendment (Scotland) Act, 1938,¹⁶ s. 8, it has been made incompetent to insert in feu rights restrictions on subfeuing. This is in striking contrast to the law of England, where by the statute Quia Emptores, 1290, subinfeudation was prohibited, and it was provided that thereafter, in transfers of land, the purchaser should not hold of the disposer but should become the feudal dependant of the disposer’s lord. In England a right of sale was thus recognised in place of the right to subinfeudate.

It is worth observing that in Scotland, where there were no restrictions on subfeuing, recognition of the right to sell came late. For a long time a vassal could not compel his superior to accept a stranger in the vassal’s place. This restriction on alienation inter vivos could be circumvented to some extent by the purchaser appearing in the guise of a creditor, and availing himself of the right of demanding entry from the debtor’s superior which was conferred on creditors, appraisers and adjudgers by the Acts 1469, c. 37 and 1672, c. 19.¹⁷ It was not, however, until 1747¹⁸ that an ordinary purchaser of feudal property gained the right, as such, to compel

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¹³ Burgage was a tenure peculiar to royal burghs, by which the burgh itself was vassal and no periodic payments were exacted from the burgh or for the burgh from the burgesses.
¹⁴ At p. 127.
¹⁵ 37 & 38 Vict. c. 94.
¹⁶ 1 & 2 Geo. 6, c. 24.
¹⁷ See also A.P.S. I, 371; cf. the more liberal practice of the Crown illustrated by the Act 1578, c. 66. As regards the historical context of these Acts, see Lord Cooper in Supra Crepidam, Edinburgh, 1951, p. 3 et seq.
¹⁸ By 20 Geo. 2, c. 50, s. 12.
the seller's superior to enter him as vassal in place of the seller. Likewise until 1747 a superior could refuse to accept a vassal as successor under a fictitious disposition de praesenti, to take effect on the granter's death—which until 1868 was the means by which prohibition of mortis causa disposition was circumvented. In 1868, by the Titles to Land Consolidation (Scotland) Act, s. 20, disposition of land by testamentary deed became lawful.

Since 1747 alienation has been permitted both mortis causa and inter vivos, but this has not stopped subinfeudation. It may be observed that the provision of an annual sum out of land by feu duty, secured by the sanction of irritancy or forfeiture, is regarded by the legal profession in Scotland as so convenient and desirable that legislation has given effect to the recommendations made by the Guthrie Committee in 1952 to the effect that long leases, which before the passing of the Entail (Scotland) Act, 1914, could not have been granted as feu holdings because of the terms of deeds of entail, should be convertible into feudal holdings. The Long Leases (Scotland) Act, 1954, provided that lessees and sublessees under grants for terms of not less than fifty years granted before that date in respect of residential property should be entitled to obtain a feu right of the property on the conditions specified in the Act. Notices requiring the grant of such a right had to be given before September 1, 1959.

The relationship between superior and vassal implies rights and duties which transcend contract, and the existence of that relationship is essential if the terms of the feu charter are to be relied on in litigation. Where "the foundation of the action is the feudal title, it is . . . only the feudal proprietor who has a title to sue." Thus, though the holding of subjects under ex facie absolute disposition to a creditor gives the debtor most of the rights of ownership, he has no title to sue in respect of alleged breaches of a feu charter by a vassal of the same superior. This principle protected the lavatories at Largs, though the pursuers in Red Court Hotel Ltd. v. Burgh of Largs would also have failed upon the principle that, when vassals holding from a common superior invoke against each other the conditions of a feu charter, upon the principle of jus quaesitum tertio, they must establish—as will be discussed in the context of Obligations

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19 Fogo v. Fogo (1842) 4 D. 1063 at p. 1137.
20 31 & 32 Vict. c. 101.
22 4 & 5 Geo. 5, c. 43.
24 Red Court Hotel, Ltd. v. Burgh of Largs, 1955 S.L.T.(Sh.Ct.) 2, per Sheriff (now Lord) Guest at p. 5.
25 Ibid.

S.L.S.—17
—that the superior intended to impose restrictions for the benefit of a "community." 26 The distinction, moreover, between the personal obligations of one who has been superior and the reciprocal and continuing duties of superiors and vassals is often of vital importance. 27

The superior can assert his rights over the land granted in feu either by conventional irritancies (scil., forfeiture stipulated for in terms of the feu charter) or by reliance on the Act, 1597, c. 250, irritancy for non-payment of feu duties. Conventional irritancies are enforced according to their terms without regard to hardship, but where the obligation is ad factum praestandum (e.g., to erect and maintain buildings on the land feu’d) the irritancy can be purged at any time prior to decree. Before the irritancy can be enforced, the superior must probably obtain from the court an order ordaining the vassal to implement his undertaking within a specified time. 28

Irritancy (forfeiture) of the feu for non-payment of feu duty is contractual in origin, and derives from the Roman contract of emphyteusis, which allowed the rights of the emphyteuta to be forfeited for non-payment of the "canon" or rent. Forfeiture ob non solutem canonem was not a casualty under the feudal system, but was borrowed, as the statute 1597, c. 250, indicates, from Roman and canon law. 29 The effect of the statute is to authorise irritancy in the event of two years’ non-payment of feu duty, as if this had been stipulated for in the feu contract. "In case it sall happen in time cummin ony vassal or fewar holtand lands in few ... ferme ... to failzie in making of payment of his few-duty ... be the space of two zeires, hail and togidder: That they sall amitte and tine their said few of their said lands, conform to the civill and cannon law." Since the consequence of enforcing the irritancy, and consequent forfeiture or tinsel of the feu, makes the whole feu contract void, as though it had never existed, it seems to be incompetent thereafter for the superior to sue for arrears of duty due under the contract itself. 30 To carry discussion further would, however, involve consideration of specialties beyond the scope of the present work.

The system of registration is of paramount importance in Scottish conveyancing, and is of considerable antiquity. There may be registration for preservation, execution and publication; but it is upon

26 Post, Chap. 34; also Hislop v. MacRitchie’s Trs. (1881) 8 R.(H.L.) 95; Girls’ School Co. v. Buchanan, 1958 S.L.T.(Notes) 2.
29 For full discussion on the antecedents of irritancy in Scots law see the Whole Court’s opinions in Cassels v. Lamb (1885) 12 R. 722, esp. per Lord Fraser, p. 759 et seq. In this case it was decided that the annulling of the vassal’s right and “all that has followed thereon” confiscated the rights of subvassals without any obligation on the superior to recompense them for buildings erected.
registration for publication in the Register of Sasines that security of landholding in Scotland depends. This register was instituted by the Act, 1617, c. 16, which provided that all redeemable rights and deeds transferring and discharging the same and also all instruments of sasine should be registered within threescore days after the date of the same; and, if any of the said writs should not be duly registered within the threescore days, the same should make no faith in judgment as against a third party who had acquired a perfect and lawful right to the said lands. The register is open to public inspection, and the public may thus ascertain the ownership of land and the burdens imposed thereon. The theory of registration, however, goes beyond mere publication. The maxim nulla sasina nulla terra has had much importance in Scotland. Unless a person who has contracted to acquire land is infeft—that is, has "sasine"—he has merely a right to claim damages against the seller, if the seller has disposed of the property to another who takes in good faith before the purchaser under the contract has gained a real right by infeftment. In early times the superior himself put the vassal in public possession of the feu actually on the ground. Sasine was transferred by delivery to the new vassal of the symbols of sasine—such as earth and stone for lands and houses; for salmon fishings, a net and cobbles; and for a right of ferry, an oar and some water. This was known as "proper investiture," but subsequently the normal method was by "improper investiture," where a bailie, acting on the superior's written precept or mandate, attended on the ground and gave symbolical delivery. A notarial instrument, the instrument of sasine, duly witnessed, was then expede describing the lands and recounting the ceremony. These instruments by the Act of 1617 had to be registered for information of all concerned, and the penalty for failure to register might be to lose the lands. The ceremony of delivering sasine was still necessary, but in time it came to be appreciated that the important aspect of the transaction was the registration. Accordingly, the Infeftment Act, 1845, provided that it should not longer be necessary to proceed to the lands to give sasine, and that infeftment might be completed by expeding and recording an instrument of sasine in the Register of Sasines. Thus registration as required by

31 The antecedents of this statute are traced by Duff, Conveyancing, p. 119 et seq. By the Act of 1696, c. 18, it was made clear that the first sasine registered, though posterior in date of grant, would be preferred.

32 There have been many important statutes developing the law regarding registration—in particular the Acts 1681, c. 11; 1693, c. 13 and 14; Infeftment Act, 1845 (8 & 9 Vict. c. 35); Titles to Land (Scotland) Act, 1858 (21 & 22 Vict. c. 76); Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101); Land Registers (Scotland) Act, 1868 (ibid., c. 64); Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. 5, c. 27); Public Registers and Records (Scotland) Acts, 1948 and 1950 (11 & 12 Geo. 6, c. 57; 14 Geo. 6, c. 11).

33 8 & 9 Vict. c. 35.
statute implied infeftment. By the Titles to Land (Scotland) Act, 1858, the precept and instrument of sasine were made unnecessary, and accordingly, to complete a real right in land by infeftment, the law requires merely that the deed of conveyance should be registered. A purchaser is infeft when his title is recorded, and the owner of a bond and disposition in security, by registering the deed declaring his security, makes it good against others claiming rights in the property.

It is not necessary for present purposes to discuss statutory changes in the Register of Sasines, nor how, by a succession of Conveyancing Acts, the methods of conveyancing in Scotland have been abbreviated while maintaining the traditional theory. It must, however, be stressed that, though there is at present a Committee presided over by Lord Reid charged with the consideration of whether a system of "registration of title" might be introduced in Scotland—and Lord Dunedin presided over another Committee on the question in 1910—the present system of registration in Scotland, which dates from the early seventeenth century, does not involve "registration of title" in the sense understood in England. The Register of Sasines is a register of writs affecting land. By contrast, the Property Register in the Land Registry in England contains inter alia a description of the land and a reference to the General Map kept in the Land Registry or to the filed plan of the land. The main objects of the English Land Registration Acts of 1925 and 1936, and the rules made thereunder, were to simplify and cheapen conveyancing by obviating the repeated investigations of title necessary in unregistered conveyancing; to provide simple forms for transfer and charge; to provide a state guarantee of the registered title; and to facilitate dealing with land subject to third party rights. These are very desirable ends, but the solution applied in England could not, it is thought, be grafted onto the present Scottish system. Scottish law does not recognise a division between legal and equitable estates in the English sense; it is perfectly possible to create in Scotland successive interests in land without the intervention of a trust; there is ownership of flats erected in blocks, i.e., in vertical space; and the hierarchy of superiorities—each being an estate in land—presents a very different problem to that of English land law, where subinfeudation has been prohibited. The Royal Commission on Registration of Title presided over by Lord Dunedin reported as long ago as 1910 that the total abolition of superiorities would present no very great theoretical difficulty, and that feu duties

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34 21 & 22 Vict. c. 76.
35 Recording only avails a bona fide purchaser, Rodger v. Fawdry, 1950 S.C. 483.
36 15 & 16 Geo. 5, c. 21.
37 26 Geo. 5 & 1 Edw. 8, c. 26.
38 Report, s. 30.
might be replaced by a perpetual first charge redeemable only at the option of the owner. Non-feudal charges are not unknown in Scottish law. In its Report the Commission recommended that, as a first step on the road to registration, all mere superiorities should be abolished, so as to reduce the Scottish land system to an allodial one. The present writer would not care to hazard an opinion as to the likelihood of action being taken on these recommendations, or on the recommendations expected from those presently charged with considering the problem of registration of title in Scotland. He may, however, express astonishment that the Reid Committee should include as one of its members the leading authority on the English system, whose proper role, it might be thought, would have been as expert witness presenting the advantages of his system as others might the merits of theirs. Further, it would seem most undesirable to introduce registration of title until various anachronisms in the general law of conveyancing have been removed. The main considerations have been reviewed—as always admirably—by Professor J. M. Halliday, Professor of Conveyancing at Glasgow University, in the Conveyancing Review. Two broad courses were suggested by him in the alternative:

(a) A comprehensive scheme involving the abolition of superiorities, a complete positive and simplified restatement of Scottish land law and the adoption of a system of registration of title whereby the validity of titles would be guaranteed by the State.

(b) A less comprehensive measure retaining the principles of the existing system, but consolidating the conveyancing statutes and drastically simplifying the forms of deeds.

ALLODIAL LANDOWNERSHIP

Though most land is held as feudal land, some land is held of no superior, and is known as allodial. There may be instanced the paramount superiority of the Crown; the property of the Crown and of the Prince of Scotland; ecclesiastical property of the Church of Scotland; and certain land acquired by compulsory purchase. Moreover, real burdens for money affecting land, and leases, even though registered, are non-feudal. Of special historical interest, though of limited application, is “udal tenure” in the Orkneys and Shetlands. These islands, as the Norse Sagas vividly portray, were settled by Viking colonists who established “odal” tenure derived from occupatio; and acknowledged no vassalage, homage or service to King

39 Ibid., s. 60.
41 “Conveyancing Reform” (1958) 1 Conveyancing Rev. 139. Subsequent correspondence arising out of Prof. Halliday’s article continues the discussion in later issues.
or magnate. Udalism and feudalism were opposed. In 1468–69 Christian I of Norway pledged Orkney and Shetland in security of the unpaid balance of Princess Margaret’s dowry upon her marriage to James III of Scotland, and the pledge has never been redeemed. In 1471, however, Earl William Sinclair, the last of the Orkneyan jarls, exchanged (anglicé exchanged) his estates for others on the Scottish mainland, and in 1612 Scotland annexed Orkney and Shetland to the Crown; though it may be noted that the Act of Parliament dealing with the matter did not in terms repeal the provisions of the Act 1567, c. 48, which declared that neither Orkney nor Shetland should be subject to the common law of Scotland, but should retain their own laws. Nevertheless Orkney and Shetland have to a large extent come under the municipal law of Scotland, which applies, except where udal law has survived the conflict between the feudalising influence of the Crown or Crown’s grantees and the efforts of the udallers to maintain their traditional rights. The record of the Scottish incomers in former times is not a reputable one. It has been judicially recognised, Lord Advocate v. Balfour, that the Crown is not deemed to have been the original proprietor of the islands as would be the case in feudal theory; and there has been no general acceptance of the feudal system in Orkney. Thus it is that, though feudal landholding has gained a considerable footing in the former Jarldom of Harald, the alodial udal tenure still to some extent continues. As this book is in press an action continues in the Court of Session between the Lord Advocate and the University of Aberdeen in respect of treasure found on the Shetland island of St. Ninian. In the course of this litigation there is likely to be a comprehensive review of the authorities dealing with the scope of udal law in the twentieth century.

Leases

A lease—referred to in the older authorities as “tack”—is a contract of location or hire whereby certain uses of land, houses or other heritable subjects are let to a tenant for a return of money or produce or, in older law, services. It must be noted, however, that if the occupation of a house by a servant is necessary for him to render the service for which he is employed, the occupation will be regarded as

42 A.P.S. IV, c. 15, 481.
43 A.P.S. III, c. 48, 41.
44 1907 S.C. 1360.
governed, not by lease, but by the contract of service. The essentials of the contract of lease are a subject let and hired, a hire or consideration or rent to be given for it, and a period of time for which the use or occupation is to be given. A mass of statute law now regulates the letting of certain categories of premises or subjects, and it is both impossible and undesirable to expound the detail of the various statutory "codes" in an introductory treatise. No one giving serious consideration to the problems raised by these "codes" would approach them without the relevant statute in hand, and, though the general reader and student should realise the great importance of statutory leases in the law of Scotland today, he should also realise the dangers of superficial treatment. For general guidance, however, a short note on "Statutory Leases" has been included as an Appendix. In the present chapter only the basic principles of the common law are considered.

At common law a lease was a personal contract, and gave no real right to the tenant—with the result that, when the subject passed to a singular successor or creditor of the landlord, the tenant had to remove if so required. This caused great hardship, and the law was altered by an Act which is still the basis of the Scottish law of leases—the Act 1449, c. 18—whereby a real right in the subjects was made valid against singular successors of the landlord. The need for such redress appears from the fact that, as Lord Cooper has pointed out, between 1449 and 1500 "No fewer than ten separate Acts were passed at brief intervals for the benefit of a class of the community described as the 'puir tennentes' or 'the puir people that labouris the grund . . . whose heavy complaintes has ofttimes been maid'."

To bring the contract within the benefit of the Act, the lease, if for more than a year, must be in writing, there must be an "ish" or term of expiry, and possession on the lease must have followed as the requisite manifestation of real right. Entry in advance of the term to do certain acts on the ground is not possession for this purpose. In Gray v. Edinburgh University, where there was no consensus as to the rent or duration of a projected lease, it was held that no lease had come into existence. The Second Division in the course of their opinions discussed the circumstances in which, when no ish had been decided, a lease for one year might be implied. They concluded that

47 Leasehold in Scottish law is heritable property—cf. English law.
48 Post, Appendix C.
49 Supra Crepidam, p. 4.
50 A lease in perpetuity could, however, bind the lessor himself.
this presumption could only arise when the relationship of landlord and tenant had actually come into existence—as by the tenant entering into possession. The absence of any provision for the payment of rent also precludes an agreement for the occupation of premises from being accepted as a lease under the Act 1449, c. 18. Thus in Mann v. Houston a purchaser was held to be entitled to succeed in an action of ejection against the occupier of premises, although the purchaser knew that the defender had entered for ten years after making a lump-sum payment of £200 to the previous owner. This agreement was held not to create any real right, and mere knowledge of it did not bar the purchaser personali exceptione. A real right may also be obtained under the Registration of Leases Act, 1857. This Act applies to probative leases which are either for thirty-one years or more, or contain an obligation of renewal so as to endure for that period. The subjects, except in mining leases, must not exceed fifty acres. Such leases when recorded in the Register of Sasines are valid in questions with singular successors, even although there is no rent, no definite term specified, and no possession has been taken.

Stipulations which are inter naturalia of the lease transmit against singular successors. There is a distinction between stipulations which are extrinsic to the lease, and therefore do not transmit against singular successors, and those which are of the essence of the contract and do transmit. Where there was a provision in a lease for 999 years that the landlord would grant a feu on demand, this was not regarded as inter naturalia of the lease—Bisset v. Magistrates of Aberdeen. Thus also, a right to retain rent for a debt unconnected with the lease is extrinsic, for it is a stipulation which bears reference to a collateral concern of the parties, and not to the general relations of landlord and tenant. It is otherwise where a stipulation is intended to render effectual some undertaking on the part of the landlord qua landlord, such as to submit to arbitration, or to pay for meliorations. In such a case the stipulation does transmit, and “neither creditors nor purchasers have reason to complain, since by the lease and possession, they have full means of learning how the stipulations and the rent stand, and so may regulate the price or their credit accordingly.”

A lease comes to an end if either party gives notice by the appropriate time before the date fixed for expiry, otherwise it continues by

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54 20 & 21 Vict. c. 26; see also 2 & 3 Eliz. 2, c. 49, ss. 26–27.
55 (1898) 1 F. 87.
56 Bell's Principles, § 1202.
57 Montgomerie v. Carrick (1848) 10 D. 1387.
58 Bell's Principles, § 1202.
tacit relocation.\textsuperscript{60} A lease may also be determined at the landlord's option under a legal or conventional irritancy (or forfeiture) for non-payment of rent or insolvency of the tenant.

**Landlord's Obligations**

The landlord is bound, apart from express agreement, to hand over to the tenant in agricultural and residential leases full possession of the subjects in a reasonable state of fitness for the purposes of the let \textsuperscript{60}; and warrants that the tenant will remain throughout the lease in undisturbed possession. If the premises are not fit for the purposes of the let, the tenant may refuse to enter and claim damages. In urban tenements every lease is, in default of any specific stipulation, deemed to include an obligation on the part of the landlord to hand over the premises in a wind and watertight condition, and if he does not do so there is a breach of contract and he may be liable in damages. He is also bound to put them into a wind and watertight condition if, by accident during the tenancy, they become not so; but this is not a warranty, and accordingly he is in no breach as to this part of his bargain till the defect is brought to his notice and he fails to remedy it.\textsuperscript{61} "Wind and watertight" means only wind and watertight against the ordinary attacks of the elements, not against exceptional encroachments of water due to other causes.\textsuperscript{62} It is, however, usual for the lessor to elide his common law liability by agreement. As this book goes to press a Housing (Scotland) Bill is being debated, and many of its provisions correspond to the Housing Act, 1961,\textsuperscript{63} which has been passed for England. In sections 32 and 33 of that Act comprehensive statutory provision is made for the first time for the distribution of repairing burdens between landlord and tenant under short tenancies. These sections protect a large class of tenants from the practice of lessors to exclude their liability at common law and to impose heavy burdens for repair upon tenants. Comparable provisions may be made for Scotland in the projected measure under consideration.\textsuperscript{63a} Meanwhile, with regard to repairs there is a distinction between urban and rural leases; in the former the obligation to repair is on the landlord,

\textsuperscript{59} For periods of notice see Removal Terms (Scotland) Act, 1886 (49 & 50 Vict. c. 50); Sheriff Courts (Scotland) Act, 1907 (7 Edw. 7, c. 51), ss. 34–38, as amended by Rent Act, 1957 (5 & 6 Eliz. 2, c. 25), s. 26 (1) and Sched. VI, paras. 28–29. For modifications in agricultural leases see Agricultural Holdings (Scotland) Act, 1949 (12, 13 & 14 Geo. 6, c. 75), s. 24, and for small dwelling-houses see House Letting and Rating (Scotland) Act, 1911 (1 & 2 Geo. 5, c. 53), ss. 3–4—both as amended by the 1957 Act.

\textsuperscript{60} Certain houses let at less than £26 p.a. must be kept reasonably fit for habitation—14 & 15 Geo. 6, c. 34 (2 & 3 Eliz. 2, c. 50).

\textsuperscript{61} Notice of defect is apparently required even under the statutory obligation imposed by the Housing (Scotland) Act, 1950, s. 3 (1), upon lessors of houses let at a rent not exceeding £26 to keep them "reasonably fit for human habitation."


\textsuperscript{63} 9 & 10 Eliz. 2, c. 65.

\textsuperscript{63a} See now 10 & 11 Eliz. 2, c. 28 and Addenda.
and in the latter on the tenant. A tenant is not bound to repair natural
decay or deterioration of an extraordinary kind. Where there is
partial destruction of the subjects, the tenant is entitled to abatement
of rent. Destruction of the subjects by *damnum fatale* discharges the
contract, *rei interitu*.

**Obligations of the Tenant**

The tenant is bound to occupy the premises let to him and to give
them the benefit arising from care and use. Thus where an agricultural
tenant was sentenced to three years' imprisonment for culpable
homicide this was held to involve breach of a material condition.64
A tenant must use a reasonable degree of diligence in preserving the
subjects from injury, and so, if he goes away in winter without
turning off the water or giving notice to the landlord, and the house
is damaged through the bursting of frozen pipes, the tenant is liable.65
The tenant has also an obligation to pay the rent. Every landlord
is entitled at common law to have a suitable stocking brought by the
tenant into the premises so as to secure him in payment of his rent.
The obligation may be reinforced by a plenishing order, at least in
cases to which the landlord's hypothec is still applicable.66

The tenant must not invert the uses either in whole or in part
for which the subjects have substantially been let. Hence, he is not
entitled to use a farm building as an alehouse, or to turn a dwelling-
house let as such into a public-house or shop. What constitutes
inversion is a question of degree, having regard to the whole circum-
stances and the bona fides of the transaction.67

**Remedies of the Tenant**

When a tenant finds that, through failure of the landlord to carry
out repairs, the house ceases to be in tenantable or habitable condition,
he may treat the mischief as a breach of a material term of the lease
entitling him to rescind the contract and abandon the lease, and also
(if he has given due notice of the disrepair) claim damages.68 Alternat-
vively, founding on the implied warranty in the contract, he may make
a claim on the landlord to put the premises in proper order, and

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64 *Blair Trust Co. v. Gilbert*, 1940 S.L.T. 322.
66 But see Hypothec Abolition (Scotland) Act, 1880 (43 Vict. c. 12) regarding
abolition in the case of agricultural leases, and restrictions in House Letting
and Rating (Scotland) Act, 1911 (1 & 2 Geo. 5, c. 53).
67 *Keith v. Reid* (1870) 8 M.(H.L.) 110; and see *Rankine on Leases*, 2nd ed., p. 224
et seq. for cases cited.
68 If the tenant, after renunciation of the lease and acceptance by the landlord
of such renunciation raises an action of damages, the landlord's acceptance
of renunciation will be construed to have implied a discharge of all claims competent
to the tenant against him—*Lyons v. Anderson* (1886) 13 R. 1020.
(unless he has contracted not to do so) will be justified in exercising the right to retain the rent. There is some authority for the view that if the tenant continues to occupy premises which he knows to be in a dangerous state, he may be barred from claiming damages for personal injury upon the principle *volenti non fit injuria*. It is thought, however, that this defence could only be competent in very exceptional cases. Judicial notice of the acute shortage of housing at the present time could reasonably be invoked to counter the suggestion that the tenant should move rather than expose his family and himself to the risk of injury. Moreover, as was recently held by the majority of the Manitoba Court of Appeal (in an action where the plaintiff had accepted a lift from an intoxicated driver) the test of *volens* should be whether the plaintiff (pursuer) had agreed to absolve the defendant (defender) from his duty of care, and not whether she was aware of the risk of danger. In such a case, however, as in the situation where a tenant continues to occupy dangerous premises, contributory negligence may be a relevant defence.

**Assignability and Subletting**

A distinction is made between rural and urban leases with regard to assignability. Leases of agricultural land were usually granted to carefully selected tenants, with a view to their occupation over a substantial period of nineteen to twenty-one years. Thus the principle of *delectus personae* is applicable to farm leases of ordinary extent. In such ordinary leases, assignees and subtenants are excluded at common law, unless the lease otherwise provides. In the case of long leases, however, the implication of law is that the tenant may assign and sublet. In leases of urban subjects—that is leases in town or country where the main object of the tenant is not cultivation but residence—the converse holds, and the common law permits assignation and subletting unless these are prohibited expressly in the lease. When assignation is competent, it is completed in questions between lessor, lessee and assignee when duly intimated to the lessor. Thereafter the original lessee remains liable only for arrears which have already fallen due, while (unless there is agreement to some other effect) the assignee alone incurs liability for future rent and also probably for arrears. Should the lessor sell the subjects, he still remains liable in respect of all obligations which do not pass to the purchaser; and even in respect of those which do pass, he probably continues to be liable for such as involve payment of money—such

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as an undertaking to purchase stock or to pay for improvements carried out on the subjects by the tenant. The purchaser alone, however, assumes liability for upkeep and repairs.73

Unless the lease is assignable, it cannot at common law be bequeathed by the will of a tenant who dies,74 though even a restriction of assignation will not prevent it passing to the heir. By the Agricultural Holdings Acts and Small Landholders Acts, however, a statutory right of bequest is conceded in favour of persons in a restricted class.75

**MODES OF ACQUIRING HERITABLE PROPERTY**

Generally speaking the modes of acquiring property are divided into two main classes—original and derivative. Since by feudal theory all feudal subjects are ultimately held by the Crown, "occupation" cannot be a method of acquisition of heritage in Scotland—except possibly in the rare case of alodial land, such as udal property which was originally acquired by "occupation."76

It is possible for an original title to be acquired by "Accession" when an addition has been made to the heritable property which is already subject to ownership. Accession may be by Alluvion, a process of gradual and imperceptible addition to land by the slow retiring of a river or of the sea, or by the accumulation of soil carried down by a stream or carried in by the sea. Such increment becomes part of the land thus enlarged.77 Where, however, there is Avulsio—that is where part of one proprietor's land is torn away by a river and deposited in an identifiable form in contact with another's land—the property is not transferred.78 Again, on the principle accessorium sequitur principale, where there has been building or planting on land, the benefit accrues to the proprietor of the land.79

With regard to derivative methods of acquiring heritable property, Prescription may avail where there is some title as a basis of the claim. Possession, even for the period of the long negative prescription by a  

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74 **Kennedy v. Johnstone, 1956 S.C. 39.**
75 These Acts, which virtually constitute codes of agricultural law for the land controlled by them, are of much importance but cannot be discussed fully in a work of the present compass. Nor again can detailed consideration be given to the Crofters (Scotland) Act, 1961, Rent Restrictions Acts, the Housing (Scotland) Act, 1950, the House Letting and Rating Act, 1911, and supplementary and amending legislation dealing with small dwelling-houses in burghs and urban districts of counties. A short statement of the main provisions of the various statutes dealing with leases is, however, included as Appendix C, post.
76 Erskine, II,1,11.
77 See Stair, II,1,35; Erskine, II,1,14; Bell's Principles, § 935.
78 Erskine and Bell, ibid.
79 But see discussion of bona fide possession, p. 296; fixtures, p. 500, and recompense, Chap. 27.
squatter, cannot vest the ownership of the subjects in the squatter, though he may avail himself of the action of ejection against a third party who can exhibit no title at all. The squatter is presumed to be the tenant-at-will of the real owner, and may maintain his possession against third parties who do not claim under authority of the owner. The period of the negative prescription was reduced to twenty years by the Conveyancing (Scotland) Act, 1924, s. 17—except for servitudes, rights of way and public rights. It will cut off obligations—other than real burdens—affecting the land, but cannot create a positive title. By contrast, where there has been possession on an ex facie valid and irredeemable title for the space of twenty years, the positive prescription fortifies a title which otherwise would be open to challenge.

A derivative title is, however, normally acquired either by disposition inter vivos or mortis causa from a previous proprietor, or by devolution according to the laws of succession. Discussion of the methods of Scottish conveyancing is beyond the scope of this book. General references have however already been made to the law regarding the granting of feu charters, disposition on sale and the granting of trust deeds.

**THE SCOPE OF LANDOWNERSHIP**

The owner of land is entitled to use it as he pleases, subject to restrictions imposed by statute, by common law, or by agreement of himself or of his authors in title. The proprietor of land enjoys the right to exclusive possession both vertically and upon the surface of the ground. As Lord McLaren observed (with the approval of the Inner House) in Glasgow City and District Ry. v. MacBrayne: "A conveyance of any land in unqualified terms gives a right of property in the substance or solid contents of the land without any assignable limit. This is what is meant by a conveyance being *a coelo ad centrum*. There are no limits in the vertical direction except such as physical

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82 14 & 15 Geo. 5, c. 27.
83 For which the period is still forty years. As to valentia agere see Campbell's *Trs. v. Campbell's Trs.*, 1950 S.C. 48 at pp. 56, 57.
84 Pettigrew v. Horton, 1956 S.C. 67. For general discussion of when a personal right may prevail over a real right see G. L. F. Henry, "Personal Rights" (1961) 2 *Conveyancing Rev.* 193. "As with the hare, the race is not always to the swift, or as Lord Justice-Clerk Thomson put it more picturesquely in *Rodger v. Fawdry*, 1950 S.C. 483 at p. 501, 'In this branch of the law, as in football, offside goals are disallowed.'"
85 Rankine *on Landownership*, pp. 29–30 and cases cited.
86 Act, 1617, c. 12, as amended by the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 34, and the Conveyancing (Scotland) Act, 1924, s. 16.
87 As to effects of possession, see p. 466, ante.
88 (1883) 10 R. 894 at p. 899.
conditions impose." It has long been recognised that a proprietor may object to his neighbour's trees hanging over his boundary.89 Further, a proprietor is entitled to protect his ground from trespass. "Trespass" denotes any temporary intrusion or entering upon the lands or heritage of another without his permission.90 But "the exclusive right of a landowner to use his ground as he pleases yields wherever public interest or necessity requires that it should yield." 91 Though reparation can always be claimed in respect of damage done to property by a trespasser, and in principle an action should lie in respect of affront or insult92 offered to a landowner, the primary legal redress against trespass afforded by Scottish law is interdict, restraining the respondent from entering upon the petitioner's land.93 Unless by virtue of some special statutory provision—as in the case of railway property—prosecution does not lie under Scottish law merely for unauthorised entry on another's land.94 As the first Lord President Clyde commented 95 "The word 'trespasser' is apt, in Scotland, to be a question-begging term ... It means with us nothing more than a person who intrudes on the lands of another without that other's permission, and it does not involve or imply the commission of any legal offence. It is, in short, a popular term, not a legal one." Interdict, having an equitable origin, is not granted automatically on mere proof of an unauthorised entry upon land. Grant of interdict is in the discretion of the court, and will not apparently be granted where no right is being asserted by the alleged trespasser—or at least where there is no reasonable ground for thinking that further entry on the land is to be expected,96 and where no appreciable injury has been caused to the land. Intention is also a relevant consideration. In "Winans v. Macrae,97 where the shooting tenant of 200,000 acres of deer forest sought interdict against the trespass of the pet lamb of a cotter, the court expressed very clear opinions that the proceedings should never have been brought; while in "Robertson v. Wright 98

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89 See Halkerton v. Wedderburn (1781) Mor. 10495; for a recent decision see also Walker v. Gill (1942) 58 Sh.Ct.Rep. 185.
90 Rankine, Landownership, p. 139. Trespass as to moveables is "a meaningless phrase in a Scottish lawyer's mouth"—per Lord Dunedin in Leitch v. Leydon, 1931 S.C.(H.L.) 1 at p. 12.
91 Bell, Principles, § 956.
92 See post, Chap. 31.
93 Equivalent to injunction in English law.
94 As regards trespass in pursuit of game, see 2 & 3 Will. 4, c. 68, discussed in Cowie v. Sandison, 1953 S.L.T.(Notes) 54.
95 Dumbreck v. Addie, 1928 S.C. 547 at p. 554. For a discussion of the disastrous consequences of disregard shown by the House of Lords for this opinion, see "Full Circle: The Law of Occupiers' Liability in Scotland," in Studies Critical and Comparative, p. 154 et seq.
96 If there has been no actual trespass or threat to trespass, assertion of right to enter on land will not be a good ground for interdict. Mags. of Inverurie v. Sorre, 1956 S.L.T.(Notes) 17.
97 (1885) 12 R. 1051.
98 (1885) 13 R. 174.
interdict was refused because the court considered the trespass to be trifling. In *Hay’s Trs. v. Young*, the court again deplored the proceedings and dismissed the petition for interdict on the ground that repetition of the entry on the petitioner’s land was not to be expected. Though physical entry on the land does not itself cause material damage—as when there has been staking out of claims to smallholdings upon a large estate—this may be a continuing wrong, and one which justifies the proprietor in apprehending the establishment of smallholdings on his land. Accordingly he may crave interdict, irrespective of the attitude of a tenant in possession.

The exceptions to the general proposition that a proprietor may use his land as he pleases may, however, go far to nullify the general rule. So far as statutory restrictions are concerned, the opinion of the learned editors of Gloag and Henderson may often be justified.

"... certain it is that the numerous Rent Acts, the Town and Country Planning Acts, and the Acts permitting the requisition of land have amongst them so affected landownership as to cause genuine doubt as to the appropriateness of the word 'ownership' in such a context."

So far as common law restrictions on the use of property are concerned, the brocard *sic utere tuo ut alienum non laedas* applies to this extent, that the proprietor is restrained by the law of neighbourhood from disturbing neighbouring proprietors in the legitimate enjoyment of their property. Thus adjacent and subjacent proprietors—in the absence of special agreement—are required to uphold their neighbours’ lands and entitled to claim like support for their own. This natural right applies to land in its natural state, but the right to claim additional support for land burdened with buildings may be acquired by express or implied grant. Lord Kilbrandon has observed recently: "A grant of land for the specific purpose of constructing a permanent work carries with it, by implication, the right of support. This is ‘a maxim of law and good sense,’ and applies as well to voluntary grants as to compulsory acquisitions. Similar rules of good sense and law apply to rights conferred by Parliament.” Again the common law regulates rights regarding water. Water which does not flow in a definite stream or course may be appropriated by the proprietor of the ground, but he must not—except in agricultural drainage—throw on his neighbour’s land a greater amount of water than would

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90 (1877) 4 R. 398.
93 See “nuisance” discussed in the context of Reparation, Chap. 31, post.
94 The right of support is an incident of property, and failure to give support is not an aspect of the law of *culpa*, *Angus v. National Coal Board*, 1955 S.C. 175.
95 In this case the widow of an agricultural worker, killed when the ground on which he was working subsided, was held to have no action against the Board.
drain there naturally.6 Once water flows in a defined channel or stream, all riparian proprietors along its course have a common interest therein, which they are entitled to protect.7 Each may insist that the quantity and quality of the water reaching him shall not be substantially altered.8 Prescription or agreement9 may, however, modify the rights of riparian proprietors. Whereas salmon fishings are a separate feudal right,10 trout fishing is an accessory to the right of property in riparian subjects. A tenant—even though he has a lease for 999 years—has no qualification or leave to kill game merely by having possession of the land. The right of killing game is a privilege sui generis, and has nothing to do with the ordinary use of land.11

**Servitudes**

Among the most important restrictions which agreement of proprietors or their authors in title can impose upon the use of property are those involving “servitudes”12 (corresponding to “easements” and “profits à prendre” in English law). Liferent was designated by the institutional writers as a personal servitude conferred irrespective of property,13 but all other servitudes in Scottish law are prædial and are inseparable from the property which they benefit. Bell14 observes:

“Servitude is a burden on land or houses, imposed by agreement—express or implied—in favour of the owners of other tenements: whereby the owner of the burdened, or ‘servient’ tenement, and his heirs and singular successors in the subject, must submit to certain uses to be exercised by the owner of the other or ‘dominant’ tenement; or must suffer restraint in his own use and occupation of their property.”

Servitudes—which are accidents of property—are thus restraints in addition to the natural restrictions on use which have been mentioned in the preceding paragraphs. Servitudes may be either positive or negative. A positive servitude empowers the dominant proprietor to

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6 An artificial ditch, though it has protected the land of a lower proprietor for over 40 years, is not regarded as a natural feature of the ground—nor can the upper proprietor be prevented from closing the ditch by alleging in effect a negative servitude by implication: *Anderson v. Robertson*, 1958 S.C. 367.
7 Interference with the bed of a river which may damage the land of a riparian proprietor, may also be interdicted: *Gay v. Malloch*, 1959 S.C. 110.
8 It is no defence to an action of interdict in respect of pollution, that all reasonable and practical steps have been taken to remedy pollution caused by the defendant: *Elderslie Estates v. Gryfe Tannery*, 1959 S.L.T.(Notes) 71.
9 The court may, if necessary, impose regulations when the parties cannot agree regarding, e.g., fishing in a narrow river: *Gay v. Malloch, supra*.
10 Contrast, however, the right of salmon fishing enjoyed by the King’s Kindly Tenants of Lochmaben: *Royal Four Towns Fishing Asscns. v. Assessor for Dumfriesshire*, 1956 S.C. 379.
11 Bell, *Principles*, § 955, and see *Welwood v. Husband* (1874) 1 R. 507. There are also general statutory prohibitions against killing game during certain months of the year.
13 It is better described as a limited right of property.
14 *Principles*, § 979.
exercise some right over the servient land, which could otherwise have been resisted. A common example is a servitude of way over Blackacre in favour of the owner of the adjacent estate of Whiteacre. A negative servitude restraints a proprietor of the servient tenant from using his land in some way to his advantage. A familiar example of this servitude is where the owner of Blackacre is restrained from building so as to interrupt the light or prospect of a house on Whiteacre. A servitude, it may be observed, imposes the burden of restraint, not of constraint. The owner of the servient tenement is not required to perform any positive act. Servitude consists in patiendo, not in faciendo.

Servitudes are classified according to the institutional writers into Urban and Rural Servitudes—the former affecting buildings either in town or country; the latter affecting lands. The influence of Roman law is very strong in this branch of jurisprudence, but the categories of servitude—at all events of positive servitude—are not necessarily closed; and it is not impossible that a burden on property, which satisfies the law as to the nature and condition of servitudes, may not be recognised as such.\(^\text{15}\) Since servitudes may not appear on the titles of the lands affected, nor appear in the Register of Sasines, it is apparent that the tendency will be towards conservatism in their recognition. The established Urban Servitudes comprise Support—for buildings (tigni inmitendi and oneris ferendi of Civil law); Stillicide (the right to cast rainwater from the eaves of a house onto neighbouring land); and Light or Prospect (implying altius non tollendi, non aedificandi, non officiendi luminibus—which restrains building which would interfere with the light or prospect of the dominant property). Possibly the most familiar Rural Servitude is Way—which may be restricted in the purposes for which it is used.\(^\text{16}\) This servitude must be distinguished from a public right of way between two public places, which may be vindicated by a member of the public. Rural Servitudes also comprise, inter alia, Aquaehaustus (the right to take water from or to water cattle on the servient land); Aqueduct (the conveying of water through the servient land); Pasturage\(^\text{17}\) (the right to pasture cattle on another's land or on a common); Fuel, Feal and Divot (the

\(^\text{15}\) Patrick v. Napier (1867) 5 M. 683; Rankine, Landownership, p. 419; and see "Servitudes" by Prof. F. MacRitchie in (1960) 2 Conveyancing Rev. 97, in which he points out that Robertson v. Scottish Union and Nat. Ins. Co., 1943 S.C. 427, appears to break new ground by extending the servitude oneris ferendi to cases of support derived from land in its natural state.

\(^\text{16}\) In Ayr Burgh Council v. British Transport Comm., 1955 S.L.T. 219, the distinctions to be drawn between a servitude of way and a public right of way are discussed. To establish the latter right unrestricted public use must be shown.

\(^\text{17}\) The general characteristics of this right have been discussed recently in Fraser v. Sec. of State for Scotland, 1959 S.L.T.(Notes) 36.
right to take peat for fuel and turf for fences); and the right to take stone and other materials for building.

Both positive and negative servitudes may be created by express grant, while positive servitudes may also be created by implied grant or prescription after use for forty years. A servitude is extinguished by the negative prescription; by renunciation of the dominant proprietor; by conduct from which acquiescence in surrendering the right may be inferred; by merging of the dominant and servient tenements confusionem; and by such fundamental change of circumstances as compulsory purchase or permanent destruction of a tenement affected by a servitude.

**Aemulatio Vicini and Nuisance**

The law of neighbourhood in Scotland restrains a proprietor from making certain uses of his property—subordinating the principle utitur jure suo to that sic utere tuo ut alienum non laedas. In this connection the related concepts of aemulatio vicini and nuisance are relevant. Where a man makes some use of his property detrimental to his neighbour, acting from a predominantly malicious motive and not to further some legitimate interest of his own, the law will regard his conduct as unlawful on the principle of aemulatio vicini. Where no such malice can be imputed, but the use made by a proprietor of his land causes harm to his neighbour, such use may be regarded as a nuisance and consequently be forbidden by interdict.

The law of Scotland has for centuries forbidden acts of a proprietor done upon his own property with the sole object of inconveniencing or causing loss to his neighbour—acts done in aemulationem vicini. Sheriff Hector McKechnie, Q.C., has collected the authorities on this point in his article “Reparation” in the Encyclopaedia of the Laws of Scotland. The principle of aemulatio vicini had been recognised judicially a hundred years before Bankton in his Institute laid down that if one uses his property purely in aemulationem vicini, to his neighbour’s hurt and without any benefit to himself, the law bars him. Erskine and Bell are to like effect; and it is of interest to note that Kames, in expounding the law

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18 In the case of positive servitudes prescription runs from the last exercise of his right by the dominant owner. In the case of negative servitudes, conduct inconsistent with the servitude must be shown on the part of the servient owner.

19 Bell, Principles, § 966; Ralston v. Pettigrew (1768) Mor. 12808.

20 An article of particular interest to Scots lawyers is that of J. E. Scholtens, “Abuse of Rights” (1958) S.A.L.J. 39.

21 Inst. IV, 45, 112.

22 Inst. II, 1, 2.

23 Principles, § 964.

on this point, exemplifies aemulatio vicini by the instance of a proprietor intercepting underground water for the purpose of hurting his neighbour. When, however, the hypothetical case supposed by Kames came before the House of Lords in the English case of Bradford v. Pickles, the application of the doctrine of aemulatio vicini to England was rejected. Lord Watson observed obiter, and without reference to any authority, that the law of Scotland on the point was identical, and that "no use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." It is unlikely that Lord Watson's view would be given effect in Scotland, and it is possibly significant that, subsequent to the case of Bradford v. Pickles, the First Division, presided over by Lord Dunedin, held in Campbell v. Muir—a case of interference with salmon fishing—that the defender was bound to fail in any event "because he was acting in aemulationem vicini against his neighbour's right."  

It is only at a comparatively recent date that Nuisance has been recognised as a definite branch of the law of Scotland; and for some time after its recognition its scope and nature were not clearly understood. The present author indeed is still somewhat mystified, especially since the extent of English influence is debatable; and it is thought that there is still a tendency to confuse a remedy for the protection of property with a claim in delict. Stair and Erskine do not mention Nuisance, while Kames gives it only casual mention as an aspect of urban public policy. The case of Dewar v. Fraser, decided in 1767, shows that the law of nuisance was not then clearly understood. The defender, on the principle utitur jure suo, was permitted to set up kilns on his land within about one hundred yards of the pursuer's house, despite the latter's complaint that the resulting smoke and smell would make his house uninhabitable. In the following year, however, the court ordained a defender to move a brick kiln on his land, on account of the damage it did to his neighbour's trees and shrubs. Since that time the law of nuisance has been accepted and developed. Broun in his work on Nuisance observes:

"Notwithstanding the lateness of its recognition, nuisance can hardly be said to introduce a novel principle into Scots law. The law of Scotland has its roots in the civil law, and the principle on which the law of nuisance

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25 See also Lord Wensleydale in Chasemore v. Richards (1859) 7 H.L.C. 349 at p. 398
27 Rankine, Landownership, pp. 381-382, however, seems to accept Bradford v. Pickles as conclusive of the matter—a view which the present writer does not share.
31 Mor. 12803, Kames, Select Decisions, p. 323.
32 Ralston v. Pettigrew (1768) Mor. 12808.
33 See also Miller v. Stein (1791) Mor. 12823.
34 1891, Edinburgh, at p. 7.
is based is the civil maxim *sic utere tuo ut alienum non laedas*, that no one is entitled to do anything on his own property that will interfere with the natural rights of his neighbour. So it may be justly held that nuisance has always been a portion of our law, for a while unrecognised, but taking shape when the three great predisposing causes of nuisance, *viz.*, increase of population, distribution of property, and the spread of manufacture, rendered the development of the principle necessary."

"Nuisance" has been defined or described by Bell 35 as follows:

"The description of nuisance in Scotland is the same, whether the public or the individual be regarded. Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood; whatever is intolerably offensive to individuals, in their dwelling-houses, or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor), or by indecency (as a brothel next door), is a nuisance."

This very wide description comprises several aspects of antisocial conduct, the main division being into "statutory" nuisance, and "common law" nuisance. Statutory nuisances, such as those condemned by the Public Health and Burgh Police Acts, do not depend on the law of neighbourhood at all. Further, being mainly concerned with protecting health and decency, they are more limited in scope than common law nuisances, and are suppressed by action of a public authority instead of by private action as in cases of common law nuisance. Though the concept of "public" nuisance is not known by that name in Scotland, nor has the Lord Advocate the same responsibility as the Attorney-General has in England with regard to nuisances which affect the community as a whole, analogous proceedings by a public body are competent in Scotland at common law. For example, a Scottish road or street authority could seek to protect by interdict or action of damages the general public use of its roads or streets against abuse by particular road users who might cause unreasonable obstruction.36 Though nuisance at common law is usually considered in connection with the use of heritable subjects to the harm of neighbouring proprietors, the concept has been extended to cover noxious acts arising from the use of corporeal moveables on the highway—as where a cargo of compressed cork, which was being drawn by tractor, was set on fire by sparks from the tractor and the burning particles did damage to adjacent property.\footnote{Slater v. McLellan, 1924 S.C. 854.} Lord President Clyde, supported by the First Division, held that, irrespective of negligence, this was a case of nuisance. As the Lord President observed \footnote{Principles, § 974.}:

35 *Principles*, § 974.
38 p. 859.
“It is not necessary for him (the pursuer) in order to establish his right to damages to appeal to the doctrine of Rylands v. Fletcher, nor indeed to the law of negligence. His remedy is under the law of nuisance.”

It may be regretted that his lordship did not explain or clarify the principles from which he made the deduction, since the scope of this aspect of the law of nuisance remains somewhat uncertain, and the doctrine of Rylands v. Fletcher has been given a cool reception in Scotland. Substantially the same kinds of conduct are regarded as nuisances in Scotland as in England—except that in England, but not in Scotland, common law nuisance comprises interference with easements or servitudes. There must have been an operation—other than an operation carried out by virtue of absolute right, as by statutory powers—on the part of the defender which, taking into account the natural rights of his neighbours, is unreasonable or extraordinary on account of its being unnatural, dangerous or offensive; and such operation must have caused material injury. The injury or annoyance must not, however, be “sentimental, speculative, trivial discomfort or personal annoyance.” 41 Lex non favet delicatum votis. 42 The nuisance may be caused inter alia by pollution of water or of air, or by noise, vibration or heat.

It is submitted that interdict for nuisance is, and should be, granted irrespective of culpa. 43 Hitherto the authorities on culpa, Rylands v. Fletcher, liability and nuisance have been somewhat confused. 44 It is thought that the law of nuisance involves a balancing of interests—that of one man to make full use of his property (utitur jure suo) with that of his neighbours not to be injured thereby (sic utere tuo ut alienum non laedas). Circumstances of time, place and degree are all relevant in deciding whether an operation is a nuisance or not. 45

Though the case of Watt v. Jamieson was an Outer House decision on relevancy, the opinion was that of Lord President Cooper, who observed 47:

“It appeared to me that the defender’s argument failed to give due weight to the fact that nuisance as a cause of action is a comparatively modern development, at least in Scots law, and the argument, especially when

39 (1868) L.R. 3 H.L. 330.
41 Per Earl of Selborne L.C., ibid. at p. 45.
43 In the sense of negligence cf. Prof. Gow’s persuasive article (1953) 65 Jur.Rev. 17.
44 Thus in Inglis v. Shotts Iron Co. (1881) 8 R. 1006, a leading case on nuisance, the pursuer relied on Kerr v. The Earl of Orkney (1857) 20 D. 298, an authority frequently invoked in questions of alleged strict liability.
45 For this reason the present writer has had difficulty in accepting the description of the operations which create nuisance as being acts in themselves unlawful. Glegg, 3rd ed., p. 319; Encyclopaedia, Vol. 10, p. 348; the illegality surely depends on the results—Burn-Murdoch, Interdict, p. 203.
46 1954 S.C. 56.
47 At p. 57.
founded upon the older authorities, tended to confuse nuisance as a cause of action with *culpa*, and the special aspect of *culpa* which is generally described as the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. The modern view of nuisance is, I think, more accurately founded upon such cases as *Broder v. Saillard* (1876) 2 Ch.D. 692; *Fleming v. Hislop* (1886) 13 R.(H.L.) 43 and *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, and this modern view is formulated in such textbooks as *Salmond on Torts*, 11th ed., at p. 259, and *Burn-Murdoch on Interdict*, p. 228. From these and other pronouncements I deduce that the proper angle of approach to a case of alleged nuisance is rather from the standpoint of the victim of the loss or inconvenience than from the standpoint of the alleged offender; and that, if any person so uses his property as to occasion serious disturbance or substantial inconvenience to his neighbour or material damage to his neighbour's property, it is in the general case irrelevant as a defence for the defender to plead merely that he was making a normal and familiar use of his own property. The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property; and in every case the answer depends on considerations of fact and of degree. I cannot accept the extreme view that in order to make a relevant case of nuisance it is always necessary for the pursuer to aver that the type of user complained of was *in itself* non-natural, unreasonable and unusual. Especially when (as in this case) the so-called 'locality' principle applies, it must be accepted that a certain amount of inconvenience, annoyance, disturbance and even damage must just be accepted as the price the pursuer pays for staying where he does in a city tenement. The critical question is whether what he was exposed to was *plus quam tolerabile* when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects. If that test is satisfied, I do not consider that our law accepts as a defence that the nature of the user complained of was usual, familiar and normal. *Any* type of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, is *prima facie*, not a 'reasonable' use."

The present author would gladly accept this as a helpful exposition of the law, had the remedy sought been interdict and not damages. It is fully in accordance with the Civilian tradition of our law—which was stressed by *Broun on Nuisance*—that interdict should be granted when a man makes unreasonable use of his property. The wrong and the remedy are within the scope of the law of Property. Claims for damages fall, however, within the scope of the law of Delict, and in principle it would seem proper to require the pursuer, if he claims reparation, to prove patrimonial loss and *culpa* or fault in the usual way. Until, however, an authoritative judicial reformulation of the law is attempted, confusion must inevitably continue so far as nuisance is concerned. This much may be said: the tort of nuisance in England is no part of the law of Scotland. It may be observed, that similar confusion has resulted in South African law through the interaction

48 Esp. p. 7.
of English and Roman-Dutch principles—the latter being very close to those of Scots law in the present context.49

Several further points may be noted which will be relevant in deciding whether a particular operation constitutes a nuisance or not. When the operation interferes with comfort and enjoyment, the circumstances of the locality must be taken into account. What would be a nuisance in a residential neighbourhood would not necessarily be so in an industrial locality. Even so, a real and substantial addition to the noise and vibration of an industrial locality may yet give a good ground of action against the person responsible for the additional disturbance.49

To an action based on nuisance the defender may plead the express or implied consent of the pursuer; the long negative prescription—of twenty years; personal bar (anglicé estoppel) by acquiescence or rei interventus 51; or statutory authority.52 Among the ineffectual defences which have been raised the following may be mentioned:

That the defender’s operations are only one of a number of contributing sources of nuisance 53; that the most suitable site was selected for the operations 54; that the defender was making a reasonable use of his own land; that—statutory authority excepted—the operations were for the public benefit; that the pursuer himself is committing a nuisance; or that the pursuer has “come” to the nuisance.53 It is not a defence to final interdiction of a nuisance that the nuisance cannot be stopped without great loss to the defender, or that remedial measures have been or are being adopted. Since, however, interdict is an equitable remedy, the court may allow the defender to adopt remedial measures. A declaratory finding may be made, and the operation of the finding may be suspended pending progress of remedial measures, in cases when the granting of immediate interdict would be attended with consequences to the respondent as injurious as, or more injurious than, the wrong suffered by the petitioner—or when grant of immediate interdict would cause some great and immediate inconvenience.56 But this discretion is exercised after the facts have been ascertained, and after a declaratory finding has been made that the nuisance exists.57

51 See ante, p. 293.
52 See Burn-Murdoch, Interdict, p. 221 et seq.
53 Duke of Buccleuch v. Cowan (1866) 5 M. 214.
54 Shotts Iron Co. v. Inglis (1882) 9 R.(H.L.) 78.
55 Fleming v. Hislop (1886) 13 R.(H.L.) 43 at p. 49; and see Burn-Murdoch, op. cit., 227 et seq.
56 Clippens Oil Co. v. Edinburgh & District Water Trs. (1897) 25 R. 370, per Lord McLaren at p. 383.
ACQUISITION AND TRANSFER OF MOVEABLE PROPERTY

CORPOREAL MOVEABLES

Considering first acquisition by original title, the law of Scotland recognises that corporeal moveables which have never had an owner may be appropriated by "Occupation"—that is to say by apprehending a thing with the intention of becoming its owner. But, except in the case of res derelictae, the maxim quod nullius est fit primi occupantis does not apply to moveables which have already had an owner at some time.\(^1\) Property in wild animals, birds and fish in their natural state is acquired by occupation, and thus they cannot normally be the subject of theft, so that—statutory forfeiture apart—a poacher becomes owner of the rabbits or other wild creatures which he takes on the land of another. Wild creatures, on the other hand, which are not at liberty, such as deer in a park, fish in a pond or birds in an aviary, are the property of him who has thus confined them, and to take them is theft. If a wild bird or animal escapes after being captured, or bees, after being kept within a skep, hive and fly away, the property is lost “as soon as the owner ceaseth to pursue for possession.”\(^2\) Domestic animals remain the property of their owners even if they stray away from him, and the same rule applies to creatures such as pigeons which have the animus revertendi or homing instinct, or which are marked in indication of private property. For property to vest by occupation, the act of appropriation must be complete, or have proceeded so far towards accomplishment as to merit acceptance as complete. Thus, if an animal is wounded so that it cannot escape, or if it is closely pursued, the intervention of a stranger will not deprive the original pursuer of his right.\(^3\)

Things which, though once appropriated, have no known owner may not be acquired by occupation. According to the brocard quod nullius est fit domini regis, certain types of lost property vest in the Crown. Thus treasure-trove and strayed cattle, if unclaimed, belong

\(^1\) Stair, II, 1, 33; Erskine, II, 1, 10–13; Bell’s Principles, § 1287 et seq.

\(^2\) Ibid., and Erskine supra, who adopts the Roman law.

\(^3\) It may be noted that the Scottish institutional writers have here preferred the opinion of Trebatius to that of Justinian, D. 41, 1, 5; Inst. 2, 1, 13. Special rules have been applied to whale fishing by the House of Lords—Sutter v. Aberdeen Arctic Co. (1862) 4 Macq. 355; Bell’s Principles, § 1289.
to the Crown.\textsuperscript{4} Wrecks are placed under the general superintendence of the Board of Trade.\textsuperscript{5} Most cases of “lost property” fall within the scope of the Burgh Police (Scotland) Act, 1892,\textsuperscript{6} s. 412 (or equivalent local Acts) whereby, if the owner cannot be found within six months, the magistrate may award the article to the finder.\textsuperscript{7} It may also be noted that in the case of moveables, possession on loan for the period of the negative prescription bars the lender’s action for recovery.\textsuperscript{8}

Another means of gaining original title is by Accession, whereby a person through his ownership of one particular subject-matter acquires ownership in a new thing, because of an intimate association between his original property and the new subject-matter, on the principle \textit{accessorium sequitur principale}. Scottish law follows generally the principles applied in Roman law. Natural accession consists in natural increase—as of animals, whose owners acquire property in their young.\textsuperscript{9} Industrial accession is the result of man’s industry; and may take many forms, as where a fund of money increases by interest. Aspects of special importance are Specification, Confusion and Commixtion. Specification is the creation of a new subject-matter from materials belonging to another. The main discussion of the application of this doctrine is by the institutional writers.\textsuperscript{10} Where the new thing made by one man from another’s materials can be reduced again to its original form, then ownership remains with the owner of the materials, who must reimburse the workman insofar as the owner is \textit{lucratus}. If, on the other hand, the original materials are destroyed, so that it is impossible to restore them to their original form, the maker of the new species will take full property in the new species—subject to compensating the owner of the materials for the loss. This situation would arise where wine was made of another’s grapes, or bread of his flour, or if a picture were painted on another’s canvas, or if lard were made with materials of the manufacturer and oil belonging to another, \textit{International Banking Corporation v. Ferguson, Shaw and Sons}.\textsuperscript{11}

Though the texts in the \textit{Corpus Juris}, and their discussion by the

\textsuperscript{4} And see A. R. G. McMillan, \textit{Bona Vacantia Passim}; W. I. R. Fraser, \textit{Constitutional Law}, 2nd ed., p. 105, contends that in Scotland all gold and silver treasure which is ownerless is treasure-trove—whether hidden or abandoned; cf. English law. See also Stair, III, 3, 27; Erskine II, 1, 12; Bell, \textit{Principles}, § 1291. \textit{Non constat}, however, that the Crown has the same rights in udal as contrasted with feudal property.

\textsuperscript{5} Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 510 \& seq.

\textsuperscript{6} 55 & 56 Vict. c. 55. A person with whom goods have been deposited is now given a statutory power of sale if they are not collected—Disposal of Uncollected Goods Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2. c. 43).

\textsuperscript{7} See this discussed in the context of Possession, ante, p. 464\textsuperscript{4}.

\textsuperscript{8} \textit{Parishioners of Abersharden v. Parishioners of Gemmre} (1633) M. 10972.

\textsuperscript{9} Stair, II, 1, 34.

\textsuperscript{10} Stair, II, 1, 41; Erskine II, 1, 16–17; Bell, § 1298 (1).

\textsuperscript{11} 1910 S.C. 182, expressly approving Bell, \textit{Principles}, supra.
Commentators provide ammunition for controversy, it may be submitted that the bona fides of the *specificator* is irrelevant. If a new species has been created, the old ownership has been destroyed, and, even if the original materials had been stolen, this should not affect property rights in the new *res*. This problem was recently considered by Lord President Clyde in the Outer House, in a case which raised the question of title to sell a vehicle which had been constructed out of part of two stolen vehicles. He considered that, *esto* there had been specification, the vehicle could be cut into two again, and the halves would belong to the former owners. It may be submitted, with great respect, that such a solution would be most inconvenient, as becomes even more apparent if the problem of a vehicle constructed after "cannibalisation" from five or six others is considered. The Lord President's judgment of Solomon would give satisfaction to no one. Where, however, several persons have agreed to contribute work or material towards the production of a new subject, this will vest in them as common property—*Wylie & Lochhead v. Mitchell.*

Somewhat similar considerations to those affecting Specification arise in Confusion of liquids and Commixtion of solids. Bell has observed:

"They raise a common property, if the commodities be of the same kind; and of such property pro indiviso the shares are in proportion to quantity and value; where either the union is by common consent, or where, having been made by accident or without fault, the commodities are inseparable. The property is unchanged if the articles be capable of separation. If the union be of substances different, so as to create a *tertium guld*, the property is (according to the rule in specification) with the owner of the materials, or with the manufacturer, according to the possibility or impossibility of restoring the original substances."

Property in corporeal moveables is transferred *inter vivos* by Tradition or Delivery, and the rule is accepted *Traditionibus non nudis pactis transferuntur rerum dominia*. No real right is created by an agreement for transfer. There must be the intention or consent of the ceding owner to transfer the moveable to the new owner, and delivery in fulfilment of that intent. Writing is commonly used in complicated transactions involving transfer of moveables or where the conveyance is of a *universitas*, but such conveyance is ineffectual without delivery. It has been stated cogently by Lord President Inglis in *Clark v. West*

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13 (1870) 8 M. 552.
14 *Principles*, § 1298.
15 See also Stair, II, 1, 37; Erskine, II, 1, 17.
16 Erskine, II, 1, 18.
17 Bell, *Principles*, § 1458.
Calder Oil Co.\textsuperscript{18}: “A mere assignation of corporeal moveables retenta possessione is nothing whatever but a personal obligation.” It is of the utmost importance to stress that delivery, in the author’s opinion, may be effective to transfer ownership, even though some contract in pursuance of which the property passed was null. The test is whether, according to the doctrine of \textit{justa causa traditionis},\textsuperscript{19} the transferor intended to pass ownership to the person who took delivery; it is not whether the contract which may have underlain delivery was valid. Considerable confusion has resulted at times in Scotland from considering these problems in connection with English doctrines regarding “void” and “voidable” contracts, and from failure to realise that at common law sale in Scotland was a contract and never a conveyance. Until the seller delivered to the purchaser, no real right passed; and a bona fide sub-purchaser was secure in his title (and could pass good title) notwithstanding the vulnerability of the original contract on grounds of error or fraud. The only vices which operated in \textit{rem} were theft and robbery, which attached to the goods themselves—as is clearly explained by Stair\textsuperscript{20}: “In moveables, purchasers are not quarrelable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased,\textsuperscript{21} unless it were by theft or violence, following the subjects to all successors, otherwise there would be the greatest encouragement to theft and robbery.” Delivery may be actual, symbolical or constructive. Actual delivery involves the physical transfer from one party to the other.\textsuperscript{22} Symbolical delivery usually takes place almost exclusively by delivery of a bill of lading which actually symbolises the goods themselves, and has the same legal effect as delivery of the goods. Constructive delivery may be given when goods are stored in the custody of an independent third party, who is directed by delivery order or endorsement of his warrant to hold the goods in future for the transferee. It is essential that the

\textsuperscript{18} (1882) 9 R. 1017 at p. 1024.

\textsuperscript{19} The clearest treatment of this doctrine in English is by J. E. Scholtens, “\textit{Justa Causa Traditionis} Contracts induced by Fraud” (1957) 74 S.A.L.J. 1; see also for references to leading South African cases, Hahlo & Kahn, \textit{South Africa} (Vol. 5 in British Commonwealth Series), p. 588.

\textsuperscript{20} I, 40, 21; \textit{ibid}. See also IV, 40, 28, “Fear and fraud have much the same effects as to singular successors (i.e., \textit{they do not operate in rem}) except in the case of robbery, which as well as theft, is \textit{vitium reale} in moveables” (author’s italics).

\textsuperscript{21} Stair is dealing with the question whether if A has purchased fraudulently from B, takes delivery, and thereafter sells to C (who takes the goods in good faith), D, who has contracted with C, could plead that C’s title was defective.

\textsuperscript{22} See the construction in \textit{West Lothian Oil Co. v. Mair} (1892) 20 R. 64, where delivery of the key to a yard where barrels were stored was accepted as delivery; \textit{cf.} Pattison’s \textit{Trs. v. Liston} (1893) 20 R. 806.
goods thus held should be ascertained and clearly distinguishable from a general mass of goods held from the would-be transferor.23

By the Sale of Goods Act, 1893,24 the property in goods passes by force of the contract of sale independent of delivery, and accordingly this constitutes a statutory exception to the general law of Scotland regarding transfer of property in moveables. This does not supersede altogether even in sale the doctrine of *justa causa traditionis*.

All British ships must be registered, and the register—not possession—proves title. Property in a ship does not pass by delivery but by bill of sale.

**INCORPOREAL MOVEABLES**

Incorporeal moveables,25 such as rights to debts, claims arising from contract or delict, shares in companies, goodwill, patents and so forth are transferred by assignation—that is by a deed conveying the right. Physical delivery of possession in such cases is clearly impossible, but, in general, unilateral deeds are not effective unless actually delivered.26 The granter of the deed is known as the cedent, the grantee as the assignee. The general rule is that anyone in right of a subject may convey it to another, but it is not competent to assign an alimentary provision, or rights involving *delectus personae*. Forms of assignation are provided in the Transmission of Moveable Property (Scotland) Act, 186227; but “no words directly importing conveyance are necessary to constitute an assignation, but . . . any words giving authority or directions which if fairly carried out will operate a transference, are sufficient to make an assignation.”28 Thus, when a beneficiary under a trust drew a bill of exchange upon trustees in favour of a third party, this was deemed sufficient assignation of the beneficiary’s right to the sum contained in the bill.29 Again, in *Brownlee v. Robb*,30 it was held that a policy was validly assigned by a writing in these terms, “I, J.R., hand over my life policy to my daughter.” By implication of law, a cedent is held to confer on the assignee everything which is necessary to make the assignation effective. The validity of the debt is warranted by the cedent, but not the solvency of the debtor.

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24 56 & 57 Vict. c. 71.
25 The law regarding Registration and Assignment of Trade Marks; the grant and transfer of Patents; the protection of Registered Designs and Copyright, is based on United Kingdom statutes which cannot be expounded in this book.
26 In exceptional cases, where the granter is the natural custodier of the writs of the grantee, delivery to the grantee is not required—see Erskine, III, 2, 44, discussed in *Connell’s Trs. v. Connell’s Trs.*, 1955 S.L.T. 125.
27 25 & 26 Vict. c. 85.
30 1907 S.C. 1302.
In questions with the cedent or his executor, execution and delivery of the assignation suffices to give the assignee an effective right; in questions with third parties, intimation to the debtor is necessary to complete the assignation. The effect of intimation is to inform the debtor of the assignation, and to instruct him that he should not pay to anyone except to the assignee. Further, intimation completes the assignee's right. The date of the intimation is the criterion by which the claim of the assignee is determined in questions with competing claimants to the subject assigned. Thus, if A assigns a debt to B, and later assigns the same debt to C who takes in good faith, C's assignation, though later in date, if first intimated to the debtor, will give to C a preferable right to that of B. Similarly, in a competition between an arrestment and an assignation, the arrestment, even though later in date than the assignation, will prevail over it if made prior to intimation. If arrestment is attempted subsequent to intimation, the assignation will prevail.

Formal intimation as prescribed by section 2 of the 1862 Act is not necessary in every case. Intimation according to the Act is effected by delivery of a copy of the assignation certified by a notary, or by the assignee sending to the debtor a certified copy by post. Such intimation is supported in the first case by the notary's certificate, and in the second case by the debtor's written acknowledgment. It is still competent to make intimation in the presence of a notary and witnesses, and to take instruments in the notary's hands. Diligence or the raising of an action founded on the assignation, is equivalent to intimation. Moreover, actual possession of the right—by entering into enjoyment of the interest or rents—is equivalent to intimation, since it imports not only notice to but actual compliance by the debtor. Assignations of certain rights such as heritable bonds are completed by registration in the Register of Sasines, and this is equivalent to intimation. On the other hand, the recording of a deed in the Books of Council and Session is for preservation and diligence, not for publication. If the debtor has actively recognised an assignation, this will be deemed equivalent to intimation.

Effect of Assignation

An assignation of incorporeal moveables places the assignee in the shoes of his cedent, and the legal position is expressed in two maxims—namely assignatus utitur jure auctoris and nemo plus juris ad alium.

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51 Supra.
52 Execution in English law.
54 See standard works on conveyancing.
55 Tod's Trs. v. Wilson (1869) 7 M. 1100, discussed in Cameron's Trs. v. Cameron, 1907 S.C. 407.

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transferre potest quam ipse habet. Thus, in a question between the debtor in a personal obligation and the assignee of the creditor, the assignee may be met with all the objections which would have been available against the cedent (creditor)—even to the extent of contending that the right has been withdrawn completely. In The Scottish Widows' Fund v. Buist,38 Moir effected a policy of insurance with the company upon the condition that if any untrue statement were contained in the declaration made by him regarding his state of health, the policy should be void. Moir then assigned the policy on his life to Buist and others for value, and the assignation was intimated to the insurance company. After Moir's death, the company refused payment to the assignees on the ground that Moir had made untrue statements regarding his health and drinking habits. It was held that the assignees took no better right than Moir himself would have had, and that therefore the insurance company was entitled to reduce (i.e., rescind) the policy. Lord President Inglis 37 laid down the law as grounded on institutional authority and decided cases,

"that in a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is nevertheless subject to all the exceptions and pleas pleadable against the original creditor."

(This doctrine does not, of course, apply to the transmission of heritable estate, nor to the sale of corporeal moveables, nor to negotiable instruments, which carry a right by delivery, and give title to a bona fide holder for value against all the world, notwithstanding any defect in the title of the transferor or prior holders.) If, in the case described, the company had continued to receive premiums after the assignation in full knowledge of the ground of challenge, they might have been met with a plea of personal bar.38

Nevertheless, it is not every latent equity which may be pleaded against an assignee, but only those which can be pleaded by the debtor in the obligation. Thus a person who holds property under a latent trust may give a good title against the true beneficiary owner to third parties taking in good faith. The classic example of this proposition is the decision in the House of Lords—mainly on institutional authority—in Redfearn v. Sommervails.39 In this case a man who was ostensibly owner of a share in a private company, but in fact had acquired the share as trustee for the firm in which he was partner, assigned it to a creditor in security for a private loan. The creditor took the share in the honest belief that the cedent was the true owner, and intimated

36 (1876) 3 R. 1078.
37 At p. 1082.
38 Scottish Equitable Life Insurance Society v. Buist (1877) 4 R. 1076, per Lord President Inglis at pp. 1081-1082; affirmed (1878) 5 R.(H.L.) 64.
39 (1813) 5 Pat.App. 707.
his right. Litigation then ensued between the trustee’s firm, which claimed the share as partnership property, and the creditor as assignee. It was held that the creditor’s claim must prevail. Here the question was not between the debtor in the obligation—i.e., the company, which granted the share—and the assignee, but between the assignee and the beneficiary under a trust, whose claim was collateral to the transaction which had transferred the share. The principle laid down in this case is that an assignee who takes for value and in good faith is not affected by latent trusts or equities affecting the cedent’s right. In *Heritable Reversionary Co. v. Millar* 40 Lord Watson observed that it was a well-known principle

“that a true owner who chooses to conceal his right from the public, and to clothe his trustees with all the indicia of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee.”

The principle of *Redfearn v. Somervails* does not, however, protect gratuitous assignees.41

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40 (1892) 19 R.(H.L.) 43 at p. 47.
41 Nor creditors under a sequestration who take the rights of a bankrupt as they stand in his person: *Gordon v. Cheyne* (1824) 2 S. 675.
Part 3

PRIVATE LAW

E

Trusts
There are specialties affecting Trusts which justify their treatment as aspects of a legal category which is *sui generis*, and not as a sub-category either of the Law of Property or of the Law of Obligations. The term "trust," variously translated, is properly used for a variety of legal devices in all mature legal systems, though the specialised technical meaning of the word in English law has gained considerable acceptance through the world-wide expansion of Anglo-American economic influence. The trust of English law, however, is but one species of the genus "trust." "As the very word indicates, the characteristic feature of the trust is not the division between legal and equitable ownership—this is the specific device employed by English law to achieve the purposes of the trust—but the separation between the control which ownership gives and the benefits of ownership... In some guise or other trusts in this sense appear in every civilised system of law." 1 Though certainly development of the modern Scottish law of trusts has been influenced to some extent by English practice—especially by the influence of chamber practice on Scottish lawyers—the history and contemporary scope of this branch of law cannot be explained in terms of a reception of English ideas.2

It is true that in 1868 Lord Westbury in a Scottish appeal observed,3 "The doctrine of trusts has the same origin and rests on the same principles both in Scots and English law, and it is desirable that it should be developed to the same extent in both systems of jurisprudence." This assertion rests upon *ipse dixit*, and not upon authority. It may be contrasted with a more recent pronouncement 4 in 1955 by the senior and most eminent Scottish judge alive, Lord Normand

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* For general background the author has drawn extensively in the present chapter on his own chapter, "Trusts and Fiduciary Relationships in the Law of Scotland," published in *Studies Critical and Comparative*, p. 198 et seq. The author wishes to express grateful appreciation of the criticisms and suggestions of Mr. A. J. Mackenzie Stuart, Advocate, son of the late Prof. A. Mackenzie Stuart, Q.C., author of the *Law of Trusts*—the second edition of whose work is being edited by his son.


3 Fleeming v. Howden (1868) 6 M.(H.L.) 113 at p. 121; subsequently criticised by Lord Watson; see Heritable Reversionary Co. v. Millar (1892) 19 R.(H.L.) 43 at p. 49.

(appropriately enough in an English appeal), "The history of the origin and development of the law of trusts in Scotland is not at all the same as the history of the origin and development of the law of trusts in England." This statement had the express support of Lord Keith of Avonholm (the other Scottish judge in the House of Lords) and of Lord Porter.

"Trust" in its broadest sense comprises a managerial aspect concerned particularly with the duties and powers of persons acting in a fiduciary capacity; and also an aspect concerned with the "trust character" of property—a character which may endure even though for some reason, such as death or declinature, there are no trustees actually in office exercising control. Thus there may be "trustees" who do not own the property which they administer, and there may be trust property which subsists in effect, at least temporarily, as an autonomous fund. It is not possible to discuss at length those cases where, though property is not vested in its administrator, his standards of fiduciary duty and the extent of his administrative powers have been fixed through statute by reference to those of trustees. The Trusts (Scotland) Act, 1921 5 (which, supplemented by the Trusts (Scotland) Act, 1961, 6 partially codifies the Scottish law of trusts) by section 2 defines "trust" to include "the appointment of any tutor, curator or judicial factor"; and the same section designates them as "trustees." These provisions were supplemented by the Guardianship of Infants Act, 1925, 7 s. 10, which provided that a father or mother acting as tutor to a pupil child shall be deemed to be a trustee within the meaning of the 1921 Act. None of these categories of persons exercising fiduciary duties—except, in some cases, judicial factors—have the trust estate vested in them. Thus, for example, a curator bonis is not vested in the ownership of the curatory estate. 8 No doubt, as Lord President Clyde observed, 9 this legislation "does not make them trustees in the ordinary sense or endow them with a right of trust ownership. . . . It does not alter the character or quality of their powers or rights in any way, except in so far as any special power which may be conferred by, or may be obtainable under, the Act of 1921 is concerned." Yet, at common law, those discharging the functions of tutor, curator or judicial factor have always been required

5 11 & 12 Geo. 5, c. 58.
6 9 & 10 Eliz. 2, c. 57.
7 15 & 16 Geo. 5, c. 45.
8 In I.R. v. McMillan's Curator Bonis, 1956 S.C. 142, Lord President Clyde (at p. 148) stressed that the Trusts Acts, which recognised a curator as trustee, did not convert the estate into a trust estate. It remained vested in the incapax. See also Burns' Curator Bonis v. Burns' Trs., 1961 S.L.T. 166, per Lord Kilbrandon (at p. 167) regarding the position in law of a curator. "He supersedes the ward in the management of his estate, which remains vested in the ward. The ward is not the beneficiary of a trust estate vested in the curator."
to show a high degree of fiduciary responsibility, and to describe them as "trustees" in the broad sense is not inapoposite. Nor is this an innovation. Bruce's Tutor's Guide (published in 1714) expressly refers to the office of tutor as one of "trust." Nevertheless, a discussion of "trusts" and "trustees" usually contemplates the situation where the trust property has in fact been vested in trustees for administration or disposal. This is what Lord President Clyde had in mind; as had Stair when he wrote, "Trust is also a kind of deposition whereby the thing intrusted is in the custody of the person intrusted, and the property of the thing intrusted... is in the person of the intrusted, else it is not proper trust."

Viewing the Scottish law of trusts as a whole, it is clear that "trust"—a word of wide general meaning—is applied to a variety of fiduciary situations, some of which have their own special rules. Partial codification of the law regarding trusts has been achieved in the Trusts (Scotland) Acts, 1921–61; and the 1961 statute has, it is to be hoped, eliminated most of the difficulties experienced in operating the provisions of earlier measures. A great deal of trust law, however, is not governed by statute at all, but by common law expounded in treatises and judicial decisions—some of great antiquity. English equity jurisprudence has at times provided useful guidance to the solution of problems resting on general equitable principles. It must be stressed, however, that no good and much harm can result from seeking to graft onto Scots law the characteristically English dichotomy of "legal" and "equitable" ownership. Confusion enough has already been caused to Scots lawyers by the uncritical extension to Scotland of essentially English doctrines of trust—in particular regarding "charities" by United Kingdom revenue statutes. Lord Normand's admonitory comments on this situation may with advantage be considered in the wider context of Scottish trust law generally. After describing a typical Scottish trust he continued, "If, however, 'trust' must be understood in so general a sense as this, it may well be impossible to deny that it is a term which would be intelligible in reference to many other systems of law which do not derive from the law of England... I have dealt with this point at greater length than is necessary for the purpose of deciding this appeal because difficulty enough has already been created for the courts in Scotland by the duty to apply characteristically English law in determining whether a Scottish trust is for the purpose of income tax a charitable trust, and it would be a great misfortune if any shadow of suspicion were to arise that a Scottish trust could not enjoy [certain statutory benefits]

10 p. 16.
11 J, 13, 7; see also I, 12, 17; IV, 45, 22.
unless it possessed the special characteristics of a trust under the law of England.”

ROOTS AND BRANCHES OF TRUST LAW

For a century after the Union of 1707 English legal influence North of the Border was not of much importance in the field of private law, and long before the Union the concept of trust was familiar in Scotland. The main sources of Scots law in its formative period were Canon law, Civil (Roman) law, and Feudal law. It was therefore in this context that “trusts” or institutions analogous to trusts first emerged. As Forsyth concluded,13 “In Scotland the origin of trusts is coeval with the law of the land... trusts were at all times enforced in Scotland when their existence could be established by evidence.” Canon law, through the ecclesiastical courts, acquired extensive jurisdiction in medieval Scotland, and, through the Commissary Courts, maintained its influence despite the Reformation in 1560 and the conscious romanisation of Scots law in the seventeenth and eighteenth centuries. These courts were concerned with questions of good faith and the fulfilment of engagements undertaken on oath, and controlled testamentary and executory matters generally.

The Executor as “Trustee”

Professor A. E. Anton of Glasgow University in a scholarly and comprehensive article has described 14 the functions of “Medieval Scottish Executors and the Courts Spiritual.” From very early times administration of the moveable estate of decedents was entrusted to executors confirmed by these courts, and later by their successors, the Commissaries. These executors might be nominated by the will of a testator, or might be executors dative, who by custom were selected from among the next-of-kin. Executors acquired title to ingather and distribute the estate. They had to satisfy the legal rights of widow and children; and executors might apply legitm as a premium for apprenticeship or retain the fund in their own hands to be disbursed for maintenance or ultimate lump sum payment over to children entitled to aliment. So far as concerned “the dead’s part” (that third of the moveable estate upon which the deceased was free to test without possibility of challenge by wife or children) the executors were normally instructed by will to distribute a proportion to charitable purposes for the welfare of the departed soul. In cases of intestacy confirmation might expressly require distribution of the dead’s part for the welfare of his soul “et in alios bonos et

"pios usus"—which were apparently construed to imply that in large measure charity should begin at home. The medieval scheme of executing administration in Scotland successfully survived the Reformation, and the conscious reception of the Roman law which elsewhere in Europe asserted the function of the heir as against that of the executor. Some romanisation of the functions of the executor did take place. To encourage him to carry out the wishes of the deceased, he was entitled until 1855 to retain a third of the dead's part on analogy with the Falcidian quarter of Roman law. This right was conferred by the Act of 1617, c. 14, "Anent Executors," from which it is apparent that the trust reposed by deceased persons in executors who were strangers to the family had in some cases been abused; and that these had taken advantage of their appointment to retain the entire dead's part for themselves in disregard of the deceased's informally expressed wish that the family should benefit. This Act seems to be the first legislative regulation of private trusts in Scots law—and regrettably it is directed against those who abused their trust to defraud the widow and fatherless. The late Lord Cooper has commented, "there is no legal system of the period which had to devote so much attention for so long a time to the frustration of chicanery as Scots law had to do in the sixteenth and seventeenth centuries—and I wish John Knox had told us why." Disregard of duty by those entrusted to carry out the wishes of deceased persons in matters of public or charitable benefaction was denounced by the Act of 1633, c. 6, "Against the Inverting of Pious Donations." Gifts of land and money to colleges, schools and hospitals had been diverted from the objects favoured by their benefactors.

Stair, father of Scots law as a comprehensive and articulate system, contrasted to the advantage of that system the position of the executor in Scotland—who was a species of fideicommissary heir in mobilibus—with the heir in Roman law. He pointed out that, "The whole interest of executory with us is in the office of executor.... It is not properly a succession, but rather an office." By confirmation, "the executor becomes not to have the full property of the defunct's goods and debts so established; but he remains fidei-commissarius."

15 To avoid confusion with English terminology, Forsyth's warning may be quoted, "It may be observed that the term 'use' frequently occurs in the older Scotch decisions. It is there employed . . . to denote a purpose of trust merely; not as synonymous with trust as a general term."—Law of Trusts, p. 5.

16 See the Intestate Moveable Succession (Scotland) Act, 1855, s. 8. Significantly the office of trustee in general is essentially gratuitous, unless the truster expressly confers a right to remuneration.

17 Selected Papers, pp. 288-289.

18 A.P.S., V, 22, c. 6.

19 III, 8, 30.

20 III, 8, 71.
Clearly executors in Scots law have for centuries been regarded as discharging fiduciary functions. Executory practice (which, though modernised, maintains the fundamental characteristics described) has influenced the development of trust law in Scotland. Very frequently, of course, executors were themselves next-of-kin and beneficiaries. This set them apart from the main stream of trust law. The Executors (Scotland) Act, 1900, provides that all executors nominate shall have the same powers and restrictions as gratuitous trustees, and by the Trusts (Scotland) Act, 1921, s. 2, the expression “trustee” is deemed to include an executor nominate. In modern practice, apart from the distinction that an executor is *eadem persona cum defuncto*, there is virtually no practical difference between trustee and executor.

**Mortifications**

Among the historical sources of the public or charitable trust in Scotland may be included grants by way of “mortification” (mortmain). The *reddendo* in this feudal tenure was generally *preces et lacrymae*, which a religious foundation such as a monastery or abbey rendered for the well-being of the granter’s soul; but the purposes of the gift might well be to establish schools, hospitals, relief for the poor and the like. There are examples of such gifts dating from as early as 1461. After the Reformation intercession for the deceased was regarded as superstitious, and lands held by mortification for this purpose were annexed to the Crown by the Act 1587, c. 29. This statute, however, excepted from annexation grants already made for public purposes which were not deemed superstitious, and mortifications remained competent through other feudal tenures. Grants by the sovereign or by private benefactors for “godly” and “pious purposes” such as the maintenance of clergy, hospitals, schools, repairing bridges and caring for the poor are encountered, while statute law safeguarded and supported such objects. Modern trusts for public purposes are, however, made by disposition to trustees.

**Fideicommissa, Entails and Trusts**

A discussion of “trusts” in most civilian “mixed” systems, e.g., South Africa, Quebec and Louisiana, starts from the “*fideicommissum*”—a term of art in Roman law which is usually translated as

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21 63 & 64 Vict. c. 55. 22 11 & 12 Geo. 5, c. 58.
25 A.P.S. III, 431, c. 8.
28 See post, Chap. 24.
'trust' in English. The influence of the Roman *fideicommissum* on Scots law has been mainly associated with the feudal land law. Originally a device to circumvent some of the technicalities of the Roman will, it merged with legacy under Justinian. The theory of *fideicommissum* was that the heir or *fiduciarius* should hold property under obligation to hand it over to the *fideicommissarius* as soon as possible, or (in settlements by fideicommissary substitution) to enjoy the property himself until he passed on the inheritance to the successor. Despite the continental lawyers' assertion that their concept of unitary ownership as "autonomous absolute, abstract power" is derived from Justinian, it may well be that Tribonian's meaning was not fully grasped by Portalis and his successors. At all events, Justinian recognised that, by operation of fideicommissary substitutions, power of alienation could be restrained for four generations in what we should regard as family settlements. This was to have considerable importance in Europe during the Middle Ages when the whole feudal system was a negation of ownership one and indivisible. The Civilians from the Glossators to Grotius had to adjust their interpretations to the society in which they lived. A hierarchy of superiors and vassals descending from king to cottager covered a single plot of land. *Dominium directum* was severed from *dominium utile*, and from the *fideicommissum* grew the entail or tailzie. In Scotland, as elsewhere in medieval Europe, succession to land could be governed by "tailzies" or entails which restricted descent to a prescribed line of heirs. Justinian's restriction of such substitutions to four generations was construed by some medieval lawyers not to impose an absolute prohibition against substitutions in perpetuity. Stair assumes that Scotland adopted direct from France the system of "tailzied succession." Though substitution in perpetuity was at one time permitted in France, the Ordonnance of Orleans, 1560, limited such destinations to two degrees including the first holder, while the Ordonnance of Moulins, 1566, provided for the registration of entails. Eventually the complexities of the law were codified in 1747—but at the Revolution entails, being closely associated with the feudal privileges of the nobility, were swept away as anachronistic and oppressive.

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29 See "Trusts" in *Introduction to Scottish Legal History* (Stair Soc., Vol. 20), pp. 219–220.
30 D. 13.6.5.15; C. 7.25.
32 Novel, 159.
33 See Vera Bolgár, "Why No Trusts in the Civil Law?" (1953) 2 Am.J.C.L. 204.
34 III, 4, 33.
Scotland's first institutional writer on feudal law, Craig, had been strongly influenced by French legal theory—that of Hotman in particular. In his *Jus Feudale*—which had a European reputation—he discusses *fideicommissum* in connection with feudal grants under the rubric 36 "Conditiones quaedam sunt fideicommissariae"—which his translator, Lord Clyde, renders as "Conditions involving trust." Bankton writing in the mid-eighteenth century observes, "There is no doubt but our tailies, even those with strict irritant clauses, are founded in the Civil law: their *Fideicommisses* resembled them greatly." 37 There had been various forms of tailzie long before the seventeenth century, but only those created by a deed which conformed to the requirements of the Act 1685, c. 22, 38 were made effectual against third parties. These requirements included clauses prohibiting alienation and clauses of irritancy for attempted evasion. Moreover, the authority of the Court of Session had to be interposed, and the entail had to be recorded in the Register of Entails. The strict conditions imposed on heirs of entail eventually proved incompatible with sound estate management, and successive statutory relaxations including powers to disentail were introduced by legislation of the late eighteenth and nineteenth centuries. By the Entail (Scotland) Act, 1914, 39 the creation of further entails was prohibited; but a very experienced conveyancer has recently stated 40 that "there must still be considerably more than 1,000 entail[s] existing in Scotland." This branch of the law became so much the concern of the feudal conveyancer that its connection with "trust" in the sense of *fideicommissum* has latterly been largely overlooked. Nevertheless from a comparatist's viewpoint, the tailzie was a "trustlike" institution dividing ownership and administration and designed to perpetuate family succession. Forsyth (1844) noted the common origin of trusts and entails from *fideicommissa*. 41 Though Scottish lawyers would not now refer to entail[s] as "trusts," in the sense explained, they operated as such.

In the case of grants of "proper liferent," which were fairly common, neither the liferenter nor fiar was full owner, and the liferenter's right was in effect that of an ordinary proprietor subject to the condition *salka rerum substantia* on behalf of the fiar. In modern practice, however, almost invariably the grant is of a "trust liferent," in which case ownership is vested in trustees.

36 *Jus Feudale* 2.5.9, and see note 26, supra.
39 4 & 5 Geo. 5, c. 43.
40 See H. H. Monteath, "Heritable Rights," *op. cit.*, note 29, p. 156 at p. 177. See generally this article and Sandford, *op. cit.*, note 37.
conveyancing concept now mainly of historical interest is that of the “fiduciary fee”—an exception to the rule in Frog’s Creditors. Where heritage was disposed to a parent “allenarly” (i.e., “only”) in liferent and to his unborn children in fee, the parent was regarded as equivalent to a trustee of the fee. The history of this development is highly technical and the fiduciary fee is now largely regulated by statutory provision. It cannot be pursued further in the present context.

Before considering the historical antecedents of inter vivos trusts, mention may be made of a case expressly construed as fideicommissum of moveables in the early eighteenth century. A father stipulated that the provision made for his daughter by marriage contract should exclude her claim to legitim. If, however, he had no further children a sum equivalent to the legitim fund was destined to her children, as she should appoint. It was held that the contract constituted “a fideicommis” in Lady Pitmedden, and that she was only bound to denude in favour of her children on her death. In modern Scots law the term fideicommissum is no longer used, though the basic idea survives in gifts sub modo. Property may still be disposed with “destinations over” (e.g., “to A whom failing to B”), but the “institute” or person first called no longer corresponds to the fiduciary, nor the “substitute” to the fideicommissary. By alienation inter vivos or mortis causa the expectations of the substitute may be defeated—and if the subject conveyed is a corporeal moveable, substitution will be defeated by the institute gaining possession.

Inter Vivos Trusts

The inter vivos trust of heritage (immoveables) or moveables certainly goes back to the fifteenth century. Prior to the seventeenth century such trusts were often created by disposition or delivery of the subject accompanied only by verbal declaration of the purpose intended—which might be to apply the property “for the use” or for “the profit and utility” of a third party, or to restore it at some future date to the truster. Among the inducements to entrust property to others in this way may be included no doubt, as Bell suggested, the hazards of engaging in civil war. It was a common-sense precaution for a family man, before risking head and forfeiture of his estate in such an enterprise, to hand over property to a trusted friend—on
the understanding that it would be restored, if all went well, or would be conveyed to the bereaved family, if matters turned out ill. On the other hand, less dramatic factors also played their part; and many trusts were designed either to secure payment of the truster’s debts—or to frustrate the claims of creditors. Not only did those engaging in the various revolutions or Risings of the seventeenth and eighteenth centuries wish to safeguard their property; the constructive “rebels” had the same object in mind. Bell observes,47 “At the time when insolvency was construed as disobedience to the command of the King, and forfeiture of moveables or of land was the punishment of this constructive rebellion, trusts were frequently resorted to as the means of preserving property to its rightful owner. These trusts were left to be proved by evidence direct and indirect where the trustee was inclined to be unfaithful. It was natural to make use of such trusts to cover property from the diligence of creditors. And innumerable difficulties were presented in detecting the existence and establishing the proofs of trust.” Consequently the courts were largely preoccupied with questions of proof of trust. An attempt was made to tackle these problems by legislation.

By the Act 1621, c. 18,48 fraudulent alienations to the prejudice of creditors were struck at, and dispositions to “conjunct or confident persons” were declared null. In fact all gratuitous alienations by bankrupts—without true, just and necessary causes and without a just price being paid—were struck at, but a special presumption of latent trust attached to the very fact of transfer to persons deemed “conjunct or confident.” (The later Act 1696, c. 25,49 prescribing stricter methods of proving trusts did not apply to such cases.50) Bankton classifies51 as trusts or fideicommisses “simulated rights” where the property had been alienated, leaving its subsequent application for the truster’s advantage entirely to the transferee’s conscience.

Though the Court of Session was never favourable to oral evidence before the nineteenth century, in the time of Stair the judges were so much perplexed by fraudulent assertions and denials of trust that they granted declarators of trust after endeavouring to “find out the truth” by oral evidence or even by applying presumptions.52 Eventually by the Act 1696, c. 25 (passed after the notorious case of Higgins v. Callander53), it was provided that—as between truster and trustee—where property had ostensibly been vested in another as owner in

47 Commentaries, ii, 174; see also Stair, IV, 6, 2; IV, 45, 21.
48 A.P.S. IV, 615, c. 18; this statute ratified an Act of Sederunt. Stair, I, 9, 15.
49 A.P.S. X, 63, c. 25.
50 Bell, supra cit., note 46; Bankton, I, 262.
51 I, 260, 69.
52 Stair, I, 12, 17.
53 (1696) Mor. 16182.
his own right, declarator of trust would not be granted in favour of a trustor unless the existence of a trust could be proved by oath or signed acknowledgment of the trustee. This did not affect the rights of third parties. Bell comments on this measure,54 "Perhaps no small mixture of political motive went towards this legislative measure. To increase the danger of trusts was to paralyse the hands of those whom safety against forfeiture might have encouraged to join the standard of the exiled family" (scil. the House of Stuart). Be that as it may, the statute had the desired effect of encouraging the setting forth of trust purposes in a trust deed or the securing of a back bond from the person entrusted. A mass of case law is concerned with trusts during the seventeenth and eighteenth centuries—but the emphasis is largely on questions of proof and on the relationship between trustor and trustee or between trustee and creditors. Against this background the institutional writers regarded the typical inter vivos trust as a combination of the contracts of deposit and mandate, with the specialty that ownership of the trust property was vested in the trustee, whereas it is not in the depositary.55 The nature of the beneficiary's jus crediti is considered in a number of cases in Morison's Dictionary under such headings as "Trust" and "Personal and Real."

Mercantile and Financial Aspects of Trust Law

The development of trusts in mercantile transactions came late. Scotland's economy had suffered severely by Union with England in 1707. It was only in the second half of the eighteenth century that lost ground was recovered and rapid advances were made. Bell, the last of the institutional writers, made his main contribution in developing principles of Scottish mercantile law. He sums up the scope and purposes of the private trust in Scotland at the beginning of the nineteenth century,56 "The particular occasions for the employment of this expedient (scil. trust) are: the settling of marriage contracts; the arranging of family settlements; the fixing of a plan for the administration of large estates...; the facilitating of the sale and distribution of land, or its price, among heirs or creditors; or finally the settling of a bankruptcy with provisions for the benefit of the creditors and a discharge of the debtor."

Bell took the law of bankruptcy as the point of departure for his Commentaries on the Law of Scotland, and gave detailed treatment to trust deeds for behoof of creditors and also to procedure by

54 Commentaries, i, 174 note.
55 Stair, I, 12, 17; I, 13, 7; II, 10, 5; III, 4, 24; IV, 6, 1-6; IV, 45, 21; Bankton, I, 260, 69; I, 395, 12; I, 396, 15; II, 614, 28; Erskine III, 1, 32; Bell, Commentaries, i, 29-34; 37-38; ii, 174-175; 387-390; Principles, §§ 1482, 1991-1992, 1995-1997.
56 Commentaries, i, 30.
sequestration whereby the bankrupt’s estate was transferred to a trustee, who had the duty of realising the assets and distributing them among the creditors. In cases where a person, whose affairs were embarrassed, voluntarily transferred property to a trustee charged with the duty of satisfying or compounding with creditors, the doctrine of “the radical right” has been frequently invoked. This is distinct from the concept of “resulting trust,” and is not restricted to cases of trust deeds for creditors. Indeed, the doctrine of radical right is no part of trust law. When a person parts with his property for a limited purpose, whether through the medium of trust or otherwise, a “radical right” remains with him. In all contingent trusts, where the truster has made a general conveyance of estate to trustees, or has conveyed heritage for certain specified purposes, he is regarded as only being denuded of so much of the estate as is necessary to fulfil those purposes. Thus he does not require reconveyance either of title or of beneficial interest in the surplus. Where, however, the disposition is ex facie absolute and does not express the trust purposes, the truster is completely divested and title is with the disponee alone. When the property conveyed is heritage, the doctrine of “radical right” involving concurrence of title in truster and trustee during the operation of a contingent trust, is one of the more abstruse aspects of feudal conveyancing.

Companies usually borrow by the issue of debentures, and security for debenture holders may be provided in the hands of trustees. Thus trusts for debenture holders have become an important aspect of modern mercantile law. The “investment trust” developed in Scotland after the mid-nineteenth century. These trusts pooled the funds of their shareholders in a substantial portfolio of securities, so that each person participating drew a dividend from income derived from a variety of different enterprises. During the present century heavy fiscal exactions on death and income have stimulated the growth of commercial and family trusts, principally designed to mitigate the impact of taxation. This is now a most sophisticated branch of law which attracts the talents of specialists acting for trustors or beneficiaries on the one hand, and, on the other, those who draft and enforce fiscal legislation. It may be noted in passing that “chamber lawyers” from the nineteenth century have drawn extensively on

57 Ibid. ii, Book VI. The modern law largely depends on the Bankruptcy (Scotland) Act, 1913.
58 Menzies, Trustees, 2nd ed., ss. 1060–1070.
59 Kinmond v. Finlay (1904) 6 F. 564.
60 Aberdeen Trades Council v. Ship Constructors’ & Shipwrights’ Association, 1949 S.C.(H.L.) 45. Even when a back letter is registered or a loan is raised through bond and disposition in security duly registered, title is in the disponee alone.
61 Menzies, Trustees, ss. 1060–1068, and authorities there cited.
English styles, and infiltration of the English trust has possibly been assisted more in this way than by judicial decisions.

Of very great importance in modern law—but too complex for elaboration—is that aspect of law which bears on monopolies and restrictive practices. Investigations into their impact on the national economy were carried out in Canada and the United States at the end of the nineteenth century, and led in the United States to the passing of the Sherman Act in 1890. The British Government did not act until much later. In February 1918 a Committee on Trusts was, however, set up to report "what action, if any, may be necessary to safeguard the public interest." The Committee reported that it would be desirable to institute machinery for the investigation of monopolies, trusts and combines which "are rapidly increasing in this country, and may within no distant period exercise a permanent control over all important branches of the British trade." A Committee on Restraint of Trade was set up in 1930, but monopolistic combinations and trusts were outwith its terms of reference. The Lloyd Jacob Committee on Restraint of Trade was set up in 1930, but monopolistic combinations and trusts were outwith its terms of reference. The Lloyd Jacob Committee on Resale Price Maintenance reported in 1948, and the subsequent Monopolies and Restrictive Practices Act, 1948, was the first real legislative step taken to deal with such problems, but these are not in Britain usually associated with the concept of "trust" in its ordinary meaning. "Trusts" in the sense of combinations by a number of companies through trustees are not in Britain struck at as such. The effects of such combinations and of restrictive practices are now, however, subjected to the scrutiny and control of the Restrictive Practices Court and of the Monopolies Commission.

Miscellaneous "Trusts"

In concluding this general survey mention may be made of certain miscellaneous aspects of trust in Scotland.

An alimentary provision—that is to say, a gift to a beneficiary for his maintenance excluding his right to alienate and putting the property beyond the reach of his creditors—could formerly be secured competently without the intervention of trust at all. This was the view of the institutional writers and also of decisions up to 1852. The condition of the grant haeret ossibus. However, the modern view is that the legatee's interest (in an alimentary

62 11 & 12 Geo. 6, c. 66.
63 See Wilberforce, Campbell and Elles, Restrictive Trade Practices and Monopolies, passim, and esp. Introduction.
64 Bankton, I, 159: Erskine, III, 67.
65 e.g., Urquhart v. Douglas (1738) Mor. 10403; Lewis v. Anstruther (1852) 14 D. 857; Dunsmure's Trs. v. Dunsmure, 1920 S.C. 147, per Lord Skerrington at p. 153.
provision) can be protected only by means of a continuing trust. The change in the law seems to have come about, not as a deliberate policy decision, but almost per incuriam. For the present it may suffice to note that the protection afforded in Anglo-American law by the "spendthrift trust" has its equivalent in Scotland, but that the notion of such protection was originally not necessarily associated with ideas of trust at all, in the sense of conveyance to trustees.

In South Africa the *inter vivos* trust has apparently taken the form of a contractual *stipulatio alteri* creating *jus quaesitum tertio* 67; in Scotland the two concepts, though used to achieve similar ends, are not identical. 68 It has always been perfectly competent for a man to confer upon wife or children the benefit of a contract of assurance upon his own life. Nevertheless, the Married Women’s Policies of Assurance (Scotland) Act, 1880, 69 also provides that a married man, by effecting a policy of assurance on his own life, expressed on the face of it to be for the benefit of wife or children or both, may constitute a trust; and that such trust shall not form part of his estate or be liable to the diligence (execution) of his creditors.

In his discussion of trusts by implied intention, Mackenzie Stuart deals with gifts subject to conditions, and concludes, 70 "Recent decision in Scotland seems to treat bequests under conditions as to maintenance and the like as constituting some kind of trust with an enforceable right of a not well-defined character in the beneficiaries." Such gifts may be, e.g., to A but in part to aliment B; or to A upon condition that he leaves by will a proportion of what is left at his death to B. Lord McLaren had thought 71 that a bequest to a legatee under burden of maintaining children is in the nature of trust, but Mackenzie Stuart is (rightly it is thought) more reserved, and points out 72 that such cases differ from trusts in the usual sense. The donee or legatee (unlike the trustee in other cases) is often himself a beneficiary; and, if he repudiates the gift the person to be benefited indirectly has no claim. Moreover, the property, if he accepts, is not beyond the reach of the donee’s creditors. Lord Kyllachy observed, 73 "There is, so far as I know, no difficulty in imposing on a gratuitous disponee or his gratuitous successors any obligation which the granter may think fit to impose. . . . The obligation may,

69 43 & 44 Vict. c. 26.
70 Trusts, p. 30.
71 Wills and Succession, § 636; § 1138.
72 Trusts, p. 7.
73 Falconar Stewart v. Wilkie (1892) 19 R. 630 at p. 634.
of course, become valueless. It may become so by the grantee’s bankruptcy. But it cannot be defeated otherwise by any act of the grantee.” It would seem more in accordance with Scottish principle to regard such gifts as legacies or donations sub modo. There is no need, as in England, to invoke the trust to eke out inadequacies in the law of contract or donation.

The expressions “constructive trust” and “resulting trust” have gained circulation in Scots law through contact with English Chancery jurisprudence. The ideas, however, have a longer history. Those discharging fiduciary functions, such as tutors, partners or factors, were always debarred from profiting by their offices as auctores in rem suam, and were bound to communicate any “eases” to those whose interest they had the duty to maintain. Such cases may be found listed under such various heads in Morison’s Dictionary of Decisions as “Adjudication,” “Pacta Illicita,” “Tutors” “Trustees,” “Restitution” or “Recompense.” Kames stresses, “Equity ... prohibits a trustee from making any profit by his management directly or indirectly. An act of this nature may in itself be innocent; but is poisonous with respect to consequences; for if a trustee be permitted, even in the most plausible circumstances, to make profit, he will soon lose sight of his duty, and direct his management chiefly for making profit to himself. It is solely on this foundation that a tutor is barred from purchasing a debt due by his pupil, or a right affecting his estate.” One of the cases cited by Kames was decided in 1662,75 while in Crawford v. Hepburn 76 it was clearly recognised that, whenever a person in a fiduciary position gains an advantage at the expense of him whose interests he is bound to safeguard, that advantage must be communicated to the beneficiary. The expression “resulting trust” is now familiar in Scots law, and the doctrine may be invoked whenever any part of trust funds is left undisposed of by direction of the trustor. Then the beneficial interest will result to the trustor, or, after his death, to those who succeed him.

Public Trusts 77

A broad division is made in Scots law between public and private trusts. The court, however, has jurisdiction over both, and the general principles of trust administration are the same. Indeed, the

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74 Principles of Equity, 4th ed., p. 375. In modern practice, of course, corporate trustees always insist on express provision for a power to pay themselves as do law agents who are also nominated trustees.

75 Carnoustie v. Auchanachie (1622) Mor. 9455 and see Morison’s Dictionary generally, sub voce “Pactum Illicitum.”

76 (1767) Mor. 16208.

77 See Chap. 24, post.
definition of "trust" in the Trusts (Scotland) Act, 1921, covers public as well as private trusts.

In England the basic distinction is between "charitable" trusts and private trusts, and as a result in some Scottish cases the expression "charitable" has been used loosely as a synonym for "public." The two adjectives do not, however, have the same meaning, and the distinction may be material in deciding whether a bequest is void for uncertainty—since a gift "for charitable purposes" has always been assumed to be sufficiently specific of itself.

The doctrine of *cy-près* (approximation), which was developed in Scotland under English influence, applies to public trusts generally. It does not, however, apply to trusts which, though they have an element of "charity" in popular parlance are, in fact, private trusts.78

Only for income tax purposes has the very technical English meaning of "charity" been thrust on Scotland by United Kingdom statute law. This is particularly irksome, since the relevant provisions preclude the Scottish courts from obtaining an opinion on doubtful cases from the English courts under the British Law Ascertainment Act, 1859.79 This situation can only be explained or justified on the grounds that tax law falls within the Exchequer jurisdiction, which, though now exercised by the Court of Session, perpetuates the essentially English character of the post-Union Exchequer Court in Scotland.80

**LEGAL RESTRICTIONS ON TRUSTS**

Trust purposes must not be illegal, immoral or contrary to public policy. In cases where a challenge on grounds of public policy has been discussed, there have usually been the concomitant factors that no beneficiary had an interest to insist on the directions of the trust being carried out, and that no public benefit or patrimonial advantage was conferred thereby. In *McCaig v. University of Glasgow* 81 the testator directed that statues of himself and his relatives should be erected on a tower built on a hill outside Oban; while the testatrix in *McCaig's Trs. v. Kirk Session of U.F. Church of Lismore* 82 provided for the erection of nine bronze statues of deceased McCaigs also to be erected above Oban. The statues, by early twentieth-century standards, would have been very costly, and there was no

79 22 & 23 Vict. c. 63.
81 1907 S.C. 231. See also *Lindsay's Exor. v. Forsyth*, 1940 S.C. 568 in which a bequest for placing flowers on graves in perpetuity was held invalid.
82 1915 S.C. 426.
evidence that members of the Clan McCaig were of such artistic or historic interest that the public would desire to be overlooked by their effigies. Similar lack of public enthusiasm was manifested in *Aitken's Trs. v. Aitken* 83 towards a trust to erect a massive bronze equestrian statue of a testator, who in his lifetime had often “ridden the Marches”—an activity dear to Borderers. Accordingly, primarily on grounds of public policy, these various trust purposes were refused effect—and the decisions themselves remain as the lasting monument to family pride or vanity beyond the grave. On the other hand, in a case where the authorities were carefully reviewed by Lord Russell, a bequest of £30,000 to erect a worthy public monument to commemorate the services of a celebrated regiment, the Royal Scots, was held to be a perfectly valid object which could be regarded as useful to large sections of the public, *Campbell Smith's Trs. v. Scott*.84

Regarding restrictions upon the duration of trusts, the situation in Scotland differs noticeably from that which obtains in England. It is lawful to create a Scottish trust in perpetuity, whether the purpose is private or public, provided that the rules limiting creation of successive liferents and accumulation of income are observed. Moreover, at common law, perpetuities were encouraged rather than discouraged. Statute has, however, introduced limitations.

The Entail (Scotland) Amendment Act, 1848,85 enacts with regard to heritage (immovables) that “It shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant.” Read in the general context of the Act, however, this provision does not invalidate successive gifts of liferent, but entitles a liferenter (born after the deed creating his right) to convert it into fee, after achieving majority, by petition to the Court of Session. Somewhat different rules regulate grants of liferent in moveables. The Trusts (Scotland) Act, 1921, s. 9, provides that “It shall be competent to constitute or reserve by means of a trust or otherwise a liferent interest in moveable and personal estate in Scotland in favour only of a person in life at the date of the deed constituting or reserving such liferent.” A liferent created by a power of appointment is deemed to be “constituted” by the deed creating the power. If a liferent in moveable estate is held for a person of full age born after the date of the deed creating it, he is entitled to the property absolutely, and can call on trustees to convey it to him.

83 1927 S.C. 374.
84 1944 S.L.T. 198.
85 11 & 12 Vict. c. 36, s. 48.
Restrictions of accumulations of income are imposed by the Trusts (Scotland) Act, 1961, s. 5, re-enacting with some modifications the Accumulations Act, 1800 (Thellusson Act). In general terms the maximum permitted period of accumulation of income is either for the period of the grantor’s life or for twenty-one years plus a period of gestation. By the Accumulations Act, 1892, a direction to accumulate income for the purchase of land is permitted only during the minority of a beneficiary who, if of full age, would be entitled to the income.

Generally speaking, every person who has a right in property of which he may dispose, may constitute a trust in respect of such property to the extent of his right. Incapaces, such as lunatics and pupils, lack the necessary power to create trusts. A minor may create a trust with consent of his curator, if he has one, and without such consent if he has no guardian. Subject to limited exceptions, however, a testamentary trust created by a minor would not carry heritage if the truster died before reaching majority.

Any property which can be conveyed or assigned may be made the subject of a trust. If, however, a provision is alimentary (for maintenance) it cannot be assigned, and is not liable to the diligence (execution) of creditors except so far as it may be excessive for the maintenance of the beneficiary.

Any person who is legally capable of holding and dealing with property may be appointed trustee. A truster may nominate as trustee someone he knows to be bankrupt; or a minor (whose curators, if any, must consent to his acceptance); or an alien (except if this would involve ownership of a British ship); or a company (if not restricted in its powers). Banks are frequently nominated as trustees. A pupil, lunatic or person undergoing punishment cannot act as trustee.

Natural or juristic persons generally may be beneficiaries under a trust, subject to the exception that an alien cannot acquire property in a British ship. By signing as notary a beneficiary nominated in the trust deed may disqualify himself. Trust purposes must benefit some person or persons entitled to enforce these purposes. Difficulties may emerge where the object is ostensibly for the benefit of animals or to set up a monument or structure. If the gift in favour of animals may be regarded as indirectly beneficial to the public, it may be enforced; similarly if the erection of a hall or monument may confer a public benefit. It would seem that a mortis causa bequest of property to erect a vault or other family memorial may

86 9 & 10 Eliz. 2, c. 57.
87 55 & 56 Vict. c. 58.
88 See ante, pp. 491-494.
be invalid if extravagant and eccentric, but not if it can be regarded as a rather lavish funeral expense.⁸⁹

**RIGHTS OF REVOCATION, VARIATION AND CONTROL OF TRUST PURPOSES**

*Mortis causa* trusts, if they come into operation, are by their nature irrevocable by the trustor; trusts *inter vivos* may or may not be revocable by him according to the terms and purposes of their constitution. If the object of such trusts is merely to administer the property for his benefit, or if no beneficiaries are in existence or entitled to more than a *spes successionis*, the trust may be revoked. If, however, the trust deed has conferred immediate rights on beneficiaries, and the deed creating them can be construed as irrevocable, the gift is irrevocable. In *Scott v. Scott* ⁹⁰ a trust was held to be irrevocable though deliberately created to defeat a claim for legal rights which the trustor's wife would have acquired by divorcing him. Lord President Clyde, after reviewing the authorities, concluded ⁹¹: “It is significant that, in the long series of cases dealing with this topic, there is not one case in which an *inter vivos* divestiture in favour of trustees for the protection of beneficial interests, immediate or contingent, has been found revocable in spite of a declaration of irrevocability contained in the deed. It seems to me that, when the true intention of the deed, and of the divestiture which has followed upon it, is otherwise *in dubio*, a declaration of irrevocability may be enough to tip the balance.”

As from August 27, 1961, extensive powers have been conferred by the Trusts (Scotland) Act, 1961, to sanction variation of trust purposes.⁹² This Act gave effect to the Ninth Report of the Law Reform Committee for Scotland.⁹³ Paragraphs 39 and 41 of that Report commented: “The variation of trusts by sanction of the court is . . . no new thing in English law. In Scotland, on the other hand, the idea that the court should have power to sanction variation of the substantive provisions of trusts, as distinct from the mere powers of trustees, is a conception foreign to our jurisprudence, and would represent a fundamental innovation. Nevertheless we are satisfied that the innovation should be adopted in Scotland. . . . The provisions of the old-fashioned settlement were designed to preserve

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⁹⁰ 1930 S.C. 903. The trust would not, however, have been effective *in fraudem* of creditors; *cf.* Torrance *v. Torrance’s Trs.*, 1950 S.C. 78 where there was no declaration of irrevocability and no immediate beneficial right was conferred.

⁹¹ At p. 917.


⁹³ (1960) Cmd. 1102.
the settled property for successive generations. Under modern conditions, particularly looking to the impact of taxation, such provisions, so far from preserving settled property, may have the opposite effect."

Until the 1961 Act came into force, powers to vary trusts in Scotland were very limited. Where all the beneficiaries were of full legal capacity it was often possible to "break" the trust by agreement; but the courts had no power to consent on behalf of incapaces. The Trusts (Scotland) Act, 1921, s. 5, did, however, enable the Court of Session to authorise trustees to do any of the acts set forth in section 4 as within the general powers of trustees, notwithstanding that these acts were at variance with the terms and purposes of the trust, if they were expedient for the execution of the trust. Moreover, by section 16 of the same Act, the Court of Session was empowered to authorise advances for maintenance and education of beneficiaries under full age, provided this was not prohibited by the trust deed. Under the *nobile officium* of the court very occasionally authority was given to make advances to beneficiaries who had reached majority. Regarding powers of investment, section 27 of the 1921 Act empowered the Court of Session by Act of Sederunt ⁹⁴ to vary from time to time the categories of "trustee" securities ⁹⁵; while very recently the Trustee Investments Act, 1961, ⁹⁶ has authorised trustees to invest a proportion of the estate in equities.

The Trusts (Scotland) Act, 1961, s. 1, which resembles in important respects the English Variation of Trusts Act, 1958, ⁹⁷ has now conferred a very extensive jurisdiction on the Court of Session to vary the purposes of trusts created by will, settlement or other disposition. ⁹⁸ Procedure is regulated by Act of Sederunt (Rules of Court Amendment No. 2), 1961 (No. 1708). On petition by the trustees or by any beneficiary, the court may, if it thinks fit, approve variations on behalf of a beneficiary incapable of consenting, or on behalf of a future contingent beneficiary (whether ascertained or not) or on behalf of any person unborn. ⁹⁹ The proposed arrangement set out in the petition may vary or revoke all or any of the trust purposes, or enlarge the powers of the trustees in their management of the trust estate. Consent will not be granted unless the court is of opinion that the variation would not be prejudicial to the person on whose behalf it acts.

⁹⁴ *i.e.*, rules made by judges of the Court of Session in virtue of statutory powers.
⁹⁵ The present list of trustee securities is set out in *Parlament House Book*, 1960–61, ii, H. 41–42.
⁹⁶ 9 & 10 Eliz. 2, c. 62.
⁹⁷ 6 & 7 Eliz. 2, c. 53.
⁹⁸ See in particular Elliott, ref. note 92.
⁹⁹ But see *infra*, p. 567.
The Scottish Act had to provide specially for alimentary trusts, which have no longer a counterpart in England since restraints upon anticipation were abolished by the Married Women (Restraint Upon Anticipation) Act, 1949. In Scotland if a liferent given by trust is declared to be "alimentary" (scil. for maintenance) this is not assignable, and is only liable to the diligence of creditors *quoad excessum*. Such a provision may be appropriate for a prodigal or spendthrift. The main purpose of such provisions has been, however, to protect the property of married women against the importunity of their husbands; and, indeed, for this reason a married woman by ante-nuptial marriage contract can create an alimentary liferent in her own funds. (In no other case can a person create an alimentary provision in favour of himself.) A married woman in modern Scots law is emancipated from the *jus mariti* and *jus administrationis* of the husband; and is a free agent in property transactions. Thus decisions on alimentary liferents based upon superseded social circumstances would seem to have lost much of their force. Even so, until 1961 once an alimentary provision had been accepted, the beneficiary had no power to renounce or to accept any alternative arrangement—though the consequences from the viewpoint of taxation might be very serious for all parties interested in a family trust. One relaxation recently conceded by judicial decision is to the effect that, when a person entitled to an alimentary liferent renounces it entirely, before entering upon its enjoyment, such renunciation is effective.

By the Trusts (Scotland) Act, 1961, s. 1 (4), provision is made for the Court of Session to assent to the variation of a trust, even though a beneficiary thereunder is entitled to an alimentary liferent or to alimentary income. On petition by the trustees or any beneficiary a new arrangement may be authorised, varying or revoking the alimentary trust purposes or making new provision for the disposal of the fee or capital burdened with the alimentary provision. It is provided, however, that such an arrangement must not be sanctioned unless the court considers "that the carrying out of the arrangement would be reasonable, having regard to the income of the alimentary beneficiary from all sources, and to such other factors, if any, as the court considers reasonable." In addition the consent of the alimentary beneficiary, or of the court on behalf of one who is

1 12, 13 & 14 Geo. 6, c. 78.
2 See ante, pp. 491-495.
4 *Douglas Hamilton*, sup. cit. This decision has incurred considerable criticism from the profession, many of whom favour Lord Guthrie's dissenting opinion. The Trusts (Scotland) Act, 1961, has, however, made further discussion of the matter largely academic. *Cf. Kennedy v. Kennedy's Trs.*, 1953 S.C. 60.
incapable, must be given. It may be observed that these provisions provide a safeguard for (say) a widow of modest means exposed to the importunity of an unscrupulous son or daughter.

Though by the common law the court has power to remove a trustee from office, this power is not readily exercised unless the trustee has been guilty of malversation of office or has shown himself unfit or has unreasonably refused to discharge his duties. In practice, however, a trustee is not removed merely for incompetence and maladministration. Protection is secured through the appointment of a judicial factor who supersedes the trustee's administration. A judicial factor may be appointed whenever this is in the interest of the trust estate. The courts (Court of Session or Sheriff Court) have also statutory powers under the Trusts (Scotland) Act, 1921, s. 23, to remove trustees. This section provides that, in the event of any trustee becoming insane or incapable of acting by reason of physical or mental disability, he shall be removed; while a trustee may be removed in the case of disappearance or continuous absence from the United Kingdom for at least six months. Application may be made by a co-trustee, beneficiary or other person interested in the trust estate. New or additional trustees may be assumed by trustees in office as provided by sections 3 and 21 of the 1921 Act, unless power to appoint is excluded by the trust deed. Even in that case, the court itself has power (by section 22) to appoint new trustees on the application of "any party having interest in the trust estate."

TRUST OWNERSHIP AND THE BENEFICIARY'S RIGHT

The concept of trust in Scotland, as has been explained, has many facets. These comprise trusts created expressly or by implication; situations wherein a person such as a curator administers property vested in another; and situations wherein ownership of and powers to administer trust property are transferred to trustees. An essential common factor in all such trusts seems to be separation between the control which ownership usually gives and the benefits of ownership. Thus Forsyth defines the concept comprehensively:

"Trusts, in the general sense of the term, include all cases in which confidence being placed in another, authority is given to perform an act or acts for behoof of the party reposing that confidence." An alternative general definition of trust might be "a confidence reposed by one person in another and enforceable in a court of law."

When analysing rights in and against trust property, it may, however, be convenient to deal in some detail with the characteristic express trust; and to note more briefly the specialties relevant to

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5 At p. 1.
other types of trust. It is with the express trust that the institutional writers and the Trusts (Scotland) Acts have been mainly concerned. Even so, no definition which includes every potentially relevant element of the express trust and excludes every irrelevant factor has yet been enunciated.

Lord Normand, after stressing that the history and development of the Scottish law of trusts were not at all the same as in England, observed 6 that the word "trust" in a United Kingdom statute "must cover the case in which a fund is held as their property in law by persons who are directed to hold it, subject to purposes which operate as a qualification of their rights and constitute a burden on the property preferable to all claims by or through them, and subject also to a reversionary right remaining with the truster, his heirs and assignees, so far as the estate is not exhausted by the purposes. I do not put this forward as a definition of 'trust,' but it is a description of a typical trust according to Scots law..." This description, which substantially follows the analysis of Bell's Commentaries, stresses the characteristics of the normal type of trust in Scotland. Significantly, his lordship had no need to advert to any dichotomy between legal and equitable ownership.

The institutional writers sought to explain the express trust in Scotland in contractual terms—particularly by reference to the contracts of mandate and deposit; and this approach has received support in the past from the courts.7 The objections are obvious: under trust, ownership may pass, while it does not in deposit; heritage (immoveables) and incorporeal rights cannot be deposited; mandate cannot come into being after the death of the mandatory and so forth. Menzies, who notes these objections, seeks to avoid them by regarding the express trust as a contract sui generis 8—a solution which is vulnerable to the criticism that a trust exists independently of the truster and trustee, and will survive even if no trustee be left to carry it on. Lord McLaren 9 in his leading treatise preferred "to consider the threefold relation subsisting between the truster, the trustee and the beneficiary as a quasi-contract, distinct from mandate, but closely allied to it." Lord President Dunedin, in a case concerned with proper joinder of parties, concluded that the institutional writers' account of trust as a combination of two contracts was no longer valid, and that breach of trust could not be regarded as breach of contract "but something which may more properly be described, in the general terms in which it was described

7 Stair, I, 12, 17; Erskine, III, I, 32; Bell, Commentaries, i, 30; Cunningham v. Montgomerie (1879) 6 R. 1333; Croskery v. Gilmour's Trs. (1890) 17 R. 697.
8 Trustees, 2nd ed., ss. 21-22.
9 Wills and Succession, § 1508.
in the Chancery law of England, as breach of duty.” 10 He offered, however, no adequate analysis of the trust concept itself. Mackenzie Stuart,11 who like McLaren could be construed as flirting dangerously with the English concept of legal and equitable ownership, defined a trust within the meaning of the Trusts Acts as “the legal relationship which arises when estate is owned by two persons at the same time, the one being under an obligation to use his ownership for the benefit of the other.” Lastly, Gloag and Henderson,12 in their chapter on Obligations, conclude that “the obligations involved in a position of trust or in certain fiduciary relationships extend so far beyond what the party who accepted that position may have intended, and are so often owed to parties with whom he clearly had no direct contractual relation, that it is more in accordance with modern decisions to regard trust, or fiduciary relationship, as an independent source of obligation.”

All these definitions catch certain aspects of the truth: none are completely satisfactory. Since the office of trustee is assumed consensu, there are affinities with contract; since certain of a trustee’s duties arise ex lege, there are affinities with quasi-contractual relationships such as negotiorum gestio, where the law imposes duties on a volunteer, while in constructive trust the analogy is with restitution; since trust subsists even in the abeyance of trustees there is an element of “autonomous property.” Mackenzie Stuart and Gloag and Henderson seem justified in their conclusion that the modern trust in Scots law is an institution sui generis. The present writer would add his own vulnerable contribution as follows: “Trust implies the complex of legal relationships which arise when property is conveyed to, or confided to the administration of, a person regarded by the law as holding fiduciary office in such a manner that the fiduciary is obliged to use his ownership or powers of administration for the advantage of a beneficiary in accordance with any lawful directions given by a truster; in accordance with and in discharge of the duties which the law imposes on that office; and in accordance with the special character which the law imposes on the property so conveyed.”

Despite statements stimulated by English dicta which refer to “equitable estate” in connection with the Scottish trust, it is submitted that the beneficiary’s right against the trustee is a personal right—a jus in personam—in some cases perhaps a jus ad rem, when the beneficiary is entitled to have conveyed to him some specific property. In most trust situations, the beneficiary’s jus ad rem will

be effective even against the trustee's creditors in his sequestration. His right, moreover, will be heritable or moveable according to the nature of the property held by trustees on his behalf—a consideration which may be important in questions of conversion and succession.

Bell, summing up the attitude of the institutional writers, observed that the beneficial interest gives only a *jus crediti*, or personal action against the trustee to execute the title or denude.13 Forsyth 14 (1844) is to like effect, "The right of the beneficiary has never in Scotland been acknowledged as a positive vested equitable and coexistent right, as distinguished from the legal right of the trustee, as in England; but merely as a personal right of action against the trustee, to fulfil an obligation . . . the actual right of property being in the trustee alone, but for the purposes declared in the trust deed." Howden 15 (1893) states, "The interest which the beneficiaries take under a trust deed is in its nature a *jus crediti*. . . . It is a *jus ad rem*, and may be enforced by the beneficiary in a personal action against the trustee." Menzies 16 (1913) adopts the same attitude: "That the trustee is the debtor of the beneficiary *quo ad* his beneficial interest is a proposition that does not seem to have been traversed in Scotland. It has, however, been the subject of controversy in England. The beneficiary has accordingly a personal claim—a *jus in personam*, it may be a *jus ad rem* against the trustee to perform his contract." Lord McLaren, it is true, questioned whether a beneficiary's interest could be adequately defined as a *jus crediti*. His quotation 17 from a speech of Lord Westbury's referring to "equitable estate" suggests that he was in danger of being misled by doctrine quite unfamiliar to Scottish jurisprudence—where ownership by trustees is incompatible with concurrent ownership by beneficiaries. At all events, if Lord McLaren had in mind the idea that a doctrine of "equitable estate" could be grafted onto Scots law, that idea has been firmly rejected by judges of greater authority. In *I.R. v. Clark’s Trs.* 18 Lord Moncreiff observed 19: "I may say, however, that I have difficulty in accepting the formulation of the law of Scotland by Lord McLaren in his *Wills and Succession* at paragraph 1527. I have difficulty in seeing how the right of the beneficiary can properly be defined as a personal right of property in the estate which is the subject of disposition." In my view the right of property in the estate of the trust is vested in the trustees to the exclusion of any competing right of property, and the right of

13 Commentaries, i, 36.
15 Trusts, etc., p. 84.
17 Wills and Succession, ii, 832–833, §§ 1527–1529.
18 1939 S.C. 11.
the beneficiary . . . is merely a right in personam against the trustees to enforce their performance of the trust.” In the same case Lord President Normand (with whom all the judges of the First Division concurred) was prepared to tolerate Lord McLaren’s somewhat ambiguous opinion only if it implied that a beneficiary takes no more than a personal right. After quoting paragraph 1527 he continued 20:

“When counsel was asked to state what rights of action a beneficiary has by our law to protect his interest in the trust estate, he was obliged to admit that these rights of action were a right to interdict the trustee from committing any breach of trust, and a right by personal action, for example a declarator or an action of accounting against the trustees, to compel them to administer the trust according to its terms. There is also a personal action of damages against the trustees for breach of trust, and it is open to the beneficiary, by suitable procedure in this court, to bring about a change of administration of the trust either by a transfer of the administration to new trustees or by transfer of the administration to a judicial factor. But there is no action by which a beneficiary as such can in any way vindicate for himself any of the trust property. In my opinion, it is no exception from, but rather a confirmation of, this proposition, that a beneficiary may compel trustees to give the use of their names or to grant an assignation of their claim against a third party, or that a beneficiary may sue a third party if he calls the trustees as defenders along with him and alleges a league between the trustees and the third party to enable the third party to evade his obligations to the trust. The result of this is, in my opinion, that the beneficiary’s right is nothing more than a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions which it contains, and I do not regard Lord McLaren’s observations in the passage which I have read as casting any real doubt upon this proposition. I think the true meaning of the paragraph which I have read is that the beneficiary’s right is a patrimonial right, enforceable by action against the trustees, and, if that is all that it means, the paragraph is unexceptionable.”

Recently I.R. v. Clark’s Trs.—and in particular Lord Normand’s opinion—has been expressly approved in the Second Division and in the House of Lords in the case of Parker v. Lord Advocate.21 The nature of a beneficiary’s interest was discussed in particular by Lord Keith 22: “Before the trustor’s death there was merely a right in the children to call the trustees to account for their administration of the trust and to pay them the income arising—I.R. v. Clark’s Trs. After

20 At p. 22.
22 At p. 41.
the death their income derived from ownership of the corpus of the trust estate vested in them for the first time on the death of the truster. These are radically different rights.”

It is submitted that these authoritative statements of the law of Scotland—especially Lord Normand’s careful summary of the remedies which a beneficiary can invoke—finally dispose of any suspicion that the law of Scotland recognises anything in the nature of different but concurrent rights of ownership in the trustee and beneficiary.

In trusts which involve conveyance of property by truster to trustees, the latter have the same rights over the property as were enjoyed by the donor—even though their powers to deal with it lawfully are limited. To quote Lord Reid in a revenue case, in which the courts declined to regard a gift of money to trustees according to the value of the beneficiary’s interest, 23 “What has happened is not that the property has changed, but that, by reason of their fiduciary position and of the directions of the truster, the trustees do not have the same freedom to deal with the property as the truster had: they are obliged to use the rights of property which have come to them in certain ways and precluded from using them in other ways, but the property remains the same.”

Mackenzie Stuart points out 24 that in a case concerned with the payment of benefits under a policy of insurance, the *jus quaesitum tertius* takes under a contract in his favour and the right which a beneficiary takes under a trust have been treated in the House of Lords as identical. This, however, can be explained on the grounds that English judges are unfamiliar with the idea of *pactum in favorem tertii* and can conceive of third party rights only through the medium of a trust. 25 So far as the nature of third party’s rights are concerned, there is undoubtedly a similarity between contract and trust. In either case, however, in Scots law there is a *jus crediti*, but no *jus in re.*

The rule established in English law and frequently cited in Scottish cases regarding the tracing of trust property has been identified with the principles of unjustifiable enrichment which, originating in the Civil law, have been accepted by Scottish institutional writers and developed by subsequent case law. In *Clydesdale Bank v. Paul* 26 and *New Mining Syndicate v. Chalmers* 27 the dictum of Lord Chancellor Campbell in an English case was quoted, to the effect that it is “an established principle that a person cannot avail himself of what has been obtained by the fraud of another unless he is not only innocent

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24 Trusts, p. 8.
26 (1877) 4 R. 626.
27 1912 S.C. 126.
of the fraud, but has given some valuable consideration." In the second Scottish case, however, it is noteworthy that Lord Skerrington observed 28 that "the same rule of equity"—which Stair called "that common ground of equity"—"was to be found in the doctrine 'Nemo debet ex alieno damno lucrari.'" English law, unlike that of Scotland, is deficient in general remedies for unjustifiable enrichment (outside the scope of trust). Though the English cases have certainly influenced Scottish rules regarding the tracing of trust property which has been wrongfully alienated to a third party by a trustee, the basic principle in Scotland may well be identified with the redress of unjustifiable enrichment through recompense and restitution. Unlike the fideicommissary heir of Roman law, however, the beneficiary in a Scottish trust has no rei vindicatio, and can be stripped of his patrimony by the fraudulent and crafty trustee. This is, of course, also true when the truster is himself the beneficiary. As Lord Watson observed in *Heritable Reversionary Co. v. Millar,* 29 "A true owner who chooses to conceal his right from the public and to clothe his trustee with all the indicia of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee." Fundamentally the primary right of the beneficiary is a personal right against the trustee; but it may be supplemented by a claim against third parties (claiming through the trustee) to recover trust property which has been alienated in breach of duty. If such third parties have acquired title gratuitously or, though onerously, with notice of trust purposes, they will be bound to restore either that property or, as surrodatum, any property into which it can be shown to have been changed. If, of course, the trust fund has been dissipated altogether, there remains nothing to be the subject of the trust and only a personal claim against the trustee may be competent; but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trusts. 30 The doctrine *surrogatum sapit naturam surrogati* 31 has been applied in many different contexts of Scots law.

Difficulty has been encountered in the past with regard to trustees' powers to sell heritable property forming part of the trust estate, since a purchaser affected by notice would not acquire good title if the trustees' acts were at variance with the terms or purposes of the trust—a matter of particular dubiety when, as in the case of appointments

28 At p. 133.
29 (1892) 19 R.(H.L.) 43 at p. 47.
30 e.g., *Macadam v. Martin's Trs.* (1872) 11 M. 33; *Jopp v. Johnston's Tr.* (1904) 6 F. 1028; Bell, *Commentaries,* i, 286.
of judicial factors, no "purposes" are expressed in the deed appointing them. The Law Reform Committee for Scotland made Recommendations to meet this problem, and these were given effect to by the Trusts (Scotland) Act, 1961, s. 2. It is now provided that where, after the statute came into operation, trustees purport to do any act in relation to the trust estate (including the selling of heritage) which they are empowered to do under the Trusts (Scotland) Acts, 1921-61, if "not at variance with the terms or purposes of the trust," neither the validity of the transaction nor the title acquired by the transferee shall be challengeable on the grounds that the act was at variance with the terms or purposes of the trust. This protection to transferees does not, however, affect the personal liability of trustees to the beneficiaries in the event of breach of trust.

The law regarding the claims of creditors against trust property has been worked out in considerable detail. As has been discussed already, the Scottish courts and legislature during the seventeenth century were much concerned with the problem of alienation of property under latent trust by insolvent persons so as to defeat the claims of creditors. At common law a gratuitous alienation by a party who is insolvent may be reduced at the instance of his creditors or trustee in bankruptcy; but, as proof may be difficult, reduction is more usually under the Act of 1621, c. 18. This statute annuls all alienations by a debtor to "conjunct and confident persons" without true, just and necessary cause and without a just price truly paid. The challenge can be met only through proof by the defender that the alienation was onerous or that the granter was solvent. If a "conjunct or confident person" has in his turn alienated the property to a bona fide third party, this cannot be recovered from the latter, but the former is liable for its value. Since an insolvent person owes a fiduciary responsibility to his creditors as a whole, disposal of his assets in favour of particular creditors may also be reduced under common law and statutory provisions.

When considering the competency of creditors attaching by diligence (execution) trust funds in the hands of trustees, a distinction may be made between an inter vivos trust for behoof of creditors, where the radical right remains in the trustor, and a trust constituted for family or testamentary purposes. Under a trust deed, so far as concurring creditors are concerned, the trustee does not represent the granter of the trust, but holds for the creditors whose respective rights are jura crediti. Non-acceding creditors are not bound by the trust, and may employ the methods of diligence appropriate to the nature

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32 At p. 556, ante.
33 Discussed Goudy, Bankruptcy, p. 47; Gloag and Henderson at p. 651.
34 Graham Stewart, Diligence at p. 53 et seq.
of the property—arrestment if moveable, adjudication if heritable. If, moreover, the truster is made notour bankrupt after granting the trust deed, it will be cut down as a voluntary alienation under the Act 1696, c. 5.

In the case of testamentary trusts or conveyances for family purposes of an irrevocable nature, the trust estate is liable to be attached by diligence at the instance of creditors of the truster, or of creditors of the trustee (for debts incurred for the trust) or of creditors of the beneficiaries. The trustee’s title to the estate is commensurate with that of the truster, and creditors of truster and trustee may attach the estate directly as it stands in his person without regard for any trust directions. The claims of debtors are preferable to the rights of beneficiaries. In the normal case of trust, the estate is vested in the office of trustee and does not belong to him personally. He can, of course, in breach of his duty confer good title to trust property on onerous third parties acting bona fide. In this sense, therefore, the trustee’s personal creditors may benefit to the detriment of the beneficiaries. On the other hand, however, trust estate held by a trustee who becomes bankrupt cannot be claimed by the personal creditors of the trustee. As Lord Watson stressed in the leading case,35 "A trustee for general creditors, whether by voluntary conveyance from the bankrupt or taking right under the Sequestration Acts, cannot plead the equities competent to a person who has acquired an interest in the trust property from the bankrupt in bona fide, and for onerous cause."

What has been said about the beneficiary’s rights against trustees and in relation to trust property referred in particular to the “characteristic trust” where the trustee holds and administers property on behalf of another. The expression “trust” has, however—as has been noted above36—been at times used in a broad sense to comprise cases of donatio sub modo where a donee is personally bound to transmit a benefit to a third party. In such cases, if the donee becomes bankrupt, his creditors may claim the property and the third party’s expectations are thereby defeated.37

So far as creditors of beneficiaries are concerned, these have no right to attach the trust estate itself, except so far as specifically destined to their debtor. Any other solution might well prejudice the interests of other beneficiaries and paralyse the execution of the trust.38 The rights of creditors of a beneficiary affect the jus crediti only. They may use arrestment to attach an interest in trust estate, whether the estate itself consists of heritable or moveable property. Moreover,

35 (1892) 19 R.(H.L.) at p. 51.
36 Ante, p. 560.
37 Falconar Stewart v. Wilkie (1892) 19 R. 630 at p. 634.
38 Graham Stewart, sup. cit., p. 61 et seq.
the beneficiary interest of a bankrupt passes to the trustee on his sequestration. If, however, the beneficiary’s liferent interest is of an alimentary character, it becomes available to his creditors only to the extent to which it is excessive for maintenance in relation to the station in life and circumstances of the beneficiary.39 Except in the case of married women entering into ante-nuptial contracts, however, such alimentary protection can only be valid if a person other than the beneficiary created the trust.

39 Livingstone v. Livingstone (1886) 14 R. 43.
CHAPTER 24

PRIVATE AND PUBLIC TRUSTS

Incidental reference to trusts has been made in other chapters of this book concerned, for example, with Lifenter and Fee or Testate Succession. The relationship of lifenter and fiar does not, however, necessarily depend on trust; nor need a testamentary disposition create a trust. In the present chapter the main categories of trust may conveniently be discussed. First, a broad and very important division is to be made in Scots law between public and private trusts. The court, however, has jurisdiction over both, and the general principles of trust administration are the same in either case. Indeed the definition of trust in the Trusts (Scotland) Act, 1921, s. 2, covers both public and private trusts.

PRIVATE TRUSTS

As already stated, trusts in Scotland were evolved by the common law, but statute law has latterly made important contributions to the development of trust law, and has expanded the scope of fiduciary responsibility. The Trusts (Scotland) Acts, 1921 and 1961, re-enact much of the legislation passed during the nineteenth and early twentieth centuries regarding trust administration. The 1921 Act—repeating the language of the Trusts (Scotland) Amendment Act, 1884—extended the meaning of "trust" to include, not only trusts created by deed, private or local Act of Parliament or resolution of corporation, but also the appointment of a tutor, curator or judicial factor by deed, decree, or otherwise. This extended meaning covers cases where the "trustee" administers property which is actually vested in another, and thus complicates analysis of the trust concept. On the other hand, the Act applies only to trusts constituted by writing, and thus does not extend to trusts constituted otherwise. It is not a code of trust law, and much of the Scottish law of trusts is still regulated by common law.

1 11 & 12 Geo. 5, c. 58.
2 See in particular: 24 & 25 Vict. c. 84; 26 & 27 Vict. c. 115; 30 & 31 Vict. c. 97; 47 & 48 Vict. c. 63; 54 & 55 Vict. c. 44; 60 & 61 Vict. c. 8; 61 & 62 Vict. c. 42.
3 9 & 10 Eliz. 2, c. 57.
4 47 & 48 Vict. c. 63.
5 In Royal Infirmary of Edinburgh Petrs., 1960 S.L.T. (Notes) 4, Lord Guest held that trustees under trusts created by public general statute could not exercise powers conferred by the 1921 Act. 5a But see p. 609, post.
Express Trusts

In its broader sense, as has been noted already, the term "trust" in Scotland comprises certain cases where a fiduciary duty is imposed by law on a person to administer property not actually vested in the trustee for the benefit of another; and in such artificial trusts, if they may be so described, the consequences of trust relationship emerge without the characteristic property relationship. In its narrower sense, the legal and beneficiary ownership of the property to be administered are separated—the legal title being vested by the truster in the trustee for certain stated purposes, while the *jus crediti* is enjoyed by the beneficiary.

Subject to this explanation—and to the qualification that Bell's analysis of trust is generally applicable to express trusts rather than to those arising from implied intention or by construction of law—para. 1991 of Bell's *Principles* may be adopted as a useful guide to the main relevant considerations.

"The whole doctrine and practice depends on these principles: (1) That a full legal estate is created in the person of the trustee, to be held by him against all adverse parties and interests, for the accomplishment of certain ends and purposes. (2) That the uses and purposes of the trust operate as qualifications of the estate in the trustee, and as burdens on it preferable to all who may claim through him. (3) That those purposes and uses are effectually declared by directions in the deed, or by a reservation of power to declare in future, and a declaration made accordingly. (4) And that the reversionary right, so far as the estate is not exhausted by the uses and purposes, remains with the truster, available to him, his heirs and creditors."

It must be noted that, where the ultimate purpose of the trust is the conveyance of the estate to a beneficiary, the estate is fully vested in the trustee. If the ultimate purpose is a reconveyance to the truster of the fee after certain purposes have been fulfilled—as in a trust deed for the benefit of creditors—the fee remains with the truster and the trust is a burden on his right. In such a case he is not wholly divested, and he retains a radical right to the estate under the burden of the trust purposes. Yet, in the case of heritage, there is a title in the trustee complementary to the truster's complete feudal title and exclusive of the truster's title to the extent to which the trustees are bound to convey in execution of their trust. The doctrine of the radical right is not free from difficulty, and cannot be investigated further in a general treatise not particularly concerned with trust law.

The Beneficiary Right

The person for whose benefit a trust has been set up is designated "the beneficiary," and, if the *jus crediti* is vested in him, it forms part

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6 p. 548, ante.
7 And see p. 569, ante.
8 See *Menzies on Trustees*, ss. 1060-1068, and cases there cited.
of his estate, which may be transmitted by him to an assignee, or be attached by his creditors, or pass on his death to his heirs. It may be material, therefore, to ascertain whether the character of the succession of a beneficiary is heritable or moveable, and this raises questions of conversion. The *jus crediti* partakes of the nature of the subject held in trust. Thus, if the truster has directed that his heritage be sold, and the proceeds held for the benefit of the beneficiaries, it is clear that the truster intends the beneficiaries to take not the heritage but an interest in moveables. Accordingly, the right of a beneficiary remains moveable whether sale has in fact taken place or not, and passes on his death to the heirs *in mobilibus*. This is known as constructive conversion.9 Where, however, the right to sell depends on the discretion of the trustees, or the duty to sell is to arise only in certain circumstances,10 then conversion does not take place until the discretion is exercised or the stipulated eventuality occurs. Accordingly, if the beneficiary dies before this happens, his interest will be transmitted as heritable in the succession. As conversion and constructive conversion—doctrines which the courts do not seem inclined11 to extend—depend on the intention of the truster, if the trustees sell under statutory power of sale "derived from the remedial enactments of a public statute," and contrary to the expressed wish of the truster, such sale does not operate conversion, *Taylor's Trs. v. Tailyour*.12 Lord Hill Watson has commented,13 "Before the court should hold that the estate had been constructively converted from heritage to moveables, the words of conveyance to the ultimate beneficiary . . . must be such as to be inconsistent with a conveyance by the trustees to the beneficiaries of a heritable property."

If heritage is directed to be sold and the proceeds paid over to a particular beneficiary or beneficiaries, constructive conversion takes place, as has been observed, before the heritage is sold. The beneficiaries may, however, elect to take the gift as heritage, and, if they do so elect, reconversion takes place.14 Lastly, on the subject of conversion, it may be observed that, if a testator directs conversion, this is only operative if the succession is effectually conveyed to beneficiaries. Thus in *Cowan v. Cowan*15 a testator, who left heritable and moveable estate, directed his trustees to realise the whole and divide the proceeds as he might direct. The testator failed to give

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9 Watson's *Trs. v. Watson* (1902) 4 F. 798.
11 Ibid.
12 1927 S.C. 288. See also the leading case of Buchanan *v. Angus* (1862) 4 Macq. 374, for discussion of the importance of the truster's intention in questions of constructive conversion.
14 Maclaren I, 237.
15 (1887) 14 R. 670; see also Swain *v. Benzies' Trs.*, supra.
directions as to the disposal of his estate, except for a few legacies. It was held that the estate which fell into intestacy did not pass wholly to the heirs *in mobilibus*, but that it should be divided rateably between the heir in heritage and the heirs *in mobilibus* according to the proportion of the value of the heritable and moveable estate left by the testator.

*Constitution and Proof of Express Trust*

In order to constitute an express trust, the subject must be legally vested in the trustee, and the purposes of the trust must be intelligibly declared in the deed of trust, or power must be reserved to declare the purposes at a later date. No special form or language is required to create an express trust, and, though normally a formal conveyance will be drawn up, informal language will suffice. Constitution is completed by delivery of the estate or deed of conveyance to the trustee or beneficiary, or to someone on behalf of either. The death of the truster makes the trust irrevocable, and is thus equivalent to delivery. The delivery may be by the donor of the estate as truster to himself as trustee.¹⁶

By the Act of 1696, c. 25, it was provided that no action of declarator of trust shall be sustained as to any deed of trust made for thereafter except

“upon a declaration or backbond of trust lawfully subscribed by the person alleagued to be the trustee and against whom or his heirs or assigneyes the Declarator shall be intended, or unless the same be referred to the oath of party simpliciter.”

This statute—which requires proof of trust by signed writing or oath of the trustee—only applies as between truster and trustee or their representatives (not where third parties are interested in the existence of an alleged trust)¹⁷; only where the form of proceedings is for a declarator of trust; and only where there is a deed declaring in absolute terms that a right of property exists in one party which is claimed by another to be held in trust for him.¹⁸ It is therefore inapplicable to a writ such as a deposit receipt which is not conclusive as to the ownership of the money deposited. Such a receipt gives the holder a right of action against the bank, and so far as the bank is concerned, the only person who can demand payment is the holder in whose name the money stands; but its terms “may prove nothing more than this, that the true owner has deposited money under an arrangement with someone by which that party, it may be the wife or

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¹⁷ *Scott v. Miller* (1832) 11 S. 21, esp. per L. P. Hope at p. 26; see also discussion in McLaren, s. 1978.
child or agent of the depositor, is empowered to uplift the money." 19
It is accordingly competent for a man to prove by parole evidence that the money contained in a deposit receipt in the name of another truly belongs not to that other but to the claimant. 20 Further, "the statute only applies when one man alleges that he has trusted another to take the title in his own name": *per* Lord President Inglis in *Horne v. Morrison*. 21 Accordingly, it does not apply where the defender had no authority to take the title to a subject in his own name. Thus, where it is said in a case of partnership or joint adventure or to any class of agency that one of the parties has, contrary to instructions, taken the adventure name, it was held that this was a precatory bequest of £3,000 since the word "prefer" was construed to be taken as a polite form of command, *Reid's Trs. v. Dawson*. 25

**Trusts arising from Implied Intention**

The intention to create a trust may not be express, but implied from the language in which a donor confers a gift. The only peculiarity of an implied trust is that the intention of the testator is construed by implication, and not from the express words of the deed.

Effect is given in the law of Scotland to "precatory trusts," where the words of gift may fairly be construed as imposing a fiduciary obligation on the donee or legatee. Thus when a person conveys his estate to a donee or legatee, and, instead of giving unambiguous directions, puts his direction in the form of a request or wish, a precatory trust may be inferred from the language used. 23 Words of request are given their ordinary meaning, and are not treated as imperative, unless it appears that it was the intention of the testator to use them in an imperative sense. 24 Thus where a testator directed his trustees to make monthly payments of £12 10s. to a lady and then added "but in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3,000 should be taken from my life insurance funds and paid over to her," it was held that this was a precatory bequest of £3,000 since the word "prefer" was construed to be taken as a polite form of command, *Reid's Trs. v. Dawson*. 25

21 (1877) 4 R. 977 at p. 979.
25 1915 S.C.(H.L.) 47.
No trust was inferred in *Wilson v. Lindsay*\(^2^8\) when a widow left estate absolutely to her husband "knowing that you will do as I wish with it," and stating that she would like him to give part to other persons; and in *Barclay’s Ex. v. McLeod*,\(^2^7\) it was held that the testator’s "anxious desire" and "hope" that his wife would bequeath at her death part of the estate to his relatives, gave them no enforceable right. If a testator gives a fee to a legatee, his subsequent desire that the legatee should leave the sum or subject in question to another will not limit the legatee’s right. Thus where a testator directed his trustees to pay his son one half of the residue of his estate and subsequently expressed his "special desire" that if the son died without issue his portion should pass to his sister, this did not limit the right already given to the son. As the Lord Justice-Clerk said "That is a request, not a bequest."\(^2^8\)

Another example of implied trust is where a bequest is made to an individual for the purpose of maintaining his family. Here again the question to be considered is whether the purpose merely expresses the motive of the gift, or whether a trust has been created so as to give the family an enforceable right. A bequest to a man "for behoof of his family" has been held to create an implied trust for his children, *Michie’s Exors. v. Michie*.\(^2^9\)

Where a power is conferred upon an individual which, if exercised, will benefit specified persons, it is a question of construction whether it was only intended to confer a power which may or may not be exercised at the donee’s discretion or whether it was intended to confer a *jus crediti* on the third parties so as to make the donee of the power a trustee for them.\(^3^0\)

There is some authority\(^3^1\) for the view that implied trusts may also arise when gifts are made subject to conditions, but it is thought that such gifts can only be described as trusts in a loose or general sense.\(^3^2\) A gift may be made in terms which give the donee a right which he holds in part for the benefit of third parties. The interest of the third party in such instances is not normally separated from ownership as in the usual case of trust, but is in the nature of a burden on the initial gift, so that, if it fails for any reason, there is no resulting trust to the donor but an accession to the original gift. Generally speaking, a purpose adjoined to a gift directly conferred, which is for the benefit

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\(^2^6\) (1878) 5 R. 539.
\(^2^7\) (1880) 7 R. 477.
\(^3^0\) *McLaren, Wills and Succession*, s. 635; *McDonald v. McGrigor* (1874) 1 R. 817.
\(^3^2\) See *ante*, p. 560.
of the donee only, is construed as merely stating the motive of gift— as if a legacy is left to an individual to enable him to qualify as a doctor. Such a legacy is still payable, though the legatee chooses another profession; or if the legatee dies after the date of the vesting before the purpose can be fulfilled; or if the purpose fails for any other reason. On the other hand, a gift may impose a binding obligation on the donee to use part for the benefit of a third party, and a modus will be implied though no trustees have been appointed to safeguard the interest of the beneficiary. Thus a legacy may be left in favour of another upon condition that the legatee shall make a bequest to a third party of what remains at the legatee’s death, Murray v. Macfarlane’s Trs. The author, with all due deference to the authorities, submits that it is undesirable to regard such gifts or legacies as “implied trusts,” but sounder to consider them in accordance with traditional Civilian principles as gifts or legacies sub modo.

Trusts arising from the Operation of Law

Trusts may be implied not only from the way in which the truster has made known his intention expressly or by implication; they may also arise by operation of law in some cases irrespective of the truster’s intention or in accordance with what the law assumes that the truster would have wished had he foreseen that his expressed purpose would fail. Such trusts may be constructive or resulting trusts.

Constructive trusts arise in various ways. Whenever a person occupying a fiduciary position gains some personal advantage—though not actually part of the trust estate—through his position as trustee, he is a constructive trustee of the profit so made, and must communicate it to the beneficiaries; and likewise if a stranger to the trust acquires property of the trust in circumstances which do not justify him in retaining it, he holds such property on a constructive trust for behoof of the beneficiaries. A partner or agent or director of a company who acquires any personal pecuniary advantage through his relationship to his principal, must account therefor. There is a presumption, which is absolute, that the profit belongs to the fiduciary not as an individual but as a trustee.

By the doctrine of resulting trust, when in the constitution of a trust the beneficial interest is not effectively disposed of, such beneficial interest, so far as not disposed of, is held as a resulting trust for behoof of the granter or his representatives. This situation may arise

34 Falconar Stewart v. Wilkie (1892) 19 R. 630 at p. 634.
35 (1895) 22 R. 927.
36 McLaren, Wills and Succession, Vol. II, s. 1926 et seq.
where estate has been conveyed reserving the right to declare the
trust purposes, but the trust purposes have not been declared; or
where a trustee has been given discretionary powers and has not
accepted office or has died without exercising his powers; or where
the trust purposes do not exhaust the trust estate or have failed
through vagueness or illegality. If the trust was created mortis causa,
then the trustees hold the estate as a resulting trust for the heirs ab
intestate whether in heritage or in moveables. If, on the other hand,
the trust was created inter vivos, as, for example, a marriage contract
trust or a trust for creditors, then on the failure of the trust purposes
the estate reverts to the trustee in virtue of his radical right therein.
Thus if in a marriage contract funds are settled on the trustee’s issue
and there is no issue, then the funds revert to the truster,
Montgomery’s Trs. v. Montgomery.37 If, however, the trust is a public
one, the doctrine of cy-près will apply, if a general charitable intention
can be read into the trust; after the trust has taken effect it will not
lapse if the original purpose fails unless the truster has provided
that it should result in such an event to himself or to his heirs.

PUBLIC AND CHARITABLE TRUSTS

The essential distinction in Scots law is not between private and
charitable, but between private and public trusts; though it is not
uncommon to encounter the term “charitable” used in a loose sense
to denote “public.” Lord McLaren has expressed the position in a
passage judicially approved—“there is no distinction either as to con-
struction or principles of administration between gifts to charitable
purposes properly so called, and gifts to purposes which, though not
charitable, are lawful and useful. The true distinction is between
private trusts and bequests in which only individuals named and
designed can claim an interest, and those which are intended for the
benefit of a section of the public and which may be enforced by
popularis actio.” 38

The expressions “charity” and “charitable purposes” have not
acquired a technical legal meaning in Scottish as in English law, and,
except in construing tax legislation, are given their ordinary popular
meaning. Since the Court of Session exercises plenary jurisdiction
over all trusts, it is not material in applying the doctrine of cy-près in
Scotland to determine whether a trust for public purposes may
properly be described as “charitable.” The Court exercises its
cy-près jurisdiction if the trust is one in which a section of the public

37 (1895) 22 R. 824.
38 i.e., an action on behalf of the public. McLaren, Wills and Succession, Vol. II,
(1952) wished to import the “common good trust.”
has an interest. Again, since the general attitude of Scottish law towards perpetuities is benevolent, there has been no particular motive as in England to claim that a particular public trust is "charitable," so as to secure relaxation of the rules against perpetuities. But, though the Scottish courts do not discriminate between public trusts and charitable trusts in matters of administration, it may be most material to ascertain whether a particular bequest is left exclusively for "charitable purposes" — as opposed to other public purposes — when considering whether or not a will is void for uncertainty. Again, in questions of tax law, the technical rules of English law have been held applicable to Scotland.

"Charity" in Construction of Gift

When considering the validity of a bequest in a Scottish will in favour of a section of the public, a question to be determined in any given case is whether the description of the class of persons or purposes to be favoured is sufficiently definite to enable an executor or trustee of ordinary sense to make a selection from within the class; or whether the description is so indefinite as to make the bequest void for uncertainty. The words used must not be so vague as to leave power to the trustees to do with the trust estate as they please. Within the class of public trusts there is an important distinction. Trusts for "charitable purposes" are held to refer to a class which is sufficiently distinct to require no further definition. The word "charitable" or a word of equivalent meaning is enough; the bequest is not void for uncertainty. Lord Keith observed in Wink's Exors. v. Tallent

"No definition of charitable purposes has been received into the law of Scotland, and, either by a legal fiction or a belief in the common sense of mankind, a bequest for charitable purposes has always been assumed to be sufficiently specific of itself."

Where, however, the bequest is for public purposes which do not necessarily fall within the category of charity — such as "religious" or

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40 On perpetuities in Scottish law see generally McLaren, Wills and Succession, Vol. I, p. 304, s. 564 et seq., also Dyke's Supplement, s. 564; Mackenzie Stuart, Trusts, p. 82 et seq.; Craig's Trs. v. Hunter, 1956 S.L.T. (Notes) 15; Lord Mackay in Lindsay's Ex. v. Forsyth, 1940 S.C. 568 at pp. 574-575. While at common law private trusts in perpetuity were fully recognised, there are now certain statutory limitations. Mackenzie Stuart (loc. cit.) considers "It is within a trustee's powers to create a trust for payment of the income of the trust estate over an indefinite period, so long as he does not infringe statute law dealing with accumulations of income or the creation of successive liferents. The privilege of creating perpetuities under trusts is not confined in Scotland to charitable bequests."

41 e.g., Highgate's Trs. v. National Trust for Scotland, 1957 S.L.T. (Notes) 37.

42 Supra, at p. 481.
"public" or "social" purposes—these must be described in greater detail, and the testator must select more definitely the particular classes or objects to be favoured. The classes may be stated widely, but they must be clear and definite, or the gift will be void for uncertainty. In this context, therefore (that of determining whether a gift is void for uncertainty), an important distinction does exist between "charitable" and other public purposes. The descriptive word "charitable" is, out of favour shown by the law to charity, held to indicate a sufficiently definite class of beneficiaries to enable a trustee or executor to make a selection within the class. Where, however, the testator fails to appoint anyone to make the selection, the bequest is invalid.43

Paradoxically the meaning of "charity" in Scottish law is undefined. It may be accepted that in very many cases an object which would be construed as "charitable" under the statute 43 Eliz. 1, c. 4, in England, would also be regarded as "charitable" in Scotland, but some of the purposes which English law would regard as "charitable" would be considered "public" rather than "charitable" in Scotland. Thus it is suggested that—except for purposes of taxation—promotion of the efficiency of the armed forces in a combatant role would be a good "charitable" purpose in England but a good "public" purpose in Scotland. A prize for bayonet fighting might be regarded as conferred from motives of public spirit rather than from those of philanthropy. There have been dicta both in the Court of Session and in the House of Lords which would restrict the meaning of the words "charity" and "charitable purposes" to the relief of poverty.45 Historically, however, as Lord Watson showed in Pemsel's case,46 "charitable" in Scotland and its synonyms "godly" and "pious" had a much wider meaning than eleemosynary purposes, and could include certain religious and educational purposes, the relief of suffering and even bridge-building and harbour repairs—indeed "all objects which a well disposed person might provide from motives of philanthropy." This is the generally accepted view today, and the narrow late nineteenth-century construction of "charity" as meaning only the

43 In Angus's Ex. v. Batchan's Trs., 1949 S.C. 335, the testatrix's purported gift of residue was in these terms "All money after paying, please give to charities." She appointed neither executor nor trustees to select the charities. By a majority the court held that the bequest must fail. The court could not appoint a judicial factor to exercise a function which was not administrative but testamentary; cf. Leith's J. F. v. Leith, 1957 S.C. 307.
44 See Re Driffield (1950) Ch. 92, where Danekwerts J. held charitable a gift to promote the defence of the United Kingdom from the attack of hostile aircraft.
46 p. 558 et seq.
relief of poverty has been disapproved in such cases as Anderson's Trs. v. Scott, and Wink's Exors. v. Tallent. The term "charitable," it has been observed, is in itself a sufficiently definite description of objects favoured by the testator. Frequently however, a definite word is used joined to an indefinite one—such as "charitable or religious," "charitable or public," "charitable or deserving," "charitable or social." Where the disjunctive particle "or" is used in such cases, since the trustees are given the power to choose objects wholly within an indefinite class—such as public, religious, deserving, social—the direction to the trustees is generally void for uncertainty. Thus in Rintoul's Trs. v. Rintoul, a bequest to "charitable or social institutions in Glasgow or elsewhere" was held to be void for uncertainty. In a limited class of case, where the words joined by the disjunctive particle "or" are substantially identical in meaning, the word "or" may be construed in an explanatory sense. Thus in Wink's Exors. v. Tallent the question was whether a direction by a testator to divide the residue of his estate among such institutions "of a benevolent or charitable nature" as they might think proper was a valid charitable bequest. It was held, following Hay's Trs. v. Baillie, that it was. The ratio of the decision was that, in the phrase under discussion, the word "charitable" was exegetical or explanatory of the word "benevolent" as if the testator had said "benevolent by which I mean charitable." In this case the First Division expressly refused to follow the decision of the House of Lords in Chichester Diocesan Fund v. Simpson, in which it had been held that an English bequest in similar, though not in identical, terms was not charitable. In England the term "charity" has a technical meaning, derived from the statute 43 Eliz. 1, c. 4. Lord President Cooper, in rejecting the Chichester case as an authority, indicated that, except for United Kingdom tax statutes, the Scots lawyer is impenitently unversed in the English law of charities which is overshadowed by the statute of Elizabeth Tudor.

"Charity" for Income Tax Purposes

Though the expressions "charity" and "charitable" have not acquired a technical meaning in the general law of Scotland, it must

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47 1914 S.C. 942.
48 1947 S.C. 470, where the authorities are discussed. See also Inland Revenue v. Glasgow Police Athletic Association, 1952 S.C. 102; rev. see note 55 infra; and Allan's Ex. v. Allan, 1908 S.C. 807.
49 1949 S.C. 297; Dunlop's Trs. v. Farquharson, 1956 S.L.T. 16; in Milne's Trs. v. Davidson, 1956 S.C. 81, it was held that in the gift to "various charities, nursing associations, infirmaries, and etc." the words "and etc." were to be construed ejusdem generis and therefore implied charities.
50 Supra.
51 1908 S.C. 1224.
52 [1944] A.C. 341
53 Repeated in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 13 (2).
now be accepted that, for the purposes of construing income tax legislation applicable to the whole United Kingdom, the technical sense of "charity" in English law must be applied in Scotland. This unfortunate and unnecessary construction has been laid down in a line of cases from Pemsel's case to I.R.C. v. Glasgow Police Athletic Association. The general rule in construing United Kingdom legislation applicable to Scotland and England is to assume that words are used in their ordinary, popular sense, and that the technical meaning which they might have in one system of jurisprudence only is not to be implied. This rule seems to have worked well in several chapters of the law, where it is desirable that statutory burdens should be distributed as evenly as possible between subjects in Scotland and England. In Pemsel's case, however, which was an English appeal, the majority held that the technical meaning of "charitable" in English law must be read into the Income Tax Act, 1842. Though he acknowledged that "charitable" in English law was one of the most technical expressions in the legal vocabulary, Lord Macnaghten expressly rejected the proposition that in taxation Acts applicable to the United Kingdom as a whole "the words used by the legislature are used in their popular signification." It might well be doubted, as Lord Bramwell doubted at the time, whether Parliament in legislating would intend an expression in general everyday use to be construed in a technical sense which was unknown in one part of the United Kingdom. The decision in Pemsel's case has certainly imposed a difficult and unwelcome duty on the Court of Session to pronounce according to the law of England in taxation cases, where an object is allegedly "charitable" within the meaning of the statute 43 Eliz. 1, c. 4, but not in the ordinary popular sense. In the Glasgow Police Athletic Association case the House of Lords, though acknowledging that at present the English law on charities is perplexing even for the experts in that law, has reaffirmed that the Court of Session has a duty in taxation cases to apply it as part of the law of Scotland. This implies that it is not competent for the Scottish courts in such cases to hear evidence as to the English law.

97 5 & 6 Vict. c. 35.
99 p. 577.
100 Ibid. p. 568.
101 This seems to have survived the holocaust of 51 & 52 Vict. c. 42—see s. 13 (2), and the Charities Act, 1960, 8 & 9 Eliz. 2, c. 58.
as a question of fact, nor to obtain an opinion thereon from the English courts under the British Law Ascertaintment Act, 1859.62

It is true that "charity" in the popular sense embraces most of the objects contemplated in Lord Macnaghten's celebrated four divisions in Pemsel's case 63—"trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads"—but within the general intendment of the preamble to the Statute of Elizabeth. On the other hand, a Scottish lawyer unversed in the mysteries of English chancery law may note with alarm that during the past few years at least forty important decisions dealing with contested questions in this branch of the law have been reported in England—seven of them being decisions of the House of Lords. A statutory definition of "charitable purposes" in income tax legislation is urgently required to remedy the present regrettable state of the law,64 and Lord Normand, with the concurrence of Lord Keith, has commented sharply in an English appeal, "difficulty enough has already been created for the courts in Scotland by the duty to apply characteristically English law in determining whether a Scottish trust is for the purpose of income tax a charitable trust." 65

Cy-Près Doctrine

It may be observed that in discussing the application of the doctrine of cy-près by the courts, the trusts so affected are frequently designated as "charitable trusts." Here, however, possibly because of frequent citations from judgments of eminent English judges, the term "charitable" is used somewhat loosely as a convenient general term. In applying the doctrine of cy-près, the Scottish courts do not confine it to charitable trusts in the narrower sense; it extends to trusts for purposes of public utility.66 It does not apply to private trusts, even though these are of a charitable character.

The favour shown by the court to gifts for the public benefit has led it to adopt special measures to prevent such gifts from lapsing when the trust cannot be carried into effect in the precise manner directed by the testator. This purpose is achieved by applying the doctrine of cy-près or approximation. This is based on the distinction between the general intention and the means which is prescribed for

62 22 & 23 Vict. c. 63.
63 At p. 583.
65 Camille & Henry Dreyfus Foundation Inc. v. I.R.C. [1956] A.C. 39 at p. 48; and see ante, p. 549.
carrying out that intention. If, on a fair construction of the terms of the gift, it appears that there is a general charitable intention, then, if the particular mode in which this general intention was to be effected cannot be carried out, the court will authorise the fulfilment of the general intention in some other way cy-près. If, however, it appears that there was no general charitable intention, then the gift will fail if the testator’s directions cannot be put into effect, *Clephane v. Magistrates of Edinburgh.*

In the former case a hospital belonging to an ancient charity for the maintenance of the poor and sick was sold to a railway company, and it was held—though the beneficiaries objected on the grounds that the foundation charter contemplated the maintenance of a hospital—that the interests of the funds would be better employed in affording out-door relief. Lord Westbury observed that, though a court cannot change a charity, it may vary the means for attaining that object when circumstances render a change expedient. In *Burgess’s Trs.* it was held that no general charitable intention had been disclosed by the testator. At the date of his death a private individual would have been able to found an industrial school for females at Paisley as the will directed. By the time when the residue became available, this was no longer possible, by reason of supervening legislation. As only a particular object appeared to be favoured, the gift lapsed.

In *Burgess’s Trs.*, the Lord President, following Lord Herschell in *Rymer v. Stanfield*, distinguished between three classes of bequest:

(a) A gift for charitable purposes, without indicating the means by which it is to be carried out. Here the court—out of favour to charitable bequests—supplies the means to give effect to the purpose.

(b) A gift to a society or institution which does not and never has existed. Here the court spells out a general charitable intention from the mere fact of the non-existence of the object and gives effect to it.

(c) Where the gift is in form made to a particular charitable institution which has ceased to exist, or for a particular purpose which can no longer be effected. In such cases the court has to decide whether on a fair construction there is a general charitable intention.

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67 (1869) 7 M. (H.L.) 7; *Burgess’s Trs. v. Crawford*, 1912 S.C. 387.
68 At p. 7.
69 Supra; see also *Tait’s Judicial Factor v. Lillie*, supra; *Cameron’s Trs. v. Edinburgh Magistrates*, 1959 S.L.T. (Notes) 32.
71 [1895] 1 Ch. 19.
73 Whether or not a general charitable intention is to be inferred is, as Lord Carmont has observed, “in large measure, a matter of impression to be drawn from the testamentary writings”—*Macrae’s Trs.*, 1955 S.L.T. (Notes) 33.
or whether the gift is meant only and exclusively for a particular institution or purpose.

It must be stressed, however, that unless a resulting trust in favour of donor or subscribers is expressed in the gift, a public trust which has actually taken effect will not lapse because of a subsequent failure of object. The funds will be applied under a scheme settled by the Inner House of the Court of Session, which is the method by which the court gives effect to the doctrine of *cy-près.* It was stressed both by the Lord President and by Lord Keith in *Robertson's Trs.,* that where a testator's directions were adequate to enable trustees to prepare a scheme for themselves, where it is not impracticable to carry them out, and where there is no lack of machinery prescribed by the testator's directions, the trustees should not have to apply to the court at all. If, however, the trustees have attempted, but have failed despite all reasonable efforts, to give effect to a testator's intention with the bequest at their disposal, it fails and falls into residue.

A recent example of the exercise by the Inner House of the nobile officium arising from the failure of a trust in operation is *Clutterbuck & Another, Petitioners.* The First Division had been petitioned to approve a scheme whereby the Regimental Associations of the Highland Light Infantry and the Royal Scots Fusiliers would be united and administered as the Royal Highland Fusiliers Regimental Association. By command of the Army Council the Regiments themselves had been amalgamated. Doubt had been expressed by the reporter to whom the petitions for amalgamation were remitted as to whether approval was competent, since potential beneficiaries of the two Regimental Associations existed, and, therefore, it could not be said that the trusts had failed. It was held, however, that the underlying charitable purpose of each Regimental Association had been to promote the welfare and *esprit de corps* of members of the respective Regiments. This had become impossible of fulfilment, since the amalgamation of Regiments, and, therefore, the original purposes having ceased to operate, the situation was proper for the exercise of the nobile officium. The judges saw to the heart of things. The amalgamation of the two Regiments had been prefaced by the superseding of their respective Honorary Colonels, who, as distinguished retired officers, had upheld their Regiments' special traditions against the Government and Army Council, and they were then replaced by serving soldiers who were

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75 1948 S.C. 1.
bound to accept orders. In the year 1962, Field-Marshal Montgomery, who had earned distinction largely through the efforts and sacrifices of Scottish Regiments, advocated the suppression of the special military and familial traditions of what he was pleased to call “the tribal areas.” Government spokesmen have subsequently tended to confirm that this conforms with the official policy. The professions of law and arms in Scotland as in Rome have commanded particular respect, and the talents of her ablest sons. If the achievements and vision of soldiers such as the great Wavell,78 are to be destroyed and frustrated for the satisfaction of lesser minds and spirits, more petitions such as *Clutterbuck & Another, Petrs.*79 are to be expected.

78 See *Wavell: Portrait of a Soldier*, by Brigadier Bernard Fergusson, D.S.O., O.B.E.
79 *Sup.cit.*
CHAPTER 25
TRUSTEES AND JUDICIAL FACTORS

TRUSTEES

Acceptance and Resignation of Office and Removal of Trustees

No person is compelled to accept office if nominated as trustee under a trust. It is a question of fact, requiring no special mode of proof, as to whether there has been acceptance of office. As has been explained in the context of joint property, the *jus accrescendi* operates where property is vested in several trustees. A majority of the accepting and surviving trustees form a quorum; and by statute power is conferred on the quorum or on a surviving trustee to assume new trustees.

Provision is made by the Conveyancing (Scotland) Act, 1874, s. 43 for the heir to a sole or last surviving trustee to complete title to land held on trust, but, except by order of the court or with the consent and approval of all beneficiaries, he is not responsible for the trust administration. Normally, he will be bound to convey the lands to a judicial factor or to trustees appointed for the purpose of administering the property. Moreover, by the Trusts (Scotland) Act, 1921, s. 24, any person who is entitled to the possession "for his own absolute use" of trust property—whether heritable or moveable—may petition to complete title if there are no trustees surviving or capable of making a conveyance.

At common law trustees were not empowered to resign, but by section 3 (a) of the 1921 Act this power is deemed to be included in all trusts unless the contrary is expressed. In the case of a sole trustee, however, this power does not arise unless he has assumed new trustees who have accepted, or unless the court has appointed new trustees.

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1 1921 Act (11 & 12 Geo. 5, c. 58) s. 3 (c).
2 Ibid. s. 3 (b).
3 But see Nutt Petr., 1959 S.L.T.(Sh.Ct.) 27.
4 In cases not covered by the 1921 Act, e.g., trusts created by public general statute, the court may appoint new trustees in exercise of the *nobile officium*; Coal Industry Social Welfare Organisation Petrs., 1959 S.L.T.(Notes) 3; Rosewell Nurses' Endowment Fund Petrs., 1955 S.L.T. 305.
5 37 & 38 Vict. c. 94.
6 As to the rights of two heirs-portioners of full age to petition under the section, in the absence of a third, see Robertson Petr., 1956 S.L.T.(Sh.Ct.) 12; Macfarlane Petr., 1958 S.L.T.(Sh.Ct.) 39.
7 37 & 38 Vict. c. 94.
8 Therefore not, for example, testamentary trustees of the deceased partners of a firm. Scott's Trs. Petrs., 1957 S.L.T. (Notes) 45.

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trustees or a judicial factor. Moreover, a trustee who has accepted a legacy upon condition that he accepts office, or who is appointed on the footing of receiving remuneration for his services, may not resign unless the trust deed otherwise provides or the court authorises resignation.9 If a trustee who resigns, or the representatives of a deceased trustee, cannot obtain a discharge from the remaining trustees and the beneficiaries cannot or will not grant a discharge, a petition for judicial discharge may be presented to the court.10 Upon resignation of a trustee, the estate vested in him till then accrues to the remaining trustees without the necessity of further conveyance.

The court has power at common law to remove a trustee from office, but is not disposed to exercise this power unless in cases of misconduct, unfitness for office, or unreasonable refusal to discharge his duties. Mere incompetence does not in practice incur the use of this power, and protection is secured through the appointment of a judicial factor. Such an appointment may be made whenever it is in the interests of the trust estate. By section 23 of the 1921 Act, if a trustee becomes insane or incapable of acting by reason of physical or mental disability, the court, on application by a co-trustee or beneficiary, has a duty to remove the incapable trustee from office. Where a trustee has been absent from the United Kingdom for a continuous period of six months, the court, on application, may remove him from office. When new trustees cannot be appointed under the trust deed,11 or when a sole trustee has been removed for incapacity or absence by the court, the court has statutory power to appoint a new trustee12; and there is also a common law power to appoint a trustee or judicial factor on a trust estate to avoid failure of the trust or deadlock.

**Fundamental Duties of Trustees**

**Duty to Exercise Due Care**

"Trusts are created by trusters for the benefit of certain nominated beneficiaries, and trustees are appointed merely to see that the interests of the beneficiaries are protected ... trustees are administrators not nursemaids." 13 The fundamental duty of a trustee is to exercise due care. He does not guarantee that his administration of the estate will be free from mistakes, but it is not sufficient that he acts in good faith and to the best of his judgment.

9 Ibid. s. 3.
10 Ibid. s. 18, and see Dickson's Tr. v. Dickson, 1959 S.L.T. (Notes) 55.
11 See ss. 3 and 21 for powers to assume new trustees.
12 Ibid. s. 22.
13 Per L.J.C. Thomson in Earl of Lindsay v. Shaw, 1959 S.L.T. (Notes) 13. Thus trustees who protect no beneficial interest have no duty to uphold a trustor's wishes if the beneficiaries raise no objection to the actings of one of their number.
His liability depends on whether he has reached the objective standard of due care which the law demands. This standard, it has been said, is that of a reasonably prudent man, and no higher degree of diligence is required than that which a man of prudence would use in the management of his own affairs. *Menzies on Trustees* stresses, however, that the standard required is not merely that of a reasonably prudent man handling his own affairs and with only himself to consider; the diligence required of a trustee is that of a prudent man undertaking business for the benefit of persons for whom he has felt morally bound to provide—in short, the standard of the prudent trustee, as opposed to that of the provident person acting on his own account exclusively.

Taking care does not mean taking no risks; it does not even mean taking all possible precautions, for an excess of caution might paralyse the administration. It involves doing what is reasonable for a trustee, and adopting the ordinary business methods even although these may involve the estate in some risk—as by the employment of agents and servants who may turn out to be dishonest. The standard of care in any given case depends on the circumstances as they are or ought to be known at the time, including reasonable care in anticipating future possibilities. But the diligence required is not be to judged by the wisdom of after-events. As Lord Shaw pointed out in *Buchanan v. Eaton*, trustees in most cases accept their duties gratuitously out of respect for the memory and wishes of a friend, and it would not be possible to maintain such a system of voluntary trusts if personal liability were imposed in cases where, in ordinary life, the conduct of the trustee would not be regarded as neglectful or a departure from ordinary business methods. In *Raes v. Meek*, Lord Herschell, from the viewpoint of an English lawyer, stated that the standard of care required of trustees was the same in Scotland and England, as appeared from the English case of *Learoyd v. Whiteley*, and the Scottish case of *Knox v. Mackinnon*.

**Duty not to Delegate Duties as Trustee (Delegatus non potest delegare)**

A trustee may not delegate his duties as trustee either to an agent or to his co-trustees. He must not in effect abdicate control

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14 2nd ed., ss. 520-521.
15 *Buchanan v. Eaton*, 1911 S.C.(H.L.) 40; McLaren, II, s. 2242 et seq.; Knox v. Mackinnon (1888) 15 R. (H.L.) 83 at p. 87; Mackenzie Stuart, Trusts, pp. 157-158. The general plan of Mackenzie Stuart on Trusts is adopted with acknowledgment in the following section.
16 Supra.
17 (1889) 16 R. (H.L.) 31 at p. 33. The vestigial concept of "gross negligence" or *crassa negligentia* of trustees was noted by L.P. Clyde in *Hunter v. Hanley*, 1955 S.C. 200 at pp. 205-206.
18 (1887) 12 App.Cas. 727.
19 Supra.
over the administration of the trust. Stair specifically deals with the question of delegation, and with the maxim, *delegatus non potest delegare*, in the context of mandate—which he regarded as the basis of trust. The brocard does not imply that the trustee must do everything himself. He is not bound to transact in person such business as reasonably prudent men would carry through with the aid of agents or experts. Thus it is a trustee's duty to employ a law agent in the trust and, if the trust accounts are complicated, the services of an accountant may also be employed. Investments should be made through a stockbroker or banker. The right to employ assistants extends to every grade of service, such as auctioneers, rent collectors, estate managers and servants generally. The Trusts (Scotland) Act, 1921, s. 4 (f) specially authorises trustees to appoint and pay factors and law agents.

In employing such assistance, a trustee does not delegate his duties: he must not surrender his judgment, but must apply his mind to what is being done on behalf of the trust. The trustee must exercise reasonable supervision over the person employed, and should not accept his advice without scrutiny as to whether the advice is strictly within the professional competence of the person employed.

*Duty not to be Auctor in Rem Suam*

A trustee must not be *auctor in rem suam*. A trustee must not use his office for the advancement of his private interests; it is his duty to protect and advance the interests of the trust, and he must do nothing to create a situation in which his duty as a trustee and his interest as an individual might conflict. This rule has three main aspects:

The trustee must act gratuitously; he is not entitled to charge for work done by him, except where the trust is authorized to do so or where all the beneficiaries have consented. This follows from the principle that it is his duty to watch over the interests of the estate: if he were allowed to perform his duties as a trustee, and claim compensation for his services, his interest would be opposed to his duty and he is not allowed to place himself in that situation. In *Lord Gray and Ors. Petrs.*, this principle was clearly enunciated, and English authorities were cited with approval. It was held that a law agent was not entitled to recover fees for work done in connection with the trust. This question, indeed, arises most frequently with

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21 1,12,7.
22 11 & 12 Geo. 5, c. 58.
23 Mackenzie Stuart, p. 167.
24 (1856) 19 D. 1.
regard to the professional services of law agents who are also trustees,\textit{Henderson v. Watson}.\textsuperscript{25} Unless they have been duly authorised to take payment for their work, they must do it without charge—even although the trustee has been the trustor's personal law agent, and is merely continuing the work done by him during the lifetime of his client. The rule is not avoided by the trustee employing his firm to do the work of the trust for him.\textsuperscript{20}

The second aspect of the rule is that a trustee must make no personal profit out of the estate. Not only is a trustee forbidden to charge for his services; he is also precluded from making a profit out of the trust, and thus any profit accruing to him from the use of the trust property or acquired in consequence of his office as trustee, does not become his private property but forms part of the trust estate, and he is accountable therefor. Accordingly, a secret commission to a trustee to do an act within his powers would accresce to the trust estate, as would any advantage gained by a man because of his office as a trustee. In \textit{Magistrates of Aberdeen v. University of Aberdeen},\textsuperscript{27} the position was that the Corporation of Aberdeen were trustees of certain mortifications which had been invested in lands near Aberdeen \textit{ex adverso} of the sea. In the year 1801, the owner of lands \textit{ex adverso} of the sea could obtain from the Crown a grant of the salmon fishings adjoining the land. The Corporation, with a view to acquiring the fishings, secretly purchased the lands through a third party, Gavin Hadden, the treasurer of the burgh. They then obtained a grant of the salmon fishings, which in course of time came to be of great value. In 1876 the university, with the concurrence of the Professors of Mathematics and Church History, who were the persons interested in the mortifications, brought an action of declarator in which they claimed both the lands and the salmon fishings. Their claim was sustained. The grant of the salmon fishings was a benefit derived by the corporation from their holding of the trust estate, and it therefore formed part of the trust. They were bound, therefore, to communicate the benefit of the fishings so obtained to the persons interested in the trust estate.

Thirdly, a trustee must not transact with the trust estate. If he does, such transactions, though not void, are voidable at the option of those beneficially entitled, albeit strangers may have no right to challenge. In exceptional circumstances, the court in exercise of the \textit{nobile officium} has authorised a trustee to bid for trust property at a public roup, \textit{Coats' Trs.}\textsuperscript{28} A trustee, except with such authority, cannot

\textsuperscript{25} 1939 S.C. 711; but the trust deed usually provides for payment.
\textsuperscript{26} See also \textit{Home v. Pringle} (1841) 2 Rob. 384.
\textsuperscript{27} (1876) 3 R. 1087.
\textsuperscript{28} 1914 S.C. 723.
buy, lease, or otherwise acquire any interest in the trust estate from himself as a trustee or from his co-trustees. Such a transaction is challengeable, apart altogether from proof of prejudice to the trust estate. In the leading case of Aberdeen Ry. Co. v. Blaikie Bros.,\textsuperscript{29} it was laid down\textsuperscript{30} that as a rule of universal application no trustee should be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which might possibly conflict, with the interests of the beneficiaries under the trust. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the transaction. It is enough that the parties who are interested object to it. It may be that the terms on which the trustee has attempted to deal with the trust estate are as good as could have been obtained from any other quarter; they may even be better—but no inquiry into that matter is permitted. It makes no difference whether the contract relates to heritage or moveables. The disability arises, not from the subject-matter of the contract, but from the fiduciary character of the contracting party. On this principle in the case of the Magistrates of Aberdeen v. University of Aberdeen\textsuperscript{31} the sale to the corporation of the lands held in trust was held to be an illegal sale, with the result that the estate continued to belong to the beneficiaries under the trust, just as if no such transaction had ever taken place. The title could not be fortified by prescription, inasmuch as no trustee in the position of the corporation could plead prescription of a right so as to perpetuate a breach of trust.

Whenever a conflict of duty and interest may arise, the prohibition on transacting with the trust estate operates—even though, for example, the trustee buys at the highest price at a public auction. This was firmly established in the leading case of York Buildings Co. v. Mackenzie.\textsuperscript{32} The defender who had bought, and whose purchase was set aside after eleven years of possession, was what was called the common agent. The case arose in an old form of process for the realisation of the landed estates of a debtor—and extended to forfeiture—known as a ranking and sale. The common agent was appointed by the court to look after and carry into effect the sale. He arranged the date of the sale, fixed the upset price, and answered the questions of inquirers. The actual sale was not conducted by him; it was by public auction and termed a judicial sale. The common agent, Mackenzie, bought at the sale; it was not said that the price

\textsuperscript{29} (1853) 1 Macq. 461.
\textsuperscript{30} At p. 471 \textit{et seq.}
\textsuperscript{31} Supra.
\textsuperscript{32} (1795) 3 Pat. 378. The York Buildings Company was set up to acquire and develop the estates sequestrated on forfeiture of Scotsmen who had supported the Jacobite Risings against Hanoverian rule.
was inadequate; but the House of Lords held that the position of the common agent was a fiduciary one, and therefore his duty and interest so conflicted in the circumstances as to make it impossible to uphold his purchase of the property at the sale.

It follows from this principle that a sale by a trustee to a firm in which he is a partner is invalid. Nor can trustees lend trust estate to one of their number on heritable security, no matter how adequate it may be, *Perston v. Perston's Trs.* There might well be a conflict between the interest of the individual and his duty as trustee. The interest of the borrower is to get the money as cheaply as he can for as little security as he can give and for as long a time as he can get it; while the interest of the lender is to see that it is not lent except upon the best security and for the best return.

To come within the prohibition of the rule, however, the transaction must be one between the trustee as trustee and himself as an individual. Accordingly, a sale by a trustee to the trustee's relatives is not struck at, though such a transaction would be carefully scrutinised, to see whether the trustee would not have a personal interest, *Burrell v. Burrell's Trs.* So also a person who is trustee under one trust can contract with himself as trustee under another. The rule that a trustee may not be *auctor in rem suam* cannot be applied to a case where he is *auctor in rem alienam*. Moreover, the trustee may be authorised by the trustor to charge for his services or to take benefit from the trust, or to transact with it. Thus trustees may be authorised to appoint one of themselves to be law agent, and where they are authorised to appoint one of themselves to perform duties which are not in their nature gratuitous, the right to be paid is implied. So a power given to a trustee to act as law agent, which is silent as to remuneration, carries with it the right to make the usual charges, *Lewis's Trs. v. Pirie*.

Authority may also be given by the beneficiaries for the trustee to make a profit out of the trust or to transact with it and to charge for the services of a trustee. The beneficiaries may do what they please with their own. But, as an arrangement of this kind involves a fiduciary relationship, the authority must be given by the beneficiaries in full knowledge of their rights and without any influence on the part of the law agent. Moreover, it would appear that, once the fiduciary relationship is definitely broken, the former trustee may transact, under this qualification that the transaction must not be entered into or arranged before the resignation takes effect. If what

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33 (1863) 1 M. 245.
34 1915 S.C. 333.
36 1912 S.C. 574.
takes place after resignation is in reality the completion of a contract already begun, the trustee remains for the whole transaction under the same disabilities as an acting trustee.

A trustee is entitled to transact with a beneficiary with regard to his share of the trust estate, but transactions of this character will only be upheld when it is shown that the trustee acted fairly and honestly. The court will examine closely such a transaction, and will require the trustee to show that he supplied the beneficiary with all relevant information and gave full value for the property, *Dougan v. Macpherson*.37

**General Administrative Powers and Duties**

Subject to what has been said regarding powers recently conferred upon the courts to vary trusts, a trustee is bound to administer the trust estate in accordance with the trustor's wishes so far as these are lawful and possible. General duties are imposed on a trustee *inter alia* to ingather the estate until the time for distribution comes, and then to distribute as directed by the trustee. The trustee must also communicate all relevant information regarding the trust to the beneficiaries and keep—or cause to be kept—proper accounts. Section 4 of the Trusts (Scotland) Act, 1921 38—which is retrospective—confers upon trustees certain powers which may be exercised, unless they are at variance with the terms or purposes of the trust, as if they had been expressly conferred by the trust deed.39 Such statutory powers include powers to sell, lease, feu or excamb the trust estate; to borrow on the security of the estate, to compromise claims; and to appoint and remunerate factors and law agents. A limited power has been conferred 40 upon trustees to acquire residential accommodation for the occupation of a beneficiary under the trust. This power, which can only be exercised when not at variance with the terms and purposes of the trust, had long been desired in situations where a widow was left, after her children had married or left home, in a house too big for her own purposes, and wished to move to a smaller house or flat. It is not always clear whether in any particular case exercise of any of the powers just mentioned is "at variance with the terms and purposes of the trust"—especially since the "purposes" include not only the purposes expressed in the trust deed but also the general purpose underlying the creation of the trust. If there is reasonable doubt as to whether the powers conferred by section 4 can properly be exercised, the trustees should ask the court for power to

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37 (1902) 4 F.(H.L.) 7.
38 11 & 12 Geo. 5, c. 58.
40 Trusts (Scotland) Act, 1961 (9 & 10 Eliz. 2, c. 57), s. 4.
do the act desired; and they may either be authorised to act or be reassured by the court's refusal of their petition as unnecessary that they are not acting beyond their statutory authority. Under section 5 of the 1921 Act, even if the powers conferred by section 4 would expressly or by implication be at variance with the terms and purposes of the trust, the court may grant authority to trustees to do any of the acts specified in section 4, if satisfied that such act is expedient for the execution of the trust. Further, unless the truster has expressly prohibited advances to be made, section 16 empowers the court to authorise advances of capital to be made out of a trust fund destined absolutely or contingently to beneficiaries not of full age, Craig's Trs.

Apart altogether from the provisions of the 1921 Act, trustees in exceptional cases may present a petition to the nobile officium of the Court of Session craving leave to exercise powers not authorised by statute. As examples of such exceptional cases there may be cited the casus improvisus, or an omission in the trust deed of the necessary administrative provisions to give effect to the trust. Certain fundamental changes were made by the Trusts (Scotland) Act, 1961, with regard to the validity of certain transactions of trustees and judicial powers to vary trust purposes. Until the Act came into force persons dealing with the trustees, especially would-be purchasers of heritable property, might question the powers of trustees to give good title, if a power of sale seemed to be possibly at variance with the purposes of the trust. Such doubts often had to be resolved by petition to the Court of Session. Now it is provided by section 2 (1) that when trustees purport to exercise any of the powers conferred by the 1921 Act, s. 4 (1) (a) to (ee), persons transacting with them shall have no right to challenge the validity of the transaction or of any title acquired thereunder on the ground that the trustees are acting at variance with the purposes of the trust. In effect the terms of the trust deed are screened off from the scrutiny of persons such as would-be purchasers, and they are not concerned with such terms. When, however, a trustee is acting under the supervision of the accountant of court, this protection is only afforded if the accountant has consented to the transaction. These provisions do not, however, affect any questions of liability as between trustees entering into such transactions and co-trustees or beneficiaries, who may thus have a

41 Lord Cameron has held that the Trusts (Scotland) Act, 1961, s. 2 has not superseded the need for a petition under s. 5 of the 1921 Act, to provide full protection for trustees in appropriate circumstances: Barclay (Mason's Curator) Petrs., 1962 S.L.T. 137.
43 1934 S.C. 34.
44 Craig's Trs. supra; Anderson's Trs., 1932 S.C. 226. As to the court's residue of common law powers, see Tennent's J.F., note 39 supra.
personal action for breach of trust if the transaction entered into was at variance with the purposes of the trust. Accordingly, in circumstances of doubt, trustees may well still wish to protect themselves by petitioning the court under section 35 of the 1921 Act for authority to transact.

The extensive powers now conferred by the 1961 Act upon the courts to vary trust purposes have already been discussed,44a and it is considered that these will be invoked in very many cases during the next few years.

If the trust is a continuing one, the trustees must invest the moneys in their hands in such investments as are authorised by statute or by the trust deed. The Trusts (Scotland) Act, 1921, by sections 10 to 12, details the investments which a trustee is entitled to make: and section 27 authorises the Court of Session, by Act of Sederunt, to revise the list of authorised investments.45 These powers may be curtailed or extended by the terms of the trust deed itself. By the Trustee Investments Act, 1961,46 additional and extended powers of investment were conferred upon trustees, the basic principle being that trustees may divide the trust fund into two halves. One half of the fund is to be invested in gilt-edged securities, and the other half may be invested in equities. Trustees in 1962 may reflect ruefully that this power anticipated by a few months a severe drop in the value of equities. Where additional power is given to invest in securities not authorised by statute, it must be exercised with ordinary prudence and care. It widens the class of securities available to the trustees but leaves untouched the duty of prudence and care in the administration. Accordingly, a power to retain investments made by the truster himself would not relieve trustees from responsibility, if they retained an investment which depreciated from year to year without the trustees considering the expediency of retaining it. Even where the truster declares that the trustee should not be liable for any loss that might arise in respect of such retention, such an indemnity clause does not license trustees to do their duty carelessly, Clarke v. Clarke’s Trs.47

In Thomson’s Trs. v. Davidson48 Lord President Cooper49 quoted Mackenzie Stuart on Trusts50 and observed:

“Even if the direction were conceived in the most imperative terms, I do not think that such a direction in relation to Stock Exchange securities can ever absolutely relieve a body of trustees from their basic duty to preserve the trust estate for the benefit of the beneficiaries entitled to participate in it.”

44a See pp. 565–568, ante.
45 For further legislative regulation see current Parliament House Book.
46 9 & 10 Eliz. 2, c. 62.
47 1925 S.C. 693.
49 At p. 657.
50 p. 275.
When discretionary powers are conferred on trustees, provided that they act in good faith and under the terms of the trust, it would appear that their decision cannot be impugned nor their reasons for decision be scrutinised, *Dundee General Hospitals v. Bell's Trs.*\(^{91}\) In this case it was held that when a sole and absolute discretion was committed to trustees to determine whether or not a hospital—to which a legacy was conditionally bequeathed—had been taken over by the State or placed under control of the State, their decision reached bona fide on these questions of law was binding on the court. Lord Normand observed \(^{52}\):

"If these two matters of law were committed to the trustees, it cannot be urged against their decision that it is invalid because it is founded on a misunderstanding or an error of law in respect of them. If it was committed to the trustees to construe the word 'control' or incidentally the terms of the Act, \(^{53}\) it was necessarily committed to them to construe wrongly as well as to construe correctly."

Lord Normand reserved his opinion as to whether a decision by trustees which was obviously incorrect could be attacked, but indicated the view that, where the testator had committed a sole discretion to trustees and they had acted bona fide within the scope of the power committed to them, their decision might be unchallengeable. Lord Reid also observed \(^{54}\) that he saw no reason in Scots law why the testator should not make his trustees sole judges of a question, and he quoted Lord President Inglis in *Low's Trs.*\(^{55}\)

"If a testator were to lay down in his will that there was to be no litigation about his succession whatever, I should have great doubt about the validity of such a provision. But where a testator merely provides that there shall be no going to law upon certain special points, and arranges so clearly for their determination as here, the case is very different, and the provisions must receive effect."

As the learned editor of the *Law Quarterly Review* points out \(^{56}\) in recommending the extension of this interpretation to England, there is nothing contrary to principle in a testator committing to his trustees a power of determining questions of law so as to prevent the estate being "eaten up by legal costs." The current tendency is to permit assumed trustees to exercise discretionary powers, unless the terms of the deed conferring powers indicate that personal considerations justify restricting their exercise to the original trustees.\(^{57}\)


\(^{52}\) At p. 86.

\(^{53}\) *i.e.*, the National Health Service (Scotland) Act, 1947 (10 & 11 Geo. 6, c. 27).

\(^{54}\) 1952 S.C.(H.L.) 78 at p. 91.

\(^{55}\) 8 S.L.R. 638.

\(^{56}\) 68 L.Q.R. at p. 293.

\(^{57}\) *Angus's Exors. v. Batchan's Trs.*, 1949 S.C. 335.
Lastly, in connection with the powers and duties of trustees, it may be observed that by the Administration of Justice (Scotland) Act, 1933,\(^58\) s. 17 (vi), trustees under a trust deed as defined in the Act may obtain directions from the court on questions relating to the investment, distribution, management or administration of the trust estate, or as to the exercise of any power vested in them or as to the performance of any duty imposed upon them.

**Liability to Beneficiaries for Breach of Trust**

A trustee who has been guilty of breach of trust may be required to make good all the loss which the estate has suffered, while he may not retain any profit which accrues from the breach.\(^59\) Thus, where a trustor who carried on a mercantile business appointed two of his partners as his trustees, directing them to invest his funds in a certain way, but they, instead of complying with his directions, continued to employ the money in the firm, paying the beneficiaries 5 per cent., it was held that the beneficiaries were entitled to claim the whole profits made by the trustees. This was upon the principle that, where a trustee has invested trust funds in violation of the trust, the beneficiary has the option either of taking the actual profits earned by the trust fund or of claiming the interest which the trust fund should have earned if properly invested.\(^60\)

Further, the beneficiary has a right to follow the trust property as against the trustee or others claiming through him. As between beneficiary and trustee—and all parties claiming under the trustee otherwise than by purchase in good faith for valuable consideration without notice—property belonging to a trust, however much it may be changed in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.\(^61\) If a trustee dissipates a trust fund altogether, there remains nothing to be the subject of the trust, but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trusts. Moreover, if a man in a fiduciary position mixes trust funds with his own, any money he withdraws for his own purposes will be deemed to be withdrawn from his own share first. If a man has £1,000 of his own in a box or a bank account, then adds to it £1,000 of trust property and subsequently takes out £1,000 and applies it to his own purposes, the court will not allow him to say that the

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58 23 & 24 Geo. 5, c. 41.
59 The liability of trustees to beneficiaries has not been affected by the Trusts (Scotland) Act, 1961—see s. 2 (2).
61 Pernell v. Deffell (1853) 4 De G.M. & G. 372 at p. 388; quoted, Macadam v. Martin's Trs. (1872) 11 M. 33; Bell, Commentaries, i, 286.
money was taken from the trust fund. The trust must have its £1,000 so long as a sufficient sum remains in the box or account. English authorities are freely quoted on this aspect of trust law, and the leading case of Re Hallett's Estate and its sequellae are founded upon as expounding the law applicable in Scotland. As has been noted in an earlier chapter, however, the principle underlying the beneficiaries' remedy, is not dependent on English equity jurisprudence. In Jopp v. Johnston's Tr. a law agent sold shares belonging to a client and placed the proceeds in his own bank account, then went bankrupt. In a competition between the client and the creditors of the law agent it was held that the proceeds of the shares did not form part of the bankrupt's estate for the benefit of creditors. Lord Moncrieff in this case laid down the following rules:

"First, where a trustee or agent, with or without authority sells trust property and lodges the proceeds of the sale in bank in his own name, the money so lodged can be followed and vindicated by the trustee provided it can be traced with reasonable certainty. Secondly, this holds good not only as between the truster and the trustee but also as between the truster and the trustee's trustee or assignee in bankruptcy acting for the general body of his creditors. Thirdly, the proceeds of the sale can be vindicated although they may have been blended with moneys belonging to the trustee. And, fourthly, if after the proceeds of trust property are so lodged and blended with the trustee's own funds, the trustee, for his own purposes, draws out part of the mixed funds, he will be held to have drawn out his own funds and not those which represent the proceeds of the trust estate."

Trust property cannot, however, be followed and reclaimed from a person who has acquired it in good faith and for value. Again, where a person pays a just debt with money fraudulently obtained or dishonestly appropriated, a creditor taking payment in bona fide is not bound to restore. Accordingly when a stockbroker sold shares for a client and paid the proceeds into his own bank account which was overdrawn, the money thus used to pay the stockbroker's debt to the bank could not be recovered from the bank by the client—Dunlop's Trs. v. Clydesdale Bank.

Protection of Trustees against Liability

A trust deed frequently contains a clause providing that the trustees "shall not be liable for omissions, errors or neglect of management nor singuli in solidum, but each shall be responsible for his own actual intromissions only." Such a clause does not protect

62 (1879) 13 Ch.D. 696.
63 See also Macadam v. Martin's Trs., supra.
64 See ante, p. 574
65 (1904) 6 F. 1928.
66 At p. 1036.
trustees from liability where they commit a positive breach of duty, although it may give some protection where trustees have committed mere errors of judgment and have acted in bona fide. It gives no protection against gross negligence or in cases where the conduct of the trustee is inconsistent with bona fides. Thus in Knox v. Mackinnon, trustees sold a tenement to William Miller at the price of £25,000. He was unable to pay £12,000 of that sum and was allowed to retain it on loan—in security of which he conveyed to the trustees three house properties upon each of which there were prior incumbrances to an amount exceeding two thirds of their estimated values. Besides these margins the trustees held the personal obligation of the debtor whom they knew to be impecunious, and of his father-in-law of whose solvency they knew nothing beyond general repute. The margins were utterly worthless. The trustees were held liable, and could not elide liability by relying on a clause of indemnity in similar terms to that quoted. The Trusts (Scotland) Act, 1921, contains certain provisions which give protection to trustees in certain cases of breach of trust. Section 31 provides that if a breach of trust has been committed at the instigation or request or with the consent in writing of a beneficiary, the court may as it thinks just order all or part of the beneficiary’s interest in the estate to be applied to indemnify the trustee or persons claiming through him. Again, by section 32, if it appears to the court that a trustee who is or may be personally liable for a breach of trust has acted honestly and reasonably and ought fairly to be excused for the breach, then the court may relieve the trustee either wholly or partly from personal liability. Section 33 provides that a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be authorised.

With regard to the effect of prescription upon cases of breach of trust, it is settled that, so long as the trust subject remains entire in the hands of the trustee, no lapse of time will bar a claim for it by the beneficiary. In such a case the whole foundation of the negative prescription fails, for the basis of that prescription is presumed abandonment of the right and acquiescence in its transference to another. Where trust property still rests in the trustee’s hands, it has all along been held in contemplation of law by the beneficiary through his trustee. In a legal sense there has never been adverse possession, and as between the trustee and beneficiary the trust character of the holding has been imprinted on the property throughout. On the other hand, the negative prescription will operate to protect trustees against a personal claim or where there has been an alienation of the trust

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estate or its equivalent, or where there has been a specific act of mismanagement which has resulted in the alienation or destruction of the trust estate and has remained unchallenged throughout the prescriptive period.\footnote{University of Aberdeen v. Irvine (1866) 4 M. 392, per Lord Kinloch at p. 401; approved, 6 M.(H.L.) 29; Cooper Scott v. Gill Scott, 1924 S.C. 309, per Lord Skerrington at p. 331.}

The personal liability of trustees in a public trust is apparently determined by a more lenient standard than applies in private trusts. The standard of care required of trustees administering private trusts has already been discussed.\footnote{p. 228, ante.} In the administration of public trusts, it is thought that if the trustees have acted honestly but mistakenly the law will not press upon them too hardly.\footnote{Andrews v. Ewart's Trs. (1886) 13 R.(H.L.) 69.}

**Trustees' Liability to Creditors**

Trustees are not liable for the trustor's debts beyond the value of the trust estate itself, but are personally liable to creditors for debts contracted by themselves in the course of the administration. In questions between trustees and persons who are not claiming under the trust, the trustees must fulfil their contracts and discharge their liabilities on their own responsibility; and are not entitled to shelter themselves behind the trust estate, or to put forward the plea that they are liable only in their representative capacity. Thus they are liable to trade creditors\footnote{Ford v. Stephenson (1886) 16 R. 24.} and for the expenses of litigation.\footnote{Anderson v. Anderson's Trs. (1901) 4 F. 96.} The trustees can, of course, recover from the trust estate the amount of liabilities properly incurred; and also, by agreement with the beneficiaries, undertake commitments which may involve even greater liability than the value of the estate, on the understanding that the beneficiaries will indemnify against personal loss. It is, moreover, generally competent for trustees to stipulate in a contract that the trust estate shall be liable and not themselves as individuals—Lumsden v. Buchanan.\footnote{(1864) 2 M. 695; (1865) 3 M.(H.L.) 89.} Whether this is a true construction of the contract must in every case be a question of interpretation and of the nature of the contract.\footnote{Ibid. p. 95.} Where parties contract expressly "as trustees," this implies that the parties agreed that the trustees should not be personally liable—Gordon v. Campbell.\footnote{(1842) 1 Bell's App. 428.} The nature of the contract, however, may exclude such a limitation of liability, where the party contracting with the trustees has no power to accept the restricted liability. Thus, if trustees take shares in a company, the
company has no power to differentiate between the liability of different shareholders, and the trustees who have taken shares will be personally liable as shareholders.79 This rule applies, even though it is the practice in Scotland—unlike the rule in England—to notice trusts in the transfer and registration of shares.80

JUDICIAL FACTORS

The Trusts (Scotland) Act, 1921,81 echoing the Trusts (Scotland) Amendment Act, 1884,82 by section 2 defined the term “trust” to include the appointment of a judicial factor; and the term “trustee” to include “judicial factor.” To overcome doubts83 as to whether all types of judicial factors could exercise the powers conferred on trustees by the 1921 Act, the Trusts (Scotland) Act, 1961,84 s. 3, substituted in place of the definition expressed in the earlier statute that “judicial factor” shall mean any person holding a judicial appointment as a factor or curator on another person’s estate.”

Historically in their development trust and judicial factory have been associated concepts, but “judicial factors” have in general been regarded as trustees only in the broad sense that they are bound to exercise powers of administration according to certain standards of fiduciary duty and do not normally have the trust estate vested in them. Thus, for example, though a judicial factor on a lapsed trust or similar estate completes title to heritage in his own name, a curator bonis or factor loco tutoris completes title in the name of his ward. Menzies on Trustees85 notes the distinction. “A judicial factor appointed vice trustees is to be distinguished from a factor loco tutoris or a curator bonis. The former is really a trustee, and acts under the trust deed, and is responsible as a trustee—the estate is vested in him and is not in manibus curiae unless where it has been sequestrated at common law. His position is better described by the English title of judicial trustee than by that of judicial factor.” In short, it may be said that, though judicial factors generally undertake the fiduciary duties of trustees, and enjoy the statutory powers of trustees, only in very few cases does judicial factory conform to the concept of trust in the sense of vesting ownership in the trustee.

79 Ibid.; also Muir v. City of Glasgow Bank (1879) 6 R. 21.
80 See Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 117, which applies only to companies registered in England; and Buckley on the Companies Acts, 12th ed., p. 298 et seq.
81 11 & 12 Geo. 5, c. 58.
82 47 & 48 Vict. c. 63.
83 See e.g., Leslie’s J.F., 1925 S.C. 464.
84 9 & 10 Eliz. 2, c. 57.
85 2nd ed., s. 347, p. 193; see also Campbell Irons on Judicial Factors, p. xi and Lord Curriehill in Maconochie Petr. (1857) 19 D. 366 at pp. 372-373.

S.L.S.—20
Now that all judicial factors are to be deemed "trustees," special provision has to be made for the common situation in which the truster has not given specific instructions set forth in a "trust deed" regarding the administration of the trust estate. Accordingly it may be difficult to determine whether any particular act of administration is, or is not, at variance with the trust purposes. Judicial factors, however, act under the supervision of the accountant of court, and the Trusts (Scotland) Act, 1961, s. 2 (1) provides that no transaction entered into by a trustee subject to such supervision shall be challengeable by the person with whom he has dealt if the accountant has consented to the transaction. A judicial factor, however, may be personally liable to beneficiaries if he acts at variance with the purposes of the trust, and he may still safeguard himself against such liability by seeking the authority of the court for a proposed transaction under section 5 of the 1921 Act.

It has long been the practice of the Court of Session, as a court both of law and of equity, by virtue of its nobile officium to make provision for the administration of an estate by a judicial factor, where loss or injustice could not be prevented by the ordinary remedies. Lord President Clyde, in Leslie's Judicial Factor, has observed that there is no limit to the circumstances in which the court in exercise of its nobile officium may—to protect against loss or injustice—appoint a judicial factor. The more familiar types of factory he classified as follows: (1) factories on trust estates (including charities); (2) factories on the estates of incapaces (pupils, minors, absentees and lunatics); (3) factories on intestate estates; (4) factories on partnership estates; (5) factories on estates actually sequestrated or threatened with sequestration; (6) factories on company estates under certain statutes; (7) factories pending litigation, and (8) factories on pro indivisio estates where the co-owners cannot agree regarding its administration.

Powers and Duties of Factors

A judicial factor is an officer of the court which, on appropriate petition, authorises both his appointment and discharge; he must find caution for the due performance of his office; and administers the estate under the supervision of the accountant of court who may make such orders as he thinks proper. Various statutes and Acts of Sederunt govern the duties of judicial factors—in particular the Act

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87 Barclay Mason's Curator Petr., 1962 S.L.T. 137.
88 1925 S.C. 464.
89 i.e., security.
of Sederunt, February 13, 1730; Judicial Factors Act, 1849\(^90\); and the Judicial Factors (Scotland) Acts, 1880\(^91\) and 1889.\(^92\) Moreover, where the judicial factor is a trustee within the meaning of the Trusts (Scotland) Act, 1921, or acts under the Bankruptcy (Scotland) Act, 1913,\(^93\) the factor enjoys the powers conferred by these statutes. When a factor desires to exercise powers which are not conferred upon him by the general law, he may apply to the court for special powers. If a judicial factor is appointed upon a trust estate, he may, generally speaking, exercise the powers conferred by the trust deed. Thus he may do what the truster has required to be done, but exercises no greater powers than the truster conferred on his trustees.\(^94\) Where a discretion has been conferred by a testator upon his trustees, and a judicial factor is appointed in their place, it is a question of construction of the trust deed as to whether an element of delectus personae excludes the transfer to a factor of the power to exercise a discretion. In many cases, however, a judicial factor may exercise what Lord President Cooper has described as discretionary powers of an "administrative character," such as the power to make advances to minor beneficiaries. In *Angus's Ex.*,\(^96\) on the other hand, it was held by the majority of a seven judge court that there was insufficient nexus between a testator and a judicial factor to permit the latter to exercise a fiduciary discretion to select beneficiaries to benefit under a general gift "to charities." The question in such a case was not as to whether the testator's intention showed delectus personae with regard to the person who should select; the gift failed because the testator had failed to test in a manner regarded by the law as effectual. It may be observed, however, with all due deference to the majority, that there is much force in the dissenting opinions of the Lord Justice-Clerk and Lord Keith, who would have permitted a judicial factor to exercise a power of selection which the majority conceded might be exercised by an assumed trustee as well as by one actually nominated by a testator.

Mere act of management by a judicial factor will not alter the nature of the succession to the estate under factory; but acts which are necessary may have that effect in law.\(^97\) Though property of a deceased may during his lifetime be surrogatum for heritage, it passes

\(^90\) 12 & 13 Vict. c. 51.
\(^91\) 43 & 44 Vict. c. 4.
\(^92\) 52 & 53 Vict. c. 39.
\(^93\) 3 & 4 Geo. 5 c. 20.
\(^95\) *Angus's Ex. v. Batchan's Trs.*, 1949 S.C. 335 at p. 368.
\(^96\) Supra, distinguished by Lord Hill Watson, who held that powers of a purely administrative character could competently be administered by a judicial factor—*Leith's J.F. v. Leith*, 1957 S.L.T. 38.
\(^97\) *Moncrieff v. Miln* (1856) 18 D. 1286; *Public Trustees of New Zealand Petr.*, 1921, 2 S.L.T. 240.
in his succession as moveable estate, even though a curator had sold the deceased’s heritage in the course of administration.98

Sequestration

The court has power not only to appoint a judicial factor to administer an estate, but also to sequestrate the estate itself generally when it is considered that a person who holds property should be superseded in its custody and management.99 When an estate is sequestrated in this sense1 the estate is placed by the court in the custody of a neutral person accountable to the court for its proper management.

99 See Campbell Irons on Judicial Factors, p. 516 et seq.
1 Cf. “mercantile sequestration” which is part of the law of bankruptcy.
Part 3
PRIVATE LAW

F
Obligations
CHAPTER 26

OBLIGATIONS IN GENERAL

Real rights, that is to say, those rights which are the counterpart to general duties, have already been examined, as have the rights and duties which arise under a fiduciary or trust relationship. It remains to discuss personal rights (\textit{jura in personam}) or obligations. The person to whom the law gives a personal right has not a \textit{jus in rem}—a claim good against the world—but merely a right of action against another bound to him by obligation to compel that other to render payment or performance of what is due.\textsuperscript{1} In Chapter 9,\textsuperscript{2} in the context of General Legal Concepts, some of the main jurisprudential considerations which are relevant to this branch of the law have been noted briefly, but a detailed discussion is more appropriate to a treatise on analytical jurisprudence.

The Scottish law of obligations and the appropriate terminology owe much to the example and inspiration of Roman law and the later commentaries on that system, though perhaps there is no branch of the law of Scotland which has suffered more from the somewhat confusing influence of the law of England which was late in developing general principles of contract and tort. It has seldom happened that lawyers versed in the principles and history of both legal systems have been in a position to point out the pitfalls, and the words of Lord Justice-Clerk Hope\textsuperscript{3} (who was dealing with another branch of the law) are particularly applicable to the Scottish law of Obligations—"I am only the more confident that we do not understand nine out of ten of the (English) cases which are quoted to us, and that, in attempts to apply that law, we run the greatest risk of spoiling our own by mistaking theirs." Judges of eminence and even Scottish institutional writers such as Bell have on occasions made the dangerous assumption that because two legal systems would afford a remedy in the same fact situation, therefore the principles and limits of remedy are identical. Concessions by counsel seeking to aid their argument by English precedents have also tended to subvert the principles of Scottish jurisprudence. No English lawyer of intelligence would assume that his system of Contracts and Torts could be properly understood without some knowledge of the history of the forms of action and of the

\begin{itemize}
  \item \textsuperscript{1} Stair I, 1, 22; Erskine III, 1, 2.
  \item \textsuperscript{2} Esp. ante, p. 279 et seq.
  \item \textsuperscript{3} McCowan v. Wright (1852) 15 D. 229 at p. 232.
\end{itemize}
respective provinces of the common law and Chancery courts; and he would be the first to reject the suggestion that the fundamentals of his system were derived from the Civil law. Yet under the pretext or assumption that “general principles of jurisprudence” common to Scots and English law apply, many of the restrictive categories of the English system (dating from a period of relative immaturity, but perpetuated by a doctrine of strict precedent) have been in some measure superimposed upon the Scottish law of obligations. Regarding some of these, second thoughts are possible at judicial level; regarding others legislation is the only cure. The present author in his Studies Critical and Comparative has attempted to analyse such situations and support with authority his contention that the law of Scotland has too often gone awhoring after strange gods, and that the time is ripe to return to the juristic altars of our fathers.

Classification

Roman law recognised four categories of obligation—ex contractu, quasi ex contractu, ex delicto and obligationes quae quasi ex delicto nascuntur. In the field of public law, the Romans also recognised the validity of the unilateral promise (pollicitatio) as a type of voluntary obligation. Scots law also refers to contract, quasi-contract, delict, quasi-delict and promise or pollicitation, though the content of these categories is not identical with that of Roman law in Justinian’s time. However, Stair has rightly commented on the Roman classification that it “insinuates no reason of the cause or rise of these distinct obligations, as is requisite in a good and distinct division.” The present author, founding mainly on Stair, has preferred to classify Obligations, according to “the cause or rise of these distinct obligations,” as follows:

I. Obligations ex Lege: namely, those obligations which are imposed by force of law quite independent of fault or will on the part of the person obliged, but yet create liability as if there has been fault or voluntary engagement (corresponding to the Roman law of Obligations quasi ex contractu and quasi ex delicto).

II. Obligations ex Culpa: arising from an Illicit Act. Here liability is founded upon culpa or fault, which is relevant in Delict, Breach of Trust and Breach of Contract.

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7 I, 3, 2.

8 See p. 281, ante; also “Strange Gods,” sup. cit.

7 For discussion of current misuse of the term quasi-delict in Scots law, see post, pp. 633-635.

8 For convenience, however, breach of trust has been considered in the context of trust and breach of contract will be considered in the context of contract.
III. Obligations ex Voluntate (Voluntary Obligations): which may either be created by binding unilateral promise (pollicitation) or by contract.

**General Considerations in Obligations**

In chapters dealing with General Legal Concepts, topics of general relevance for private law as a whole have been discussed briefly—including legal capacity, the relationship between obligation and conveyance, good faith and personal bar. A few additional topics which affect the law of Obligations in particular may be mentioned briefly.

**Obligations Pure, Future and Conditional**

Pure or simple obligations are those which have been undertaken unconditionally; or where conditions upon which they depended have been fulfilled. In the case of a money debt, demand for payment may be made forthwith. Pure obligations are to be contrasted with conditional obligations, which are suspended by the condition under which they are contracted.

So-called “future obligations” are those in which performance is postponed to a determinate day. A debt payable or an act prestable in futuro on a date certain or on the happening of an event which must take place—as on the death of a named individual—is therefore often called a future obligation. In truth such an obligation is a present obligation which is to be discharged in the future—debitum in praesenti solvendum in futuro.

Contingent or conditional obligations are those which depend on stipulated conditions which are not yet accomplished.

The law regarding conditions (stricto sensu) may be summarised as follows. If performance is not to be exigible until the uncertain event occurs, the condition is termed a suspensive condition. If the obligation has to determine on the occurrence of an uncertain event, such a condition is called a condition resolutive. A condition may consist in the occurrence of an event (positive condition), or in the non-occurrence of an event (negative condition). A condition which lies within the power of one or other of the parties to the contract is termed

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9 Chaps. 8 and 9, ante.
11 This is the correct use of the term “condition” in Scottish law—namely, a factor upon which the existence of the obligation is made to depend; though even Stair and Erskine had occasion to protest—Stair I, 3, 8; Erskine III, 1, 7; Gloag, 270—at the loose employment of the term “condition” to imply a stipulation in the contract itself. The ambiguity has become even more prevalent in modern times, and has been encouraged by the confusing use of the term “condition” in English law. See S. J. Stoljar (1953) 69 L.Q.R. 485.
a potestative condition. A condition which lies outside the power of either of the parties is termed a casual condition. A condition which is at once casual and potestative is termed a mixed condition.12

A person who has undertaken a conditional obligation is held to bind himself not to defeat it, and, if he does so, will be barred from relying on the condition.13 Moreover, if the structure of the contract envisages that, as a condition of the contract, something will be done which requires the concurrence of both parties, an undertaking will be implied that each will do what is necessary to give it effect.14 Principles of personal bar will preclude a party who has prevented fulfilment of the condition from founding upon this fact to invalidate the contract. A promise or transfer of property which is made conditional upon the occurrence of an event which is physically impossible or upon an act or forbearance which is illegal or immoral is effective.15 A promise which is made contingent on the non-occurrence of an event which is physically impossible is construed as unconditional.16

While it is unnecessary to elaborate on positive or negative conditions or on those which are suspensive or resolutive (in English law “conditions precedent” and “conditions subsequent”), a short explanation may be offered on potestative, casual and mixed conditions. A “potestative condition” is one which is in the power of one of the parties to fulfil—as a promise to make an allowance to a man on condition that he studies for admission to the Faculty of Advocates; or, in rare cases, the condition may affect the debtor in the obligation—as “if I decide to sell, you shall have the first option.” A “casual condition” depends upon chance or upon the will of a third person, and does not lie within the power of the parties—as a promise to sell to A if C and D agree, or to pay if a ship sinks. A “mixed condition” is one which depends upon the will of the party who is to benefit and also upon the will of a third party—as a promise to make a provision to John if he marries Jean. In construing testamentary writings if a legacy has been given in these circumstances, John may take the legacy if he has done all that he can do to fulfil the condition, even though the lady refuses him. This was well illustrated by the case of Simpson v. Roberts,17 where a liferent of property was left to the testatrix’s companion and housekeeper, provided that she was in the employment of the testatrix’s

12 This summary follows closely the admirable exposition by Lee and Honoré in the Digest of the South African Law of Obligations, 1950, tit. V, 70.
13 Pirie v. Pirie (1873) 11 M. 941, esp. at p. 949; Dowling v. Methven, 1921 S.C. 948.
15 But in testamentary dispositions such conditions are treated as pro non scriptis: Bell’s Principles, § 1785; cf. Aird’s Exors. v. Aird, 1949 S.C. 154.
16 Bell’s Principles, § 49.
17 1931 S.C. 259.
husband at his death. The husband, however, married again and dismissed the housekeeper, who had been willing to continue in his employment until his death. She was held entitled to benefit under the will. Erskine considered that the same construction should apply in the field of obligations, but in most cases this would seem unsound. Gloag puts the difficulty aptly:

Suppose a brewer to agree to advance money to a publican if he obtains a licence, could any court hold that the money was due because the publican had applied for a licence, and had been refused?

**Parties to Obligation**

To constitute an obligation there must be at least two persons—a debtor and a creditor. The obligation, unless there is a personal element as in a contract of service, is not destroyed by the death of either party, since rights and duties transmit to heirs and universal successors. Apart from cases where rights and duties run with property, or where a *jus quaesitum tertio* is recognised, obligations do not bind or give rights to strangers to the agreement. An obligation is contracted *in solidum* on the part of the debtors when each is obliged for the whole payment or performance, so that payment or performance by one liberates all. The general rule, however, is that each obligant is concerned to the extent of his share only (*pro rata*); though, if the obligation is for performance of an act—*ad factum praestandum*—or, if it is contracted by partners or joint purchasers or persons taking a bond "jointly and severally," liability will be *in solidum*. There is, however, a right of relief among the debtors, and a creditor cannot grant a discharge of one debtor to the prejudice of the others. Even joint delinquents, who are liable jointly and severally to the person injured, have a right of relief *inter se* in such proportion as shall seem just to the court.

**The Object of Obligations**

The object of an obligation may either be a "thing" (*res*) which the debtor binds himself to give, or an act which he obliges himself to do or abstain from doing. The use or possession of a thing may also be the object of obligation. All things *in commerce* may be the object of obligation if defined with sufficient certainty; though the exact amount need not be determined at the time of contract, provided that it can be

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18 *The Times*, October 29, 1952, reports the English case of *Kendrew*, where the gift was in very similar terms, and the husband both married the housekeeper and employed her as housekeeper. The gift was held to be valid.

19 III, 3, 85.

20 p. 279.

21 Bell’s *Principles*, § 51.

22 Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940 (3 & 4 Geo. 6, c. 42), s. 3.
OBLIGATIONS IN GENERAL

determined in the future. *Certum est quod certum reddi potest.* Things not yet in existence but which are expected to come into existence may be the object of an obligation—as, for example, a crop not yet sown.23 Moreover, there may be a valid contract of risk, *emptio spei*, where the existence of a thing or state of circumstances is known to be in doubt. Such cases are to be contrasted with contracts for a *res extincta* (a subject-matter which has ceased to exist). In contracts of risk—as insurance of a ship “sunk or not sunk”—the obligation is good, because the risk is the subject-matter; ostensible obligations in respect of a subject-matter, which unknown to the parties has perished, are void, because an essential element of obligation is lacking—as for example a contract for the sale of a ship which at the date of contract had sunk.24 The contrast between these two types of case may be illustrated by *Pender-Small v. Kinloch's Trs.*25 where each party was held to have taken the risk that the House of Lords might reverse the Court of Session and hold that the annuitant who was to benefit had no legal existence.26 This contingency was present to the minds of both parties.

If an act is the object of an obligation it must be physically possible, though a person who undertakes performance beyond his own powers cannot plead this in excuse. The party in whose favour an obligation is contracted must have an appreciable patrimonial interest in performance. Although an act in which the creditor has no such interest may not be the object of an obligation, it may be the condition of an obligation. A promise to walk to Inverness from Aberdeen could not be sued on, but a promise to pay £5 upon condition that Neil walked to Inverness would be enforceable.

Patrimonial interest may be the right to property or the right to use property. If a clergyman of a voluntary religious body merely objects to an alteration of the constitution or doctrines of that body, the courts cannot sustain the action.27 But if he is ejected from his manse, or is deprived of his stipend in consequence, the courts can examine the change of doctrine. The same principle applies to societies and clubs. If these own property, a member who is expelled may raise an action in respect of his patrimonial interest.28 Possession of a professional status, or capacity to perform certain functions or hold certain offices

23 See also Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5 (2).
24 Ibid. s. 6.
26 This case arose out of the litigation regarding the legal status of the Free Church, following the Union of the Free Church with the U.P. Church in 1900. The House of Lords (see supra), reversed the Scottish courts. The resulting confusion had to be settled by statute.
28 See Skerrett v. Oliver (1896) 23 R. 468; also for discussion of a clause excluding the jurisdiction of the civil courts when a committee's suspension of a minister of religion was allegedly ultra vires.
—as an advocate or holder of a master’s ticket—is a patrimonial interest which the courts will protect. Lastly, it may be noted that an agreement for an act or forbearance must be concerned with legal relations, and not, for example, be as to social undertakings, wagers, or sports fixtures. As Lord Kinnear observed in *Murdison v. Scottish Football Union* 29 : “If there be an agreement between them to play a game together, that is not an agreement which the law will enforce.”

**Concurrent and Cumulative Liability**

Though there is a hierarchy of obligations, there may well be concurrent or cumulative liability under several categories. In Scots law the categories of liability complement but do not necessarily exclude each other. Nevertheless, as the author has observed in a passage approved by Lord Keith, 30 “The *non-sequitur* that because A owes a duty in contract to B, he cannot owe a further duty to C in reparation quite independent of contract, appears in several nineteenth century Scottish cases in which the judges were probably influenced by English notions of privity.” This was apparent in circumstances where a member of a tenant’s family sought reparation for injury caused by the defective state of premises 31 ; where a consumer of a product claimed against a negligent manufacturer; where a workman asserted the liability for *culpa* of a contractor who had not employed him; where parties had suffered loss through the negligence of law agents who had not been employed by them, and so forth. 32 The “contract-tort catena” of English law, its obsession with the doctrine of privity of contract, its refusal to recognise the *pactum in favorem tertii*, and the pigeon-hole technique of the “forms of action” had their disastrous repercussions on the law of Scotland. Judicial decisions such as *Donoghue v. Stevenson* 33 and legislation such as the Occupiers’ Liability (Scotland) Act, 1960, 34 have in large measure restored the status quo, and, in a wider context, it is still open to argument that some of the precedents which proceeded on concessions by counsel, or without bringing relevant authorities to the attention of the court, are not strictly binding in future cases *in pari materia*.

Even in English law today it is widely accepted that contractual and delictual responsibility are not mutually exclusive. This may often have important repercussions. Thus, though the liability of pupils and

29 (1896) 23 R. 449 at p. 466. The dictum concerns amateurs.
32 Smith, *Studies*, pp. 111 et seq., 190 et seq.
34 8 & 9 Eliz. 2, c. 30.
minors in contract is restricted, there is a wider concept of liability in delict. The measure of damages is usually more extensive in delict than in contract, and the test of remoteness is not identical. In many situations, such as the carriage of a passenger or of goods, liability may rest alternatively on breach of a term of the contract or upon culpa. In Scotland (where civil jury trial came late and has outstayed its welcome) pursuers are naturally inclined to invoke this procedure when possible; and this procedure is competent in delict but not in contract. In general, it may be said, where an obediential duty is owed by A in delict, this duty remains due to B though A has entered into a contractual relationship with B—unless the terms of the contract restrict the delictual duty. So far as C, who is not a party to the contract between A and B is concerned, the delictual duty remains unqualified on the principle res inter alios acta, aliis nec nocet, nec prodest.

A leading example of restriction by contract of delictual liability is the case of McKay v. Scottish Airways \(^{35}\) in which the pursuers were held to be barred by a term in the contract of carriage renouncing contractual or delictual liability for injury. Though, as will be considered in due course, the terms of this particular contract might have been held to conflict with public policy, in default of such challenge, agreement was sufficient to exclude delictual liability. Persons are free (questions of public policy apart) to contract that they will not exact their due under the law of delict; and this operates in effect as a pactum de non petendo.

In R. v. S.\(^{36}\) however, the agreement was not a pactum de non petendo, but an undertaking by a potential defender that she would not repeat certain slanderous statements. After she had done so, it was held that she was not precluded in an action in delict from founding upon a plea of veritas, though the majority in the Inner House seemingly recognised that, had the action been brought in respect of her breach of undertaking, the consequences might well have been different. This result seems to support the proposition that restriction of delictual liability by contract rests in effect upon the pactum de non petendo.

\(^{35}\) 1948 S.C. 254. The author is indebted to his colleague Mr. M. R. Topping for the privilege of seeing before publication his paper "Cumulative Liability in Contract and Delict in the Law of Scotland" (1962).

\(^{36}\) 1914 S.C. 193.
OBLIGATIONS EX LEGE

CHAPTER 27

OBLIGATIONS EX LEGE

QUASI-CONTRACT

The expression "quasi-contract" has long been in use as a convenient nomen juris to designate those equitable or obediential obligations which redress unjust enrichment. These resemble contractual obligations only in that the duty imposed under them is for payment or performance; but they differ essentially from contract in that the quasi-contractual tie arises from force of law and not from consent. Nor must quasi-contract be confused with implied contract, where the law founds obligation on an implied consent. The ultimate source of quasi-contractual liability is in equity, as is recognised by the institutional writers. The principal heads are Restitution, Recompense and Negotiorum gestio, though a full treatment of the subject would involve discussion of such topics as salvage and general average. While the category of quasi-contract has been taken from Roman law, the content of that category cannot be ascertained from Roman jurisprudence.

In 1951 Lord Porter observed in an English appeal: "The exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content . . . to accept the view that it forms no part of the law of England." Professor Dawson in his masterly comparative survey Unjust Enrichment deplores the long delay and lack of systematic analysis in the development of the American law in this field. He surveys the Roman and European systems and observes, "Three times in European history the prevention of enrichment through another's loss has seemed an ideal that was almost attainable—in sixth-century Byzantium, in eighteenth-century Germany, and in nineteenth-century France. The result in

1 Stair I, 3, 4; I, t.7; I, t.8; Bankton I, 4, 25; I, 8, 5; Erskine III, 1, 10; Bell's Principles, §§ 531-532.
2 See also the discussion of the obediential duty to aliment relatives, ante, pp. 345, 376. Salvage and General Average will be treated in Professor Gow's book.
5 John P. Dawson, Unjust Enrichment, esp. at pp. 107-109. This book is worth reading from cover to cover by anyone seeking to develop the essential principles of Scots law regarding unjustifiable enrichment.
each case was much confusion, for confusion is sure to follow when an aspiration is phrased as a rule of law. Yet the European development on the whole shows remarkable continuity . . . The real break in continuity came with the French Code in 1804.” Of his own system he notes “The remarkable thing is that when we began we drew hardly at all on so rich a fund of ideas.”

“The fund of ideas” to which he refers is, of course, part of the patrimony of Scots law as a Civilian system, and must be drawn on further in the development of the Scots law of unjustified enrichment. Perhaps too much attention has been paid to Pothier, whose contribution in this field has been justly criticised, and the potentialities of the actio de in rem verso have not been fully appreciated. An admirable survey of the Roman-Dutch and South African use of Roman materials has recently been published in Scotland by Professor Wouter de Vos. This survey has particular relevance for Scots law, since it deals with the handling of problems in uncodified systems which have very close affinities with Scots law past and present. There is as yet no comprehensive treatment in a Scottish treatise of liability arising from unjustifiable enrichment, and it is to be hoped that as this branch of jurisprudence develops, it will become more systematic. For present purposes the main categories already recognised may be discussed very briefly.

Restitution

Restitution is described by Erskine as a natural duty in consequence of which whatever comes into our power and possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him: and though the possessor should have purchased the subject for a price bona fide, still the owner must have it restored to him. . . .

The circumstances in which the duty to make restitution arises are set out in the works of the institutional writers. These comprise the restoration of lost property: pledges; property recovered from thieves or enemies; things which have been given for a purpose which has failed; and payments made in error.

When things have been stolen—except in the case of money and negotiable instruments—a vitium reale taints them, and the true owner has an action to recover them, even against persons taking

6 Ibid. pp. 95–96.
8 III, 1, 10.
9 See also Stair I, 7, 2 et seq.; Bankton I, 8, 21; Bell's Principles, § 526 et seq.
10 See refs. in previous note.
11 Discussed generally, p. 463 et seq., ante.
them in good faith and for value. There is no doctrine of market overt in Scottish law. The true owner's right of vindication of the thing itself (rei vindicatio) is a right in rem, but in addition the person in possession of another's goods is bound by the obligation of restitution. This is a jus in personam. Accordingly, when one who had possessed stolen goods later parted with them in good faith, he is free of the duty of restitution; though he may be liable in recompense for any profit he may have made—as on resale—or if he relinquished possession mala fide. If the property of another is destroyed as a separate substance—as where one man mixes his soda water with another's whisky—different considerations arise and the maker of the new species is liable to that other on a personal claim for the value of the property he has used. The bona fide user of the property of another is not liable to restore the fruits; but a person who has fraudulently rid himself of property which he would have been bound to restore is liable, not only for the value of the thing itself, but also for the fruits (pro possessor habetur qui dolo desit possidere). In cases where property has been stolen, clearly the first person bound to make restitution is the thief, and, even when he has parted with the stolen goods, he will still be liable on personal claims in delict and also on the principle of restitution.

Goods which have been sold or pledged by persons with limited title may also be vindicated by the owner. Where a motor-lorry was hired out on a hire-purchase agreement, and the hirer handed it over to a firm of engineers for repairs but failed to pay for these repairs, it was held that the firm could not refuse delivery to the owners by asserting a lien for payment: Lamonby v. Foulds.

12 Morrison v. Robertson, 1908 S.C. 332; but see infra, Stair 1, 7, 11.
13 Though the vitium reale does not attach to goods purchased in market overt out of Scotland, and brought to this country. This depends upon the principles of conflict of laws: Todd v. Armour (1882) 9 R. 901. By like reasoning it should follow that if property stolen in Scotland is taken to England and sold in market overt, the vitium reale should continue to attach or at least would revive if the goods ever returned to Scotland.
14 Stair 1, 7, 2.
15 See post, p. 627.
16 Scot v. Low (1704) Mor. 9123; Walker v. Spence & Carrae (1765) Mor. 12802. Stair, supra, holds that if a man pays off his debts by using another's property or makes a present with it—if he would have made the gift, whether the property of the other had come into his hands or not—he is lucratus and therefore bound to make recompense.
17 See discussion of specificatio, p. 537, supra; also International Banking Corp. v. Ferguson, Shaw & Sons, 1910 S.C. 182.
19 A statutory exception is made by the Factors Acts, 1889-1890, under which a mercantile agent in possession of goods or the title thereto, with the consent of the true owner, has an ostensible right to sell or pledge them; and in some cases personal bar might be pleaded against an owner who had misled the party taking property in good faith from a person with limited title. See Lamonby v. Foulds, 1928 S.C. 89; see also Mitchell v. Hayes & Sons (1894) 21 R. 600; Kolbin & Sons v. Kinnear & Co., 1931 S.C.(H.L.) 128.
20 Supra, note 19.
The obligation of restitution also extends to property or money which has been delivered by mistake or—on the principle causa data causa non secuta—held on a consideration which has failed, such as things given in contemplation of a marriage which does not take place.21 The obligation of restitution arises generally on reduction of contract. "Repetition" is a special aspect of the obligation of restitution, and the general rule concerning it is that whatever has been delivered or paid under an erroneous conception of duty or obligation, or for a consideration which has failed, may be recovered. The principle does not apply, however, when the consideration has been illegal or immoral. The Roman law terms 22 condictio causa data, causa non secuta and condictio indebiti are commonly used in Scots law to denote the basis of a claim to repetition. Thus when payment has been made in error of a debt which has been discharged, or overpayment is made on an account, or, in some cases, even under mistake in law,23 equity requires that, on the basis of the condictio indebiti, the party out of pocket should be reimbursed.24 Since, however, the ground of action is equitable, it will not be sustained unless retention of the money would be inequitable, and a moral or natural consideration for the payment may be shown by the defender.25

Where there is a failure of consideration, as on frustration or reduction of contract, the law of Scotland applies the principle of restitution to adjust the position of the parties in accordance with equitable principles. Money paid for a consideration which has failed may be recovered, subject to deduction in respect of any outlays made or expenses actually incurred by the recipient. Thus in the leading case Cantiere San Rocco v. Clyde Shipbuilding Co.,26 it was decided that, when a contract, which was not illegal when entered into, was subsequently frustrated without the fault of either party, money paid in advance might be recovered. A Scottish firm had undertaken to build marine engines for an Austrian firm, and an instalment of the price had, in accordance with the provisions of the contract, been paid on signature. Before work on the engines had begun, war with Austria was declared; the Austrian firm, in consequence, became

21 Erskine III, 1, 10; Bell's Principles, § 530.
22 For the remedies available in Roman law and their later development see refs. notes 3, 5 and 7, supra.
25 Erskine III, 3, 54; Bell's Principles, § 532. Yet payment by a cautioner in ignorance of the septennial prescription of cautionary obligations was held recoverable: Carrick v. Carse (1778) Mor. 2931.
26 1923 S.C.(H.L.) 105; in Court of Session, 1922 S.C. 723.
alien enemies, and the contract was frustrated. In an action raised after the restoration of peace, concluding for repayment of the instalment paid, the House of Lords held that the principle expressed in the phrase *causa data causa non secuta* applied to any case where the performance promised for the consideration was not rendered, whatever the causes of that failure might be. Moreover, their Lordships expressly approved Lord President Inglis' explanation of the law in *Watson v. Shankland* 27: "There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contracts to build me a house, and stipulates that I shall advance him a certain portion of the price before he begins to bring his materials to the ground or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been." 28

**Recompense**

Stair spoke of "recompense of what we are profited by the damage of others without their purpose to gift." 29 It is clearly founded on equity. 30 The principle of recompense is defined in Bell's *Principles* 31 as follows: "Where one has gained by the lawful act of

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27 (1871) 10 M. 142 at p. 152.
28 The Lord President is considering the case of a builder who fails in his contract. If the contract were frustrated, it is considered that the builder could recover his outlays and expenses.
29 1, 8, 3.
30 Buchanan v. Stewart (1874) 2 R. 78; Stewart v. Steuart (1878) 6 R. 145.
31 § 538; see also Erskine III, 1, 10.
another, done without any intention of donation, he is bound to re-
compense or indemnify that other to the extent of the gain.” This is,
however, not an adequate definition, as has been pointed out by Lord
President Dunedin in Edinburgh Tramways v. Courtney.32 Not every
consequential benefit which accrues to A by reason of B’s efforts or
misfortunes will entitle B to a claim against A in recompense.33 Lord
Dunedin considered it impossible to frame a definition of recompense
which would in terms at once include all classes of cases which fall
within the doctrine and at the same time successfully exclude those
which do not. The Lord President instanced a case which, though it
would fall within the terms of Bell’s definition, clearly would not
ground an action for recompense.

One man heats his house, and his neighbour gets a great deal of benefit. It
is absurd to suppose that the person who has heated his house can go to his
neighbour and say, “Give me so much for my coal bill, because you have
been warmed by what I have done, and I did not intend to give you a
present of it.” . . . That being so, the truth is that it is an equitable
doctrine, and the basis of the equitable doctrine, I think, lies upon the old
brocard nemo debet locupletari ex aliena jactura. I notice that that is the
basis of Pothier’s definition of it, his definition being really practically no
more than a translation of the brocard. The result is, of course, that each
case must be judged of by its own circumstances . . . and I think that
one mark or note is that the person who claims recompense must have
lost something. That is contained in the idea of jactura.

Except in its application to special relationships such as cautionary,
joint debtors and common ownership, the principle of recompense
operates only where there is an intimate relation between gain and
loss.34 Not every connection between gain and loss will, however,
suffice. In Newton v. Newton 35 where the pursuer had carried out
improvements on a house in the belief that it was his, but failed to
prove by writ or oath that the defender held it in trust for him, a claim
in recompense for the improvements was permitted in so far as the
defender was lucratus. Another case is where a person has done work
under a contract, but has so far departed from the contractual terms
that he has no claim under the contract at all. In such a case, if it can
be shown that the other party to the contract—the defender in the
action for recompense—has actually benefited by the work or services
of the pursuer, the defender may be liable to remunerate the pursuer
not for all his expenditure—but to the extent of the defender’s benefit,
quantum lucratus.36 If, however, there is a contract in force, and the

33 Kames, Equity, 4th ed., p. 101 et seq.
34 Stewart v. Steuart (1878) 6 R. 145, per L. P. Inglis at p. 149; Exchange Telegraph
35 1925 S.C. 715.
36 Ramsay & Son v. Brand (1898) 25 R. 1212; Graham & Co. v. United Turkey Red
Co., 1922 S.C. 533.
contractor incurs expenditure on the work which he had not foreseen when the contract was made—and the contract cannot be reduced—he cannot waive the contract and claim additional remuneration on the principle of recompense.  

When goods or money have been supplied under an ostensible contract which the party benefiting can repudiate on grounds of incapacity—as if a transaction were ultra vires—a claim against him in recompense may yet be competent. If an ostensible contract is made null (but not illegal) by statute, then payment for goods delivered in pursuance of such null agreement may be recovered under the principle of recompense.

A further example of how claims in recompense may succeed when a contractual obligation fails is the case of Duncan v. Motherwell Bridge & Engineering Co. An electric welder was employed to work on oil tanks on the Persian Gulf, and the company undertook to pay his fare back to Scotland on completion of the work. In fact, he sought repatriation to Scotland after a year, and the company paid his return fare and also certain debts incurred by him in Kuwait. Subsequently, the whole contract was held illegal and void ab initio because of an infringement of the Truck Acts. In subsequent proceedings brought by the electric welder, the company successfully counterclaimed on grounds of recompense for the cost of the return fare. As the Lord Justice-Clerk (Thomson) observed this was not, as the Lord Ordinary had thought, a claim for breach of contract. “Quite apart from any question of contract or breach of contract the defenders without intending donation provided certain services for the pursuer.” It may be observed that, though the contract in this case, as in Jamieson v. Watt’s Trs., was illegal, the claim in recompense in Duncan’s case was based only on collateral transaction. In Jamieson’s case an effort was made to circumvent the defence that the contract was illegal (pactum illicitum) by claiming in recompense for work done in excess of that licensed under the Defence Regulations. The attempt failed, since the pursuer could not establish his claim, except by showing—which the law would not permit—that he had carried out work in breach of statute.

The essential elements in the ordinary claim for recompense are loss (factura) by the pursuer and gain (lucrum) by the defender. A man does not suffer where he spends money for a purpose which is in fact attained; because the purpose attained is primarily for the benefit of

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38 Magistrates of Stonehaven v. Kincardine C.C., 1939 S.C. 760; Stair I, 8, 6.
40 1952 S.C. 131.
41 p. 47.
the man who spent the money.\textsuperscript{43} The facts in \textit{Edinburgh Tramways Co. v. Courtney}\textsuperscript{44} were that the tramway company had let the right of advertising on their cars to an advertising contractor, under a contract by which the latter undertook to supply the necessary fittings for holding the advertisements. New cars were, however, constructed for the tramway company, which, as constructed, were already supplied with the fittings required for holding the advertisements—and of these the advertising contractors made use. The fittings were also of use to the tramway company in that they served as “decent boards” (presumably screening the legs of passengers from the public gaze—the date of this case being 1909) and provided additional safety for passengers. The tramway company sought to recover from the advertising contractors a sum in respect of recompense for the use of these fittings in addition to the agreed rent. They failed, because the tramway company had not in fact lost anything. A man cannot (cases of common ownership excepted)\textsuperscript{46} claim recompense for something he has done upon his own property. In this case, not only were the boards useful in themselves to the tramway company, but the Board of Trade would not have allowed the cars to run unless they had been provided with such boards.

On similar grounds a person holding a property on a limited right, such as a tenant or liferenter, who makes an improvement on the property, is generally presumed to do so for his or her own benefit.\textsuperscript{46} Where, however, a liferenter laid out expenditure on a reasonable expectation of repayment, he could recover,\textsuperscript{47} and likewise, a heritable creditor in possession.\textsuperscript{48}

\textit{Lucrum} comprehends every real benefit, prevention of loss as well as positive increase of fortune. Where a work is done that prevents loss, as by fortifying a river bank against the river’s encroachments, the subject is thereby improved and made of greater value.\textsuperscript{49} A man is not \textit{lucratus} because he has recovered a just debt. Hence a creditor receiving payment is under no liability to the person from whom the debtor may have borrowed money.\textsuperscript{50}

\textsuperscript{44} 1909 S.C. 99.
\textsuperscript{46} An exception to the rule that the party claiming recompense must show loss is found in certain cases of common ownership or interest. Thus, if one proprietor expends money in a way beneficial to the common property, he may have a claim to recompense from his co-owners, although his expenditure has met with adequate returns. The others have no right to take advantage gratuitously: Kames, \textit{Equity}, 4th ed., p. 124.
\textsuperscript{47} Wallace v. Braid (1900) 2 F. 754.
\textsuperscript{48} Morgan v. Morgan’s Judicial Factor, 1922 S.L.T. 247.
\textsuperscript{49} Nelson v. Gordon (1874) 1 R. 1093.
\textsuperscript{50} Thomson v. Clydesdale Bank (1893) 20 R.(H.L.) 59; cf. Clydesdale Bank v. Paul (1877) 4 R. 626, where a principal was liable to the bank on the grounds that he was \textit{lucratus} at the bank’s expense when his agent had fraudulently involved him in
There is no doctrine in Scots law that everyone who has profited by work done under a contract is liable for the work so done. Thus, if tradesmen effect repairs on a house over which a bond has been granted, they have no claim for recom pense against the heritable creditor, although their operations may have increased the value of the house and so improved the value of his securities. Moreover, when an accountant undertook to carry out the amalgamation of two companies for a contract price, it was held that those who had employed him were under no liability to a law agent, who, on the accountant's instructions, had drawn up the necessary agreement.

Recompense and Implied Contract

The principle of recom pense arises ex lege in cases where either there is no contract between the parties, or where work has been done, ostensibly in pursuance of a contract, in circumstances which preclude any claim ex contractu. Accordingly, an action based on recom pense must be distinguished from an action based on an implied contract. When work has been done in circumstances which indicate that payment for that work is expected, and such work has been tacitly accepted, a contract will be implied. The measure of payment is quantum meruit. Quantum meruit is assessed by reference to the current market value of the services, and it is this amount which the party benefiting by implication has agreed to pay. Such a claim cannot properly be described as recom pense. In recom pense there is no implied agreement, and the extent of the claim is not the market value of the services but quantum lucratus, that is the extent to which the recipient has actually benefited. This will also, of course, often be assessed by reference to current market value, but the distinction may be important. Where it is doubtful whether work which has proved beneficial should be treated as the proper subject of a claim on recom pense or on implied contract, it is wise to plead in the alternative.

Negotiorum Gestio

"Negotiorum gestio" is the management of the affairs of one who is absent or incapacitated from attending to his affairs spontaneously undertaken without his knowledge, and on the presumption that he would, if aware of the circumstances, have given a mandate for such interference.
The intervention may be on behalf of a pupil, minor, absentee, or one who is ill, insane or in prison. Stair treats this obligation as an aspect of recompense, but the other institutional writers treat it as a separate category.\(^{57}\) Stair\(^ {58}\) and Kames both quote Ulpian\(^ {59}\) and the Scottish doctrine was clearly based on Roman law. The basis of this equitable obligation is generally recognised to be implied mandate\(^ {60}\); and thus, like mandate, implies the duties to account, to carry through the transaction to its conclusion, and to exercise the care and diligence which a prudent man would take in relation to his own property. Thus, if the gestor has received goods in the course of a mercantile transaction, he must act as a reasonably prudent business man would have acted in the circumstances. It is conceived, however, that if, in an emergency, a man lacking in commercial experience—such as a farmer or a philosopher—had to act, the most that the law could expect of him would be the exercise of that care which he would take of his own affairs. The standards of \textit{culpa lata, levis} and \textit{levissima} have now been discarded.\(^ {61}\) In \textit{Kolbin \& Sons v. Kinnear \& Co.}\(^ {62}\) the defenders had lawfully acted as \textit{negotiorum gestores} in shipping flax and tow from Archangel, which was about to be evacuated by the Allies. They were held liable, however, for handing over the goods in Britain, without proper safeguards, to a person whom they believed erroneously to be an agent for the pursuers.

The claim in \textit{negotiorum gestio} is wider than in recompense, since the gestor may claim—if he acted in emergency—for the reimbursement of his services, even though they did not ultimately prove beneficial. Thus he may claim for repairs to a house which subsequently is accidentally destroyed, or for expenses incurred in curing a sick servant, though the servant ultimately dies.\(^ {63}\)

The full scope of \textit{negotiorum gestio} in Scots law has not been fully explored, but in principle it may be regarded as extending to cover any situation in which one man acts in the interests of another in circumstances where that other cannot give effective consent—as if a surgeon operates upon a patient incapacitated through illness or injury from giving effective consent.


\(^{58}\) I, 8, 3.

\(^{59}\) D. 3, 5, 10.

\(^{60}\) See authorities cited; also \textit{S.M.T. Sales and Service Co. v. Motor and General Finance Co.}, supra, note 50.


\(^{62}\) \textit{Supra}, note 51.

\(^{63}\) Ulpian, D. 3, 5, 10; Stair I, 8, 3; Kames, \textit{Equity}, 4th ed., p. 131 \textit{et seq.}
Note on Terminology

Though the actual term quasi delictum was not used in Roman law itself, obligationes quae quasi ex maleficio (ex delicto) nascuntur were recognised and actions were given in four cases. The judge who "makes the case his own" (si judex item suam fecerit) was liable on that account; shipowners, innkeepers and stablers were liable for damage or theft; an actio popularis was given against the occupier of a building from which things were suspended (res suspensae) to the danger of passers-by; and a householder was held liable for damage to property or to a passer-by caused by something thrown or poured from a dwelling (res dejectae vel effusae). Though the case of the judge long caused difficulty to the commentators, until the nature of the judicial function in the meaning of the original text was realised, it is now recognised that the common characteristic of these quasi delicta, as they came to be called first by the Bolognese Glossators, was that they were cases of strict or absolute liability. Unlike the delicta they did not depend upon proof of dolus or culpa. Nevertheless, the category of quasi delicta long perplexed the commentators—some of whom (including Mackenzie and Bankton in Scotland) considered that it was appropriate for wrongs which were not so grave as to merit the sanctions of the criminal law. Another approach, associated with the names of Heineccius and Pothier, was to identify "quasi-delict" with "negligence"—as contrasted with delicts where intention had to be proved. This classification was not only useless, since the measure of damages is in general the same, but also ignored the fact that Aquilian liability for culpa, the great mother of actions in all Civilian systems—including Scotland—implied delict and not quasi-delict.

Stair, like Grotius, recognised that culpa needed no subdivision into "negligence" and "intention" in the general action for damages...
—though in the case of delicts involving, for example, insult, intention may be an essential element. However, since the time of Bell, Pothier’s unhelpful distinction between “delict” and “quasi-delict” has led to the frequent and incorrect use in Scotland of “quasi-delict” to signify a negligent wrong. It is true that Heineccius 72 preceded Pothier in this classification, which is also reflected in Forbes, 73 but the author concludes that it was the great influence of Pothier upon Bell, and of Bell upon Hume, and of both these writers on the judiciary, which has caused false terminological coinage to circulate in Scotland and to lead judges to apply the term “quasi-delict” to cases where liability is now imposed as though the defender had been guilty of culpa or fault.

In South African law, which shared with Scotland the strong influence of Roman-Dutch law, the correct use of the terms “delict” and “quasi-delict” is clearly preserved. Lee rightly comments 74 “The French law has given a strange turn to the term quasi-delit by making it mean ‘an unlawful act which causes damage to another without the intention of hurting him,’ while delit imports intention. This distinction, which seems to have originated with Pothier, is, of course, wholly foreign to Roman law.” The Roman use of the term “quasi-delict” would not only be appropriate but also most useful in modern Scots law to designate cases of strict or absolute liability. Magna est veritas et praevalebit. Nevertheless, unless judicial authority is interposed to restore the proper meaning of the term “quasi-delict” in Scotland (which would have the blessing of Stair), it is unlikely that truth will prevail in the author’s lifetime. Not only has the expression “quasi-delict” been abused for a considerable time, but Pothier’s error (and who is the author to cast the first stone?) has been perpetuated in codified systems based on the Code Napoléon. 75 Since English lawyers evolved a “tort of negligence” quite recently, it may be convenient for some to equiparate mentally the meaning of that tort with quasi-delict. This, however, for a Scottish lawyer, is to repudiate the whole tradition of general redress for culpa based on the Aquilian action and embracing both intention and negligence. The late Lord Justice-Clerk (Lord Thomson) who considered that aberrations in the use of the term “actio injuriarum” could and should be corrected judicially, was more dubious as to whether the abuse of the term “quasi-delict” could be corrected at this stage. As a sound Civilian, this grieved him; but he was a sound judge, not only of law, but of lawyers too. Ob

72 Elementa Juris Civilis, ss. 1032–1138 ; 1112.
73 See Stein, op. cit., note 65 at p. 372.
74 Elements of Roman Law, 4th ed., p. 419.
75 § 1382.
majorem cautelam, therefore, the author has designated obligations ex lege arising quasi ex delicto as "Strict or Absolute Liability without Personal Fault (Quasi-Delict?)." One day the mark of interrogation may be superfluous.

Categories of Strict Liability

While the general principle in Scottish law is undoubtedly that there is "no liability without fault," certain exceptions to the rule are clearly recognised, while other cases are debatable.

Edictal Liability

Innkeepers, stable keepers and common carriers incur strict liability under the Praetorian Edict nautae, caupones, stabularii,76 which both Stair77 and Erskine78 specifically recognise as creating obligations ex lege.79 "Hence also is that famous edict of the Praetor in the Roman law, Nautae, caupones, stabularii, quod cuiusque salvum fore receperint, nisi restituent, in eos judicium dabo; . . . but these obligations are rather introduced by statutory law for common utility, than by natural obligation." (This aspect of edictal liability founded on receptum is discussed in Digest 4, 9, 1. It must be distinguished from the quasi-delictual liability for theft attaching to nautae, caupones et stabularii under Digest 47, 5, 1.) At common law80 the innkeeper and livery stable keeper are liable for loss of or damage to property brought onto their premises by travellers, unless they can prove that the loss or damage was caused by the negligence of the owner, or can be attributed to act of the Queen's enemies or to damnum fatale (act of God). It is irrelevant for a defender to prove that the loss or damage was caused by theft or other wrongful act of a third party. Common carriers are subject to a similar duty of care. Though a garage proprietor would seem to be the modern counterpart of the stable keeper, the authorities—though not conclusive—would seem to exclude the former from the scope of the Edict.81 In Burns v. Royal Hotel (St. Andrews), Ltd.,82 the First Division disapproved dicta of Lord Cooper in an earlier case83 which seemed to imply that a defender might elide liability for fire if he could prove that he had taken reasonable care. Lord President Clyde

76 D. 4, 9, 1; for translation and comment on the edict's relevance for Scots law see J. Mackintosh, The Edict Nautae, Caupones, Stabularii. The principal review of authorities is in Mustard v. Paterson, 1923 S.C. 142.
77 I, 9, 5.
78 III, 1, 28.
79 Stair, ibid.
80 See Mustard v. Paterson, sup. cit., note 76.
82 Sup. cit.
83 Sinclair v. Juner, sup. cit. at p. 44.
observed. If the defenders are successfully to invoke the exception to their liability based on *damnum fatale*, the onus is on them to show that the fire started by pure accident. . . . In the ordinary case I should be prepared to hold that the defenders do not discharge this onus unless they prove in evidence that the cause of the fire was not their negligence." *Damnum fatale* has been defined as an accident "due to natural causes, directly and exclusively without human intervention, which could not reasonably have been prevented by any amount of foresight and pains and care reasonably to be expected."

The strict liability of innkeepers and common carriers has, however, been modified by statute. Now by the Hotel Proprietors Act, 1956, certain hotels are to be deemed to be inns while others are expressly excluded. Edictal liability attaches only to such establishments as offer food, drink and sleeping accommodation for travellers generally who appear able and willing to pay a reasonable sum for the facilities offered and are in a fit state to be received. Establishments which only offer food and drink are not deemed to be inns. Without prejudice to any other obligations by which hotel proprietors or innkeepers within the meaning of the Act may be bound—as under contract or through *culpa*—strict liability is only incurred towards a traveller who has engaged sleeping accommodation, and does not extend to any vehicle or property left therein nor to any horse or other animal. Moreover, innkeepers are not in general liable for loss or damage to the property of any one guest for any greater sum than £50 in respect of any one article or for a greater sum than £100 in aggregate. These limits do not apply, however, when property has been stolen, lost or damaged through the neglect, fault or wilful act of the proprietor or his servant. Nor again is the proprietor protected where property has been expressly deposited for safe custody; or where it has been offered for safe custody; or when the guest has desired to offer it but has been prevented by default of the proprietor from doing so. This statutory protection can only be claimed if, at the time the guest's property was brought to the hotel, a copy of the notice set forth in the Schedule to the Act has been exhibited conspicuously at the reception desk or at the main entrance to the hotel.

86 4 & 5 Eliz. 2, c. 62.
87 s. 1 (1), (3).
88 s. 2 (1).
89 s. 2 (3).
A “common carrier” is one who undertakes for hire to transport the goods of all who choose to employ him in the business which he professes to ply.\(^{92}\) The detail of the law regarding carriers is to be dealt with elsewhere.\(^ {93}\) It may, however, be noted that the strict liability of common carriers is restricted by the Carrier’s Act, 1830.\(^ {94}\) Except where loss or damage has resulted from the felonious act of his servant, this Act excludes the carrier’s liability for certain specified goods unless their nature and value have been specified when they have been delivered to the carrier and an increased charge has been paid.

**Actio de Effusis vel Dejectis**

The *actio de effusis vel dejectis* was, as has been observed, one of the *obligationes quae quasi ex maleficio nascentur* known to Roman law. It is a matter of doubt as to whether it may be regarded as received or receivable into Scots law as part of the Civilian heritage. Unfortunately when the question was mooted recently in the Sheriff Court, though the judge\(^ {95}\) was one of the most learned and experienced to have sat on the Shrieval Bench, his attention was not drawn to all the relevant authorities, and he rejected the praetorian action as no part of Scots law.

It is remarkable how often the most fascinating questions of law arise in the course of small debt actions. In *Gray v. Dunlop*\(^ {96}\) the pursuer averred that, as his son was walking past the defender’s common lodging house, someone emptied over him a vessel containing urine from an upper window. The perpetrator of this offensive and insanitary frolic could not be identified, and accordingly the defender was sued *qua* registered keeper and occupier of the premises; and the second ground of the pursuer's claim was based on absolute liability under the *actio de effusis vel dejectis*. He relied upon Bankton I, 4, 31, which gave some support to his argument but did not invoke the more pertinent authority of Kames and Hume.\(^ {97}\) Professor Stein, commenting on this case,\(^ {98}\) has provided ample argument for any pursuer who may wish to reopen the general question of strict liability under the *actio*; and the lawyers of Scotland’s classical age would support him in Elysium. To quote the

\(^{92}\) Barr v. Caledonian Ry. (1890) 18 R. 139.

\(^{93}\) By Professor Gow in his complementary volume dealing with mercantile and industrial law.

\(^{94}\) 11 Geo. 4 & 1 Will. 4, c. 68.


\(^{96}\) Supra.


\(^{98}\) "The *Actio de Effusis vel Dejectis* and the Concept of Quasi-Delict in Scots Law" (1955) 1 & C.L. Quart. 356.
learned author,99 "In the middle of the eighteenth century, Scots law was still in a formative period. From contemporary accounts of Edinburgh life, it is clear the situation envisaged by the action was an everyday occurrence. In A Tour Through Great Britain, for example, we read 'For after Ten at Night, you run a great Risque, if you walk the streets, of having chamber-pots of Ordure thrown upon your Head; and it sounds very oddly in the Ears of a Stranger, to hear all Passers-by cry out, as loud as to be heard to the uppermost Stories of the Houses, which are generally six or seven high in the Front of the High Street, Hoad yare Hoand.' After 10 p.m. it was the practice to pour waste matter into the street . . . But what if the hour were anticipated and the refuse poured out by day? Contemporary Roman-Dutch law, with which mid-eighteenth century Scots lawyers were generally familiar, gave an action in such circumstances."

It may be hoped that the exact species facti of Gray v. Dunlop will not often be repeated, and that the "flowers o' Edinburgh" will not again taint the evening air. Nevertheless objects or fluids may again be cast or poured from buildings through carelessness or malice; and there may be cause to recall that the Athens of the North is juristically an heir of Rome.

Vicarious Liability of Employers

Though the underlying principle has perhaps not been settled conclusively, it would seem that another example of strict liability is to be found in the vicarious liability of an employer for the delicts of his employees which cause harm to others. An employer is, of course, liable in any event for breach of a personal duty, even if he seeks to discharge it through the means of a servant. Such liability rests on the ordinary principle of culpa. Vicarious liability in the sense of strict liability arises, however, in those cases where there has been no personal fault whatever on the part of the employer. An employer is made liable for all delicts of his servants committed in the course of their employment. The position seems to be as stated by Lord Reid1: "It is a rule of law that an employer, though guilty of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment. The maxims respondeat superior and qui facit per alium facit per se are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it."

99 Ibid. at p. 359.

Slander

Until the Defamation Act, 1952, became law it could be argued with some confidence that liability for defamation in Scotland rested upon the principle of *culpa* where patrimonial loss was involved and on *animus injuriandi* where solatium was demanded for insult. In such cases as *Morrison v. Ritchie* where the Scotsman had published a false announcement of the birth of twins to a very recently married couple, there was an element of negligence; and the full rigour of English law, exemplified by cases such as *Hulton v. Jones*, *Cassidy v. Daily Mirror Newspapers, Ltd.*, and *Newstead v. London Express Newspapers, Ltd.*, was not necessarily part of Scots law. Matters are less clear since the 1952 Act, because it seems to have been tacitly assumed that the Scottish and English approaches to defamation were substantially similar so far as unintentional defamation was concerned. Section 4 of the Act now provides that a person who has published words alleged to be defamatory of another may, if he claims that the words were published “innocently,” make an “offer of amends” which shall be available as a defence in certain circumstances. This defence is not, however, open to a publisher even if he had no intention to defame, even if the words were not *ex facie* defamatory, and even though he had exercised all reasonable care—unless he proves that the author wrote the words complained of without malice. It may be thought that in this situation liability arises *ex lege* as in the case of an employer whose servant commits some delict in the course of his employment.

Statutory Duty

Sheriff Middleton has observed in a penetrating article “Strict Liability can be reconciled with the principle of no liability without fault only if fault, or *culpa*, and negligence can be distinguished from one another.” In fact, of course, negligence is merely one aspect of *culpa* or fault, and it is misleading to identify all breaches of statutory duty with negligence. It is true, moreover, that, whereas in the ordinary action based on *culpa* the standard of care demanded of the defendant is that of the reasonable man, statute may prescribe a more exacting standard. Lord President Cooper considered that “‘Statutory negligence’ is nonetheless negligence. It infers that breach of duty which underlies every common law action for *culpa*. In such cases the right to recover damages is not created by the

2 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66.
3 (1902) 4 F. 645.
5 [1929] 2 K.B. 331.
statute but by the common law, the function of the statute being merely evidential, in prescribing certain minima of precautions the non-observance of which per se infers negligence, and renders it unnecessary to have recourse to the standard of the reasonable man, or the custom of good employers in like circumstances." The tendency of the courts has been not to construe statutory duties as absolute, and this fact, taken with the tendency to subsume all liability under categories of nominate torts, in England encouraged the House of Lords to describe breach of statutory duty as "negligence" in the leading Scottish case of McMullan v. Lochgelly Iron & Coal Co. 9 (In English law a "tort of negligence" has developed quite recently, but is not identical with culpa in Scots law.) In some cases, however, a duty imposed by statute is absolute in its terms, and it is both inaccurate and misleading to describe failure to fulfil that duty as "negligence." What the courts really imply is that the defender is liable as if he had been negligent. To quote Sheriff Middleton again, 10 "The phrase 'statutory negligence' is perhaps apt to mislead. In the first place, the 'right to recover damages is not created by the statute but by the common law.' . . . Even the evidentiary function of the statute is an invention of the courts, who have developed the rule . . . mainly in order to mitigate what they felt to be the unfair consequences of the doctrine of common employment . . . Secondly, negligence which is inferred per se by the fact of breach of a statutory provision is an imputed, or fictitious, negligence. What the rule does is to treat as negligence something which is not necessarily negligence at all.

Viewing the problem as English lawyers, the learned editors of Clerk & Lindsell on Torts have written 11: "Whether the breach of a duty imposed by statute is redressible by an action for damages depends on the construction of the particular statute, though for this purpose several (sometimes conflicting) presumptions have been applied by the courts. Where it is held that a statutory duty creates a tort the emphasis on duty has led to comparisons with negligence which are not really justified, since as regards defences the position differs considerably . . . Consequently, the whole subject is one of specific tort and represents only a kind of general exception to any principle of liability based upon intention or negligence." And later the same editors state 12: "Although in Lochgelly Iron, etc., Co. v. McMullan 13 the House of Lords held that an action for breach of statutory duty could properly be described as an action for

12 Ibid., s. 1409.
13 Sup. cit., note 9.
negligence, Lord Wright has since made it clear that the action is not for 'negligence in the strict or ordinary sense,' 14 but 'belongs to the category often described as that of cases of strict or absolute liability.'” 15

Scots law is not concerned with the categories of nominate torts such as "negligence" and has no need to classify breaches of statutory duty as "negligence." Breaches of such duties create obligations ex lege. Thus liability in such cases as Galashiel Gas Co. v. Millar 16 are truly quasi ex delicto and do not depend on culpa at all—the duty imposed by the Factories Act, 1937,17 s. 22 (1), being in the terms "every hoist or lift shall be . . . properly maintained." The obligation imposed was absolute so that any failure in the mechanism implied liability, though the failure could not be explained and was impossible to foresee.

Statute frequently imposes strict liability irrespective of culpa, but, since the precaution of insurance against such liability can be provided for—either by statutory obligation or as a normal industrial safeguard where a strict duty is clearly imposed—hardship need not result to the defender, nor is the basic theory of the law distorted. The Civil Aviation Act, 1949,18 ss. 40 and 43, may be given as an illustration of a situation where absolute liability is imposed and also the duty to insure.

In the atomic age it may be well to note that the Atomic Energy Authority Act, 1954,19 s. 5 (3), provides that it shall be the duty of the Authority to secure that no ionising radiation from anything on any premises occupied by them, or from any waste discharged by them, shall cause damage to person or property. This seems to impose an absolute obligation upon which an action could be brought by a pursuer injured through breach. Absolute liability is imposed on every producer or user of nuclear energy by the Nuclear Installations (Licensing and Insurance) Act, 1959,20 s. 4.

Nuisance

The considerations which weigh in determining whether a use of property constitutes a nuisance have already been discussed in the appropriate context of Property.21 There is, however, authority for the view that nuisance (though not identical with the English tort of that

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17 1 Edw. 8 & 1 Geo. 6, c. 67.
18 12, 13 & 14 Geo. 6, c. 67.
19 2 & 3 Eliz. 2, c. 32.
20 7 & 8 Eliz. 2, c. 46.
21 p. 531 et seq., ante.
name) may ground an action for damages.\textsuperscript{22} If it were recognised that \textit{reparation} for harm caused by use of property was based upon the principle of \textit{culpa}, then "nuisance"\textsuperscript{22a} could appropriately be eliminated from the law of Obligations. This would be a desirable solution, but \textit{ob majorem cautelam}, as the authorities stand, nuisance must perhaps be mentioned in the context of obligations, and clearly cannot be explained in terms of \textit{culpa}, but only as an obligation arising \textit{ex lege} on a balance of proprietary interests. Unlike English law, however, the conduct complained of must be of continuous or repeated nature.

\textit{Animals}

In general liability for damage caused by animals is determined in Scots law according to the principle of \textit{culpa}, though in the case of animals \textit{ferae naturae}—while absolute liability does not arise as in England—negligence is readily presumed. By statute, however, certain cases of damage caused by animals involved strict liability. By the Dogs Act, 1906,\textsuperscript{23} the owner of a dog is made liable for injury done by it to cattle, including horses, mules, asses, sheep, goats and swine, and it is not necessary for the person seeking damages to show a previous mischievous propensity in the dog or to show that the injury was attributable to neglect on the part of the owner. The Dogs (Amendment) Act, 1928,\textsuperscript{24} extended these provisions to cover poultry. Owners of animals are required by the Winter Herding Act, 1686,\textsuperscript{25} to herd them all the year round so that they may not destroy a neighbour's grass or planting, under penalty of a half-merk Scots for each animal trespassing besides payment for the actual damage done. A person in occupation of ground damaged by straying beasts may detain them in security of the penalty and expenses, but not of damages. It will be appreciated that the money penalty is illusory in modern conditions.

\textit{Liability for Dangerous Agencies Escaping from Land}

The rule in the English case of \textit{Rylands v. Fletcher}\textsuperscript{26} is to the effect that the person who for his own purposes—except for some "natural" purpose—brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is prima facie liable for all the damage which is the natural consequence of its escape. It may be observed that, if the principle of insurance in respect of damage resulting from \textit{opera manu- facta} or so-called "non natural use" of property is accepted in the law


\textsuperscript{22a} Because the category would be unnecessary.

\textsuperscript{23} 6 Edw. 7, c. 32.

\textsuperscript{24} 18 & 19 Geo. 5, c. 21.

\textsuperscript{25} Act 1686, c. 21 (c. 11).

\textsuperscript{26} (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
of Scotland under the designation of a leading case, that case should be—not *Rylands v. Fletcher*—but *Kerr v. Earl of Orkney*.

The short point of this latter case was that the defenders were held liable for damage to a neighbour's property which had resulted from the bursting of a dam—a *novum opus* erected by the pursuer—shortly after the work was completed. There are dicta of Lord Justice-Clerk Hope in that case which might warrant the view that he was laying down the doctrine of insurance, and there are like dicta in subsequent authorities.

To accept as directly applicable in Scotland the doctrine of *Rylands v. Fletcher*, as developed in the English courts, adds to the main difficulty of reconciling strict liability, except under statute, with a fundamental theory of reparation based on *culpa* a further difficulty—namely that the scope of so called “*Rylands v. Fletcher liability*,” if it is established in Scotland, would apparently not cover certain uses of land to which the doctrine has been extended in England. While in Scotland liability of a stringent nature has been imposed in respect of certain uses of heritable subjects which have resulted in damage to neighbouring property, the principle of *Kerr v. Earl of Orkney* has not, for example, been extended to benefit a pursuer injured by an electric shock while travelling in a tramway car. The English decisions which have brought within the scope of the principle of *Rylands v. Fletcher* cases of personal injury from a flagpole, or a chair o'plane, and damage caused by mischievous caravan-dwellers, have no counterparts in Scotland. It might therefore have been preferable that the principles of liability for “dangerous agencies” should have been and should in the future be adjusted without reference to the leading English case governing liability for such agencies in England—even though, in the end, in many instances the practical result may substantially not diverge in the two countries.

The question still seems open as to whether—even within the restricted field of “*opera manufacta*”—the strict principle of liability as enunciated in *Rylands v. Fletcher* applies in Scotland. Judges and writers are alike divided. Gloag and Henderson and their editors accept the application of the rule to cases where water, dangerous animals, or explosives have been brought onto land. Sheriff K. W. B.

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27 (1857) 20 D. 298.
28 e.g., *Chalmers v. Dixon* (1876) 3 R. 461 and *Caledonian Ry. v. Corporation of Greenock*, 1917 S.C.(H.L.) 56, which accepted that view of *Kerr's Case*.
30 *Reynolds v. Lanarkshire Tramways Co.*, supra.
33 *Att.-Gen. v. Corke* [1933] Ch. 89.
Middleton also regards the rule as a well-established exception to the rule that liability for reparation in Scotland must rest in *culpa*. Professor Rankine in his work on *Landownership* also laid down that there would be liability for an *opus manufactum* which interferes with the flow of water if the injured proprietor can show that but for the *opus* he would have been unharmed by a subsequent injurious flow of water. In a South African appeal to the Privy Council, *Eastern Telegraph Co. v. Cape Town Tramways*, Lord Robertson expressed the view that the doctrine of *Rylands v. Fletcher* was not inconsistent with Roman law and had been "fully accepted in Scotland." This view has, however, been strongly attacked with regard to South African law by Professor T. W. Price, and was obiter so far as Scottish law is concerned. Mr. Hector McKechnie writing in 1931 concluded:

The question of whether or not *Rylands v. Fletcher*, so far as based upon insurance and not upon negligence was good law in this country was raised in 1890. In no reported Scottish case was liability imposed on such a principle until the decision of the House of Lords in *Caledonian Ry. v. Greenock Corporation* in 1917. In 1917, however, the House of Lords interpreted Lord Justice-Clerk Hope as enunciating in *Kerr v. Earl of Orkney* that anyone who alters a watercourse does so at his peril, and will be liable without fault for any loss resulting. That any incautious dicta on this particular topic had not been regarded as laying down a general rule is manifest from Lord President Inglis' two clear subsequent statements that there is no further recognised basis of reparation in Scotland than *culpa*. It is submitted that the doctrine of *Rylands v. Fletcher*, if it obtains in Scotland at all, must be confined to exactly the *species facti* which were covered by the decision of the House of Lords in 1917.

On the other hand, it must be conceded that what was believed to be the rule in *Rylands v. Fletcher* has been apparently accepted by Scottish courts as applicable in other circumstances than escape of water. Thus in *Chalmers v. Dixon* the case was quoted with approval by Lord Justice-Clerk Moncreiff in a case where a bing took fire and caused injury by emission of noxious vapours; and

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55 62 Jur.Rev. 113–115; see also his admirable survey of "Liability without Fault" (1960) Jur.Rev. 72. This is a magazine of ammunition against the present author's thesis.
58 (1953) 70 S.A.L.J. 381.
60 *Supra*. This was another case of water escaping from a culvert by which a stream had been diverted.
61 *Supra*.
63 (1876) 3 R. 461.
64 At p. 464.
in Western Silver Fox Ranch, Ltd. v. Ross & Cromarty C.C.,45 Lord Patrick, in the Outer House, held the principle applicable to injury caused by blasting operations to breeding vixens in a silver fox ranch. In the latter case, however, Lord Patrick also expressly found against the defenders on grounds of negligence; and in Chalmers v. Dixon,46 as in other Scottish cases where Rylands v. Fletcher has been cited,47 it has apparently been assumed that the leading English case involved an element of negligence. There is justification for that interpretation, since there was an express finding that the contractors, though not the defendants personally, had been at fault.48 Glegg on Reparation, moreover,49 in the same track of thought concludes: “It is more in accordance with Scottish theory to hold that the standard of care (breach of which is negligence) is infinitely variable, and is higher in certain cases than in others. If this view is sound, Rylands v. Fletcher can be accepted as part of the law of Scotland only in so far as it is an authority for the very high degree of care imposed on a person who makes an unnatural use of heritable subjects and not for the doctrine of absolute liability or of insurance against loss however caused.”

In McLaughlan v. Craig,50 where the pursuer sought to invoke the principle of Rylands v. Fletcher after suffering damage from an explosion resulting from a leak of gas, he failed since he did not establish culpa on the part of the defenders. The First Division followed an earlier decision of the Second Division in Miller v. Addie,51 where the damage had also been caused by a domestic supply of gas, and the Lord President (Cooper) expressed52 strong views on the pursuer’s line of argument:

In view of the assistance which the pursuer sought to derive for his case against the first defenders from Rylands v. Fletcher and its derivatives, it may be permissible to utter yet another warning against the dangers to our native principles which attend the incautious use of English precedents bearing upon this highly controversial branch of law, the limitations of which have recently required to be pointedly stressed by the House of Lords in an English appeal.53 England has been groping for a characteristic compromise between that “coarse and impolitic idea”54 and the doctrine of culpa as the indispensable basis of delictual liability (see per Lord Macmillan and Lord Simonds in Read v. Lyons & Co.). In Scotland we have never felt the need to seek any such compromise, for the medieval

45 1940 S.C. 601.
46 Supra.
47 e.g., Miller v. Addie, 1934 S.C. 150, per Lord Justice-Clerk Aitchison, at p. 155.
48 See (1866) L.R. 1 Ex. at p. 269.
49 pp. 16 and 17.
50 1948 S.C. 599.
51 Supra.
52 pp. 610.
54 i.e., that a man acts at his peril.
2. **DELICT**

**CHAPTER 28**

**DEFINITION AND HISTORICAL BACKGROUND OF DELICT**

Reparation (reparatio injuriarum) is the term normally used to describe the civil obligation resulting from delict. In fact, however, "reparation" has a wider meaning and could be used appropriately to include all actions for damages, as in cases of breach of trust or contract. "Delict" implies a wrongful invasion of the rights, and in some cases the liberties of another. The term "quasi-delict" has been extensively employed to designate an unintended breach of duty. This abuse may one day be corrected judicially. The scope of delict comprises wrongs affecting person, liberty, reputation and property. This chapter of the law has increased greatly in importance during the past century and a half, as appears clearly from the brief treatment which it receives in the works of the institutional writers, including even the editions of Bell's *Principles* prepared by the author himself and Baron David Hume's *Lectures*.

In early Scottish law, as in other rudimentary systems, no very clear distinction was made between public and private wrongs, so that delict and crime were interrelated. As would be expected, the earliest forms of redress recognised are for injury to the person and for physical interference with property. "Assythment," that is, pecuniary redress for the killing or injuring of another, was originally intended to regulate the blood-feud, and was exigible in cases of homicide whenever the culprit escaped the gallows. If the culprit was in fact executed, the rancour of his victim's relatives was regarded as assuaged by vengeance rather than by the *solatium* of payment of assythment. Assythment survived as a remedy—though the injuries which it covered varied—until the nineteenth century; and though never expressly

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1 The expression "damages" was used in place of "reparation" during much of the nineteenth century; while the earlier institutional writers—Mackenzie, Stair, Bankton and Erskine—refer to "malefice" or "delinquency" instead of "delict." Strictly "reparation" refers to the pecuniary remedy, but the term is used loosely to signify the injuries reparable.

2 See ante, pp. 633-635.


abolished, was in practice superseded by the composite action of damages for personal injury, which was adapted at the end of the eighteenth century to afford redress to those injured by, or to the relatives of those killed by, the Aquilian fault of the defender, even though it were not of a criminal nature. The element of solatium in this action seems to have been grafted from the earlier redress of assythment and not from the actio injuriarum of Roman law. The remedy for wrongful interference with possession of property—the other principal concern of the early law—was in the remote past by the brief of "novel dissasine," but about 1400 it was replaced by the action for "spuilzie." The scope of "spuilzie," however, became in time limited to moveables, while "ejection" and "intrusion" became the appropriate remedies for one dispossessed of heritage. Spuilzie was defined by Stair as the taking away or inter-meddling with moveable goods without consent of the owner or due order of law. It was a remedy frequently invoked until the nineteenth century, when it passed into obsolescence. Other wrongs were recognised as social manners and economic organisation developed, and, being unrestricted by forms of action, the Scottish law of reparation had become fairly comprehensive by the time of Stair. In his Institutions he observed of "delinquences" that

These are either general, having no particular name or designation and such are pursued under the general name of damage and interest; which has as many branches and specialties as there can be valuable and repairable damage; besides those of a special name and nature which are chiefly these, assythment, extortion, circumvention, defraud of creditors, spuilzie, intrusion, ejection, molestation and so forth. He mentions twelve nominate species. Bankton expressly includes "injury" (that is injury to fame and reputation by words or deeds), and "damage" to goods—and adds other examples of named delicts, while mentioning that the law of reparation "hath as many branches as there are ways whereby our valuable and repairable interests may be damnified, whereof divers instances are given in the titles of the Digest ad leg. Aquil. It were tedious to particularise these." Some thirty nominate species have been identified by later writers, but many are obsolete or obsolescent, since the generality of

5 This action is commonly, but most misleadingly, described as an actio injuriarum—see p. 657, post.
6 Derived from the actio spolii of Canon law and the Roman interdict unde vi: see D. M. Walker, "The Development of Reparation" (1952) 64 Jur.Rev. 112 et seq.; pace Walker, Stair did in fact consider defamation as a "delinquency"—see Inst. I, 9, 3.
7 I, 9, 16.
8 I, 9, 6.
9 I, 10, 3.
10 I, 10, 41.
11 McKechnie, Encyclopaedia, Vol. 12, title Reparation, p. 494; "Delict and Quasi-Delict," Chap. 20, in Introduction to Scottish Legal History (Stair Soc.).
the right to reparation has rendered them redundant. The generality of the right to reparation rests, as the institutional writers appreciated, mainly upon the principle of *culpa* in the sense of Aquilian fault, but they also recognised the generality of redress for real or verbal injury based upon the Roman *actio injuriarum*—some of the aspects of which have acquired specific names and characteristics of their own—such as "slander." The general relevance of *animus injuriandi* as a basis for liability has been unduly neglected in modern practice.

Until the nineteenth century the great preponderance of actions for reparation of delict was in respect of deliberate wrongdoing. It may be observed that though Stair does not expressly recognise liability for negligence it would not have occurred to him—any more than to Grotius or the other leaders of the Natural Law School—to distinguish between intention and negligence in the broad principle of *culpa* (which comprised both). The *lex Aquilia* of Roman law later influenced the development of general doctrines of liability throughout Europe, and the Aquilian action applied to cases both of negligence and deliberate wrongdoing. The Natural lawyers of the seventeenth century declined to be limited by the various categories of the Roman law of delict, and asserted for the first time the principle long latent in the *jus commune* that a wrongful act or omission created an obligation to repair the loss caused thereby. Mackenzie, writing in the seventeenth century, mentions negligence incidentally, while Erskine states expressly that "Wrongs may arise not only from positive acts of trespass or injury, but from blameable omission or neglect of duty." Assessment of liability for "blameable omission or neglect of duty" in the nineteenth century became, and still remains, the main concern of the law of reparation. Relatively, redress for deliberate wrongdoing is much less frequently sought by litigants today. A distinction between delict and quasi-delict was stated by Bell. Delict he defines as "an offence committed with an injurious, fraudulent, or criminal purpose," and points out that the sole concern of civil jurisprudence with such offences is by enforcing the obligation of reparation. Of quasi-delict Bell says:

Gross negligence or imprudence, though it should bear no such character of fraud, malice or criminal purpose . . . is, as a ground for an action for damages, held as a delict to the effect of making the person guilty of the imprudence or negligence, liable to indemnify the person who suffers by the fault. These are by lawyers called quasi-delicts.


13 III, 1, 13, see also Bankton III, 4, 41.

14 "Trespass" is not used in a technical sense as in English law.


16 § 544.

17 § 553.
This dichotomy is, for practical purposes, of no value and proceeds on an erroneous interpretation of Roman law fathered by Heineccius and Pothier. The other Scottish institutional writers, recognising as they did the comprehensive principle of Aquilian fault, do not support Bell's distinction. It has, however, been perpetuated and sanctified by judicial dicta and authors of legal treatises, and is strongly entrenched through communis error.

The idea that negligence or *culpa* in its narrower sense implied moral wrongdoing—which is most obvious in gross cases—was useful in the transition stage when liability was first extended from deliberate wrongdoing to cases where there had been fault but no dole. In wrongs based on *culpa*, as in wrongs based on dole or malice, the more serious cases received the first recognition. In fact, however, it has long been recognised that the obligation to make reparation in Scottish law may in cases of strict liability involve no moral issue at all and in other cases may only do so in a very refined sense. *In lege Aquilia et levissima culpa venit.* In 1864, Guthrie Smith observes regarding dole and *culpa*:

In the one case, we have a wicked and depraved disposition; in the other a mere error of judgment. The one presupposes a bad heart, the other a mere want of thought. Dole belongs to morals, *culpa* to the intellect. . . . Responsibility for *culpa* rests on the one great principle, that in all well-regulated communities everyone must so govern his affairs and regulate his conduct as not to be productive of injury to his neighbour. This is a social obligation imposed on each, because essential to the safety of all. It is our duty to avail ourselves of the intelligence with which we have been endowed. . . . in all our doing to manifest that care and circumspection which may be reasonably expected of us in the circumstances.

This definition or description recognises that *culpa* need only imply moral wrongdoing in the limited sense of disregard of social duty.

The "duty" which Guthrie Smith discusses has, of course, nothing to do with the concept of "particular duty" which, for reasons which are obscure to the writer, was introduced into Scottish law at the very end of the nineteenth century and beginning of the twentieth century. If this concept originated, as the late Sir Percy Winfield has deduced, from confusion between contractual and delictual liability arising from specialties in the English common law, it seems particularly inappropriate that it should have been received to the extent it has into the

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18 W. A. Elliott and J. J. Gow in *The Juridical Review* have, however, revived the question whether *culpa* necessarily involves a moral factor. These articles may justly be described as important for the study of the contemporary Scottish law of reparation. See "Reparation and the English Tort of Negligence" (1952) 64 Jur.Rev. 1 and "Is Culpa Amoral?" (1953) 65 Jur.Rev. 17.
19 In his treatise *Reparation*, 1st ed., at p. 59 et seq.
Scottish law. Professor F. H. Lawson's persuasive *apologia* for the doctrine of particular duty \(^{21}\) leaves the present writer unconvinced that Scottish law would not have been better left as a "foreign system" untrammelled by this doctrine.\(^{22}\)


CHAPTER 29

BASIC PRINCIPLES OF LIABILITY

GENERALITY OF RIGHT TO REPARATION

There are three essential basic principles in the Scottish law of delict. First, the generality of the right of reparation for unlawful harm or loss (damnum) must be stressed. Secondly, the pursuer must establish fault on the part of the defender. Thirdly, there must be a causative link between the harm suffered and the fault of which the defender can be accused.

The elements of general right of reparation for unlawful harm and causation need not be elaborated at the present stage, and may be mentioned briefly. Patrimonial loss—that is damage by which the defender incurs financial loss—is repaired either through one of the few nominate delicts or, more probably, by invoking the broad principle of culpa or Aquilian fault, which covers instances both of deliberate infliction of harm and of negligence. In lege Aquilia et levissima culpa venit. The categories of liability under this principle are never closed.

Apart from patrimonial loss, a pursuer may suffer “sentimental” damage or injury to his feelings. For such injury the law again makes general provision. If the injury consists of grief or of pain and suffering caused by physical injury the test of liability is according to the same standard of culpa as applies in cases of patrimonial loss. Though Roman law itself did not give damages upon the principle of culpa for the killing or injuring of a liber homo, after the Reception—and in particular as a result of the influence of Grotius—those countries of Europe (including Scotland) which had developed their legal systems from the legacy of Rome grafted from customary sources a claim for death and injury (including solatium doloris) onto the general action for damages evolved from the lex Aquilia. Though the Latin term solatium is used in this connection, it has nothing whatsoever to do with solatium in the sense of the

Roman law of delict. Nevertheless solatium, in the Roman sense of compensation for feelings injured by contumelia or affront, is also recognised as justifying generally a claim for reparation in Scots law. As will be more fully considered in the context of fault, injuriae inflicted animo injuriandi may be of great variety, according to the perverse ingenuity of human minds. It may well be that contumelia which is implicit in the actio injuriarum (properly so called — in the Roman sense) is most often thought of in the context of slander and that the abuse of the term actio injuriarum to designate claims for patrimonial loss and solatium for death or personal injury has obscured the generality of the right to reparation. Yet the principle remains fertile in the twentieth century, and may be contrasted with English law which, even in cases of defamation, has in theory compensated the injury inflicted on reputation as an economic asset and refused solatium for affront. In Scotland claims for patrimonial loss may be competent, arising out of the same fact situations as claims for solatium, but these are separate jura actionis and, though pursued in one process, the principles of liability are governed by very different rules.

Contumelia inflicted animo injuriandi has perhaps as many aspects as culpa in the context of damnum injuria datum. Though it is less frequently invoked, the actio injuriarum (properly so called) is a general remedy like the action ex lege Aquilia which applies in cases of culpa causing patrimonial loss. Stair instances as a possible case of injuria or affront the snatching of another's game before he could completely constitute possession, while Bankton instances injuries (in the sense of insults) inflicted upon the dead, though, it may be thought, such wrongs in large measure are inflicted upon the surviving relatives. The modern cases in which unauthorised carrying out of post-mortem examinations and removal of organs from
the dead \(^{10}\) have been accepted as reparable wrongs both illustrate the generality of the law of delict and the scope of redress for affront to feelings upon the principles of the *actio injuriarum*. It is submitted, that masterful entry upon another's land in disregard of his wishes and many other types of affront might justify redress upon the same principles. It has always been asserted by the leading writers on the law of Scotland that there is a general right to reparation though the fact situation cannot be allocated to any of the familiar categories, nor be vouched for by established precedent. This gives the law a desirable flexibility to meet new social conditions and unforeseen situations. One such possible situation is the infliction of affront upon an individual by invading his privacy. This matter has never really been the subject of serious consideration by the Scottish courts. It is true that the general question was raised in somewhat unpromising circumstances in *Murray v. Beaverbrook Newspapers, Ltd.*,\(^{11}\) but the rejection of the pursuer's claim in that case should not be construed as a repudiation by the Scottish courts of the principle of generality of the right to reparation for harm.

In this case, a Border sheriff, about a year after being convicted of a road traffic offence, wrote a letter to the *Glasgow Herald* advocating heavier fines in certain motoring offences. This letter stimulated the interest of a reporter for another paper, who discussed it with the sheriff on the telephone and thereafter published (despite a warning not to do so) a somewhat ironical comment on the situation. In the Second Division the Lord Justice-Clerk dealt with the matter mainly in the context of defamation—which was not surprising, since the argument addressed to the court concentrated on this point. Lord Thomson observed "I know of no authority to the effect that mere invasion of privacy, however hurtful and whatever its purpose and however repugnant to good taste, is itself actionable. Whether such an invasion might amount to an ingredient in malice in circumstances where it was incumbent on the pursuer to establish that the defender acted maliciously it is unnecessary to consider . . . No doubt there are cases where the digging up of old skeletons will be frowned on by the law, but it must be a question of circumstances." This decision should not be construed, in the author's submission, as rejecting the possibility of an action for invasion of privacy where *animus injuriandi* could be established. The learned sheriff, having deliberately entered the arena of controversy and having attracted publicity to himself, could scarcely justify his

\(^{10}\) *Pollok v. Workman* (1900) 2 F. 354; *Conway v. Dalziel* (1901) 3 F. 918; *Hughes v. Robertson*, 1913 S.C. 394.

demand for immunity from comment, even if of dubious taste. It is thought, however, that, had his house been invaded by photographers, or had he been subjected to contumely beyond the ambit of comment on his public activities, a remedy might well have been competent. Mere lack of precedent should be no obstacle, and in most civilised countries some protection is afforded by the law in respect of a citizen’s private life.

CAUSATION

It is never sufficient for a pursuer to establish damage and fault, if there is no causative link connecting the two. This question of causation will be reopened in the context of Limits of Liability. A harmful act may be regarded as causa causans of the damage or merely as a causa sine qua non—a cause but for which the damage would not have been sustained. The frontier between these causae remains open. Lord Cooper in Drew v. Western S.M.T.12 described causa causans “as a compendious equivalent for what has been described in different decisions as the direct, immediate, decisive, proximate, real, dominant, efficient, effective or substantial cause, and I willingly accept recent injunctions to apply commonsense standards of causation and to ignore all metaphysical implications.” Another Scottish judge, in an English case, observed 13: “To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.” The difficulty, of course, is as to how the reasonable jury should be properly instructed. When the defender’s wrongous act is a causa sine qua non of the damage, and the defender foresaw or should have foreseen the resulting damage, he may well be held responsible in any event—though the chain of causation may come to include by what would otherwise have been regarded as novus actus interveniens, which is merely an unforeseeable human intervention. If A’s negligent conduct, which B should have foreseen, supervenes after B’s initial negligent act, both parties at fault may be regarded as co-delinquents—though this is not the necessary consequence of a series of acts or omissions which were each at one stage potentially harmful.

In McWilliams v. Sir William Arrol & Co., Ltd.,14 it was established that the defenders were at fault in that they had not provided

14 1962 S.L.T. 121.
a safety belt for the pursuer's deceased husband who was erecting a tower for a steel crane. On the other hand, evidence showed that on similar jobs in the past this workman had persistently abstained from wearing a safety belt, and that steel erectors in general had adopted a similar attitude. The House of Lords held, accordingly, that, though there had been culpa and damnum, the causative link between the two had not been established.

**FAULT**

**General**

Fault is fundamental to liability in the law of delict proper though, as has been discussed already, a duty to make reparation may arise ex lege upon principles of strict liability. While there are certain delicts with specific rules of their own, these are supplemented by two broad general principles of fault, both derived from the Roman law.

In Roman law injuria had the general meaning of unlawful conduct—omne enim quod non jure fit—but it had also two specialised meanings. It might imply culpa in the context of Aquilian liability (damnum injuria datum)—interdum injuriae appelatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus. In relation to the actio injuriarum, however, it developed the special technical meaning of affront or contumelia. It may be stressed in parenthesis that the term actio injuriarum was reserved for the delict Injuria, which implied affront or contumelia. The actio ex lege Aquilia (damnum injuria datum) was the appropriate action when patrimonial loss was caused through culpa or fault, but did not lie for the killing of a liber homo. When later law grafted onto the action for culpa an element of solatium for killing or injuring a free man—as happened throughout the Civilian systems of Europe—this latter element was non-Roman and derived from canonical and customary sources. The tendency to refer in Scotland to an action for patrimonial loss and solatium as an actio injuriarum has involved

15 Ante, Chap. 27.
16 D.47.10.1 (Ulpian). Injuria ex eo dicta est, quod non jure fiat: omne, enim, quod non jure fit, injurta fieri dicitur. hoc generaliter, specialiter autem injuria dicitur contumelis, interdum injuriae appelatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus. This may be translated “The word injuria is used to denote anything done wrongously, for one speaks of everything done wrongously as having been done by way of an injuria or injury. This is its general meaning. In a special sense, however, contumelious conduct is said to be an injuria or injury. Sometimes, however, by the term injuria is implied harm caused through the defender's fault, and in this sense we are accustomed to use the word with reference to the lex Aquilia.”
17 Ibid. See generally D.9.2. Ad Legem Aquiliam for the concept of culpa or fault.
18 Ibid. See generally D.47.10. De Injuris et Famosis Libellis for the concept of contumelis and the scope of the actio injuriarum.
a perversion of terminology which has caused unnecessary confusion. Shortly before his death the late Lord Justice-Clerk Thomson (who had himself taught the Civil law) expressed his intention of reasserting in Scots law the appropriate Civilian terminology, familiar wherever the Roman law has been studied and (of course) part of the tradition of the law of Scotland.

The two aspects of liability for fault relevant for Scots law depend upon the specialised meaning of *injuria* just explained—namely, (1) liability for *culpa* or Aquilian fault, as that principle has evolved since the Reception and (2) liability for *contumelia* or affront. The more important general ground of liability is clearly the broad principle of *culpa* in actions for patrimonial loss. Whenever there is *damnnum injuria datum* in the sense of Aquilian fault causing patrimonial loss, the right to redress is recognised. Damage, causation and *culpa* are the essentials. This may be contrasted with the position in English law where there has been much controversy as to whether there is a “Law of Tort” or a “Law of Torts.” It must be conceded, however, that the predilection of English lawyers for dividing liability into categories, as separate torts *de facto* or *de jure*—such as “trespass,” “trover,” “detinue,” “conversion,” “liability for dangerous chattels,” “Rylands *v.* Fletcher liability,” (until recently) the triform liability of occupiers,19 and—above all, liability for the so-called “tort of negligence” has at times, through decisions of the House of Lords, or through citation of English decisions in Scottish cases, led to a classifying of particular duties of care in Scots law. This was quite out of keeping with traditional Scottish theory, and, while the influence lasted, virtually created separate species of delict closely dependent on stereotyped conditions prescribed in ruling precedents. This categorising influence is on the wane, as indeed English law itself moves towards general principles of liability.

Categorising of *culpa* through contact with the English law of tort was due to the false assumption that, because in a particular fact situation a remedy would be granted by the courts both in Scotland and England, *therefore*, the basic principles of liability were identical in both countries; and that *therefore* what a lawyer meant by *culpa* in Scotland was the same as “negligence” in England. The fact that they overlap to a great extent tended to obscure the differences. The hazards created by this fallacy often become apparent only when the limits within which principles may be applied have to be considered. As a very simple example one may take the interpretation

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of Donoghue v. Stevenson. 20 From the Scottish point of view this was merely a decision upon the extent of the duty of care owed to the consumer by a manufacturer of ginger beer in the circumstances of that case, and a repudiation of the irrelevant doctrine, which had been adopted or imposed from English law, that there could not be a duty in delict wider than the duty in contract. It did not establish a "tort of negligence," but reasserted the age old concept of culpa or Aquilian fault. It is meaningless to suggest that earlier Scottish decisions assessing the degree of care which had to be shown in respect, say, of heritable subjects could have been outflanked by invoking as a new cause of action a "tort of negligence" with different standards founded on Donoghue v. Stevenson. Culpa was a general principle of liability. The Scottish law is concerned primarily not with the source of the duty of care, but with its extent. "Negligence" is used as an approximate synonym for culpa in Scottish law, but, since the misconception is widespread and entertained at exalted levels, it cannot be too strongly stressed that culpa is not synonymous with the "tort of negligence" as it is accepted in England, nor are all the limitations of that tort (which are the legacy of history and of precedent) relevant when considering the scope of culpa as a general ground of liability. Culpa, moreover, comprises cases where patrimonial loss has been caused intentionally as well as cases of negligence, and thus embraces situations where the English lawyer would consider the appropriate remedies to be trespass, conversion, and so forth.

Despite the infiltration of certain English classifications, and the fact that certain delicts—like crimes—have acquired in Scotland nomina juris and specialties of their own, it remains fundamental that there is a universal right to reparation for wrongful injury, though an instance cannot be allocated to any of the familiar categories. This traditional principle has the authority of Stair, 21 Bankton, 22 Erskine, 23 and Kames, 24 and the action in factum, so to speak, is familiar. Yet legal redress does not extend to every case where an individual suffers damage by the act of another. For certain types of harm the law gives no redress. There must have been injuria (here in the general sense not of culpa or contumelia but of a wrongful act). Thus, in the case of trade competition, though his rival's success involves his loss, one trader cannot claim a right to monopoly. Nor, as Stair puts it, can one 25 "point for unkindness."

21 I, 9, 6.
22 I, 10, 41.
23 III, 1, 13.
25 I, 1, 14.
Generally speaking, the pursuer must show violation of a right, not merely of a liberty enjoyed by him. Even so, at least where use of property is concerned, acts done merely in aemulatione vicini—out of spite and to advance no legitimate interest of the actor—seem to be actionable, and the doctrine of Mayor of Bradford v. Pickles to have no place in Scottish law. Motive is also relevant in conspiracy.

Animus injuriandi which inflicts affront or contumelia is the second general ground of liability for fault, and, it is submitted, justifies reparation in a wide set of circumstances. This submission will be developed presently.

Liability to make reparation does not arise ex dominio, that is to say, merely on the grounds that the defender owned the property which caused the damage, nor will it suffice to prove damage resulting from an accident without establishing culpa on the part of the defender. In an action for reparation the object of the law is to give reparation for harm suffered—not to punish the defender, but, apart from certain exceptional cases discussed in the context of Obligations arising ex lege, the courts consider that one man should bear another’s loss only where the pursuer can show culpa on the part of the defender. Culpa may be used in a broad sense—implying dolus (or wrongful intention) and also culpa in a narrower sense (scil., inadvertent contravention of the standards of due care recognised by law). Often the term culpa is used in the narrower sense of negligence, as contrasted with dolus or intent. It may be observed that where the pursuer’s claim is in respect of patrimonial loss the principles applicable to liability are generally the same in delict whether the “fault” is deliberate or inadvertent. This was the case in Roman law under the lex Aquilia whence Scots law derived the concept of culpa, and Lord Justice-Clerk Inglis (as he then was) observed in Liquidators of Western Bank v. Douglas, “The same measure of reparation is due on the same conditions, and by the same form of action, whether the cause of the damage be the one kind of delict or the other.” The consequences of wilful misconduct and of negligence in actions for patrimonial loss are usually the same. Intention may increase damages by allowing compensation.

27 Sup. cit.
28 Crofter Handwoven Harris Tweed Co. v. Veitch, 1942 S.C.(H.L.) 1, but see post. pp. 662, 740.
29 Campbell v. Kennedy (1864) 3 M. 121.
31 Chap. 27, ante.
32 (1860) 22 D. 447 at p. 475-476.
for injurious consequences which might otherwise have been regarded as too remote, or (where the claim comprises more than patrimonial loss) by justifying consideration of solatium for deliberate insult to the pursuer; but in an action for economic loss based upon culpa, the greater includes the less, and, while the presence of dole will not bar an action based on Aquilian fault, it is sufficient to found on fault generally. Defamation is equally actionable quoad patrimonial loss whether published negligently or deliberately; and should a landowner, who mistakenly denies a right of way through his land, dig a pit near the path and so cause injury to others, he may be liable whether he acted maliciously or through failing to take proper precautions to guard the pit. If, however, wrongful intention alone is averred, a pursuer cannot succeed by merely proving failure to take proper care. Again, the scope of vicarious responsibility of employers for the delicts of their servants is more restricted in cases of deliberate wrongdoing. There are certain situations, where the pursuer's claim is exclusively or primarily for injury to his feelings rather than to his pocket, in which cases proof of actual intention to harm is relevant—and indeed essential for success. In modern society, however, such situations are but a small proportion of those which result in litigation and they may be noted briefly. It may, thereafter, be convenient to give particular attention to culpa in the sense of Aquilian fault (overwhelmingly cases of negligence, but also comprising cases of patrimonial loss caused intentionally). In some instances claims for patrimonial loss and solatium may be asserted in the same action—thus invoking two of the general principles of liability—damnum injuria datum and contumelia inflicted animo injuriandi. Thus, in the so-called action for slander and defamation, the pursuer may claim damages for the economic value of harm done to his reputation and also solatium for hurt to his feelings. These two elements may coincide in one claim, or one element alone be relevant.

**DOLUS**

Generally speaking, it is not necessary to discriminate between dolus (intentional harm) and culpa (in the sense of negligence). (Dolus in its narrower meaning implies fraud or mala fides—a specific form of wrongful intent.) The consequences in cases of patrimonial loss are in effect identical, though a few refinements will be noted in connection with reparable interests. Two qualifications of the general rule that the consequences of dolus and culpa coincide may be noted.

34 Power v. S.M.T. Co., 1949 S.C. 376; and see p. 687, post.
First, an improper motive may in certain circumstances justify reparation for an act which would otherwise be lawful but is reparable according to the doctrine of abuse of rights. Secondly, *animus injuriandi* lies at the root of liability for affront to personality.

**Abuse of Rights**

That aspect of abuse of rights which concerns the malicious use of property in *aemulatone vicini* has already been mentioned. Sheriff McKechnie rightly asserts that “there is a constant tract of decisions between 1757 and 1809 in which this limit of *dominium* was regularly admitted by defenders as being settled law,” and there is an abundance of reasonably modern authority (supported even by Lord Watson) to justify the assertion that the doctrine of *aemulatio vicini* is still recognised as part of the law of Scotland. Any use of property which has the sole or predominant object of harming a neighbour is *injuria*, and reparable. In fact the developing modern law of nuisance has largely taken over the territory covered by this doctrine.

“Abuse of rights” is, nevertheless, a more general concept than *aemulatio vicini*, regulating the rights and duties of adjacent proprietors. The earliest cases in which the doctrine was invoked include some concerned with malicious interference with economic interests, and in modern times this approach would have much to recommend it by contrast with the illogical doctrine of conspiracy, which requires a combination of persons acting with improper motive. However, in *McFarlane v. Mochrum School Board*, without deciding that malice as the real motive for the defender’s actions would have been an irrelevant consideration, the First Division excluded it from their consideration in the circumstances averred. In *Brown v. Magistrates of Edinburgh* and in *McKenzie v. Iron Trades Employers’ Insurance Association, Ltd.*, Lord President Dunedin, who in *Campbell v. Muir* had vindicated the doctrine of abuse of rights in connection with heritable property, accepted in connection with contracts of employment the English doctrine of *Allen v. Flood* —which had rejected malice as a test of lawful exercise of a right. It cannot be said that the question was adequately argued. There is a wealth of authority, both in earlier Scots law and in those

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35 "Reparation" in *Encyclopaedia of the Laws of Scotland*, Vol. 12, pp. 497–498, and see generally for discussion and citation of authorities.

36 *Young & Co. v. Bankier Distillery Co.* (1893) 20 R. 76 at p. 77.

37 *Falconer v. Glenbervie* (1642) Mor. 4146; *Farquharson v. Earl of Aboyne* (1679) Mor. 4147.

38 (1875) 3 R. 88.

39 1907 S.C. 256.

40 1910 S.C. 79.

systems most closely associated with its principles, which might yet be invoked were the matter to be reopened. The doctrine of abuse of rights is useful and attractive, but there are factors which merit consideration before passing it into general service. These refinements are beyond the scope of this book. It must suffice to say that the doctrine of abuse of rights has been approved in connection with use of property, and has so far been disapproved in connection with contracts of service. This leaves a large field in which the doctrine may still have scope according to social policies favoured by the judiciary.

**Animus Injuriandi**

The actio injuriarum of Roman law lay in respect of any wrongous act which constituted an aggression upon the person, dignity, or reputation of another. Animus injuriandi, which is a species of dolus, is an essential element, though culpa lata dolo aequiparatur. Real and verbal injuries as discussed by the institutional writers were infringements of the general right to reparation for contumelia. The generality of the principle has been somewhat obscured by the prominence of the main species of injuria, namely, insult in an action for slander and defamation. Nevertheless it is suggested that there are many sets of circumstances in which redress for contumelia might well be sought—such as invasion of privacy, publication of a person's photograph for purposes of advertisement without his leave, masterful trespass, accosting of respectable women—and so forth. As in Roman law it may well be that Scots law would recognise the same act as an injuria against several persons. Thus if a wife or daughter were subjected to indignity the husband or father might also competently sue.

**Culpa**

To understand the true nature of liability in Scots law for culpa (in the sense of intentional or negligent conduct causing patrimonial loss) it is necessary to keep in mind the broad basic principle. Culpa is the basis of all liability for patrimonial loss inflicted through

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42 For an interesting discussion of the place of this doctrine in South African law, which is based on the same principles as Scots law see J. E. Scholtens "Abuse of Rights" (1958) S.A.L.J. 39.

43 See e.g., Stair I, 9, 3; II, 1, 33; Mackenzie, Law & Customs of Scotland in Matters Criminal, Title XXX; Bankton I, tit. 10; Erskine IV, 4, 89; George Wallace, Principles of the Law of Scotland, Book IX, tit. 11; Hume, Vol. I, pp. 343–344.

44 See post, p. 724 et seq.

45 For a discussion of the practical scope of the actio injuriarum see Hallo & Kahn, Union of South Africa (British Commonwealth Series), p. 522 et seq.

46 See, e.g., Bankton I, 10, 30, also next-of-kin of the deceased, ibid. I, 10, 29, also refs note 10, supra.
the means of human conduct, or through the means of moveables or immoveables, for which the defender was responsible.

_Culpa_ and negligence have been used at times by learned authors and judges as synonyms. In general, the terms "culpa" and "negligence" mean the same thing—namely breach of a duty of care owned by the defender in the circumstances of the case, and Mr. Elliott is largely justified in his view that "In Scotland at any rate it seems clear that negligence is a new word for culpa and denotes that branch of law dealing with breaches of legal duty to take care." There are, moreover, numerous judicial utterances accepting the overlap of "culpa" and "negligence." Provided that it is realised that culpa is more comprehensive than negligence and includes the causing of patrimonial loss by a wrongful act—deliberate or negligent—the association of culpa with negligence is acceptable in the great majority of cases. In Scottish law culpa remains a general principle of liability—and comprises cases which in English law would be rubriced under such diverse heads as "tresspass," "negligence," "Rule in Rylands v. Fletcher," "Liability for dangerous chattels," and so forth. In England the "tort of negligence" seems to comprise situations for which specific categories of duty have not been defined, and regarding which reference is still competent to the basic standard of care expected of the reasonable man. This restricted field is most certainly not what culpa implies in Scotland. In Scotland the principle comprehends many cases which have now been reduced to special categories in English law.

A century ago the broad principle of culpa, which applied to all cases of harm causing patrimonial loss, could be described by Guthrie Smith as follows:

Responsibility for culpa rests on the one great principle, that in all well-regulated communities every one must so govern his affairs and regulate his conduct, as not to be productive of injury to his neighbour. . . . It is our duty to . . . manifest that care and circumspection which may be reasonably expected of us in the circumstances.

Again,

So in negligence, the issue sent to the jury is, whether the injury in question happened through the defender's fault; and the jury answer the question on a review of the whole circumstances of each case.

48 e.g., Campbell v. Kennedy (1864) 3 M. 121; Lord Kinnear in Owners of the "Islay" v. Patience (1892) 20 R. 224; Lord President Cooper, Hamilton v. Anderson, 1953 S.C. 129 at p. 137. Since, however, culpa is wider than negligence it is regrettable that case digests and Scottish Current Law treat the concepts as identical.
49 Reparation (1st ed. 1864) at pp. 59-60.
50 Ibid. p. 63.
The distinction has been fully received into our own law, and the measure of this *culpa* is found in the answer to the question—how would a man of ordinary prudence and sagacity have acted in like circumstances; or rather in the circumstances as they must have appeared at the time to the person sought to be made liable?

A suggested influence of the English law of tort on the Scottish law of delict has, however, been the doctrine of "particular duty"—that is, that in any action based on *culpa* the pursuer must show *in limine* that a "particular duty" or "directional duty" of care was owed to *him* by the defender—as distinct from the concept of general duty of care dependent on the whole circumstances of the act or omission which caused the damage. In view of its origins, it is surprising that this English doctrine ever gained acceptance at all in Scotland, where a broader concept of general duty owed in the circumstances of the case had been operating successfully for a considerable time.

The expression "duty of care," as Mr. Wilson has shown, has been used with different meanings in a variety of judicial dicta. In one sense "duty of care" implies that the defender is bound in the circumstances to advert to the possibility of harm being caused to the pursuer. If he is not bound to advert to this possibility, there is no "duty of care." There are cases in which, on grounds of social policy, the law allows loss to lie where it falls though caused by an act or omission which could reasonably have been foreseen as likely to cause harm. These are instances of *damnum absque injuria*. Thus it has been suggested (though the present author does not accept the general validity of the suggestions) that reparation may not be given for the infliction of pecuniary loss or for harm caused by omissions. Again, no action is given to an employer for the killing or injuring of his servant, nor (it would seem) to a person who sustains nervous shock, when outside the area of physical peril.

It is, however, in a different sense that the English doctrine of "duty of care" has penetrated Civilian systems such as Scotland and South Africa, which have come into close contact with English

51 Ibid. p. 8.
54 See post, p. 673 et seq.
law. The English doctrine of “duty of care” implies that the plaintiff/pursuer must, as a prerequisite of success, be able to show that the defendant/defender owed him a duty of care—such a duty arising when the reasonable man in the defender’s position would have foreseen and guarded against the possibility of harm to a person such as the pursuer. The view which prevailed in Scotland until the end of the nineteenth century, and was shared with Civilian systems generally, was that if a negligent act is likely in the circumstances to harm some person, a defender should be liable to any person injured (provided the damage is not too remote) even though he could not have foreseen the likelihood of harming one in the situation of the pursuer. It is perhaps significant that the English doctrine of “particular” or “directional” duty is not applied when a defender pleads that the pursuer has been guilty of contributory negligence, and that the doctrine has been explained (and condemned) by Winfield as an unnecessary excrescence resulting from the “contract tort catena” which influenced the English law of obligations at a relatively immature stage of development. Views differ as to the extent and viability of the doctrine of “particular duty” in the Scots law of culpa. An authoritative judicial re-examination and restatement on the law on this point would be most welcome.

It may be thought that the general effect of certain English doctrines upon the Scottish law of delict have been to some extent to impair its logical development. Lord Cooper has referred to the fact that in certain restricted but important types of case the indiscriminate citation of English precedents in Scottish cases and the facile assumption that the law must be the same on both sides of the Border have threatened to produce in Scotland rather unsystematic and illogical results.

And again (on Delict):

The subject is one in which in every country new problems are presenting themselves for solution every day. In the last resort it does not greatly matter what solutions are found, but it does greatly matter that in any given country the law should develop systematically and logically so that its future trend and application shall be capable of reasoned forecast. Either oil or water is preferable to the unsatisfactory emulsion which results from attempts to mix the two.

Accepting, however, that certain English glosses are superimposed on the basic principle of culpa, the contemporary law in Scotland may be examined.

58 See p. 651, ante.
59 See refs. note 52 and 53, supra.
60 Selected Papers, p. 191.
61 Ibid.
The modern approach to the problem of liability for *culpa* or fault—that of liability for breach of duty—is clearly enunciated in Lord Macmillan's opinion in *Donoghue v. Stevenson*, followed in *Lockhart v. Barr*. In the former case it was decided on relevancy (*anglicé* "demurrer") that a manufacturer of ginger beer owed a duty of reasonable care to ensure that his produce would reach the ultimate consumer in a wholesome condition; and that, if he failed in that duty, the ultimate consumer (irrespective of any contractual relation) might recover damages for injury sustained by the breach. It was averred that the pursuer had sustained injury through consuming ginger beer manufactured by the defenders which had been contaminated by the unsuspected presence, in a sealed and opaque bottle, of the decomposing remnants of a snail. Counsel having assented—somewhat surprisingly—to the proposition that the Scottish and English law on questions of negligence was the same, the House of Lords reached their decision after an elaborate examination of English authorities. Indeed, the case has probably been of greater importance in England than in Scotland, since broad principles of negligence had long before this decision been accepted in Scotland—though somewhat obscured by English doctrines and borrowed precedents during the late nineteenth and early twentieth centuries. It was followed by a rapid expansion of the categories of duty, breach of which would infer liability. In Scotland *Donoghue* merely illustrated a general principle of liability by applying it to a particular aspect of *culpa*. Lord Atkin's well-known statement of the "proximity rule" as the test of duty or no duty has been invoked as a guide in innumerable cases since *Donoghue*:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The foresight of the reasonable man is now generally accepted as the test of whether a duty of care was owed, though such foresight

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63 1943 S.C.(H.L.) 1.
64 They probably meant no more than in the fact situation both Scots and English law should afford a remedy. Clearly an elementary review of the origins of the Scots law in the *lex Aquilia* and of English law in "trespass on the case" would have disclosed essential differences.
does not necessarily determine the extent of the duty.\textsuperscript{67} Lord Macmillan was more cautious in his references to the categories of duty \textsuperscript{68}:

In the daily contacts of social and business life, human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.

Through judicial decision thousands of these categories are recognised each year—and English precedents in this field are freely cited in Scotland. It was at one time suggested that mere opportunity for such intermediate inspection before use of a defective thing or dangerous structure causing damage as would reveal the defect absolved from liability a defender who had been initially responsible for the defect.\textsuperscript{69} The view has now been discredited,\textsuperscript{70} and liability cannot be elided unless intermediate inspection must reasonably have been anticipated as probable, or unless the defender could not have foreseen that the injured party would assume the risk of injury from the defect.

It is, generally speaking, true that \textsuperscript{71} the duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.\textsuperscript{72}

Accordingly, even though the pursuer suffers injury as a result of the defender's conduct, this will be \textit{damnum sine injuria}, and without redress, if the reasonable man in the position of the defender could not in all the circumstances reasonably have foreseen the likelihood of injury to someone or—more problematical—to someone in the situation of the pursuer.\textsuperscript{73} The pursuer may also fail because, though the defender did owe a duty to take reasonable care, the pursuer's

\textsuperscript{67} See, e.g., Lord Keith in \textit{McPhail v. Lanarkshire C.C.}, 1951 S.C. 301.
\textsuperscript{71} \textit{Per} Lord Macmillan in \textit{Bourhill} and \textit{Muir}, sup. cit.
\textsuperscript{72} There are, however, two views regarding the "particular" or "directional" duty.
\textsuperscript{73} \textit{Bourhill v. Young}, but see note 72, supra.
injury resulted from an operation which the reasonable man would not have foreseen to be intrinsically dangerous. These fine distinctions are of doubtful value. In recommending a fresh approach to the question of culpa, Professor J. J. Gow puts the criticism aptly:

The hypothesis of the reasonable man and his foresight may (i.e., is justified according to the writer’s theory as opposed to the doctrine of the leading cases) be resorted to to determine proximity of causation, but not in order to create the sophisticated distinction which separates Bourhill v. Young from Muir v. Glasgow Corporation.

As Mr. Wilson has shown, the foreseeability of the reasonable man has been invoked in four contexts—to determine whether a duty of care exists, to establish whether the defender’s conduct constitutes breach of that duty, in the context of probability of harm, and to assess the damage for which a defender may be liable. He has understandably expressed the hope that (as in dealing with questions of causation) a simpler formula might be adopted, and has quoted Lord Denning in an English case which, in effect, propounds the older Scottish approach: “Instead of asking three questions, I should have thought that in many cases it would be simpler and better to ask the one question: is the consequence within the risk? And to answer it by applying ordinary plain common sense.”

Res Ipsa Loquitur

Generally speaking, a person who has sustained injury, and alleges that his injury was due to the fault of another, must prove that other’s negligence. The onus of proof normally rests on the pursuer. In certain cases, however, he may be assisted by the doctrine of res ipsa loquitur, so as to shift onto the defender the burden of proving that the accident could have happened despite reasonable care on the defender’s part. The principle established in Ballard v. N.B. Ry. is to the effect that, where an accident is such as does not in the ordinary course of things happen if those who have the management use proper care, it affords reasonable evidence, unless the defender can rebut the inference, that the accident arose from want of care.

Lord Shaw of Dunfermline in Ballard expressed his views on res ipsa loquitur as follows:

(1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, i.e., that a thing tells its own story—not

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74 The occurrence of a foreseeable risk may be most improbable.
76 “The Analysis of Negligence,” 1962 S.L.T.(News) 1 at p. 4; see also “Some Notes on Reasonable Care,” ibid. 57.
78 1923 S.C.(H.L.) 43.
79 At p. 56.
always, but sometimes. (2) But, although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem relevant...to infer liability for some occurrence out of the usual, the remainder of the story may displace that inference. But (4) if the remainder of the story does not do so, then the inference remains *res ipsa loquitur.*

In the normal course of things, if due care has been exercised by those having management or control: bags of flour do not fall from windows, nor sacks of sugar from warehouses onto passers-by; nor do vehicles collide with lamp standards, nor brake or swerve violently so as to injure passengers, nor do the doors of railway carriages fly open of their own accord.

An attempt has been made in judicial dicta to restrict the invocation of the brocard *res ipsa loquitur* to cases when the thing which has caused the injury was outside immediate human control. In cases where there has been immediate human control of the means of injury—as, for example, a motor-vehicle—it has been suggested that it is better to avoid the expression *res ipsa loquitur,* and to consider whether the facts and circumstances proved are prima facie evidence of negligence and affect the onus of proof. But this distinction, as Lord Normand himself conceded, is really a matter of phraseology—provoked, it is thought, by judicial impatience of arguments which invoke the brocard as having some magical power to solve difficult questions of negligence. Possibly if the distinction which Lord Normand was anxious to make is regarded—that is, between unexpected behaviour of things not under immediate human control and like behaviour of things under immediate human control—no harm will be done in considering both sets of circumstances as properly described by the brocard *res ipsa loquitur.*

The distinction is of importance in practice. As Lord Normand suggested in *O'Hara,* in cases where there has been no immediate human control of the thing causing the injury—as when sacks fall from a warehouse—the owners of the warehouse may defend themselves by proving that there were conditions present which...
have caused the accident without negligence on the defenders' part. They might, for example, prove that there had been an explosion in the neighbouring premises—even though they could not prove that the explosion had in fact caused the sacks to fall. The onus of proof would then shift back to the pursuer. When, however, the means through which the injury was caused had been under immediate human control—as, for example, an omnibus which swerved—then the defenders must displace the prima facie presumption of negligence by full legal proof exculpating themselves from blame. In this connection, it would not be a sufficient defence to show that the swerve or sudden violent braking of the vehicle was necessary to avoid a pedestrian or obstacle on the road, if, had the vehicle been driven carefully, an accident could have been avoided by less drastic measures. Moreover, it would not necessarily excuse an omnibus company to show that their driver, though driving with proper care, collided with a lamp standard because of a burst tyre. The burst, like a skid in certain circumstances, might be regarded as "neutral." An inference of negligence would remain—unless satisfactorily disproved by the defenders—to the effect that the defenders had not taken reasonable steps by inspection or otherwise to ensure that the tyres on their vehicles were sound. It is submitted that a defender is not required to prove the precise cause of an accident as a condition of escaping liability when inevitable accident is pleaded, though, if the defender claims to know the cause of the "accident," he must prove that cause and show that he was not negligent.

**SPECIAL ASPECTS OF CULPA**

**Statutory Duty**

Since *culpa* implies breach of duty and is now a term often used as interchangeable with "negligence" in its legal sense, it has been held that, when there is breach by the defender of a duty of care owed to the pursuer and imposed by statute, this is "negligence." In consequence an action at common law lies in respect of injury caused by such "negligence," just as it does when the standard of the duty of care is set by the foresight of the reasonable man and not by statutory definition. In *Hamilton v. Anderson*—a case

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89 O'Hara, *sup. cit.*
91 Elliott, *sup. cit.*
92 The relevant Scottish and English authorities are cited and analysed in "The Onus upon Defenders," 1956 S.L.T.(News) 37, 45 and esp. at pp. 50-51.
93 McMullen v. Lochgelly Iron Co., 1933 S.C(H.L.) 64; 65 Jur.Rev. 71; but see ante, p. 640.
94 1953 S.C. 129 at p. 137.
arising out of breach of a provision of the Factories Act, 1937—
the Lord President (Cooper) observed:

"Statutory negligence" is nonetheless negligence. It infers that breach of
duty which underlies every common law action for *culpa*. In such cases
the right to recover damages is not created by the statute but by the
common law, the function of the statute being merely evidential, in
prescribing certain minima of precautions the non-observance of which
*per se* infers negligence, and renders it unnecessary to have recourse to the
standard of the reasonable man, or the custom of good employers in like
circumstances.96

When the statutory duty is absolute—so that the defender is respon-
sible for injury caused by breach of a regulation, even though he
has exercised all possible care—it has been submitted that the obli-
gation arises *ex lege* and is not a true delictual obligation.97 In
*Millar v. Galashiels Gas Co.*98 a workman was killed through failure of
the brake mechanism of a hoist in his employers’ works. The
employers had taken every care to ensure that the mechanism worked
properly and that the hoist was safe to use. The brake had worked
well both before and after the accident; its failure on this particular
occasion could not have been anticipated and was never explained.
Since, however, the Factories Act, 1937, ss. 22 (1) and 152 (1), require
hoists to be "maintained in an efficient state, in efficient working
order, and in good repair," the defenders could not elide liability
in an action for damages based on breach of obligation, though
they had taken every effort to fulfil their statutory duty. Whether
statute prescribes a standard of care or imposes an absolute duty is in
each case a question of construction; and if breach of the statute
involves civil liability, the consequences, so far as reparation is con-
cerned, are the same.

**Liability for omission**

The apologists for the theory of particular duty99 in the law of
liability for negligence or *culpa* stress very properly that without some

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96 1 Edw. 8 & 1 Geo. 6, c. 67.
97 See also Lord Keith, *ibid.* at p. 138, and Lord Walker in *Durnin v. Wm. Coutts &
98 Ante, p. 641.
99 1949 S.C.(H.L.) 31. From the mass of recent case-law on liability under statute the
following authorities are selected to illustrate current trends. In certain of the
cases an absolute duty was held to be imposed, and in others a statutory standard
S.C. 6; *Reid v. Westfield Paper Co.*, 1957 S.C. 218; *McNeil v. Dickson &
259.
99 The same results can, however, be achieved without invoking this theory.
SPECIAL ASPECTS OF CULPA

theory of duty it would not be easy to explain why, despite reasonable foresight that injury to another would result, a person is not generally held liable for what in English law is termed "non-feasance"—a passive attitude to the prospect of another's injury. It has been said that unless by compulsion of official, domestic, or some other duty (as in the case of a policeman, or fireman, or parent); or unless by reason of having undertaken positive responsibilities to another (as in the case of a surgeon or omnibus driver), mere failure to act will not in itself be a ground of action. Morality, not law, compels the rescuer. If, however, the test of liability is to be determined according to what the reasonable man would have done in the circumstances, there may be wider liability for omission. An interesting example is provided by the law of South Africa which, in the field of delict, is closest to that of Scotland. In *Silva's Fishing Corp., Ltd. v. Maweza* the defendant was held to be potentially liable to the widow of a deceased fisherman who had been a member of the crew working the defendant's boat—though under contract with its captain and not with the defendant. The engine of the boat had failed, and, after drifting for nine days, she was wrecked in a storm, and the plaintiff's husband was drowned. She sued on averments that the defendant, though aware of the boat's distress and having rescue facilities available, had failed to attempt rescue. Her action was held to be competent. Even the judges of the Appellate Division whose thought was most influenced by English law held in her favour, because the defendant had provided a boat in which he and the crew were financially interested and had an element of control. The judges, who approached the question primarily as Civilians, considered that "There is a variety of circumstances, some of them unconnected with prior conduct, which impose the duty to act in order to avoid reasonably foreseeable loss to another. The circumstances which will give rise to such a duty may differ according to the conceptions prevailing in a particular community at a given time." Circumstances were found to be sufficiently averred to hold the defendant potentially liable.

It is submitted that there may be situations where the law, which regards the categories of negligence as never closed, might well hold a defender liable for omission even though he had not come within the scope of some special statutory or common law duty, and, apart from all questions of special relationship, prior conduct or custody or control of dangerous property. French law 3

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1 For discussion of the "rescue cases," see p. 706.
2 1957 (2) S.A. 256 (A.D.).
3 Per Steyn J.A. at p. 265.

S.L.S.—22
has held a defender to be liable for the death by drowning of his son-in-law in an icy canal when he could have stretched out a pole which was readily available. To Lord Atkin's famous question—"Who, then, in law is my neighbour?"—the law may, in certain circumstances, reply: "One in the position of the man who went down from Jerusalem to Jericho and fell among thieves"—at least if the thieves are out of the picture. The subject is too large and controversial to explore in the present book, but it had to be mentioned.

Culpa and financial loss

Another alleged limitation of liability for foreseeable harm to another is in respect of financial loss caused by non-fraudulent but negligent statements or conduct which involves no physical contact. The categories of liability where damage has been caused to persons or corporeal property are now reasonably well defined, but beyond this the law has not in Scotland been finally determined. Text-writers influenced by the situation in England have suggested that there is no duty in law to abstain from negligent misstatements which involve another in financial loss. In England it has been held by a majority of the Court of Appeal that the "proximity" test laid down by Lord Atkin in Donoghue v. Stevenson is inapplicable where the damage complained of was not physical in its incidence to either person or property, that no general duty of care is imposed by law in respect of negligent misrepresentations, and that, therefore, loss incurred by the plaintiff due to the defendant's negligent misstatements could not be recovered. Asquith L.J. conceded that this was not altogether logical, but that there was no escape from the fetters of precedent.

As the present Lord Hunter observed, the majority founded strongly upon a passage of Bowen L.J. in Le Lièvre v. Gould,

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5 In Donoghue v. Stevenson, 1932 S.C.(H.L.) 31 at p. 44.
10 At p. 195. Professor D. Daube has established (Studi Solazzi, 1948) that damnum in Aquilian liability implied economic loss. Roman law gave an action for loss caused nec corpore nec corpore.
11 "Recent Legal Cases of Interest to Chartered Accountants" (1961) 65 The Accountants Magazine, esp. 240 et seq.; also discussed in (1961) 32 The Chartered Accountant in Australia, at p. 18.
dealing with negligent and inaccurate certification by an architect—
"But the law of England ... does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly."

Lord Hunter’s comment on this remarkable statement may be quoted in full 13:

With all respect to the memory of Bowen L.J. this statement seems to me as a lawyer unsound and as a layman lacking in common sense and even absurd. ... Professor T. B. Smith ... has recently dismissed 14 Candler v. Crane, Christmas & Co. in the following sentence—“To describe, as the English do, a non-fraudulent statement as ‘innocent misrepresentation’ seems to me as unjustifiable as to describe running down a pedestrian on the highway as ‘innocent bad driving’”—and he adds that both should surely found an action in delict. On this matter I confess myself on the side of Lord Denning and Professor T. B. Smith, and I dare say we may all be on the side of the angels. At any rate I should be sorry to see a Scottish court reach upon English authority a decision so grossly inequitable as that to which the majority in Candler v. Crane, Christmas & Co. felt themselves compelled.

Though a wider view than that taken by the English Court of Appeal is taken in other systems derived from the English common law—such as those of Australia and the United States 15—English law denies redress for harm inflicted by non-physical means (whether words or conduct) or where the damage has not been physical in its incidence to person or property. Thus pecuniary damage cannot, as a general rule, be recovered as such in an action based on negligence. The author may be permitted to quote his own comments on this situation. 16 “If general principles of liability are accepted, and not merely haphazard heads of liability based on precedent, it is difficult to reject on logical grounds the contention that ‘Words may be as dangerous as guns. Arsenic labelled salt is more dangerous than dynamite labelled dynamite.’ The distinction between physical and financial damage is hard to justify when it is appreciated that, even where injury has been physical in effect, the damages awarded are pecuniary, and—as in the case of loss of earnings—may take into account financial loss suffered by an injured party.” It would certainly be ironical if the Scottish courts refused reparation in those very cases when evaluation in money terms could be most accurate.

In Roman law, though the limits of redress are controversial and are not, in any event, binding upon modern Civilian systems,

13 At pp. 241-242.
14 See Smith, Studies, at p. 82.
16 Ibid.
there is no doubt that redress for *culpa* was given where the damage inflicted was not by physical means and resulted in pecuniary loss. The doctrine of *culpa* evolved from the *lex Aquilia*, rather than from the English tort of negligence, is the basis for considering the scope of liability in Scotland for loss caused by fault. There is no doubt that in the past reparation has been given for pecuniary loss caused by *culpa* which did not physically damage person or property.\(^{17}\) Negligent misrepresentation is merely one aspect of this wider problem. Mr. Ashton-Cross\(^ {18}\) has analysed seventeen Scottish cases dealing with harm caused by false (but not fraudulent) representation, and, while conceding that the current textbook authorities are against him, submits a strong case for the view that in Scots law today reparation is competent for negligent statements, even though the pursuer may have no right to damages in a contractual relationship. The present author, after approaching the problem from a rather different angle, and after considering other lines of authority, has reached the same conclusion.\(^ {19}\) As will be discussed further in the context of defamation,\(^ {20}\) *culpa* was recognised as justifying an action for pecuniary loss caused by a statement which was not "injurious" in the strict sense, and other examples of

\(^{17}\) Refs. *ibid.* at p. 111.


\(^{19}\) According to the institutional writers reparation is due for "Every thing by which a man's estate is diminished"—see Stair I, 9, 3–5; Erskine III, I, 13–14; Bankton I, 10, 41; Bell, *Principles*, §§ 543, 553; Kames, *Historical Law Tracts*, p. 242. See also Lords Dunedin and Shaw in *Nocion* v. *Ashburton* [1914] A.C. 932 at pp. 962 and 971. It may be observed that in *Boysd & Forrest* v. *Glasgow and S.W. Ry.*, 1912 S.C.(H.L.) 93; 1915 S.C.(H.L.) 20 there was a clause in the contract exempting the company from errors and omissions, and the main argument concentrated on fraud. Moreover, it was held that the pursuers were not induced to contract by the alleged misrepresentations. Various dicta regarding liability for "innocent misrepresentation" must be read in this light, and, further (whatever the position in England), it would not be consistent with principles of *culpa* in Scotland to describe as "innocent" the pressing of an advantage secured by negligence. *Robinson* v. *National Bank of Scotland*, 1916 S.C.(H.L.) 154, despite certain contrary dicta, the author submits, is not conclusive of the matter. The case had been argued on fraud, and almost as an afterthought the pursuers sought to rely on *Nocion* v. *Ashburton*, sup. cit. No reference was made to the principle of *culpa* despite the fact that Scottish authorities in the 19th century recognised the competency of reparation for pecuniary loss. Moreover, since the correspondence between the defender's agent and the pursuer's bank was stated to be "strictly confidential," and expressly excluded liability for any inaccuracies in the information furnished, it is difficult to appreciate how the defenders could be regarded as having foreseen harm to the pursuer. In any event the Lords were clearly uncertain, and indicated that if the matter were argued further, their views might change. There is, in short, no authority conclusively against admitting liability for financial harm caused by non-physical means provided that *culpa* (as opposed to blameless or innocent mistake) can be shown. See Smith, *Studies*, pp. 111, 115, 191. The conclusions drawn for English law by Pearson L.J. from the case of *Robinson* v. *National Bank of Scotland* (supra) in *Hedley Byrne & Co.* v. *Heller* [1961] 3 W.L.R. 1225 at p. 1237 may very well be true. The dicta there cited cannot, however, be reconciled with the concept of *culpa*.

\(^{20}\) Post, p. 731.
liability for pecuniary loss can be cited. Had Scots law not been bedevilled for a time by the contract-tort catena of English law, the relevant principles would have appeared clearly. The same situation is apparent in South Africa, where the majority of the Appellate Division refused to recognize, in Herschell v. Mrupe, that Aquilian liability might in general be incurred by negligent misstatements. They were, however, careful to emphasize that an action in respect of negligent statements causing loss might well be competent in certain circumstances. Perhaps the dissenting opinion of Centlivres C.J., renowned for his championship of liberty as for scholarship and law, is most relevant for consideration in a Scottish court.

Liability for Animals

The subject of liability for injuries caused by animals is at present under consideration by the Law Reform Committee for Scotland. As the law stands at present, in the case of animals ferae naturae, that is, of a species known to be dangerous to mankind—such as monkeys—a very high duty of care is imposed on their keepers, amounting almost to insurance. It seems to be widely accepted now in Scottish law that in the case of animals mansuetae naturae, that is domestic animals which are usually harmless, the owner will only be liable on proof of scienter—namely, proof that the owner had previous knowledge of the vicious tendency of the particular animal. This is an artificial doctrine of English law, and the dissenting opinion of Lord Johnston in Milligan v. Henderson is persuasive.

He considered that the House of Lords decision in Fleeming v. Orr, had left open a question whether, even without technical scienter, there might not be liability founded on culpa. Certain farm animals, such as bulls, have by nature a disposition to cause certain kinds of harm, and have known dangerous tendencies which are common to the species. Owners of such animals are bound to take reasonable precautions against these risks. Liability for special viciousness of the particular animal depends on knowledge. The existing distinctions between wild animals which are naturally dangerous, domestic animals which as a species have known dangerous tendencies, and domestic animals with dangerous tendencies not

21 1954 (3) S.A. 464 (A.D.); see also Hahlo & Kahn, Union of South Africa (British Commonwealth Series), 508; T. W. Price, "Aquilian Liability and the 'Duty of Care': A Return to the Charge" (1959) Acta Juridica 120.
23 Sup. cit. at p. 1042 et seq.
24 (1855) 2 Macq. 14.
shared by the species, are confusing and unsatisfactory. It is pertinent to note that the majority of the English Law Reform Committee have suggested that liability should rest on negligence and not on a distinction between animals ferae naturae and mansuetae naturae.  

The most comprehensive review of modern case law regarding damage caused by straying animals is contained in Sheriff Lillie’s opinion in Tierney v. Ritchie, where the defenders were held liable for damage caused to the pursuer’s car as a result of a collision on the highway with the defender’s black bull calf during hours of darkness. He observed “I have come to the conclusion that the rule of law... amounts to this... Failure to fence domestic animals from public roads in itself gives no action. Neither will it amount to negligence in the ordinary case, because prima facie the presence of such animals in the public road does not give rise to danger... A person seeking a remedy when injured by an animal on the public road can prove either that it was a wild animal or that it was known to be vicious... or he can base his claim on negligence, in which case he must establish that injury to himself was reasonably foreseeable, or, in other words, a natural consequence of the presence of the animal on the roadway and that the defender took less than reasonable precautions to keep it off the roadway. To succeed in this he must overcome the strong presumption that domestic animals are not a source of danger... I realise that in isolated English cases, there have been expressions of opinion that the presumption against domestic animals creating a danger is irrebuttable, but I do not think such opinions are in the general line of authority. I consider that the judges who expressed that view have fallen into the error warned against by the judges in the House of Lords in Qualcast (Wolverhampton), Ltd. v. Haynes namely erecting into a fixed rule of law what are really ‘particular applications to special facts of propositions of ordinary good sense.’”

26 See Glegg on Reparation, 4th ed., p. 354 et seq.
29 Sup. cit. See also the fascinating sheriff court case of Cameron v. Hamilton’s Auction Marts, 1955 S.L.T.(Sh.Ct.) 74. Sheriff McKechnie held that there might be liability without scientia on the grounds of failure to control a cow’s movements. This remarkable animal having escaped, climbed a stairway above a shop, turned on a tap and fell through the floor into the shop—thus causing extensive flooding and damage. The exploits of the cow in a china shop earned a fourth leader in The Times.
Liability of an owner for injury caused by dogs to certain other animals is governed by the Dogs Act, 1906 and 1928,\textsuperscript{31} which apply without proof of \textit{scienter}\textsuperscript{32}; and liability for damage done by straying cattle is dealt with by the Act, 1686, c. 11, anent winter herding.\textsuperscript{33}

\textbf{"Rylands v. Fletcher" Liability}

The extent to which the rule in \textit{Rylands v. Fletcher}\textsuperscript{34} regarding strict or absolute liability for unnatural use of land applies in Scotland has already been discussed.\textsuperscript{35} It is thought that the Scottish understanding of the rule is as an aspect of \textit{culpa}.\textsuperscript{36} Moreover, even those in Scotland who consider the original principle of \textit{Rylands v. Fletcher} to be valuable, would, it is thought, reject its extension beyond claims by one occupier of land against another, and would have difficulty in justifying the arbitrary distinctions between natural and non-natural use which are at present introduced in an endeavour to do justice between competing interests. It might be better if reference was not made to \textit{Rylands v. Fletcher} liability in Scottish law; but the habit of invoking that decision (for what it may not have decided) is quite deeply rooted. On the more general aspect of the question, it may be accepted that operations which confer no benefit on the community may be so dangerous that to undertake them at all would infer \textit{culpa}, and also, that it is always open to the legislature to dispense with proof of \textit{culpa} when this exceptional course seems justified on grounds of social expediency.

\textbf{Professional Negligence}

Between professional men and their clients there is a contractual relationship which will justify an action for breach of contract if there has been a failure to use proper care and skill. This contractual relationship does not, of course, preclude a claim in delict unless the parties have agreed to limit rights of redress.\textsuperscript{37} In situations where there is no contractual relationship between the professional man and the person suffering harm, the remedy depends on the broad principle of \textit{culpa}. Until the House of Lords intervened in the matter, the position could be stated very simply. Where there was failure to use the care and skill required in the circumstances, a professional man would be liable in reparation to persons injured

\textsuperscript{31} 6 Edw. 7, c. 32; 18 & 19 Geo. 5, c. 21.
\textsuperscript{32} See ante, p. 642.
\textsuperscript{33} Ibid.
\textsuperscript{34} (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
\textsuperscript{35} See p. 642 et seq., ante.
\textsuperscript{37} See ante, p. 621.
by his *culpa* or fault.\textsuperscript{38} This remains the fundamental situation, but English doctrines of privity of contract have been superimposed on the law regarding the liability of law agents, and it has even been suggested that the English rule, which denies a remedy for negligence inflicting pecuniary—but not physical—harm, should be regarded in Scotland. Since the doctrine of *culpa* has been developed from the evolved concept of Aquilian liability in Roman law—which gave redress for pecuniary loss and for harm inflicted *nec corpore nec corpori*—it would be remarkable if Scots law were to be fettered at this late date by notions of “physical means” and “physical harm” which English lawyers themselves regret as illogical limitations of the tort of negligence—due to its derivation from “trespass on the case.”

Severing the question of liability in delict of a law agent from other instances of professional negligence—since the House of Lords has created anomalies in the case of the law agent—a few comments must suffice on the general legal position. First, a professional man will be liable for *culpa* which inflicts harm on any person who he should reasonably have foreseen might be injured by his lack of skill. The doctrine of “privity of contract”—namely the fallacy that because A owes a duty in contract to B, he cannot owe a duty in delict to C—was never part of the law of Scotland, and only applies when the English rule has been superimposed. Accordingly, in *Edgar v. Lamont*,\textsuperscript{39} there was no difficulty in holding a medical man liable for unskilful treatment of a married woman, though in fact his contract was with her husband. The “privity of contract” cases concerning law agents and lessors were cited, but were rejected.

Until the introduction of the National Health Service in 1947 actions were seldom brought against medical men in Scotland for failure in professional skill, and as recently as 1955 Lord President Clyde observed\textsuperscript{40} “It is a tribute to the high standard in general of the medical profession in Scotland that there are practically no decisions on this question in the reported cases.” (He had, *horresco referens*, to turn for analogies to actions in respect of professional negligence by law agents advising their clients.) On professional negligence he had this to say:\textsuperscript{41}

To succeed in an action based on negligence, whether against a doctor or against anyone else, it is of course necessary to establish a breach of that duty to take care which the law requires, and the degree of want of care which constitutes negligence must vary with the circumstances. . . .

\textsuperscript{38} e.g., *Goldie v. MacDonald* (1757) Mor. 3527; *Lillie v. MacDonald*, Dec. 13, 1816, F.C.; *Lang v. Siruthers* (1826) 4 S. 418; aff. (1827) 2 W. & S. 563.

\textsuperscript{39} 1914 S.C. 271.

\textsuperscript{40} *Hunter v. Hanley*, 1955 S.C. 200 at p. 205.

where the conduct of a doctor, or indeed of any professional man, is concerned, the circumstances are not so precise and clear cut as in the normal case. In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.

Having disposed in ingenious, if evasive, terms of the various House of Lords dicta invoking “gross negligence” in cases of professional negligence, the Lord President added:

It follows from what I have said that in regard to allegations of deviation from ordinary professional practice... such a deviation is not necessarily evidence of negligence. Indeed it would be disastrous if this were so, for all inducement to progress in medical science would then be destroyed... To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly, it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail.

Clearly professional negligence by a medical man will be primarily physical in its effect. This is not so in the case of surveyors, accountants and law agents, where the consequences of culpa are likely to be pecuniary loss. The liability of a surveyor for negligence is mentioned elsewhere. Though in England an accountant may not be liable for pecuniary loss caused by his negligence to a third party, as he should have reasonably anticipated, there is no reason why this restriction should be imported into the Scottish concept of culpa. In Candler v. Crane, Christmas & Co. the English Court

42 See Lord Hunter, “Recent Legal Cases of Interest to Accountants” (1961) 65 The Accountants Magazine at p. 238. He observed “In Hunter v. Hanley the Lord President dealt with such a difficulty (call. ‘gross negligence’) in a manner which I think you will agree is nothing if not ingenious... In England it has been possible for judges to be more direct, possibly because the House of Lords has made fewer difficulties for them. Indeed it would be a fascinating pursuit to discover how many false doctrines—that is false so far as the law of Scotland is concerned—have had their origin in that august assembly, and also, which is more shameful, how many of these false doctrines have been fathered or preached by peers and Lords of Appeal of Scottish origin who have crossed the Border and found in the metropolis of London their spiritual home... Chief among these boasting and unsound expatriates I place my pet aversion, Lord Brougham, one of the foremost apostles of crassa negligentia.”


44 See post, p. 864.

45 [1951] 2 K.B. 164.
of Appeal by a majority of two to one held on the basis of precedent that if a clerk in the course of his employment had been guilty of extreme carelessness, but not of fraud, his employers were not liable to persons who, as should have been anticipated, sustained loss in consequence. The lack of contractual or fiduciary relationship was fatal. Lord Hunter has observed:

But, if a similar question were to arise in Scotland, it is far from certain that Candler v. Crane, Christmas & Co. would be followed. It would certainly be a fascinating contest, with one side firing off English authorities and the other ascending the more lofty pinnacles of principle and the Civil law, which is one of the great sources to which a Scottish lawyer ought from time to time to return. . . . It is said that a negligent misrepresentation differs from other negligent acts involving liability in respect that it does not involve damage physical in its incidence to either person or property. I question whether such a distinction is valid under Scots law, whatever the authorities in England may say.

There is a certain irony in the situation regarding the liability of law agents. As with liability of occupiers of heritable property in Scotland until 1961, liability of law agents has been diverted from the main stream of culpa in Scots law and there has been superimposed the English doctrine of privity of contract, which denies redress in delict to persons who suffer loss as the reasonably foreseeable consequence of a professional negligence. This was certainly not the law of Scotland in the first half of the nineteenth century, but in Robertson v. Fleming the question was taken on appeal to the House of Lords. So far as liability was asserted on the grounds of jus quaesitum tertio the pursuers deservedly failed, but their Lordships seemed incapable of grasping either the doctrine of stipulatio alteri or of culpa in delict and put an altogether artificial construction upon earlier Scottish cases in which negligent law agents had been held liable for lack of care or skill to persons suffering loss in consequence. Subsequently Scottish courts have considered themselves bound by Robertson v. Fleming, though it is thought that the obvious confusion between delictual and contractual redress would even now make it possible to circumvent the authorities based on that case and to return to basic principle. In Robertson v. Fleming Lord Campbell L.C. exclaimed:

I never had any doubt of the unsoundness of the doctrine . . . that A employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and

48 (1861) 4 Macq. 167.
50 (1861) 4 Macq. at p. 177.
C—if through the gross negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B and recover damages for the loss sustained. If this were law a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed or attested. There must be privity of contract between the parties. I am clearly of opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science.\textsuperscript{51}

This whole passage is redolent of the way of legal thinking which imposed the doctrine of common employment upon Scots law, denied a remedy against the negligent lessor to a tenant’s family, applied the categories of occupiers’ liability, and, until \textit{Donoghue v. Stevenson},\textsuperscript{52} superseded the doctrine of \textit{culpa} in the case of consumers who had not contracted with the manufacturer of products. The other aberrations have been corrected by legislation or judicial restatement. After a century of inglorious life the doctrine in \textit{Robertson v. Fleming}\textsuperscript{53} deserves decent burial.

\textsuperscript{51} Such actions were competent when jurisprudence was cultivated as a science in Scotland, see refs. note 38, p. 680.

\textsuperscript{52} 1932 S.C.(H.L.) 31.

\textsuperscript{53} (1861) 4 Macq. 167. It may be noted that the decision is in direct conflict with the previous decision of the House in \textit{Lang v. Struthers} (1827) 2 W. & S. 567, and the grounds upon which it was sought to distinguish that case could convince no one who had even a moderate grasp of the principle of \textit{culpa} as developed in Scots law.
A person is responsible for his own wrongous acts whether the fault be deliberate or not, and cannot excuse himself on the plea that he was carrying out the instructions of another. A possible exception is the case of the amanuensis who takes down a slanderous statement. Further, a law agent who makes an allegation—which unknown to him is false and defamatory—on his client’s instructions does not incur personal liability.\(^1\) A further general rule is that no one can escape liability for wrongdoing by employing another to act for him—culpa tenet suos auctores.\(^2\) A distinction is, however, made between the responsibility of a person for acts which he has expressly authorised, and those committed without his express authority by one who has a contractual relationship with him. Where there is express authority for wrongdoing, the brocard applies—qui facit per alium facit per se—and the initiating party is fully liable.\(^3\) When, however, it is sought to impose on a defender vicarious liability for wilful but unauthorised wrongdoing, or for negligent wrongdoing, by one who is bound to the defender by contract, further analysis of the position is necessary. In the case of partnership, the firm, and also the partners jointly and severally, are liable for wrongful acts or omissions of a partner acting within the ordinary course of business, with this limitation: that the partnership relationship does not imply liability to a partner for injury caused to him by the negligence of another partner in the joint enterprise.\(^4\) In rare cases a landlord may be liable for the wrongdoing of his tenant, Fleming v. Gemmil,\(^5\) but is not liable for a nuisance committed without his authority.

### Liability for Servant’s Wrongdoing

The most important aspect, however, of vicarious liability is that concerned with liability for servants and independent contractors.

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1. If he expresses views of his own, he must answer for them: *Crawford v. Dunlop* (1900) 2 F. 987.
3. *Miller v. Renton* (1885) 13 R. 309; in cases of negligence this brocard has been described as “a fictional explanation,” *Staveley Iron & Chemical Co. v. Jones* [1956] A.C. 627, per Lord Reid at p. 643.
5. 1908 S.C. 340.
A master has always been held liable for personal fault when his servant's act caused the injury. The evolution of the doctrine of respondeat superior to cover cases where no culpa could be attributed to the master—even in the attenuated form of faulty selection or supervision—was not complete until well into the nineteenth century. Moreover, until 1948, in cases of common employment, the rule of culpa prevailed over that of respondeat superior. Culpa is still a relevant consideration when a master seeks relief in respect of damages he has had to pay to a third party on account of a servant's wrongdoing. If the employer's liability is purely vicarious, and is involved not because of any personal fault but because of the relationship which he has with the employee who inflicts the wrong, he may recover the amount of damages paid to a third party from the employee.

A servant may be very generally defined as a person employed by another to do work for him upon terms that he, the servant, is to be subject to the control and directions of the employer in respect of the manner in which the work is to be done. Nevertheless, it is not inconsistent with a contract of service that a considerable measure of skill and independent judgment is exercised by the person employed—as, for example, in the case of a professional footballer. Nor, again, is the doctrine of respondeat superior excluded where the "superior" is not in a position to select or dismiss the servant or to exercise immediate control over the servant's work, and changing social and political conditions have virtually transformed the rule of respondeat superior into a principle of expediency affected by many factors. For reasons of public policy an employer is made vicariously responsible for the wrongful acts of a servant committed in the course of his employment—even though no authority was given to do the act which resulted in injury to the pursuer. The employer is not, however, liable for all the wrongful acts of his servant merely because a contract of service exists between them at the material time. Generally speaking, an employer is liable

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6 See in particular Woodhead v. Gartness Mineral Co. (1877) 4 R. 469; also Smith, Master and Servant, Chap. 12, in Introduction to Scottish Legal History (Stair Soc.).
7 Though there may be social arguments against this result, and the insurers of the employer are likely to be the party interested in enforcing it, it seems legally unexceptionable as the law stands. See in particular Lister v. Romford Ice & Cold Storage Co. (1957) A.C. 555 and an admirable survey of the authorities and relevant articles by Sheriff K. W. B. Middleton, "Vicarious Liability and Insurance Companies," (1958) Jur.Rev. 85.
8 See infra for discussion of "hospital liability."
10 The "scope of employment" does not necessarily cease as soon as the hooter sounds: Bell v. Blackwood Morton & Sons, Ltd., 1960 S.C. 11.
for the acts of the servant if they are within the general scope of employment, though they have been done in an unauthorised way. A good example is *Finburgh v. Moss' Empires*,11 a case of slander by a theatre manager of a young married woman whom it would have been his duty to exclude from the theatre had she been, as he supposed, a notorious prostitute.12 On the other hand an employer will not generally be liable if the servant’s act was altogether unauthorised and for his own ends. Thus, if, in defiance of prohibition, a miner fires a shot in a mine—shot-firing being a function exclusively reserved to a “shot-firer,” and quite outside the scope of an ordinary miner’s employment—the miner’s employer would not on that account be liable to persons injured.13 In an emergency, of course, a servant may have implied authority to do an act which would be outside the scope of his ordinary employment—as if one of the hands on a trawler tried to bring her to port after an accident to those employed to navigate. In *Mulholland v. William Reid and Leys, Ltd.*,14 the pursuer’s husband, a blacksmith employed by the defenders, had been killed when an apprentice, who had no instructions to move a van and had no licence to drive, took it on himself to shift it to clear the way into a workshop. Though the employer might well not have been liable had the negligent apprentice driven the van on a public road, in the circumstances his act was regarded as reasonably incidental to his employment. Lord Sorn observed 15: “The learned sheriff-substitute put his finger on the point in the case when he says, in effect, that the moving of a vehicle by an employee on the firm’s premises is not a great matter, and that, when it is done incidentally to a job with the journeyman in charge looking on without protest, it would be going too far to say that this employee had gone outside the scope of his employment.”

In *Bell’s Principles*16 it is laid down that if a servant wilfully or maliciously does an injurious act for his own private ends, the master will not incur liability. This proposition is too broad, though the extent to which it must be qualified is not clear. Provided that the servant is acting within the ostensible scope of his employment, it will no more avail an employer to prove that he had forbidden the act of the servant which caused injury than it would avail him

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11 1908 S.C. 928.
12 See also *Century Insurance Co. v. N.I. Road Transport Board* [1942] A.C. 509 as to negligent acts done within the scope of a servant’s employment. An act, such as smoking when delivering petrol, though for the servant’s sole benefit, may involve negligence in doing the duties he is employed to perform.
15 At p. 299.
16 § 547.
to prove that he had ordered the servant not to act negligently within the scope of his duties. It would seem, however, that unless there is some additional contractual duty owed by the employer to the person injured by the servant's wilful wrongdoing, for his own ends entirely, vicarious liability will not arise. In *Power v. Central S.M.T. Co.*, the First Division held that the Lord Ordinary had erred in charging the jury that if the conductress of an omnibus, from which an old lady had been thrown, had deliberately caused it to start suddenly out of spite, the employers would be liable. Not every act done while a contract of service is in force, or even by means of the employer's property, it was said, will involve vicarious liability if the servant acted wrongfully and to gratify personal spite. On the other hand, in *Central Motors v. Cessnock Garage*, when the defender's servant for his own purposes took out and used a customer's car and damaged it, the employers were held liable. Here there was a special duty arising from the contract of *locatio custodiae*. A comparable duty may be discovered in *Lloyd v. Grace Smith & Co.*, where the ostensible authority conferred by the defendants on their managing clerk enabled him fraudulently to induce a client to entrust securities to him. A useful summary of the general problem is contained in Lord President Clyde's opinion in *Kirby v. National Coal Board*.

It is probably not possible and it is certainly inadvisable to endeavour to lay down an exhaustive definition of what falls within the scope of the employment. ... In the decisions, four different types of situation have been envisaged as guides to the solution of this problem. In the first place, if the master actually authorised the particular act, he is clearly liable for it. Secondly, where the workman does some work which he is appointed to do, but does it in a way which his master has not authorised, and would not have authorised had he known of it, the master is nevertheless still responsible, for the servant's act is still within the scope of his employment. On the other hand, in the third place, if the servant is employed only to do a particular work or a particular class of work, and he does something outside the scope of that work, the master is not responsible for any mischief the servant may do to a third party. Lastly, if the servant uses his master's time or his master's place or his master's tools for his own purposes, the master is not responsible. ... It is often difficult in the particular case to distinguish between the second and the third of these situations, but the criterion is whether the act which is unauthorised is so connected with acts which have been authorised that it may be regarded as a mode—although an improper mode—of doing an authorised act, as distinct from constituting an independent act for which the master would not be liable.

17 Cf. refs. note 6, supra; also *Fraser v. Younger & Sons* (1867) 5 M. 861.
18 1949 S.C. 376.
19 1925 S.C. 796.
It may be observed that a "servant"—for whose wrongful acts another may be held vicariously liable—may not be in the ordinary employment of the defender, but be only employed gratuitously or temporarily, pro hac vice. Thus if a man requests a friend to drive his car for him, that friend may be treated as his servant for purposes of vicarious liability.\(^2\) Again, a servant in the general employment of one employer may be sent to do work for another employer. It then becomes a question of fact, depending on the arrangement, degree of control, power to select and dismiss, responsibility for payment of wages, and other factors, as to whether the servant continues in the employment of his general employer—the patron habituel—or as to whether the "temporary employer," and not the "general employer," becomes liable for wrongful acts within the scope of the servant's employment. The element of "control" was at one time stressed as the determining factor, but, as Lord Wright made clear in the Century Insurance case,\(^2\) this approach over-simplifies the question as to whether a servant has been transferred, or only the use and benefit of his work. The leading exposition of the law of Scotland on service pro hac vice is the opinion of Lord Justice-Clerk Cooper (as he then was) in Malley v. L.M.S.\(^2\) In this case an accident had occurred through the negligence of the crew of an engine, which had been lent to a works for two shifts each day to do such shunting work as the works officials required. The actual conduct of the operations was left to the engine-crew. It was held that the railway company remained vicariously liable for their servant's negligence, and that this liability had not been transferred to the company. Lord Cooper observed that, for the transfer of a servant to be effected, there must in effect be a tripartite bargain, since the servant is also a party to the arrangement. He also accepted the view that a very considerable degree of transferred control is perfectly compatible with transfer of nothing more than the use and benefit of services (as contrasted with the transfer of the servant himself). There is a presumption against such transfer, and the onus of proof lies on the party asserting that it has been effected. Each case must be decided on its own facts.

**Liability for Independent Contractors**

Where a contract is one for services, different considerations apply regarding an employer's liability than those discussed in

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connection with a contract of service. In *Stephen v. Thurso Police Commissioners* 25 the suggested test for distinguishing between servant and independent contractor was—has the employer the right to direct how the work is to be done or, on the other hand, is his right “merely to reject work that is ill done, or to stop work that is not being rightly done”? 26 The general rule is that, though an employer is responsible for the negligent and other wrongdoing of his servant, he is not responsible for the wrongdoing of an agent who is an independent contractor. There are exceptions to this rule, and the tendency has been until recently towards increasing the employer’s liability for independent contractors. Some check on this tendency has become apparent, since the implications of the abolition of the defence of common employment have been realised. Thus an employee cannot succeed against his employer on bare averments that he was injured by the negligence of an independent contractor engaged to carry out work on the same premises. 27

Liability of the employer of an independent contractor is not, in the accurate sense of the term, a case of vicarious liability. The principle of the exceptions is that the employer has himself failed in a duty which he cannot elide by employing an independent contractor. Thus, in *Stephen v. Thurso Police Commissioners*, 28 a contractor employed by the defenders failed to move rubbish from the street, and the pursuer sustained injury through falling over it at night while it was unfenced and unlighted. It was held that the defenders could not elide responsibility by blaming the situation on the contractors.

The main exceptions to the general rule that an employer is not liable for the wrongdoing of an independent contractor may be stated briefly. When the contractor is employed to perform a wrongful act, the employer is liable both for its direct consequences and for the incidental consequences which result from the contractor’s negligence. 29 If the employer actually directs or controls the contractor’s operations, he will be himself liable. When a duty is imposed on a person by statute or common law to procure or maintain a certain state of affairs, he cannot escape liability for the proper discharge of that duty by delegating the work to an independent contractor. In *Stephen v. Thurso Police Commissioners*, where the defenders were themselves under a statutory duty to

25 (1876) 3 R. 535.
28 *Supra*, note 25.
29 *Ellis v. Sheffield Gas Co.* (1853) 2 E. & B. 767.
maintain the streets in a safe condition, the duty itself could not be delegated. Similarly, if the work undertaken will only be lawful if it is achieved without involving certain consequences, the person instructing the work cannot escape personal responsibility. Thus, if special hazards attend any operation, such as pulling down a gable or digging out foundations so as to incur possible danger to neighbouring property, liability may attach to the employer as originator of the danger. This principle was applied in *Stewart v. Adams*,\(^{30}\) in a case where the pursuer's cow was poisoned by eating paint which had been scraped off the defender's boat by an independent contractor and left lying by the loch side. Lastly, it may be observed, liability may be incurred by one who has chosen his agents negligently.

**Special Considerations Regarding Liability of Hospitals**

Questions of difficulty have arisen as to the liability of hospital boards for negligence of their medical staff. The National Health Service (Scotland) Act, 1947,\(^{31}\) and the equivalent English Act,\(^{32}\) which superseded the voluntary hospital system by laying on the Secretary of State for Scotland and the Minister of Health in England the duty of promoting a comprehensive health service, have also fundamentally altered the general background of hospital administration. It is probable that an authoritative solution to the problems of vicarious liability for hospital staff will be laid down by legislation or by the House of Lords in the future, and that this solution will apply both in Scottish and in English law. Until quite recently the two systems diverged conspicuously. The earlier approach of the English courts to the problems of hospital liability was that skilled medical treatment was given under a contract of services not of service, and that this factor excluded vicarious liability.\(^{33}\) Today vicarious liability is admitted, not only in respect of nursing staff and radiographers,\(^{34}\) but now even for medical practitioners employed in the hospital.\(^{35}\) In *Cassidy v. Minister of Health*,\(^{36}\) Denning L.J. considered that a hospital should be liable for the negligence of its medical staff irrespective of whether they are employed on a contract of service or services, or whether they are paid by the hospital or not, on the grounds that a duty of care is cast on the hospital

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\(^{30}\) 1920 S.C. 129.

\(^{31}\) 10 & 11 Geo. 6, c. 27.

\(^{32}\) National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81).


\(^{34}\) *Gold v. Essex C.C.* [1942] 2 K.B. 293.


\(^{36}\) *Supra.*
by reason of a hospital receiving a patient for treatment. Other English judges prefer to extend vicarious liability by bringing the higher grades of hospital staff within the scope of a contract of service.

In the days when voluntary hospitals were maintained by charitable contributions and enjoyed the gratuitous services of medical specialists, Lord President Clyde, in Reidford v. Magistrates of Aberdeen, construed "hospital liability" in Scotland very narrowly. All the managers undertake is to provide an efficient, heated, clean, wholesome sick-house, equipped with the necessary furniture and fittings for the reception of patients; to employ a competent staff; and to provide the necessary medicine and food. But they do not . . . undertake to treat, or to dose, or to operate upon, any of those who come into their institution.

An essential distinction was therefore made in Scottish law between a contract of service and one of services, so that when medical staff of all grades were exercising professional skill, they were not regarded as "servants" of the hospital; and, therefore, vicarious responsibility of the hospital authorities for their negligence was not incurred. On the other hand, if (say) a nurse was doing work which it was the hospital managers' business to do—as by serving meals—the hospital might be held vicariously liable for her negligence.

In Lavelle v. Glasgow Royal Infirmary, Lord Justice-Clerk Alness had dissented from the majority view that a distinction could be made between the acts of a nurse in her administrative capacity and those performed in her professional capacity; but in Reidford the views of the majority in Lavelle prevailed for the time being.

Several actions brought in the Outer House after the National Health Service (Scotland) Act, 1947, had come into force were decided by following Reidford and Lavelle, but the law regarding hospital liability in Scotland has been recast in the cases of Macdonald v. Glasgow Western Hospitals Board and Hayward v. Edinburgh Royal Infirmary Board of Management. In these cases it was held that the Boards of Management could be held liable for negligence on the part of resident medical staff. The broad basis of hospital liability seems now to be as follows. The 1947 Act imposed on the

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39 1933 S.C. 276 at p. 281. The Scottish cases decided prior to the 1947 Act are analysed in J. J. Gow's article, supra, note 37.
40 Scottish Insurance Commissioners v. Edinburgh Royal Infirmary, 1913 S.C. 751; Lavelle v. Glasgow Royal Infirmary, 1932 S.C. 245; Reidford (supra); Davis's Tutor v. Glasgow Victoria Hospitals, 1950 S.C. 382.
41 Supra.
42 10 & 11 Geo. 6, c. 27.
Secretary of State for Scotland the obligation to provide hospital and specialist services, including hospital accommodation and surgical, medical and nursing services. The Secretary of State was required to delegate certain of his functions to Hospital Boards of Management. Boards of Management can only operate through agents or servants, and if any of these is guilty of negligence the Hospital Board concerned will be liable for the improper performance of those duties which the Board has delegated to the medical, nursing or other staff. The question whether the member of staff at fault was servant or other agent is irrelevant, though, as was pointed out, there is no obvious reason why persons professing medical skill should not be classified as servants in the same way as persons professing other forms of skill. It may be observed that the recent cases were concerned with the question of vicarious liability for resident medical staff in hospitals operating under the National Health Service. The question of liability for consultants was left open, and it was not expressly decided—though it was at least inferred—that voluntary hospitals operating outside the National Health Service Scheme would be vicariously liable for resident medical staff.

EMPLOYERS' LIABILITY

The law as to the liability of an employer to his employee for injury sustained in the course of his employment has changed constantly over the past century or so. Apart from cases of strict liability under statute, it might be said that, after prolonged wandering in the wilderness, the courts have returned to the principle of culpa which was well established in the first half of the nineteenth century. Though it is impossible to analyse developments in their historical perspective, the author has seen in draft an admirable survey by Mr. Hector McLean on "The Changing Currents of Social Justice." When this is published it will have more than historical importance: lessons for the future can be learned as well.

46 The immunity from liability conferred on hospital boards in respect of any irregularity on the part of themselves or their officers in the bona fide execution of the Act by the National Health Service (Scotland) Act, 1947, s. 70, incorporating—most inconveniently—the Public Health (Scotland) Act, 1897, s. 166 (60 & 61 Vic. c. 38), has not been closely defined and requires to be clarified by statute. The section may only apply to administrative acts. See McGinty v. Glasgow Victoria Infirmary, 1951 S.C. 200; Macdonald (supra); cf. McQueen v. Glasgow Victoria Hospitals Board, 1956 S.C. 535. The scope of the section so far as it requires Board to indemnify their officers in respect of liabilities is also obscure.
In *Dixon v. Ranken*\(^4^7\) in 1852 Lord Justice-Clerk Hope could comment that the limits of a master’s liability for injury to his servant had been established by a large number of decisions over the previous fifty years. He was bound to provide good and sufficient machinery, and was liable for injury caused to one servant through his own inattention to duty or the negligence of another of his employees. Personal duty and vicarious liability for a servant were in effect treated as one.\(^4^8\) The prevalent view in Scotland was against the doctrine of common employment, but there was sufficient discrepancy to enable the House of Lords to conclude that the law in Scotland was not sufficiently settled to displace the universal rule which had been established in English law. The onus was on Scots lawyers to show cause why the English rule should not apply. Thus in *Bartonhill Coal Co. v. Reid*,\(^4^9\) Scots law was saddled with that harsh and illogical doctrine until, in 1948, statute gave relief. For some time, the Inner House attempted to limit the effects of the *Bartonhill Coal Co.* case, but in *Wilson v. Merry & Cunningham*,\(^5^0\) the doctrine was given even wider scope than before by holding in effect that a master could only be personally liable if he “personally” performed his “personal duty”; and in *Woodhead v. Gartness Mineral Co.*,\(^5^1\) it was held that the doctrine of common employment applied whether there was a common master or not, since the servant was deemed to accept all risks which naturally arose from his employment. As a partial mitigation of the hardship which resulted, Parliament eventually passed the Employers’ Liability Act, 1880.\(^5^2\) This Act restored the liability of an employer to provide safe “ways, works, machinery and plant,” and gave the workman a claim limited by statute in respect of injury caused by the fault of a superior to whom the employer had delegated his personal duty. The House of Lords, moreover, gave a more liberal orientation to the principles of common law by emphasising that the doctrine of *volenti non fit injuria* implied *volens* not merely *sciens*,\(^5^3\) and by restricting the defence of common employment to cases where there was a common master.\(^5^4\) Shortly thereafter the Workman’s Compensation Acts from 1897 onwards set up a system of statutory liability independent of *culpa*, alternative to

\(^{47}\) (1852) 14 D. 420 at p. 422 et seq.

\(^{48}\) Baird v. Addie (1854) 16 D. 490.

\(^{49}\) (1858) 3 Macq. 366.

\(^{50}\) (1867) 5 M. 807; (1868) 6 M.(H.L.) 84.

\(^{51}\) (1877) 4 R. 469.

\(^{52}\) 43 & 44 Vict. c. 42.


the common law, without affecting the doctrine of common employment. A workman was put to election between a claim at common law or under statute.

The courts continued, however, to construe very narrowly the scope of an employer’s duties towards his servants. Eventually, however, in two Scottish appeals to the House of Lords (which in themselves are valuable analyses of the whole history of employers’ liability) it was decided that a breach of a statutory duty under the Coal Mines Act, 1911, constituted personal negligence excluding the defence of common employment; and that this defence could not be pleaded when breach of personal duty by an employer was relied upon. In English v. Wilsons & Clyde Coal Co. the employer’s duty at common law was restated in the light of modern industrial conditions, as obliging him to provide competent staff, proper plant and appliances and a safe system of work. In 1945 Parliament abolished the defence of contributory negligence as an absolute bar to success (a defence which had led to much casuistic reasoning in questions of causation) and in 1948 the doctrine of common employment was also swept away—restoring in this respect the law of Scotland to the status quo.

Since 1948, because claims of workmen against employers have been freed from unjust and irrational restrictions, the principle of culpa or fault has been freed from artificial constructions which were expedient to assist an injured workman over the obstacles which encumbered his path as litigant. Accordingly more attention is given in modern decisions to the question of whether in fact the employer should be held liable for fault in the circumstances. In Staveley Iron & Chemical Co. v. Jones the House of Lords held that the Acts of 1945 and 1948 have not altered the standard of care required at common law from workmen or employers, and that the standard does not differ whether a negligent workman is sued personally or his employer vicariously—or according to whether an injury has been caused to a fellow servant or third party.

To some extent the modern trend has been to confine an employer’s liability at common law within reasonable limits, and to

55 1 & 2 Geo. 5, c. 50.
56 Macmullan v. Lochgelly Iron & Coal Co., 1933 S.C.(H.L.) 64. As to the accuracy of the expression “negligent” in this context, see ante, p. 640.
58 Supra.
58a See also Black v. Fife Coal Co., 1912 S.C.(H.L.) 33.
59 By the Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6, c. 28).
60 Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6, c. 41).
62 Refs. notes 59 and 60, supra.
avoid unreasonably wide constructions.63 Thus, in Davie v. New Merton Board Mills,64 which has been accepted as expounding principles applicable to Scottish as to English law, it was held by the House of Lords that, though employers are under a duty to take reasonable care to provide reasonably safe tools, they may discharge that duty by buying from a reliable supplier a tool the latent defects of which they had no means of discovering. Lord Simonds commented 65:

In the first place, in England for the 100 years between the decision in Priestley v. Fowler 66 and the abolition of the doctrine of common employment, and for a somewhat shorter period in Scotland, the determination to avert, or at least reduce, the consequences of that decision led to a great deal of artificiality and refinement which would have been otherwise unnecessary. The shadow of it is still upon us. But we can at least return to the simple question which is at the bottom of it all: "Has the employer taken reasonable care for the safety of the workmen?," a question which can only be answered in each case by a consideration of all its circumstances.

In the same case Lord Reid observed 67:

An employer, besides being liable to his servant for injury caused by the negligence of his own servants, is in some cases liable in respect of the negligence of others. Where, then, is the line to be drawn? On the one hand it appears that an employer is liable for the negligence of an independent contractor whom he has engaged to carry out one of what have been described as his personal duties on his own premises, and whose work might normally be done by the employer's own servant—at least if the negligent workmanship is discoverable by reasonable inspection. On the other hand . . . I am of opinion that he is not liable for the negligence of the manufacturer of an article which he has bought, provided that he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make. That leaves a wide sphere regarding which it is unnecessary, and it would, I think, be undesirable, to express any opinion here.

In Sullivan v. Gallagher & Craig 68 the principles enunciated in Davie's case 69 were applied by the Second Division in preference to an earlier decision of their own. A rigger had been injured in an accident, arising from a defect in an electric truck which he was driving in connection with the loading of a ship. He sued his employers, as well as the ship managers who had hired, and the

65 At pp. 618-619.
66 (1837) 3 M. & W. 1.
67 At pp. 645-646.
69 Supra, note 64.
owners who had let, the defective vehicle. It was held that, in the circumstances, the pursuer's employers could not be regarded as having delegated their personal duty to the truck owners so as to incur liability towards an employee. The Lord Justice-Clerk's opinion is a model of humanity, lucidity and sound law, and merits fuller quotation than is possible in this work. He commented, inter alia:

There is no longer the same sociological justification for pushing the personal liability doctrine to what may have been its logical conclusion. So the tide has now turned and the erosion has ceased. Generally when the tide turns, the scars of erosion are only too obvious and a good deal of débris is left stranded on the deserted shore. One can look only with unfeigned admiration at the salvage work in Davie, and the restoration of the waterfront to much of its pristine purity. . . . But, while the tide has turned, where is the new high water mark? The value, if I may respectfully say so, of the decision in Davie, is that it endeavours to return to simplicity and first principles . . . and the fundamental thing is that the duty owed by an employer to an employee is to take reasonable care to provide proper appliances and so forth. Ordinarily, this is a jury question, to be answered according to the circumstances of the particular case. . . . But the legacy of the employer's personal liability is still with us to some extent . . . the tide had not receded so far as to confine vicarious liability to the case of the servant proper. There is still a man's land.

Again, so far as causation is concerned, the current trend of the law is to treat an employee like any other pursuer claiming reparation. Thus, for example, in Wardlaw v. Bonnington Castings the House of Lords affirmed that where a breach of a safety regulation had been established and injury which could have been caused thereby, the onus of proof did not, in the absence of express statutory provision, shift to the employer to prove that the breach had not caused the injury. The onus remained on the workman to show affirmatively, by the ordinary balance of proof in civil actions, that on a balance of probabilities the breach of statutory duty had caused or had materially contributed to his injury. In this particular case it was held that the pursuer had discharged this onus. Lastly, in McWilliams v. Sir William Arrol & Co., Ltd. again affirming the First Division, the House of Lords has held that it is not sufficient for a pursuer to prove negligence on the part of the defender. There must also be established on a balance of probabilities that the negligent act or omission caused the harm which was suffered.

70 1959 S.C. at p. 259. The Lord Justice-Clerk also adverted to the change of legal climate since the abolition of the doctrine of common employment and the development of the law of negligence since Donoghue v. Stevenson, 1932 S.C.(H.L.) 31.
Thus, in the instant case, the pursuer failed because it was established by the defenders that the pursuer’s deceased husband, in respect of whose death reparation was sought, had, on similar jobs to that in which he was killed, abstained from wearing a safety belt when it was provided. Though the defenders were negligent in not providing a safety belt on the day of his accident, this could not be regarded as having caused his death.

**Title to Sue**

The general rule is that any person injured by the wrongful or negligent act of another may sue for damages; but to this rule there are certain recognised exceptions. On the ground of “intimate relationship” an action for reparation by one spouse against the other has been refused. It is thought that this rule is not too firmly established; and it may be relevant to note that actions are competent between parent and child. In *Laidlaw v. National Coal Board* it was held that a mother had no title to sue in respect of the death of her son, who was her sole support, while the father of the deceased was still living, yet had not supported the pursuer or her deceased son from the time of his birth. At present the Law Reform (Damages and Solatium) (Scotland) Bill, 1962, is before Parliament, and, if given legislative effect, will rectify an anachronistic injustice. An action may not be brought, except in certain cases, as will be explained presently, by close relatives in respect of the death or injury of another human being—*quia liberum corpus nullam recipit aestimationem*. Accordingly, in *Reavis v. Clan Line Steamers* the pursuer was held to have no competent claim for damages in respect of the death and injury of certain members of a negro concert party, who had been employed by her and had been travelling on the defenders’ vessel—which had sunk as the result of a collision at sea due to the fault of the defenders.

The effect of death upon title to sue requires special notice. If patrimonial damage is caused, the representatives of the deceased may always sue in respect of the loss. If damage is caused to person or property, the representatives of a deceased wrongdoer may be sued by the parties injured. On the other hand, when the victim of personal injury, or one who has been injured in his feelings,

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74 See now Addenda.
76 1957 S.C. 49.
76a This measure is now law, see Addenda.
78 1925 S.C. 725.
79 See Lord Macmillan, *supra* at p. 42; also Bourhill v. Young, 1942 S.C.(H.L.) 78.
dies before instituting legal proceedings, no claim transmits to his executor. If the deceased has actually instituted proceedings before his death, then title to sue after litis contestatio is transmitted to his executors, who in any event have always title to sue for patrimonial loss to the estate of a deceased person. The reason for the rule which bars an executor from suing for personal injury (which is not a claim derived from Roman law) apparently proceeds on analogy with the Roman law, where the actio injuriarum had a strong element of personal vindication and was therefore not transmissible. It was on analogy with the actio injuriarum that the Scottish courts extended to all claims for solatium (even though of customary origin) the Roman rule excluding active transmissibility of such a claim, unless novation had taken place by litis contestatio. For this reason the Scottish courts have seldom had to consider the assessment of damages for shortened expectation of life, though such a claim has been recognised. Since it could only be competent if the injured party had initiated proceedings during his lifetime, there is no occasion for the Scottish courts to consider the problem from the somewhat metaphysical angle of approach which the English courts may have to adopt with regard to transmitted claims under the Law Reform (Miscellaneous Provisions) Act, 1934, when the victim has been killed almost instantaneously—as in the sequellae of Rose v. Ford.

Though the executor's claim may thus be barred, in cases where he has no title to sue a non-derivative right of action for loss of support and solatium for wounded feelings is given at common law to close relatives of a person killed by the wrongdoing of another. This right of action, which has been grafted from customary sources onto most Civilian systems, is confined to those relatives of the deceased between whom and the deceased there was a reciprocal duty of aliment during the latter's lifetime—as, for example,

80 Stewart's Exr. v. L.M.S., supra, note 77.
83 But see p. 657, ante.
84 Reid v. Lanarkshire Traction Co., 1934 S.C. 79.
85 24 & 25 Geo. 5, c. 41.
87 Even a contingent right of support will justify a claim: Sagar v. National Coal Board, 1955 S.C. 424.
89 Evenen a contingent right of support will justify a claim: Sagar v. National Coal Board, 1955 S.C. 424.
90 Eisten v. N.B. Ry. (1870) 8 M. 980. For this purpose evidence of injury to the pursuer's health as a result of the death is irrelevant: Nicolson v. Cursiter, 1959 S.C. 350.
husband or wife, children,90 and parents, grandchildren and grandparents—but not brother or sister. Those relatives who have title to sue are required to join in one action against the defender, and may not pursue their remedies independently.91 It is somewhat anomalous in principle, but established law that, though the action given to relatives of a deceased is non-derivative in character, their claim can be barred if for any reason the deceased himself could not have succeeded, or if, as by acceptance of a contract excluding the defender’s liability, the deceased has renounced all claims for himself and his dependants.92

The report and discussion in the learned journals of the case of McElroy v. McAllister93 indicate that there is considerable confusion of thought with regard to the actions given respectively by the laws of Scotland and England in consequence of the death of an individual. In outline, the essential differences are as follows. The English action given to relatives by the Fatal Accidents Act, 1846,94 is non-derivative like the Scottish action at common law; but this English action does not recognise any claim for solatium. By contrast, this is an important element in the Scottish action.95 By the Law Reform (Miscellaneous Provisions) Act, 1934,96 in England all causes of action—with certain exceptions—vested in a person at his death survive for the benefit of his estate, including claims in respect of personal injuries, as for pain and suffering and loss of expectation of life. In Scotland no such right of action in respect of personal injuries can transmit, unless the deceased has taken steps to enforce it before his death.97 In a short note by the present author appended to Professor Ehrenzweig’s article,98 attention is drawn to the fact that the pursuer’s summons in McElroy’s case

90 An adopted or illegitimate child may sue in respect of the death of an adoptive or natural parent, but the natural parent of an illegitimate child has had no claim in respect of the death of such child, nor has a mother been allowed to sue in respect of the death of her child during its father’s lifetime, even in cases of legitimate relationship: Laidlaw v. National Coal Board, 1957 S.C. 49. The Law Reform (Damages and Solatium) (Scotland) Act, 1962, has very recently amended the law on both points—see Addenda.

91 Darling v. Gray (1892) 19 R.H.L.) 31; Kinnaird v. McLean, 1942 S.C. 448; the courts may relax this rule on equitable grounds, when a convincing excuse can be urged for a pursuer’s failure to participate in the original action.


93 1949 S.C. 110.

94 9 & 10 Vict. c. 93.


96 24 & 25 Geo. 5, c. 41.


98 See note 97, supra.
misstates the English law, and the reporter of the case in the Scots Law Times unfortunately accepts this pro veritate, with the result that the headnote to the case is misleading.

DEFENCES

The main defences to an action for reparation are the following: contributory negligence, volenti non fit injuria, novus actus interveniens, self-defence, statutory authority, privilege and statutory protection. These may be considered briefly at this stage, and other more specialised defences will be considered later in their appropriate context.

Contributory Negligence

The law regarding contributory negligence as a defence is presumably identical in Scotland and England since the Law Reform (Contributory Negligence) Act, 1945, applies to both countries. Many decided cases and much learned dissertation by legal writers on the topic have failed to produce certainty on all points, and accurate condensation of the law is thus particularly difficult.

By "contributory negligence" is implied that the pursuer, through failing to take reasonable care for his own safety, was "jointly causative of the accident along with the negligence of the defender." Though, as has been observed and will be discussed further in due course, the concept of "particular duty" may have been superimposed on the Scottish action for reparation in respect of damage caused by "culpa" or "negligence," no equivalent element of "particular duty" has been grafted onto the doctrine of "contributory negligence."

Until the 1945 Act came into force, if the pursuer were to succeed in an action based on negligence, he had to show—except in maritime causes where the principle of apportionment of damages according to fault was applied—that it was the fault of the defender only which caused the accident. Although the pursuer could show that the defender had caused him injury through negligence, if the defender could show that the pursuer had by his own carelessness contributed to the accident in any substantial measure, the pursuer's claim was condemned to total failure. It was immaterial that the defender had been principally at fault. The pursuer had to establish that the defender's negligence was the sole cause of the accident in respect of which reparation was claimed. An elaborate analysis

90 8 & 9 Geo. 6, c. 28.
2 See meaning of these terms discussed ante, p. 663 et seq.
3 Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57).
of contributory negligence was, however, attempted by the courts to restrict the application of the doctrine and to give the pursuer redress in cases where, though he had been negligent, such negligence had not necessarily contributed to the action. The leading classification of cases involving negligence on the part of the pursuer is that of Viscount Birkenhead L.C., in *Admiralty Commissioners v. Volute*,
4 expressly approved in *Owners of Boy Andrew v. Owners of St. Rognvald*.
5 The pursuer’s negligence, according to this classification, may fall into one of three categories:

(a) The defender’s negligence may be “subsequent and severable” from the pursuer’s negligence.

(b) The pursuer’s negligence may be joint negligence with that of the defender, so that both parties in fact caused the accident.

(c) The pursuer, though negligent if his conduct were considered in isolation, may have been forced by the defender’s wrongdoing to act without adequate time for reflection—that is “in the agony of the moment.”

Further, a doctrine known as that of “the last clear opportunity of avoiding the accident” gained some measure of acceptance, though its position was precarious. It was always vulnerable to the criticism that, as Lord Wright has observed,
6 “The potent effectiveness of earlier causes may count for more than later operations. The last straw may break the camel’s back, but it cannot rank as the substantial cause.” It is thought that the so-called doctrine of “the last clear opportunity” has now been virtually discarded by the House of Lords.
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The first category, that of subsequent and severable negligence, implies that, even if the pursuer had been careless of his own safety at one stage in the events leading to his injury, the defender may be held wholly responsible if, by the exercise of ordinary care and diligence, the defender could at a subsequent stage have avoided the accident.
8 Of course, as Lord Birkenhead indicated in *The Volute*:
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While no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so

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5 1947 S.C.(H.L.) 70.
6 13 M.L.R. 2 at p. 9.
7 *The Boy Andrew*, esp. p. 76; *Grant v. Sun Shipping Co.*, 1948 S.C.(H.L.) 73 esp. at p. 94.
closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent . . . might . . . invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.\textsuperscript{10}

The law applicable to the second category—that of joint negligence of pursuer and defender—is expounded most clearly in \textit{The Volute} \textsuperscript{11} and \textit{The Boy Andrew},\textsuperscript{12} cases of collisions at sea where both ships were moving and answering their helms, and neither could be regarded as in the situation of the tethered donkey in \textit{Davies v. Mann}.\textsuperscript{13} The alleged doctrine of "the last clear opportunity to avoid the accident" was severely handled in \textit{The Boy Andrew}, and it was stressed that the question for inquiry must always be "Whose act caused the wrong?" \textsuperscript{14} The third category of "agony of the moment" has been most frequently discussed in connection with collisions at sea. When the defender's vessel has by faulty navigation put the pursuer's vessel in extreme peril, and the navigator of the pursuer's vessel happens to commit an error of judgment in the emergency, the defender will not be permitted to urge this error as a defence. The defender's responsibility may continue so long as the "hand of the original wrongdoer" lies heavy on the pursuer's ship.\textsuperscript{15}

Only in the second category, that of "joint negligence," was the defence of contributory negligence relevant. Lord Birkenhead in \textit{The Volute}\textsuperscript{16} had emphasised that "the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it"—and had pointed out that there are cases where it is not possible in the circumstances to draw a clear line between "subsequent and severable negligence" and "joint negligence." Except in maritime cases, however, the tendency was to restrict the category of "joint negligence" to as few cases as possible so as to afford the pursuer a remedy. Thus to do justice, the logic of the law was subjected to undue strain.

Now, however, by the Law Reform (Contributory Negligence) Act, 1945,\textsuperscript{17} s. 1 (1), it is provided that "Where any person suffers

\begin{itemize}
\item \textsuperscript{10} See also Lord MacDermott in \textit{The Boy Andrew}, supra at p. 83.
\item \textsuperscript{11} \textit{Supra}, note 4.
\item \textsuperscript{12} \textit{Supra}, note 5.
\item \textsuperscript{13} (1842) 10 M. & W. 546.
\item \textsuperscript{14} See also \textit{Grant v. Sun Shipping Co.}, supra, esp. per Lord du Parcq.
\item \textsuperscript{15} \textit{Laird Line v. U.S. Shipping Board}, 1924 S.C.(H.L.) 37; applying \textit{The Bywell Castle} (1879) 4 P.D. 219; see also \textit{The City of Lincoln} (1890) 15 P.D. 15; \textit{SS. Singleton Abbey v. SS. Paludina} [1927] A.C. 16 esp. at p. 27; \textit{Baron Vernon v. Metagama}, 1928 S.C.(H.L.) 21.
\item \textsuperscript{16} [1922] 1 A.C. 129 at p. 144.
\item \textsuperscript{17} 8 & 9 Geo. 6, c. 28.
\end{itemize}
damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage."

Thus in cases where both parties have by their joint negligence caused an accident, damages will be apportioned according to the degree of blame attaching to each party.\textsuperscript{18}

In these circumstances, there is no longer the same incentive or justification for making unduly narrow distinctions, and it is suggested—with some diffidence—that, applied on broad common-sense lines, Lord Birkenhead's three categories still accurately delimit the scope of the defence of contributory negligence. Where the defender's negligence is clearly subsequent and severable from the negligence of the pursuer, the latter may recover in full—though the pursuer will certainly not find courts and juries so ready to reach this conclusion as formerly.\textsuperscript{19}

The learned editors of \textit{Gloag and Henderson}\textsuperscript{20} consider that—except in Admiralty cases—the first and second categories are assimilated. The present author considers that there will be a \textit{de facto} tendency to assimilate these categories, but that they are strictly separate even in non-Admiralty cases. Again, if the pursuer has acted in the "agony of the moment," as formerly it will not avail the defender to show that the pursuer's actions were misconceived. In the middle category alone—that of joint negligence by pursuer and defender—the defence of contributory negligence, it is thought, is still relevant. If the defence succeeds, the pursuer will not fail \textit{in toto} as formerly, though of the total damages assessed he will recover only that proportion which was found to be due to the fault of the defender. Apportionment also applies where the fault is shared by the defender and a deceased person, in respect of whose death the pursuer claims reparation.\textsuperscript{21}

It is provided by the Road Traffic Act, 1960,\textsuperscript{22} s. 74 (5), that any failure on the part of any person to observe a provision of the


\textsuperscript{20} 6th ed., p. 427.

\textsuperscript{21} 1945 Act, s. 5 (c). For the effect of apportionment-expenses see \textit{Howley v. Glasgow Corporation}, 1949 S.L.T.(Notes) 9, where the jury in an action arising out of a fatal street accident assessed total damages of £300, but apportioned responsibility for the accident 10 per cent. to the defenders and 90 per cent. to the deceased child of the pursuer, with the result that the pursuer was entitled only to £30 and to expenses on the sheriff court scale.

\textsuperscript{22} 8 & 9 Eliz. 2, c. 16.
Highway Code may be relied on by any party in any proceedings as tending to establish or negative any liability in question in these proceedings. This section may be relevant in questions regarding contributory negligence.

A subjective factor has been introduced into the law of contributory negligence—especially regarding young children—and it has been held to be a question of fact for the jury as to whether in the circumstances a very young child can be guilty of contributory negligence. Juries are not benevolently disposed to such a defence in the case of children of tender years. The standard of the reasonable man is expected of a defender in an action based on negligence, but the same standard should surely not be expected of the pursuer, whose degree of fault should be assessed according to his capacity.

**Volenti Non Fit Injuria**

In certain circumstances when a man has undertaken the risk of injury to himself—in the sense of relieving the defender from the consequences of his breach of duty—it may be held that the person who is responsible for the actual infliction of injury has committed no actionable wrong. This contrasts with a plea of contributory negligence which, in effect, admits that the defender was in breach of duty, but asserts that the pursuer was in part to blame. The principle of law is expressed in the brocard *volenti non fit injuria*. This principle may be invoked as a valid defence to an action brought by a pursuer in respect of injury sustained while participating in manly sports, such as boxing or rugby football played according to the rules. It would also provide a valid defence to an action brought by a spectator who had been injured by an accident known to be incidental to a particular sport or display—such as shinty or racing. In the case of any employment which is necessarily dangerous, such as that of a test-pilot or steeplejack, the servant is held to accept the known hazards of his occupation. But when employers seek to make out this defence in the case of any employee, two things must be proved: first that there was an acceptance of it, in the sense that the employee took upon his own shoulders the risk of accident and discharged his employers from their liability. It is not enough to prove that the employee was

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25 See p. 700, ante.

26 *Injuria* is used in the sense of "unlawful act" not of "injury."

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sciens; he must be shown to be volens.28 The doctrine was also the alleged justification for the former defence of common employment—namely that an employer was not liable to a servant for injuries caused by the fault of a fellow servant. This rule was grafted onto Scots law 29 by the House of Lords in Bartonshill Coal Co. v. Reid,30 but was abolished by the Law Reform (Personal Injuries) Act, 1948.31

It has been laid down that the doctrine of volenti non fit injuria is more easily applicable in cases between landlord and tenant where a tenant continues to occupy property in a dangerous condition in knowledge of the risk. He should, it has been suggested, notify the landlord, and, if the defect is not remedied within a reasonable time, abandon the lease.32 The present writer feels obliged to venture the opinion that this may be one of the instances where the ratio of older decisions could be regarded as superseded by changed circumstances.33 The shortage of accommodation in post-war Britain is a notorious fact, and a tenant may well be compelled to occupy dangerous premises sciens but not volens. However, the matter would have to be argued in the Inner House, if the law is to be reorientated.

A person is not bound to submit to deprivation of his freedom of action by the wrong of another, even though a certain risk is involved. Thus a passenger, who ventured into an obviously overcrowded railway station (which the company had a duty to keep safe for passengers) and sustained injury, recovered against the company. It was no answer that the pursuer could have avoided injury at the cost of losing the train.34 The question is, however, one of degree. If a train failed to stop at a scheduled station, a passenger who jumped from the train while it was in motion could scarcely hold the Commissioners responsible for consequent injuries.

It has been decided, moreover, that a person who deliberately or spontaneously intervenes to rescue persons or property, and is injured in the process, will not—if he acted reasonably—be barred by the principle of volenti non fit injuria from recovering damages from the

29 For caustic criticism of this English importation, see Professor A. Dewar Gibb, Law from Over the Border, pp. 99-100.
30 (1858) 3 Macq. 266.
31 11 & 12 Geo. 6, c. 41.
33 See Beith’s Trs. v. Beith, 1950 S.C. 66.
34 Fraser v. Caledonian Ry. (1902) 5 F. 41.

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person who created the danger. Where the natural and probable result of the defender’s negligence is that some person will attempt rescue or salvage, then the defender’s negligence is regarded as the sole cause of the injury. The English decisions such as Haynes v. Harwood,35 D’Urso v. Sanson,36 and Cutler v. United Dairies,37 as well as American and relevant Scottish decisions, were reviewed by Lord Justice-Clerk Cooper in Steel v. Glasgow Iron & Steel Co.38 The rubric in that case summarises the law of Scotland.

While a person guilty of negligence is liable in damages only for its reasonable and probable consequences and only to persons to whom injury through such negligence may reasonably and probably be anticipated, there may be included among these persons not only a person injured in an attempt to save life or limb from the effect of his negligence, but also a person who similarly has attempted to save property: such action does not necessarily constitute a novus actus interveniens between the negligent act and the injury.

In that case the pursuer’s deceased husband, the guard of a goods train, had been fatally injured while attempting to prevent or minimise a collision between his train and runaway wagons which were converging upon the line whereon the train was travelling. The widow recovered damages in the circumstances, though, as Lord Cooper observed,39

Clearly a much higher degree of risk may normally be taken by a rescuer than a salvor, and in weighing the justification for the intervention of a salvor it would usually be necessary to consider not only the nature and value of the property sought to be protected and the measure of the risk run but also the salvor’s antecedent relationship or duty, if any, to the property.

Finally, it may be noted that the intervention of a rescuer or salvor may be considered either in the context of volenti non fit injuria or of novus actus interveniens. The result is the same, though theoretically in the first case the defender argues that there has been no breach of duty to the pursuer, and, in the second case, that the pursuer has not sustained the alleged damage due to the defender’s wrongdoing.40

In considering novus actus interveniens and remoteness of damage, of course, the question whether the human conduct interposed between the wrongful act and its final consequences should have been foreseen or not may be concerned with the actings of persons who are not parties to the action at all.

37 [1933] 2 K.B. 297.
38 1944 S.C. 237.
39 At p. 249.
40 Likewise in contributory negligence, Thomas v. Quartermaine (1887) 18 Q.B.D. 697.
Self-Defence

Self-defence—or more accurately "private defence," since a man may in certain circumstances lawfully protect others—is recognised as a valid justification for acts which would otherwise be wrongful. It must not exceed what is reasonable, though the law will not weigh in fine scales acts done in defence of person or property. A proprietor may remove from his premises by force a person who has no right to be there—but if the intruder has even a vulnerable title, legal action is appropriate and not self-help. Persons who enter public transport and refuse to comply with reasonable regulations with regard to conditions of travel may be removed.

Privilege

The defence of privilege is available in certain cases where, on grounds of public policy, redress for injury is refused, either absolutely or only on proof of malice or lack of probable cause, against certain categories of defenders. The relevance of this defence in the law of slander will be discussed later in that context. The Sovereign in Her personal capacity may not be sued, but, on the other hand, actions against the Crown are competent in the circumstances set out in the Crown Proceedings Act, 1947. Scottish judges have absolute privilege in respect of their acts and utterances in a judicial capacity. The Lord Advocate cannot be sued for damages for any act done by him or on his behalf as public prosecutor, and this protection extends even to procurator fiscals depute acting in his name in criminal trials on indictment in the sheriff court.

Inevitable Accident

The burden imposed on a defender wishing to plead inevitable accident is very heavy, and in a recent case Lord Kilbrandon with some regret held a driver liable for a collision while he was temporarily blinded by a fly which had invaded his eye. He observed, "Inevitable accident means an accident which could not have been avoided without the act of the defendant."
by the exercise of reasonable care and skill." In the instant case, the driver, though blinded, should have hugged his own side of the road. The driver had some control—which he would not have had in certain cases of heart attack.

No Causation
A defender is liable only for harm which his fault has caused. Thus in McWilliams v. Sir William Arrol & Co. it has been firmly established that a pursuer cannot succeed merely by proving the defender’s negligence. The defenders had failed to issue a safety belt to the pursuer’s deceased husband, a skilled steel erector, and were negligent in not doing so. On the other hand, the evidence showed that there was a high degree of probability that, even had he been issued with a safety belt, he would not have worn it.

Statutory Authority, Statutory Protection and Limitation of Actions
Acts which would otherwise be wrongful may be expressly authorised by statute. As Lord Blackburn observed in Caledonian Ry. v. Walker’s Trs.:

No action can be maintained for anything which is done under the authority of the legislature, though the act is one which, if unauthorised by the legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him.

The statutory powers must, of course, be exercised without negligence, and must, as far as practicable, avoid damage to third parties.

Statutory provisions have been introduced in most chapters of the law to cut off stale claims, and thus to provide a defence against actions brought after the prescribed periods of time. So far as personal claims in reparation are concerned, these were, and are, restricted by the long negative prescription and also by a variety of unco-ordinated statutory provisions. Most notable and possibly most frequently invoked of these was the Public Authorities Protection Act, 1893, which was pled only too often to permit public authorities to evade their just liabilities. Now by the Law Reform (Limitation of Actions, etc.) Act, 1954, some endeavour has been made to rationalise statutory limitations of action by cutting down the rights of action of pursuers rather than by protecting classes of defenders. The sections which apply in England may be relevant in a Scottish court when

48 1962 S.L.T. 121.
49 (1882) 9 R.(H.L.) 19 at p. 32.
50 For comments on statutory authority and the rule in Rylands v. Fletcher, see ante, p. 642 et seq.
51 56 & 57 Vict. c. 61.
52 2 & 3 Eliz. 2, c. 36
English law has to be applied in a case such as McElroy v. McAllister,\textsuperscript{53} but the main provision affecting Scotland is section 6. This section provides that no action of damages, where the damages consist of or include damages or solatium in respect of personal injuries to any person, shall be brought in Scotland against any person, unless it is commenced by or on behalf of the person injured before the expiration of three years from the act, neglect or default complained of (or of the date when it ceased, in the case of a continuing injury); or, in the case of an action brought by or on behalf of a person to whom a right of action accrued on the death of another person due to injuries sustained by him, before the expiration of three years from the date of that death. It has been decided that the punctum temporis to be considered, in deciding whether the action is brought “before the expiration of three years from the date of the act, neglect or default giving rise to the action,”\textsuperscript{54} is the date when the active injury is suffered. Accordingly, a manufacturer may be liable to a workman for injury caused by a defective machine supplied to the employers more than three years before the action was raised.\textsuperscript{55} If an action is raised timeously, adjustment beyond the statutory period for bringing the action will not be precluded \textsuperscript{56}; but a new party cannot be convened after that period by way of amendment.\textsuperscript{57} Special provision is made by section 6 (2) for certain persons under disability to bring an action within three years from the cessation of disability. There are still, however, a variety of statutory limitations of actions which, with the details of the 1954 Act, cannot be discussed here.\textsuperscript{58}

**Damages**

Damages are awarded in reparation with a view to restoring the pursuer to the same position as he would have been in had he not sustained the injury of which he complains.\textsuperscript{59} The evaluation in money terms of such loss as injured reputation caused by slander or wounded

\textsuperscript{53} 1949 S.C. 110.
\textsuperscript{54} s. 6 (1) (a). See also Haddow v. Lord Advocate, 1959 S.L.T.(Notes) 48.
\textsuperscript{58} See discussion of the problem and tabular presentation of the various special statutory periods of limitation by D. M. Walker, 1954 S.L.T.(News) 125; also, e.g., on National Health Service (Scotland) Act, 1947, s. 70, McQueen v. Glasgow Victoria Hospitals, 1956 S.C. 536.
\textsuperscript{59} Regarding interest on damages see Interest on Damages (Scotland) Act, 1958 (6 & 7 Eliz. 2, c. 61); Macrae v. Reed and Mallik, Ltd., 1961 S.C. 68.
feelings caused by bereavement can, of course, only be based on conjecture. Since, however, the object of awarding damages is satisfaction of the pursuer and not punishment of the defender—apart from certain specialties regarding aggravation and mitigation of damages—the position of the pursuer and not that of the defender is to be considered in awarding monetary reparation. To succeed in his action, the pursuer must prove loss, but in cases of deliberate infraction of a legal right—as in wrongful detention of furniture, or slander—a certain amount of damage is presumed. This is not the case in actions based on negligence.

When injury to moveable property is established, the pursuer may claim for necessary repairs or for the value of the article if destroyed; the defender is also liable for a sum in respect of the loss of use of the article until it can be repaired or replaced. In cases of personal injury which does not prove fatal, the pursuer may claim for patrimonial loss arising from the accident, as for medical expenses, damage to clothing, and loss of earnings; also for physical suffering and loss of expectation of life. When close relatives of a person killed by the defender’s wrongdoing bring an action on that account, they may claim solatium for their wounded feelings; and also, if it can be proved, a sum in respect of loss of support measured by the way in which the deceased lived. It has been held that the claim for solatium is a substantive and independent right of action, and not a mere item of damages. Whether it is exigible depends on the lex loci delicti, and is, accordingly, not recoverable even in a Scottish action if the delict complained of took place in England where the claim for solatium is not recognised.

Remoteness of Damage and Causation

A pursuer who has suffered damage in consequence of the defender’s

60 It has been held in the Outer House that in certain cases a claim for damages may include a sum for outlays which the pursuer was under no legal liability to make, Murphy v. Baxter’s Bus Services, Ltd., 1961 S.L.T. 435; as regards the possible relevance of a claim in respect of liability incurred through the obligation of recompense—see p. 627, ante.


63 It must be proved that the pursuers’ feelings were in fact wounded, and that they sustained loss of support: Rankin v. Waddell, 1949 S.C. 555; Duffy v. Kinnell Coal Co., 1930 S.C. 596; as to damages for loss of support see Dickson (J.) v. Nat. Coal Board, 1957 S.C. 137.


65 Naftalin v. L.M.S., 1933 S.C. 259; McElroy v. McAllister, 1949 S.C. 110; see also p. 699, ante.
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act 66 may be disentitled to recover reparation, either because the
defender’s conduct was not in law regarded as *injuria*—as in trade
competition; or because, though the defender acted in breach of a duty
of care, this duty was not owed to the pursuer 67; or because the
damage was not of a kind recognised by law as recoverable from the
defender. Thus, though breach of a statute which creates a criminal
offence will generally also imply civil liability to an individual injured
by the breach of the statute, this is not necessarily so.$8$ Again the
damage may be too remote. *Causa proxima non remota spectatur.* A
defender will not be liable for every loss or injury which the pursuer
has sustained and would not have sustained but for the pursuer’s
wrongful conduct. The law cannot take account of everything that
follows a wrongful act. Thus even if the action is based on deliberate
wrongdoing—as in a case of assault which necessitates the taking of
the victim to hospital—the original aggressor will not be liable for
further injuries sustained in a street accident caused by the negligence
of the ambulance driver. The original assault would not be the direct
cause of the injuries suffered in the accident.

Much has been written and, no doubt, much will be written, on the
subject of “remoteness of damage.” To attempt a short appreciation
of the law of Scotland on this topic must involve dangerous over-
simplification. Nevertheless the author holds the belief that a tentative
opinion is preferable to none; and that something useful may be learnt
from the criticism by judges of the views of text writers.

At the outset of any consideration of remoteness of damage, it may
be observed that the development of the concept of “duty” in actions
based on negligence has to some extent provided the courts with an
opportunity to evade theoretical examination of the law regarding
remoteness of damage, by holding that the defender owed no duty to
the pursuer in law. In the modern analysis of negligence the pursuer
must establish a duty owed by the defender, breach of that duty and
damages flowing from the breach. Once it has been held that no duty
was owed in the circumstances, there is no occasion for investigating
whether damage sustained by him is or is not too remote.$69$ The
question of duty is one for the court, and may be decided on relevancy,
thus preventing the question of damages being left to a jury whose

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66 If the defender's *culpa* has not in fact caused the harm, there is no ground of
460.
mental processes—whatever direction has been given in law—remain inscrutable.

Next, it may be observed that questions of remoteness of damage are not invariably soluble by logical deductions from a formula. Lord Wright observed in *The Edison*:

In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons.

To like effect is the observation of Professor Paton in his work on *Jurisprudence*:

The law would be simpler if some decisions were expressed in this way—undoubtedly in a physical sense the defendant's act was the direct cause of the plaintiff's damage, but we consider for reasons of policy that it is inexpedient to impose liability.

The courts' ultimate approach to the question of damages is selective rather than logical, though certain rules have been formulated to assist them in balancing the competing interests of pursuer and defender. These rules, it is thought, however, are subordinate to the principle that a just balance of interests is to be achieved. There are situations in which, though in a general or logical sense the defendant's negligent conduct "caused" harm, in law he is not liable to make reparation, either because the act is deemed "causa sine qua non" rather than "causa causans"; because the harm inflicted is not of a kind which the law recognises as appropriate for compensation; or, because, according to the "calculus of risk," it was harm of an improbable kind. As Lord Justice-Clerk Thomson observed, in *Blaikie v. British Transport Commission* (a case in which the pursuer's deceased husband had died of coronary thrombosis as a result of over-exerting himself in a situation caused by the defenders' negligence):

The law has always had to come to some kind of a compromise with the doctrine of causation. The problem is always rather a practical than an intellectual one. It is easy and usual to bedevil it with subtleties but the attitude of the law is that expediency and good sense dictate that for practical purposes a line has to be drawn somewhere, and in drawing it one must be guided by the practical experience of the reasonable man rather

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70 Paradoxically, civil jury trial, which was imposed on Scotland in the early nineteenth century on the English model, continues for many actions which in England would now be tried by a judge sitting alone.


72 2nd ed., p. 381.


than by the theoretical speculations of the philosopher. . . . The reasonable man goes round in bogey because he plays the orthodox shots, is never in trouble and is not called on to do the unexpected. . . . It is enough for the decision of the present case to say that, looked at broadly, the death of this man would not have been anticipated by a reasonable man as a probable consequence of the initial act of negligence.

In approaching problems of liability and causation, there is much to be said for applying the "calculus of risk" principle. The probability of injury and the seriousness of the possible consequences are weighed against the difficulty, expense and other disadvantages of refraining from the act or making good the admission.\(^{75}\)

So far as intended consequences of a wrongous act are concerned, the defender will be liable, even though they might not have been anticipated in the ordinary course of things. With regard to unintended consequences of wrongful or negligent acts, more complex questions arise.\(^{76}\)

In *Allan v. Barclay*\(^ {77}\) Lord Kinloch observed: "the grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer." According to this view, the foresight of the reasonable man determines not only whether a duty of care is owed, but also the scope of liability for damages. This view may be supported by a mass of judicial dicta.\(^{78}\)

A competing principle was laid down by the Court of Appeal in England in *Re Polemis*.\(^ {79}\) In that case it was shown that a plank had fallen into the hold of the plaintiff's ship, due to negligence of the defendants' servants. This was likely to cause some damage, but it could not reasonably have been anticipated that—as happened—a fire would break out and destroy the whole ship. The defendants were held liable for the whole loss. The gist of the decision was that, *esto* the wrongdoer should have foreseen some damage, it mattered not whether the damage in fact caused was what he could reasonably have foreseen or not. It was said\(^ {80}\) that:

To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause

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\(^{76}\) See, e.g., J. Munkman (1954) 17 M.L.R. 134.

\(^{77}\) (1864) 2 M. 873 at p. 874.


\(^{79}\) [1921] 3 K.B. 560.

\(^{80}\) Per Scrutton L.J. at p. 577.
damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act.

Though in most cases what is directly traceable to a negligent act is reasonably foreseeable, this need not always be so. The doctrine of _Re Polemis_ was accepted by Lord Justice-Clerk Aitchison in his dissenting opinion in _Bourhill v. Young_, but dicta in the opinions of the other Scottish judges in the Court of Session and in the House of Lords reject the wider rule as inapplicable to Scotland—whatever the position might be in England. Professor Walker is, however, justified in his comment that some at least of these dicta have not really distinguished between foreseeability as a test of whether any liability has been incurred at all and the very different problem as to the extent of liability _esto_ fault is admitted or proved. It has yet to be decided positively whether the rule in _Re Polemis_ or some variation of it will not be established as preferable to assessing damages according to what the reasonable man would have foreseen. The author would venture the tentative opinion that the rule in _Allan v. Barclay_ is a less suitable formula for assessing damages in reparation than at least a qualified version of the rule in _Re Polemis_.

Lord Wright, who favours the _Re Polemis_ rule, has suggested in his valuable article in the _Modern Law Review_ that, in an action based on negligence, proof of the duty owed by the defendant-defender to the plaintiff-pursuer must be further analysed to ascertain in respect of what particular interest of the pursuer—the pursuer's personal security or some property—the defender owed a duty. If any such duty is infringed the defender will be liable for all "direct" consequences of breach. The "direct" consequences, in his Lordship's view, are to be ascertained by an "ex post facto" judgment in regard to remoteness after the damage has been done and ascertained, and the question is then only how far it is directly traceable to the defendant's

81 _Supra_, note 78.
83 For a general discussion of the "pro-Polemis" view see D. M. Walker "Remoteness of Damage and Re Polemis," 1961 S.L.T.(News) 37. It may be that he goes too far in concluding that _Baron Vernon v. Metagama_, 1928 S.C.(H.L.) 21, is "conclusive" of the acceptance of _Re Polemis_ so far as Scots law is concerned. Before trial the defendants had admitted liability and therefore the case proceeded to some extent on concession.
84 _Supra_, note 77.
86 14 M.L.R. at p. 398; cf. his opinion in _Bourhill v. Young_.

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default.” Lord Wright’s view may well not conform to the general understanding of Re Polemis, which does not greatly matter in Scotland since that case is not binding in Scotland, but may assist to some extent in settling a sound formula for investigating whether damages are too remote or not. It is of interest to note that, in McHarg v. McMillan, Lord Sorn, though purporting to reject the rule in Re Polemis and to adopt the test of reasonable foreseeability, came quite close in the end to the view which Lord Wright was to adopt later in his article in support of Re Polemis.

McHarg v. McMillan was an action for damages (arising out of a collision between two motor-cars) in which the pursuer, who was a farmer, claimed farming losses incurred. She averred that as a result of her injuries she had been confined to the house, and prevented from supervising the farmhands. In consequence of this sixteen calves and a valuable foal died, the bull was not timeously put out with the cows, and the sowing and subsequent cultivation of the oat crop was not properly carried out. For this loss she claimed £710 and it was held that her averments of loss were relevant. In the course of his judgment Lord Sorn observed:

It is not the particular result of the injury which must be deemed to be within the contemplation of the wrongdoer, but merely, in my opinion, the particular type of result. For instance, in the present case it must have been, or should be deemed to have been, within the contemplation of the wrongdoer that his action might result in incapacitating a traveller in the other car; also that that person might be a wage-earner or somebody who had to earn their livelihood, and also that that person might follow the occupation of a farmer. I think, again, that it is within reasonable contemplation that, if a farmer is incapacitated, the work on the farm is likely to suffer.

It may not be unreasonable to construe this opinion as supporting the view that, once a foreseeable duty is established with regard to a particular interest, the defender may be held liable for all the direct consequences flowing from breach of that duty—at least such as are “natural and not improbable.” There is no doubt that the House of Lords’ decision in Baron Vernon v. Metagama is at least a strong case in favour of a Re Polemis approach.

The principle of Re Polemis has recently been rejected by the Privy Council in an Australian appeal—the repercussions of which cannot yet be assessed. It is not improbable that a direct result of the decision

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88 In Bourhill and Malcolm, supra, no duty was established.
89 At p. 13.
90 This is a rare example of where the double negative may be useful—see MacDonald v. David Macbrayne, Ltd., 1915 S.C. 716, per Lord Dundas at p. 723. For other formulae see Walker, Damages, pp. 537–538.
91 1928 S.C.(H.L.) 21, but see note 83, ante, p. 714.
in *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co.*, 92 "The Wagon Mound," will be to extend the same interpretation of remoteness to English law. Nevertheless, as only one opinion is delivered by the Privy Council and its decisions are not binding on the Scottish or English courts, the House of Lords is free to follow a different view of law in Scottish or English appeals. Both in *Re Polemis* and in *The Wagon Mound* it was found as a fact that the fire which caused very extensive destruction could not reasonably have been foreseen, though some damage could have been expected from the defendant’s negligence. (The author confesses to mild surprise at these findings of fact: the burning of furnace oil on the surface of the sea—as in the latter case—seemed all too familiar a phenomenon in recent sea warfare.) In *The Wagon Mound* it was held that, though the damage was the direct result of the escape of oil, applying the test of foreseeability the defendants who were responsible for its escape could not reasonably have been expected to know the oil would catch fire (as it did through the falling of molten metal from a wharf) and as a result cause extensive damage to the wharf. The Privy Council considered that 93 "it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be ‘direct’." It might, of course, be said with equal justification that, *esto* fault of another is established and is shown to be the direct cause of damage, it is not self-evident that justice is best served by allowing the loss to fall on the altogether innocent victim. Certainly in cases of injury to the person, the wrongdoer takes his victim as he finds him and, *esto* there is liability, cannot plead that the damage was not foreseeable because, *e.g.*, of the victim’s "egg-shell skull" or *haemophilia*. The whole question of remoteness and foreseeability still remains open, and formidable arguments can be ranged on either side. 94 The ultimate solution can only be determined in the highest courts.

It must be stressed again that in dealing with questions of "remoteness of damage" the law is selective and not always logical, and, further, that when a new problem is offered to the courts for solution,

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caution and conservatism may often be apparent at first. A proportion of judges usually anticipate that to sustain a novel claim may lead to the thronging of their courts by speculative litigants—now further encouraged by the system of “assisted” litigation. This largely explains the attitude of certain judges to claims for “nervous shock.” The history, bibliography and relevant case citations are contained in the learned articles already referred to and in the cases of Bourhill v. Young and King v. Phillips.

The former case, where discussion of the problem was obiter, was Scottish, and the latter English, but ultimately it is probable that a common solution will be adopted in both countries. It is thought that eventually a defender will be held liable for the physical consequences of nervous shock or emotional injury inflicted on the pursuer, whenever the defender could reasonably have foreseen that he might cause such injury to a person in the pursuer’s position. It is thought that the “area of risk” for this purpose need not be within the “area of risk” of direct physical injury; and that, so far as Bourhill v. Young seems to imply that the pursuer in a case of nervous shock must have been within the vision of the defender, the case will have to be reviewed—as Professor Dewar Gibb has already suggested. It has been doubted whether in Scotland claims for nervous shock should be admitted, except where there has been an element of apprehension by the pursuer for his own safety. Is a claim competent in respect of nervous shock, suffered as a result of witnessing an accident to another person due to the negligence of the defender? The weight of existing authority in Scotland is against admitting claims unless there has been apprehension by the pursuer for his or her own safety. The case of A v. B’s Trs., where the nervous shock to the pursuer was caused by the person represented by the defender committing suicide in the pursuer’s lodgings, was exceptional. In Bourhill there was no averment that the pursuer was apprehensive for her own safety. Despite the number of dicta in Scottish cases which would restrict claims for nervous shock to cases where the pursuer was in peril of direct physical injury, the author leans to the view that, when the law is clarified, this restriction will be discarded in Scotland.

95 Note 85, ante, p. 714. See also Walker, Damages, Chap. 23.
96 1941 S.C. 395; 1942 S.C.(H.L.) 78.
98 Select Cases, 2nd ed., 1951, at p. 127.
1 (1906) 13 S.L.T. 830.
There seems to be much force in Lord Wright’s observation in Bournhill ²:

Always assuming that the wrongful act is established, the damage to be proved is physical injury due to nervous shock. Modern medical science may, perhaps, show that the nervous shock is not necessarily associated with any particular mental ideas. The worse nervous shock may for the moment at least paralyse the mind.

One other aspect of remoteness which may be noted briefly is that of novus actus interveniens, that is unpredictable intervention of human agency between the original wrongful act of the defender and its ultimate consequences. If such conduct should reasonably have been foreseen by the defender, the so-called chain of causation will not be broken, but if it could not have been thus anticipated, it may break the chain of causation, so as to relieve the wrongdoer of liability for the remoter consequences of his act.

The intervention may be that of the pursuer himself, ³ in which case there seems to be substantial overlapping of the defences of novus actus interveniens and volenti non fit injuria. The doctrine of “agony of the moment” and that of the “rescue cases” apply.⁴

On the other hand, the human intervention may be that of third parties. Though, in general, the intended act of a third party will break the chain of causation between the wrongful act and its consequences,⁵ such human action as should reasonably have been foreseen as likely to result upon an act of wrongdoing cannot be regarded as novus actus interveniens— as, for example, children “acting in the wantonness of infancy.” ⁶ It may also be observed in this context that the doctrine apparently enunciated in Eccles v. Cross & McIlwham ⁷ that duty of, and opportunity for, intermediate inspection by a third party will absolve from responsibility a person initially guilty of negligence for damage suffered by the pursuer subsequent to the opportunity for such inspection, can no longer be accepted.⁸

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² 1942 S.C.(H.L.) 78 at p. 94.
⁴ See p. 706.
⁶ Morrison v. McAra (1896) 23 R. 564; Findlay v. Angus (1887) 14 R. 312.
⁷ 1938 S.C. 697.
CHAPTER 31

REPARABLE INTERESTS

It is only possible in the present work to note very briefly the more important points in each of the main species of delictual liability. These fall into four main categories—Injuries to the Person, Injuries to Liberty, Injuries to Reputation and Injuries to Property.

INJURIES TO THE PERSON

Assythment and Liability for Culpa causing Death or Injury

Bell laid down that “Everyone who lives under the protection of the law has an absolute right to safety of his person; and wherever this right is invaded, there is in Civil law a provision for redress of the injury.” In the past the law of “assythment” provided redress both for intentional and unintentional injury to the person, but the restriction of this remedy to cases which involved criminal responsibility made it inappropriate to repair injury caused by non-criminal negligence. In practice assythment has lapsed into obsolescence. Assythment being penal in its nature, the sum payable by way of redress was assessed with regard to the ability and estate of the offender, and was available to a wider circle of relatives of a person killed—such as brothers and sisters—than in the modern action for damages.

The old action of assythment was superseded by a composite action which, though foreshadowed by Stair, did not gain full recognition until the end of the eighteenth century. This action afforded redress to those injured by, or to close relatives of those killed by, wrongful—usually negligent—conduct of defenders, albeit such conduct might not be of a criminal nature. Nourished by the Glossators, the main impulse for the development of the Aquilian action to include claims for death or injury came from Grotius, whose thought is

1 Principles, § 2028.
2 See p. 648, ante.
3 Stair I, 9, 7.
5 I, 9, 4. This passage is very close to the view of Grotius, which had a general influence in Europe, see note 8; cf. H. McKechnie, Introduction to Scottish Legal History, p. 274.
6 e.g., Gardner v. Fergusons (1795) unreported; extended to fatal injury, Black v. Cadell (1804) Mor. 13905; (1812) 5 Paton 567.
7 See refs. note 4, supra.
reflected in Stair. The grafting onto the action for patrimonial loss (based on *culpa*) of an element of *solatium* derived from customary law was a phenomenon apparent in the various Civilian systems of Europe, was largely due to ecclesiastical influences and was no anomaly peculiar to Scotland.⁸

By curious perversion of the Roman terminology the Scottish action for damages in respect of death or personal injury has been frequently designated by judges of august authority as an "*actio injuriarum.*"⁹ Since the *actio injuriarum* in Roman law was appropriate only in cases where there had been deliberate personal affront or outrage inflicted on the pursuer by the defender *animo injuriandi*, it is most unfortunate that the term should be applied to cases of negligence. In fact, the basis of liability in actions brought in respect of personal injury is Aquilian fault—*damnum injuria datum.*¹⁰ The element of *solatium*, which is a separate *jus actionis*¹¹ in Scottish law, was grafted from the old law of assythment—not from the Roman law at all—onto the action for patrimonial loss based on Aquilian fault.¹² (Moreover, an independent action of damages based on *solatium* and loss of support was given to close relations of a person killed by fault of a defender.) The grafted element of *solatium* caused difficulty to the courts when they had to decide whether a claim for *solatium* should transmit actively to representatives of a deceased who had suffered injury, on analogy with the Aquilian action (which did not cover such a claim). In rejecting the transmissibility of a claim for *solatium*, the courts considered the analogy of the Roman law "*actio injuriarum*" in which the claim for *solatium* (which was based on contumelia) was considered too personal a claim to transmit to the representatives of the person who had been

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¹⁰ *Innes v. Magistrates of Edinburgh* (1798) Mor. 13189; refs. note 8; W. A. Elliott, "What is *Culpa*?" (1954) 66 J.R. Rev. 15. Both Sheriff McKechnie (sup. cit. p. 276) and Mr. Elliott state that Bell used the term *actio injuriarum* to denote the action for damages for death or injury. In fact he did not. After his death later editions had this misnomer inserted by an editorial hand (or foot ?), see Bell, *Principles* 4th (1839) ed., §§ 2029-2030.


affronted.\(^15\) Since damages claimed in respect of *solatium* were and are usually lumped together with a claim for patrimonial loss, it may possibly be that the courts tended to designate actions for damages for personal injuries generally as "*actiones injuriarum*," for no better reason than that such actions in Roman law admitted a claim for *solatium*, and Scottish law had also grafted a claim for *solatium* (of non-Roman origin) onto the action based on *culpa*. Lord Kinnear recognised in *Leigh's Ex. v. Caledonian Ry.*,\(^14\) that the words "*actio injuriarum*" when used by Scottish judges in this way were not intended to refer to the Roman law doctrine at all. Thus *Bern's Ex. v. Montrose Asylum*\(^16\) was followed in *Stewart's Exrx. v. L.M.S.*\(^17\) without judicial comment on the fact that the earlier claim was based on assault upon a deceased (and thus an example of the *species facti* which would have justified the true *actio injuriarum*) while the claim in the latter case was founded only on negligence (and thus inappropriately classified in Roman categories as an *actio injuriarum*).

Lord Macmillan in *Stewart's Exrx. v. L.M.S.*\(^18\) made a memorable digression in his speech to relate the influence of the great jurists of the Netherlands upon Scottish students of law in the seventeenth and eighteenth centuries, and was clearly troubled by the designation of an action in respect of death or personal injury as an *actio injuriarum*. In point of fact, every one of the jurists to whom he refers would have supported him in rejecting this designation, and he was, of course, right when he ventured to observe\(^19\): "It may be that the *utilis actio legis Aquiliae* was a nearer analogue of the modern action of reparation for personal injuries." However, *ob majorem cautelam* he did not venture to disagree with the provisional view of Sheriff Hector McKechnie that this action was derived from the *actio injuriarum*. Sheriff McKechnie, with the integrity of a scholar, has now himself corrected his earlier opinion. He has recently commented\(^20\): "The generality of the references in earlier paragraphs . . . to the *Lex Aquilia* will have indicated that as the real source of the action of reparation for personal injury or death as well as for damage to property. Unfortunately the great authority of Professor Bell and successive Lord Presidents from Inglis onwards has supported the view that the correct term is the *actio*

\(^{13}\) *Bern's Ex. v. Montrose Asylum* (1893) 20 R. 859 and authorities collected in *Stewart's Exrx. v. L.M.S.*, *sup. cit.*

\(^{14}\) 1913 S.C. 838.

\(^{15}\) *Sup. cit.*, note 13.

\(^{16}\) 1943 S.C.(H.L.) 19.


\(^{19}\) *Introduction to Scottish Legal History*, pp. 276–177, and see notes 9 and 10.
injuriarum, which they almost invariably used. There is no doubt that this is an abuse of the Roman law term, the essence of which was contumelia or insult. The typical example of an actio injuriarum was thus assault or defamation. Only if injuria is used in the broad sense of culpa can the prevalent usage be justified, but probably it is too deep seated to be readily displaced."

The present author formerly considered that the erroneous terminology, though bound to startle any person with even the most rudimentary knowledge of Roman law, could be tolerated as a domestic anomaly. Unfortunately, however, there is an appropriate use of the concepts of the actio injuriarum where contumelia is involved, and confusion is inevitable when analogies are drawn from the actio injuriarum improperly designated. Further in the recent case of Smith v. Stewart & Co. confusion resulted from an endeavour by the defenders to apply the principles of the Roman actio injuriarum regarding transmissibility of actions to the element of patrimonial loss in a claim based on culpa made by the executor of a deceased. Thereafter the late Lord Justice-Clerk Thomson, who had a firm grasp of the Civil law, decided to correct current perversions in terminology. Unfortunately he died before he had accomplished this purpose; and one who teaches the Civil law in Scotland must still seek to rationalise the unjustifiable.

Assault

Personal violence is clearly a gross invasion of the rights of the individual, and assault (which is a real injury) therefore gives grounds for an action of reparation. Actual patrimonial loss is covered by the principle of culpa, but solatium is also given for contumelia, and so an action is competent though there be no patrimonial loss sustained. In its civil aspect assault consists in an overt physical act intended to insult another and committed without justification or excuse. By "insult," however, a broad meaning is implied and would include all wilful invasions of the person of another. It is not necessary that the pursuer should have been actually struck ("battery" in English law), provided that he has been put in apparent danger of bodily harm. The main defences to assault are consent, justification and provocation. Consent would excuse injuries inflicted in self-defence in sports such as boxing, and by

20 The term was always used in its proper sense in the 18th and early 19th centuries, see e.g., Memis v. Governors of Aberdeen Royal Infirmary (1776) Mor.App., "Delinquency," No. 2, also Smith, Studies, pp. 79–80; see also p. 728, post.
proper medical treatment. Justification excuses the moderate correction of children by parents or teachers, and the exercise of lawful restraint by police officers or masters of vessels. Lord Chief Commissioner Adam said:

On the question of assault, there is no doubt that a person seeking reparation must come into court pure; for if there is provocation, though greatly less than what is returned, it is a justification.

This, however, oversimplifies the position, and the test seems to be whether the defender, if first provoked, exceeded the moderamen inculpatae tutelae.

**Seduction—Adultery, Enticement**

Sheriff Hector McKechnie has written: "Seduction has never been defined, but it may perhaps be described as the obtaining of carnal connection with a woman by circumvention or undue influence." The woman herself can bring the action, as can her husband if she is married. The essence of the action is dishonour. Pregnancy resulting from connection is not itself a ground of action at the woman's instance. "Else" observed the judges caustically in the old case of *Hislop v. Ker* "a hundred such processes would be intended by whores." The pursuer must prove the method of seduction. The most common circumvention used in seduction is—or probably was—promise of marriage to an unmarried female, but lesser methods of circumvention will suffice. In most actions for seduction there has been some averment by the pursuer of deception by the defender—though sometimes it is not very convincing in its nature—but, in *Murray v. Fraser*, Lord Justice-Clerk Scott Dickson considered that such an averment was superfluous where personal ascendancy by the defender over the pursuer could be established. In this case a girl of sixteen years, who was ignorant of sexual matters, had been seduced by the defender, who was thirty years of age, a friend of the girl's parents, and liked and trusted by her.

A husband may sue his wife's paramour for reparation, and here *solatium* for sexual connection—not seduction—is the basis of the

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23 *Young v. Allison* (1820) 2 Mu. 228 at p. 231.
25 [Encyclopaedia, title "Reparation," s. 1131; see also Glegg on *Reparation*, 4th ed., p. 133 et seq.]
27 (1696) Mor. 13988.
28 [Cathcart v. Brown (1905) 7 F. 951.]
29 *Stewart v. Menzies* (1837) 15 S. 1198; *MacLeod v. MacAskill*, 1920 S.C. 72.
30 At p. 632, *sup. cit.*
31 In this case there was an averment that the defender told the girl that he would do her no harm, but the Lord Justice-Clerk did not consider it essential.
action, as it is of an action based on rape. Though there is little authority on the point in Scotland, enticement of a spouse has been held to be an actionable wrong. It must be shown that the spouse was actually induced by solicitations of the defender to leave the pursuer.32

**INJURIES TO LIBERTY**

"Next to life is liberty; and the delinquences against it are restraint and constraint. And though liberty itself be inestimable, yet the damages sustained through these delinquences are reparable." 33 Even a slight infringement of personal liberty, as by detaining a lady for a quarter of an hour against her will in a room, in an endeavour to make her apologise, is actionable.34 Whatever may have been the case in the more robust periods of Scottish history, at the present day there is seldom interference with personal liberty except under colour of legal process. The restraint, therefore, is usually admitted by the defender in an action of reparation for interference with liberty, but with a plea of justification. The success of the action then depends upon whether the restraint—as by arrest, initiation of process, imprisonment or detention in a hospital for mental diseases—was justified.35

**INJURIES TO REPUTATION**

**Slander, Defamation and Verbal Injury**

**Basic Principles**

Assault, as has been noted, is a real injury justifying an award of damages by way of *solatium* for the insult or affront to the pursuer’s feelings. Patrimonial loss, for example by loss of earnings or damage to clothing, is reparable on the usual principle of *culpa*. It is submitted that in the law of Scotland the same principles apply in an action for slander, and that the older law is not as irrelevant as some writers have supposed.36 Injurious words (verbal injury as distinguished from real injury) are actionable because of the element of insult, and in this connection the *animus injuriandi* of the defender is relevant. If the words have been published to others beside the pursuer himself they will almost inevitably damage his reputation as

33 Stair 1, 9, 4.
36 See for detail Glegg, Reparation, 4th ed., under these heads also pp. 79-81. In Agnew v. Laughlan, 1948 S.C. 656, Lord Mackintosh in the Outer House refused to reduce an order for detention and certain medical certificates after the death of the person detained. Certain implications of this case may be regretted, since both the widower and the child of the deceased might well have an interest in establishing her sanity, e.g., if a life policy were taken out for the child. The element of *injuria* might also have been relevant; see p. 654, ante.
36 e.g., Glegg, Reparation, 1st ed.
an economic asset (defamation)—but in this connection *culpa* rather than *animus injurandi* is (or should be) the foundation of liability. Insult and defamation usually coincide in an action for slander, but this need not necessarily be the case. Because of the element of insult, *solatium* is given for affront to the feelings of the pursuer, even though the slander was published to no one else. If there has been publication, there may also be liability for damage to reputation as an economic asset, even though the statement is not necessarily insulting. To accuse a lawyer in the privacy of his chambers of being a swindler and a hypocrite would be actionable, though no one heard the insult. Were the same statement to be made in the bar of this lawyer's club before witnesses, damages would also be given for harm done to his reputation. If a well-meaning person (labouring under misapprehension) were to say at a private interview with a commercial man "I am sorry to hear, my friend, that you have been sequestrated," this would not be actionable. The element of insult would be altogether lacking: there would be no *animus injurandi*. Were the same well-meaning person to say to friends at the club "I am most distressed to hear that poor Midas has been sequestrated," the statement would be defamatory and actionable.

Though this explanation seems consistent with a long line of authorities—especially the older ones—matters have been confused latterly by failure to appreciate the distinction between the element of insult and the element of defamation in actions for slander, and by incautious reliance on English authorities. The law of England does not regard insult as an actionable wrong, and the English law of defamation is concerned in theory only with harm inflicted on reputation as an economic asset—though exemplary damages are allowed, and the huge sums awarded in English libel actions are not too easy to reconcile with the basic theory. Indeed, in both countries, except in cases where the pursuer/plaintiff can show that he has actually suffered economic loss, it might have been preferable to leave to the criminal law redress for insult (which is recognised in the Scottish law of slander, but only indirectly—apart from criminal proceedings—in England through awards of damages). There is a great disproportion between the amount of fines imposed for insulting words and behaviour and awards of damages. Actions are, of course, relatively rare in modern Scots law and usually are tried in the sheriff court rather than, as in England, before a High Court jury.

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37 Scots law does not distinguish between libel and slander as does English law.
In fact in older Scottish practice slander in the sense of insult was dealt with mainly in the commissary courts, which imposed fine or imprisonment and palinode (recantation) as well as awarding damages to the injured party. This redress, designed to prevent breach of the peace, combined punishment with retraction of the calumny, and gave *solatium* for insult. When, however, the pursuer could establish damage to reputation, he was entitled to seek reparation as well as *solatium*, and could competently seek his remedy in the sheriff court or Court of Session. This usual division of jurisdiction made it clear that slander had potentially two distinct elements, and that different considerations applied to each. With the abolition of the commissary courts and the establishment of the Jury Court, presided over by a Scotsman whose career had been in politics and English law, the basic concepts were to some extent obscured. Indeed, a perusal of the slander cases in Murray’s Reports leaves the impression that Lord Chief Commissioner Adam regarded his function as being to impose on Scotland the English law of defamation. This law, as its leading exponents freely accept, is in a very confused state so far as defamation is concerned, and in particular with regard to the concept of “malice.” The importation of this term into Scots law was disastrous for the logic of the law. It may possibly not be too late to return to the older and sounder principles of testing the element of *insult* in slander by reference to *animus injuriandi* (recognising, of course, that *culpa lata dolo aequiparatur*), and by testing *defamation*, or harm to reputation, by reference to *culpa*. Admittedly, this would involve a good deal of what the late Lord Justice-Clerk (Thomson) called “salvage work” by the judiciary, but it would be well worth while. It would also be expedient at the same time to reaffirm that the term “verbal injury” implies any affront by words which justifies a claim for *solatium*. Lord President Robertson is thought to have considered that it meant patrimonial loss caused

39 See Bell’s *Principles*, § 2043; Mackenzie, title XXX; Hume, i, 343–344; Boyd, *Judicial Proceedings* (1779 ed.), p. 139, gives a style of “summons for scandal” which is similar to the older form of indictment, but a civil party injured could be solaced in the same proceedings.


42 According, e.g., to Winfield, 6th ed., p. 287, “irrational and hair-splitting.”

43 Ibid. p. 299 et seq.


by a false and malicious statement. When one observes that every writer of repute for over two thousand years, including all the Scottish institutional writers, and every lawyer throughout the world trained in the Civilian tradition has recognised the meaning of *injuria verbis* to be that stated in Digest 47, title 10, it may be permitted even to the least worthy of academics to question what is alleged to be Lord President Robertson’s innovation.

It seems to the author that the topic of slander and defamation may best be studied by first considering that aspect which is concerned with insult—in which connection English authority is irrelevant—and then to consider defamation in the context of harm caused to reputation, where the English authorities may be of some assistance.

**Verbal Injury (Insult)**

The late Professor R. W. Lee, when discussing the delict of *injuria* which justified the actio injuriarum, observed,46 “Essentially, it is an affront, a contumely, which easily passes into the associated wrong of defamation. But they are different. It is one thing to injure my reputation, another to injure my feelings. Wherever the Roman tradition exists, as on the Continent and in Scotland and South Africa, both are actionable wrongs. But this is not so in English law. ‘Our law (said Lord President Inglis in a Scottish case) 47 says that a man may have damages for injury done to his feelings. The law of England repudiates that doctrine’.”

This essential difference between Scots and English law, which is particularly relevant when considering the mental element in slander, was recognised very clearly by Stair. In Scotland insult and defamation may, but need not, coincide; in English law damage to reputation is compensated, but verbal insult is within the province of the criminal law alone. Stair commented,48 “Actions upon injurious words, as they may relate to damage in means, are frequent and curious among the English; but with us there is little of it accustomed to be pursued, though we own the same grounds, and would proceed to the same effect with them, if questioned, . . . Slander is competent to be judged by commissaries. And therefore a decreet of the Commissaries of Edinburgh, upon a pursuit for slander and defamation, decerning the slanderer to make acknowledgement of the injury before the congregation and to pay an hundred pounds Scots to the party, and as much to the poor, was sustained by the Lords.” Until the abolition of the commissary

47 *Mackay v. McCankie* (1883) 10 R. 537.
courts the Court of Session was, in general, content to leave jurisdiction over verbal injury (in the sense of insult) to the commissaries, but exercised jurisdiction when an element of patrimonial loss for defamation was in issue. Bankton described verbal injury as "when Words are spoken to or concerning one whereby he is defamed . . . it is regularly cognoscible by the Commis-
sars . . . the damage may likewise be sued, before the Court of Session or other civil judges." "Slander and defamation," "scandal and defamation" indicated the double aspect of the delict. Commissary Wallace also acknowledged that, though reparation for real or verbal injury could be claimed in the Court of Session, the commissaries had privative jurisdiction for scandal (i.e., insult) alone. Erskine stressed the same point, and illustrates it by the example of falsely calling another bankrupt. Since such a statement does not necessarily reflect on a man's honour, but may ruin his credit, the action for damages must be pursued, not before the commissaries, but before the sheriff or other judge ordinary.

So far as slander or verbal injury is concerned, animus injuriandi was regarded as an essential element. Mackenzie laid down, "Verbal injuries are those which are committed by unwarrantable expressions, as to call a man a cheat or a woman a whore . . . therefore . . . the injurandi animus, the design of injuring as well as the injuring words, must be proved." The same view (as was consistent with Civilian principles) is apparent in Bankton, Erskine, Wallace, Kames and others. On the other hand, where reparation was sought for loss suffered, actual or probable, the test was culpa. Kames observed in Graeme v. Cunningham, "An actio injuriarum, where there is no patrimonial loss and where the damages awarded are only in solatium, must be founded on dolus malus, according to the opinion of all writers upon law; and so far it differs from damages awarded for repair to patrimonial loss, in which it is sufficient to specify even culpa levissima." The same view was expressed by Lord President Blair, "In the proper action of scandal animus injuriandi is requisite. True there may be grounds for process of reparation (though not strictly for scandal) even in a case of error with no wrongful purpose." Borthwick summarises the

49 Wallace, Principles of the Law of Scotland, § 719; Bell, Principles, § 2043; Borthwick, op. cit., p. 56.
50 I, 10, 24, and see subsequent sections.
51 Sup. cit.
52 IV, 4, 81.
53 Law and Customs of Scotland in Matters Criminal, title XXX.
55 Craig v. Hunter, June 29, 1809, F.C. A fuller report is given by Borthwick, Libel and Slander, pp. 193-194, from which the quotation is taken.
situation, 56 "The same degree of *culpa* will not entitle a person to *solatium* as will entitle him to damages. In the case of damages it has to be said, as in the passage, above quoted from Lord Kames, that *culpa levissima* will be sufficient. But, as may be inferred from the case of Craig *v.* Hunter & Co., to which Lord President Blair’s opinion relates—to entitle the pursuer to *solatium* something more blameable, something like that which is technically termed *culpa lata* will at the least be requisite." These views of the law, it may be added, have the authority of the Court of Session when the "Hale Fifteen" sat together, and are not lightly to be disregarded even today.

The failure of some writers and judges to appreciate that in Scotland two different elements might be present in an action for slander, led to some confusion regarding the requisite ingredient of fault. This situation was aggravated by borrowing English precedents, and by using the "slippery" and ambiguous term "malice," without realising that English law did not give redress for *injuria* in the sense of affront. Hence one may encounter a large number of unconvincing dicta from able judges and scrupulous scholars who were puzzled by the problem of rationalising the English concept of "malice" in the context of slander and defamation. 57 The English concept was not intended to comprehend *contumelia* at all; but few seem to have recognised this basic fact, and have sought to straddle two stools with the usual undignified result.

The distinction between *injuria* (as insult) and *culpa* inflicting harm to reputation is also relevant in the context of defence—especially when insulting words are spoken *in rixa* or by a person obviously in drink. The insult is negatived by the absence of *animus injuriandi*, while defamation *quoad* the understanding of third parties would usually be excluded by the realisation that the words were not intended seriously. It is submitted that, whatever the situation may be when a defender is sued for damage to reputation, the basic principle of *animus injuriandi* applies today when an action for slander depends upon the element of *injuria* (insult). Scots law is not alone in the battle for survival as a Civilian system under pressure from the Anglo-American common law. Sometimes it is the Englishman of vision rather than the aping Boswell who sees the situation in perspective. When the relevance of *animus injuriandi* was raised

57 e.g., Bell, *Principles*, § 2044; Hume, *Lectures III* (Vol. 15, Stair Society), clearly appreciates the difficulty without making a clear distinction between reparation and *solatium*. In the former case "'Tis sufficient the defender have so conducted himself, though owing to rashness only, or levity, and indiscretion as to occasion harm or risk of harm to the complainer." See also Cooper, *Defamation and Verbal Injury*, p. 2; cf Guthrie Smith, *Reparation*, pp. 188, 207; Glegg, *Reparation*, 4th ed., p. 155.
in an appeal to the Privy Council from Ceylon (where Roman-Dutch law, which is close to Scottish, applies) Lord Uthwatt observed: "In Roman-Dutch law animus injurandi is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing animus injurandi rests on the defendant. The course of development of Roman-Dutch law in Ceylon has, put broadly, been to recognise as defences those matters which, under the inapt name of privilege and the apt name of fair comment, have in the course of the history of the common law (scil. English law) come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences, or, more accurately, the principles which underlie them, find their technical setting in Roman-Dutch law as matters relevant to negativing animus injurandi. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law (scil. English law). Decisions under the common law are, indeed, of the greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman-Dutch law. The 'gladsome light of Roman jurisprudence' once shone on the common law: repayment to the successor of the Roman law should not take the form of obscuring one of its leading principles." It may be hoped that in the House of Lords Lord Uthwatt's mantle may fall on a successor worthy and capable of vindicating a leading principle of the law of Scotland, and that Gatley will not be the scripture which Scottish counsel choose to cite for their purpose in the next leading case.

"Verbal Injury" (according to Lord President Robertson)

The accepted meaning of verbal injury, as has been explained and as has been accepted wherever the Civil law has been received, implies contumelia. This has the support of the Scottish Institutional writers, and seems also to be illustrated by such cases as Sheriff v. Wilson. A very different interpretation is attributed to Lord President Robertson. He apparently considered that, even when a false statement was not slanderous in the strict sense, it might be actionable if it was intended to damage or was made reckless of the consequences—and had caused harm to the person regarding whom it was made. This redress would include the type of case where a

58 Perera v. Petris [1949] A.C. 1 at p. 19. In South African law—also a Romanistic system which had been subjected to English influences in the field of defamation—the concept of animus injurandi has been reasserted. See, e.g., T. W. Price, "Animus Injuriandi in Defamation" (1949) 66 S.A.L.J. 4; Maisel v. van Naeren, 1960 (4) S.A. 836 (C).
59 Author's italics.
60 Idem.
61 (1855) 17 D. 528.
false report was deliberately circulated that the pursuer has ceased
to carry on business, and he accordingly lost custom. Again, a false
statement which—though not defamatory—held a man up to public
hatred and ridicule or contempt by ascribing to him the expression
of unpopular opinions might be actionable.62 The pursuer would
have a good action if the statement made about him was false, was
made with intent to injure, and was calculated to cause pecuniary
damage to the pursuer. In Paterson v. Welch63 the defenders had
ascribed to a candidate at a municipal election the statement that, if
pupils from the board schools at St. Andrews were admitted to Madras
College, they would contaminate the “gentle children” attending
it. As a result, on the night of the election, an indignant crowd
sought to enter the grounds of the pursuer’s house to burn him in
effigy. He was held to have no action for slander, but a good
action for “verbal injury.”

It is submitted, with the greatest respect to the learned judges
who propounded this view,64 that they misconceived the true nature
of verbal injury in the law of Scotland. This delict, which is an
aspect of the actio injuriarum (properly so called), is concerned with
solatium for insult, and may well be wider in scope than defamation
in the narrow sense. Patrimonial loss caused by false statements,
whether deliberate or negligent, should be, and in the past has
been,65 regarded as reparable on the principle of culpa. In Lever
Bros. v. The Daily Record66 the First Division did not regard Lord
Robertson’s concept of verbal injury as firmly established, though
in Andrew v. Macara67 the Lord Justice-Clerk (Scott Dickson) would
go no further than to observe68 that “Observations have been
made upon Paterson’s case in subsequent cases, but I do not think
it has ever been overruled or that the view expressed by the Lord
President has ever been declared to be unsound.” On the other hand,
it is impossible to reconcile Lord President Robertson’s reputed view
with the concept of verbal injury in the institutional writers or in
the opinions of the Court of Session when it sat as a collegiate
body; and these opinions are entitled to prevail over decisions of a
quorum of judges. Perhaps the matter may one day be resolved
by decision of Seven Judges or the Whole Court. Considering the

62 This should certainly be regarded as convicium, but the test should not be pecuniary loss—even though the Defamation Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 66), s. 14 (b), now provides that this need not actually be proved.
63 (1893) 20 R. 744.
64 See Cooper, Defamation and Verbal Injury, p. 12.
65 See refs. notes 54 and 55; D. L. C. Ashton-Cross, “The Scots Law Regarding Actions of Reparation Based on False Statements” (1951) 63 Jur.Rev. 199; and for other aspects of pecuniary loss caused by non-physical means, see p. 574, ante.
66 1909 S.C. 1004.
67 1917 S.C. 247.
68 At pp. 250–251.
whole background of the law of Scotland and the meaning attached from time immemorial to the expression *injuria verbis* in Scotland and in other Civilian systems, the present author cannot consider himself altogether in the role of *Athanasius contra mundum*. If he is to be condemned as heretic, the saints are already in torment. One obvious difficulty, however, is that by inference the Defamation Act, 1952, s. 14, seems to homologate Lord President Robertson's view that "verbal injury" is concerned with patrimonial loss. If that view were held to be erroneous, the statutory provision would merely be redundant.

**Slander Generally (Insult and Defamation)**

Slander (which in most cases involves an element of moral turpitude) consists—insult apart—in disparaging the reputation of a person, or imputing insolvency or certain diseases to him, by an allegation which is false, defamatory and without lawful justification. It is necessary to prove that the allegation was published in some way, though publication of insult to the pursuer suffices. In Scottish law dictation of a defamatory statement to an amanuensis, or transmission of such a statement by telegram through Post Office clerks who know nothing of the person defamed, is not regarded as sufficient publication. The allegation may be made by language, acts, or by pictures or effigies. Such English cases as *Monson v. Tussaud* are freely cited in Scottish law, but for the author's present purpose he does not feel obliged to deal with the English authorities. They may be helpful where damage to reputation is in issue, but are quite irrelevant *quaed* the element of *injuria*.

In English law defamation in transient form is called "slander," and defamation in permanent form is called "libel"; the law of Scotland does not recognise this distinction, though the words "slander" and "libel" are both used as convenient and comprehensive non-technical expressions implying defamation. Slander comprehends both insult and defamation.

To be actionable a statement must be false (falsity being presumed if an allegation is defamatory) but if the defender can prove the substantial truth of his allegation (*i.e.*, *veritas*)—except in the case of *convicium*—this is a complete defence. It will not suffice to support an allegation that a man is "a liar" or "a drunkard"

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69 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66.
70 *Evans & Sons v. Stein* (1904) 7 F. 65; cf. English law.
72 *[1894] 1 Q.B. 671*.
73 Cooper on *Defamation and Verbal Injury*, 1906, pp. 3-5.
74 *Buchan v. N.B. Ry.* (1894) 21 R. 379; Defamation Act, 1952 (15 & 16 Geo. 6, and 1 Eliz. 2, c. 66), s. 5.
to prove that he lied on one occasion,\textsuperscript{75} or to show that the pursuer had succumbed to inebriety on occasions which "were isolated and pardonable instances of a gentleman being overtaken."\textsuperscript{76} But it would presumably justify a statement that a man was a "murderer" to show that he had committed one murder. If a serious imputation is made so as to imply that the pursuer is still tainted with misconduct of which he was guilty in the past, the statement may be treated as false and defamatory of the pursuer. Thus in \textit{Fletcher v. Wilsons} \textsuperscript{77} it was held to be no justification to say that a man was a "thief" on the grounds that twenty-three years earlier as a boy he had twice been convicted of petty theft. In the circumstances the imputation was exceptionally unjustified. The matter is well put by Lord Shaw of Dunfermline.\textsuperscript{78}

A statement of fact or of opinion which consists in the raking up of a long buried past may, without an explanation (and, in cases which are conceivable, even with an explanation) be libellous or slanderous if written or uttered in such circumstances as to suggest that a taint upon character and conduct still subsists.

Some have questioned whether the doctrine \textit{convicium veritas non excusat} is still good law in Scotland; that is as to whether an action will lie irrespective of truth in respect of the wanton or malicious publication of some old scandal or the drawing of attention to some deformity as a campaign of mere persecution. Cooper \textsuperscript{79} it is true considered that the authorities for this action are inadequate and prior in date to the complete establishment of the defence of \textit{veritas} or justification as a defence. On the other hand, in 1950, Lord Normand is reported to have spoken strongly at Oxford in favour of the view that \textit{convicium} is still a useful weapon in the Scottish legal armoury.\textsuperscript{80} Moreover, in 1957 the Second Division in \textit{Murray v. Beaverbrook Newspapers} \textsuperscript{81} approved the view of the sheriff that it would still be open to the court to give redress for this ancient wrong if the circumstances indicated deliberate persecution.

The pursuer must establish that the imputation of which he complains is defamatory. While comprehensive definitions of what is "defamatory" have been attempted in a number of English cases and textbooks, these can be regarded as providing only general guidance in a Scottish action. It is not necessarily defamatory (\textit{stricto

\textsuperscript{75} Milne v. Walker (1893) 21 R. 155. \\
\textsuperscript{76} Per Lord President Robertson in Hunter v. Macnaughton (1894) 21 R. 850 at p. 853. \\
\textsuperscript{77} (1885) 12 R. 683. \\
\textsuperscript{78} Sutherland v. Stopes [1925] A.C. 47 at p. 74. \\
\textsuperscript{80} To the Oxford University Law Society. \\
\textsuperscript{81} June 18, 1957 (unreported).
sensus) in Scotland to say of a man that he is "mean" though this might possibly be regarded as tending to his discredit. Nor can the formula of "hatred, ridicule and contempt" be accepted without qualification in Scotland, unless slander is construed broadly as injuria. Ridicule, however, may involve liability for insult or verbal injury.

In Scotland the meaning of "defamatory" has been a matter for judicial construction in the decided cases. Defamatory imputations may involve, inter alia, allegations of crime, immorality, professional incompetence, insolvency, or affliction by certain diseases. Some of these do not necessarily imply moral turpitude, and would not justifi

False accusations of crimes such as those of poisoning, theft or even poaching are actionable, but it is thought that not every imputation of a technical breach of the criminal code would be actionable. Imputations on character and conduct which suggest turpitude but not criminality will also ground an action for slander, but, it is suggested, precedent is not an infallible guide in this field, since the views which society takes of conduct may change with the times. Thus desecration of the Sabbath more majorum was founded on as defamatory on at least four occasions during the past century, but it may be doubted whether such an allegation would bring a man into such general disrepute as formerly in Scotland. Allegations implying certain kinds of conduct are, however, clearly defamatory. Imputations of sexual immorality are defamatory, but much less will suffice, especially if the pursuer be a woman. Imputations of lack of womanly modesty may suffice, as in Cuthbert v. Linklater. In this case Mrs. Cuthbert (better known as Wendy Wood, who is well known for her concern with Scottish affairs) complained of the following passage in Mr. Eric Linklater's novel Magnus Merriman:

Magnus found himself buttonholed by a young woman who looked like Joan of Arc. She introduced herself as Beaty Bracken. Magnus had heard a good deal about her, and he was interested to meet her, for she had recently achieved fame by removing a Union Jack from the Castle and placing it in a public urinal.

83 McLaughlan v. Orr (1894) 22 R. 38; Cooper, p. 78 et seq.; cf. Lord Kinhear's obiter dictum in Russell v. Stubbs, 1913 S.C. (H.L.) 14 at p. 19; which was delivered, it is thought, per incuriam.
84 Reid v. Coyle (1892) 19 R. 775; Handasyde v. Hepworth (1907) 15 S.L.T. 180; Nelson v. Irving (1897) 24 R. 1054; and see Cooper, pp. 35-42, for a catalogue of imputations of crime held to be actionable. See Cooper, p. 52, and cases there cited.
86 See for a wealth of examples Cooper, p. 42 et seq., also Glegg on Reparation, 4th ed.
87 Burnet v. Gow (1896) 24 R. 156.
The pursuer had in fact, as was common knowledge, some years earlier removed a Union Jack from Stirling Castle, and after rolling it up had thrown it to the guard. It was held that the passage complained of was capable of the defamatory meaning that the pursuer was immodest and indecent, a woman of low and depraved mentality, without natural or proper womanly delicacy of mind or action. False accusations of untruthfulness are defamatory as are those of dishonesty—though falling short of crime—and also allegations of cowardice and treachery. Imputations of drunkenness may be actionable. A somewhat remarkable case is that of Falconer v. Docherty, in which a clergyman sought damages for allegedly false allegations that he was not a trustworthy administrator of charitable funds, and that he had entered a public-house for the purpose of obtaining alcoholic liquors—albeit no imputation of insobriety was made. Both imputations were held to be defamatory; but it is somewhat surprising that he claimed larger damages in respect of the second. Words of general abuse without precise meaning do not amount to slander—as, for example, "damned puppy"; while words which have in fact prima facie a defamatory meaning may lose their natural meaning if it appears from the circumstances that they were spoken in rixa—in the heat of altercation—and were not to be taken (either as insult or defamation) as serious imputations. This has been held to cover such strong expressions as "I will put you in prison" and "whore." On the whole, the courts are reluctant to construe mere verbal utterances as defamatory unless in strong cases, or where the allegation has been frequently repeated in different company.

Imputations against a person's commercial credit are actionable, but since insolvency does not necessarily reflect on personal character, a claim for solatium would seem inappropriate. Aspersions on a man's fitness for a business or profession range from those which are close to imputations on character and conduct to those which prejudice financial repute. It is defamatory to say falsely of a soldier that he has failed in his duty during an engagement; or of a law agent that he has litigated for his own ends and in disregard of his client's

90 Godfrey v. Thomson (1890) 17 R. 1108.
91 Grierson v. Harvey (1871) 43 Sc.J. 190; Gordon v. Leng, 1919 S.C. 415—where it had been imputed that a Commanding Officer of a Battalion of the Gordon Highlanders had, by surrendering, failed in his duty as a soldier.
92 Aird v. Kennedy (1851) 13 D. 775; Oliver v. Laidlaw (1895) 3 S.L.T. 142.
93 (1893) 20 R. 765.
94 Archer v. Ritchie (1891) 18 R. 719.
95 Cockburn v. Reekie (1890) 17 R. 568; Reid v. Scott (1825) 4 S. 5; see also Christie v. Robertson (1899) 1 F. 1155.
96 Erskine IV, 4, 80; Clark v. Gray, 1951 S.L.T. (Notes) 58.
97 On "blacklist" cases see Russell v. Stubbs, 1913 S.C.(H.L.) 14.
98 Gordon v. Leng, supra.
interests\(^9\); or that the appointment of the pursuer as a professor would be a heavy blow to the prosperity of a college\(^1\); or to allege that the pursuer’s hotel was distinguished for heavy drinking, squalid untidiness and dirt.\(^2\) To assert of a person falsely that he suffers from insanity or impotence or from certain diseases involving a measure of social ostracism, such as leprosy or venereal disease, is defamatory, even though no moral turpitude is implied.

Few statements are necessarily in all circumstances innocent, and it is always competent for a pursuer to prove that the words of which he complains—though prima facie inoffensive—were in fact defamatory because of some latent or secondary sense. Thus, the pursuer may set forth on record the defamatory innuendo which, he claims, attaches to the words used. The court will then decide whether the defender’s words are capable of bearing the meaning suggested in the innuendo. The jury—in the case of jury trial—must decide whether in fact that meaning was understood. Extrinsic facts suggesting the defender’s intention to injure the pursuer may be proved.\(^3\) In *Morrison v. Ritchie*,\(^4\) where *culpa* was not excluded from consideration, the pursuers, a married couple, were held entitled to sue the *Scotsman* newspaper in respect of false entries in the “*Notification of Births*”—presumably supplied by some practical joker of poor taste—which announced the birth of twin sons to the wife within two months of her marriage to the male pursuer. In the circumstances the “*Birth Notices*” clearly implied that the pursuers had indulged in ante-nuptial intercourse.\(^5\) This case also illustrates the proposition that, if a person makes a statement which is false and defamatory, he cannot escape all responsibility for it by showing that he published without *animus injuriandi*. When loss of reputation is in issue *culpa levissima* may suffice. In England the law goes further, though how far it has been received in Scotland is controversial. According to English law “*malice*” is implied—cases of privilege apart—from the publication of a defamatory statement. The *Defamation Act*, 1952,\(^6\) s. 4, however, is designed to discourage “*gold-digging*” actions (which have not flourished in Scotland as in England) in respect of unintentional defamation. The publisher of a statement in good faith and without negligence may, on discovering that it is defamatory of another, make an “*offer of amends*” (as defined in the section)

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\(^9\) *MacRostie v. Ironside* (1849) 12 D. 74.
\(^1\) *Auld v. Shapra* (1875) 2 R. 940.
\(^2\) *McIver v. McNeill* (1873) 1 M. 777.
\(^4\) (1902) 4 F. 645.
\(^6\) 15 & 16 Geo. 6 & 1 Eliz., 2, c. 66.
including an apology. Such offer of amends will be available as a defence if an action for slander is brought subsequently by the person defamed, provided that the defender can prove that the words complained of were written without malice.\(^7\)

The other main defences to an action in respect of defamation are *veritas*, vulgar abuse, words spoken in *rix*\(^a\), fair retort, no damage, fair comment, privilege. The defence of *veritas* will not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially affect the pursuer’s reputation, having regard to the truth of the remaining charges.\(^8\) A defence of “vulgar abuse” is appropriate where the opprobrious epithets used lacked definite meaning or were not meant or understood seriously.\(^9\) The defence is somewhat different when it is said that words prima facie injurious were spoken in *rix*\(^a\)—a defence practically confined to oral slander. Here it must be shown that the words were used in the heat of a squabble, and that they were not intended to convey and did not convey the imputation which their natural meaning would import.\(^10\) “Fair retort” may be pleaded when a person in repelling a public attack, as in the Press, reacts in vigorous or even gross language, casting imputations on the party who has provoked the retort. Such a defence will not, however, cover a specific false allegation as of theft.\(^11\) The defence of “no damage” is available when the defender can show that the pursuer’s character is already so far discredited that it could sustain no further injury or only slight injury, even if the defender’s allegations were in fact justified.\(^12\) It is deemed to be in the public interest that “fair comment” on matters of public interest should be permitted, provided that a fair-minded man upon the facts stated might bona fide hold the opinions expressed.\(^13\) Where the defence of “privilege” is available, it even covers—unlike “fair comment”—statements of fact which are false and defamatory. Privilege may be either “absolute”—as statements made in Parliament, or in the course of judicial proceedings, or fair reports of what took place on a fully privileged occasion—or “qualified,” where the statement complained of has been made by a person in the discharge of some public or private duty, or in the conduct of his own affairs.

\(^7\) S. 4 does not cover the *Morrison v. Ritchie (supra)* type of case, since the publisher of a third party’s statements must prove that he was not negligent and that the author also acted without malice.

\(^8\) Defamation Act, 1952, ss. 5 and 14 (d).

\(^9\) Cooper, p. 46.

\(^10\) See Cooper, Chap. XII: also p. 730, ante.


\(^12\) C. v. *M.*, 1923 S.C. 1.

\(^13\) Wheatley v. *Anderson*, 1927 S.C. 133. See also Defamation Act, 1952, s. 6, which allows the defence to succeed even though the defender fails to prove the truth of every allegation of fact. For appropriate form of counter-issue see *Moffat v. London Express*, 1951 S.L.T.(Notes) 8.
in matters where his interest is concerned.\textsuperscript{14} When privilege is absolute, even proof of dolus will not avail the pursuer, but proof of dolus will destroy a defence of qualified privilege.\textsuperscript{15} Defamatory statements of public officers made in the discharge of their duties, if a defence of qualified privilege is raised, must be shown by the pursuer to have been made not only maliciously, but also without "probable cause."\textsuperscript{16}

\textbf{ABUSE OF LEGAL PROCESS}

False accusations of crime are not actionable merely on grounds of mistake, but may be actionable after the acquittal of the victim if he can prove malice and want of reasonable and probable cause.\textsuperscript{16a}

Irregular diligence (anglicé "execution") is also a wrong. When the diligence is of a kind competent without special application to the court—such as "arrestment"—an action will not lie merely because the defender acted mistakenly. Malice and lack of reasonable cause must be proved. But by contrast, those forms of diligence which are granted by the court on an \textit{ex parte} statement, such as interim interdict, are granted at the petitioner's risk—

\textit{periculo petentis}—and, even if he did not act maliciously, he may yet be held liable if he acted mistakenly.\textsuperscript{17}

\textbf{WRONGS TO PROPERTY}

\textbf{(SLANDER OF PROPERTY OR TITLE, WRONGOUS INTERFERENCE WITH PROPERTY, FRAUD AND MISREPRESENTATION, INTERFERENCE WITH CONTRACTUAL RELATIONS, CONSPIRACY)}

Slander of title and slander of property impute a reflection on the pursuer's property or title thereto.\textsuperscript{17a} It is actionable to assert falsely that typhoid fever had broken out on a dairyman's premises; or that property leased out for shops and dwelling-houses was liable to collapse at any time.\textsuperscript{18}

Unauthorized entry upon, and unreasonable use of, heritable property have already been discussed in the context of Law of Property.\textsuperscript{19} Wrongous interference with moveables was formerly redressed by the action of spuizie, but there seems not to have been such an action brought since \textit{Stove v. Colvin}.\textsuperscript{20} In modern times

\textsuperscript{14} A.B. v. X.Y., 1917 S.C. 15. As to privileged reports, see 1952 Act, s. 7, and Schedule. 
\textsuperscript{16a} Norman v. Commercial Bank of Scotland, 1938 S.C. 522 at p. 533. 
\textsuperscript{17} Wolthekker v. Northern Agricultural Co. (1862) 1 M. 211; Grant v. Magistrates of Airdrie, 1939 S.C. 738. 
\textsuperscript{17a} Aspects of culpa? 
\textsuperscript{18} Bruce v. Smith (1898) 1 F. 327. 
\textsuperscript{19} See ante, pp. 526-528, 530-535. 
\textsuperscript{20} (1831) 9 S. 633.
actions "in factum" have been brought in respect of wrongful interference with the moveables of another—as in Mackintosh v. Galbraith where the owner of a car, who had sent his car for repair, successfully sued a person who had negligently sold it. The English law of trover and conversion and trespass to moveables has no application in Scotland, though Lord Dunedin had occasion to remind the House of Lords on this point in Leitch v. Leydon.

Fraud is also a delict—being a machination or contrivance to deceive by making a false representation. The cheat is liable to pay damages, quite apart from the effects of fraud on contract. Fraud justifies reduction of contract and restitution, but it is not a prerequisite to a claim for damages on grounds of fraud that reduction should also be sought. The fraudulent misrepresentation must be shown to have been made knowingly or without belief in its truth. It is submitted that in principle a negligent statement which causes loss is likewise actionable on the principle of culpa.

"A violation of legal right committed knowingly is a cause of action and . . . it is violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." Accordingly, it is actionable if C persuades A to break his contract with B. In certain cases, however, C might have a duty to advise breach, as if a father persuaded his child to break off an unsuitable engagement to marry. It is arguable that an action lies for harbouring the servant of another by employing him while aware that he has already a contract to serve that other, but this doctrine seems anachronistic, and is probably obsolete.

When a person sustains loss, not due to breach of his contract with another, but because his liberty to contract—to buy or to sell, to employ or to serve—has suffered interference, different considerations arise. A, the pursuer, may complain that to his own loss he has been intimidated by C not to contract with B, or to terminate his contract with B; or A may complain that B has been compelled by C not to deal with A, or compelled to terminate an existing contract with A—to A's loss. It is not in every case that A will have a good cause of action, and the law has been tested in many trade disputes.

21 (1900) 3 F. 66.
22 On quasi-contractual obligations of restitution see anie, p. 625.
23 1931 S.C. (H.L.) 1 at p. 8.
24 Smith v. Sim, 1954 S.C. 357; and authorities there cited.
24a See ante, p. 674.
29 Crofter Harris Tweed case (supra).
If the intimidation has consisted of an illegal act or threat to do or procure an illegal act, A will have an action against C. Where the defender C has not used threats to do an unlawful act, then A may be without a remedy, though C has acted malevolently. On the other hand, if the intimidation is not that of an individual but of two or more persons acting together in pursuance of a common design, the fact of combination will, if the predominant motive was malevolent, render the defenders liable for conspiracy. The law on this question has been reviewed in the Harris Tweed case, in which the leading cases were discussed. The main consequences of the Harris Tweed case seem to be as follows. A combination wilfully to injure a man in his trade or other lawful interests is unlawful, and, if damage is caused, is actionable as a conspiracy. On the other hand, the defenders may prove by way of justification that their real and predominant purpose in combining was to advance their own lawful interests, in circumstances where they believed that their interests would suffer directly if they did not combine. Not all the difficulties of this branch of the law have been set at rest. The motives of members of a combination may be mixed, either in the sense that each member has a different motive or in the sense that all members have mixed motives. Ascertainment of the predominant motive may be very difficult. Though the "conspiracy" cases have been mainly concerned with trade competition or industrial disputes, there is no reason to believe that the same considerations do not apply to other types of collective interference with liberty to contract—as, for example, marriage.

In the Harris Tweed case Viscount Simon L.C. adverted to the illogicality that a malevolent act done by a combination of persons should be actionable, whereas the authorities indicated that one malicious actor, though more powerful than a number of individuals combined, was not liable for causing loss unless he invaded an existing right. The Lord Chancellor then proceeded to enter upon a fascinating historical excursus concerning the procedure of the Court of Star Chamber and the consequences for the English law of tort. Rapt as he may be in contemplation of the Lord Chancellor's erudition, a Scots lawyer is bound to ask himself what all this had to do

32 Supra.
34 e.g., Huntley v. Thornton [1957] 1 W.L.R. 321.
35 The question of the "colour bar" was considered in Scala Ballroom (Wolverhampton) v. Ratcliffe [1958] 1 W.L.R. 1057.
36 1942 S.C. (H.L.) 1 at p. 9.
with the islanders of Lewis, whose forebears sustained life without
the assistance of that notorious tribunal, and how far the excursus was
relevant for the law of Scotland where conspiracy has been in effect
an aspect of the law of attempt. In the seventeenth century the
doctrine of abuse of rights was sufficiently established to provide
a remedy against malicious interference with the liberties of others
in the economic field—though the interference was that of an indi-
vidual and not of a combination.\textsuperscript{37} It was a solution which made
sense. True it is also, that in a number of cases decided during the
late nineteenth and early twentieth centuries this weapon in the legal
armoury was forgotten,\textsuperscript{38} and Scottish judges went awhoring after the
doctrine of \textit{Allen v. Flood}\textsuperscript{39} which disregarded the factor of malice.
No precedent is binding when relevant authorities have been over-
looked, and it may well be that the doctrine of abuse of rights may yet
be invoked to deal with unjustifiable harm inflicted by one malevolent
individual. One may sense that Lord Simon would have approved.

\textsuperscript{37} See p. 662, ante.
\textsuperscript{38} \textit{Ibid.}
\textsuperscript{39} [1898] A.C. 1.
3. VOLUNTARY OBLIGATIONS

CHAPTER 32

UNILATERAL PROMISE (POLlicitatio)

Scots law accepts to a greater extent than most legal systems the enforceability of unilateral promises. These, it is suggested, may conveniently be referred to as “pollicitations.” The Digest makes clear the essential distinction between unilateral promises on the one hand and agreements or contracts on the other—Pactum est duorum consensus atque conventio, pollicitatio vero offerentis solius promissum. In English law the so-called “contract under seal” may be a unilateral juristic act, and thus not truly a contract at all; while “simple contracts” are based on the doctrine of consideration or quid pro quo. An English contract can never be gratuitous, and the whole theory of voluntary obligation thus differs essentially from the approach of systems such as that of Scotland in which (as Stair observed) omne verbum in ore fidelis cadit in debitum. Any seriously intended promise contemplating a lawful purpose is binding, if it can be proved, and the relationship is governed by principles of good faith. In fact, of course, most obligations such as sale, hire and agency do in fact contemplate reciprocal performance. The traditional Scottish character as presented in literature and on the stage contemplates value for money. Nevertheless, unlike English law, Scots law does not require “consideration” as a badge of concluded obligation. Nor again, as in certain other systems, is there now in Scotland any doctrine of “cause” in the sense of causa civilis or causa praeter conventionem by which the actionability of agreements must first be tested. On the other hand, “consideration” or causa is used in Scots law to designate causa naturalis, i.e., the cause or reason for granting an obligation. Simulated causa or some illegality

1 50.12.3 pr. See also Stair I, 10, 6. The pollicitatio was, of course, a concept of public and not of private law in Roman jurisprudence. The author has traced the development of a doctrine of unilateral binding promise and has discussed its scope in Scots law, see “Pollicitatio—Promise and Offer” in Smith, Studies, p. 168 et seq.

2 1, 10, 7.
of *causa* or consideration may thus be resolutive of an obligation—as where the object contemplated is to evade restrictions on certain types of transaction by simulating the forms of another (e.g., security and sale); or where the object is illegal (*turpis causa*). Again when the contemplated object has failed, the resulting situation of unjustified enrichment is redressed through the *condictio causa data, causa non secuta* or the *condictio sine causa.*

**The Nature of Unilateral Promise (Pollicitation)**

In the *De Jure Belli ac Pacis* *Grotius* distinguishes between three ways of speaking concerning the future "*distingui sunt diligentem tres gradus loquendi de rebus futuris quae nostrae sunt potestatis.*" First there is assertion of intention (*assertio*); secondly *pollicitatio*, where the will is declared with sufficient sign to indicate the necessity of perseverance; and thirdly there is promise (*perfecta promissio*). In the view of Grotius the third grade alone (when met by acceptance) creates an enforceable right. *Pollicitatio*, he holds, creates an obligation in the declarant, but not a corresponding right in another to compel performance. He adds, "In order that a promise may transfer a right, acceptance is required. . . . Nor is this contradicted by what is appointed in the Civil law, that offers made to the Public are binding; which reason has induced some persons to judge that by the law of Nature, the act of the promiser alone suffices; for the Roman law does not say that a pollicitation has full force before acceptance, but forbids revocation so that it may always be accepted."

Elsewhere Grotius contrasts "*toezegging*" with "*belofte.*" Later in the same work he observes, presumably founding on D.50. 12.1–2, that promises made in God’s honour or from antecedent causes for the honour of a country or of a city are deemed in law to be accepted contracts.

In short Grotius apparently forces unilateral and absolute declarations of will into the categories of either (a) irrevocable offer or (b) offers which are presumed by law to have been accepted. Probably the most important consequence of this doctrine is to frustrate the development of the law regarding *jus quasestium tertio*. If the promise *in favorem tertii* requires acceptance by the *tertius* before he can secure an enforceable right against the promisor, the result is not unlike agency; and no determinate right can be acquired until a *tertius* comes into existence who is capable of accepting and does

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3 See ante, p. 626.
4 2.11.6.
5 2.11.14.
6 Jurisprudence of Holland, 3.1.10-11. Lee identified *belofte* with *pollicitatio*.
7 Ibid. 3.1.48.
accept the benefit in his favour. This legacy of confusion has been transmitted to most modern codes.

Pothier, whose works provided the material particularly for the chapters on Obligations in the *Code Napoléon*, expressly adopted the view of Grotius that a pollicitation does not create an enforceable right, for there cannot be any obligation without a right being acquired by the person in whose favour it is contracted against the person bound. He noted that in Roman law certain *pollicitationes* were binding, but that in French law gratuitous dispositions except by will or donation *inter vivos* had been forbidden by the Ordinance of 1731. Thus Grotius through Pothier determined the rejection of pollicitation in the French Civil Code and in those many other codes based upon it.

Stair, who published the first edition of his *Institutions of the Law of Scotland* in 1681, in many of his opinions shows the influence of Grotius. Yet he differs from him regarding the enforceability of promises. Mere desire or resolution to confer a benefit will not suffice. There must be an act of the will conferring or stating a power of exaction in the creditor—that is, engagement. Distinguishing between cases where the obligatory act of the will is absolute and pure on the one hand or conditional on the other, he notes that the condition may relate to the obligation itself or its performance. The condition upon which the obligation itself depends may be casual or potestative—or may indeed be the fact of acceptance by the party to whom an offer even of gratuitous benefit is made. He instances in this connection the case of *Allan v. Collier*, where a son had offered to pay a creditor of his mother's but was held not to be bound after her death, since the offer had not been accepted by the creditor. The absolute promise which does not contemplate acceptance is, however, in Stair's view, clearly enforceable if it can be proved as the law requires. Such promises are effective to create rights in favour of those who are not yet born or who are absent. *Omne verbum de ore fideli cadit in debitum*.

But a promise is that which is simple and pure, and hath not implied in it as a condition, the acceptance of another. In this Grotius differs; holding, "that acceptance is necessary to every conventional obligation in equity, without consideration of positive law"; and to prevent that obvious objection, that promises are made to absents, infants, idiots, or persons not yet born, who cannot accept, and therefore such promises would ever be revocable, till their acceptation, which some of them can never do; he answereth, that the Civil law only holdeth, that such offers cannot be revoked, until these be of such capacity as to accept or refuse.

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8 *Obligations*, 1.1.2.
9 See especially 1.10.3-7.
10 (1664) Mor. 9428. This seems to confuse contract with promise.
Promises now are commonly held obligatory; the Canon law hath taken off the exception of the Civil law, *de nudo pacto*. It is true, if he in whose favour they are made, accept not, they become void, not by the negative non-acceptance, but by the contrary rejection. For as the will of the promiser constitutes a right in the other, so the other's will, by renouncing and rejecting that right, voids it, and makes it return. This also quadrates with the nature of a right, which consists in a faculty or power which may be in these, who exerce no act of the will about it, nor know of it; so infants truly have right as well as men, though they do not know, nor cannot exerce it.\(^\text{11}\)

Stair adds\(^\text{12}\) that by an Act of Sederunt dated November 27, 1592, “all pactions and promises” are acknowledged as effectual in Scots law. The leading example of the enforceable promise which does not depend on acceptance (unless expressly contemplated by the parties)\(^\text{13}\) is according to Stair the *jus quaesitum tertio*.\(^\text{14}\) Such promises are effective to create rights in favour of those who are not yet born or who are absent. This results from the promisor’s unilateral declaration of will in favour of the tertius, such declaration being stipulated for by the other party to the *pactum in favorem tertii.* (Lord Dunedin in *Cantiere San Rocco v. Clyde Shipbuilding & Engineering Co.*\(^\text{15}\) almost certainly misrepresented Stair’s view regarding the time when the right of the tertius vested.)

Stair, though he clearly distinguishes unilateral declarations of will from contracts or agreements, unfortunately is somewhat ambiguous and inconsistent in his terminology. When discussing unilateral declaration of will, he explains that these are enforceable since “the Canon law hath taken off the exception of the Civil law *de nudo pacto*.” The expression “*nudum pactum*,” though often used by early writers to cover *pollicitation*, is misleading. Further, in refuting Grotius’ view regarding the enforceability of what Grotius calls *pollicitationes*, Stair in the immediately preceding section\(^\text{16}\) has actually himself used the term “*pollicitation*” as synonymous with “*offer*” as distinct from “*promise*.” *Pollicitatio*, though often used ambiguously, is the appropriate term for a unilateral declaration of will; this institution is quite distinct from contract; and it creates confusion (*pace* Ashton-Cross and Gow)\(^\text{17}\) to refer to such an obligation as a “contract.”

\(^\text{11}\) I, 10.4. Stair then discussed specialties of proof in such cases.
\(^\text{12}\) I, 10.7. Surprisingly, the Act deals with quite different matters.
\(^\text{13}\) I, 10.6.
\(^\text{14}\) I, 10.5.
\(^\text{16}\) I, 10, 3. This ambiguous terminology also misled L.J.-C. Inglis in *Macfarlane v. Johnson* (1864) 2 M. 1210 at p. 1213.
Though Stair clearly rejects the need for acceptance where there has been an absolute promise intended to bind the declarant, some subsequent Scottish writers, as Mr. Ashton-Cross has shown in an important article, have unfortunately tended to think in terms of “presumed acceptance,” and to confuse unilateral with bilateral juristic acts such as contracts.

In Europe there has been a revival of interest in the concept of promise or polllicitation to solve difficult problems in the field of obligations. The approach through contract may sometimes, if strictly maintained, lead to unsatisfactory solutions to problems, e.g., concerning options, the stipulatio alteri and advertisements of reward. Moreover the expedient of deeming or presuming promises sub conditione to have been “accepted offers” mistakes the true nature of such declarations of will. Despite some ambiguity in his terminolo-

**VALUE OF THE DOCTRINE**

Founding on Stair, it is submitted that Scots law recognises (a) bilateral contracts where each party undertakes obligations; (b) unilateral contracts concluded by offer and acceptance where one party alone is bound to performance and the other is merely bound to accept it: (c) promises (polllicitationes) which inter vivos bind the declarant by his own unilateral act of will. Such promises may be made subject to casual or potestative conditions, and, if potestative, purification may or may not confer some benefit on the promisor. The distinction between contract and promise may thus be very narrow, and Scots law would apparently construe as promises sub conditione relationships which English law would regard as onerous contracts because performance of the “condition” involved benefit to the promisor or detriment to the promisee. Among the important implications of this analysis three alone may be mentioned briefly.

**Jus Quaesitum Tertio**

First, as has been observed, a system which recognises a promise as a unilateral juristic act experiences no difficulty in recognising the

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18 Sup. cit.
19 See Smith, Studies, p. 168 et seq.
20 With respect the writer would question the accuracy of the general proposition in Lord President Clyde’s recent statement—“No one can be forced to take a benefit under a contract where his own interest only is involved”: Douglas Hamilton v. Duke and Duchess of Hamilton’s Trs., 1961 S.L.T. 305 at p. 311. Whereas one is not bound to accept a gift, by accepting an offer one should in principle be bound to accept performance—even if the subject delivered be a white elephant.
21 The distinction between promise and offer may sometimes be narrow and words used such as “promise” or “agree” are not conclusive: Macfarlane v. Johnston (1864) 2 M. 1210.
22 See Lord Normand in (1939) 55 L.Q.R. 338.
nature of the claim of a tertius in the stipulatio alteri or jus quaesitum tertio.\(^2\) Systems which have developed through the Grotius-Pothier tradition have been perplexed by the element of acceptance to complete the right of the beneficiary. Distinguished French scholars,\(^2\) however, are willing to accept the right of the third party as created by the unilateral declaration of will on the part of the promisor.

**Revocability of Offers**

Secondly, promise may be a relevant factor in considering the revocability of an offer. Though in German law an offer is not apparently a unilateral juristic act, the code\(^2\) gives it very similar effect, and limits its revocability. In French law various theories have been advanced to cope with the situation where an offer is made which is expressed to be open for acceptance within a specified time—\textit{e.g.}, A offers B certain goods and adds that the offer will remain open for acceptance within four days. \textit{Quid juris} if A purports to withdraw his offer after one day? The tenth edition of \textit{Colin et Capitant}\(^2\) argued, however, "\textit{Il est plus simple et plus juste de dire que le pollicitant est engagé par le seul effet de sa volonté} . . . \textit{Il n’y a en effet aucune impossibilité logique à admettre qu’une personne puisse s’obliger par sa seule volonté, du moment qu’elle en manifeste clairement l’intention.}" In Scots law, it seems clear that if a man offers to sell and undertakes to keep the offer open for a fixed period, this should be construed as an offer to sell combined with a binding unilateral declaration of will (promise or pollicitation) obliging the offeror to keep the offer open. A contract (of sale) only results when the offer is accepted, but an independent obligation (to keep the offer open) is constituted immediately.

**Promises of Reward**

Thirdly, promises of reward for some service have created special problems in most legal systems. Perhaps this branch of the law is particularly popular in countries governed by English law due to the case of \textit{Carll v. Carbolic Smoke Ball Co.}\(^2\) Reflections on Mrs. Carlill diligently and trustingly snuffing her carbolic ball in the hope of fending off influenza have claimed the sympathies of generations of law students. In French law if a reward is advertised, \textit{e.g.}, for finding lost property, it is acknowledged that this is to be treated as an

\(^2\) See post, p. 777 et seq.
\(^2\) B.G.B., s. 145 et seq.
\(^2\) Colin et Capitant, s. 46 et seq.; s. 273 et seq.; \textit{cf.} 1959 ed. by Jolliot de la Morandière, s. 632.
\(^2\) [1892] 2 Q.B. 484; [1893] 1 Q.B. 256.
offer which can be revoked before acceptance, though the Franco-
Italian *projet* would restrict the power of revocation. As for German
law, special provision is made in the Code for the promise (*Auslobung*)
of reward. Such promises are regarded as unilateral juristic acts,
which do not require acceptance. He who performs the condition of
the reward is entitled whether he knew of the promise or not.

Scots law, which has accepted a general doctrine of obligation by
unilateral declaration of will, might be expected to view advertise-
ments of reward as promises *sub conditione*. Paradoxically, in the
recent cases bearing on this problem, this approach has been in effect
ignored; and there has been a tendency to assimilate Scots law in the
advertisement cases to the English interpretation. The English inter-
pretation is that the advertisement must be regarded as an offer, and
that the offeree must do some act to signify acceptance—such act
usually also supplying the consideration. Moreover, in English law
it is arguable that until the act required has been completely per-
formed, there has been no acceptance, and therefore revocation is
still competent though the offeree may have gone far towards com-
pletion. This would not be competent if the situation were viewed
as promise *sub conditione*, as the element of good faith would
preclude the promisor from frustrating fulfilment of the condition. In
the pursuer sued successfully for a reward offered by advertisement
for information which would lead to the detection of the author and
printer of an alleged libel. He averred that the reward was promised
unconditionally for such information, while the defence contended
(unsuccesfully) that the reward was only payable if the person
denounced had actually been convicted in a criminal court. This case
could be treated, therefore, as founded on promise or pollicitation
*sub conditione*. Two subsequent cases (both subsequent to the
*Smoke Ball* case in England) were *Law v. Newnes* and *Hunter v. Hunter*. In each of these cases claims were made to benefit by
"insurances" in favour of the next-of-kin of railway passengers who
might be killed when in possession of copies of newspapers which had
advertised themselves by offering these benefits. The cases were
decided on the point that the newspaper proprietors were in the
circumstances entitled to decide who were "next-of-kin," and it was
assumed rather than debated that there had been a contract between

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28 Cheshire and Fifoot, *Law of Contract*, 5th ed., p. 47, gives the following example
"A reward may have been advertised for the return of a lost dog to a given
address... May the offeror, by giving notice, revoke his offer when he sees the
dog being led through the streets towards his house?"

29 (1834) 13 S. 68.
30 (1894) 21 R. 1027.
31 (1904) 7 F. 136.
the deceased in each case and the newspaper proprietors. Carlill v. Carbolic Smoke Ball Co. was, however, cited in the earlier case, which was followed by the court in their later decision. Lord Young twice expressed strong views dissociating himself from the view that there had been a contract at all between the newspaper proprietors and the deceased.

The leading authority on advertisement cases is, however, Hunter v. General Accident, etc., Corp. The relevant facts were these: coupon policies of insurance contained in pocket diaries stated that "£1,000 will be paid under the following condition to the executors of any owner of such a diary who should be fatally injured in a railway accident." The conditions were that such owner must have caused his name to be registered at the head office of the insurance company concerned, and the claim had to be made within twelve months of the registration. Hunter bought a diary and caused his name to be registered, paying a registration fee of 6d. which was also to cover cost of acknowledgment. Subsequently he received fatal injuries in a railway accident. The case could have been argued in two ways. First, a claim could have been presented as a unilateral expression of will—a promise or pollicitation—subject to a condition, like the promise made in Morton's Trs. v. Aged Christian Friend Society, where the deceased had promised to pay sums of money to a charity if it were formed according to his wishes. To succeed on such grounds, however, the pursuer would have had to prove the promise by writ or oath of the defender. The printed coupon itself—since it was not "the writ of the defender"—would not have sufficed. In the circumstances this might not have been fatal, since the insurance company had expressly acknowledged by signed letter receipt of the registration fee and had referred to the insurance. If, however, the insurance company had prescribed some private act to qualify and had not required intimation—e.g., had required the diary owner to enter his name on the coupon—then proof of the promise by writ would have been impossible, though proof by oath might have been secured.

The other approach open to the pursuer was to aver contract formed by offer and acceptance, and thus to found on the English authority of the Smoke Ball case. This was in fact the line of argument which succeeded; the Inner House, and subsequently the House of Lords, held that the coupon constituted an offer, which had been duly accepted by the deceased having himself registered.

33 (1899) 2 F. 82.
Hunter's case perhaps illustrates that the distinction between promise subject to condition and contract by offer and acceptance may be narrow. The assimilation of this case (except for the English law requirement of consideration) to Cartill v. Carbolic Smoke Ball Co.\textsuperscript{34} is obvious, and Scottish legal writers have treated the two cases uncritically as illustrating the same principle. The consequences of this assimilation become apparent in A. & G. Paterson v. Highland Ry.\textsuperscript{35} During the 1914–18 war, on the representation of traders in pitwood, the Railway Executive Committee wrote a letter to the Board of Trade intimating that they would carry pitwood at a special rate during the war and so long as the existing system of control by the Government should last. The terms of this letter were made known to the traders, but no formal “acceptance” of the “offer” stated in the letter was made by any of them. Later, increased charges were intimated on behalf of the railway companies a year and seven months before Government control officially terminated. The pursuer claimed that the defenders were bound by the terms of their earlier letter. Nevertheless, the House of Lords (reversing the Court of Session) absolved the defenders on various grounds, among them (Lord Shaw of Dunfermline dissenting on this point) because there had never been a contract, since the alleged “offer” had never been accepted for or on behalf of the pursuers. Lord Dunedin, who gave the leading judgment, considered that the case under consideration was not analogous to an offer or promise to give an option in favour of an individual to purchase a property within a specified period (which in Scotland, unlike England, would be valid without consideration); a closer analogy, he thought, would be the case where a tradesman intimated that he intended to sell at a particular price during November—in which case he would not be precluded from altering his prices at any time before a prospective buyer tendered that price. Lord Shaw, on the other hand, considered the situation to be covered by Lord Kinnear’s observations in Hunter, and considered that the period for which the special rates must be maintained was the period of Government control. Lord Sumner distinguished the case sub judice from the Smoke Ball case, in particular on the grounds that the traders did not have to do anything to indicate acceptance—like the smelling of the ball. None of the opinions, however, seems to have considered whether the true basis for discussion should have been a contract at all—though, of course, in dubio a proposal to enter into business relations will be construed as an offer rather than an obligatory promise.\textsuperscript{36}

\textsuperscript{34} [1892] 2 Q.B. 484; [1893] 1 Q.B. 256.
\textsuperscript{35} 1927 S.C. (H.L.) 32.
\textsuperscript{36} See Macfarlane v. Johnston (1864) 2 M. 1210; Malcolm v. Campbell (1891) 19 R. 278; Forbes v. Knox, 1957 S.L.T. 102, per Lord Walker at p. 103.
Had the question been approached from the angle of *pollicitatio* or unilateral promise, the issue of acceptance in Scots law—and in particular Lord Sumner’s comparison with the *Smoke Ball* case—would have been irrelevant. Moreover in *Paterson’s* case there was adequate proof of the promise by the promisor’s writ in the terms of the letters written on November 16, 1914, and August 2, 1916. The decision in *Paterson v. Highland Ry.* can be supported on several grounds, but the dicta referred to certainly seem to have extended English contract doctrine to the law of Scotland regarding promises made in favour of members of the public. This was possibly done *per incuriam*.

**Problems of Proof**

Obligations which are classified as unilateral and gratuitous in Scottish law would not in all cases fail under the English law of contract for lack of consideration. Whether a promise is gratuitous in Scottish law is decided while matters are entire, and without reference to actings of the promisee which may be demanded as a condition of the gift. Accordingly, if A makes a promise of a benefit to B which is conditional—as on B marrying, or building a church, or coming to live in a particular district, or forming a committee to operate a charity—these are regarded as unilateral and gratuitous obligations. B himself undertakes no counter-obligation, though he cannot take the benefit unless he fulfils the condition laid down by the promisor. In English law, B, by fulfilling the condition prescribed, might well invoke the doctrine of "executed consideration" to establish a bilateral contractual obligation. Under Scots law, moreover, since the quality of a unilateral obligation is fixed when it is made, a person who has fulfilled the condition of the promise in his favour cannot turn the unilateral promise into the bilateral contract by showing conduct on the faith of the promise and pleading *rei interventus*. The quality of the obligation—unilateral or bilateral—is determined *rebus integris*. This can be of vital importance when it comes to setting up the obligation, since the rules of proof are stricter regarding unilateral and gratuitous promises than in the case of bilateral onerous obligations. Lord Normand has noted,

There are probably few cases (or perhaps none) where an English court would hold that there was no consideration and a Scottish court would permit proof by witnesses, but there are probably many in which the English courts would hold that there was consideration and yet the Scottish courts would insist on proof *scripto vel juramento*.

37 *Hawick Heritable Investment Co. v. Huggan* (1902) 5 F. 75.
It is a matter for regret that the doctrine of *rei interventus* should so far have been regarded as irrelevant except to bar *locus poenitentiae* in bilateral obligations, and even the technicalities of "past consideration" in English law appear in a relatively favourable light compared with the present legal situation in Scotland when a promisee has fulfilled a potestative condition,\(^40\) but is met by technical difficulties of proof. This may be illustrated by the decided cases.

In *Morton’s Trs. v. Aged Christian Friend Society*\(^41\) it appeared that the late Mr. Morton by certain letters undertook to pay sums of money to the society if certain conditions were fulfilled. He performed his promises during his lifetime, but after his death his representatives raised the question whether they were bound to continue to implement his promises. It was held that they were.

It is a familiar doctrine in the law of Scotland differing in that respect from the law of England, that an obligation is binding although it may not proceed on a valuable consideration, or may not be expressed in a solemn form. . . . What is necessary is that a promisor should intend to bind himself by an enforceable obligation and should express that intention in clear words.\(^42\)

It is, however, the rule that a unilateral promise can only be proved by writ or oath of the promisor; and if such proof cannot be adduced, the obligation cannot be proved, even though the promisee has done work or incurred expense in reliance on the promise. This has been so held in several cases—as in *Millar v. Tremamondo*,\(^43\) where the pursuer averred that the defender had made certain promises to him in the prospect of the pursuer marrying the defender’s daughter. It was held that these promises, being gratuitous, could only be proved by writ or oath of the defender, and Lord Hailes reports\(^44\)—an interesting sidelight on filial piety—"Miller did not reclaim (i.e., appeal)—he . . . declared that he would not put his father-in-law upon oath lest he should perjure himself." *In Smith v. Oliver,*\(^45\) trustees for a Roman Catholic Church brought an action against the executors of a deceased lady for payment of the cost of work which she had asked to be carried out on a church in which she had interested herself. She had been restricted in the disposal of her capital during her lifetime, but had undertaken to provide by her will for the cost of the work. Unfortunately she failed to sign the necessary codicil, and thus the pursuers, who had acted bona fide and had

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\(^{41}\) (1899) 2 F. 82.

\(^{42}\) Per Lord Kinnear, *ibid.* p. 85.

\(^{43}\) (1771) Mor. 12395; also reported by Hailes, 409.

\(^{44}\) *Ibid.* at p. 412.

\(^{45}\) 1911 S.C. 103.
incurred expense, could not prove the promise—which would otherwise have been effective, as in Morton.\footnote{Supra, note 40.} A similar situation arose in Edmondston v. Edmondston,\footnote{(1861) 23 D. 995. \textit{Quaere} could the principle of recompense be invoked; see ante, p. 627.} where it was held that the promise of a man to leave his whole property to his brother, upon condition that the latter should settle as a medical practitioner in his neighbourhood, could not be proved by parole.

**ERROR IN UNILATERAL AND GRATUITOUS OBLIGATION**

In cases of essential error, where the obligation has been gratuitous and unilateral, the courts have been more willing to grant relief than in onerous transactions. Broadly speaking, a plea of essential error in contracting an onerous obligation is seldom upheld unless the error has been induced by or shared with the other party to the obligation.\footnote{Stewart v. Kennedy (1890) 17 R. (H.L.) 25.} This attitude is relaxed in favour of the maker of a gratuitous unilateral promise, who need not aver misrepresentation inducing error.\footnote{McCaig v. Glasgow University (1904) 6 F. 918; McLaurin v. Stafford (1875) 3 R. 265; cf. Sinclair v. Sinclair, 1949 S.I.T.(Notes) 16; McConchy v. McIndoe (1853) 16 D. 315; Purdon v. Rowat's Trs. (1856) 19 D. 206; McAndrew v. Gilhooley, 1911 S.C. 448.} The present writer suggests—and will develop the submission later in connection with "essential error"—that, though important, this distinction should not be erected into a rigid rule of law. It is thought that unilateral essential error is always a sufficient ground of reduction, if the error is shown to be reasonable \textit{(justus et probabilis)}. If the party seeking to defend the obligation has himself induced or shared the error, he can scarcely be heard to contend that the pursuer's error was unreasonable. Likewise, since the success of a plea of essential error is intimately associated with questions of personal bar, equity will more readily permit such a plea to succeed if urged by one who has made a gratuitous and unilateral promise, than by one whose obligation was founded on onerous considerations. It must be admitted that this approach to the problem of essential error has not yet been clearly recognised by Scottish judicial or textbook authority, though the principle is thought to be sound.
CHAPTER 33

CONTRACTS

FORMATION AND CONTENT OF CONTRACTS

General Considerations

A contract is a species of agreement; and in law an agreement is the consent of two or more parties to form, rescind or modify a legal relationship. Normally the term "contract" is applied to the actual formation of a legal relationship, though it is also used, not improperly, in a wider sense to include rescission or modification. For practical purposes, "contract" may be defined as "an agreement recognised in law by which two or more parties reciprocally engage, or one at least of them engages himself to the other or others, to give some particular thing, or to do or to abstain from doing some particular act." It is preferable to avoid definitions of contract which refer, as in Anglo-American jurisprudence, to "promises" since, as has already been discussed, a unilateral promise may create a valid obligation without the necessity of bilateral agreement.

It is true to say that Scottish legal theory recognises a "law of contract" in the sense that "every pactio produceth action" as Stair observed, and parties who satisfy the specialties of evidence, may engage themselves for any lawful purpose. In Roman law stipulatio provided a means whereby if the "type contracts" such as emptio-venditio, locatio-conductio, mandatum, depositum, did not suit the wishes of parties they could fashion a detailed agreement for themselves. In Scots law, though stipulatio is superseded by a general doctrine of informal contract, the "type contracts" derived from Roman law still remain relevant. Such contracts may be real or consensual. Their importance was and is that, once parties have entered into a recognised type contract—such as hire, deposit, loan or mandate—and have agreed on certain fundamental matters, the law proceeds to make the rest of the contract for them. Various terms are implied which the parties are bound to observe unless they expressly exclude them. Thus in hire (and formerly in sale until statutory anglicisation) there is a general common law duty on the party delivering the subject to disclose latent defects which

1 p. 742, ante.
2 I, 10. 7.
render the subject unfit for the purposes for which it was hired; and the relationship is governed by principles of good faith. In other traditional “type contracts” such as loan and deposit, the relationship comes into being and is regulated by law as from the time when the subject is delivered. Agreements to lend or deposit are not “type contracts”; but loan and deposit are “type contracts,” depending on the fact of delivery, and are therefore “real contracts.”

Contracts of Adhesion: Standard Form Contracts

In modern times, however, a new form of “type contract” has come into vogue, known in France as the contrat d’adhésion—the “take it or leave it contract.” Much theoretical discussion of the principles of contracts has been based on the doctrine of “freedom of contract,” which reached its apotheosis in the nineteenth century, and has tended to demand continued reverence through the operation of precedent. Even during the nineteenth century, especially where contracts of service were construed, the so-called freedom to contract was often illusory—so far as the workman was concerned. He had little more than an option between accepting either the terms of service dictated by an employer or destitution as an alternative. In mercantile dealings, however, there was much more negotiation regarding contractual terms between parties of equal bargaining power. All this has changed. Today in response to mass demands for goods and services standard-form contracts are drawn up by large scale enterprises, which may well be safeguarded against competition and have a bargaining power far in excess of the nineteenth-century business or firm. These standard form contracts as a rule make detailed provisions to secure the interests of the enterprise and to exclude remedies available at common law to persons dealing with it. Individuals have, in effect, no bargaining power: so far as their freedom of contract exists, it is confined to the option whether to enter into an agreement or not. Many of the vital services of normal life are governed by such contracts, and high pressure advertising techniques are used to persuade the ordinary citizen that certain goods or services are indispensable if he or his family is to circulate among the other Joneses without being branded as pariahs. In some instances the state itself has intervened by legislation to protect the individual from the consequences of an unrestricted doctrine of freedom to contract.

3 Pothier, Letting and Hiring (trans. Mulligan), s. 109 et seq.
4 The classical expression of the English doctrine which had considerable influence on Scotland is that of Sir George Jessel M.R. in Printing and Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq. 462 at p. 465: “If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”
Examples may be found in hire-purchase transactions, in contracts of carriage, and in certain dealings between landlord and tenant. The Judiciary has also endeavoured to temper the rigour of standard form contracts in favour of the individual through the doctrine of strict construction contra proferentem.

The courts may, however, go further—in Scotland at least, where more liberal rules are accepted regarding judicial precedent than are admitted in England. In Beith’s Ts. v. Beith, the First Division, a mere quorum of judges, declined to follow a precedent which was directly in point, though it had the authority of a court of seven judges. Lord President Cooper in this case stressed that the situation of married women had changed greatly since 1875, and he, in effect, applied the principle cessante ratione legis cessat lex ipsa. In the field of contract, the situation has also changed greatly since the end of the nineteenth century. The same learned judge in McKay v. Scottish Airways indicated that public policy may be a more flexible instrument in Scots than in English law, and that the courts may use it to protect the lieges against unreasonable terms in standard form contracts. Equity is still a potentially creative element in Scottish jurisprudence, and the Scottish courts have not known the dichotomy of Law and Equity. Lord Cooper observed of the contract in the Scottish Airways case, “The remarkable feature of these conditions is their amazing width, and the effort which has evidently been made to create a leonine bargain under which the aeroplane passenger takes all the risks and the company accepts no obligations, not even to carry the passenger or his baggage nor even to admit him to the aeroplane. It was not argued that the conditions were contrary to public policy, nor that they were so extreme as to deprive the contract of all meaning and effect as a contract of carriage; and I reserve my opinion upon these questions.”

It is to be hoped that the late Lord President has not trailed his coat in vain and that his mantle with a double portion of his spirit has passed to his successors. If Britain is to enter the Common Market, it may be observed that Belgian, French, German and Italian law all in different ways give protection against the leonine bargain. The approach of German law is perhaps of particular interest to Scottish litigants who may be encouraged to argue principles of freedom of contract from first principles. Freedom of contract has two aspects. First, there is the power to determine whether to enter into an agreement or not—including (except in the case of dealings with fully monopolistic enterprises) the right to select the supplier of goods

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5 1950 S.C. 66.
6 1948 S.C. 254; and see p. 772, post.
7 At p. 263.
or services. Secondly, there is the power to co-determine the terms of the contract. So far as standard form contracts in Scotland are concerned, it may be noted that discussions of so called “freedom of contract” have so far tended to concentrate exclusively on the option to enter into the transaction, and no adequate consideration has been given to the freedom to negotiate terms. If and when this matter is argued, it would be desirable to turn for comparative material, not to the law of England but to those European systems with which Scots law was closely associated when the foundations were laid.8

Consensus in Idem

Consent in a civilian system such as Scots law implies the will or mental determination to be bound and the declaration of that will. Two competing theories have striven for recognition. On the one hand the subjective school stress the priority which should be given to the actual state of a declarant’s mind. On the other hand, the objective school (which is particularly favoured by English law) claim that the declaration of will itself should be the sole aspect for consideration, since otherwise reasonable expectations of the obligee might be defeated. In most legal systems, including that of Scotland, a compromise has been struck between these approaches to problems of consent.9 From the formation of a valid bilateral contract it is often said that there must be agreement of minds—consensus in idem. In fact, however, except where there is ambiguity, or equity justifies an investigation of subjective intention, the law usually tests consensus objectively. The fact that the parties to an apparently complete contract were not ad idem in their minds is often irrelevant. The court will first inquire as to what each party was reasonably entitled to conclude from the speech and actions of the other, and a contracting party cannot be heard to say that when he received an offer to purchase, he thought that sale meant hire. As Lord President Dunedin had occasion to observe in Muirhead & Turnbull v. Dickson,10 “Commercial contracts cannot be arranged by what people think in


10 (1905) 7 F. 686 at p. 694. This dictum is sometimes construed much too broadly. In the first place the courts are likely to enforce commercial contracts more strictly according to their terms than, e.g., a family agreement between experienced adults and persons who have just reached majority and lack advice or experience. Again, even in commercial contracts, as will be discussed in the context of error (post, p. 824), there are occasions when the courts will take into account the subjective intention of contracting parties.
their inmost minds. Commercial contracts are made according to what people say.” Also, in the case of Brownlee v. Robb,11 Lord McLaren quoted Lord Blackburn’s words in an earlier case, in all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other party. Conversely, the court may hold that there is in fact no contract, even though the parties themselves believed that they had entered into a contract. The parties submit their words for interpretation by the court.12 It is thus preferable to accentuate the objective construction and enforcement by law of contractual terms rather than subjective intention, though the subjective aspect of contract may be of much importance in appropriate cases.13 There may, moreover, be, for example, such ambiguity of meaning that the court cannot hold that one meaning should be preferred to another—as in the well-known English case of Raffles v. Wichelhaus,14 where the parties, who had agreed for the shipping of cotton “ex Peerless from Bombay,” had contemplated different vessels of that name which were due to sail at different times. Likewise there was an ambiguity which would not yield to objective construction in Stuart & Co. v. Kennedy,15 where, in a contract for paving-stones by the foot, one party had meant measurement by “lineal” feet and the other by “superficial” feet.16

Offer and Acceptance

Mutual consent is deemed to be at the root of contract, but this consent is inferred from words and conduct. Consensus in idem is held to be complete when a definite offer is met by an unqualified acceptance. Thus, in legal analysis, every contract presupposes offer and acceptance. These are not formal in any way. It may be that the court is asked to hold that, at some stage in a long course of mercantile correspondence, the parties were ad idem; or again, offer and acceptance may be inferred from conduct, as where a newspaper vendor leaves a bundle of papers at his stance, and a purchaser on taking up a paper puts down the appropriate coins.

There is much truth in Mr. Atiyah’s observations 17 regarding offer and acceptance: “In fact these elements are usually present in a

11 1907 S.C. 1302 at p. 1312.
13 Such as certain cases of essential error. See p. 814, post.
14 (1864) 2 H. & C. 906.
15 (1885) 13 R. 221.
16 See also Buchanan v. Duke of Hamilton (1877) 4 R. 328, 854; affirmed (1878) 5 R. (H.L.) 69.
contract, even if they are implied rather than expressed, and even if it may be difficult to disentangle the offer and the acceptance from the negotiations preceding them, and even if . . . the acceptance may sometimes be virtually compelled. It sometimes happens, however, that the law of contract is strained to serve purposes which are really alien to its main objects. For instance, the relationship between the members of a club or society is theoretically regulated by a contract (viz., the rules of the society) and in such cases it may be very difficult, if not impossible, to find a real offer and acceptance or to decide who is the offeror and who the offeree. Such cases show that to insist on the presence of a genuine offer and acceptance in every case is likely to land one in sheer fiction, although it may be convenient to postulate the existence of an offer and acceptance for some purposes. . . . None the less, the majority of cases are susceptible of explanation in terms of offer and acceptance without any undue straining of these concepts."

There must, at least in theory, be a definite offer made in some form either to a definite person, or to a class or, as in advertisements of reward or compensation for acts, to the public at large. Offers of general advantage to the public are construed as more than mere expressions of general intention, and, if duly accepted by a member of the public who performs the act stipulated for in knowledge of the offer, may be construed as contracts. When an offer addressed to the public is appropriated to himself by one person, the result is the same as if the offer had been addressed to that individual 18; but, on grounds of common sense, it seems that in cases where the general invitation is to do one specific act—such as the offer of reward to anyone who supplies information identifying the author of a crime—only the first informant can claim the reward. The general offer may, however, admit of several acceptances—as in the case of Hunter v. General Accident Corporation.19 Hunter had bought a Letts’ diary which had as its centre page a form of insurance, which stated that £1,000 would be paid to the executors of any diary owner who was fatally injured in a railway accident, provided that he had caused himself to be registered at the head office of the company. Hunter applied for registration, and was subsequently killed in a railway accident. In an action by his executors the contract of insurance was held to be binding. Lord Kinnear commented,20

18 Petrie v. Earl of Airlie (1834) 13 S. 68.
19 1909 S.C. 344; ibid. (H.L.) 30. The alternative approach to "offers" of this kind as promises or pollicitations has been considered, p. 747, ante.
20 At p. 353.
it is suggested that this is making a contract by an advertisement, but it is none the worse for being an advertisement if it is a distinct and definite offer unconditionally accepted. . . . When a general offer addressed to the public is appropriated to himself by a distinct acceptance by one person, then it is to be read in exactly the same way as if it had been addressed to that individual originally.21

It seems, however, that unless members of the public are invited to perform, and do so in fact perform, some positive act by way of acceptance in response to the advertisement, general intimations will not be construed as offers.22

Offers are to be distinguished from invitations to enter into negotiations. When tenders are invited, this is not an offer which can be accepted by submitting the lowest tender. It is the tender which is the offer. At an auction, each bid is an offer which is not accepted unless by fall of the auctioneer's hammer.23 Again, the sending out of book catalogues or wine lists merely invites clientèle to make offers in response. Clearly, if a book dealer has only one copy of a first edition, his position would be impossible if every person who received his priced catalogue could, by tendering the sum quoted, claim to have concluded a contract. Similar conditions apply, it has been suggested, to the exhibition of goods in a shop-window with price tickets attached.24 Moreover, even in public callings—like that of innkeepers, who are obliged to provide facilities for members of the public who apply for them—the personal element of the guest is not entirely excluded.25

Offer is also to be distinguished from a mere statement of intention which a man may be free to alter, though the distinction is sometimes narrow.26 Where, however, a trader quotes to another commercial man the price of commodities in which he deals, he will in general be held to have made an offer to sell.27

A contract is concluded at the moment when the offer is met by an unqualified acceptance—though some reservations must be discussed regarding communication of acceptance. Acceptance may be by words or conduct, and must be communicated to the offeror, unless he dispenses with the need to notify acceptance. No one can,

21 See the equivalent case in England, Carllll v. Carbolic Smoke Ball Co. [1892] 2 Q.B. 484; also comment, p. 747, supra.
23 Fenwick v. Macdonald Fraser & Co. (1904) 6 F. 850.
25 Philp v. Knoblauch, 1907 S.C. 994; in this case the Privy Council case of Harvey v. Facey [1893] A.C. 552 was quoted, but distinguished by the court.
however, force a contract on another by intimating that he will hold his offer accepted unless the other refuses—though agreement, previous dealings or trade custom might imply this method of acceptance. If the method of acceptance suggested by the offeror is disregarded, the offeror takes the risk of loss or delay of his acceptance. Mere mental assent is not enough, though when offers are made to the public, provided that some positive act must be done to signify acceptance, intention to accept the public offer need not be communicated.

Acceptance, to be effective, must meet the offer. If it is attempted to introduce terms or conditions into an "acceptance," this will be construed as a counter-offer, which, to conclude a contract, must itself be accepted. If an offer calls for one kind of performance, purported acceptance by promising a different kind of performance will not complete a contract. If the reply to an offer expresses willingness to contract, but on more favourable terms, the parties are not ad idem, and there is no contract. Where, however, the offeree, before deciding whether to accept or refuse, asks for further information regarding the possibility of the terms being modified, this is not to be taken as a counter-offer. Where the difference between offer and acceptance is merely with regard to how the parties shall carry out their contractual purpose, the contract is complete. This matter has several times been litigated, where parties have agreed "subject to contract" or "subject to a formal lease being drawn up"—or equivalent words. Is the effect of such expressions to postpone the completion of the obligation? It used to be suggested that in Scottish law, by contrast with English law, the completion would not be postponed. It has now been laid down, however, that the words "subject to contract" have no fixed technical significance in Scots law, and that it is always a matter of construction whether the use of such words in their context indicates that the parties are still at the stage of negotiation, or that they have reached agreement, with the understanding that their contract shall be put in formal writing.

28 1925 S.C. 1.
31 Stobo, Ltd. v. Morrisons (Gowns), Ltd., 1949 S.C. 184.
One further aspect of acceptance not meeting "offer" may be noted—where, owing to mistake in the transmission of an offer (by a telegraph clerk, for example), it is sent to the wrong person or the telegram misstates the quantity of goods ordered. Clearly the offeror would not be bound by purported acceptance of what was not, in fact, his offer at all.32

Intimation and Revocation of Offer and Acceptance

Though exceptions may arise where there is a continuing relationship, or when the personal or financial factor is subsidiary,33 revocation of an offer is implied in the case of death, insanity or bankruptcy of the offeror, or if there is no acceptance within a reasonable time. An offer may, moreover, be withdrawn at any time before acceptance, unless there is a promise to keep the offer open for a specified time, or it is stated to be irrevocable.34 An irrevocable "offer" seems to be construed as a promise which does not require acceptance.35

An offer may be expressly revoked at any time prior to acceptance. Acceptance concludes the contract, and, therefore, except in rare cases where theory gives way to common sense, cannot be revoked. To determine the exact time when communication of revocation of offer and communication of acceptance of contract become effective involves difficult questions of law which may be examined briefly. It is said that offer may be revoked at any time until it is accepted. One difficulty, which has not yet been resolved, arises in cases where acceptance is constituted, not by a reciprocal promise, but by performance of an act—as if A advertised a reward payable to the person who should find and return his dog to him. Suppose that B, relying on A's advertisement, has found the dog and is leading it up the street to A's residence: can it be contended that A could at this stage, before the act was completed, revoke his offer? It is thought that such a case might justify a plea of personal bar, quite apart from the alternative remedy for recompense.36 Moreover, as has been argued already,37 an alternative approach may be available through the doctrine of unilateral promise sub conditione.

The conduct of business by letter, telephone or telegraph has given rise to a close examination of the times from which revocation of offer and acceptance become effective. Revocation of offer must be

32 Verdín v. Robertson (1871) 10 M. 35; see also Henkel v. Pape (1870) L.R. 6 Ex. 7.
33 Would, for example, an offer of marriage be revoked by bankruptcy?
36 As to which see Quasi-Contract, ante, p. 627 et seq.
37 Ante, p. 747 et seq.
actually brought to the knowledge of the offeree before he accepts, otherwise it will be ineffective, even though the revocation was sent off by the offeror before the time at which acceptance was communicated. This supposes, however, that the parties are acting in business matters in the ordinary business way. Thus if a revocation of offer is sent to the offeree at his office, and he would have received it before accepting had he been in his office during normal business hours, it is thought that the revocation will in fact be effective, though an acceptance is sent by the offeree from some other address in ignorance of the revocation.38

By contrast with the rule regarding actual communication of revocation of offer, though acceptance is deemed to be effective when actually communicated to the offeror in transactions where acceptance by post is appropriate, the contract is complete when the acceptance is posted.39 Logically this implies that a revocation which has not reached the offeree before he accepts is ineffective; and that by posting an acceptance the offeree has committed himself irrevocably. Thus, if the chronological order of events is (a) offer received, (b) posting of revocation of offer, (c) posting of acceptance, (d) revocation received, (e) acceptance received—the contract is complete and the revocation is ineffective.40 In the case of Thomson v. James,41 James offered to buy from Thomson an estate which had been advertised. Thomson posted an acceptance on December 1, and on the same day James posted a letter withdrawing his offer. It was held that the contract was complete, and that the revocation was ineffective. Since the posting of the acceptance concludes the contract, it has been held that the risk of delay in post falls on the offeror—so that, if an offer is open for acceptance only by return of post, and the acceptance is posted in time but is delivered late, the offeror will be bound.42 It might be expected to follow that if the offeree could prove the posting of his acceptance, the offeror would be bound, though he had never received the letter of acceptance at all, and this view has been adopted in the English case of Household Fire 38 Burnley v. Alford, 1919, 2 S.L.T. 123.
41 Supra.
42 Dunlop v. Higgins (1847) 9 D. 1407; affd. (1848) 6 Bell's App. 195. In Entores v. Miles, supra, however, the Court of Appeal in England held that, though in the contract by post acceptance is complete when the letter of acceptance is posted; where a contract is made by instantaneous communication, such as Telex or telephone, the contract is only complete when the acceptance is received by the offeror. Accordingly the contract is "made" in the place where the offeror receives acceptance.
Insurance v. Grant.\(^{43}\) Lord Shand, however, in the Scottish case of Mason v. Benhar Coal Co.\(^{44}\) expressed his disinclination to extend this construction to Scottish law.\(^{45}\)

Another instance in which the Scottish courts may decline to draw unqualified conclusions from the theory that acceptance is irrevocable, is where revocation of acceptance actually reaches the offeror before the acceptance itself—as if a telephone message or telegram revoking acceptance reaches the knowledge of the offeror before (say) a letter of acceptance. The one Scottish authority on this question—Countess of Dunmore v. Alexander\(^ {46}\)—is not very satisfactory. This was an action for wages, based on averments that the Countess had engaged Alexander as servant, but had refused to fulfil the contract. She had written to a lady, in whose service Alexander then was, asking her to engage Alexander, who had offered her services. The following day the Countess sent a letter withdrawing her acceptance, but both letters arrived together. The cancellation was held to be effective. In Thomson v. James\(^ {47}\) the earlier case was explained as being justifiable only on its special facts—namely, that there had been a common agent, and that the two letters could be read together, so that the second was, in effect, a postscript to the first. Though the result in Alexander's case is perhaps not logical, it is a common-sense solution which has the support of Gloag and others.\(^ {48}\)

**CONTENT OF CONTRACT**

Though it may be clear that a contract has been concluded, to ascertain its exact scope may well require further examination. The court may have to ascertain and construe the express terms of agreement; and, in addition, give effect to implied terms introduced by statute,\(^ {49}\) by the operation of personal bar, by trade usage or custom, or on more general grounds of tacit agreement. Moreover, in the "type contracts" such as sale, hire, loan, deposit, agency, partnership and so forth, once the parties have agreed or made delivery, the law implies terms appropriate to contracts of each type. As Gloag has observed\(^ {50}\): "A written or verbal agreement may be the framework on which the law may build." It is not practicable to examine the many situations in which terms may be implied\(^ {51}\); but very short

\(^{43}\) (1879) 4 Ex.D. 216. \(^{44}\) (1882) 9 R. 883 at p. 890. \(^{45}\) The offeror can, of course, always stipulate expressly that the contract shall not be complete until he actually receives an acceptance. 

\(^{46}\) (1830) 9 S. 190. \(^{47}\) Supra, note 41. 


\(^{49}\) As in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). 

\(^{50}\) Contract, p. 286. 

\(^{51}\) The alleged doctrine of "implied term" in cases of frustration of contract, must however be considered in that context, post, p. 849.
consideration may be given to the ascertainment and construction of express terms.

Difficulties in this field of law have resulted from an almost unprecedented terminological confusion. The expressions "condition" and "warranty" both in Scottish and in English law have specialised—but different—technical meanings. Indeed in English law the expression "condition" has a variety of meanings according to context, and the expression "warranty" is used in insurance contracts to imply what would usually in England be designated a "condition." An English lawyer, versed in the antecedents of these problems—and in particular the different antecedents of Chancery and common law doctrines—can manipulate his own concepts with reasonable confidence. When, however, in the House of Lords an English Law Lord has encountered the expressions "condition" or "warranty" in a Scottish appeal, his dicta (against the background of his English training) have often darkened counsel, which, in any event, has been growing somewhat murky in Scotland since Bell—who was not always well grounded in the principles of English law—set the fashion for somewhat uncritical importation of English mercantile jurisprudence into the law of Scotland.

Ultimately the present author intends in a larger treatise to deal with the general principles of Contract, and it will be more appropriate to deal there in detail with the problems both of semantics and principle which vex any lawyer seeking to expound the basic structure of contract in a reasonably comprehensible fashion. Since detailed argument is precluded in a work of the present compass, the matter must be dealt with succinctly. Though laconic, the author does not wish to be dogmatic nor to express a concluded opinion. While he is convinced that many statements by judges and text writers have been confused and confusing, having himself wandered in the maze, his reactions are sympathetic rather than censorious.

In the course of negotiating a contract it is usual for the parties to make a number of oral or written statements with reference to the contemplated transaction. Not all of these statements become either warranties (i.e., promissory terms) or conditions of the contract. Certain statements are, from the viewpoint of the law, irrelevant. Certain representations, if false, material, and inducing a contractual relationship may provide good grounds for reduction. Moreover, damages in delict may also be demanded. Lawyers expect the

53 Ibid. p. 246.
54 See ante, p. 739; post, p. 834.
more blatant commendations of a product by its vendor, however, to be considered by purchasers with a healthy scepticism. If the scent "Pongo" is stated to make women irresistible, the vendor cannot be sued upon proof that no lady had to withstand an avalanche of importunate suitors. *Simplex commendatio non obligat.* On the other hand, as Lord Kyllachy commented in *Hyslop v. Shirlaw*—a case concerning the authenticity of a Gainsborough: "To constitute a warranty no *voces signatae* are necessary. A representation may be a warranty if it appears that it was so intended and understood; the question whether it was so or not being always a jury question depending upon the evidence." Generally speaking if a statement does not refer to the *res*, but to collateral matters only, it will be construed as a mere representation; a statement being made on the past history of the *res* will usually, but not necessarily, be likewise construed; but a reference to its present state will normally be construed as part of the contract. Representations which are construed as conditions become terms of contract in English law, while the effect of such representations in Scots law is to qualify the operation of the contract.

When the term "warranty" is properly used in Scots law—and it frequently is not—it implies a term of a contract obliging the party who gives it in the sense summarised by Lord Justice-Clerk Moncreiff: "I understand the law of Scotland, in regard to mutual contracts, to be quite clear—1st, that the stipulations on either side are the counterparts and the consideration given for each other; 2nd, that a failure to perform any material or substantial part of the contract on the part of one will prevent him suing the other for performance; and 3rd, that where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach or to rescind the contract altogether—except so far as it has been performed."

By contrast a "condition"—when the term is correctly used—does not imply a promise of performance at all. In Scotland, as in all Civilian systems, a conditional contract implies a contract, the existence of which depends on the occurrence or non-occurrence of a particular specified event. Erskine stressed "Articles which one of the parties to an obligation or contract undertakes to perform, though they should be conceived in the style of provisions, are most improperly called *conditions*. A provision *ex. gr.* in a lease, that the lessee should inclose his grounds within a certain time, though in the

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55 (1905) 7 F. 875 at p. 881.
56 *Turnbull v. McLean* (1874) 1 R. 730 at p. 738; see also p. 772, post.
form of words a condition or provision, is truly one of the obligations he enters into.” Matters are somewhat complicated by the fact that certain statements may qualify the obligation and also may have a promissory aspect—in short, the notion of “promissory conditions.” Regarding these Zulucta comments 58: “Both in English and Latin ‘condition’ often has a wider sense. Thus, in the familiar phrase ‘conditions of sale’ it denotes contractual provisions of all kinds, which strictly are conditions only in the sense that, unless they are accepted, there will be no sale. The fact that an offeror couches his terms in the syntactical form of conditions does not make them true conditions. Sometimes a question of construction is raised. For example, you may promise to buy my land on condition that I pay off a mortgage on it within six months. My payment of the debt may be a pure condition which I am free to realise or not, or I may have bound myself to it. In the latter case my payment is indeed a condition of your liability, but I can be compelled to make it. For the terms of this latter kind ‘promissory conditions’ is a convenient name.”

Such a perplexing use of the term “condition” arises in connection with so-called “conditions precedent.” Gloag summarises the confusion in language which the present author regretfully adopts to illustrate the serious dangers of loose legal terminology. 59 “The phrase ‘condition precedent’ is not used by the earlier writers in Scots law, and has been borrowed from English legal phraseology. If used with reference to time, and with regard to a particular obligation, it is synonymous with suspensive condition. . . . But in many cases where the term ‘condition precedent’ is used, the word condition is to be understood in its wider sense, as denoting one of the various obligations to which each party may be subject under the contract. The reference is then not to time but to materiality. A condition—or, more correctly, a term in a contract—is a condition precedent if it is of such materiality that its non-fulfilment amounts to a discharge of the contract, and liberates the other party from his obligations. It is not necessarily so merely because, in reference to time, it may be the initial step in the performance of the contract.”

Since “condition” and “warranty” signify very different legal concepts in Scotland and England, 60 the safest policy in Scotland is to retrace any discussion to first principles and to avoid judicial dicta and comments of text writers which have been influenced by English law. English precedents make sense in the context of English jurisprudence, but since the basic legal terminology attaches widely

59 Contract, p. 273; see also Wade v. Waldon, 1909 S.C. 571, where the influence of English doctrine is particularly apparent; see p. 772, post.
60 Indeed, the effect of “warranty” in Scotland is comparable to the effect of “condition” in England.
different meaning in Scotland and England to identical words, only a
master of both systems could manipulate the relevant authorities with
ture discernment. This is not to say, however, that where angels
should fear to tread, those who are not angels have not rushed in
impetuously. To such as do, one may well quote the apposite com-
ment of Lord Jeffrey when Scottish counsel sought success by
invoking superficially relevant—and fundamentally irrelevant—English
authority. He expostulated 61: “The insurance company know they
have no case. They brandish before our eyes a set of English cases,
which I always approach with distrust. I was startled with the intro-
duction of the word warranty, which, according to our notions, has
nothing to do with the matter. Condition is the better word.”

A further difficulty of construction is whether a particular pro-
vision in a contract is to be construed on the one hand as a condition
or qualification of the limits of the obligation undertaken, or, on the
other, as an actual term of the obligation. The expression
“condition” is properly used in the former sense and also, somewhat
confusingly, loosely in the latter.62 If the provision is to be read
as a condition in the strict sense, then it is generally irrelevant to
consider whether it is material or not.63 This may be illustrated by the
case of Standard Life Assurance Co. v. Weems.64 With a view to
insuring his life with the company, one Weems had made a number of
statements regarding his health and habits in answer to questions in a
declaration which, the policy stated, was to be the basis of the contract.
The policy also provided that “if anything averred in the declaration
hereinbefore referred to shall be untrue the policy shall be void.” To
questions as to his drinking habits Weems answered that he was tem-
perate and always had been so. Later he died of a disease probably
caused by habitual drinking, and there was evidence that for some
time prior to taking out the policy Weems had been drinking intem-
perately by the standards of contemporary society and of the
community in which he lived. The insurance company therefore
sought reduction of the policy. This was granted on the grounds that
the answers made by Weems in the declaration as to health were
untrue, that it was irrelevant whether he believed them to be true, and

61 Hutchison v. National Life Assurance Co. (1845) 7 D. 467 at p. 481; see also Sellars
62 The distinction taken between “condition” and “warranty” in the English sense
—i.e., that breach of a condition may justify rescission, but breach of warranty
only damages (see, for example, Sale of Goods Act, 1893, s. 11 (1)) does not apply
in Scottish law. The wider Scottish right of opting between rejection and a claim
for damages depends on materiality, and was preserved by the Act, s. 11 (2); and
But see p. 766, ante, and p. 772, post.
64 (1884) 11 R.(H.L.) 48.
Further, that the policy and declaration contained an express condition on which the obligation depended so that investigation into the materiality of the misstatements would be irrelevant. Though it appeared that excessive drinking had been a cause of death, as Lord Blackburn observed 65 "Now the cause of death was in one sense immaterial. If the policy was avoided the insurance company would not have been liable though he had been killed in a railway accident." 66

Terms Known to One Party Only

Whether a statement becomes a term of the contract depends, as has been noted, on the intention of the parties usually deduced objectively. It sometimes happens, however, that one party to a contract intends that particular terms shall be imported into the contract, but the other party remains in fact unaware of them. The question arises frequently when, during formation of the contract, documents have passed between the parties, and these documents contain stipulations which, one party asserts, form part of the agreement. The general question for inquiry in all such cases is as to whether the party founding on the alleged terms or conditions has taken reasonable steps to bring them to the notice of the other party. Many transactions involve inquiry of this kind. In commercial correspondence headings on writing paper have been held to incorporate terms or conditions. Thus, in Oakbank Oil Co. v. Love & Stewart, 67 a notepaper heading "Offers made subject to withdrawal in case of war or strikes" was construed as a condition of contract. Most frequently, however, the validity of terms known to one contracting party only is discussed in connection with the "ticket cases"—as when a man deposits luggage at a cloakroom, hands his suit to the cleaners, buys a ticket for the theatre or a football match, or takes a ticket for a journey by rail, sea or air. If when he seeks to recover his luggage, it is lost; or if his suit has been ruined by chemicals; or if he is injured while at his entertainment or on his journey—how far can his claim for redress be barred by conditions excluding liability printed on the ticket and unknown to him?

If a contract has been reduced to writing and signed by the parties, then, fraud or misrepresentation apart, one party cannot be heard to say that he did not read the terms of the contract to which he put his signature. In cases where there is no signed document containing the contract, but it is contended that a term or condition is imported

65 At p. 52. His language is, however, that of an English lawyer construing a Scottish contract.
66 See also Dawsons, Ltd. v. Bonnin, 1922 S.C.(H.L.) 156.
67 1918 S.C.(H.L.) 54.
into the contract by tickets or vouchers or receipts, the court must first decide whether the document should be deemed to be part of the contract at all. If the document which was handed to the party alleged to be bound was such that a reasonable man would regard it as no more than (say) an acknowledgment for payment or an advertisement, then terms or conditions printed on such a document will not be binding on the party receiving it. A good illustration is provided by Taylor v. Glasgow Corporation. The pursuer brought an action against the corporation for damages in respect of personal injuries sustained by her while using public bathing facilities provided by them. It appeared that, on asking for a hot bath, and paying 6d., the pursuer received a ticket from an attendant who operated a machine of the cash-register type. The ticket was of stout paper and part of a continuous strip. On the front was a serial number, the price, the letters H.B. and in legible characters “for conditions see back,” and on the back the words “The Corporation of Glasgow are NOT responsible for any loss, injury or damage sustained by persons entering or using this establishment or its equipment.” The corporation relied unsuccessfully on this alleged condition to exclude liability for injuries. It was proved that the pursuer, though she knew that there was writing on the ticket, did not know that it contained conditions. The Second Division held that this ticket—unlike those issued in contracts of carriage and deposit—was to be regarded as a mere voucher fulfilling the same function as a domestic check as a turnstile might do. Accordingly, the pursuer could not reasonably be expected to study it for conditions, and, moreover, the defenders had not done what was reasonably sufficient to give notice to the pursuer of the condition on which they relied.

It is thus clear that a party cannot import terms into a contract by printing them on the back of what the other would take for a mere voucher or receipt. The intricacy and value of the transaction are relevant in assessing what attention a man should pay to a piece of paper which is put into his hands. Was the document issued to the pursuer in the course of a transaction in which the reasonable man would expect terms to be set out in the documents delivered in respect of the transaction?—or would the reasonable man in the circumstances not have contemplated the introduction of contractual terms in this way?

If it is established that the transaction was of a kind where the reasonable man expects undertakings to be imported by tickets or other documents issued, the court must then consider whether in

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68 1932 S.C. 440.
fact reasonable notice was given of the terms actually set out in the tickets or documents. There is a mass of case law on what constitutes reasonable notice in the "ticket" cases; and for a time there seemed a danger that the courts, through preoccupation with formulae designed to test whether reasonable notice had been given, might lose sight of the essential question—was reasonable notice in fact given by the defender to the pursuer? The courts have, moreover, limited the area of free decision by ruling that in certain well-known contractual relations certain methods of notifying terms will suffice in law, and thus it will not avail the individual, bound by such notice, to assert that he was not in fact aware of the terms or conditions, or to prove that these were difficult to ascertain. Thus travellers by excursion trains or at reduced fares have been held bound by conditions excluding liability of which they did not know—though the reference in the ticket itself was to the "Notices Regulations in the Current Railway Time Table and Bills"—which may not have been easy either to obtain or to understand.71 If, in fact, the reasonable man should have been aware that a ticket contained terms, then the person receiving it will be bound, irrespective of knowledge, by terms or conditions reasonable in the circumstances—such as the exclusion of liability for loss or injury in contracts of travel or deposit. It does not follow, however, that, even though a man should have read the conditions referred to in his ticket, he will be bound by every term or condition which is set out therein. He will only be bound by those he could reasonably have anticipated. This point was well taken by Lawrence and Sankey L.JJ. in Thompson v. L.M.S.72 Even if a man knew that conditions were contained in a cloakroom ticket issued when he deposited his luggage—and did not bother to read them—though he might be bound by a condition excluding the custodian's liability for losing the baggage, he would not be bound by stipulations forfeiting the luggage if not removed within twenty-four hours, or requiring payment of a penalty of £100. The extent to which corporations controlling essential services may now limit or exclude their liability by means of "ticket" conditions, was the subject of comment by Lord President Cooper in Mackay v. Scottish Airways.73 His Lordship noted that under the contract of carriage in this case the passenger took all the risks, and the company accepted

73 1948 S.C. 254.
no obligation—not even that of carrying the passenger or his baggage—which could not be evaded by reliance on ticket conditions. In particular, liability for causing the passenger’s death was excluded by the conditions. The Lord President reserved his view as to whether it would not, in such cases, be possible to plead that some of the very one-sided terms were contrary to public policy. This suggests an opportunity to re-orientate the law regarding “ticket conditions”—which, in recent years, have been the safeguard of many leonine bargains.

**Fundamental and Material Terms**

Through the doctrine of the “fundamental obligation” English judges have refused effect to clauses drafted so widely as to attempt exclusion of liability for breach of the basic duties which characterise a contract. This doctrine has long had its counterpart in Scotland, and should comprise at least the essentials implied by law in the recognised “type contracts.” Moreover the common law would seem to extend the scope of fundamental duties of a seller, for example, beyond those specified in the Sale of Goods Act, 1893. Though the law may regard certain duties as essential, it is thought that any term of a mutual contract should be regarded as material so as to justify specific implement or rescission, though if the contract has been substantially performed or breach is trifling or inadvertent, the court may in exercise of an equitable discretion award damages in lieu. The hierarchy of English conditions and warranties is generally recognised to be no part of Scots law, though it must be confessed that the language of the 1893 Act, ss. 11 (2) and 62, and that of Lord President Dunedin in *Wade v. Waldon* would seem to foster a comparable dichotomy. The older (and it is thought sounder) authorities were concerned with whether the defender had *materially performed* what he warranted—not with whether what he warranted was material. Warranty in contract implied that the parties regarded the matter as material.

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75 *e.g.*, *Jeffé v. Ritchie* (1860) 23 D. 242.
76 To be discussed by J. J. Gow.
78 *Cf.* Cheshire and Fifoot, *op. cit.*, p. 120.
79 1909 S.C. 571.
80 See refs. note 77, supra; also *White & Carter (Councils), Ltd. v. McGregor*, 1962 S.L.T. 9, per Lord Keith at p. 13.
CHAPTER 34

TITLE TO SUE

The general rule in Scots law, as in most other systems, is expressed in the proposition res inter alios acta aliis nec nocet nec prodest. A contract can neither benefit nor bind a stranger to it. There are, however, important exceptions to this rule, and these fall into certain main categories:

(a) Cases of mandate or agency, where a mandatory or agent is employed to bring his principal into contractual relations with third parties.

(b) Cases of trust, arising under the Married Women’s Policies of Assurance (Scotland) Act, 1880,1 or by formal trust deed. These have been considered earlier in this book.2

(c) Cases of tutors or curators who act on behalf of persons who do not possess the requisite legal capacity. These have also been considered.3

(d) Cases where a third party (not being a principal in a contract concluded by an agent) acquires rights under a contract entered into by others for his benefit—that is by the doctrine of jus quaesitum tertio.

(e) Cases where third parties acquire rights subsequent to the original contract—as through transmission of an estate in land or as representative of a deceased, or as trustee in bankruptcy, or as an assignee. In general the acquisition of property does not carry with it the right to sue on a contract to which the acquirer was not a party. Title to sue or to be sued does not run with moveables, but contracts relating to heritage—such as the continuous obligations in a feu charter—may run with the lands, so that rights and liabilities pass to singular successors. Generally speaking, the representatives of a deceased person, a trustee in bankruptcy, or an assignee may sue on the contracts of their authors, provided that the personal qualities of the party they represent were not material on the principle of delectus personae.4 A trustee in bankruptcy is never bound to carry out the bankrupt’s contract.

1 43 & 44 Vict. c. 26.
2 Ante, p. 349.
3 Ante, p. 385.
(f) Cases where the faulty performance by A of his contract with B (e.g., to repair a vehicle or lift) causes injury to C. Such cases involve the liability of A to C under the general law of reparation.  
(g) Cases where A is induced by B to break his contract with C. Such cases are also dealt with in the context of reparation.

In the present chapter the law regarding mandate or agency, *jus quaesitum tertio* and assignation will be considered briefly.

**Mandate or Agency**

Mercantile agency—which is the most important aspect of Agency today—is to be discussed elsewhere in detail. A few general observations may suffice for present purposes.

There are two aspects of the *stipulatio alteri*—*jus quaesitum tertio* and agency. Agency, which is an aspect of representation, arises—except in cases of *negotiorum gestio*—by virtue of an agreement between a principal (or mandant) and agent (or mandatory). Where the relationship is gratuitous, the appropriate term is "mandate"; when the representation is for reward, "agency" is the recognised expression. An agent may be described as "a person who has authority to act for and on behalf of another (called the principal) in contracting legal relations with third parties; and the agent representing the principal creates, alters, or discharges legal obligations of a contractual nature between the latter and third parties." The authority to act may be conferred on the agent before he enters into a relationship with a third party, or may be conferred retrospectively by ratification. The position of a person who acts ostensibly as agent, but without authority is considered in the context of "Damages." The Roman law never fully recognised the principle of agency in its modern sense—which contemplates a two-way direct action between principal and third party, while the agent (in general) acquires neither personal rights nor liabilities under the contract he has concluded. Moreover, *mandatum* was a gratuitous relationship between *mandator* and *mandatarius*. The *mandator* acquired a right to sue the third party (generally speaking) by cession to him of the rights acquired by the *mandatarius*. He received a mandate to sue as procurator *in rem suam*. The third party was increasingly given a "one way" direct action against the *mandator* through the *actiones adjectitiae*

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5 See *supra*. It may be noted that the duty of care due to C may well be extended by the contract, since, apart from contract, A would incur no liability to C if he did not repair B's vehicle or lift.
6 See ante, p. 739.
7 See complementary volume on Scottish Mercantile and Industrial Law at present in preparation by Professor J. J. Gow.
9 p. 863, post.
qualitatis—the “added quality” of which implied that (under the formulary system) the latter’s name was included in the condemnatio clause. By Justinian’s time it seems probable that the actio quasi institoria was available to the third party against the “principal” in every case in which the “agent” had acted within the scope of his authority. The “agent,” of course, did not drop out of the contract, as happens today, but was liable in the alternative. The Roman concept of mandatum was concerned with relations between mandator and mandatarius, and not with relations between mandator and third party. This emphasis is apparent in the treatment of mandate by the earlier Scottish institutional writers and in codified systems such as that of France.

The idea that a contracting party could actually be represented at the formation of contract gradually gained recognition during the Middle Ages and is fully accepted in the codified Civilian systems today—though in some respects their approach is obviously different from that of Anglo-American jurisprudence. While all are agreed that a principal may authorise an agent to contract in his name, the doctrine of the “undisclosed principal” is essentially one of English law. An interesting paradox, therefore, appears. Civilian systems generally permit the tertius to enforce a jus quaesitum tertio under the stipulatio alteri, though the tertius was not a party to the contract. In this context they admit the effect of contract as a multi-party relationship and reject a strict doctrine of “privity of contract.” Yet, on the other hand, they refuse to recognise any direct right of action by or against an “undisclosed principal.” Such a right can only be acquired by assignation. By contrast, English law which10 “knows nothing of a jus quaesitum tertio” has accepted the competency of assignment and has found it perfectly practicable to give rights to or against an “undisclosed principal.” Such a right can only be acquired by assignation. By contrast, English law which10 “knows nothing of a jus quaesitum tertio” has accepted the competency of assignment and has found it perfectly practicable to give rights to or against an “undisclosed principal” in respect of a contract to which he was not a party. This latter concept took root before English law was concerned with the Civilian concept of consensus in the formation of contract, and at a time when the courts concentrated on “consideration” or quid pro quo as the essential element in contract.11 As the “undisclosed principal” was the person who in fact supplied the consideration, the agent was treated as a mere conduit pipe, and actions between “undisclosed principal” and third party were recognised. From the mid-nineteenth century, as the English courts gave increasing attention to the doctrine of “meeting of minds” the doctrine of the undisclosed principal

(though well established by precedent) has been increasingly restricted and contradictions have been introduced. In *Humble v. Hunter*,\(^{12}\) Denman C.J. held that the doctrine of "undisclosed principal" could not apply where the agent had contracted as principal—which he did by designating himself "owner" of a ship. But when, it has been pertinently asked,\(^{13}\) does an agent of an undisclosed principal not contract as principal? If he does not, his principal is not undisclosed.

The Scots law of agency is heir both to the Civilian and Anglo-American traditions. Stair,\(^{14}\) writing on the law of mandate or commission at the end of the seventeenth century, follows the Roman rules regulating the relationship of mandate and mandatory, even to the extent of holding that acceptance must be gratuitous. Yet, he departs\(^ {15}\) (as was general in Europe at that time) from the Roman law where the mandatory had acted in the name of his constituent. If he had not so acted, he was bound to transmit his right by cession. Bell, on the other hand, notes\(^ {16}\) that "Instead of the amicable and gratuitous MANDATE, there has been introduced the onerous contract of agency or factory, the relation of principal and agent, imposing duties more imperative, entitling the principal to more entire reliance on the performance of his orders, and raising with third parties relations of great extent and importance in trade."

In modern law the rights and liabilities of principal and agent *inter se* are in general the same as those which regulate the relationship of employer and employee. The agent, however, acts in a fiduciary capacity and is bound to account to his principal for any financial advantage which he has acquired, without his principal's knowledge and consent, from his position as agent. In particular—under the principle of trust—he is liable to make over any secret commission, and, if he has taken such, forfeits any commission paid by or due from the principal.

If the agent acts for a named principal, apart from trade custom to the contrary, the principal and third party alone, generally speaking, acquire rights and duties under the transaction negotiated. When the agent contracts as such but does not name his principal he may be treated as a party to the contract,\(^ {17}\) but the general rule is subject to exceptions which are fully considered elsewhere. If the agent acts on behalf of an "undisclosed principal," through the influence

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\(^{13}\) Müller-Freienfels, *sup. cit.* at p. 316.

\(^{14}\) I, 12.

\(^{15}\) I, 12, 16.

\(^{16}\) *Commentaries*, i, 506.

\(^{17}\) *Ferrier v. Dods* (1865) 3 *M.* 561.
of English law a situation comparable to the Roman actiones adjec-
tiae qualitatis seems to result. The situation is not one of true
representation nor true indirect representation—and is probably sui
generis. Principal and agent may sue the third party and the
third party can plead compensation on a debt due to him by the
agent, if it had been incurred before he had known of the principal’s
existence. The third party has the right to elect whether to sue prin-
cipal or agent, but is not bound by anything done before he became
aware of the principal’s existence. The doctrine of the “undisclosed
principal” is a specialty of English law, which Scots law may well have right to adopt—though not for the reasons which gave birth to the doctrine. At all events, recognition has been
given in this context to the social function of contract rather than
to autonomy of contract, and this approach has interested Continental
lawyers—who achieve somewhat similar results through indirect
representation, i.e., cession or assignation of rights.

In conclusion it may be noted that, though in general knowledge
of the agent is imputed to the principal, it has been held in England
that when an agent for an insurance company negotiates a contract
with an assured, the intermediary is to be treated as acting for the
latter—so that if a proposal form is inaccurately filled up, despite
disclosure to the intermediary, the insurers may repudiate liability.

Scots law has also been influenced to some extent by this doctrine,
but the Law Reform Committee for Scotland concluded that a dis-
tinction may be drawn between an agent in the strict sense (scil., a
representative authorised to negotiate contracts) and a person merely
paid commission for introducing business to an insurance company.
In the former, but not in the latter case, knowledge of the “agent”
might be imputed to the principal.

**Jus Tertii: Jus Quaesitum Tertio**

In his *Studies Critical and Comparative* the present author has
attempted a detailed analysis of the *jus quaesitum tertio*. To that
book he would refer the reader for fuller citation of authority than
is possible within the scope of the present book. The primary rule
is that only the contracting parties can enforce a contract. Though
a third party may be interested in the contract, this does not give
him a title to sue. To such a person the answer is “Jus Tertii.”
This expression is used when the defender denies that the pursuer

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20 e.g., *Newsholme Bros. v. Road Transport & General Insurance Co.* [1929] 2 K.B. 356.
22 p. 183 *et seq.*
has any such right as he alleges, though it is not denied that some other person might properly sue in respect of the defender’s act or omission. Accordingly, the pursuer failed in his action in Finnie v. Glasgow & S.W. Ry. In that case a manufacturer attempted to recover charges made by a railway company, on the ground that they exceeded rates fixed in a contract between that railway company and another. It was held that this contract conferred no rights upon anyone except the parties thereto.

There is, however, an important exception to this primary rule recognised by the law of Scotland, where it can be shown that the agreed object of a contract between A and B was to benefit a third party, C, i.e., a pactum in favorem tertii. This is known as “jus quaesitum tertio,” and, where the doctrine applies, C may enforce a right arising out of the contract between A and B to which he was not party. Being free from doctrines of “consideration” and “privity of contract” Scottish law developed a doctrine of jus quaesitum tertio at an early stage. On the question Stair observed: It is likewise the opinion of Molina, and it quadrates with our customs, that when parties contract, if there be any article in favour of a third party, at any time, est jus quaesitum tertio which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and therefore the obliged may be compelled to perform. So a promise, though gratuitous, made in favour of a third party, that party albeit not present or accepting, was found to have right thereby.

The learned author quotes four cases of which the earliest is dated 1627, though the reports contain even older cases—such as Wood v. Moncur in 1591—in which the jus quaesitum tertio was recognised.

In fact, however, the doctrine of jus quaesitum tertio does not at first sight appear to have been conceded such wide scope by the Scottish courts as Stair seems to have contended for in the passage cited. In Carmichael v. Carmichael’s Ex., Lord Dunedin reviewed the law in considerable detail, and subjected Stair’s statement of the

23 (1857) 3 Macq. 75.
24 “Quaesitum” is an adjective, not a verb. The phrase means “The third party has acquired a right.”
26 I, 10, 5. Since Stair was influenced in his legal thought by the jurists of the Low Countries, the development of the stipulatio alteri in Roman-Dutch law is of special interest. See Wessels on Contract, I, s. 1743 et seq.; R. L. Lee, Introduction to Roman Dutch Law, 4th ed., at pp. 243 and 437; Lee and Honoré, South African Law of Obligations, pp. 138–141.
27 Supplicants v. Nimmo (1627) Mor. 7740; Renton v. Aiton (1634) Mor. 7721; Ogilvie v. Ker (1664) Mor. 7740; Irving v. Forbes (1676) Mor. 7722.
28 (1591) Mor. 7719.
law to a good deal of interpretation and textual criticism—in particular on the point as to when a *jus quaesitum* may be revoked by consent of the original parties to the contract. Lord Dunedin (who almost certainly misunderstood Stair's meaning) stated that Stair's exposition of the law would only be accurate if the reading were "if there be any article in favour of a third party which cannot be recalled by either or both of the contractors est jus quaesitum tertio." In short, irrevocability would be "a condition not a consequence of the expression of the *jus* in favour of the *tertius."" \(^{31}\)

The right (*jus*) referred to in the phrase *jus quaesitum tertio* may have to be established in two different sets of circumstances. The question may be as to whether the *tertius* has acquired under the contract an irrevocable claim to the benefit; or the question may be as to whether the *tertius* has a right to sue on a contract to which he was not a party. These two aspects are distinguished in the opinion of Lord Dunedin in *Carmichael v. Carmichael's Ex.* \(^{32}\)

I think it very necessary to begin by pointing out that the expression *jus quaesitum tertio* is, in different cases and different circumstances, used in a varying sense, or, perhaps I might better say, is looked at from a different point of view. The one sense is meant when the question being considered is simply whether the *tertius* C has a right to sue A in respect of a contract made between A and B to which contract C is no party. The controversy then arises between C, who wishes to sue, and A, who denies his title to do so . . . The other sense of the expression is when the emphasis is, so to speak, on the *quaesitum*, and when the controversy arises not between C and A but between C and B. In such a case A is willing to perform his contract, and the contract in form provides that A shall do something for C, but B, or those who represent B's estate, interfere and say that B and not C is the true creditor in the stipulation.

After a clear analysis of the authorities Mr. J. T. Cameron has contended that cases of *jus quaesitum tertio* in Scots law, so far as revocation is concerned, can be divided into two categories.\(^{33}\) Cases falling within the first class are those in which the *tertius* acquires a right on the completion of the contract in his favour, and this right is from the moment of its creation irrevocable. There is, however, a less usual second class of case where, despite the terms of the contract between the stipulator and promisor, the right of the *tertius* depends on subsequent donation by the stipulator-creditor. Accordingly, to create an irrevocable right in the *tertius* there must be proof of *animus donandi* by delivery or its equivalent, such as registration. Until this *animus* is established, the *stipulator* is to be regarded as


\(^{32}\) *Supra,* at pp. 197–198.

the creditor. Thus if a bond is taken in the name of a third party, but delivered to the party who provides the money, the right of the tertius is not constituted. To quote Cameron: "The mere pact between creditor and debtor that a sum is to be repaid to a third party does not vest any right in the third party. The debtor's obligation remains the property of the original creditor—it is his to donate or not, as he wishes: for only by delivery is the right passed to the third party. . . . Where, however, there is no question of a transfer of property from original creditor to third party, where the obligation is not something 'acquired' by the original creditor, Stair's dictum may be applied in the wide sense. In cases of the latter variety, there is no room to apply the rule 'traditionibus non nudis pactis.'" Thus, when a firm in contract with an association of underwriters guaranteed the transactions of a member, and parties incurred risks with that member in knowledge of that guarantee, it was held that the guarantee could not be withdrawn while the risks were current. Again, in Hislop v. MacRitchie's Trs. it was not suggested that there should (or could) have been any donation or delivery. On the other hand, in Carmichael v. Carmichael's Ex where the element of donation was present the proposition was rejected that, by contracting for the benefit of a third party, the principals in the obligation barred themselves from revoking that benefit. In fact, however, an indefeasible jus quaesitum was held to have been established in the circumstances of the case, which included awareness by the tertius of the terms of an insurance policy in his favour, though no formal intimation had been made to him. In this type of case the intention of the stipulator to confer an enforceable right on the beneficiary must have been supplemented by delivery, registration, or, in some cases, intimation to put the gift beyond the stipulator's control and preclude him from revoking his original animus donandi.

Jus Quaesitum as Title to Sue

To maintain an action against the debtor in an obligation to which he was a stranger, the tertius must establish that both parties intended to confer on him a right to sue. If the contract is in writing, this is a question of construction. The clearest case is where an express right to sue is conferred on a third party by the principals in the contract. In such a case it would seem that the tertius can

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34 Ibid. 116.
35 Rose, Munison & Thomson v. Wingate, Birrell & Co.'s Tr. (1889) 16 R. 1132; Tunno & Brotherton v. Tunno (1681) M. 9438.
36 (1881) 8 R. (H.L.) 95.
37 Supra.
38 See Cameron's Trs. v. Cameron, 1907 S.C. 407, and conflicting opinions thereon in Carmichael (supra).
sue, even though no personal benefit accrues to himself. Again, if in a contract between A and B both expressly agree that B, the debtor in the obligation, will do or pay something for the benefit of C, C can enforce his right, even though A also retains a substantial interest under the contract—as in Lamont v. Burnett, where the purchaser of an hotel was held bound to pay to the vendor’s wife the sum of £100, which he had promised to pay in addition to the purchase price of £7,000 payable to the vendor. In cases where title to sue has not been expressly conferred by the contracting parties on a tertius, the question of title to sue depends upon a construction of their presumed intention. The mere fact that the tertius has not been mentioned in the contract is not conclusive. On this point Gloag observes concisely, “Was their object, in entering into the contract, to secure a benefit to a third party, or was the benefit which the fulfilment of the contract would secure to a third party merely the incidental result of an advantage which one or other of them proposed to secure to himself?” Where no substantial benefit is reserved by the party stipulating for performance, the courts will quite readily construe the agreement as intended to benefit a third party, if he alone has an interest in the fulfilment of the contract. On the other hand, the mere interest of a third party in the transaction will not suffice to confer title to sue; and the trend of decisions is against construing contracts so as to confer rights to sue on third parties, if such contracts do not expressly confer title to sue, or operate for the exclusive benefit of tertii. Accordingly, if the person who has stipulated for performance retains a substantial interest himself, this will go far to exclude the implication that the contract contemplated the conferring of a right on a tertius. Where express language is used, the question of interpretation need not, of course, arise. Somewhat complicated rules have been laid down in decided cases regarding the enforcement of building restrictions between co-feuars or disponees


40 (1901) 3 F. 797.

41 See also *Magistrates of Dunbar v. Mackersy*, 1931 S.C. 180.

42 *Contract*, p. 235.

43 See also *Taylor v. R. H. Thomson & Co. (1902) 9 S.L.T. 373, per Lord Kincairney* at p. 374.


45 *Flinnie v. Glasgow & S.W. Ry.* (1857) 3 Macq. 75.

46 *Henderson v. Stubbs* (1894) 22 R. 51.
on the dividing up of land into a building estate. It may suffice to observe that, as a disposer parts with his entire interest on sale, the law will more readily presume that building restrictions were imposed on purchasers of plots of land, so as to be enforceable by other purchasers interested in the amenities, than would be the case when land is given out to feuors by a common superior. The mere fact that the same restrictions are imposed on all feuars, and that each feuar has an interest to enforce compliance with them, will not per se give one feuar title to sue another. In the absence of agreement between the feuars themselves to give title to sue, there must either be a reference to a common plan or a stipulation in each feu or contract that the same restrictions are to be imposed on all feuars of the estate which has been divided.

Limits of Contractual Liability to Third Parties

So far as the author is aware, there has been no adequate juristic analysis in Scotland of the nature of the right conferred on the tertius by the stipulation in his favour (stipulatio alteri). The relation of the contracting parties and the tertius where property is to be transferred to the tertius is, as it were, tripartite, and the right conferred by the stipulator on the tertius resembles that which arises on indirect donation. It does not seem to be a proper inference that the relation between the tertius and the party who has promised performance (the debtor) is also analogous to that of donee and donor. In discussing the extent of the remedies of a tertius against the debtor in the obligation, it is thought that very learned Scottish authorities have, however, tended to restrict the rights of action available to the tertius against the debtor to those appropriate between donee and donor. This has led to somewhat questionable conclusions with regard to rights of action available to the tertius against the debtor who has tendered defective performance of the obligation. Glogo states,

A person who undertakes duties under a contract, and by failure to fulfil them properly causes loss, is not liable on the contract to a person with whom he did not contract, but on whom the loss has happened to light ... all attempts in such cases to infer liability on the principle of jus quaesitum tertio have failed. That principle, though it may entitle a tertius to sue on nonfeasance of a contract, will not entitle him to damages for misfeasance, because the real foundation of his title to sue is that the debtor in the contract has agreed to be liable to him, and it is not to be presumed that the debtor in a contract has agreed to be liable to a tertius in respect of his defective performance.

49 Contract, p. 239.
Similarly, Gloag and Henderson,50 lay down:

It has been authoritatively stated that although a third party may have a title to enforce an obligation under a contract he can never have any contractual right to sue for damages for the defective performance of the contract.

Both works quote in support of their views the cases of Robertson v. Fleming 51 and Tully v. Ingram,52 and it is apparent, from a detailed study of the cases, that considerable misunderstanding resulted in these cases from a confusion of delictual and contractual concepts.53

The present author differs from these views of Gloag with difference. If the stipulator has agreed with the debtor that the latter should confer upon the tertius certain property—for example, if the relation between stipulator and tertius is analogous to that of donation—it is not clear why the stipulator should not be deemed to have transferred with the gift the right to claim damages in default of full and satisfactory performance. Gloag’s justification quoted above does not seem very convincing. If the stipulatio alteri is for delivery of goods, it is not self-evident why the tertius—if he alone is interested—should not be entitled, not merely to performance of a sort, but to goods of merchantable quality and delivery within a reasonable time. The view expressed by Gloag would apparently deny redress if inferior goods, inefficient service or bad workmanship were foisted on the tertius—though this could scarcely have been in contemplation of the actual contracting parties.54

The authorities relied on by Gloag and by the learned authors and editors of Gloag and Henderson were somewhat special. In each an attempt was made by persons disappointed by the negligent professional actings of a solicitor, employed by another, to sue that solicitor for negligence. The relation of law agent and client is, certainly, particularly intimate and personal, but there is no doubt that the principle of culpa, had, prior to Robertson v. Fleming,55 given a right of action in delict to a third party—though in English law the very idea seemed shocking in the mid-nineteenth century.56 It must be stressed that the cases relied on by Gloag are not truly authorities on jus quaesitum tertio at all. In neither case did the person who employed the law agent stipulate that the latter should render services

50 Introduction to the Law of Scotland, 6th ed., p. 91. See also Walker on Damages, p. 87.
51 (1861) 4 Macq. 167.
52 (1891) 19 R. 65. See also Raes v. Meek (1888) 15 R. 1033; aff. 16 R.(H.L.) 31; and Goldie v. Goldie (1842) 4 D. 1489.
53 See analysis in Smith, Studies, p. 190 et seq.
54 There are also cases in which the law will not decree specific implement, but only damages.
55 Supra, note 51.
56 e.g., Lang v. Struthers (1826) 4 S. 418; (1827) 2 W. & S. 563; see also Smith, Studies, p. 190 et seq.
to or confer any right or property of his own on the third parties who were pursuers in the subsequent actions. In neither case did the action arise out of any "vested right absolutely acquired by a consummated transaction." Indeed, if the law agents had declined to act, it is difficult to believe that the pursuers in the respective actions could have founded on "nonfeasance." It is, therefore, suggested that in appropriate cases a tertius, in whom a right to sue is clearly vested—quite apart from any remedies he may have in delict—may sue both for failure to perform, and also for faulty execution by the debtor of the stipulated performance.

Though the question of liability of the debtor to the tertius for faulty performance has not been dealt with authoritatively by the Court of Session, an interesting illustration of the problem in a concrete case is to be found in Cullen v. McMenamin. Indeed, if the law agents had declined to act, it is difficult to believe that the pursuers in the respective actions could have founded on "nonfeasance." It is, therefore, suggested that in appropriate cases a tertius, in whom a right to sue is clearly vested—quite apart from any remedies he may have in delict—may sue both for failure to perform, and also for faulty execution by the debtor of the stipulated performance.

In the type of case where a direct right is created in the tertius by the contract between stipulator and promisor, it may be noted that the right of the tertius is created by the unilateral binding promise in his favour. Indeed, Stair gives as the leading example of unilateral promise this very situation. There is not the least doubt that in the ordinary case of binding unilateral promise—e.g., to keep open an offer for a certain period—damages would be awarded for breach. It would be fantastically illogical to deny damages merely because the promise had been stipulated for through a pactum in favorem tertii. Lord Keith has raised the question whether the right of the tertius should be recognised only subject to any defences which would have been valid as against the stipulator, e.g., fraud, and commented: "I see no reason in principle why it should not operate as part of the law of jus quaesitum tertio." With this opinion the author respectfully agrees.

57 See Robertson v. Fleming, supra, per Lord Chelmsford at p. 210, and per Lord Campbell, loc. cit. at p. 177.
60 Smith, Studies, pp. 196-197.
61 Spirit of the Law of Scotland, p. 28; see also Smith, Studies, p. 197.
ASSIGNATION

In contracts capable of assignation, the assignee acquires the right to sue in his own name, and may also sist himself in an action brought by the cedent. When a contract is an "executed contract"—that is when one party has performed his part, and nothing remains to be done under the agreement except for the other party to pay the price or deliver the subject—the creditor may, in the absence of agreement to the contrary, assign the right to receive the benefit arising thereunder. In executory contracts—that is where something remains to be done by either party, other than the tendering of payment or delivery—whether there can be a valid assignation depends upon the element of _delectus personae_; that is upon whether the personal qualities of a party to the original contract were material.

Gloag distinguishes three senses in which there may be assignation—(1) The contract may be so completely assignable that the cedent (that is the party who assigns) may not only transfer his contractual rights, but also free himself from his contractual liabilities; (2) The contract may be assignable in the sense that an assignee acquires a right to tender performance and sue for its counterpart, but the cedent nevertheless remains liable if the contract is not implemented; and (3) The contract may be assignable only in the sense that one or other party may perform the obligation which he has undertaken through the agency of a third party, without giving that third party any rights to enforce the contract.

(1) The general rule is clear that a person who undertakes contractual liabilities cannot assign his _liabilities_, nor can agreement be compelled by the obligor or by any third party to accept anyone but the obligee as the person ultimately liable under the contract. The considerations which apply to vassals and lessees fall outside the scope of ordinary contracts and should be studied in the standard works on conveyancing. So far as contracts unconnected with land are concerned, two apparent exceptions have been suggested to the rule that liabilities cannot be assigned. There may be novation, when a person comes forward to perform that which another had previously promised to perform, and that other may be freed of his liability. This is not, however, assignation of the first contract at all: an entirely new contract comes into existence, albeit with the same terms as the earlier one. Again, the original parties may provide in their agreement for assignation of liabilities as well as rights to third parties, and, if they do so agree, the original parties may shed liability. The duration of the obligation may be a relevant factor to consider in

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63 _Contract_, p. 416.
this connection, but it is thought that without other evidence of the parties’ intention, this consideration alone would not justify transfer of contractual liabilities.  

(2) The contract may be assignable in the sense that, though the assignee acquires a right to tender performance and sue for its counterpart, the cedent nevertheless remains liable if the obligation is not fulfilled. Where there is no question of defective personae (such as set-off, or the right to demand personal performance) any person to whom performance may be delegated may also acquire by assignment the right to sue in respect of performance. The cedent, of course, does not avoid liability if the performance of the assignee fails or is faulty. Moreover, even after assignment, the cedent may tender performance of the contract which he has assigned, and the party entitled to performance has no title to object.

The fact that the power to delegate performance and the power to assign concurs where there is no defective personae, and where the contract is an executory one reducible to performance on one side and payment on the other, has tended to obscure the distinction between these two powers. Delegation of performance is always competent where there is no element of defective personae. The significance of this factor is well illustrated by the case of Cole v. Hamblin. The facts were as follows. S contracted to sell to H a quantity of black grease, to be of “usual good merchantable quality” and to satisfy the tests of a named analyst. Though S had expert knowledge of the qualities of black grease, he did not manufacture the grease which he supplied, and this was known to H. S executed a trust deed in favour of C who, thereafter, tendered delivery of grease to H, who refused to accept it. C brought an action for damages for breach of contract and H asserted that he was entitled to refuse because he had relied upon the personal skill of S in the selection of the grease, and that the contract was not assignable. The pursuer’s claim was sustained, since the standard to which the grease had to conform according to the contract excluded the idea of reliance upon the special skill of the seller. Accordingly, the contract was held to be assignable.

Lord Kinmurr said: 

[References to cases and legal concepts are provided, including notes for further reading.]
The principle which we call *delectus personae*, as I understand it, applies when a person is employed to do work or to perform services requiring some degree of skill or experience. And it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualifications. Such a contract is not assignable.

The skill need not be literary or artistic; it may be manual or professional.

The Lord President observed,\(^69\)

The highest and easiest example of a contract in which there is *delectus personae* is where the contract is one for a personal service of a peculiar nature. Nobody supposes that in a contract with A or B to paint a picture or write a book it is possible for A or B to say—"I will get somebody else to paint you the picture or write you the book, and that must satisfy you, and you must pay me the price." Next you have another class where the *delectus personae* is not so clear. I mean the case of manufactured articles. It may quite well be that an article is of such a character and quality and the reputation of the manufacturer such that, when you contract for a thing from so-and-so, you really imply that the article is to be made by so-and-so. . . . But when we come away from manufactures . . . to a contract for goods of a certain description . . . then it seems to me that you may go on and contract in one form or another. You may either say—"I contract with you that you shall supply me with goods as to which you shall do something, or as to which you shall satisfy yourself in such-and-such a way," and then you really incorporate into your contract for the goods a contract also for the personal services of the person with whom you contract. Or, on the other hand, you may contract for an article, and then stipulate that the article is to be of a certain standard which is specified in the contract, and say no more. It seems to me that in the latter case the whole element of *delectus personae* is gone.\(^70\)

In *Cole v. Handasyde*,\(^71\) the contract was assignable—not merely in the sense that the broker S could employ a third party to supply the grease, but in the larger sense that he could assign the right to tender delivery and to sue for damages when the tender was refused by H. Delegated performance and assignability in this sense are not the same thing. There are cases where a contracting party may perform duties under a contract by employing a third party to perform them, without being able to transmit to that third party the right to sue under the contract.

(3) The third class to be considered comprises cases where there is power to delegate performance without power to transmit the right

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\(^69\) p. 73; but see criticism of the passage on manufactured articles, Gloag, *Contract*, 2nd ed., 424; Gibb's *Select Cases*, 2nd ed., 31; and see Reid's *Tr. v. Watson's Trs.* (1896) 23 R. 636 at p. 649.

\(^70\) There are further good illustrations of the power to delegate performance in Stevenson *v. Maule & Sons*, 1920 S.C. 335 (carpet-beating); and *Asphaltic Lime-stone Concrete Co. v. Glasgow Corp.*, 1907 S.C. 463 (laying and repairing streets).

\(^71\) *Supra*, note 67.
to sue. This class of "assignation"—though it must be observed that the term "assignation" is stretched out of its usual meaning—arises, when, though the main obligation may or may not be reducible to performance on one side and payment on the other, there may also be involved collateral and subsidiary obligations on either side, which introduce an element of collateral *delectus personae* which would otherwise be absent. In such contracts the performance only of the main obligation may be delegated, though the contract as a whole cannot be assigned. Thus, in *International Fibre Syndicate v. Dawson*,72 A, a proprietor of a machine for decorticating fibre, contracted with B, the owner of an estate in Borneo, to put a machine on B's estate. B undertook to develop his cultivation of fibrous plants by an agreed acreage every three months, and to order further machines as his business required them. These machines were to be supplied by A at cost price. Subsequently A assigned his business and contracts to a company which sued B for damages for failure to order further machines. It was held that it had no title to sue; the contract was not assignable, in view of the subsidiary obligation undertaken by B to extend his cultivation and of the subsidiary obligation of A to supply machines at cost price, both of which imported the element of *delectus personae* into the contract. Had the contract been merely one for sale of machines it seems that the contract would have been assignable.73 The fact that there were mutual collateral and personal obligations excluded the right to assign.

The principle of collateral *delectus personae* excluding assignation in its proper sense, also operates where a person orders goods or work from his debtor, against whom he would be entitled to set off the price or part of it. In such cases the debtor cannot assign to a third party the right to fulfil the order and sue for the price. Unless, however, the work calls for personal skill in the debtor (*delectus personae* in the principal obligation) there is no reason why the debtor should not delegate performance to a third party. The rights and liabilities under the contract, however, remain attached to himself alone.

72 (1900) 2 F. 636, and (1901) 3 F.(H.L.) 32.
73 See also the English case of *Kemp v. Baerselman* [1906] 2 K.B. 604.
A "contract" is ineffective if, despite the fact that there has been offer and acceptance, there is lacking some element which the law regards as essential for validity, or if any essential element is vitiated in some way. That notable exponent of the Anglo-American common law, Professor Williston, who has now happily entered the élite of centenarian jurists, is probably the most eminent of the many distinguished scholars who have given fair warning that it is dangerous to assume that a sound principle of the Civil law can be successfully transplanted to the English common law of contract. When considering problems of nullity and reduction, it is particularly desirable to avoid the citation of English authorities in Scottish cases. When such citation has been resorted to, confusion of principle has almost inevitably resulted. Nullity in Scots law, as in other systems derived from the Roman law, may affect the efficacy of an ostensible contract in two ways. The ostensible agreement may be absolutely null or relatively null—that is, subsisting until reduced by judicial decision. The terms absolute and relative nullity seem preferable to "void," and "voidable," which have overtones of English law. Moreover the Scottish institutional writers occasionally use the term "void" as implying "null," but without distinguishing between the two forms of nullity. It would be justifiable to subdivide the category of absolute nullity into a sub-category covering cases where no legal agreement had ever existed and a sub-category covering cases where, for reasons of public policy, the law refuses recognition to agreement. However, in an introductory work this subtlety may pardonably be discarded. The various grounds of nullity and reduction can, therefore, be classified as follows.

**Absolute Nullity**

(a) Incapacity.

(b) Total absence of consent—as where there was no volition by one party at all, *dissensus* on a material matter (e.g., fundamental ambiguity) or common error (i.e., error of both parties) as to a matter which they both regarded as an essential condition of agreement.

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1 See Williston on Contracts, "Intention to Contract," § 21.
(c) No object of the contract (though the parties may have believed erroneously that an object existed).
(d) Lack of form, where the law insists on particular formalities for certain contracts.
(e) Impossibility of object.
(f) Illegality when the law categorically refuses effect to an agreement of the kind concluded.

Relative Nullity
(a) Certain cases of error; also of error in motive induced by misrepresentation, *vi ac metu*, and conduct inconsistent with bona fides.
(b) Enorm lesion in contracts with minors.

Declarator of Nullity and Reduction
In cases of absolute nullity the inefficacy of the agreement can be invoked, not only by the actual parties, but by all persons who can show a patrimonial interest to sue, such as heirs, creditors or, on behalf of the State, by the court acting even *ex proprio motu*. The appropriate procedure is declarator of nullity, and there is no scope for the doctrine of homologation. Relative nullity, on the other hand, may only be asserted by a party to the vulnerable contract or by one who represents him. The appropriate procedure is by reduction, though it may indeed be prudent to proceed by way of reduction in any event, rather than by declarator, if it is doubtful whether the facts which can be proved would create absolute or only relative nullity. A contract which is vulnerable to reduction creates an obligation which subsists until reduced. Moreover, the right of reduction may be lost in certain circumstances. There are conditions which must be satisfied when it is sought to reduce a contract which is relatively null. The pursuer must not have delayed unduly to enforce his remedy, nor must he have recognised the obligation which he challenges, so as to be obnoxious to a plea of personal bar. Further, *restitutio in integrum* must be possible. The person seeking to reduce an annulable contract, and thus to recover his money or property, must restore the consideration which he had received. He cannot repudiate a contract for the cake which he has eaten. In effect, reduction creates an obligation which reverses the duties of the parties under the original contract. The quasi-contractual obligation of recompense may also arise when one party has been enriched by the other's loss. As Lord Wright observed in *Spence v. Crawford*, "Restoration

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2 See, e.g., Mackay, *The Practice of the Court of Session*, i, 129.
3 Ibid. pp. 128–129.
4 See ante, p. 294.
5 1939 S.C.(H.L.) 57 at p. 77.
is essential to the idea of restitution." On this principle, if a person who would, rebus intergris, have been entitled to reduce a contract of sale, subsequently resells the property which he was induced to purchase by misrepresentation, he loses his right to challenge the original contract, since his rights in the subject-matter have passed to the sub-purchaser. Further, when contractors have carried out work on land which cannot thereafter be restored to its former condition, there can be no restitution, and accordingly no reduction of contract. Where, however, the substantial identity of the subject-matter remains, the court can go a long way towards ordering restitution, even though the subject-matter has deteriorated or fallen substantially in value since the date of the contract which it is sought to reduce. Thus shares may be returned although they have become valueless. In cases of fraud, and even in cases of non-fraudulent misrepresentation, restitution may be ordered with an account of the profits and compensation to do justice between the parties. In cases of non-fraudulent misrepresentation, however, the courts may be reluctant to order reduction and restitution where there has been substantial alteration of the subject-matter; but in cases of fraud they would be less rigid in construing restitution in integrum. In the Lagunas case, although the subject-matter—a mine—had been largely worked under contract, the English courts held that, at least if the case were one of fraud, this would not be a bar to rescission. This case was quoted and approved in Spence v. Crawford, which is of special interest, since—unlike the usual action for reduction—it was the vendor who sought to reduce. He asked for reduction of a sale of shares made by him, relying on the defender's fraudulent representation as to the condition of the company. He offered to repay the price he had received with interest, and also to pay or do anything else which was deemed necessary to effect restitution in integrum. The defender contended that restitution in integrum was impossible, because the defender had relieved the pursuer of obligations in respect of overdrafts, and, further, the constitution of the share capital of the company had

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7 *Boyd and Forrest v. Glasgow and S.W. Ry.*, 1915 S.C.(H.L.) 20. Strictly the dicta in this case were *obiter* so far as damages for misrepresentation were concerned. The complex litigation culminated in a decision on *res judicata*, 1918 S.C.(H.L.) 14, when it was stressed that the pursuers had never sought reduction at all. The basic contract, moreover, exempted the company for responsibility regarding information as to "bores."


9 *Sup. cit.*

10 *Sup. cit.*
altered since the date of sale so as to give the holder of the shares a stronger position in controlling the company than at the time of the sale. Nevertheless, stressing the element of fraud, the House of Lords reduced the contract on the terms proposed by the pursuer. It may be noted that, even when a contract with a fraudulent person is reduced, the defender must not be robbed, nor the pursuer be unjustly enriched, at the other’s expense.

In *McGuiness v. Anderson*,¹¹ where reduction was sought on the alternative grounds of fraud and non-fraudulent misrepresentation, the Second Division indicated that the question as to whether *restitutio in integrum* could be offered must be construed broadly and on the facts of each case—depending on the extent of change of the subject-matter and also on the reason for its change. If the subject had deteriorated due to causes independent of the change of possession or control, the claim for reduction and restitution would be stronger than when deterioration or alteration had been due to some treatment of the subject while in the possession of the party seeking to reduce the transaction.

The interests of creditors of a party to a contract do not generally preclude reduction, but there are exceptions—notably in company law. After liquidation has begun, a person who had agreed to take shares, relying on false statements in a prospectus, is barred from asserting that his agreement with the company can be set aside.¹²

The consequences of nullity on third-party rights are in general the same, whether the nullity is absolute or is the consequence of decree of reduction. *Resoluto jure dantis resolvitur jus accipientis.* With the reduction of the cedent’s right, that of a third party assignee is also extinguished. It must, however, be stressed immediately that this maxim applies to personal rights and not to real rights which have been transferred. Where there has been delivery of a real right, secured in the case of heritage by registration, or effected in the case of corporeal moveables by *traditio* supported by *justa causa*, though the other party to the null contract may be bound to restore property still vested in himself, a third party who has received it from him for value and in good faith is usually secure. The same is true in the case of assignees of negotiable instruments.¹³

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¹³ Stair IV, 40, 20; Bell, *Principles*, 4th ed. (1839), note to §§ 11, 12, 13. The meaning of “it” at the beginning of the second note clearly means “reduction” if read with Stair, *sup. cit.*
Thus Stair, discussing fraud, and extending his account of its effects to error and *vis ac metus*, observes that in questions of feudal rights a plea of fraud is “not relevant against singular successors... But in personal rights the fraud of authors is relevant against singular successors, though not partaking nor conscious of the fraud, when they purchased, because assignees are but procurators, albeit *in rem suam*, and therefore they are in the same case with their cedents.” In short, assignatus utitur jure auctoris: resoluto jure dantis resolvitur jus accipientis. As regards corporeal moveables, except where a *vitium reale* attaches, as in the case of theft, a purchaser for value is secure though the contract under which the transferor acquired the *res* be null. “Yet in moveables,” said Stair, “purchasers are not quarrellable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is, because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes reales*, following the subject to all successors.” (It may be stressed that the *labis realis* or *vitium reale* attaches to the *res* itself, and is an aspect of the law of Property not of Obligations.) Stair’s thought is reflected by Bell in the last work from his own hands—the fourth (1839) edition of his *Principles*. He commented (in a passage which is somewhat ambiguous unless read with Stair), “The want of consent, where the obligation proceeds from error or force, annuls the contract: but the nullity must be declared judicially. The contract ostensibly is valid and regular; and 1. it subsists till it be reduced; 2. it will be effectual against third parties without notice; under the exception of land or heritable securities acquired on the faith of the records, moveables corporeal, and bills and notes.”

The situation, it is submitted therefore, is that, when considering the effects of nullity in contract, the exceptions to the rule *resoluto jure dantis resolvitur jus accipientis* are so extensive as to restrict the operation of the rule to a small class of cases—namely assignation of personal rights, gratuitous transfers of real rights to third parties, and when a party to an ostensible contract has acquired property in circumstances which amount to theft. It may be well to stress that this interpretation of the law by the present author differs substantially from that of the late Professor Gloag and from certain dicta

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14 IV, 40, 20–28. Fraud and error are regarded as “congenorous alleagencies,” while the consequences of fear and fraud regarding singular successors are the same. See also J. E. Scholtens, *Justa Causa Traditionis* and “Contracts Induced by Fraud” (1957) 74 S.A.I.J. 280 and authorities there cited; M. Franklin “La Possession Vaut Titre” (1932) 6 Tulane Law Rev. 589.

15 Stair IV, 40, 21.

16 *Principles*, note to §§ 11, 12, 13.

17 See ante, p. 541.
on which he relied. These seem to have proceeded largely on consider-
ization of English contract doctrine which, as Williston from his
immense experience has warned,\textsuperscript{18} cannot safely be reconciled with
Civilian doctrines. With respect—and with a good deal of sympathy
after years of reflection on the same problems—the author has con-
cluded that the sections of \textit{Gloag on Contract}\textsuperscript{19} dealing with vices of
consent are perhaps the least satisfactory in that distinguished author’s
monumental work. A close reading of \textit{Gloag} seems to justify the
assertion that he was not altogether satisfied with some of his own
conclusions in these sections.

\textsuperscript{18} See note 1, supra.

\textsuperscript{19} Also Gloag and Henderson, \textit{Introduction to the Law of Scotland} (various editions,
of which the latest is the 6th).
CHAPTER 36

GROUNDS OF NULLITY AND REDUCTION
(INCAPACITY, ILLEGALITY, INFORMALITY)

INCAPACITY

Minority and Pupillarity

Capacity has already been discussed in the general context of Persons and Personality. A few of the main considerations may be recapitulated. It may be recalled that pupils (males under the age of fourteen and girls under the age of twelve) have no contractual capacity, though a claim may be competent on grounds of recompense for money or goods applied to their benefit. Minors, that is children over the age of puberty and under the age of twenty-one, may contract alone if they have no curator; or, if they have a curator, with his consent. Further, contracts generally, if entered into by a minor who has a curator, but without the curator’s consent, are probably merely unenforceable against a minor, if to his detriment. They are, however, probably binding on other parties to the contract, if it is to the minor’s advantage. In short, such a transaction would be a “one-sided contract” (negotium claudicans). There are, however, certain contracts which will be binding on a minor even if he acts without his curator’s consent—such as marriage, or contracts of service or apprenticeship, or for necessaries. Contracts by or on behalf of persons under twenty-one years of age, whether their curators concurred or otherwise, may be reduced on proof of enorm lesion within the quadriennium utile. This means that, if before reaching the age of twenty-five, the person injuriously affected takes appropriate steps to have the contract set aside, he may do so and get restitution on showing that the contract was materially disadvantageous. Reductions on grounds of minority and lesion may be barred, however, if there has been homologation after majority, or if the minor contracts in the course of trade or represents himself to be of full age.6

1 Ante, Chap. 8.
2 Ante, p. 631.
4 Gloag, Contract, p. 88; Erskine I, 7, 33; Wessels, Law of Contract in South Africa, i, s. 799; Voet, 26, 8, 3.
5 Gloag, p. 82 and authorities there cited.
6 This is presumed in gratuitous transactions.
7 Gloag, pp. 87-88.
Lunatics
   A lunatic's contracts are null, even though his condition is not
   known to the other party, but he must pay a reasonable price for
   necessaries. Contracts of a continuing nature—such as partnership
   —which were entered into by a person whilst sane, are not
   automatically dissolved by supervening insanity.

Drunkenness
   Only such a state of complete drunkenness as will temporarily
deprive a person of his reason will diminish his capacity so as to make
his contracts reducible. He should take prompt steps to reduce the
bargain when he comes to his senses and realises what he has done.
A lesser degree of inebriation, which merely darkens the intellect, is
insufficient, unless reference is made to the general doctrine of bona
fides.

Aliens
   Aliens now enjoy the same powers to contract and hold property
as do British subjects, except that they cannot be registered as owners
of a British ship or aircraft. The disabilities of aliens with regard
to property and contractual capacity have been removed by statute
without, however, it is thought, conferring on them those privileges
of citizenship which are not of a proprietary character—such as
capacity to hold office. Contracts with enemy aliens, unless a Crown
licence has been obtained, are illegal, and for this purpose any person
voluntarily residing or trading in enemy territory is regarded as an
enemy alien irrespective of his nationality. Persons of enemy
nationality resident in Britain do not lose their capacity to contract,
though a company registered in Britain, but controlled by enemy aliens,
may be regarded as an enemy alien.

Corporations
   Corporations established by Royal Charter may contract in any way
which is not forbidden by the Charter, but may be restrained from
applying their funds in breach of trust. Statutory corporations may
contract in any matter sanctioned expressly or by implication in the
statute creating them; an ultra vires transaction may not be validated,
even by the consent of all persons interested in the corporation.

8 Loudon & Co. v. Elder's Curator Bonis, 1923 S.L.T. 226; Sale of Goods Act,
1893 (56 & 57 Vict. c. 71), s. 2; see also p. 260, ante.
9 Pollok v. Burns (1875) 2 R. 497; and see p. 259, ante.
10 Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.
Companies registered in accordance with the Companies Act are restricted in their contractual powers by their memoranda of association.18

**Trades Unions**

Trades unions may enter into ordinary commercial contracts, but certain agreements regarding payment of benefits and application of funds by trades unions are made unenforceable by the Trade Union Act, 1871.14

**Pacta Illicita**

Certain bargains which may have been reached with full consent on either side may be prohibited by rule of statute or common law, and be rendered null because they offend against a positive rule of law, or of morality or public policy. Such agreements are described as *pacta illicita*, and the courts refuse aid to a man who seeks to enforce a *pactum illicitum*, on the principle *ex turpi causa non oritur actio*. Moreover, property transferred under such an agreement may be irrecoverable on the principle *in turpi causa melior est conditio possidentis*.15 Illegality admits of differences of degree, and the less culpable party in an illegal agreement may in some cases recover money he paid or property he transferred to the other—as in the case of collusive agreements in bankruptcy, where the debtor and creditor are not in an equally strong position.16 Again, where statute prohibits a transaction to protect a member of a particular class, a member of that class may recover his money or property despite the illegality—as in cases of borrowing from an unlicensed moneylender.17

There are many statutes which limit freedom to contract, whether by prohibiting particular forms of agreement or by imposing penalties for particular acts. Statute may render a transaction illegal, null or merely unenforceable; and the language of enactments must be construed according to the intention of the legislature and not by rule of thumb. If the transaction is made illegal, then, subject to the qualifications stated, no action may be brought on the agreement, and money or even property, delivered in pursuance of it, may not be recoverable by relying on the contract.18 There is a presumption that

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13 See ante, p. 266 et seq.
14 34 & 35 Vict. c. 31, s. 4.
15 On the other hand it would go too far to say that, if a person's goods had got into the possession of another in consequence of an unlawful transaction, they must be regarded as forfeited—see J. J. Gow, "Ex Turpi Causa Non Oritur Actio," 1958 S.L.T.(News) 74.
16 McFarlane v. Nicoll (1864) 3 M. 237.
18 Jamieson v. Watts Trs., 1950 S.C. 265 (illegal contract); cf. Cuthbertson v. Lowes (1870) 10 M. 1073 (unenforceable contract); Duncan v. Motherwell Bridge & Engineering Co., 1952 S.C. 131 (illegal contract, but a claim in recompense was competent in respect of a collateral transaction).
an Act which imposes a penalty impliedly provides that a contract which would render that penalty exigible is illegal.\textsuperscript{19} Building contracts carried out without appropriate licences have given considerable scope for pleas of \textit{pacta illicita}, but the courts have had to intervene to protect within limits contractors who have carried out work beyond the amount permitted in the licence. The lawfulness of a tradesman's work depends solely on whether the licensed expenditure had been exceeded before the work was executed.\textsuperscript{20} and it would seem that, though work beyond the permitted sum is illegal, the fact that such work has been done does not taint the contract as a whole so as to exclude any claim for payment.\textsuperscript{21}

Agreements may also be illegal at common law. These fall into various categories, and the consequences to the parties are not the same in all cases. Agreements in respect of the commission of a crime or civil wrong—such as the engagement of hooligans to kill or injure a man—are clearly struck at, though insurance against the consequences of criminal negligence seems to have been accepted as legal. Agreements in fraud of creditors or of the public\textsuperscript{22} are clearly illegal, as are bargains obstructing the course of justice—e.g., \textit{pacta de quota litis} (agreements between client and agent or advocate to pay over part of the subject of the action in place of fees). \textit{Pacta illicita} also comprise agreements to the prejudice of sexual morality\textsuperscript{23}—as where the consideration for payment is illicit intercourse. In \textit{Hamilton v. Main}\textsuperscript{24} a promissory note was vitiated when its consideration was disclosed to be a six-day orgy with a prostitute during which 113 bottles of port and madeira had been consumed “besides a large quantity of spirituous and malt liquors.” There is, however, no legal objection to making provision for a former mistress. It would seem that contracts which are prima facie unobjectionable may be treated as \textit{pacta illicita}, if entered into for a collateral purpose which was known to be illegal or immoral—such as the renting of a flat for purposes of prostitution. It is thought, however, that the principle of collateral illegality cannot be pressed too far.

Contracts interfering with freedom of marriage are illegal, and are regarded as \textit{contra bonos mores}. Thus an obligation designed to restrain a person from marriage would be immoral, and a condition to this effect annexed to a legacy would be ineffective—though there

\textsuperscript{20} Designers & Decorators (Scotland), Ltd. v. Ellis, 1957 S.C.(H.L.) 69.
\textsuperscript{22} Arrol v. Montgomery (1826) 4 S. 499.
\textsuperscript{23} Hamilton v. Main (1823) 2 S. 356; Hamilton v. De Gares (1765) Mor. 9471.
\textsuperscript{24} Sup. cit.
might well be a valid restriction imposed on marrying a particular individual or one of a class of persons, such as lawyers.  

Agreements made with matrimonial agencies or with individuals in consideration of bringing about a marriage are also, it would appear, thought to be against public policy. In Thomson v. MacKaile it was urged in vain that such agreements were competent in Roman law, while about a century earlier in Earl of Buchan v. Cochran, though the pursuer was allowed proof of his expenses in securing as bride for the Earl a rich English lady, he was not allowed to recover on a bond for this consideration. It may be suggested, however, that esto there is no misrepresentation involved, the securing for a fee of suitable partners for persons with few social contacts does not seem to be flagrantly undesirable. Much conjugal dispeace might be avoided if a lady whose interests were Chinese porcelain, string quartets and the writings of the Sitwells could have discovered timeously that the gentleman who sought her hand had no interests outside the increasing of the sale of soap, rough shooting and the Light Programme.

Contracts contrary to public policy, and therefore pacta illicita, may take many forms—and it must also be noted that ideas of public policy change with the times. It seems to be the view of certain eminent judges in England that new heads of public policy cannot be invented, and that the courts may only elaborate by analogy the existing heads. While it is clearly undesirable that judges should exercise too free an “annulling power,” it may be that some Scottish judges at least do not regard themselves as precluded from extending the categories of public policy. One illustration, with many possibilities, is the passage from the opinion of Lord President Cooper in Mackay v. Scottish Airways, where he suggested that leonine bargains imposed by “ticket conditions” in contracts, where one party exercises virtual monopoly, might be challenged on grounds of public policy. Among those agreements which are held to be illegal on grounds of public policy, as affecting the State externally, are agreements with enemy aliens, and also probably contracts to evade the laws of friendly States—as by contracts for smuggling, gun-running or currency offences. Among transactions detrimental to the internal welfare of the State are agreements to obtain a title or public office.

25 For discussion of the limits of such restrictions, see Aird’s Exors. v. Aird, 1949 S.C. 154.
26 (1770) Mor. 9519.
27 (1698) Mor. 9507.
29 1948 S.C. 254.
30 Though certain forms of gaming are forbidden in Scotland, the courts refuse to enforce the ordinary gaming contracts—not because they are illegal, but because bets and wagers are frivolous agreements, sponsiones ludicrae, which do not merit the recognition of judicial inquiry. Where, however, the courts do not have to
arrangements to interfere with the course of justice, and covenants unreasonably restrictive of trade.\textsuperscript{31}

\section*{Restrictive Covenants}

Brief comment may be made particularly on the law regarding restrictive covenants, a topic on which reference to the leading English decisions is accepted practice. The three main types of case are: (a) where a restriction on competition in the future is imposed by an employer on his servants; (b) where, on the sale of a business with its goodwill, the vendor undertakes that he will not carry on a similar business in competition with the purchaser; and (c) where manufacturers or merchants combine to regulate their trade relations, as, for example, in respect of output or prices. The basic principles are the same in all three cases, though there may be differences in stress. A restraint on trade must be reasonable in the public interest.\textsuperscript{32} Moreover, the courts will not be disposed to cut down an excessively wide restriction, so as to enforce part.\textsuperscript{33} But if there are severable restrictions, the court may enforce those which are reasonable.\textsuperscript{34} Gloag took the view\textsuperscript{35} that an undertaking not to canvass an employer’s customers is always severable and enforceable.

Where an employer has imposed restrictions on competition by a servant who leaves his employment, this will not be enforced if it is merely to exclude competition. An employer is, however, entitled to protect his legitimate interests—in particular to guard against disclosure of his trade secrets or the enticement of a trade-connection which has been built up by personal contacts and the development of personal relationships.\textsuperscript{36} Gloag considered that Watson v. Neuffert\textsuperscript{37} would not now be followed. In that case the restriction excluding competition, which was upheld, had been imposed by a

decide the issue of a wager, they will intervene to protect a patrimonial interest in certain circumstances, even though it resulted from a joint venture for betting purposes—see authorities cited in Forsyth v. Czarowski, 1961 S.L.T.(Sh.Ct.) 22. Moreover, the law has recently shown greater benevolence to the appetite for gambling—see, e.g., Small Lotteries and Gaming Act, 1956 (4 & 5 Eliz. 2, c. 45); Betting and Gaming Act, 1960 (8 & 9 Eliz. 2, c. 60).

\textsuperscript{31} Such agreements now often fall within the province of the Restrictive Practices Court and of the Monopolies Commission; and see Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 (11 & 12 Geo. 6, c. 66); Monopolies and Restrictive Practices Commission Act, 1953 (1 & 2 Eliz. 2, c. 51).


\textsuperscript{34} Mulvey v. Murray, 1908 S.C. 528; Dumbarton Steamboat Co. v. Macfarlane (1899) 1 F. 993.

\textsuperscript{35} Contract, p. 574.

\textsuperscript{36} Scottish Farmers Dairy Co. (Glasgow), Ltd. v. McGhee, 1933 S.C. 148; cf. Ballachulish Slate Quarries v. Grant (1903) 5 F. 1105. See also Fitch v. Dewes [1920] 2 Ch. 159; [1921] 2 A.C. 158.

\textsuperscript{37} (1863) 1 M. 1110.
corn-factor upon his clerk. The party seeking to enforce a restriction must have an interest to do so at the time when it is proposed to enforce it. Whether a covenant between employer and employee may be assigned depends upon circumstances—and assignment may be excluded by considerations of *delectus personae*. Dicta in *Berlitz School of Languages v. Duchêne*\(^\text{38}\) which would exclude assignment of a restrictive covenant between employer and employee have been doubted by Gloag.\(^\text{39}\)

When a restriction on competition is imposed upon the vendor of the goodwill of a business in favour of a purchaser, such a restriction is more readily enforceable than in cases of employer and employee—but must, nevertheless, be reasonable between the parties and in the public interest. In particular, the covenant must not be unnecessarily wide, nor attempt to protect a proprietary interest which has not been acquired by the purchaser.\(^\text{40}\)

When restrictive covenants are entered into by manufacturers or merchants—as by an association controlling prices or output—the courts, though they must consider the public interest, will not readily hold an agreement to be unreasonable as between the parties themselves.\(^\text{41}\) In *British Motor Trade Association v. Gray*\(^\text{42}\) the Court of Session held that a scheme of the association was not in undue restraint of trade when it required purchasers of cars to sign an undertaking with the association and with the dealer supplying the car that the car would not be resold within a year. This was designed to put down the "black market" in second-hand cars. Gray, it was averred by the association, had persistently secured breaches of these agreements, and they sought interdict against him. He objected that the whole scheme was in restraint of trade in second-hand cars. The court held that in the circumstances the restrictions were not unreasonable; but it is of importance to note that the court was divided on the question whether a person charged with procuring breach of contract could be heard to object that such a contract—to which he was not a party—was illegal because in restraint of trade.

\(^{38}\) (1903) 6 F. 181.

\(^{39}\) *Contract*, p. 425; and see Lord Cave in *Fitch v. Dewes*, *supra* at p. 168; cf. the observations of L.J.-C. Cooper in *Malley v. L.M.S.*, 1944 S.C. 129 at p. 137, regarding the status of an employee.

\(^{40}\) *Dumbarton Steamboat Co. v. Macfarlane*, sup. cit.

\(^{41}\) *N.W. Salt Co., Ltd. v. Electrolytic Alkali, Ltd.* [1914] A.C. 461 at p. 471; *English Hop Growers v. Dering* [1928] 2 K.B. 174; cf. *McEllistrim v. Ballymacelligott Co-op., Agricultural and Dairy Society* [1919] A.C. 548. When, however, a cooperative society was bound to accept the award of an arbiter regarding trade areas, it has been held that the society had not bound itself for all time, and was not precluded from resigning from the union (the rules of which provided for arbitration) after an award had been issued: *Bellshill & Mossend Co-op. Soc. v. Dalziel Co-op. Soc., Ltd.*, 1960 S.C.(H.L.) 64.

\(^{42}\) 1951 S.C. 586; and see Lord Keith's observations on nullity at p. 604.
Defect in Form

Few aspects of Scots law can be in such a confused state as that relating to form and proof of obligations. Confusion has been aggravated by the tendency of authors writing on contracts to over-simplify the problems involved. Having had the opportunity, through the courtesy of Sheriffs N. M. L. and A. G. Walker, of reading the galley-proofs of their treatise on Evidence, and having studied in detail Professor J. J. Gow's valuable analytical study 43 "Constitution and Proof of Voluntary Obligations," the present author has concluded that the topic of form and proof of obligation can only be dealt with adequately in a work on Evidence. Professor Gow's account of the historical background is most revealing. With the Walkers and Gow to hand the serious inquirer may make his way through the maze. The present section owes much to their pioneering work. To those approaching the law of Scotland for the first time one may stress the danger of seeking simple solutions. It is also well to remember that not until the nineteenth century did the Scots courts look with favour on oral testimony, and not until 1853 44 could a pursuer or his spouse give evidence in ordinary circumstances.

The Sheriffs Walker begin Chapter IX of their book as follows 45:

"The law which requires writing for the constitution and proof of obligations is so uncertain and unsatisfactory that it is almost impossible to state a principle of general application. In attempting to state the law as it is, it is difficult not to adopt the course, so often adopted by the courts, of dealing with each kind of obligation as if it were contained in a watertight compartment, and without regard to the anomalies arising from the application of different rules to other analogous obligations. An attempt to deal with the subject as a whole was last made in the Whole Court Case of Paterson v. Paterson. 46 This case has recently been criticised as misrepresenting the earlier law, 47 but until the law is restated by the House of Lords or the Whole Court or by statute, the decision, if not perhaps all its obiter dicta, must be regarded as authoritative, in spite of any anomalies to which it may give rise. Briefly put, the proposition accepted by the majority in Paterson v. Paterson was that the solemnities prescribed by the authentication statutes applied only to obligationes literis, and did not apply to obligations which require writing, not for their constitution, but only for their proof (in modum

44 Evidence (Scotland) Act, 1853 (16 & 17 Vict. c. 20).
45 Page references cannot be given, as the present author has only had access to galley-proofs.
46 (1897) 25 R. 144.
47 Gow, op. cit.
probationis). For the latter, informal writings were held to be sufficient."

Special rules regarding writing have been relevant in feudal conveyancing from a very early date.48 In considering obligations other than those affecting heritable rights the majority in Paterson v. Paterson 49 almost certainly misunderstood the earlier law, under which all obligations of importance had to be evidenced according to the authentication statutes,50 unless they fell within the categories of the recognised “form contract,” such as sale deposit, loan or pledge, or within the class of obligations in re mercatoria. (Indeed the real purpose of the doctrine of res mercatoria was to relax the strictness of proof.) It would have been logical if the Whole Court in Paterson v. Paterson had accepted or rejected rei interventus as a doctrine generally applicable to obligations requiring writing as a condition of enforceability.

The distinction drawn in that case between obligations requiring writ for constitution (the so-called obligationes literis) and those requiring writ in modum probationis rests on a suspect foundation,51 but must be acquiesced in until the law is reconsidered. In bare outline, therefore, the law of Scotland regarding form and proof of obligations by writ seems to be as follows:

1. The origin of the so-called obligatio literis depended on the law of feudal conveyancing, where writ was required to complete a real right. Later this doctrine was extended to agreements concerning heritable rights, except in the case of leases for less than a year. Contracts of service for more than a year also require to be constituted in writing, probably because of the regard paid by feudal law to status. All these “obligations” require to be constituted by writ probative of both parties, and in the absence of probative writ, either party may resile, even though the person taking advantage of locus poenitentiae has himself executed a probative writing.52 On the other hand, rei interventus, that is, actings on the faith of an improbative agreement, will set up a bargain defective in form—provided that it can be proved by writing, however informal or even subsequent in date to the agreement, or by oath of the defender.53 Rei interventus may be proved by parole evidence, but the formal agreement can only be proved by writ or oath. Though agreements in respect of heritage must be constituted in writing, the modern

48 Ibid. p. 244.
49 Supra.
50 In particular the Act, 1681, c. 5, and 1696, c. 15. Other relevant Acts still in force comprise 1540, c. 117; 1579, c. 29; 1593, c. 179.
51 See Gow, esp. p. 119 et seq.
52 Goldston v. Young (1868) 7 M. 188.
53 Walker v. Flint (1863) 1 M. 417.
tendency is to restrict this requirement to cases where heritage is the real and substantial subject-matter of the contract, and is not merely incidental.\(^{54}\) In contracts of service, actual service is regarded as *rei interventus*,\(^{55}\) and will consequently set up an improbative agreement on the same principles as apply to contracts relating to heritage.

The doctrine of *res mercatoria* may be invoked to justify the use of informal writing in circumstances to which the authentication statutes would otherwise apply. This doctrine relates to \(^{56}\) "what are properly mercantile dealings," including all the varieties of engagements or mandates or acknowledgments which the infinite occasions of trade may require. It is thought that formerly such cases were the only ones (apart from the recognised type contracts and contracts involving under £100 Scots) to which the authentication statutes did not apply. This is no longer the case, however.\(^{57}\) In view of its origins, it is difficult to appreciate why *res mercatoria* should not be relevant even in connection with contracts concerning heritage—at all events *quoad* executory matters—or of service.

2. Originally, apart from the recognised consensual and real contracts, proof of obligation by writ\(^{58}\) or oath was probably generally required, though formalities were relaxed in the case of obligations in *re mercatoria*, and were dispensed with when a mutual contract was for less than one hundred pounds Scots (£8 6s. 8d.).\(^{59}\) The present position, however, is that, in general, mutual contracts can be proved by parole evidence unless they fall within one of the categories to which special rules of law apply.

3. Proof by oath or by writ\(^{60}\) (*in modum probationis*) is required to establish loan of money of over £100 Scots;\(^{61}\) declarator of trust;\(^{62}\) gratuitious obligations;\(^{63}\) obligation of relief;\(^{64}\) and innominate and unusual contracts.\(^{65}\) Moreover, when an obligation is constituted in writing or is vouched for by a document of debt, discharge

\(^{54}\) Allan v. Millar, 1932 S.C. 620.
\(^{55}\) On this doctrine and the associated doctrine of homologation see p. 297, *ante*.
\(^{56}\) Bell, Commentaries, i, 342.
\(^{57}\) See *ante*, p. 803.
\(^{58}\) The oath of verity was not, however, admissible to supply the want of a written instrument, if this were not merely by way of proof, but a solemnity essential to the right. Stair II, 44, 5; Erskine IV, 2, 9.
\(^{59}\) Stair I, 10, 9; Erskine III, 2, 9.
\(^{60}\) Or admission on record. See generally N.M.L. and A. G. Walker's *Treatise on Evidence* (in the press), Chap. XI; also *Paterson v. Paterson* (1897) 25 R. 144, per Lord Young at p. 152, on the distinction between proof by writ and reference to oath. His Lordship would, however, have found the practice of reference to oath in other Civilian systems.
\(^{61}\) But see *Annand's Trs.* v. *Annand* (1869) 7 M. 526.
\(^{62}\) See *ante*, p. 381.
\(^{63}\) See *Smith v. Oliver*, 1911 S.C. 103; *Gray v. Johnston's Ex.*, 1928 S.C. 659; also p. 752, *ante*.
or performance, in general it may be proved only by the writ of the other party or reference to his oath—\textit{nullumquodque eodem modo dissolvitur quo colligatur}. There are, however, exceptions to this rule where the obligation is \textit{ad factum praestandum}, in cases of fraud and in other circumstances too complex for present discussion. Even when an obligation is not expressed in writing, payment of a sum of money in implement of an antecedent obligation must, in general, be proved by writ or oath of the creditor.\textsuperscript{67} The operation of what may loosely be described as prescriptions may,\textsuperscript{68} after the lapse of specified periods of time, require the pursuer to prove his claim \textit{scripto vel juramento}. If an obligation falls within a category which normally requires to be constituted in writing, but the impediment of lack of probative writ has been overcome by invoking \textit{rei interventus}, the rules regarding proof by writ or oath apply.\textsuperscript{69}

4. A contract may be of a type which the modern law does not require to be constituted in formal writing but which the parties nevertheless themselves agree to express in that way. If the writing is to constitute the agreement, there is \textit{locus poenitentiae} for either party to resile until the contract is executed—though this may be barred by \textit{rei interventus} or homologation. A contract which the parties themselves stipulate shall be expressed in formal writing is sometimes referred to as an \textit{obligatio literis}.\textsuperscript{70} Reference to writ or oath is apparently excluded unless the pursuer can establish \textit{rei interventus} or homologation, or invoke the doctrine of \textit{res mercatoria}.\textsuperscript{71} It appears that the doctrine of \textit{res mercatoria} can be invoked to set up an informal writing embodying a contract of this kind, even in the absence of personal bar—which adds to the confusion of the law regarding form and proof of obligations.

5. The Mercantile Law Amendment (Scotland) Act, 1856,\textsuperscript{72} s. 6, provides that all cautionary obligations must be in writing and subscribed by the person undertaking the obligation, and otherwise are to have no effect. The statute applied to all guarantees and securities of cautionary obligations made or granted by one person for another, and include representations and assurances as to character and credit. Regarding obligations to which the Mercantile Law Amendment

\textsuperscript{66} Dickson on Evidence, § 610; Thiems Trs. v. Collie (1899) 1 F. 764.
\textsuperscript{67} This may lead to grave injustice, and Lord Som has noted the need for re-examination of the whole question, and presumably for reform by statute: Hope Bros. v. Morrison, 1960 S.C. 1.
\textsuperscript{68} See p. 845 et seq.
\textsuperscript{69} Cf. Clark v. Clark's Trs. (1860) 23 D. 74.
\textsuperscript{70} See discussion in Inglis v. Buttery & Co. (1877) 5 R. 58; \textit{ibid.} (H.L.) 87. The doctrine of \textit{res mercatoria} was, however, conceded to be admissible in this case.
\textsuperscript{71} Supra, p. 804.
\textsuperscript{72} 19 & 20 Vict. c. 60.
(Scotland) Act applies, the Sheriffs Walker comment rightly that the law regarding proof of cautionary obligations is in a state of considerable uncertainty. The state of the law before 1856 is so doubtful that it seems impossible to state with certainty what changes the Mercantile Law Amendment (Scotland) Act effected or was intended to effect. Only one of the possible views as to the present state of the law regarding cautionary obligations will enable them to be fitted into the framework created by Paterson v. Paterson; the view, namely, that a cautionary obligation requires for its constitution writing which is either solemnly executed or holograph, with the usual exceptions in relation to res mercatoria and rei interventus. It is thought, however, that this view fails to give effect to the terms of the statute, which provide that a writing subscribed by the granter is the only essential requirement.” The relevance of the doctrine of rei interventus or of proof by oath or judicial admission remains dubious.

6. The Hire Purchase and Small Debt (Scotland) Act, 1933, applies to contracts for the sale or hire of an article not exceeding £300 in value in consideration of periodical payments with an option to the hirer to become the purchaser, or subject to a suspensive condition on the passing of property. No contract to which the Act applies is binding on a person as hirer, purchaser, cautioner or guarantor unless the contract is signed by him. The present author respectfully agrees with the Sheriffs Walker that “as in the case of cautionary obligations, this obligation cannot be fitted into the framework created by Paterson v. Paterson and . . . a special statutory rule applies to it.”

7. There are certain miscellaneous obligations which require writing. These, by virtue of statute, include contracts of marine insurance and fidelity insurance, if the latter includes a cautionary obligation. Pace Gloag, it is submitted that the common law does not, in general, require insurance contracts to be in writing. While a contract to transfer incorporeal rights in moveables need not be in

73 See Chap. X of their invaluable work.
74 (1897) 25 R. 144.
75 22 & 23 Geo. 5, c. 38, as amended by the Hire-Purchase Act, 1954 (2 & 3 Eliz. 2, c. 51).
76 In their opinion, therefore, reference to oath is incompetent, judicial admission is useless, and the doctrines of res mercatoria and rei interventus are irrelevant, cf. United Dominions Trust (Commercial), Ltd. v. Lindsay, 1959 S.L.T.(Sh.Ct.) 58; English v. Donnelly, 1958 S.C. 494.
77 The author expresses his warmest and most grateful appreciation of the exceptional generosity of the Sheriffs Walker for giving him access to their major work in its preparatory state.
78 Marine Insurance Act, 1906 (6 Edw. 7, c. 41).
79 Mercantile Law Amendment (Scotland) Act, 1856, s. 6, supra.
writing, the actual transfer or assignation must be, in general, by probative writ, in particular where the obligation is itself constituted in writing. Various statutory formalities apply to transfers of shares, assignations of patents and copyrights, and bills of sale of shares in a British ship.

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80 Dickson on Evidence, § 560.
81 Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 73, 75.
82 Patents Act, 1949 (4 & 5 Eliz. 2, c. 74), s. 36 (3).
83 Merchant Shipping Act, 1894 (supra), s. 24.
CHAPTER 37

GROUND OF NULLITY AND REDUCTION
(ERROR, MISREPRESENTATION, VIS AC METUS,
MALA FIDES)

ERROR AND MISREPRESENTATION

General

As will be considered presently under the subtitle "Aspects of Error" the term "error" is used to comprehend a number of situations to which different principles may apply—such as dissensus, common error, mutual error, unilateral error, error in expression, error calculi, error in fact, error in law, error in substantialibus, and error in motive. The subject is very complex for discussion in a short, general work. For reasons stated in the Preface, although the author has accumulated most of the relevant material, which he will use in a more comprehensive work on Contracts, circumstances have precluded him from using as much as he would have wished in the present volume. Not every statement made without citation of authority rests upon the ipse dixit of the author. Moreover, when one contemplates the current confusion of the law of error in Scotland and contrasts it with the justice and simplicity of the solutions propounded by the Father of Scots Law, it is in the spirit of the reformer rather than of the antiquarian that the exhortation petere fontes may be uttered. If this chapter conflicts with the views of some eminent modern authors, the present writer would also readily concede that his own earlier opinions had often to be reconsidered. Nor would he venture to assert that the opinions now advanced will represent his ultimate position. On the more general aspects of the subject a few prefatory remarks may be justified.

The validity of an ostensible contract may be challenged when one or both parties have laboured under error. They may have been mistaken as to the essentials of the contract, or in certain circumstances as to some material factor which induced consent to the agreement. Error may be a ground of reduction in certain circumstances, irrespective of the culpable conduct of one party to the transaction; while if fault, such as material misrepresentation, or—in certain cases—concealment, can be established, then the party deceived may claim reduction on the grounds that he has been misled by the other on some material point (though not actually in the essentials or substantialis of the contract). It is important to
recognise that when it is said that reduction may be sought on grounds of fraud, misrepresentation or concealment, this is only a short way of stating that error or misapprehension induced regarding certain matters, by these means, may justify reduction of contract. Misrepresentation which does not in fact deceive has no effect upon the validity of an agreement; error of some kind must be proved. Indeed, so far as the law of contract is concerned, misrepresentation merely widens the scope of the doctrine of error to include cases of error in motive which would not per se justify reduction without the element of misrepresentation.

It is regrettable that, for reasons which will be explained later, the expression "essential error" which should have been restricted to those cases where the error is as to the substantials of a contract, has been extended, in certain dicta (based on a passage from Lord Watson’s opinion in Menzies v. Menzies) to cover cases of material misrepresentation regarding matters less fundamental (error dans locum contractui). Unless this point is grasped, the authorities will seem confusing and illogical and it must be confessed that in the process of recognising material non-fraudulent misrepresentation (though not affecting the essentials) as a ground for reducing contracts, the authorities on "essential error" have become confused, and cannot all be reconciled. A full analysis of these authorities cannot be attempted in a work of the present scope, but the author may claim to have given more anxious thought to them than to those on most other chapters of the law. He must freely admit that in choosing some authorities and discarding others he exposes his conclusions to attack by those who would have chosen what he discarded, and discarded what he chose. It is doubtful whether one can say in the present state of the law that there is a "correct" interpretation of "essential error" in the law of Scotland. Until the law is declared, by a Court of Seven Judges at least, there can be no "right" view—except for an exponent of "prophetic jurisprudence." 

A further general point must be made. English authorities on Mistake should be regarded with exceptional caution in this branch of the law. They are responsible for a good deal of confused

1 As to misrepresentation in the law of Delict see supra, pp. 674, 739.
3 J. J. Gow has contributed three valuable articles upon the Scottish law of error—"Mistake and Error" (1952) 1 Int. & Comp. L.Q. p. 472, and "Some Observations on Error" (1953) 65 Jur.Rev. 221; (1955) 66 Jur.Rev. 53. These articles have subjected to close and critical analysis the main authorities on error. Though the present author differs in some of his conclusions from those of Professor Gow, he regards the articles cited as of major importance.
thought on the Scottish law of error, and are liable to be misunderstood and misapplied in Scottish cases. For example, the case of *Kennedy v. Panama Mail Co.*⁴ has frequently been quoted in Scottish courts, without realising that a very different result might have been expected in England after the Judicature Act, 1873.⁵ English law approaches questions of misapprehension primarily from the angle of dishonesty. Civilian systems are less concerned with the dishonesty of defenders than with the vitiated consent of pursuers seeking relief through reduction on such terms as the courts may think just.

Scottish judges have seldom had to consider the question as to when error, even in the substantials, renders a contract absolutely null (*anglicé* *void ab initio* because actions for reduction have practically always been litigated between the actual parties to the ostensible agreement, without involving third party rights. The one modern decision on the question, *Morrisson v. Robertson*,⁶ was not really an authority on *error in persona* at all. The fraudulent person never claimed to be the other contracting party, but merely his agent. The English authorities cited in this case were therefore irrelevant. The Scottish courts have yet to decide in a concrete case if or when error in the substantials renders a contract absolutely null. When that decision has to be made, it is to be hoped that there will be circumspection in selecting precedents from comparative law sources. It is submitted that by far the most useful reservoir of comparative law material for a Scottish lawyer on questions of error is to be found in the law of such countries as France, Quebec and, of course, South Africa, which has a very similar tradition to the law of Scotland. On the other hand, as has already been stressed, the consequences of nullity of contract need not be to annul a real right which has been transferred to a third party. Contract and conveyance are different juristic acts and the protection given to third parties acquiring real rights for value depends on a specifically Scottish solution enunciated by Stair. This solution, it is thought, deserves emulation rather than emasculation. Professor F. H. Lawson⁷ has already in effect read a *viaticum* over the Scottish law of error, and has virtually suggested that Scottish lawyers should have the courage and intelligence to accept the realities of the situation. He observed,⁸ of the Scottish law of *error in substantia*,

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⁴ 1867 L.R. 2 Q.B. 580.
⁵ 36 & 37 Vict. c. 66.
⁶ 1908 S.C. 332.
⁸ p. 99.
There remained and remains a residuum of Roman law ideas which may or may not be good law. The late Professor Gloag, for instance, thought that unilateral error in substantia might still be good law in Scotland, but it cuts a very curious figure in a chapter the rest of which is almost interchangeable with English law.

With all respect to the Professor of Comparative Law at Oxford and to the late Professor Gloag for whom the author has a very high regard, it is submitted that, on a proper interpretation, there are still substantial differences between the English law of Mistake and the Scottish law of Error; while the divergent views expressed in and on the case of *Bell v. Lever Bros.* and its sequellae do not suggest that upon the topic of mistake the law of England is ripe for export.

**ERROR IN SUBSTANTIALLS**

In *limine* it is proposed to consider the scope and effect of that doctrine of error which is not necessarily dependent on the factor of misrepresentation—namely error in substantials or “essential error” in its strict sense. In Guthrie’s tenth edition of Bell’s *Principles* the editor observes:

Obligations and contracts are annulled or dissolved on the ground either of essential error (§ 11), or of error produced by misrepresentation or fraud (§§ 13 et seq.).

It may be regretted that the expression “essential error” is also used—as a result of misunderstanding when developing the law of error induced by misrepresentation—to describe error which does not necessarily affect the substantials of contract, but induces contract by misrepresentation (error in motive). This ambiguity has been criticised judicially. To avoid ambiguity, however, the expression “error in substantials” rather than the term “essential error” will be used to describe those aspects of error which go to the root of the contract. Strictly the terms are synonyms.

The classic statement of the law is that of Lord Watson in *Stewart v. Kennedy.* He said:

I concur . . . as to the accuracy of the general doctrine laid down by Professor Bell (Bell’s *Principles*, § 11), to the effect that error in substantials such as will invalidate consent given to a contract or obligation must be in relation to either (1) its subject-matter; (2) the persons undertaking or to whom it is undertaken; (3) the price or consideration;

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10 § 11.
13 (1890) 17 R.(H.L.) 25 at p. 28; in the Court of Session (1889) 16 R. 421, 857.
(4) the quality of the thing engaged for, if expressly or tacitly essential; or (5) the nature of the contract or engagement supposed to be entered into. I believe that these five categories will be found to embrace all the forms of essential error which, either per se or when induced by the other party to the contract, give the person labouring under such error a right to rescind it.

**Personal Bar and the Plea of Error**

It does not follow, however, that a party to a contract can always have it reduced by pleading that he was in error as to one of the categories mentioned in § 11 of Bell’s Principles. Far from it. The law will endeavour, ceteris paribus, to ascertain the intention of the parties from their words and conduct, and it is extremely difficult to prove reasonable unilateral error in the form of subjective belief. Stair appreciated this clearly when he observed,14 “But the exception upon error is seldom relevant, because it depends upon the knowledge of the person erring, which he can hardly prove. Neither will error have any effect if it be not in substantialibus.” An added reason for the rarity of plea by error in the time of Stair was that before the anglicising by statute of the contract of sale of goods, the Roman law regarding the vendor’s liability for latent defects applied, and this liability was based on implied dolus.15 Hence the “error in quality” type of case would be treated on the basis that the purchaser was “dolo circumventus.”

Though the dictum has been cited to imply more than was said, or perhaps intended, Lord President Dunedin rightly observed 16 “Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say.” In short, prima facie, a person who has made an ostensible contract will be restrained by doctrines of personal bar from pleading error in an action for reduction. Personal bar is, however, part of the law of evidence based on equitable considerations, and cannot be relied upon where to do so would be clearly inequitable. Nor, presumably, in cases of absolute nullity, would it be effective against third parties with title to sue.17 The pursuer seeking reduction of his contract must accordingly show, not only that he erred in the substantialis of the contract, but also that his error was reasonable (justus et probabilis error). This may be no easy task. It is submitted, however, that courts administering justice according to equitable principles must always consider on the facts

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14 IV, 40, 24.
15 Ibid.
16 Muirhead & Turnbull v. Dickson (1905) 7 F. 686 at p. 694, and see p. 757. The court may, for example, be more benevolent to a plea of error in the context of a family agreement than in a commercial contract.
17 See p. 790, ante.
averred or proved whether the error was in fact reasonable. This principle has possibly been obscured, and therefore its application has been unnecessarily restricted, through the placing of undue emphasis by judges and text writers on part of a dictum by Lord Watson in Stewart v. Kennedy\textsuperscript{18} without noting the qualification. His Lordship said\textsuperscript{19}:

*Without venturing to affirm that there can be no exceptions to the rule*\textsuperscript{20} I think it may be safely said that in the case of onerous contracts reduced to writing,\textsuperscript{21} the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right (to reduce the contract) unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract.

It was not necessary for Lord Watson to consider for the purposes of the case before him what other situations would justify a pursuer in asserting that his error was reasonable. In Stein v. Stein,\textsuperscript{22} Lord Skerrington gave a somewhat similar negative definition of the circumstances when a plea of error would not be barred.

*As a general rule*\textsuperscript{23} essential error is not in itself enough, according to Scots law, to nullify a contract. It must further be proved that the error was mutual . . . or, alternatively, that it was induced by misrepresentations either innocent or fraudulent, made by the other party to the contract, or that it was induced by fraudulent concealment.\textsuperscript{24}

It is thought, however, that the dicta quoted support, rather than contradict, the author's submission that reasonable error can be established as a ground of reduction without showing either misrepresentation or that the error was shared. Cases of misrepresentation and shared error are, of course, clear examples of when a pursuer could show that his error in the substantials of a contract was reasonable (*justus et probabilis*). If the defender had himself induced the pursuer's error, or if he had shared it, he could hardly be heard to say that the pursuer's error was unreasonable.

It will not be easy to establish reasonable error which will justify reduction of contract in circumstances not expressly covered by the dicta of Lord Watson and Lord Skerrington. There are, however, cases where, on balance of the equities, a pursuer is not barred or stopped from proving his error. No attempt is made to formulate an exhaustive list. In gratuitous transactions as is to be expected,

\textsuperscript{18} Supra.
\textsuperscript{19} p. 29.
\textsuperscript{20} Author's italics.
\textsuperscript{21} But see pp. 819, 822.
\textsuperscript{22} 1914 S.C. 903 at p. 908.
\textsuperscript{23} Author's italics.
on equitable grounds, a benefactor is not treated as strictly as a party to an onerous transaction and thus is not precluded from pleading his error unless thoroughly unreasonable. McAndrew v. Gilhooley was a case where a workman of low mental type signed a discharge, which he did not understand, of claims competent to him under the Workmen's Compensation Acts. He was held not to be bound by his discharge. This case, though capable of classification as error in a gratuitous transaction, may also be regarded as exemplifying the broader principle that the courts, in dealing with a plea of error, will consider whether it is justus et probabilis.

In another case in which a workman, through error as to the effect of a document, discharged claims for compensation, Ellis v. Lochgelly Iron & Coal Co., Ltd., Lord President Dunedin made the point contended for by the present author. I do not think it necessary, in this case, to go into the somewhat difficult question of how far there may be, in certain instances, relief from a contract on the ground of essential error not induced by the representations of the other parties. That there may be some cases of that sort is, I think, fairly evident from the opening words of Lord Watson in the House of Lords in the well-known case of Stewart v. Kennedy.

It also appears that a party may be allowed to plead unilateral error, even if not actually induced by the other party, if that other knows that the ostensible expression of intention by the first did not really express his true intention; and advantage has been taken of it to snatch a bargain, Steuart's Trs. v. Hart. It is thought that this case is still good law, and it was referred to without any implication of disapproval in the House of Lords and in the Court of Session, in the quite recent case of Anderson v. Lambie.

**Theories on the Effect of Error on Contracts**

It must be stated categorically that certain modern works dealing with the law of contract in Scotland consider that error in the substantials always makes a contract void or absolutely null, while error

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25 Purdon v. Rowat's Trs. (1856) 19 D. 206; McLaurin v. Stafford (1875) 3 R. 265; McConachy v. McIndoe (1853) 16 D. 315—which Gloag, p. 453, considered overruled by Stewart v. Kennedy, supra, but which the author thinks may be defended in the principle contended for here; McCaig v. University of Glasgow (1904) 6 F. 918.

26 1911 S.C. 448.

27 1909 S.C. 1278.

28 At p. 1282.

29 (1875) 3 R. 192. But F. H. Lawson, 52 L.Q.R. at p. 100, considered that this case could not stand, in view of the English decision of Smith v. Hughes (1871) L.R. 6 Q.B. 597. See also Gloag, Contract, p. 438, and comments by J. J. Gow, (1952) 1 Int. & Comp. L.Q. at p. 478. The present author considers the case to be altogether consistent with principle.

induced by misrepresentation (error dans causam contractui or error in motive) renders a contract only liable to reduction.\textsuperscript{31} In fact the questions whether and when error in substantials need result in absolute nullity have never been satisfactorily argued or settled; and the present author cannot regard the views of Gloag as conclusive on the point—especially with regard to cases where unilateral error is pleaded in a transaction apparently complete, from which one of the parties seeks to be released, on the ground that his apparent intention does not coincide with his real intention. Such cases are to be distinguished from those of "dissensus," where, owing to a latent ambiguity or patent conflict of declarations, no agreement whatever has been reached.

The institutional writers in Scotland do not always distinguish clearly between null (void) and reducible (anglicé voidable) in their treatment of error, since they usually considered the problem between the actual parties to the disputed transaction.\textsuperscript{32} Stair\textsuperscript{33} and Bell,\textsuperscript{34} however, did consider the question of third party rights. Gloag\textsuperscript{35} thought that Bell considered error in substantials a ground of reduction, not of total nullity. It is submitted that Bell was right in stressing the need for reduction in ordinary cases of error, though he would probably have accepted the suggestion that in certain situations involving dissensus an ostensible contract might be null. He was undoubtedly influenced by Pothier, but does not seem to have discriminated, as Pothier did, between "erreur obstacle" (dealt with in the Traité des Obligations) which prevented formation of contract independent of judicial declaration, and "vices de consentement," which Pothier discussed in his Traité de la Procedure Civile, and which could be relied on only after "lettres de rescission" had been obtained.\textsuperscript{36} The fourth edition of the Principles, published in 1839, was prepared by Bell himself,\textsuperscript{37} and may be taken as setting forth Bell's final opinion on the question. In the Commentaries\textsuperscript{38} Bell had expressly stated that error in substantials

\textsuperscript{31} Gloag, p. 442; Trotter, p. 139 et seq.; cf. Gloag and Henderson, pp. 71–76. In any event the nullity of the obligation would not necessarily affect real rights transferred to onerous third parties—see p. 792 et seq., ante.

\textsuperscript{32} See Stair I, 4, 6; I, 10, 13; I, 9, 8; IV, 40, 24. Some of these references would support the contention that contract entered into under error created a reducible obligation capable of ratification. Bankton I, 23, 63, also contemplates that, though error in substantials "excludes" consent, the transaction may be "homologated"—which would be impossible in a case of absolute nullity. Erskine III, 1, 16, follows Stair, and does not apparently distinguish between the effect of error in substantials and fraud. See also Kames, Principles of Equity, 3rd ed., p. 280.

\textsuperscript{33} IV, 40, 21 & 24, fraud and error are regarded as "congenerous alleigances."

\textsuperscript{34} Principles, note to §§ 11, 12, and 13 in 4th edition.

\textsuperscript{35} Contract, p. 442, note.

\textsuperscript{36} See Prof. René David's discussion of Pothier's attitude to error—Etudes de Droit Civil à la memoire de Henri Captiani, Dalloz, Paris.

\textsuperscript{37} 5th ed., 1826.

\textsuperscript{38} 7th ed., pp. 313–316.
will justify reductions even to the prejudice of third parties,\textsuperscript{39} while (though this is no longer the law) the converse was true in cases of fraud. In the Principles \textsuperscript{40} Bell considers that a contract entered into under error is valid until declared judicially to be null.

In the circumstances, it is submitted that the institutional writers seem to recognise that reduction is usually the appropriate remedy in the case of error—as with other vices of consent. This is consistent with the attitude of other Civilian systems. So far as case law is concerned, there seems to be only one modern Scottish decision to be considered, that of \textit{Morrison v. Robertson}.\textsuperscript{41} The short facts were that a fraudulent person, Telford, falsely represented to the pursuer, Morrison (who was a dairyman), that he was the son of Wilson of Bonnyrigg, who had authorised him to purchase two cows. Morrison knew Wilson to be a person of credit, and agreed to sell the cows to him on credit, delivering them to Telford. Telford, without paying the price, then sold the cows to Robertson, who took in good faith and for value. Morrison claimed the cows from Robertson. The case was argued and apparently decided (except possibly by Lord McLaren) on a false premise—that this was a case of error regarding the identity of the purchaser, like the English case of \textit{Cundy v. Lindsay}.\textsuperscript{42} It seems self-evident that this was a misconception. The fraudulent person never represented himself to be a buyer, but only the agent for another (a disclosed principal)—who in fact knew nothing of the matter. The question of masquerade would seem to be irrelevant. There was indeed no buyer involved at all as Lord McLaren noted.\textsuperscript{43} Telford was in the position of a thief, and a \textit{vitium reale} would taint any \textit{res} handed over to him. There was no place for the doctrine of \textit{justa causa traditionis}. The decision was right but the \textit{ratio decidendi} of the majority cannot be relied on with confidence.\textsuperscript{44} At all events it is thought that \textit{Morrison v. Robertson} cannot be accepted as authority for the view that error in the substantials must always render a contract null \textit{ab initio} nor that the consequences of nullity would always affect third party rights. Moreover, so far as the author is aware, there is no reported decision which purports to follow the \textit{ratio} of the majority in \textit{Morrison}, nor to follow \textit{Cundy v. Lindsay}.\textsuperscript{45}

\textsuperscript{39} The distinction between real and personal rights might have been stressed.
\textsuperscript{40} 4th ed., p. 7, note.
\textsuperscript{41} 1908 S.C. 332.
\textsuperscript{42} (1878) 3 App.Cas. 459.
\textsuperscript{43} p. 336.
\textsuperscript{44} Yet it is quoted without criticism by Gloag, \textit{Contract}, and in Gloag and Henderson. Note 76 on p. 74 of the latter work may be treated with reserve.
\textsuperscript{45} \textit{Supra}. The true English counterpart of \textit{Morrison v. Robertson} is \textit{Lake v. Simmons} [1927] A.C. 487.
It is suggested, therefore, that the question as to when error in substantials renders a contract absolutely null and when such error justifies reduction has not been clearly or conclusively answered by a Scottish court. Nor is the distinction often relevant in Scottish practice—which is why the institutional writers tend to use the terms "null," "void" and "annulled" as interchangeable. The acquirer of a derivative right is in the same position whether the contract is null or annulled. Bell's editors started a fashion of distinguishing, as the English do, between "void" and "voidable" contracts—which has misled many into the belief that the consequences which English law attaches to these concepts has relevance in Scotland. These English doctrines have as their background the dichotomy between law and equity, the transfer of property by agreement and recognition of the doctrine of "market overt." Unless compelled by statute or by an appellate decision annihilating the institutional law, Scots lawyers would do well to consider nullity in a Civilian rather than in an English context. If this implies that the present author has the option between sharing glory with Gloag or the stake with Stair, he must accept the latter.

It must be stressed that for the reasons already discussed nullity or annulment of contract should not be regarded as having the same effects as void and voidable contracts in England. In Scotland the onerous third party taking in bona fide is protected in the case of negotiable instruments. So far as rights in heritage are concerned, he can rely on the effect of registration, while, if he has purchased corporeal moveables, he should be secure unless the goods have been stolen. In that event a vitium reale attaches to the goods themselves, and it is on that account—not because of the nullity of obligation—that his right is vulnerable.

If a contract on grounds of error in substantials is reduced, when a court grants reduction it has power to impose such conditions on a party seeking reduction as may seem just—and indeed this is an important aspect of restitutio in integrum. The principle has been applied in cases of essential error, such as Steuart's Trs. v. Hart. This case has been cited without disapproval in opinions of the House of Lords and Court of Session as recently as 1954, and seems consistent with the demands of justice and with the principles of

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56 It is submitted that in civilibus at all events the question of whether a real right has been effectively transferred through a fraudulent person to an onerous third party should be tested by the principles laid down in Brown v. Marr, Barclay & Others (1880) 7 R. 427, rather than by the very broad concept of theft which was recognised in Hardinge (1863) 4 Irv. 347, and Wilson (1882) 5 Cou. 48 by quorums of the High Court of Justiciary.

57 (1875) 3 R. 192.

Scottish law. Thus, for example, in *McConchy v. McLindoe* the Lord Justice-Clerk observed that reduction might not have been competent in that case had the interests of onerous third parties been involved.49

**ASPECTS OF ERROR**

Dissertations upon the subject of error must deal with a variety of juristic situations.

**Dissensus (Mutual Error)**

In cases of this type, while there may be the externals of agreements, in fact the minds of the contracting parties have never been *ad idem*. Lee and Honoré state one aspect of the matter succinctly 50:

*Ambiguity.* Where a promise is understood in different senses by the promisor and the promisee it will be enforced in accordance with the intention to be deferred from the words and conduct of the parties, but if such words and conduct are ambiguous the contract is void.

In rare circumstances the language may be so ambiguous as to make it impossible to prefer one interpretation to another. The classic case in Scotland is *Stuart v. Kennedy*,51 where there was a verbal bargain for the supply of stone coping at so much per foot. One party believed that the price quoted was for lineal feet, and the other thought that it was for superficial feet. It was held that there was in fact no agreement, and therefore no binding contract. The equivalent English case is *Raffles v. Wichelhaus*,52 where cotton was ordered to arrive "*ex Peerless*" from Bombay. In fact there were two ships of that name which were due to arrive at substantially different dates. Ulpian's example53 of the vendor and purchaser differing as to the identity of the estate to be sold also illustrates *dissensus*. In *Houldsworth v. Gordon Cumming* 54 it was clearly indicated that, where two different estates were known by the same name, there might be failure of *consensus*. Where parties have committed their agreement to writing, however, it can rarely happen that "mutual error" can have effect, since the court construes the meaning of the writing rather than of the parties. Moreover, the court can find that there is in fact no contract because of *dissensus*—even if the parties themselves thought that there was a contract.55 Where *dissensus* is established with regard to the substantials of an ostensible contract, such

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49 (1853) 16 D. 315.
50 South African Law of Obligations, s. 45; and see Gloag, *Contract*, p. 446.
51 (1885) 13 R. 221.
52 (1864) 2 H. & C. 906.
53 D.18.1.9. The doctrine of *dissensus* concerns only declarations of will.
54 1910 S.C.(H.L.) 49 at pp. 52 and 62.
a “contract” will be absolutely null. Though the examples are usually of *dissensus* as to the subject-matter, it seems clear that if the ambiguity affects any of the substantialis of the transaction contained in the declarations, no contract will result. If parties have acted on the assumption that a contract existed, when it was a nullity, the court will decree an equitable solution.\(^5\)

**Common Error**

Common error consists in an erroneous assumption by both parties that a particular state of facts exists which they both consider vital to the existence of their contract. Cases of an ostensible contract for a *res extincta* (subject-matter destroyed at the time of contract unknown to the parties),\(^5\) or *res sua* (subject already property of the purchaser) can be regarded as fundamentally null because there is no subject-matter on which the contract can operate. There is, however, authority for at least reducing a contract at the instance of one party, where the common error with regard to a state of facts is less fundamental than the legal or actual existence of the subject-matter, but which the parties to a contract may be deemed to have assumed as fundamental to their bargain. Thus in *Ross v. Mackenzie*,\(^5\) a discharge was reduced which had been grounded on the mutual and erroneous assumption that the sum received by the granter of the discharge was the full sum due by way of *legitim*. Again, in *Dickson v. Halbert*\(^5\) a discharge was granted under a common and mistaken belief that all claims had been satisfied. In *Mercer v. Anstruther's Trs.*,\(^5\) a daughter, by contract with her father, renounced her share in her mother's estate on the common and erroneous assumption that the right had not vested in her. In *Baird's Trs. v. Baird*,\(^5\) it was held that when lessees paid interest on annual instalments under common error that they were due, they were entitled to relief (albeit the error was of law and not of fact).\(^5\)

**Unilateral Error as a Vice affecting Consent**

Though the burden of proof is formidable, the law of Scotland has accepted, as have other Civilian systems, the doctrine that a party

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58 (1842) 5 D. 151.
59 (1854) 16 D. 586.
60 (1871) 9 M. 618.
61 (1877) 4 R. 1005. It may be observed that the procedure was in each of the cases initiated by way of reduction, cf. Mackay, *Court of Session Practice*, ii, p. 195.
62 See also Anderson v. Lambe, 1954 S.C.(H.L.) 43, which Lord Keith considered as a case of essential error, affecting the identity of subjects erroneously described in a disposition. In this case, however, it would seem that at the time of contracting the parties were *ad idem*, but subsequently their solicitors failed to reflect that *consensus* (though accurately set forth in the missives) when drafting the disposition. There was error in the expression rather than in the formation of contract.
may plead his own unilateral error (provided it is *justus et probabilis*) as a vice of consent justifying reduction of contract, upon the condition, however, that he must compensate the other party as the court considers equitable: *Steuart's Trs. v. Hart.*  

As has been discussed already such a plea need not necessarily be supported by averments of misrepresentation. It is for the court to interpret the language used by the parties, and—questions of misrepresentations apart—a man cannot assert that he attached a meaning to words in an onerous written contract which is not that which the court attaches to them.

*Justus et probabilis* error can, however, be pleaded, it is submitted, at least when consent has been vitiated by active misapprehension regarding the subject-matter of agreement, the *persona* of the other party, the price or consideration to be given, the nature of the obligation or (subject to qualifications) the quality of the subject-matter. In cases of this kind by contrast with dissensus a party seeks to be released from a transaction objectively complete on the grounds that his apparent intention does not coincide with his real intention.

**Categories of Error in Substantials**

Whereas the categories of error in substantials may not be as finally closed as Lord Watson supposed, the subject may be most conveniently discussed by reference to those categories which are clearly accepted. It may be stressed, moreover, that Scots law has never accepted what may be the English doctrine, namely that once parties have, to all appearances, agreed with sufficient certainty on the same terms on the same subject-matter, neither can rely on his error to say that the agreement was a nullity. Of course, as has been already explained, the effect on third party rights of declarator of nullity or reduction is very different from the consequences of a successful plea of mistake in England.

**Error as to Identity (error in persona)**

It is generally considered that only where the personality of the other party to the bargain is so material that the person who is mistaken intended to deal with no one else, can error as to identity be relied on as a ground of nullity. For reasons already explained

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03 (1875) 3 R. 192.

04 *Stewart v. Kennedy* (1890) 17 R.(H.L.) 25 esp. at p. 29. See also Lee & Honoré, *The South African Law of Obligations*, § 43. The late Lord President Cooper had a special regard for this work. Hahlo & Kahn, *Union of South Africa* (British Commonwealth Series), p. 454 et seq., deals with problems comparable to those of Scots law in this field.


06 *Ante*, p. 817.

Morrisson v. Robertson does not seem to be in point, nor are the older cases which were cited by Trotter. In unilateral obligations and contracts which expect performance of a service, error as to identity is almost always important; in bilateral contracts, such as sale or hire, it may or may not be, though personal credit is deemed a relevant consideration. In most Civilian systems today error in persona is a ground for reduction, though not of absolute nullity. It may be thought that reasonable error as to the attributes of the other contracting party might well be justified as a ground for reduction—though not of absolute nullity when the other party was aware that these attributes were regarded as material. It is difficult to justify in principle the view that the law should consider the qualities of the res but not of the persona. It is of interest to note that the Quebec Civil Code expressly generalises this idea. While error in Quebec is a cause of absolute nullity only when it occurs in the nature of the contract or substance of the res, reduction may be granted when error concerns some thing which is a principal consideration for making the contract. This covers error in persona as well as error in substantia, and recognises that attributes of personality deserve recognition in the context of error—as in marriage, agency, donation or hire.

Error in Relation to Price or Consideration (error in pretio)

Where in a contract, such as sale or lease, a party can show that he laboured under reasonable error as to price, rent or other consideration, there will be ground for reducing the contract on account of lack of consensus. The position of the parties will then be adjusted by restitution if matters are entire—otherwise by requiring the payment of a reasonable price or wage. This situation usually arises where there is dissensus (discussed supra) but in an exceptional case the error may be unilateral.

Stewart's Trs. v. Hart is often cited as an example of unilateral error in this context. In this case a proprietor sold part of his ground for £75 under the belief that it was burdened with a cumulo feu duty of £9 15s. The purchaser was aware that the portion affeiring to it was only 3s., and was aware of the seller's intention to sell the property burdened with a cumulo feu duty. Decree of reduction was granted, upon condition that the seller reimbursed the defender for

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65 Supra.
66 Again in Dunlop v. Crookshank (1752) Mor. 4879 the vendor neither intended to contract with nor to deliver to the fraudulent party as an individual.
68 Bell, Commentaries, i. p. 314.
69 Article 992.
71 (1875) 3 R. 192.
all outlays, including permanent additions and improvements. (This adjustment of relations is of special interest in considering—as do other Civilian systems—the consequences of reduction on grounds of error.) In fact, however, it would seem that the seller's error was not so much as to price as regarding the value of what he was selling. The case may, perhaps, be better assessed on the basis that, especially in a contract bonae fidei, if one party is well aware that the other labours under a misapprehension regarding a factor which he regards as essential to the bargain, the court will inter partes refuse to maintain it. A clear case of unilateral error in pretio is Sword v. Sinclair. In this case a tea merchant, through the error of his agent, offered tea at 2s. 8d. per pound instead of 3s. 8d. When this error was discovered, the vendors refused to make delivery, and were held to be justified in their attitude.

**Error as to Nature of Contract (error in negotio)**

When a person ostensibly enters into one type of contract in belief that he is entering into another, it is clear that he gives no consent; and if the error in negotio is reasonable and not demonstrably due to his own negligence, the courts will give effect to the subjective lack of consensus, and hold him not to be bound. The clearest cases are where a man believes himself to be entering into a transaction of a totally different nature to that which he in fact puts his hand to—as if he signs a document believing it to be a testamentary deed, when, in fact, it is a disposition inter vivos; or again, to quote Bell's Principles, "As, for example, if one signs a conveyance believing it to be a bond, or security or a testamentary deed." The pursuer seeking reduction must specify a particular error he claims to have laboured under, and also the facts and circumstances which induced it. Where a party merely misapprehends the legal effect of the contract, this is not normally—apart from misrepresentation—a ground for reduction; but the question is one of degree, and some of the cases turn on narrow distinctions.

Though this branch of the law of error in Scotland may have been influenced by the English doctrine of *non est factum*, so as to render a document executed in ignorance of its true nature absolutely null, in Scotland a person—at least one of average education and intelligence—cannot in questions with third parties plead *non est factum* regarding a document known to relate to business on the grounds that

78 (1771) Mor. 14241.
74 McLaurin v. Stafford (1875) 3 R. 265.
76 § 11.
75 Ritchie v. Ritchie's Trs. (1866) 4 M. 292; Fletcher v. Lord Advocate, 1923 S.C. 27.
78 Wardlaw v. Mackenzie (1859) 21 D. 940.
he did not know what it was about. This might not preclude him from reducing it—after making appropriate compensation—in proceedings affecting only the other party, or if there had been misrepresentation as to the legal effect of the document. Where, however, a man executes without negligence a document of completely different kind to that which he had contemplated, or puts his hand to an onerous document when he was not contemplating business at all, he would seem not to be bound. Lord Dunedin in Ellis v. Lochgelly Iron & Coal Co., instances the case of the man who believes himself to be signing a visitors' book on which (unknown to him) a cheque book has been left in such a way as to appear part of the book.

**Error in Relation to the Subject-matter (error in corpore)**

This is the first aspect of essential error mentioned by Bell in his Principles, “As when one commodity is mistaken for another.” Cases of this type are rare, and can hardly arise except in verbal contracts. In commercial contracts it will not avail a vendor to state that a commodity which he obliged himself to sell was not in fact what he thought it was. Error as to the identity of the subject-matter could seldom be justus et probabilis. It may be noted that there are certain Scottish cases where the expression “error in the subject-matter” seems to have been used to comprise cases of “error as to the quality of the subject-matter.”

**Error as to Quality (error in substantia): Essential and Integral Element of Agreement**

Professor David and Professor Lawson have shown how in codified Continental systems the concept of error in substantia has been developed by “jurisprudence” to comprise error in causa as well as error as to quality. Scots law seems to have recognised within limits a doctrine of error in substantia in those cases where the agreed subject-matter lacks some quality which was assumed by the parties to be an essential and integral element of the subject-matter of the transaction. Here, as on the Continent, limited recognition is given to what in a sense might be described as “error in

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79 Gloag, p. 445, and authorities there cited.
81 Supra.
82 § 11.
83 Gloag, p. 447.
84 Earl of Wemyss v. Campbell (1868) 20 D. 1090; Hamilton v. Western Bank of Scotland (1861) 23 D. 1033.
85 Gloag, p. 446.
86 Supra.
87 Supra.
88 The Code Civil and its interpreters, as David has demonstrated, have departed in several respects from the views of Pothier, though his thought guided the drafters of the code.
89 Stewart v. Kennedy, supra.
motive.” If the vendor of an eighteenth-century portrait was aware that the purchaser’s whole object was to acquire it to complete his collection of Raeburns, and the vendor well knew that the artist had been someone else, it is suggested that the doctrine of error in quality considered in the context of bona fides, which lies at the root of the Scottish law of contract, might well justify reduction.

Professor J. J. Gow in his article “Mistake and Error” has stressed a point of considerable importance when he draws attention to the specialty mentioned by Bell regarding error as to quality—namely that each party to the contract must have had his mind directed to the essential quality which is alleged to be lacking in the subject-matter of the contract. In this connection the doctrine of bona fides, which applies generally in the Scottish law of contracts is particularly relevant. Bell in his Commentaries observes Error as to quality, the thing itself being identically what the parties understood to be the subject of their agreement, may or may not be sufficient to annul the consent. If it be a quality touching the very object of the contract and of which the seller must be aware, it will be held essential.

It may be added in this connection that the category of error in substantia (error as to a quality of subject-matter) has been mainly considered in the context of sale of corporeal property. The expression “quality” is, however, rather inapt when the subject-matter of the agreement is not a physical res, but partnership or the like. Again, if the element which the parties contemplated as essential to their bargain was not a physical defect, the term “quality” seems unduly limited and artificial—and some broader expression would seem preferable. In Gordon v. Hughes an estate was sold, both vendor and purchaser believing erroneously that it carried to the purchaser a sufficient qualification to vote as a freeholder. The court

90 (1952) 1 Int. & Comp. L.Q., p. 472.
91 See, e.g., McLellan v. Gibson (1843) 5 D. 1032. In the L.J.C.’s charge the conjunctive “and” was clearly printed in mistake for the disjunctive “or.” See Stein, op. cit., p. 187.
93 J. J. Gow, ref. supra, note 3 at p. 476, is very relevant when he points out that it is not necessary to show that the seller did not know the quality was lacking, provided that he was aware that it was essential. To use a neutral term, a mental state is required on both parties quoad essential quality—but the error may be unilateral. Such cases would be very rare. The action in Bell v. Lever Bros. [1932] A.C. 161 would only have failed in Scotland if the defeasible nature of the service contracts had not been contemplated by the parties on each side of the transaction. Reference may be made to the following authorities: Hamilton v. Western Bank of Scotland (1861) 23 D. 1033; Edgar v. Hector, 1912 S.C. 348; 1912 1 S.L.T. 93 (a somewhat ambiguous decision); Stewart’s Trs. v. Hart (1875) 3 R. 192; Stewart v. Kennedy (1890) 17 R.H.L. 25; Welsh v. Cousins (1899) 2 F. 277. Such actions were seldom necessary under the older law, since in the contracts both of sale and hire the implied warranty of Roman law against latent defects gave the purchaser or hirer an adequate remedy without invoking the law of error.
94 1815, F.C., June 15; cf. Maclean v. Macneill (1757) Mor. 14164.
would clearly have ordered reduction and restitution if that remedy had been claimed. Perhaps, as in Quebec, it may be preferable to refer—instead of to “error in quality”—to error as to “some thing which is the principal consideration for making” the contract.

**Error in Law**

In a bilateral transaction entered into at arm’s length justifiable error in law by one party can seldom be so fundamental as to vitiate consent. A contract deliberately executed in the terms which the parties intended cannot normally be set aside on the ground that one of them misunderstood its legal effects.96 The possibility cannot, however, be excluded of reduction in a case where one party secured a substantial benefit for totally inadequate consideration from a person whose error in law he had induced or connived at. Such cases would, of course, normally be discussed in the context of misrepresentation.97

Until 1830 the better view in Scottish law seems to have been that excusable error in law would support the *condictio indebiti*.98 In two House of Lords appeals, however—Wilson & McLellan v. Sinclair99 and Dixon v. Monklands Canal Co.1—strong obiter dicta (which were expressed in very offensive language) sought to apply the “Law of Westminster Hall” to Scotland, and thus to exclude the *condictio indebiti* where the error was in law. The soundness of these dicta has, however, been challenged directly or indirectly on several occasions since 1830.2 The scope of the *condictio indebiti* for error in law has already been discussed in the context of quasi-contract.3 Moreover it has been noted 4 that the English common law rule laid down obiter for Scotland by Lords Lyndhurst and Brougham in 1830 and 1831 is now in English law susceptible of certain exceptions in equity.9 The House of Lords in 1830 may have overlooked the fact that the Court of Session exercises an undifferentiated equitable jurisdiction.

**Error in Expression**

In cases where there has been genuine *consensus* on the essentials of a contract, but that agreement has been erroneously formulated in writing, the courts have certain powers to correct the recorded

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96 See also *Laing v. Provincial Homes Investment Co.*, 1909 S.C. 812; *Stewart v. Kennedy*, supra.
97 But see *Stewart’s Trs. v. Hart*, discussed supra, p. 821.
98 See *Wessels on Contract*, I, 988 discussing the opinions of Dutch civilians; also Erskine, III, 3, 54 and Bankton, I, 8, 23.
99 (1830) 4 W. & S. 398.
1 (1831) 5 W. & S. 445.
3 *Ante*, p. 626.
expression. Difficulties may arise when it is contended that a contract, after being drawn up and signed by the parties, does not in fact represent their agreed intention. If the error is self-evident, it can be corrected by construing the deed as in Glen's Trs. v. Lancs & Yorks Insurance Co., where a meaning could only be given to an insurance policy by deleting a "not" which had been inserted by mistake. Where, however, an error in expression has been introduced which cannot be cured by construction, then, whether the error is admitted by both parties or not, the courts, though they cannot rectify the agreement, may reduce it after proof. Thus, in Waddell v. Waddell, it was averred that a bond had been mistakenly recorded in favour of the pursuer's son instead of in favour of himself; he was held to be entitled to prove this. In Krupp v. Menzies, it was argued that parole evidence could not be admitted to show that the provision in a written contract for a manageress to have one-fifth of the profits of a hotel should have been one-twentieth. Proof was, however, allowed of the fact that the clerk, who had been instructed to draw up the agreement by copying another contract (which provided for one-tenth of the profit) and halving the amount of profit shown there, had, by mistake, put one-fifth as half of one-tenth. Lord President Dunedin, after noting that neither party was under error as to the terms of the contract, considered that it would "be truly a disgrace to any system of jurisprudence if there was no way available of rectifying what would otherwise be a gross injustice." Though these decisions were given a somewhat restricted interpretation in Anderson v. Lambie, in the Court of Session, they seem to have been reinstated as generally sound by the decision of the House of Lords in that case. It was eventually held that, even though a conveyance had been registered, it could, as between the parties, be reduced. It was proved that the area of land disposed under the formal disposition was, through error on the part of the parties' solicitors, of greater extent than that described in the missives which recorded the original agreement of the parties. Lord Reid observed:

If the two parties both intend their contract to deal with one thing, and by mistake the contract or conveyance is so written out that it deals with another, then, as a general rule, the written document cannot stand if either party attacks it.

6 (1906) 8 F. 915.
7 (1863) 1 M. 635. It was not decided, however, that the entry in the Register of Sasines should be altered.
8 See also Glasgow Feuing & Building Co. v. Watson's Trs. (1887) 14 R. 610.
9 1907 S.C. 903.
10 At p. 908.
11 1953 S.C. 94.
Reduction is the remedy; it is not competent for the court to "rectify" the contract or conveyance. This view was reaffirmed in Anderson. It may be observed that reduction on grounds of error in expression may not be granted to the prejudice of a person who is holder for value of a negotiable instrument; nor if a third party has relied in a question of title to land on a document which has been incorrectly drawn up but recorded in the Register of Sasines. The First Division in Anderson took the view that once a disposition had been recorded in the Register it should be no longer liable to reduction. Not only is recording in the Register of Sasines now the equivalent in theory of the giving of sasine, but reliance on the "faith of the Records" has long been an important characteristic of the Scottish system. The Lord President observed that it is not only purchasers for value who inspect and rely on the records. A man might make an unsecured loan, relying on the faith of the records which showed the borrower as a man of substance. The House of Lords, however, rejected this view in the absence of proof that third parties had actually acted in the faith of the recorded title.

Where offers are made by mistake—as where a man through slip of the tongue or pen makes an offer in terms he did not intend, and the offer is accepted by one who knows that the offer could not have been intended in these terms—the offeror will not be bound. The clearest case is where parties have been negotiating as to price, and a purchaser purports to accept the offer of a vendor who having written refusing £5,000, adds in his reply that he is prepared to offer his property at £3,500—intending £5,000. Gloag doubted the soundness of Seaton Brick & Tile Co. v. Mitchell, where an offer to do work at a lump sum (which had been accepted in good faith) was held binding, albeit, due to faulty calculation, the tender had been made lower than was intended. He preferred the decision (not quoted in the later case) of Sword v. Sinclair where a tea merchant had instructed his agent not to sell under 2s. 8d. per lb. (by mistake for 3s. 8d.). The agent in good faith had sold at 2s. 8d. This case, however seems truly to be an example of error in pretio rather than error calculi.
Error Calculi

In its strict meaning error calculi involves an error patent on the face of the writings bringing forth an obligation, such error involving some mistake in the ordinary rules of arithmetical computation or some other palpable and obvious error, the means of correcting which are to be found in the writings themselves.21 The term has also been applied to errors of book-keeping or accounting, as by entering an item twice in a statement of account.22 If the error is not discovered until after payment or performance, the party who has been overcharged may recover the excess—in the case of money by the condictio indebitti.23

Misrepresentation as a Ground of Reduction: Error in Motive

Though error in the substantials of contract is in itself a ground of nullity, while error in motive (except in the sense explained in the context of error in quality) is not usually so regarded, the scope of error is enlarged when a party can be shown to have been induced to contract by a material false misrepresentation—when, in short, but for error in motive he would have refused to contract. For purposes of reduction of contract the consequences of fraudulent and non-fraudulent misrepresentation are the same.

Professor Gloag24 in his work on Contract accepts the doctrine that a contract may be reduced if it was induced by a material non-fraudulent representation, even though the error caused in the mind of the person deceived was not as to the substantials of contract. In short, he considers that, for purposes of reduction, the consequences of misstatements—fraudulent25 or non-fraudulent—are generally speaking the same. He writes26 of this aspect of error:

It is conceived that it may be stated as a general principle, not confined to contracts uberrimae fidei27 where even non-disclosure is a ground of reduction, that a contract is reducible if induced by a misrepresentation, although there may be no proof of fraud, and that in a reduction on this ground it is not necessary to prove that the misrepresentation produced such error in the mind of the party misled as to preclude any real consent on his part. Thus while mere error as to the obligations involved in the contract, or as to facts which form the motive for contracting, or as to

21 Per L.J.C. Inglis in McLaren v. Liddell's Trs. (1862) 24 D. 577 at p. 584. Quaere whether, as would seem unjustifiable, the doctrine is restricted to cases of written documents and would not apply, e.g., to computations on a machine.
24 pp. 471–473.
25 If, however, fraud is relied on, it ought "to be specifically averred and clearly proved," per L.P. Cooper in Sinclair v. R. McLaren & Co. (June 3, 1952, unreported). It is no easy matter to establish fraud.
26 pp. 471–472.
27 As to which, see post, p. 835 et seq.
the quality of the subjects to which the contract relates, is not ... a relevant ground for reduction when the other party is not responsible for the error, the fact that he is so responsible makes a cardinal difference, and renders the contract reducible. The general rule was expressed by Lord Watson, in a passage which has been regarded as the ruling authority: "Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other party, or of his agent, made in the course of negotiation, and with reference to the subject-matter of the contract. If his error is proved to have been so induced, the fact that the misleading representations were made in good faith affords no defence against the remedy of rescission."

Gloag notes, however, that if Menzies v. Menzies is an authority on non-fraudulent misrepresentation, the adjective "essential" has apparently two conflicting meanings, while "with reference to the subject-matter of the contract" must be widely construed.

It seems reasonably clear from the context, however, e.g., his reference to Adam v. Newbigging, that Lord Watson used the expression "essential error" per incuriam. He was concerned with material misrepresentation inducing contract. The majority of the House of Lords apparently regarding Menzies v. Menzies as a case of fraud and if—contrary to the author's belief—Lord Watson was considering error in substantialibus, then his ratio is not binding and should be discarded.

Though the definition of fraud in Derry v. Peek and the classic English formulation of the doctrine of so-called "innocent misrepresentation" in the cases of Redgrave v. Hurd and Adam v. Newbigging have influenced Scottish doctrines regarding reduction for error in motive induced by misrepresentation, the Scottish rules seem to have evolved independently. It is entirely consistent with Scottish legal principles that no man should have the assistance of a

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26 pp. 472-473. The contrary opinion of Lord Kyllachy in Woods v. Tulloch (1893) 20 R. 477—which was upheld in the First Division and is supported by other dicta—has never been expressly overruled, but may be regarded as relegated to the limbo of forgotten decisions.

26 (1899) 20 R. (H.L.) 108.

27 I.e., error in substantialibus and error in motive induced by misrepresentation. In Bradford Property Trust, Ltd. v. Hunter (July 24, 1959, unreported) L.P. Clyde seemed to apply Lord Watson's broader definition to a case of error as to the legal effect of a contract. In the House of Lords (March 10, 1960) Lord Keith noted that the phrases "essential error"—"error in substantialibus" had or might have a different connotation according to context.

28 (1888) 13 App.Cas. 308; but Lord Watson also referred to Stewart v. Kennedy (1890) 17 R. (H.L.) 25, which is an authority on error in substantialibus.

29 Lord Rutherford Clark in whose judgment the L.C. expressly concurred (p. 140) regarded the alleged misrepresentation as fraudulent. See also Lord Ashbourne (p. 147) and Lord Hannen (p. 152).

30 (1889) 14 App.Cas. 337.

31 (1888) 20 Ch.D. 1.

32 Supra.
court of law to insist on a contract which he has secured by mis-
representation.

In *Mair v. Rio Grande Rubber Estates* Lord Shaw uttered a
dictum which represents an attitude latent in the older common law
of Scotland. "Fraud is not far away from—nay, indeed, it must be
that it accompanies—a case of any defendant holding a plaintiff to a
bargain which has been induced by representations which were
untrue; for it is contrary to good faith and it partakes of fraud to hold
a person to a contract induced by an untruth for which you yourself
stand responsible. It is elementary that a party cannot take advan-
tage of a benefit derived by a contract sprung out of his own fraud,
and I think it is equally sound that a party cannot take a benefit
sprung out of a falsehood which he has placed before the other party
as an inducing cause." As has been observed 37 a restricted class
of cases on "error in quality" are dependent on a contracting party's
awareness of the other's object in contracting. Moreover, Scottish
judges (at all events before *Derry v. Peek* apparently restricted the
meaning of fraud to that of the English tort of deceit) at times con-
strued dolus in the wider meaning of the Civil law, i.e., not in the
restricted delictual sense, but in the broader sense of conduct incon-
sistent with bona fides, or applied the maxim *culpa lata dolo
aequiparatur.* 39

In exercise of inherent equitable powers, the Court of Session was
on occasion prepared in the early nineteenth century to grant reduc-
tion in cases of fraud in the sense of *mala fides,* where there had been
unconscionable dealing, misrepresentation or unconscionable conceal-
ment. 40 These early cases of equitable relief, granted where one
party had gained an unconscionable advantage over another by con-
duct which was not strictly fraudulent (in the delictual sense), did not
establish any clear principle that misrepresentation which had merely
influenced the formation of contract (but had not induced error in the
substantials) should be recognised as a separate category of reduction
—like fraud *stricto sensu.* Mere general averments of representation
were not accepted as sufficient, 41 and the fact that cases of misrepre-
sentation generally were indexed by the reporters under "Fraud"

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36 1913 S.C.(H.L.) 74 at p. 82.
37 Ante, p. 824.
38 Sup. cit.
39 General reference may be made to P. Stein, *Fault in the Formation of Contract in
Roman and Scots Law,* Chaps. 14 and 15. The present author does not go as far
as Professor Stein in accepting the category of so-called "innocent misrepresentation,"
but freely admits that there is ample justification in Scottish textbooks and
dicta to justify Professor Stein's view.
40 Murray (1826) 4 S. 374; McDarmid, ibid. 583; Kinloch v. Campbell, 1815 F.C.,
June 14, and cf. McLagan v. Dickson (1832) 11 S. 165; see also British Guarantee
Association v. Western Bank of Scotland (1853) 15 D. 834.
41 Kyle's *Trs. v. Allan* (1832) 11 S. 87; McLagan v. Dickson, ibid. 165.
or "Error" indicates that there was a certain amount of overlap and perhaps of confusion of thought.\textsuperscript{42} Pace Professor D. M. Walker,\textsuperscript{43} cases such as Oliver v. Suttie \textsuperscript{44} did not specifically reject non-fraudulent misrepresentation as a ground of relief.\textsuperscript{45} That case, and others like it,\textsuperscript{46} show that courts were not always prepared in cases of non-fraudulent misrepresentation to grant an action of reparation (as contrasted with an action for reduction) on analogy with the action of reparation which is a primary legal remedy granted in cases of fraud. It was in this context that in Oliver v. Suttie the Lord Ordinary could say that he knew no mid-plea between fraud and unintentional error.\textsuperscript{47} In Oliver v. Suttie the claim, brought at the end of a lease, was for reduction and damages. As in Reddie v. Syme,\textsuperscript{48} the party who had allegedly made the misrepresentation had earlier offered restitutio; and the pursuer was, in effect, seeking a remedy in reparation rather than in contract. It would appear that a timeous offer of restitutio in integrum might have entitled the pursuers to reduction in Reddie v. Syme.\textsuperscript{49} Rejection of such a plea of misrepresentation as a ground of action in reparation did not necessarily imply that the Scottish courts discounted the relevance of such misrepresentation in actions for reduction.

Conversely,\textsuperscript{50} it did not follow that clear acceptance of non-fraudulent misrepresentation as a separate category justifying reduction of contracts (in the absence of error in substantialibus) is to be inferred from such cases as Adamson v. Glasgow Waterworks Commissioners \textsuperscript{51} and Wilson v. Caledonian Ry.\textsuperscript{52} In the former of these cases—which were, it is thought, cases of error in substantialibus—there can, of course, be found dicta which indicated some confusion of judicial thought as to whether an issue of misrepresentation could stand apart from an issue of error in substantialibus. The view which prevailed, and it would seem entirely correct in such cases, was that the question of misrepresentation was ancillary to the question of essential error (error in substantialibus)—explaining how


\textsuperscript{43} (1954) 66 Jur.Rev. at p. 130.

\textsuperscript{44} (1840) 2 D. 514.

\textsuperscript{45} But see ante, p. 675.

\textsuperscript{46} Reddie v. Syme (1831) 9 S. 413; (1832) 6 W. & S. 188. Gordon v. Hughes, 1815 F.C., June 15; rev. (1819) 1 Bligh 287; Campbell v. Boxwall (1841) 3 D. 637; Brownlie v. Miller (1878) 5 R. 1076; (1880) 7 R. (H.L.) 66.

\textsuperscript{47} p. 516.

\textsuperscript{48} Sup. cit.

\textsuperscript{49} Supra. See also Gordon v. Hughes, supra: cf. p. 835, post. It may be regretted that so little scope was given in Scotland to the actio quanti minoris.

\textsuperscript{50} The interpretation of Professor Walker differs, sup. cit. note 43.

\textsuperscript{51} (1859) 21 D. 1012. Lord Deas (at p. 1020) apparently considered the case as one of quasi-fraud rather than of error in substantialibus.

\textsuperscript{52} (1860) 22 D. 1408.
that error arose. In this sense even non-fraudulent misrepresentation was very relevant to show that the pursuer's plea of error was reasonable (justus et probabilis), and, therefore, should not be rejected on principles of personal bar. Indeed, a pursuer claiming reduction on grounds of error has long been expected to plead and prove the circumstances which induced his error.\textsuperscript{53}

Confusion has undoubtedly resulted from use of terms such as "fraud" and "misrepresentation" in cases where the misrepresentation has actually induced error in the substantials, and is thus really ancillary to a plea of error. Unilateral error in substantialibus if justus et probabilis justifies reduction even apart from misrepresentation, and it follows a fortiori that fraudulent or non-fraudulent misrepresentation by the other party has always been relevant to explain and establish fundamental error in substantialibus. It is a quite different question as to whether non-fraudulent misrepresentation which merely affects the motives of a contracting party can be relied on as a ground of reduction or repudiation of contract. The equitable remedy of reduction in the latter circumstances, though never clearly formulated by the Scottish courts during the nineteenth century, was not considered incompetent—and, as has been shown, equitable considerations were in the first half of the century invoked to reduce contracts where the alleged misrepresentation had been regarding collateral issues, and had induced error as to motive.

Later in the century, however, Lord Kyllachy in \textit{Woods} v. \textit{Tulloch},\textsuperscript{54} in an opinion which was expressly approved by the First Division and is indirectly supported by other authority,\textsuperscript{55} expressly rejected the doctrine that non-fraudulent misrepresentation which did not actually induce "essential error" (presumably error in the substantials within the meaning of Bell's \textit{Principles}, 4th ed., § 11) could invalidate a contract. Though this decision has never been expressly overruled, it cannot live with later authorities, and, most justifiably, Lord Carmont doubted its soundness in \textit{Ritchie} v. \textit{Glass}.\textsuperscript{56} Guthrie's edition (the 10th) of Bell's \textit{Principles}, which was published in 1899, seems to follow the view expressed by Lord Kyllachy. Note (e) (p. 8) reads: "an innocent\textsuperscript{57} misrepresentation (not leading to an essential error and not being a warranty) does not invalidate a contract." The authorities which the learned editor quotes are not, however, relevant to the question of reduction, and by 1899 the meaning of "essential error" had been somewhat obscured by Lord Watson's confused dictum in \textit{Menzies} v. \textit{Menzies}.

\textsuperscript{53} See, e.g., Stair, IV, 40, 24 and L.J.-C. Moncreiff in \textit{Munro} v. \textit{Strain} (1874) 1 R. 522.
\textsuperscript{54} (1893) 20 R. 477.
\textsuperscript{55} See Gloag, p. 473, note 7.
\textsuperscript{56} 1936 S.L.T. 591.
\textsuperscript{57} The English technical term "innocent misrepresentation" is discussed, \textit{post}, p. 834.
The view of Lord Kyllachy and of Sheriff Guthrie have not prevailed. At least two eminent Scottish judges have expressly recognised that, while the law affords a remedy for both categories of error, there is a fundamental distinction between the meaning of the term “essential error” properly used to denote error as to the substantials as defined in Bell’s Principles, § 11, and, by contrast, the meaning of the term “essential error” as used more loosely by Lord Watson in Menzies v. Menzies. In the latter sense—the sense of error in motive induced by material misrepresentation—it implies no closer relation with the essentials of contract than is necessary to base an action of reduction upon fraud, when, of course, error in the substantials need not be shown.

**Special Considerations Regarding Fraudulent and Non-Fraudulent Misrepresentation**

As has been already submitted, a material misrepresentation justifies reduction of contract, whether the misrepresentation be fraudulent or not. For practical purposes the effects of either type of misrepresentation are the same in the realm of contract. If, however, fraud is alleged, it must be specifically averred and proved. Accordingly it is necessary to ascertain the limits of this concept. During the nineteenth century “fraud” in Scots law like dolus in Roman law was used in two senses. If, in the words of Bell, the defender was guilty of “a machination or contrivance to deceive” not only was this a ground for reduction of contract, but it also justified action in delict. If, however, the defender’s conduct was merely inconsistent with bona fides, the expression “fraud” was also used in the context of reduction. To some extent the English concept of “fraud in equity” was analogous. The English tort of deceit was, however, much narrower in meaning, and, after the Judicature Acts had thrown open the frontier between common law and equity in England, the House of Lords insisted on asserting the narrow common law meaning of fraud in Derry v. Peek, where a claim for damages in respect of false but not deliberately fraudulent statements was in issue.

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59 Principles, § 13. Damages for fraud can be claimed in delict without insisting on rescission, see p. 739.

60 (1889) 14 App.Cas. 337; the immediate result of that decision had to be obviated by legislation (now reproduced in the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 43 and 46) which rendered and renders certain persons responsible for the issue of a company prospectus liable in an action for damages in respect of false statements made therein and irrespective of “fraud.” Moreover, irrespective of fraud a person who mistakenly but non-fraudulently holds himself out as agent, though without authority, is held liable in contract by English law. There is authority for this approach in Scots law: Anderson v. Croall (1903) 6 F. 153, but see post, p. 863.
Lord Herschell’s definition of fraud has often been cited in Scotland, but it must be stressed that the remedy of damages as contrasted with *restitutio in integrum* is an aspect of the law of Delict not of the law of Contract in Scotland.

Fraud in the sense of delict—extended also by English precedents to contract—is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. There is no fraud in the delictual sense where there is innocent belief in the truth of the statement, even if it has been made negligently, though absence of reasonable grounds may be evidence that a belief expressed was not innocently held. Though a certain licence is permitted to those who advertise products for sale, where advertisement was by deliberate and detailed fabrication regarding the nature and content of a patent medicine, this has been held to be fraudulent.

Generally speaking, mere silence cannot be considered as fraudulent; but there may be fraud in things themselves without any words being spoken—as where forged stamps or pseudo antiques are exhibited with a view to deceiving purchasers. Conduct which amounts to active concealment of the truth is misrepresentation, and usually misrepresentation of a fraudulent character.

The foregoing discussion of fraud is relevant both for reduction and restitution on the one hand and for reparation on the other. Though Gloag considered that material non-fraudulent misrepresentation inducing contract was a ground for reduction and restitution, he concluded that damages in delict could not be awarded, apart from the statutory provisions of the Companies Acts and breach of warranty of an agent’s authority for so-called “innocent misrepresentation.” If by “innocent misrepresentation” were implied a false statement made without fault, the present author would concur in that conclusion. However, following the English law (as a number of judicial dicta can in part justify), Gloag observed that, “A misrepresentation inducing a contract is spoken of as innocent in cases where the party making it believed what he said, as fraudulent when he did not believe.” As has been discussed already in the context of delict, there may be liability in Scots law for harm

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61 At p. 374.
62 The third aspect is merely a special case of the second; see also Boyd and Forrest v. Glasgow and S.W. Ry., 1912 S.C.(H.L.) 93.
63 Bile Beans Manufacturing Co. v. Davidson (1906) 8 F. 1181.
64 Patterson v. Landsberg (1905) 7 F. 675; White v. Dougherty (1891) 18 R. 972.
66 p. 471.
67 Ibid.
68 p. 863, post.
69 Ibid.; but see p. 830, ante.
70 At p. 674 et seq., ante.
caused by negligent statements—as by other non-physical means. The doctrine of Candler v. Crane, Christmas & Co.,71 which was regretted by the English Court of Appeal as illogical, is not binding in Scotland. It is submitted that when a false representation causes loss, an action in delict should be competent in Scotland (as an alternative to reduction and restitution) provided that *culpa* can be established. The doctrine of “innocent misrepresentation” should be confined to cases such as Manners v. Whitehead72 as interpreted by Lord McLaren—“But when we are in the region of damages it does not appear to be consistent with equity, or with any sound principle of law, that in respect of a mistake for which neither party is responsible, the seller shall pay to the purchaser a sum of damages, the purchaser retaining such benefit as the contract has given to him.” The basic principle of liability in delict is that of *culpa* or fault and, though reduction and restitution will certainly be made if a contract has been induced by a false representation made without fault, there seems no good reason for refusing an action in delict in respect of a negligent misrepresentation causing loss. Certainly there are dicta in Scottish cases opposed to this submission, but it is thought that no binding decision imposes categorically the peculiarly English idea that misrepresentation which is not deliberately fraudulent is not culpable. When Scottish judges have used the expression “innocent misrepresentation” as an actual ground of decision, they have contemplated situations where there has been neither *dolus* nor *culpa*.

**CONCEALMENT**

Associated with the rules regarding reduction for misrepresentation are those concerned with improper concealment of material facts. It is not in every contract that there is a duty to disclose all material facts to the other party. In mercantile contracts, at all events, men normally contract at arm’s length, and, provided there is no fraudulent concealment or misrepresentation by suppressing part of the truth, the contract will not be set aside if a party later discovers facts which would have deterred him from contracting had he known them sooner—questions of essential error apart.73 There are, however, certain contracts known to English lawyers as *uberrimae fidei* contracts, where a special duty to disclose all the material facts is cast on one or both parties. If they fail in this duty, the consequences are the same as if the party in fault had made a material non-fraudulent misrepresentation. The leading examples

71 [1951] 2 K.B. 164.
72 (1898) 1 F. 171 at p. 177; author’s italics.
73 Brownlie v. Miller (1880) 7 R. (H.L.) 66.
are—insurance, guarantees for the fidelity of an official, invitations to take shares in a company, and proposals to enter into partnership.

For example, in the contract of insurance a duty lies upon both parties to disclose fully the material facts affecting contract. The assured will be required to state not only those facts within his knowledge which he believes to be material to the question of insurance, but all those facts of which he is aware which are, in fact, material. Materiality has been defined in the Marine Insurance Act, 1906, s. 18 (2)—and the definition may be taken as a general application in insurance law: “Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.” Materiality is always a question of fact. Circumstances may make any fact material. Thus in The Spathari, it was held that there was a duty on the insured to disclose that the party having the main interest in a vessel was Greek, at a time when vessels belonging to Greeks were virtually uninsurable. This particular vessel had the misfortune to sink in calm waters with a cargo of decomposing fish which had been insured for a substantial sum. But their Lordships showed a certain lack of sympathy with the assured in his loss. It may also be noted that each renewal of an insurance is made on the understanding that the original representations remain true. If the circumstances have altered this must be disclosed.

The category of uberrima fides has gained some recognition in Scotland, both in dicta and in treatises such as Gloag on Contract. It may, however, be noted that bona fides is fundamental in the Scottish law of contract in a way which it is not in the law of England; and certainly if one scrutinises the early nineteenth-century Scottish cases—including those dealing with insurance—bona fides or “good faith” is the expression used by Scottish judges. The introduction of the superlative adjective from England seems somewhat unnecessary in a Civilian system. This point has been well put by a lawyer whose background is also that of a Civilian in touch with English concepts—“The expression ‘uberrima fides’ is not derived from the Civil law and the implication in it that the law requires varying standards of honesty is hardly a happy one. The Roman ‘bona fides’ is a unitary concept; the law with a somewhat

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74 Life Association of Scotland v. Foster (1873) 11 M. 351, esp. per L.P. Inglis, p. 359; bona fides and uberrima fides were regarded as synonyms.
75 6 Edw. 7, c. 41.
76 1925 S.C.(H.L.) 6.
77a 74 S.A.L.J. 177, esp. at pp. 188-189.
78 M. A. Millner, “Fraudulent Non-Disclosure” (1957)
benign optimism, endows its average man with a generous measure of prudence and honesty, and he is considered to govern his conduct in both respects by a single unvarying standard. But just as the amount of care which he exercises varies with circumstances, so does the amount of candour which informs his negotiations. The negotiations preceding a contract uberrimae fidei do not create a situation in which a man should be more honest than on other occasions, but one in which an honest man would be more candid. The reason is that it is specially characteristic of negotiations of this type that many material facts are accessible to him alone so that the other party is obliged to depend on him, i.e., to trust him to disclose them. In short, a relationship of involuntary dependence springs into being in these circumstances which, in so far as it obliges the one to repose confidence in the other, has a quality comparable to those subsisting in fiduciary relationships which admittedly give rise to a positive duty of disclosure. . . . The same relationship, and therefore the same duty of disclosure, can arise in any negotiations which, in the particular case, are characterised by the involuntary reliance of the one party on the other for information material to his decision.

FORCE AND FEAR (VIS AC METUS)

Stair comments 70 "Fear and fraud have much the same effects as to singular successors, except—in the case of robbery, which, as well as theft, is vitium reale in moveables; and therefore what hath been said of fraud in that point, needs not here be repeated." This statement in effect outflanks Gloag's anxiety regarding "Contracts Void and Voidable," which he thought relevant so far as third party rights are concerned. If property is taken from another in circumstances which amount to robbery, or, it is suggested, if physical force is applied, e.g., to a man's hand to trace his signature, no third party can acquire title. In the first case a vitium reale, attaches, and in the second it is not even true to say "coactus volui." Other aspects of force and fear are relevant in the context (as in Roman law) of reduction. In this situation the general rule is resoluto jure dantis resolvitur jus accipientis—subject to the significant exceptions of registration in the case of heritable rights, bona fide purchase for value in the case of corporeal moveables and the holder in due course of negotiable instruments. Quoad personal rights annulment

70 IV, 40, 28. It is in this context that I, 9, 8 (which refers to the delictual aspect of vis ac metus) must be read; see also Erskine, III, 1, 16; IV, 1, 26; Bell, Principles, § 12; Com. i, p. 314. As regards homologation see Thomson v. Amundale (1829) 7 S. 305. The position of a holder in due course of a bill of exchange is expressly safeguarded by statute by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 29.
results in the application of the rule assignatus utitur jure auctoris. The third party, even taking in good faith and for value may be met by the plea of vis ac metus which would have been valid against his author.

To justify reduction on grounds of force and fear, violence or threats sufficient to overcome the fortitude of a reasonable man must have been used. In Sinclair v. R. McLaren & Co. Lord President Cooper commented 80 "It is now one hundred and twenty years since Bell remarked in his Commentaries 83 that force and fear is 'in modern times seldom a ground of reduction,' and since then there have been very few reported cases or none in which force and fear has been sustained as a whole ground of reduction. Such cases, like cases of alleged fraud, ought in my view to be specifically averred and clearly proved." One may regret that the late Lord President, who had expressed strong views on the changed position of married women in modern times, 82 did not deal with the view of Bell on force and fear—"that in the case of married women it still may occur; such persons being subject to the domestic tyranny of their husbands, without any means of exposure or protection." Tempora mutantur.

Threats, to justify reduction, need not be of actual physical violence, but may cover such cases as threatening a workman with loss of employment. 83 Threats to near relatives have the same effect as though they were directed against the party concussed into the bargain. Menaces, if they are to avoid a contract, must not be of something which the person applying pressure has a right to do. Thus if a security is elicited by a threat to take bankruptcy proceedings against a debtor, this cannot be challenged if payment alone is sought. But a threat to take bankruptcy proceedings might invalidate a promise to marry elicited under such pressure. Lord Migdale 84 recently approved the view of Lord Trayner in a divided Second Division to the effect that a plea of force and fear is only valid quoad a personal right if the defenders knew of this compulsion. 85 This view, however, must be construed, it is thought, by analogy with the effect of fraud.

Miscellaneous Aspects of Mala Fides

Before the rigid construction of the term "fraud" to conform to the English tort of deceit, "fraud" was used in Scotland, so far as contract was concerned, as a general term to imply lack of bona

80 June 3, 1952 (unreported).
81 i, p. 315.
82 e.g., Beith's Trs. v. Beith, 1950, S.C. 66.
83 Gow v. Henry (1899) 2 F. 48.
fides, and comprised a variety of situations in which one party had taken unfair advantage of the other. The miscellaneous aspects hereafter mentioned merely illustrate a more general principle.

**Extortion**

"While . . . there may be cases where the court will interfere on the sole ground of gross unfairness, the general rule undoubtedly is that parties who are sui juris and dealing with each other at arm's length are bound by their contracts whether they are fair or not." 86 The categories of contracts in which this power of reduction may be exercised are not closely defined, and the power itself is seldom invoked.

Erskine lays down that 87:

All bargains which from their very appearance discover oppression, or an intention in any of the contractors to catch some undue advantage from his neighbour's necessities, lie open to reduction on the head of dole or extortion, without the necessity of proving any special circumstance of fraud or circumvention on the part of that contractor.

In Murray v. Murray's Trs., 88 though there were vague suggestions of fraud, it seems that reduction of a gratuitous renunciation of valuable rights was permitted on the more general grounds that advantage had been taken of a young man who had just reached majority. 89 In the absence of a special relationship or facility, only in very exceptional cases would the modern law be likely to grant relief, if advantage were taken merely of ignorance and inexperience.

The business of moneylending is now controlled by statute. 90 In two actions raised before the Act of 1900 came into force, the court reduced moneylending contracts of an extortionate character, involving the same moneylender, Isaac Gordon. 91 Similar principles operate in judicial scrutiny of "penalty clauses" to take effect on breach of contract.

**Facility and Circumvention**

Facility and Circumvention is recognised as a ground for reduction of contract, or of a will, distinguishable from actual fraud in the narrowest meaning of that term. In McKellar v. McKellar. 92

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86 Gloag, *Contract*, p. 493; see also his general discussion and authorities quoted *ibid*.
87 IV, 1, 27.
88 (1826) 4 S. 374.
89 See also authorities referred to by the Lord Ordinary in Murray v. Murray's Trs., p. 577; McDiarmid v. McDiarmid, *ibid.* 583; cf. Kyle's Trs. v. Allan (1832) 11 S. 87; and see Gloag, *Contract*, p. 487.
90 Moneylenders Acts, 1900 (63 & 64 Vict. c. 51), and 1927 (17 & 18 Geo. 5, c. 21).
92 (1861) 24 D. 143.
Lord President McNeill described circumvention as "legal or constructive fraud." The approved form of issue left to the jury in such cases asks whether the pursuer was weak and facile in mind and easily imposed upon, and whether the defender (or someone on his behalf), taking advantage of the said weakness and facility, did by fraud or circumvention impetrate and obtain from the pursuer the deed, will or contract in question.93

"Facility" has not been precisely defined and includes states which would not amount to insanity, such as the weakening of faculties due to old age, alcoholism or severe illness. The question of facility 94 "does not depend altogether on the state of the mind in respect of mere intellect or understanding. It rather regards the state of the mind morally and constitutionally, whereby it may be liable either to undue influence induced by fraudulent pretences or to intimidation under peculiar relations between the parties."

There must be circumvention—that is, some unfair practice—used on the person said to have been imposed upon. In Love v. Marshall and Others 95 Lord Kinloch observed of circumvention, "This influence implies a course of deception ... which is fraud in grain, but not fraud perpetuated by a single specific act. Or it implies intimidation—meaning thereby not a single act of violence, but a general course of threats and harshness, so operating on the mind as to bring the individual within entire control.96 Mere facility and lesion alone are insufficient. A sick man is not lightly deprived by law of his contractual capacity.97

Undue Influence

Undue influence is a technical term of English law which has apparently been partially accepted in Scotland though not necessarily with the technical meaning. In England the term "undue influence" bears a different meaning in disputes regarding wills than in transactions inter vivos.98 The testamentary sense of "undue influence" in English law infers an element of coercion; such cases are covered in Scottish law by the doctrine of facility and circumvention, though there are debatable Scottish dicta which might support the view that undue influence in the sense of coercion of one who was not facile would avail to reduce a will.99 Quoad

93 And see McDougal v. McDougal's Trs., 1931 S.C. 102.
94 Per Lord Moncreiff in Cairns v. Marianski (1850) 12 D. 1286 at p. 1290.
95 (1870) 9 M. 291 at p. 297.
96 See also Horsburgh v. Thomson's Trs., 1912 S.C. 267.
97 See generally Gloag, Contract, p. 484.
99 e.g., Wels v. Grace (1898) 1 F. 233 at p. 277; Forrests v. Low's Trs., 1907 S.C. 1240 at p. 1258.
inter vivos dispositions, “undue influence” in English law has a differnt or “equitable” sense, which does not require the element of coercion. It is, however, doubtful if the twofold English meaning of “undue influence” has always been appreciated by the Scottish judges who have used it, or if they consciously used the words in a technical sense.

The expression “undue influence” in its English equitable sense does not imply coercion but “rests on the existence of a personal influence over the mind; on a personal relationship to which, if abused, the maxim ‘equity acts in personam’ applies in the name of conscience.” The court interferes, not because the influence of the ascendant party is wrongful in itself, but to prevent that influence being used to the detriment of the weaker party—who may indeed, as a result of the influence, have volunteered to benefit the person exercising the influence. Such cases are clearly not covered by the doctrine of facility and circumvention, nor by the looser concept of extortion.

The doctrine of “undue influence” in inter vivos transactions seems to have been received precariously after some hesitation into the law of Scotland in the case of Gray v. Binny. This was a case of parent-child relationship; and the principle was extended to avoid a gift made to a law agent by a client in Logan’s Trs. v. Reid. There have been suggestions that the doctrine might be extended to other relationships, but it cannot be regarded as generally received in Scots law as in English law.

The effect of fiduciary relationships generally on contract is beyond the scope of this book, and should be studied in the standard works.

2 Recently the Appellate Division in South Africa had also to consider this concept, and, without erecting it into a separate head of reduction with technical rules of its own, seem to have accepted it as a general equitable ground justifying restitutio in integrum: Preller v. Jordan, 1956 (1) S.A. 483 (A.D.). In popular language “improper influence” and “undue influence” may be inconsistent with bona fides.
3 Winder, loc. cit. 99. His views on the subject are adopted with acknowledgment.
4 See Tennent v. Tennent’s Trs. (1868) 6 M. 840; Smith Cuninghame v. Anstruther’s Trs. (1872) 10 M. (H.L.) 39. Kames, in his Principles of Equity, refers to “undue influence” in Book I, in a different sense from that here discussed.
5 (1879) 7 R. 332; see also Carmichael v. Baird (1899) 6 S.L.T. 369.
6 (1885) 12 R. 1094.
7 Gloag, Contract, pp. 528-529.
8 Lord Guthrie has recently reviewed the authorities on “undue influence” and has declined to extend the application of this concept: Forbes v. Forbes’s Trs., 1957 S.C. 325.
9 See Gloag, Contract, Chap. 31.
CHAPTER 38

EXTINCTION OF OBLIGATION

A contractual obligation may be extinguished by the following methods: 1. Discharge (acceptilation); 2. Performance or payment; 3. Compensation; 4. Novation; 5. Delegation; 6. Confusion; 7. Lapse of time; 8. Impossibility (rei interitus, frustration); 9. Breach. Redress in contract does not, of course, exclude remedies in delict, such as damages for misrepresentation or interdict against the inducing of breach of contract.³

DISCHARGE (ACCEPTILATION)

Acceptilation is the appropriate term for the discharge by a creditor of his right without payment or performance. A contract entered into orally may also be discharged in this manner; but if the contract was in writing, so also should be the discharge. (The specialities of the law on this topic must be studied in the standard works.)

PERFORMANCE OR PAYMENT

When a contractual obligation has been fully performed or paid it is at an end. There are certain technical rules of evidence which may be relied on to prove payment—such as apocha trium annorum, chirographum apud debitorem, and the presumption of payment in certain cases—such as counsel's fees and hotel bills. These rules, like those governing the appropriation of indefinite payments to discharge particular debts, must be studied in the standard works on contract and evidence.

A short statement on legal payment may be justified. Payment by cheque is good payment, but is subject to resolutive condition if the cheque is dishonoured. Under the Coinage Acts (1870-1946) gold is legal tender to any amount; silver or cupro-nickel up to £2; copper up to 1s. By the Currency and Bank Notes Act, 1954,² notes of the Bank of England if of a denomination of less than £5 are made legal tender in Scotland, but not, strictly speaking, £5 notes.³ It is an apparent paradox that bank notes of Scottish banks are not legal tender even in Scotland; before Hitler's war they had been given precarious recognition by the Currency (Defence) Act.

¹ See pp. 675, 739, 801, 835, ante.
² 2 & 3 Eliz. 2, c. 12, s. 1 (1) and (2).
³ Cf. English law, s. 1, ibid.
1939, s. 2 (2), which provided that the notes of Scottish banks should be accepted as legal tender until His Majesty by Order in Council should withdraw such recognition. Bank of England notes are legal tender in Scotland because that Bank was empowered to issue notes in succession to the former Treasury notes which had been introduced as a substitute for gold during the First World War. Had Malachi Malagrowther (the pseudonym under which Sir Walter Scott defended the Scottish paper currency in the Edinburgh Weekly Journal, when in 1825-26 the London administration proposed its abolition) still been with us, he might well have had some caustic comments to offer on this situation, especially since by the Bank of England Act, 1946, the Bank of England was nationalised in substance but not in name. References to Scots money do not refer to legal tender, but still may be encountered as a standard of value in questions of method of proof, and also in modern statutes, as, for example, the Income Tax Act, 1952, First Schedule, where the qualifications for General Commissioners are set out. Scots money is one-twelfth of the value of sterling, so that £100 (Scots) is thus the equivalent of £8 6s. 8d. sterling.

**Compensation**

"Compensation" is the appropriate term in Scots law for the right to set off one claim against another, so that, if equal in amount, both claims are extinguished, and, if they are not equal—the larger claim is extinguished pro tanto. The object of this rule is to prevent multiplication of law suits, and it rests upon the Act 1592, c. 141, which provided that "ony debt de liquido in liquidum instantlie verifiet be writ or aith of the partie befoir the geving of decreit be admittit be all Jugis within this realme by way of exception." Subject to exceptions in the law of bankruptcy, compensation can only be pleaded when the parties are debtor and creditor in their own right at the same time, and the two debts are liquid and actually due. In cases of bankruptcy even illiquid claims and those which are future or contingent may be set off against liquid claims.

**Novation and Delegation**

"Novation," in the strict sense, is the substitution of a new engagement or obligation by the same debtor to the same creditor, so as to extinguish the original debt. "Delegation" is the substitution,
with the creditor’s consent, of a new debtor for the old. In point of fact, the term “novation” is frequently used in modern practice to comprise both “novation” stricto sensu and “delegation.” The consent of three parties is always necessary in cases of “novation” in the sense of “delegation”—the original debtor, the new debtor and the creditor accepting the new debtor and discharging the original obligation. There is a certain presumption against novation, because a man is not lightly to be deprived of a right by implication; but novation can arise by implication if the circumstances warrant—as when traders continue to deal with a firm in full knowledge that there has been some change in the members of the firm.

**CONFUSION**

When the same person becomes both debtor and creditor in an obligation, and so would acquire not only the right to claim payment but also the liability to discharge it, the obligation is dissolved by “confusion”—since a person cannot be creditor and debtor to himself. This situation may arise when the creditor succeeds to the debtor’s estate, or the debtor to that of the creditor, or when a stranger succeeds to both. Confusion operates by force of law or not at all, and is subject to certain restrictions. It does not, for example, apply to feudal rights.

**LAPSE OF TIME (NOTICE: TACIT RELOCATION: PRESCRIPTION: LIMITATION)**

If no fixed period is set for the duration of a contract, either party may terminate it at will. It may, however, be necessary to give notice of termination, if want of notice would place the other party in difficulty or hardship. When a contract is of fixed duration, no notice is required except in the case of contracts of partnership, service and lease, where it is an established rule that notice must be given on either side of an intention to terminate the contract. In such contracts as lease or service, if notice is not given, the contract is kept in force by the doctrine of tacit relocation for a further period. Under the doctrine of tacit relocation, where notice of termination of contract is required and is not given, or where no notice is required and the parties continue in contractual relations without any new arrangement, a further contract must be implied. Accordingly, a contract containing the stipulations and conditions of

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8 Bell’s Principles, §§ 576–577.
The fortify possession of land will be equally fatal to the enforcement of claims. The positive prescription may fortify possession of land for twenty years on a defective title. The effect of the long negative prescription, which has been reduced from forty years to twenty by the Conveyancing (Scotland) Act, 1924, s. 17, is to extinguish an obligation, so that, even if the debtor admitted that he had been bound, his obligation would not revive. The negative prescription applies to all contractual and quasi-contractual rights—and is a bar to reduction of a contract on any extrinsic grounds such as fraud, but would not bar reduction on grounds of forgery. Prescription may be interrupted by written acknowledgment of the debtor, by citation, action or diligence, or by partial payment of capital or interest. Prior to the Conveyancing (Scotland) Act, 1924, the years of minority or like disability could be deducted in calculating the prescriptive period under the negative and (with one exception) under the positive prescription. For practical purposes, it may now be regarded as the law that, except in questions of servitude or right of way, the plea of *non valens agere* will not avail when the disability was intrinsic—such as minority. There may still be scope, however, for such a plea where extrinsic grounds can be shown—such as a fiar excluded by a liferenter, but Lord Justice-Clerk Thomson concluded that “there is no justification for extending the doctrine one inch beyond the decided cases.”

The Septennial Prescription of cautionary obligations (that is, contracts of guarantee) was introduced by the Act 1695, c. 5. When this prescription applies, it extinguishes the obligation after seven years, unless steps are taken to renew it.

There are also various statutory limitations of proof—commonly called prescriptions—which do not extinguish obligations, but alter the onus and method of proof. The Sexennial Prescription, by the Bills of Exchange (Scotland) Act, 1772, requires action to be taken

11 See *ante*, p. 288.
12 14 & 15 Geo. 5, c. 27, except in the case of servitudes and public rights.
14 *Supra.*
18 12 Geo. 3, c. 72.
on bills within six years, otherwise the constitution and subsistence of the debt contained in the bill must be proved by writ or oath of the debtor. The Vicennial Prescription, which was introduced by the Act 1669 c. 9, provides that, unless action is brought or diligence done within twenty years on obligations contained in holograph writings, they may only be proved by writ or oath of the debtor. The Triennial Prescription, based on an Act of 1579, c. 83, restricts to such proof claims made after three years for payment in respect of board and lodging, wages and salaries or tradesmen's accounts. The Quinquennial Prescription, introduced by the Act 1669, c. 9, applies to all bargains concerning moveables or sums of money provable by witnesses, and to ministers' stipends and rents. Here again, if the right is not enforced within five years, proof must be by writ or oath. It may be observed, that if reference is made to oath of the defender, he may not rest on a general denial, but must answer all relevant questions.

**IMPOSSIBILITY (REI INTERITUS; FRUSTRATION)**

The law regarding discharge of contract by supervening impossibility or frustration is still developing, due largely to the impact of two world wars upon commercial relationships. It is, however, generally accepted that, if after the formation of a contract certain circumstances arise, which, owing to the fault of neither party, render fulfilment of the contract impossible in any sense or mode contemplated by them, the contract terminates forthwith and both parties are discharged. Though the leading English and Privy Council decisions on frustration are quoted in the Scottish courts, and there is substantial agreement on many points, there are also important differences—in particular as to the underlying principle to which a court should give effect when it is argued that an agreement has been discharged by frustration. The origin of the Scottish law on this point—as Lord Cooper has pointed out with learning and lucidity—was one aspect of the wider question as to how the relations of two parties should be readjusted equitably by the court, when one had been unintentionally enriched at the expense of the other. In cases where the purpose contemplated by the parties had failed, it was assumed that the original obligation would be replaced by the equitable, obediential or quasi-contractual obligation of

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21 "Frustration of Contract in Scots Law" (1946) 28 Jour. of Comp. Leg. 1.
Restitution. Moreover, before a comprehensive theory of discharge of contract because of impossibility had emerged, the courts had been obliged in many early contract cases to decide the question—upon which party must fall the risk of accidental destruction of the subject-matter? These cases introduced the concept of *rei interitus* (destruction of the thing) into Scottish law. The idea of restitution and *rei interitus* thus anticipated the formulation of a general theory of discharge of contract by supervening change in essential circumstances. The first authoritative formulation of such a theory in Scottish law is in Guthrie’s editions of Bell’s *Principles*, where it is stated that “when by the nature of the contract its performance depends on the existence of a particular thing or state of things, the failure or destruction of that thing or state of things, without default on either side, liberates both parties.”

*Rei interitus*, or the death or illness of an individual, whose personal qualities were material to the contract, were clear cases for discharge of contract on the principle stated by Guthrie. This applied to destruction of the subject-matter in a contract of sale and also to like circumstances in a contract of location (lease or hire). In such cases the contract was terminated *rei interitus*; and the same principle applied where a ship, though not actually lost, had become totally unfit for the purpose for which she had been chartered: *London & Edinburgh Shipping Co. v. Admiralty*. The doctrine was carried further by two cases where leases were held to have been terminated by constructive *rei interitus*, though the actual subjects remained in being: *Tay Salmon Fisheries v. Speedie* and *Mackeson v. Boyd*. In the former case, a lease of salmon fishings was held to be discharged when the Air Ministry lawfully established

22 Stair I, 7, 7; Bankston I, 8, 23; Erskine III, 1, 10; Bell’s *Principles*, § 530; see “Restitution” discussed post, p. 624 et seq.

23 Guthrie’s somewhat surprising reference later in the section to “an implied condition” has been commented on by Lord Cooper, ref. note 21, supra.

24 Where the obligation is to pay money, the general rule is that this is exigible from the estate of a contracting party after his death, though cautionary obligations usually lapsed on the death of the principal debtor: *Gloag, Contract*, p. 361; cf. *Woodfield Finance Trust v. Morgan*, [1958] S.L.T. (Sh.Ct.) 14.


26 Allan v. *Robertson’s Trs.* (1891) 18 R. 932; *Duff v. Fleming* (1870) 8 M. 769.

27 1920 S.C. 309. In this case the party founding on frustration was responsible for the negligent navigation of the vessel which had been wrecked. Though liable for damages for the loss of the vessel, the defendants were held not to be liable for hire of the vessel after the date of the accident. If, as has been recognised in more recent English cases, the essence of frustration is that it should not be due to the act or election of the party, this case must be regarded as a dubious precedent: *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* [1935] A.C. 524; *Constantine SS. Line v. Imperial Smelting Corporation* [1942] A.C. 154. There may, however, be justification for a distinction between deliberate and negligent conduct resulting in prevention of a contract’s fulfilment.

28 1929 S.C. 593.

29 1942 S.C. 56.
a bombing range in the fishing area, which made it impracticable for the tenant to exercise his right of fishing; while in the latter case, requisition of a furnished mansion house and grounds by the Government was held so analogous to destruction as to determine the lease. The question was one of degree.\textsuperscript{31} Death terminates contracts involving \textit{delectus personae}\textsuperscript{32} as does serious illness which prevents an obligant from performing his part.\textsuperscript{33} The same conditions would presumably apply in Scotland on the conscription, internment or imprisonment of an obligant.\textsuperscript{34}

The principle of frustration, however, goes further than \textit{rei interitus} actual, partial or constructive. Frustration implies the premature determination of a lawful contract, which is in operation, due to an intervening event or change of circumstances so fundamental as to be regarded by law as striking at the root of the agreement. Performance in a literal sense or performance of some of the stipulations may be possible—yet the contract may be regarded as frustrated.\textsuperscript{35} Thus in \textit{Jackson v. Union Marine Insurance Co.}\textsuperscript{36} a contract was held to be frustrated when a vessel, due to having gone aground in November, was so damaged as to be unable to proceed to South America until August to load a cargo. The obligation had been to arrive with all convenient speed, unless delayed by dangers and accidents of navigation. Though in a literal sense this could be done, it was not performance as contemplated, and the charterers were held entitled to throw up the charter in the month of February. The intervening event may often be a change in law, which makes further performance illegal and thus, in law, impossible. It seems that a change in foreign law has a like effect on contract.

It is not every supervening event affecting performance which will discharge a contract, though, in this developing branch of the law, it is possible that the courts will not consider themselves too strictly bound by precedents formulated before the broad underlying principle of frustration had been clearly discerned. A rise in prices or wages will not avoid a contract, though the position of one party may be seriously affected. It has also been said that violent or

\textsuperscript{31} Cf. the different view of English law with regard to lease. In \textit{Cricklewood Property, Ltd. v. Leighton's Investment Trust} [1945] A.C. 221 at p. 239, Lord Wright notes the divergence; while Lord Normand in \textit{Mackeson v. Boyd}, supra at p. 63, gives an abrupt warning against incautious reliance on English authorities in such cases.

\textsuperscript{32} \textit{Hoey v. MacEwan & Auld} (1867) 5 M. 814.

\textsuperscript{33} \textit{Manson v. Downie} (1885) 12 R. 1103; \textit{Robinson v. Davidson} (1871) L.R. 6 Ex. 269; Bell's Principles, § 179.

\textsuperscript{34} See the English cases \textit{Unger v. Preston Corporation} [1942] 1 All E.R. 200; \textit{Marshall v. Glanville} [1917] 2 K.B. 87.


\textsuperscript{36} (1874) L.R. 10 C.P. 125.
unwarrantable interference by third parties will not excuse performance,\textsuperscript{37} but it may be doubted whether this would be so in all circumstances. By contrast with the English Coronation cases, such as Chandler v. Webster\textsuperscript{38} and Krell v. Henry\textsuperscript{39} there is authority in Scotland for the view that the non-occurrence of an expected event—such as a Coronation procession—need not avoid a contract based on the assumption that it would occur.\textsuperscript{40} Both on grounds of general equity and also indeed by the fiction of implied term, this view is justifiable. If seats are let in a shop window to view a procession, and it does not take place owing (say) to illness of a personage in whose honour it is held, the shopkeeper is deprived of the use of the window for normal purposes. Moreover, had the parties contemplated the event at the time of contracting, it is probable that the purchaser of the seats would have been willing to accept the risk of the procession being cancelled.

In the leading Scottish authority on frustration, James B. Fraser & Co. v. Denny, Mott & Dickson, Ltd.,\textsuperscript{41} it was held that an option to purchase a timber yard—an option which was subsidiary to a contract for trading in timber—could not be exercised when, as the result of war and orders made by the Minister of Supply, trading between the parties became impossible, and the main purpose of the contract was thus frustrated.

There has been much discussion in England as to the theoretical basis of the doctrine of frustration—such as the theory of an implied term, the theory that the foundation of the contract has disappeared, or the theory that the court imposes a just solution in the circumstances of each case. It would be superfluous to discuss these questions in detail here. Yet, since Scottish appeals lie to the House of Lords, note must be taken of the fact that the theory of the "implied term" still has some support in England especially through obiter dicta by the House of Lords in British Movietonews v. London Cinemas.\textsuperscript{42} This theory holds that the court implies a condition for discharge of contract, if it can be assumed that the parties at the time of contracting would have provided for discharge in the circumstances which have supervened. More recently, however, in Davis Contractors, Ltd. v. Fareham U.D.C.\textsuperscript{43} the "implied term" theory has been treated with less favour in England. Lord Reid observed,\textsuperscript{44} "It appears to me that frustration depends, at least in

\textsuperscript{37} Milligan v. Ayr Harbour Trs., 1915 S.C. 937, per Lord Guthrie.

\textsuperscript{38} [1904] 1 K.B. 493.

\textsuperscript{39} [1903] 2 K.B. 740.

\textsuperscript{40} Gloag, Contract, 2nd ed., pp. 353–354; see also Treviaion v. Blanche, 1919 S.C. 617.

\textsuperscript{41} 1943 S.C. 293, aff. 1944 S.C.(H.L.) 35.


\textsuperscript{43} [1956] A.C. 696.

\textsuperscript{44} At pp. 720–721. See also Lord Radeliffe at pp. 728–729.
most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.” Lord Wright had demonstrated in the Scottish case of *James B. Fraser & Co. v. Denny, Mott & Dickson* that the theory of implied term is in reality a fiction, and that in fact the court has formulated the doctrine of frustration by virtue of its inherent jurisdiction. When the object contemplated has been rendered impossible, it is contrary to justice that the contract should be enforced according to a literal reading which does not imply the real object contemplated by the parties.\(^{49}\)

The court, on consideration of the terms of a contract and of the circumstances which existed when it was made and of the events which have supervened, may hold that the contract should no longer bind.\(^{47}\) The court does what seems just in circumstances for which the parties never provided. As Lord Cooper has stressed\(^{48}\) “this in essence has been the Scottish view for more than three hundred years, and we need nothing better.” If English law is to return to the theory of “implied term” it may be hoped that Scottish law on this point may be permitted by the House of Lords to maintain a different interpretation of the underlying principle of frustration.\(^{49}\)

When frustration operates, it does so irrespective of the will of contracting parties—and indeed overrides any provisions which they may have made for regulating their relations on the possible occurrence of the event which has supervened.\(^{50}\) The subsequent relations of the parties to a frustrated contract are regulated by the principle of restitution.\(^{51}\)

**Breach**

In some cases breach of contract may entitle the party aggrieved thereby not only to sue in respect of such breach, but also to hold the contract as discharged, and himself free from all further performance. If a party—either by words or conduct—\(^{52}\) has shown

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45 1944 S.C.(H.L.) 35, at pp. 43-44.


47 This is always after actual investigation of the facts; *Head Wrightson Aluminium, Ltd. v. Aberdeen Harbour Commissioners*, 1958 S.L.T.(Notes) 12.

48 (1946) 28 Jour. of Comp. Leg., p. 5.

49 But see for a different view, Gloag and Henderson, 5th ed., pp. 100-101, and, generally, Chap. XI on “Impossibility of Performance.”


fundamental disregard of the contractual faith reposed in him, the option of the other to rescind may arise in three sets of circumstances.

The party in breach may have renounced his liabilities before the time for performance has actually come. This is known as "anticipatory breach." Generally speaking, the party who receives intimation that the other will not perform his part of the contract is not bound to accept this as final. If the disappointed party avails himself of his option to hold the contract as discharged, a subsequent offer of performance—even within the contract period—comes too late. It may be noted, however, that the option to treat a contract as repudiated by breach can only arise when, as is usual, the stipulations for performance on either side are interdependent, so that the party disappointed by breach may hold himself free from his own counter-obligations. In Langford & Co. v. Dutch it had been held that where the party repudiating intimated that she did not wish to receive the stipulated performance (exhibition of an advertising film) over a period of time, and was prepared to pay damages on that account, the other party should sue for general damages rather than bring an action later for the full contract price in respect of performance which the party in breach did not wish to receive. This view, which has at least the justification of common sense, was rejected by a narrow majority (including one of the Scottish Lords of Appeal) in the very recent case of White & Carter (Councils), Ltd. v. McGregor. In short, the facts were that the pursuers supplied litter bins to local authorities and made their profit from exhibiting advertisements thereon. The defender's manager entered into a contract for an advertisement to be exhibited for three years, but later on the same day the defenders sought to cancel the contract. The cancellation was refused, and the pursuers, having exhibited the advertisement agreed on for the period of the contract, sued for the full price. This they were held entitled to do, and Langford & Co. v. Dutch was overruled. The majority in the House of Lords decided that the contract as agreed upon remained in full effect, even though the party who was not in breach was tendering a performance which was not desired. This decision has been greeted with fairly general surprise, and Lord Keith—who

54 Gilfillan v. Cadell & Grant (1893) 21 R. 269.
58 Sup. cit.; which accords with the U.S. view, e.g., Rockingham County v. Luten Bridge Co., 1929 66 A.L.R. 735.
59 e.g., A. L. Goodhart (1962) 78 L.Q.R. 263.
60 1962 S.L.T. p. 12 et seq.
was one of the First Division who decided Langford & Co. v. Dutch made a powerful dissenting speech in the House of Lords. One might add to his arguments the hypothetical one that had the defenders ceased to carry on the business advertised, it is difficult to conceive that good sense could justify the advertisement of a service which had ceased to be available. One day the question may be reopened in the Law Reform Committee.

Again, if one party voluntarily puts it beyond his power to perform the contract at the stipulated time, this may be held as the equivalent of an immediate refusal to perform, and therefore as repudiation. Thus where the owner of a newspaper engaged a manager for five years, and two years later disposed of the paper, it was held that this entitled the manager to sue forthwith for damages in respect of the loss of the remaining period of employment.

A material breach of contract may also entitle the party prejudiced to repudiate the agreement; but not all breaches will justify such a step. Thus in Wade v. Waldon the pursuer, known professionally as George Robey, had agreed with the defender to perform as a comedian in the latter's theatre for one week at a salary of £350. The contract was subject to certain rules, one of which provided that “all artistes engaged must give fourteen days' notice prior to such engagement, such notice to be accompanied with ‘bill matter’” The pursuer failed to send “bill matter” in time, and the defender, on this account, refused to let him appear, and treated the contract as discharged. It was held that in the circumstances the defender was not justified in his attitude, and was himself liable to an action for breach of contract.

ARBITRATION

In questions of alleged repudiation or frustration of contract, a dispute between the parties may arise as to whether their differences must be settled by arbitration in accordance with a term of the contract, or whether the arbitration clause falls with the terms contemplating performance of contract. It has always been competent by the law of Scotland for parties to insert in their contracts a clause binding themselves to refer future disputes to arbitration, and to exclude the jurisdiction of the courts to inquire into the merits of the disputed matters. Gloag considered that an arbitration clause was a clear example of an obligation separate from and independent of other

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61 N.B. Ry. v. Benhar Coal Co. (1886) 14 R. 141.
64 See also Stewart Roofing Co. v. Shanlin, 1958 S.L.T.(Sh.Ct.) 53; but cf. pp. 567, 772, ante.
65 Hamlyn v. Talisker Distillery (1894) 21 R.(H.L.) 21 at p. 27.
terms of a contract, and, provided that it was expressed in terms sufficiently wide to cover the dispute which had arisen, would be enforceable—even, e.g., to assess damages, in cases of repudiation, or to adjust the relations of the parties after further performance had been prevented by frustration. Naturally, a clause which provided merely for arbitration regarding disputes in the working out of a contract (executory arbitration) would not be wide enough in scope to cover disputes arising when performance had ceased on repudiation or frustration. Nor, again, is an arbitral award binding for all time on a party who is free to withdraw from a union, the rules of which provide for arbitration.

An agreement to refer (the submission or reference) need not be in probative form, and need not now name the arbiter. Unless statute lays down a particular method of arbitration, the reference is usually to a single arbiter, or to two arbiters and an oversman. The arbiters’ decision, or that of the oversman where two arbiters disagree, is final in fact and law. Though not enforceable directly, indirect effect is usually given to the award by virtue of a clause (in the deed providing for reference) of consent to registration for preservation and execution. Reduction of an award is competent, inter alia, on grounds of concealed interest of the arbiter; if the arbiter proceeds ultra fines compromissi; if he violates principles of natural justice; or if he fails to deal with the questions submitted to him.

66 Arbitration clauses, e.g., in building contracts, are normally drafted in very wide terms: see Port Glasgow Magistrates v. Scottish Construction Co., Ltd., 1960 S.L.T. 319.


69 See generally Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13); there are also numerous statutory provisions for arbitration in particular cases, e.g., agricultural leases.
CHAPTER 39

REMEDIES FOR BREACH OF CONTRACT

The primary right of the creditor is to enforce the act or abstention for which he has stipulated. Accordingly, the principal remedies for breach of contract are decree of specific implement and of interdict. There are, however, cases where, on grounds of equity or public policy, the law withholds these remedies, and leaves the creditor to the alternative redress of damages. In addition to the main remedies for breach of contract, the law also provides certain supplementary remedies against a person in breach of his contract.

SPECIFIC IMPLEMENT

The remedy of specific implement is accepted by the institutional writers 1 as the ordinary means whereby performance of a positive obligation can be compelled. The decree ad factum praestandum must be definite, and will not be granted on vague and indefinite summons. In Stewart v. Kennedy 2 Lord Herschell, 3 Lord Watson 4 and Lord Macnaghten 5 took the opportunity to contrast specific implement, as the ordinary remedy in Scottish procedure, with "specific performance," which in English procedure was an extraordinary remedy. This distinction is due to the fact that in Scotland the equitable jurisdiction has never been separated, as in England, from the ordinary jurisdiction of the courts. It is probable that in practice there is now no wide divergence between the application of the corresponding remedies in Scotland and England. In Scotland it is within the discretion of the court in exceptional cases to refuse decree of specific implement, when to grant it would be clearly inequitable—as where it would impose exceptional hardship on the defender. 6 Apart from considerations of hardship, the courts will refuse decree of specific implement of an obligation to pay a sum of money, or for delivery of an article which is readily procurable in the

1 Stair I, 17, 16; Erskine III, 3, 86; Bell’s Principles, § 29.
2 (1890) 17 R.(H.L.) 25.
3 p. 5.
4 p. 9.
5 p. 11.
6 Stewart v. Kennedy, supra, at p. 9; Moore v. Paterson (1881) 9 R. 337; Grahame v. Magistrates of Kirkcaldy (1882) 9 R.(H.L.) 91; Beadmore v. Barry, 1928 S.C. 101; aff. 1928 S.C.(H.L.) 47; Winans v. Mackenzie (1883) 10 R. 941 (an attempt by a tenant of a large shooting estate to force his landlord to evict cottars, who, it was said, held on an old Highland tenure).
market,\textsuperscript{7} or when compliance with or enforcement of the decree is impossible.\textsuperscript{8} Moreover, when to enforce the obligation would involve an intimate relationship—such as marriage, service or partnership—decree of specific implement would be refused on grounds of public policy; and the pursuer would be left to sue for damages instead. It may be observed, moreover, that as the courts are extremely reluctant to enforce decrees of specific implement by the sanction of civil imprisonment, pursuers usually include an alternative conclusion for damages in any event.

\textbf{INTERDICT}

Interdict is the means by which breach of a negative undertaking is enforced.\textsuperscript{9} This remedy is generally available to restrain the commission of a wrongful act. Erskine refers\textsuperscript{10} to the use of suspension by way of interdict, while, from an early period in Scottish law decrees were issued to restrain the commission of wrongs, a jurisdiction which the Court of Session assumed from the time of its establishment.

Like specific implement interdict is an equitable and, therefore, to some extent, a discretionary remedy, so that it is competent for the court to refuse it.\textsuperscript{11} Thus in \textit{Winans v. McRae}\textsuperscript{12} interdict was refused to the pursuer, a Londoner who had acquired a tenancy of 200,000 acres in the Highlands of Scotland, when he complained of the trespass on his land of a cottar’s pet lamb. Mr. Winans’ appearances in the Law Reports\textsuperscript{13} suggest that he would have found Nathan, Isaiah and Elijah somewhat uncongenial companions.

There is very little Scottish authority as to how far a positive obligation may be enforced by interdicting conduct inconsistent with this undertaking. In certain Scottish cases where interdict was granted, the indirect positive effect was not considered—as where a vassal, who had undertaken to roof his tenements with blue Scotch slates, was interdicted from using slates of another kind.\textsuperscript{14} It has, however, been regarded as a ground of objection to the granting of interdict in Scotland that it would have a positive effect—by compelling performance through interdicting inconsistent conduct.\textsuperscript{15}

\textsuperscript{7} Union Electric Co. v. Holman, 1913 S.C. 954.
\textsuperscript{8} McArthur v. Lawson (1877) 4 R. 1134; Gall v. Loyal Glenbogle Lodge (1900) 2 F. 1187.
\textsuperscript{9} Bell’s Principles, § 29; Stewart v. Stewart (1899) 1 F. 1158.
\textsuperscript{10} IV, 3, 20.
\textsuperscript{11} McClure v. McClure, 1911 S.C. 200; Grahame v. Magistrates of Kirkcaldy, supra, esp. per Lord Watson.
\textsuperscript{12} (1885) 12 R. 1051.
\textsuperscript{13} See also Winans v. Mackenzie, supra, note 6.
\textsuperscript{14} Burn Murdoch, \textit{Interdict}, 1933, p. 168 et seq.; also Gloag, \textit{Contract}, p. 663.
REMEDIES FOR BREACH OF CONTRACT

RETENTION

Where rescission of a contract on grounds of the breach would not be to the advantage of the person entitled to performance, or where the failure of performance is not sufficiently material to justify rescission, the creditor may avail himself of the remedy of retention—that is of withholding performance on his side until the other fulfils his contractual obligations. Thus, a tenant may retain rent on account of the landlord’s failure to carry out repairs under the contract of lease, unless the right has been excluded by agreement, or a lien may be exercised and a particular thing retained until some debt is paid. A debt which is admittedly due for payment, cannot, however, be withheld on a plea of retention in respect of a claim for damages which does not arise out of the same contract or unless the creditor in the liquid claim is bankrupt. As Lord Justice-Clerk Alness observed in Smart v. Wilkinson,

there is only one exception . . . to the principle that an illiquid claim cannot be pleaded by a defender in answer to a liquid claim by a pursuer, and that is where the counterclaim arises out of the same contract as the claim. The exception is based on the familiar principle that a person who is himself in breach of a contract cannot claim implement of that contract as against another person.

IRRITANCES, PENALTIES, LIQUIDATE DAMAGES

Parties to a contract often endeavour to provide for the possibility of breach by conferring on the party aggrieved the right to visit such failure with consequences which would not always be inferred by law. There are, however, certain restrictions on such provisions. A conventional provision for failure to perform may take the form of an irritancy or a penalty, or both combined. An irritancy is the right of one party to cancel the contract in the event of some failure by the other; a penalty is a provision that in like circumstances the party in breach shall incur a forfeit. In the one case he loses rights under the contract; in the other he is deprived of money or property to which he has title independent of the contract.

Irritancies are either “legal”—that is imposed by the general law, such as irritancies of feus or leases—or “conventional”—that is provided for by contract. The law does not discourage provisions for irritancy, though in the case of “legal” irritancies the party in default may “purge” them by tendering payment of feu-duty or rent before decree. Conventional irritancies are, however, enforced strictly according to the terms without regard to hardship.

10 Skene v. Cameron, 1942 S.C. 393.
17 1928 S.C. 383 at p. 387.
18 His Lordship was not considering cases of insolvency.
The view was expressed by the late Professor Gloag \(^{20}\) that a party who elects to enforce an irritancy is not thereby debarred from claiming damages for the breach of contract which also justified enforcement of the irritancy. This seems to be contrary to principle, and the reasoning of Lord Young in *Walker's Trs. v. Manson* \(^{21}\) seems preferable: "It is said that if the landlord had terminated the lease as otherwise therein provided for he would have had a claim for damages, and therefore that the renunciation included a reservation of that claim; but I am as clear as I can be about anything of the sort, that if he had terminated the lease as he had a right to do he would have had no claim to damages. He cannot possibly claim damages for what he himself does."

A provision in a contract for the subjection of one party to a penalty in the event of breach will not be enforced by the courts, unless the provision can be construed as a genuine pre-estimate of the damage which will be sustained through breach of contract—that is liquidate damages. The principle was stated by Lord Young in *Robertson v. Driver's Trs.* \(^{22}\): "if . . . the penalty be truly a penalty—that is, a punishment—the court will not allow that, because the law will not let people punish each other."

The attitude of Scots law towards penalties has changed noticeably over the centuries. Before the Reformation, when the influence of Canon law was strongly opposed to usury, the courts refused effect to penal stipulations. Thus, in *Home v. Hepburn*, \(^{23}\) it was observed that *de practica regni* only damage suffered could be recovered and not conventional penalties, "*quia sapiunt quondam usuram et inhonestum quaestum.*" In this particular case, however, the judges made an exception, because the penalty involved an Englishman, and the defenders were condemned in *odium anglorum, in favorem rei publicae*. Spoiling the Egyptians was not in the same category as oppressing the lieges. After the Reformation, however, the institutional writers \(^{24}\) followed the Roman law regarding the *stipulatio poenae*, and recognised the enforceability of penal stipulations—subject to the power of the courts to modify exorbitant penalties. In this connection reference was often made to the *Lex Unica de*

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\(^{20}\) *Contract*, p. 669. The case on which he mainly relies, *Nelson & Sons v. Dundee East Coast Shipping Co.*, 1907 S.C. 927, was in essence an instance of fundamental repudiation by the party in breach. See also D. M. Walker, *Damages*, pp. 499–500.

\(^{21}\) (1886) 13 R. 1198 at p. 1201; see also *Buttercase & Geddie's Tr. v. Geddie* (1897) 24 R. 1128. Irritancy of the feu, as has been said, annihilates the feu contract and any stipulation expressed therein: *Malcolm v. Donald*, 1956 S.L.T.(Sh.Ct.) 101.

\(^{22}\) (1881) 8 R. 555.

\(^{23}\) (1549) Mor. 10,033.

\(^{24}\) Stair, I, 7, 14–20; IV, 18, 3; Bankton, I, 23, 75; Erskine, III, 3, 86; Kames, *Equity*, 4th ed., p. 423; Bell, *Commentaries*, I, 699; *Principles*, § 34.
Sententiis,\textsuperscript{25} which restricted claims to twice the value of the subject-matter of contract. One obvious advantage of the penal stipulation, controlled by judicial power to modify exorbitant claims, is that the extent of the damage suffered is actually known at the time the penalty is claimed, and the onus lies on the defender to show that it is exorbitant. This makes a penalty clause a more effective compulsor than do the rules regarding liquidated damages—which depend on the parties’ intention and guess-work at the time of concluding their contract. Indeed, though the Privy Council superimposed the English concept of liquidated damages on South African law \textsuperscript{26} (where the background was, as Lord Tomlin noted, very similar to that of Scotland), legislation has now restored there the validity of penal stipulations subject to judicial modification when exorbitant.

Though an authoritative reorientation of the law of Scotland regarding penalties was effected in 1863,\textsuperscript{27} it was not until 1912 \textsuperscript{28} that the last traces of the law regarding penal stipulations was eliminated.

The usual cases in which the question of an illegal penalty arises are those where, under a clause in the contract, provision is made for payment of a sum of money in the event of a party being in default. The principle is in fact wider, and operates to restrict the literal application of clauses limiting the right to redeem a subject conveyed in security (\textit{pactum legis commissoriae in pignoribus}). On the other hand, a provision for resale to a party in a certain event (\textit{pactum de retrovendendo}) is not thus restricted.\textsuperscript{29}

The modern tendency is to uphold, as genuine pre-estimates of damage, contractual provisions binding a party to pay fixed sums in the event of breach of contract—provided always that they bear a reasonable relation to the loss likely to be sustained. In determining whether such provisions are penalties or genuine attempts to assess liquidate damages, the courts are not bound by the phraseology of the parties—thus, the use of the expression “penalty” is not conclusive, and a provision so described may be construed as an assessment of liquidate damages.\textsuperscript{30} If the provision is construed to be a penalty, nothing can be recovered except on proof of actual loss—but, on the other hand, if greater loss can be proved than what was anticipated at the time of contract, this can be recovered.\textsuperscript{31} If the provision for payment in the event of breach is construed as liquidate damages, no loss in excess of this estimate can be recovered.

\textsuperscript{25} C. 7, 47.
\textsuperscript{26} Pearl Assurance Co. v. Union Government [1934] A.C. 570.
\textsuperscript{27} Craig v. McBeath (1863) 1 M. 1020.
\textsuperscript{28} Dingwall v. Burnett, 1912 S.C. 1097.
\textsuperscript{29} Stair II, 10, 6.
\textsuperscript{30} Clydebank Engineering Co. v. Castenada (1903) 5 F. 1016; (1904) 7 F.(H.L.) 77; [1905] A.C. 6.
\textsuperscript{31} Dingwall v. Burnett, supra.
The rules for construing clauses stipulating for payments on breach are admirably summarised by Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co., Ltd.*:

1. Though the parties to a contract who use the words “penalty” or “liquidated damages” may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

   (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

   (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.

   (c) There is a presumption (but no more) that it is penalty when “a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.”

On the other hand:

   (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

It may be well to stress that a “penalty clause” is not to be read as a licence to break a contract upon payment of the sum specified. The primary remedies of enforcing performance—specific implement and interdict—still remain available.

The law regarding penalties in hire-purchase contracts has been admirably summarised by Professor Gow. Most such contracts include “minimum hiring clauses,” which provide that, even after

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33 Clydebank Engineering Co. v. Castenada, *sup. cit.*
35 Kemble v. Farren (1829) 6 Bing. 141.
return of the subject hired, the hirer shall nevertheless pay a sum equivalent to the amount of the unpaid instalments—or, at least, a high proportion of what that amount would be. If the hirer exercises his option to return the thing hired, then he is not in breach of contract, and the law regarding penalties and liquidated damages does not come into operation.\(^{39}\) On the other hand, if the owner elects to terminate the contract for breach by the hirer and repossesses the subject, a clause requiring the hirer to pay the same amount as he would have been bound to pay had he exercised his option may well be treated as a penalty.\(^{40}\) There is point in Professor Gow's comment,\(^{41}\) "Perhaps regret may be expressed that the courts have given such a rigid interpretation to minimum hiring clauses that the rule is that the doctrine of penalty is not applicable if the sum stipulated for is not payable on the breach of an agreement, but on the exercise of a power by the hirer."

**DAMAGES**

A claim for damages may be made, not only when the contract has been discharged because of breach, but also where there has been a breach of some of the contractual terms in the course of carrying out the main purpose of the obligation. Moreover, in cases where interdict or specific implement are not granted,\(^{42}\) the pursuer is left to seek redress through an award of damages. Damages are assessed with a view to compensation, but even if the pursuer fails to prove actual loss through breach of contract, he is entitled to nominal damages.\(^{43}\) A party whose contract has been broken is generally \(^{44}\) bound to take all reasonable steps to minimise his loss, and cannot recover a greater sum in damages than the measure of his loss had he taken these steps. Thus, a servant who has been dismissed wrongfully must seek other employment.\(^{45}\) He is not, however, bound to adopt extraordinary measures to avert loss.\(^{46}\)

39 Bell Bros. (H.P.), Ltd. v. Aitken, 1939 S.C. 577. This case has been distinguished in the sheriff court when, in addition to forfeiture, depreciation money was claimed: Mercantile Credit Co. v. Brown, 1960 S.L.T.(Sh.Ct.) 41; Union Transport Finance Co. v. McQueen, 1961 S.L.T.(Sh.Ct.) 35.

40 The House of Lords, which has recently approved Cooden Engineering Co. v. Stanford [1953] Q.B. 86 in Campbell Discount Co. v. Bridge [1962] 2 W.L.R. 439, would probably apply similar principles in a Scottish appeal. In any event this decision will be very powerful persuasive authority in Scotland.

41 The Law of Hire Purchase, p. 111.

42 See ante, pp. 854-855.

43 Certain inroads seem to have been made upon this principle by the recent House of Lords decision in White & Carter (Councils), Ltd. v. McGregor, 1962 S.L.T. 9, discussed pp. 851-852, ante.

44 Ross v. McFarlane (1894) 21 R. 396; Warin & Craven v. Forrester (1876) 4 R. 190; (1877) 4 R.(H.L.) 75.

The measure of damages in contract is accurately and succinctly stated by Gloag: "A party who breaks his contract is liable for those consequences which a reasonable man, possessing the knowledge which the party had at the time of contracting, would have anticipated." It is thought that the leading cases merely demonstrate this admirable condensation of the law.

It has been observed in the House of Lords that "the quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases"; and again, "Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and not too rigidly applied." Among these general rules is that relating to "remoteness." Parties to a contract may by express agreement or disclosure of particular circumstances bring within the scope of recoverable damages even improbable or indirect consequences of breach.

The effect of the decisions—in particular of Victoria Laundry (Windsor) Ltd. v. Newman Industries—is well summarised by Professor Walker, "The principles may therefore be summed up in the phrase 'the reasonable contemplation of the parties, having regard to their knowledge.'" In this case, various propositions were stated by Asquith L.J., which may for convenience, be quoted verbatim:

1. It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. . . . This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,

2. In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

3. What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

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51 [1949] 2 K.B. 528.

52 Damages, p. 29.

4. For this purpose, knowledge "possessed" is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject-matter of the "first rule" in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

5. In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.

6. Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.

The law is not clear as to when damages may be recovered in Scots law for inducing a party to alter his position in the belief that he had entered, or was about to enter, a contractual relationship. As is discussed elsewhere damages in delict are recoverable for loss caused by a fraudulent misstatement, and may possibly be recoverable for some negligent misstatements. Apart from delictual liability, however, a claim in recompense may be competent in some circumstances, and it is argued—and would be consistent with principles of justice recognised elsewhere—that damages could be recovered if an offer was revoked before acceptance after the offeree has been put to expense. Moreover, though both parties to an ostensible contract may have acted in good faith, if it subsequently appears that there was in fact no subject-matter, and therefore no contract, a claim for damages representing the "negative" or "reliance" interest may well

54 (1854) 9 Ex. 341.
56 At p. 30.
57 At pp. 674, 739, 834-835, ante.
58 Bell, Principles, § 73; D. I. C. Ashton-Cross, "The Scots Law regarding Actions of Reparation based on False Statements" (1952) 63 Jur.Rev. 199.
be competent. If a vessel, believed to be stranded, is sold to salvors after, in fact, she has sunk, and the salvors had incurred expense in an effort to recover her, it might seem the reasonable solution to reimburse them for their "reliance interest."—i.e., their actual outlays—though not their expectation of profit. If loss has to fall somewhere, it would seem more just that it should rest on the party who initiated the transaction in the first place. This doctrine of *culpa in contrahendo* (which does not here necessarily imply *culpa* in the sense of fault) has yet to be considered fully by the Scottish courts. There are, however, straws to be clutched at and ample precedents from systems of comparable inspiration to that of Scotland.

One aspect of abortive contract is encountered when an ostensible agent acts without authority on behalf of a principal who refuses to ratify. There are theoretically three possible solutions to this problem. The ostensible agent may himself be held liable in delict for the loss inflicted by his false representation; or he may be held liable contractually on a subsidiary contract warranting his authority; or the pseudo agent may be answerable under the doctrine of *culpa in contrahendo*. In the leading English case of *Collen v. Wright*, an ostensible agent for a principal who refused to ratify was held liable upon what was in effect a subsidiary contract implying that he had authority to act; and the fact that the third party entered into a transaction was regarded as sufficient "consideration." In Scotland the case of *Anderson v. Croall* seems to have followed this English lead, though, of course, consideration was irrelevant to the Scottish interpretation, and it has not been decided, as in England, that damages cannot (apart from fraud) be recovered in delict for loss caused by non-physical means such as a negligent statement.

It must be stressed that a pursuer may often have an alternative claim in delict, and may elect to pursue it if he is likely to recover larger damages than for breach of contract. If, for example, a person has sustained personal injuries through the defenders' negligent breach of a contractual duty of safe carriage, the pursuer may prefer to bring

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59 There are three interests which a party to a "contract" which has miscarried may wish protected, namely, (i) the "expectation, positive or affirmative" interest, i.e., the position in which the pursuer would have been had the contract been fulfilled; (ii) the "restitution" interest, e.g., the right to recover the price handed over; (iii) (between the expectation and restitution interests), the "reliance" or "negative" interest, i.e., the restoration of a pursuer to the position in which he would have been had the contract never been contemplated at all.

60 For a concise statement in English, see H. Schwenk, "Culpa in Contrahendo in German, French and Louisiana Law" (1940) 15 Tulane Law Rev. 87; also P. Stein, *Fault in the Formation of Contract* in *Roman Law and Scots Law*, p. 83.


62 (1903) 6 F. 153. The same English influence is apparent in the law of South Africa which has developed from the same Civilian principles as has Scots law; see de Villiers & Mackintosh, *The Law of Agency in South Africa*, 2nd ed., p. 291.
his action in delict and to assert a right to jury trial which would not be available to him were he claiming damages for breach of contract. In *Gilmour v. Simpson* 63 a painter employed by a firm engaged to paint the pursuer’s farmhouse used a blow lamp negligently with the result that the house was destroyed. In an action claiming damages on grounds of negligence the same principles were applied in assessing damages as had been invoked in *Hutchison v. Davidson,*64 where there was no contractual relationship at all.

A recent Outer House opinion of general interest on the subject of professional negligence was delivered by Lord Cameron, who considered the liability of a surveyor who had failed to mention the presence of woodworm in subjects he had been employed to inspect on behalf of a prospective purchaser. Lord Cameron decided 65 that the proper measure of damages was the difference between the price actually paid by the purchaser (as representing the market value of the subjects on the basis of the report) and the price which the subjects would have fetched on the basis of their actual condition.

The House of Lords decided in *Gourley v. British Transport Commission* 66 that in assessing damages there should be deducted the amount for which the plaintiff would have been liable in tax. Otherwise he would, it was said, be overcompensated for his loss. This, of course, already happens where a pursuer is insured—since the wrongdoer cannot reduce his liability by showing that the pursuer has been in part compensated ex aliunde. Though the principle in Gourley’s case has been generally accepted in Scottish practice, the decision itself is not binding on the Scottish courts, nor need the principle be given exactly the same scope in Scotland as in England. Difficulties have already been encountered in its application, and the argument *ab inconvenienti* of Lord Keith’s dissenting speech 67 may yet be given some recognition. One may, for example, reflect on whether the tax position of the cedent or assignee should be considered: whether the tax position of an agent for an undisclosed principal should be considered if he is sued instead of the principal 68; and whether the tax position of the tertius or of the stipulator is relevant in the *jus quaesitum tertio* relationship. The author, while accepting the principle of Gourley in straightforward cases, has recorded his view 69 that, “if the principle of deducting from damages the estimated

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64 1945 S.C. 395.
67 p. 216 et seq.
68 The agent for an undisclosed principal differs in his legal relationship to principal and third party from that which exists in ordinary cases of direct representation.
amount of tax payable is to transform ordinary straightforward claims into involved and protracted disputes as to the tax position of pursuers, then, in my opinion, the law should intervene to restore what Lord Keith has described as 'a simple rule which has been adopted for generations and creates the minimum of trouble.' In *Spencer v. Macmillan's Trs.* the Second Division distinguished Gourley's case, and decided that the tax element should not be considered in an award of damages for alleged breach of a contract to sell the issued share capital of a company. The court reserved opinion upon the question whether in the absence of the Inland Revenue from the process, proof would be competent as to revenue practice with regard to taxing awards of damages, and Lord Mackintosh considered that the Revenue would not be bound by a decision pronounced in a process from which they had been absent. If the spectre of the Revenue is to range at large through the temples of justice, legislation may well become expedient to lay it, or to restrict its menace in litigation between private citizens.

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70 1958 S.C. 300.
71 At p. 325.
APPENDICES


APPENDIX B. The Church of Scotland Act 1921—Schedule of Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual.

APPENDIX C. Statutory Tenancies.

APPENDIX D. Abridged Bibliography of Scots Law.
APPENDIX A

THE ACT OF UNION 1706-7 (with England) (With which is incorporated the Act for Securing the Protestant Religion and Presbyterian Church Government in Scotland.)

Those parts of the Act which are deemed to be repealed according to the third edition of Statutes Revised have been italicised.

The Articles of Union were signed by the Commissioners for both countries on July 22, 1706. The Articles with minor alterations were passed by the Scots Parliament on January 16, 1707, and by the English Parliament on March 6 of the same year. The Scottish Record version of the Act (of which the following is a copy) is A.P.S., xi, 406, c. 7. The English Act is 6 Anne, c. 11.

Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of SCOTLAND and ENGLAND.

The Estates of Parliament Considering that Articles of Union of the Kingdoms of Scotland and England were agreed on the twenty-second of July One thousand seven hundred and six years by the Commissioners nominated on behalf of this Kingdom, under Her Majesties Great Seal of Scotland bearing date the twenty-seventh of February last past in pursuance of the fourth Act of the third Session of this Parliament and the Commissioners nominated on behalf of the Kingdom of England under Her Majesties Great Seal of England bearing date at Westminster the tenth day of April last past in pursuance of an Act of Parliament made in England the third year of Her Majesties Reign to treat of and concerning an Union of the said Kingdoms Which Articles were in all humility presented to Her Majesty upon the twenty-third of the said Month of July and were Recommended to this Parliament by Her Majesties Royal Letter of the date the thirty-one day of July One thousand seven hundred and six And that the said Estates of Parliament have agreed to and approve of the saids Articles of Union with some Additions and Explanations as is contained in the Articles hereafter insert And sicklyke Her Majesty with advice and consent of the Estates of Parliament Resolving to Establish the Protestant Religion and Presbyterian Church Government within this Kingdom has past in this Session of Parliament an Act entitled Act for securing the Protestant Religion and Presbyterian Church Government which by the Tenor thereof is appointed to be insert in any Act ratifying the Treaty and expressly declared to be a fundamentall and essentail Condition of the said Treaty or Union in all time coming Therefore Her Majesty with advice and consent of the Estates of Parliament in fortification of the Approbation of the Articles as abovementioned And for their further and better Establishment of the same upon full and mature deliberation upon the forsaid Articles of Union and Act of Parliament Doth Ratifie Approve and Confirm the same with the Additions and Explanations contained in the saids Articles in manner and under the provision aftermentioned whereof the Tenor follows.
Article I

THAT the Two Kingdoms of Scotland and England, shall upon the first day of May next ensuing the date hereof, and forever after, be United into One Kingdom by the Name of GREAT BRITAIN: And that the Ensigns Armorial of the said United Kingdom be such as Her Majesty shall appoint and the Crosses of St Andrew and St George be conjoined in such manner as Her Majesty shall think fit, and used in all Flags, Banners, Standards and Ensigns both at Sea and Land.

Article II

THAT the Succession to the Monarchy of the United Kingdom of Great Britain and of the Dominions thereunto belonging after Her Most Sacred Majesty, and in default of Issue of Her Majesty be, remain and continue to the Most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover, and the Heirs of Her body, being Protestants, upon whom the Crown of England is settled by an Act of Parliament made in England in the twelfth year of the Reign of His late Majesty King William the Third entitled An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject: And that all Papists and persons marrying Papists, shall be excluded from and for ever incapable to inherit possess or enjoy the Imperial Crown of Great Britain, and the Dominions thereunto belonging or any part thereof; And in every such case the Crown and Government shall from time to time descend to, and be enjoyed by such person being a Protestant as should have inherited and enjoyed the same, in case such Papists or person marrying a Papist was naturally dead, according to the provision for the Descent of the Crown of England, made by another Act of Parliament in England in the first year of the Reign of their late Majesties King William and Queen Mary entitled An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.

Article III

THAT the United Kingdom of Great Britain be Represented by one and the same Parliament to be stiled the Parliament of Great Britain.

Article IV

THAT all the Subjects of the United Kingdom of Great Britain shall from and after the Union have full Freedom and Intercourse of Trade and Navigation to and from any port or place within the said United Kingdom and the Dominions and Plantations thereunto belonging. And that there be a Communication of all other Rights, Privileges and Advantages which do or may belong to the Subjects of either Kingdom except where it is otherways expressly agreed in these Articles.

Article V

THAT all ships or vessels belonging to Her Majesties Subjects of Scotland at the time of Ratifying the Treaty of Union of the Two Kingdoms in the Parliament of Scotland though forreign built be deemed and pass as ships of the build of Great Britain; the Owner or where there are more Owners, one or more of the Owners within Twelve Months after the first of May next making oath that at the time of Ratifying the Treaty of
Union in the Parliament of Scotland, the same did in haill or in part belong to him or them, or to some other Subject or Subjects of Scotland, to be particularly named with the place of their respective abodes, and that the same doth then at the time of the said Deposition wholly belong to him or them, and that no forreigner directly or indirectly hath any share part or interest therein, Which Oath shall be made before the chief Officer or Officers of the Customs in the Port next to the abode of the said Owner or Owners; And the said Officer or Officers shall be Impowered to administer the said Oath. And the Oath being so administred shall be attested by the Officer or Officers who administred the same And being Registered by the said Officer or Officers, shall be delivered to the Master of the ship for security of her Navigation and a Duplicate thereof shall be transmitted by the said Officer or Officers to the chief Officer or Officers of the Customs in the port of Edinburgh, to be there Entered in a Register and from thence to be sent to the port of London to be there Entered in the General Register of all Trading ships belonging to Great Britain.

Article VI

THAT all parts of the United Kingdom for ever from and after the Union shall have the same Allowances Encouragements and Drawbacks, and be under the same Prohibitions Restrictions and Regulations of Trade and lyable to the same Customs and Duties on Import and Export And that the Allowances Encouragements and Drawbacks Prohibitions Restrictions and Regulations of Trade and the Customs and Duties on Import and Export settled in England when the Union commences shall from and after the Union take place throughout the whole United Kingdom, excepting and reserving the Duties upon Export and Import of such particular Commodities from which any persons the Subjects of either Kingdom are specially Liberated and Exempted by their private Rights which after the Union are to remain safe and entire to them in all respects as before the same And that from and after the Union no Scots Cattle carried into England shall be lyable to any other Duties either on the publick or private Accounts than these Duties to which the Cattle of England are or shall be lyable within the said Kingdom. And seeing by the Laws of England there are Rewards granted upon the Exportation of certain kinds of Grain wherein Oats grinded or ungrinded are not expressed, that from and after the Union when Oats shall be sold at fifteen shillings Sterling per quarter or under there shall be payed two shillings and sixpence Sterling for every quarter of the Oat-meal exported in the terms of the Law whereby and so long as Rewards are granted for Exportation of other Grains And that the Bear of Scotland have the same Rewards as Barley. And in respect the Importation of Victual into Scotland from any place beyond Sea would prove a Discouragement to Tillage, Therefore that the Prohibition as now in force by the Law of Scotland against Importation of Victual from Ireland or any other place beyond Sea into Scotland, do after the Union remain in the same force as now it is until more proper and effectual ways be provided by the Parliament of Great Britain for discouraging the Importation of the said Victual from beyond Sea.
Article VII

THAT all parts of the United Kingdom be for ever from and after the Union lyable to the same Excises upon all Exciseable Liquors excepting only that the thirty-four Gallons English Barrel of Beer or Ale amounting to twelve Gallons Scots present measure sold in Scotland by the Brewer at nine shillings six pence Sterling excluding all Duties and Retailed including Duties and the Retailers profit at two pence the Scots pint or eight part of the Scots Gallon, be not after the Union lyable on account of the present Excise upon Exciseable Liquors in England, to any higher Imposition than two shillings Sterling upon the forsaid thirty four Gallons English barrel, being twelve gallons the present Scots measure And that the Excise settled in England on all other Liquors when the Union commences take place throughout the whole United Kingdom.

Article VIII

THAT from and after the Union all foreign Salt which shall be Imported into Scotland shall be charged at the Importation there with the same Duties as the like Salt is now charged with being Imported into England and to be levied and secured in the same manner. But in regard the Duties of great quantities of foreign Salt Imported may be very heavy on the Merchants Importers; That therefor all foreign Salt imported into Scotland shall be Cellared and Locked up under the custody of the Merchant Importer and the Officers employed for levying the Duties upon Salt And that the Merchant may have what quantities thereof his occasion may require not under a Weigh or fourtie Bushells at a time; Giving security for the duty of what quantity he receives payable in six Months. But Scotland shall for the space of seven Years from the said Union be Exempted from paying in Scotland for Salt made there the Dutie or Excise now payable for Salt made in England: But from the Expiration of the said seven years shall be subject and lyable to the same Duties for Salt made in Scotland, as shall be then payable for Salt made in England, to be levied and secured in the same manner and with proportional Drawbacks and Allowances as in England, with this exception that Scotland shall after the said seven years remain exempted from the Duty of two shillings and four pence a Bushell on home Salt Imposed by an Act made in England in the Ninth and Tenth of King William the Third of England And if the Parliament of Great Britain shall at or before the expiring of the said seven years substitute any other fund in place of the said two shillings and four pence of Excise on the bushel of Home Salt, Scotland shall after the said seven years, bear a proportion of the said Fund, and have an Equivalent in the Terms of this Treaty. And that during the said seven years there shall be payed in England for all Salt made in Scotland and imported from thence into England the same duties upon the Importation as shall be payable for Salt made in England to be levied and secured in the same manner as the Duties on foreign Salt are to be levied and secured in England. And that after the said seven years how long the said Duty of two shillings four pence a Bushel upon Salt is continued in England the said two shillings four pence a Bushel shall be payable for all Salt made in Scotland and imported into England, to be levied and secured in the same manner And that during the continuance of the Duty of
two shillings four pence a Bushel upon Salt made in England no Salt whatsoever be brought from Scotland to England by Land in any manner under the penalty of forfeiting the Salt and the Carriage and Carriages made use of in bringing the same and paying twenty shillings for every Bushel of such Salt, and proportionably for a greater or lesser quantity, for which the Carrier as well as the Owner shall be liable jointly and severally. And the persons bringing or carrying the same, to be imprisoned by any one Justice of the Peace, by the space of six months without Bail, and until the penalty be paid: And for Establishing an equality in Trade That all Fleshes exported from Scotland to England and put on Board in Scotland to be Exported to parts beyond the Seas and provisions for ships in Scotland and for foreign voyages may be salted with Scots Salt paying the same Dutie for what Salt is so employed as the like quantity of such Salt pays in England and under the same penalties forfeitures and provisions for preventing of frauds as are mentioned in the Laws of England. And that from and after the Union the Laws and Acts of Parliament in Scotland for Pineing Curing and Packing of Herrings White Fish and Salmon for Exportation with Forreign Salt only without any mixture of British or Irish Salt and for preventing of frauds in Curing and Packing of Fish be continued in force in Scotland subject to such alterations as shall be made by the Parliament of Great Britain. And that all Fish exported from Scotland to parts beyond the Seas which shall be Cured with Forreign Salt only and without mixture of British or Irish Salt, shall have the same Eases Præmiums and Drawbacks as are or shall be allowed to such persons as Export the like Fish from England: And that for Encouragement of the Herring Fishing there shall be allowed and payed to the Subjects Inhabitants of Great Britain during the present allowances for other Fishes ten shillings five pence Sterling for every Barrel of White Herrings which shall be exported from Scotland; And that there shall be allowed five shillings Sterling for every Barrel of Beef or Pork salted with Forreign Salt without mixture of British or Irish Salt and Exported for sale from Scotland to parts beyond Sea alterable by the Parliament of Great Britain. And if any matters of fraud relating to the said Duties on Salt shall hereafter appear which are not sufficiently provided against by this Article the same shall be subject to such further provisions as shall be thought fit by the Parliament of Great Britain.

Article IX

THAT whenever the sum of One Million, nine hundred ninety seven thousand, seven hundred and sixty three pounds, eight shillings and four pence half penny shall be Enacted by the Parliament of Great Britain to be raised in that part of the United Kingdom now called England, on Land and other things usually charged in Acts of Parliament there for granting an aid to the Crown by a Land Tax; that part of the United Kingdom now called Scotland shall be charged by the same Act with a further sum of fourty eight thousand pounds free of all Charges, as the Quota of Scotland to such Tax, and so proportionably for any greater or lesser sum raised in England by any Tax on Land and other things usually charged, together with the Land, And that such Quota for Scotland in
the cases aforesaid, be raised and collected in the same manner as the Cess now is in Scotland, but subject to such Regulations in the manner of Collecting, as shall be made by the Parliament of Great Britain.

**Article X**

THAT during the continuance of the respective Duties on Stampt paper, Vellom and Parchment, by the several Acts now in force in England, Scotland shall not be charged with the same respective Duties.

**Article XI**

THAT during the continuance of the Duties payable in England on Windows and Lights which determines on the first day of August One thousand seven hundred and ten Scotland shall not be charged with the same Duties.

**Article XII**

THAT during the continuance of the Duties payable in England on Coals, Culm and Cinders, which determines the thirtieth day of September One thousand seven hundred and ten Scotland shall not be charged there with for Coals Culm and Cinders consumed there but shall be charged with the same Duties as in England for all Coals, Culm and Cinders not consumed in Scotland.

**Article XIII**

THAT during the continuance of the Duty payable in England on Malt, which determines the twenty fourth day of June One thousand seven hundred and seven, Scotland shall not be charged with that Duty.

**Article XIV**

THAT the Kingdom of Scotland be not Charged with any other Duties laid on by the Parliament of England before the Union except these consented to in this Treaty, in regard it is agreed, That all necessary Provision shall be made by the Parliament of Scotland for the publick Charge and Service of that Kingdom for the year One thousand seven hundred and seven: Provided nevertheless That if the Parliament of England shall think fit to lay any further Impositions by way of Customs, or such Excises, with which by virtue of this Treaty, Scotland is to be charged equally with England, in such case Scotland shall be lyable to the same Customs and Excises, and have an Equivalent to be settled by the Parliament of Great Britain; With this further provision That any Malt to be made and consumed in that part of the United Kingdom now called Scotland shall not be charged with any Imposition upon Malt during this present War And seeing it cannot be supposed that the Parliament of Great Britain will ever lay any sorts of Burthens upon the United Kingdom, but what they shall find of necessity at that time for the Preservation and Good of the whole, and with due regard to the Circumstances and Abilities of every part of the United Kingdom Therefore it is agreed That there be no further Exemption insisted upon for any part of the United Kingdom, but that the consideration of any Exemptions beyond what are already agreed on in this Treaty, shall be left to the determination of the Parliament of Great Britain.
WHEREAS by the Terms of this Treaty the Subjects of Scotland for preserving an Equality of Trade throughout the United Kingdom, will be lyable to severall Customs and Excises now payable in England, which will be applicable towards payment of the Debts of England, contracted before the Union; It is agreed, That Scotland shall have an Equivalent for what the Subjects thereof shall be so charged towards payment of the said Debts of England, in all particulars whatsoever, in manner following viz. That before the Union of the said Kingdoms, the sum of three hundred ninety eight thousand and eighty five pounds ten shillings be granted to Her Majesty by the Parliament of England for the uses aftermentioned, being the Equivalent to be answered to Scotland for such parts of the saids Customs and Excises upon all Exciseable Liquors, with which that Kingdom is to be charged upon the Union, as will be applicable to the payment of the said Debts of England, according to the proportions which the present Customs in Scotland, being thirty thousand pounds per annum, do bear to the Customs in England, computed at One million three hundred forty one thousand five hundred and fifty nine pounds per annum: And which the present Excises on Exciseable Liquors in Scotland, being thirty three thousand and five hundred pounds per annum, do bear to the Excises on Exciseable Liquors in England, computed at nine hundred forty seven thousand six hundred and two pounds per annum; Which sum of three hundred ninety eight thousand eighty five pounds ten shillings, shall be due and payable from the time of the Union: And in regard That after the Union Scotland becoming lyable to the same Customs and Duties payable on Import and Export, and to the same Excises on all Exciseable Liquors as in England as well upon that account as upon the account of the Increase of Trade and People (which will be the happy consequence of the Union) the said Revenues will much improve beyond the before mentioned annual values thereof, of which no present Estimate can be made, Yet nevertheless for the reasons aforesaid there ought to be a proportionable Equivalent answered to Scotland It is agreed That after the Union there shall be an Accompt kept of the said Duties arising in Scotland, to the end it may appear, what ought to be answered to Scotland, as an Equivalent for such proportion of the said encrease as shall be applicable to the payment of the Debts of England. And for the further and more effectual answering the severall ends hereafter mentioned It is agreed that from and after the Union, the whole Encrease of the Revenues of Customs, and Duties on Import and Export, and Excise upon Exciseable Liquors in Scotland over and above the annual produce of the said respective Duties, as above stated, shall go and be applied, for the term of seven years, to the uses hereafter mentioned; And that upon the said account, there shall be answered to Scotland annually from the end of seven years after the Union, an Equivalent in proportion to such part of the said Increase as shall be applicable to the Debts of England. And generally that an Equivalent shall be answered to Scotland for such parts of the English Debts as Scotland may hereafter become lyable to pay by reason of the Union, other than such for which appropriations have been made by Parliament in England of the Customs, or other duties on Export and Import Excises on all Exciseable Liquors, in respect of which Debts, Equivalents are herein before provided. And as for the uses to
which the said sum of Three hundred ninety eight thousand eighty five pounds ten shillings to be granted as aforesaid and all other monies, which are to be answered or allowed to Scotland as said is are to be applied. It is agreed That in the first place out of the foresaid sum what consideration shall be found necessary to be had for any Losses which privat persons may sustain by reducing the Coin of Scotland to the Standard and Value of the Coin of England may be made good. In the next place That the Capital Stock or fund of the African and Indian Company of Scotland advanced together with the Interest for the said Capital Stock after the rate of Five per Cent. per annum from the respective times of the payment thereof shall be payed; Upon payment of which Capital Stock and Interest It is agreed The said Company be dissolved and cease And also that from the time of passing the Act of Parliament in England for raising the said sum of three hundred ninety eight thousand eighty five pound ten shillings the said Company shall neither Trade nor Grant Licence to Trade Providing that if the said Stock and Interest shall not be payed in twelve months after the Commencement of the Union. That then the said Company may from thence forward Trade or give Licence to Trade until the said hail Capitall Stock and Interest shall be payed: And as to the Overplus of the said sum of three hundred ninety eight thousand eighty five pound ten shillings after payment of what consideration shall be had for losses in repairing the Coin and paying the said Capital Stock and Interest, and also the hail increase of the said Revenues of Customs Duties and Excises above the present value which shall arise in Scotland during the said term of seven years together with the Equivalent which shall become due upon the Improvement thereof in Scotland after the said term and also as to all other sums which according to the agreements aforesaid may become payable to Scotland by way of Equivalent for what that Kingdom shall hereafter become lyable towards payment of the Debt of England. It is agreed That the samen be applied in manner following viz. That all the publick Debts of the Kingdom of Scotland as shall be adjusted by this present Parliament shall be payed and that two thousand pounds per annum for the space of seven years shall be applied towards Encouraging and Promoting the Manufacture of coarse Wool within these shires which produce the Wool. And that the first two thousand pounds Sterling be payed at Martinmass next, and so yearly at Martinmass during the space foresaid and afterwards the same shall be wholly applied towards the Encouraging and Promoting the Fisheries and such other Manufactures and Improvements in Scotland as may most conduce to the general Good of the United Kingdom. And it is agreed, That Her Majesty be Impowered to appoint Commissioners, who shall be accountable to the Parliament of Great Britain, for disposing the said sum of three hundred ninety eight thousand eighty five pounds ten shillings, and all other monies which shall arise to Scotland, upon the agreements aforesaid to the purposes before mentioned: Which Commissioners shall be Impowered to call for, Receive and Dispose of the said monies in manner aforesaid, and to Inspect the books of the severall Collectors of the said Revenues, and of all other duties from whence an Equivalent may arise; and that the Collectors and Managers of the said Revenues and Duties be obliged to give to the said Commissioners subscribed authentick Abbreviats of the Produce of such Revenues and Duties arising in their
respective Districts, and that the said Commissioners shall have their office within the Limits of Scotland, and shall in such Office keep Books containing Accoompts of the Amount of the Equivalents, and how the same shall have been disposed of from time to time, which may be inspected by any of the Subjects who shall desire the samem.

**Article XVI**

THAT from and after the Union the Coin shall be of the same standard and value, throughout the United Kingdom, as now in England, And a Mint shall be continued in Scotland under the same Rules as the Mint in England. And the present Officers of the Mint continued subject to such Regulations and Alterations as Her Majesty Her Heirs or Successors, or the Parliament of Great Britain shall think fit.

**Article XVII**

THAT from and after the Union the same Weights and Measures shall be used throughout the United Kingdom, as are now Established in England; And Standards of Weights and Measures shall be kept by those Burroughs in Scotland, to whom the keeping the Standards of Weights and Measures now in use there does of special Right belong; All which Standards shall be sent down to such respective Burroughs from the Standards kept in the Exchequer at Westminster, subject nevertheless to such Regulations as the Parliament of Great Britain shall think fit.

**Article XVIII**

THAT the Laws concerning Regulation of Trade, Customs, and such Excises, to which Scotland is by virtue of this Treaty to be lyable, be the same in Scotland, from and after the Union as in England; and that all other Laws, in use within the Kingdom of Scotland do after the Union, and notwithstanding thereof, remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain, With this difference betwixt the Laws concerning publike Right, Policy, and Civil Government, and those which concern private Right; That the Laws which concern publike Right Policy and Civil Government may be made the same throughout the whole United Kingdom; but that no alteration be made in Laws which concern private Right, except for evident utility of the subjects within Scotland.

**Article XIX**

THAT the Court of Session or Colledge of Justice, do after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the Union; subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain; And that hereafter none shall be named by Her Majesty or Her Royal Successors to be Ordinary Lords of Session but such who have served in the Colledge of Justice as Advocats or Principal Clerks of Session for the space of five years, or as Writers to the Signet for the space of ten years With
this provision. That no Writer to the Signet be capable to be admitted a Lord of the Session unless he undergo a private and publick Tryal on the Civil Law before the Faculty of Advocats and be found by them qualified for the said Office two years before he be named to be a Lord of the Session yet so as the Qualifications made or to be made for capacitating persons to be named Ordinary Lords of Session may be altered by the Parliament of Great Britain. And that the Court of Justiciary do also after the Union, and notwithstanding thereof remain in all time coming within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the Union; subject nevertheless to such Regulations as shall be made by the Parliament of Great Britain, and without prejudice of other Rights of Justiciary: And that all Admiralty Jurisdictions be under the Lord High Admirall or Commissioners for the Admiralty of Great Britain for the time being; And that the Court of Admiralty now Established in Scotland be continued, And that all Reviews, Reductions or Suspensions of the Sentences in Maritime Cases competent to the Jurisdiction of that Court remain in the same manner after the Union as now in Scotland, until the Parliament of Great Britain shall make such Regulations and Alterations, as shall be judged expedient for the whole United Kingdom, so as there be always continued in Scotland a Court of Admiralty such as in England, for determination of all Maritime Cases relating to private Rights in Scotland competent to the Jurisdiction of the Admiralty Court; subject nevertheless to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain; And that the Heritable Rights of Admiralty and Vice-Admiralties in Scotland be reserved to the respective Proprietors as Rights of Property, subject nevertheless, as to the manner of Exercising such Heritable Rights to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain; And that all other Courts now in being within the Kingdom of Scotland do remain, but subject to Alterations by the Parliament of Great Britain; And that all Inferior Courts within the said Limits do remain subordinate, as they are now to the Supreme Courts of Justice within the same in all time coming; And that no Causes in Scotland be cogniscible by the Courts of Chancery, Queens-Bench, Common-Pleas, or any other Court in Westminster-hall; And that the said Courts, or any other of the like nature after the Union, shall have no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same; And that there be a Court of Exchequer in Scotland after the Union, for deciding Questions concerning the Revenues of Customs and Excises there, having the same power and authority in such cases, as the Court of Exchequer has in England. And that the said Court of Exchequer in Scotland have power of passing Signatures, Gifts Tutors, and in other things as the Court of Exchequer at present in Scotland hath; And that the Court of Exchequer that now is in Scotland do remain, until a New Court of Exchequer be settled by the Parliament of Great Britain in Scotland after the Union; And that after the Union the Queens Majesty and Her Royal Successors, may Continue a Privy Council in Scotland, for preserving of public Peace and Order, until the Parliament of Great Britain shall think fit to alter it or establish any other effectual method for that end.
Scotland in the Great solution; Britain Great Houses present of Parliament of England dom, thereof. thereof, Offices which time then the that Court from Elected, shall Act present of Commons of to Cause Sixteen Peers, who are vision Britain until their pleasure that in the House of of the Parliament of Great House of Lords to sit in the House of Lords to be Summoned and forty-five Members to be Elected to sit in the House of Commons of the Parliament of Great Britain according to the Agreement in this Treaty, in such manner as by a subsequent Act of this present Session of the Parliament of Scotland shall be settled; Which Act is hereby Declared to be as valid as if it were a part of and ingrossed in this Treaty: And that the Names of the Persons so Summoned and Elected, shall be Returned by the Privy Council of Scotland into the Court from whence the said Writ did issue. And that if Her Majesty, on or before the first day of May next, on which day the Union is to take place shall Declare under the Great Seal of England, That it is expedient, that the Lords of Parliament of England, and Commons of the present Parliament of England should be the Members of the respective Houses of the first Parliament of Great Britain for and on the part of England, then the said Lords of Parliament of England, and Commons of the present Parliament of England, shall be the members of the respective Houses of the first Parliament of Great Britain, for and on the part of England: And Her Majesty may by Her Royal Proclamation under the Great Seal of Great Britain, appoint the said first Parliament of Great Britain to Meet at such time and place as Her Majesty shall think fit; which time shall not be less than fifty days after the date of such Proclamation; And the time and place of the Meeting of such Parliament being so appointed, a Writ shall be immediately issued under the Great Seal of Great Britain, directed to the Privy Council of Scotland, for the summoning the Sixteen Peers, and for Electing forty-five Members, by whom Scotland is to be Represented in the Parliament of Great Britain: And the Lords of Parliament of England, and the Sixteen Peers of Scotland, such Sixteen Peers being Summoned and Returned in the manner agreed in this Treaty; and the Members of the House of Commons of the said

Article XX

THAT all heritable Offices, Superiorities, heritable Jurisdictions, Offices for life, and Jurisdictions for life, be reserved to the Owners thereof, as Rights of Property, in the same manner as they are now enjoyed by the Laws of Scotland, notwithstanding of this Treaty.

Article XXI

THAT the Rights and Privileges of the Royall Burroughs in Scotland as they now are, Do Remain entire after the Union, and notwithstanding thereof.

Article XXII

THAT by virtue of this Treaty, Of the Peers of Scotland at the time of the Union Sixteen shall be the number to Sit and Vote in the House of Lords, and Forty-five the number of the Representatives of Scotland in the House of Commons of the Parliament of Great Britain; And that when Her Majesty Her Heirs or Successors, shall Declare Her or their pleasure for holding the first or any subsequent Parliament of Great Britain until the Parliament of Great Britain shall make further provision therein, A Writ do issue under the Great Seal of the United Kingdom, Directed to the Privy Council of Scotland, Commanding them to Cause Sixteen Peers, who are to sit in the House of Lords to be Summoned to Parliament and forty-five Members to be Elected to sit in the House of Commons of the Parliament of Great Britain according to the Agreement in this Treaty, in such manner as by a subsequent Act of this present Session of the Parliament of Scotland shall be settled; Which Act is hereby Declared to be as valid as if it were a part of and ingrossed in this Treaty; And that the Names of the Persons so Summoned and Elected, shall be Returned by the Privy Council of Scotland into the Court from whence the said Writ did issue. And that if Her Majesty, on or before the first day of May next, on which day the Union is to take place shall Declare under the Great Seal of England, That it is expedient, that the Lords of Parliament of England, and Commons of the present Parliament of England should be the Members of the respective Houses of the first Parliament of Great Britain for and on the part of England, then the said Lords of Parliament of England, and Commons of the present Parliament of England, shall be the members of the respective Houses of the first Parliament of Great Britain, for and on the part of England: And Her Majesty may by Her Royal Proclamation under the Great Seal of Great Britain, appoint the said first Parliament of Great Britain to Meet at such time and place as Her Majesty shall think fit; which time shall not be less than fifty days after the date of such Proclamation; And the time and place of the Meeting of such Parliament being so appointed, a Writ shall be immediately issued under the Great Seal of Great Britain, directed to the Privy Council of Scotland, for the summoning the Sixteen Peers, and for Electing forty-five Members, by whom Scotland is to be Represented in the Parliament of Great Britain: And the Lords of Parliament of England, and the Sixteen Peers of Scotland, such Sixteen Peers being Summoned and Returned in the manner agreed in this Treaty; and the Members of the House of Commons of the said
Parliament of England and the forty-five Members for Scotland, such forty-five Members being Elected and Returned in the manner agreed in this Treaty shall assemble and meet respectively in their respective houses of the Parliament of Great Britain, at such time and place as shall be so appointed by Her Majesty, and shall be the Two houses of the first Parliament of Great Britain. And that Parliament may Continue for such time only as the present Parliament of England might have Continued, if the Union of the Two Kingdoms had not been made, unless sooner Dissolved by Her Majesty; And that every one of the Lords of Parliament of Great Britain, and every member of the House of Commons of the Parliament of Great Britain in the first and all succeeding Parliaments of Great Britain until the Parliament of Great Britain shall otherways Direct, shall take the respective Oaths, appointed to be taken in stead of the Oaths of Allegiance and Supremacy, by an Act of Parliament made in England in the first year of the Reign of the late King William and Queen Mary entituled An Act for the abrogating of the Oaths of Supremacy and Allegiance, and appointing other Oaths, and Make Subscribe and audibly Repeat the Declaration mentioned in an Act of Parliament made in England in the thirtieth year of the Reign of King Charles the Second entituled An Act for the more effectual preserving the Kings Person and Government by Disabling Papists from sitting in either House of Parliament, and shall take and subscribe the Oath mentioned in an Act of Parliament made in England, in the first year of Her Majesties Reign entituled An Act to Declare the Alterations in the Oath appointed to be taken by the Act Entituled An Act for the further security of His Majesties Person, and the Succession of the Crown in the Protestant Line, and for Extinguishing the Hopes of the pretended Prince of Wales, and all other pretenders and their open and secret Abettors, and for Declaring the Association to be determined, at such time, and in such manner as the Members of both Houses of Parliament of England are by the said respective Acts, directed to take, make and subscribe the same upon the penalties and disabilities in the said respective Acts contained. And it is Declared and Agreed That these words This Realm, The Crown of this Realm, and the Queen of this Realm, mentioned in the Oaths and Declaration contained in the aforesaid Acts, which were intended to signify the Crown and Realm of England, shall be understood of the Crown and Realm of Great Britain, And that in that sense, the said Oaths and Declaration be taken and subscribed by the members of both Houses of the Parliament of Great Britain.

Article XXIII

THAT the aforesaid Sixteen Peers of Scotland, mentioned in the last preceding Article, to sit in the House of Lords of the Parliament of Great Britain, shall have all Privileges of Parliament which the Peers of England now have, and which They or any Peers of Great Britain shall have after the Union, and particularly the Right of sitting upon the tryals of Peers: And in case of the tryal of any Peer in time of Adjournment or Prorogation of Parliament, the said Sixteen Peers shall be summoned in the same manner, and have the same powers and privileges at such tryal, as any other Peers of Great Britain; And that in case any tryals of Peers shall hereafter happen when there is no Parliament in being, the Sixteen Peers
of Scotland who sate in the last preceding Parliament, shall be summoned in the same manner and have the same powers and privileges at such tryals as any other Peers of Great Britain; and that all Peers of Scotland, and their successors to their Honours and Dignities, shall from and after the Union be Peers of Great Britain, and have Rank and Precedency next and immediately after the Peers of the like orders and degrees in England at the time of the Union, and before all Peers of Great Britain of the like orders and degrees, who may be Created after the Union, and shall be tryed as Peers of Great Britain, and shall Enjoy all Privileges of Peers, as fully as the Peers of England do now, or as they, or any other Peers of Great Britain may hereafter Enjoy the same except the Right and Privilege of sitting in the House of Lords and the Privileges depending thereon and particularly the Right of sitting upon the tryals of Peers.

Article XXIV

THAT from and after the Union, there be One Great Seal for the United Kingdom of Great Britain, which shall be different from the Great Seal now used in either Kingdom; And that the Quartering the Arms and the Rank and Precedency of the Lyon King of Arms of the Kingdom of Scotland as may best suit the Union be left to Her Majesty: And that in the mean time the Great Seal of England be used as the Great Seal of the United Kingdom, and that the Great Seal of the United Kingdom be used for Sealing Writs to Elect and Summon the Parliament of Great Britain and for sealing all Treaties with Foreign Princes and States, and all publick Acts Instruments and Orders of State which Concern the whole United Kingdom, and in all other matters relating to England, as the Great Seal of England is now used, and that a Seal in Scotland after the Union be always kept and made use of in all things relating to private Rights or Grants, which have usually passed the Great Seal of Scotland, and which only concern Offices, Grants, Commissions, and private Rights within that Kingdom, And that until such Seal shall be appointed by Her Majesty the present Great Seal of Scotland shall be used for such purposes; and that the Privy Seal, Signet, Casset, Signet of the Justiciary Court, Quarter Seal, and Seals of Courts now used in Scotland be Continued, but that the said Seals be altered and adapted to the state of the Union as Her Majesty shall think fit; And the said Seals, and all of them, and the Keepers of them, shall be subject to such Regulations as the Parliament of Great Britain shall hereafter make: And that the Crown, Scepter and Sword of State, the Records of Parliament, and all other Records, Rolls and Registers whatsoever, both publick and private general and particular, and Warrands thereof Continue to be kept as they are within that part of the United Kingdom now called Scotland, and that they shall so remain in all time coming notwithstanding of the Union.

Article XXV

THAT all Laws and Statutes in either Kingdom so far as they are contrary to, or inconsistent with the Terms of these Articles, or any of them, shall from and after the Union cease and become void, and shall be so declared to be by the respective Parliaments of the said Kingdoms.

Our sovereign lady and the estates of Parliament considering that by the late Act of Parliament for a treaty with England for an union of both kingdoms it is provided that the commissioners for that treaty should not treat of or concerning any alteration of the worship discipline and government of the Church of this kingdom as now by law established which treaty being now reported to the Parliament and it being reasonable and necessary that the true Protestant religion as presently professed within this kingdom with the worship discipline and government of this Church should be effectually and unalterably secured therefore her Majesty with advice and consent of the said estates of Parliament doth hereby establish and confirm the said true Protestant religion and the worship discipline and government of this Church to continue without any alteration to the people of this land in all succeeding generations and more especially her Majesty with advice and consent aforesaid ratifies approves and for ever confirms the fifth Act of the first Parliament of King William and Queen Mary intituled Act ratifying the confession of faith and settling Presbyterian Church government with all other Acts of Parliament relating thereto in prosecution of the declaration of the estates of this kingdom containing the claim of right bearing date the eleventh of April one thousand six hundred and eighty nine And her Majesty with advice and consent aforesaid expressly provides and declares that the foresaid true Protestant religion contained in the above mentioned confession of faith with the form and purity of worship presently in use within this Church and its Presbyterian Church government and discipline (that is to say) the government of the Church by kirk sessions presbyteries provincial synods and general assemblies all established by the foresaid Acts of Parliament pursuant to the claim of right shall remain and continue unalterable and that the said Presbyterian government shall be the only government of the Church within the kingdom of Scotland.

And further for the greater security of the foresaid Protestant religion and of the worship discipline and government of the Church as above established her Majesty with advice and consent aforesaid statutes and ordains that the universities and colleges of Saint Andrews Glasgow Aberdeen and Edinburgh as now established by law shall continue within this kingdom for ever And that in all time coming no professors principals regents masters or others bearing office in any university college or school within this kingdom be capable or be admitted or allowed to continue in the exercise of their said functions but such as shall own and acknowledge the civil government in manner prescribed or to be prescribed by the Acts of Parliament as also that before or at their admissions they do and shall subscribe to the foresaid confession of faith as the confession of their faith and that they will practise and conform themselves to the worship presently in use in this Church and submit themselves to the government and discipline thereof and never endeavour directly or indirectly the prejudice or subversion of the same and that before the respective presbyteries of their bounds by whatsoever gift presentation or provisions they may be thereto provided.

And further her Majesty with advice aforesaid expressly declares and statutes that none of the subjects of this kingdom shall be liable to put
all and every one of them for ever free of any oath test or subscription within this kingdom contrary to or inconsistent with the foresaid true Protestant religion and Presbyterian Church government worship and discipline as above established and that the same within the bounds of this Church and kingdom shall never be imposed upon or required of them in any sort And lastly that after the decease of her present Majesty (whom God long preserve) the sovereign succeeding to her in the royal government of the kingdom of Great Britain shall in all time coming at his or her accession to the crown swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion with the government worship discipline right and privileges of this Church as above established by the laws of this kingdom in prosecution of the claim of right.

And it is hereby statute and ordained that this Act of Parliament with the establishment therein contained shall be held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms without any alteration thereof or derogation thereto in any sort for ever As also that this Act of Parliament and settlement therein contained shall be insert and repeated in any Act of Parliament that shall pass for agreeing and concluding the forsaid treaty or union betwixt the two kingdoms and that the same shall be therein expressly declared to be a fundamental and essential condition of the said treaty or union in all time coming...
APPENDIX B

ARTICLES DECLARATORY OF THE CONSTITUTION OF THE CHURCH OF SCOTLAND IN MATTERS SPIRITUAL

Schedule to the Church of Scotland Act 1921 (11 & 12 Geo. 5, c. 29) (see Vol. XVI Statutes Revised, 3rd ed., pp. 628–630)

I. The Church of Scotland is part of the Holy Catholic or Universal Church; worshipping one God, Almighty, all-wise, and all-loving in the Trinity of the Father, the Son, and the Holy Ghost, the same in substance, equal in power and glory; adoring the Father, infinite in Majesty, of whom are all things; confessing our Lord Jesus Christ, the Eternal Son, made very man for our salvation; gloriing in His Cross and Resurrection, and owning obedience to Him as the Head over all things to His Church; trusting in the promised renewal and guidance of the Holy Spirit; proclaiming the forgiveness of sins and acceptance with God through faith in Christ, and the gift of Eternal life; and labouring for the advancement of the Kingdom of God throughout the world. The Church of Scotland adheres to the Scottish Reformation; receives the Word of God which is contained in the Scriptures of the Old and New Testaments as its supreme rule of faith and life; and avows the fundamental doctrines of the Catholic faith founded thereupon.

II. The principal subordinate standard of the Church of Scotland is the Westminster Confession of Faith approved by the General Assembly of 1647, containing the sum and substance of the Faith of the Reformed Church. Its government is Presbyterian, and is exercised through Kirk sessions, Presbyteries, Provincial Synods, and General Assemblies. Its system and principles of worship, orders and discipline are in accordance with "The Directory for the Public Worship of God," "The Form of Presbyterian Church Government," and "The Form of Process," as these have been or may hereafter be interpreted or modified by Acts of the General Assembly or by consuetude.

III. This Church is in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707. The continuity and identity of the Church of Scotland are not prejudiced by the adoption of these Articles. As a national Church representative of the Christian faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry.

IV. This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and
membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.

V. This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith.

VI. This Church acknowledges the divine appointment and authority of the civil magistrate within his own sphere, and maintains its historic testimony to the duty of the nation acting in its corporate capacity to render homage to God, to acknowledge the Lord Jesus Christ to be King over the nations, to obey His laws, to reverence His ordinances, to honour His Church, and to promote in all appropriate ways the Kingdom of God. The Church and State owe mutual duties to each other, and acting within their respective spheres may signalize promote each other's welfare. The Church and the State have the right to determine each for itself all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and the obligations arising therefrom.

VII. The Church of Scotland, believing it to be the will of Christ that His disciples should all be one in the Father and in Him, that the world may believe that the Father has sent Him, recognises the obligation to seek and promote union with other Churches in which it finds the Word to be purely preached, the sacraments administered according to Christ's ordinance, and discipline rightly exercised; and it has the right to unite with any such Church without loss of its identity on terms which this Church finds to be consistent with these Articles.

VIII. The Church has the right to interpret these Articles, and, subject to the safeguards for deliberate action and legislation provided by the Church itself, to modify or add to them; but always consistently with the provisions of the first Article hereof, adherence to which, as interpreted by the Church, is essential to its continuity and corporate life. Any proposal for a modification of or addition to these Articles which may be approved of by the General Assembly shall, before it can be enacted by the Assembly, be transmitted by way of overture to Presbyteries in at least two immediately successive years. If the overture shall receive the approval, with or without suggested amendment, of two-thirds of the whole of the Presbyteries of the Church, the Assembly may revise the overture in the light of any suggestions by Presbyteries, and may transmit
the overture when so revised to Presbyteries for their consent. If the overture as transmitted in its final form shall receive the consent of not less than two-thirds of the whole of the Presbyteries of the Church, the General Assembly may, if it deems it expedient, modify or add to these Articles in terms of the said overture. But if the overture as transmitted in its final form shall not receive the requisite consent, the same or a similar proposal shall not be again transmitted for the consent of Presbyteries until an interval of five years after the failure to obtain the requisite consent has been reported to the General Assembly.

IX. Subject to the provisions of the foregoing Articles and the powers of amendment therein contained, the Constitution of the Church of Scotland in matters spiritual is hereby anew ratified and confirmed by the Church.
APPENDIX C

STATUTORY TENANCIES

I

AGRICULTURAL TENANCIES

by

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1. AGRICULTURAL HOLDINGS

(1) The Statutory Basis

The law relating to agricultural holdings in Scotland is governed principally by the Agricultural Holdings (Scotland) Act of 1949, as amended by the Agriculture Act of 1958. The Act of 1949 consolidated, amended and formally repealed, in so far as they related to agricultural holdings, a number of previous enactments, the most important of which were the Agricultural Holdings (Scotland) Act of 1923, the Small Landholders and Agricultural Holdings (Scotland) Act of 1931 and the Agriculture (Scotland) Act of 1948. It must, however, be emphasised that the earlier statutes repealed by the 1949 Act cannot be entirely neglected, since that Act in certain cases saves rights vested or agreements made before its coming into operation. Furthermore, since the Act in many cases simply re-enacts the provisions of the earlier statutes, the practitioner may have occasion to consult decisions on such provisions, which, although technically decisions on repealed statutes, are in fact applicable to those now in force.

(2) The Definition of an Agricultural Holding

An agricultural holding is defined by section 1 (1) of the 1949 Act as "the aggregate of the agricultural land comprised in a lease, not being a lease under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord." "Agricultural land" is defined (s. 1 (2)) as "land used for agriculture which is so used for the purposes of a trade or business and includes any other land which, by virtue of a designation of the Secretary of State under subsection (1) of section 86 of the Agriculture (Scotland) Act, 1948, is agricultural land within the meaning of that Act." The definition of

2 12 & 13 Geo. 6, c. 75.
3 6 & 7 Eliz. 2, c. 71.
4 13 & 14 Geo. 5, c. 10.
5 21 & 22 Geo. 5, c. 44.
6 11 & 12 Geo. 6, c. 45.
7 Vide, e.g., s. 5 (6) of the 1948 Act.
8 11 & 12 Geo. 6, c. 45.
“agriculture” in section 93 (1) of the 1949 Act is so wide that the effect of these somewhat cumbrous definitions is to include all land employed for any sort of farming activity whatever, including even horticulture, fruit growing or market gardening.

(3) Leases of Agricultural Holdings

The 1949 Act lays down certain requirements to which all leases of agricultural holdings must conform. Section 2 (1) forbids (with an exception in the case of leases for grazing or mowing during some specified period of the year) the letting of an agricultural holding for a period of less than one year without the prior permission of the Secretary of State. Where a tenancy is not formally renewed on its expiry, it is held to continue by tacit relocation from year to year. This provision cannot be waived by the consent of parties (s. 3).

The Act further makes provision for the creation of written leases where such do not exist or, in certain cases, for the alteration of existing leases. Where either there is no written lease in existence, or there is such a lease but it contains no provisions as to certain matters9 specified in the Fifth Schedule to the Act, or is inconsistent with the provisions of section 5 of the Act (relating to the maintenance and insurance of fixed equipment), then either the landlord or the tenant may give notice to the other party requesting him to enter into a lease making provision for all these matters and not inconsistent with the parts of the Act referred to. In the event of the parties being unable to agree, recourse is had to arbitration.

(4) Incidents of the Lease

The Acts contain various detailed provisions regulating the respective positions of landlord and tenant. Only an outline of the most important of such provisions can be given here.

(a) Fixed Equipment

Section 5 of the 1949 Act imports into leases of agricultural holdings an undertaking by the landlord to put the fixed equipment on the holding into a state of thorough repair and to provide such buildings and equipment as are appropriate to the holding in question, and to replace all fair wear and tear, at the same time restricting the tenant’s liability to the maintenance of the equipment in a state of good repair, fair wear and tear excepted. Section 14 gives the tenant a right to remove any fixture or building erected by him on the land either during the currency of the lease or within six months of its expiry. This does not apply to fixtures or buildings which the tenant was bound to erect, or in respect of which he was otherwise entitled to compensation, nor where his rent was in arrears or he had failed to give due notice to the landlord of his intention to remove the fixtures.

9 In outline, these matters are: (i) the names of parties, (ii) an adequate description of the holding by reference to a map, (iii) the term of the lease, (iv) the rent due and the dates on which it is payable, (v) respective undertakings by landlord and tenant relating to damage to buildings and the destruction of crops.
(b) **Record of Holding**

At any time during the currency of a holding, either the landlord or the tenant has a right (s. 17) to require the making of a record of the condition of the fixed equipment and of the cultivation of the holding. The tenant may further require a record of any improvements he has carried out, or has paid for, or of any fixtures which he has a right to remove under section 14. In new leases, a record of fixed equipment must be entered into (s. 5 (1)).

(c) **Miscellaneous**

The parties to a lease may demand a reference to arbitration as to the variation of the amount of land agreed to be maintained as permanent pasture (s. 9 of the 1949 Act as amended by Part II of Schedule I to the 1958 Act). No conditions can be imposed on a tenant by lease restricting him from disposing in any way of the produce of the holding (other than manure) or from practising any system of cropping (s. 12). On the other hand a tenant who has given notice to terminate the tenancy, may not remove manure or fodder from the holding unless and until he has given the landlord or incoming tenant an opportunity of purchasing it at a fair price.

(5) **Variation of Rent**

The 1949 Act lays down (s. 7) that either landlord or tenant may, by notice to the other party, demand a reference to arbitration on the question as to what rent should be payable as from the next ensuing day upon which the tenancy could have been terminated by notice to quit. The 1958 Act, by section 2, enacted (in conformity with its general policy of redressing the balance of the law in favour of the landlord) that the rent properly payable in respect of a holding should be “the rent at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing landlord to a willing tenant there being disregarded . . . any effect on rent of the fact that the tenant who is a party to the arbitration is in occupation of the holding”—the point of the last proviso being to provide a general criterion for the basis of rent rather than the previous particular one enunciated in *Guthe v. Broach* 10 where it was held that an arbiter under the 1949 Act must, in fixing the rent, consider not the market value of the holding, but the appropriate rent payable as between the particular parties.

A reference to arbitration may not be made (s. 7 (3)) where any alteration of rent made in consequence thereof would take effect before five years had elapsed from any of the following dates:

(a) the beginning of the tenancy,
(b) the last increase or reduction of rent,
(c) the last direction of an arbiter under section 7 that the rent remain unchanged.

This section does not apply to certain important though rather special cases enumerated in the proviso to it.

10 1956 S.C. 132.
The Act also provides (s. 8) that in the case of certain specific improvements carried out by the landlord, he has an absolute right to increase the rent by an amount equal to the increase in rental value of the holding attributable to such improvements.

(6) Termination of the Lease and Security of Tenure

Tenancies may of course be terminated by consent. Further, in terms of section 19 of the 1949 Act, where the tenant is six months in arrears of rent, the landlord may raise an action of removing in the sheriff court, craving eviction of the tenant at the next ensuing legal term and, unless the tenant either pays the arrears or finds caution for both them and the ensuing year's rent, then the sheriff shall decern for removal accordingly.

The more important provisions relating to termination of tenancies under the Acts are, however, those guaranteeing a certain security of tenure to the tenant where the landlord wishes to terminate the lease for purposes of his own. By section 24 of the 1949 Act, notice to quit, in order to be effective, must be given by either party not less than one nor more than two years before the lease is due to expire. A similar period of notice must be given where the lease is continued by tacit relocation. It is impossible to exclude the operation of this section by contract.

Where notice to quit is given by a landlord to his tenant, section 25 of the 1949 Act as amended by section 35 of the 1958 Act provides that, if within one month of the giving of the notice to quit the tenant serves upon the landlord a counter-notice requiring that section 25 apply to the notice, then that notice may not take effect unless the land court consents to its operation. Such consent must be applied for by the landlord within one month of the service of the counter-notice. The tenant also has (s. 27 of the 1949 Act, as amended by s. 37 of the 1958 Act) an alternative right to proceed by arbitration.

Where the matter is referred to the land court for its consent, section 26 of the 1949 Act, as amended by section 3 (2) of the 1958 Act, provides that consent to the notice to quit shall only be given where the land court is satisfied of any of the following:

(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry in respect of the holding as a unit, or in the interests of sound management of the estates of which it forms a part;

(b) that the carrying out of the notice is desirable for the purposes of agricultural research, education or experiment, or for allotments, or for certain other purposes relating to smallholdings;

(c) that greater hardship would be caused by withholding than by giving consent to the operation of the notice;

(d) that the landlord's purpose is to employ the land for other than agricultural purposes which do not fall within section 25 (2) (c) of the Act (relating to town planning).

To these cases is added the general provision that the land court, notwithstanding that it is satisfied that one of the above conditions is fulfilled "shall withhold consent to the operation of the notice to quit if in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession."
These are the very general provisions relating to notices to quit. The Act in the sections referred to does, however, introduce a series of detailed exceptions to the rules—as, for example, the provision of section 24 (5) that a landlord may remove a tenant whose estates have been sequestrated under the Bankruptcy (Scotland) Act, 1913, without recourse to the notice to quit procedure or removing the protection of section 25 of the Act from a tenant in respect of whom a certificate of bad husbandry has been issued not more than nine months before the giving of the notice to quit. For these detailed provisions, however, the student must be referred to the Act itself.

(7) Compensation under the Acts

(a) For Disturbance

Where a tenant vacates a holding following upon a notice to quit, or where he has given the notice to the landlord under section 33 of the Act that he accepts a notice to quit part of his holding as a notice to quit the entire holding, then he has the right (s. 35 of the Act) to claim compensation for disturbance. He may not so claim where the landlord has obtained a certificate of bad husbandry or where any of the other conditions are fulfilled which would release him from the operation of section 25 of the Act in terms of section 25 (2). The tenant is entitled to one year's rent (as defined in the proviso to section 33 (2)) as compensation for disturbance as of right and without actual proof of loss or expense, but in certain other cases he may claim up to a maximum of two years' rent.

(b) For Improvements

The 1949 Act contains provisions as intricate as they are detailed as to compensation for improvements effected on the holding. The improvements in respect of which compensation may be claimed are set forth in the First, Second and Third Schedules to the Act and, as regards market gardens, in the Fourth Schedule. The conditions under which compensation may be claimed may depend upon their date. Moreover, before compensation is payable for certain improvements (e.g., planting of orchards) the landlord's prior consent to the improvement must have been obtained, whereas in other cases (e.g., reclamation of waste land) all that is necessary is prior notice to the landlord, while in yet a third type of case (e.g., application to land of artificial manure) neither notice to, nor the consent of, the landlord is required.

The amount of compensation payable is (s. 38) "such sum as fairly represents the value of the improvement to an incoming tenant." Here again, as with section 7, the test is a general one: the quantum of compensation is determined in relation to the value of the improvements to an incoming tenant, not to the incoming tenant. Differences as to the amount payable are to be determined by arbitration (s. 74).

11 s. 28 of the Act of 1949, as amended by the 1958 Act, Sched. I, para. 38, provides for the issue by the land court, on the application of the landlord, of a certificate of bad husbandry where it is satisfied that the tenant "is not fulfilling his responsibility to farm in accordance with the rules of good husbandry."

12 Vide supra, note 11.

13 Sed quare as to s. 25 (2) (e)—vide Connell, op. cit., p. 148, note 4, and s. 35 (1) of the Act.
In addition to compensation for specific improvements, section 86 of the Act further provides for compensation to a tenant who has increased the value of a holding by the continuous adoption of a standard of farming which has been more beneficial to the holding than the standard or system required by the lease, to the extent of the value to an incoming tenant of the adoption of that standard or system.

(c) Compensation for damage by game

Where the right to kill and take game is vested in the landlord, the tenant may claim compensation for damage caused by game in excess of one shilling per acre of the area over which it extends, subject to various provisions as to notice (s. 15).

(d) Compensation to Landlord

A landlord is entitled, by virtue of sections 57 and 58 of the 1948 Act to recover compensation where, on quitting a holding, it can be shown that the value of the holding or of any part thereof has been reduced by the failure of the tenant to farm in accordance with the principles of good husbandry. Such compensation is recoverable to the extent of the cost, at the date of the tenant's quitting the holding, of making good the deterioration.

(8) Succession to Leases

Section 20 of the 1949 Act, as amended by section 6 of the 1958 Act, provides that the tenant of an agricultural holding may by will bequeath his lease of the holding to "any member of his family" (as defined by section 6 (2) of the 1958 Act). The legatee, if he accepts the bequest, must so notify the landlord within twenty-one days after the tenant's death, or, if he is unavoidably prevented from so doing, as soon thereafter as is possible. The landlord may, within one month of such acceptance, object thereto on some "reasonable ground" in which case the matter is referred to the land court for its determination. In Kennedy v. Johnstone it was held by the First Division of the Court of Session that where a lease contained an express exclusion of the tenant's legatee, section 20 could not be invoked. Should the legatee fail to accept, the lease passes to the heir-at-law of the tenant.

Section 6 (3) of the 1958 Act provides that where a legatee or heir-at-law has acquired right to a holding in terms of section 20 of the 1949 Act, then, in general terms, notice to quit may be given free from the provisions of section 25 (1) of the 1949 Act.

2. SMALL LANDHOLDERS AND CROFTERS

Because of the somewhat peculiar social and economic position of small landholders in Scotland, particularly in the Highland counties where crofting is the traditional mode of landholding, special statutory provision has been made for this class of tenant in a series of statutes dating back to the later years of the nineteenth century. Crofts in the Highland counties

were first regulated by the Crofters Holdings (Scotland) Act of 1886,\textsuperscript{16} and the provisions of the 1886 Act amended and extended to the other Scottish counties by the Small Landholders (Scotland) Act, 1911.\textsuperscript{17} In 1955, crofters were again constituted a separate category by the Crofters (Scotland) Act \textsuperscript{18} of that year.

Since complex separate statutory codes of tenure are established for both small landholders and crofters, it is necessary to define these separate categories, but in the space available here it is impossible to say anything about the substantive provisions of the various relevant statutes.

(1) Small Landholders

The principal relevant statutes are the Small Landholders (Scotland) Act of 1911,\textsuperscript{19} the Land Settlement Act of 1919,\textsuperscript{20} and the Small Landholders and Agricultural Holdings (Scotland) Act, 1931.\textsuperscript{21}

The Acts apply to all subjects outside the crofting counties (as defined in the 1955 Crofters Act) which are holdings under the 1911 Act. The subjects comprised in this definition are those held under a lease from year to year or for a longer period, by a tenant who resides on or within two miles of his holding and who by himself or his family cultivates the holding with or without hired labour, and he or his predecessor in the same family has provided all or most of the buildings or other permanent improvements on the holding without receiving from the landlord or his predecessor fair consideration or payment therefor,\textsuperscript{22} and the rent of which did not exceed £50 per annum on April 1, 1912 (the date of coming into operation of the Act), unless the subjects do not exceed 50 acres in extent (1911 Act, s. 2 (I)).

The Act constituted (s. 24) the Scottish land court with a general supervisory jurisdiction over small landholdings. The general provisions of the Acts which the court is to apply cannot, for reasons of space, be enumerated here. Suffice it to say that they are similar in intent though not identical in purport with the provisions of the Agricultural Holdings Acts—hence there are provisions for application to the land court to fix a fair rent, for security of tenure, succession to the lease and such matters. There are also provisions designed to cope with the problems of the special economic class of persons to whose welfare they are directed—as, for example, sections 21 of the 1911 Act and 13 of the 1919 Act allowing aged of infirm landholders, with the permission of the land court, to assign their holdings to their wives or heirs on intestacy.

(2) Crofters

There is scarcely a period of Scottish history at which the Highlands have not been "a problem." The depopulation of the crofts led to the setting up in the 1880s of the Napier Commission and the subsequent Act

\textsuperscript{16} 49 & 50 Vict. c. 59.
\textsuperscript{17} 1 & 2 Geo. 5, c. 49.
\textsuperscript{18} 3 & 4 Eliz. 2, c. 21.
\textsuperscript{19} 1 & 2 Geo. 5, c. 49.
\textsuperscript{20} 9 & 10 Geo. 5, c. 97.
\textsuperscript{21} 21 & 22 Geo. 5, c. 44.
\textsuperscript{22} Where such improvements have not been provided by the landholder, or have been paid for by the landlord, the holder is known as a statutory small tenant, and is outwith the provisions of the Acts, save as provided by s. 32 of the 1911 Act.
of 1886. In 1951 it was clear that the decaying crofts were still as problematic as they had been seventy years before, and so a fresh commission, the Taylor Commission, was set up and on the basis of its Report the 1955 Crofters (Scotland) Act was passed to regulate the position of crofters. It has recently been amended by the 1961 Crofters (Scotland) Act. The Acts apply only to the "crofting counties" specified in section 37 (1) of the 1955 Act, viz., Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland. In these counties, a croft is defined by section 3 of the 1955 Act as (a) a holding which was a small landholding or statutory small tenancy on the date of coming into operation of the Act, or (b) a holding registered as a croft subsequent to that date in pursuance of section 4 of the 1955 Act, as amended by section 2 (1) of the 1961 Act, providing for the registration as crofts of holdings of which the annual rent does not exceed £50 or of which the area does not exceed 75 acres (exclusive of pasturage). The Secretary of State has power, if he thinks fit, to register as a croft a holding greater in size or with a higher rent (1961 Act, s. 2 (2)).

The Acts set up a Crofters Commission to reorganise and regulate crofting and to promote the interests of crofters generally. They vest legal as opposed to administrative jurisdiction in most crofting matters in the land court (1961 Act, s. 4). For the statutory code of tenure once more the Acts themselves must be consulted.

II

URBAN TENANCIES

by

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1. RENT RESTRICTIONS ACTS

These Acts originated as emergency legislation in the early part of the 1914–18 war when, owing to the cessation of building, the shortage of working-class houses became acute and rents threatened to rise alarmingly. The Acts apply mainly to houses let unfurnished and their broad effect is to control rents and to give tenants security of tenure. It is not possible to contract out of the Acts.

The 1920 Increase of Rent and Mortgage (Restrictions) Act,23a which is still the principal Act, gave landlords limited powers to increase controlled rents but it was 1954 before a further increase—a "repairs increase"—was permitted. During the inter-war years, the area of control was gradually reduced by various measures of decontrol but the outbreak of war in 1939 saw the control limit restored to the 1920 level of £90 rateable value and it was not until the Rent Act, 1957,24 that a start was again made with the process of general decontrol.

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23 9 & 10 Eliz. 2, c. 58.
23a 10 & 11 Geo. 5, c. 17.
24 5 & 6 Eliz. 2, c. 25.
The chief Acts comprised in this code of rent control are the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939 (nine Acts, referred to in the footnotes by their respective years and known collectively as "the Rent Acts"), Part II of the Housing (Repairs and Rents) (Scotland) Act, 1954,25 and the Rent Act, 1957.26 A summary of the main provisions of these Acts is given below.

Houses to which the Acts apply

The Rent Act, 1957, decontrolled (a) all dwelling-houses in Scotland of rateable values on November 7, 1956, exceeding £40; and (b) tenancies created by a lease or agreement, to someone other than a sitting controlled tenant, coming into operation at or after July 6, 1957, of dwelling-houses with rateable values on November 7, 1956, of £40 or less (1957 Act, s. 11 (1) and (2)). The Acts accordingly now apply only to dwelling-houses, rated on November 7, 1956, at £40 or less, which were let before July 6, 1957, to the present sitting tenant (or to a previous tenant whose widow or member of his family has succeeded to the tenancy under the Acts and is occupying the house (see p. 899)). When the tenant of a controlled house removes, the house becomes decontrolled (except where the tenancy comes to an end because of overcrowding under the Housing (Scotland) Act, 1950.27,28 (1957 Act, s. 11 (6)).

The Secretary of State for Scotland is given power to reduce, by order, the rateable value limit for control from such date as he may specify but any such order cannot take effect until it has been approved by Parliament (1957 Act, s. 11 (3) and (7)).

For the purposes of the Acts, "dwelling-house" means a house or part of a house let as a separate dwelling and includes a flat; it may even include a single room if it is let as a separate dwelling (1920 Act, s. 12 (2) and (8); 1933 Act, s. 16 (1) 29).

The chief categories of tenancies and houses outwith the Acts, apart from houses decontrolled by the Rent Act, 1957, are lettings by local authorities, new town development corporations and housing associations (including the Scottish Special Housing Association) (1939 Act,28 s. 3 (2) (c) and 8 (d); 1954 Act, s. 25); certain houses let together with a substantial amount of land or other premises (1920 Act, s. 12 (2) (iii); and see 1939 Act, s. 3 (3)); Crown property (except sub-tenancies to which the Crown-Lessees (Protection of Sub-Tenants) Act, 1952.29 applies); houses let at least that two-thirds of the rateable value (being the yearly value in the valuation roll for 1914–15 for "old control" houses and in the roll at May 16, 1939, for "new control" houses) (1920 Act, s. 12 (7) and 18 (1) (a); 1939 Act, ss. 7 and 8 and Sched. I; and Valuation and Rating (Scotland) Act,30 1956, Sched. III, para. 8); tied houses occupied by an employee by virtue of his contract of service and not under a tenancy; tenancies with the use of furniture or with attendance where the amount of rent

25 2 & 3 Eliz. 2, c. 50.
26 5 & 6 Eliz. 2, c. 25.
27 14 Geo. 6, c. 34.
28 23 & 24 Geo. 5, c. 32.
29 2 & 3 Geo. 6, c. 71.
30 15 & 16 Geo. 6 & 1 Eliz. 2, c. 40.
31 4 & 5 Eliz. 2, c. 60.
fairly attributable to the use of furniture or the attendance forms a “substantial” portion of the whole rent; and tenancies with board (1920 Act, s. 12 (2) (i); 1939 Act, s. 3 (2) (b)).

Rent
The maximum rent recoverable in respect of a controlled house is arrived at by taking the standard rent and adding to it any of the permitted increases which apply to the house.

Standard Rent
The “standard rent” (1920 Act, s. 12 (1) (a); 1933 Act, s. 6; 1939 Act, Sched. I) means in general the rent at which the house was let (i) on August 3, 1914, in the case of “old control” houses (that is, those which were controlled immediately before September 2, 1939), and (ii) on September 1, 1939, in the case of “new control” houses (that is, those brought under control by the 1939 Act). If the house was not let on the appropriate date, the standard rent is the rent at which it was last let before that date or, if it was let for the first time after that date, the rent at which it was first let. Under section 16 and the Third Schedule to the Valuation and Rating (Scotland) Act, 1956, in consequence of the abolition of owners’ rates and the levying of all rates on occupiers, the rents payable under existing tenancies were reduced from May 1957 by the amount of owners’ rates paid in the year 1956–57 and standard rents and previous permitted increases were also reduced correspondingly from the same date.

The Landlord and Tenant (Rent Control) Act, 1949, provides that where a “new control” house was let for the first time after September 1, 1939, and the standard rent was therefore the rent at which it was then let, the landlord or tenant may apply to the local rent tribunal to fix the reasonable rent for the house and the rent so fixed, if it differs from the existing standard rent, becomes the new standard rent (1949 Act, s. 1).

Permitted Increases
The increases in rent permitted by the Acts are as follows:

Improvements. 12½ per cent. (formerly 8 per cent.) of any expenditure by the landlord on improvement or structural alteration (including additional or improved fittings and fixtures, but excluding expenditure on decoration or repairs) (1920 Act, s. 2 (1) (a); 1933 Act, s. 7; 1939 Act, Sched. I; Housing (Scotland) Act, 1949, 1962, s. 16).

Rates. The full amount of the rates where the landlord is responsible for payment thereof under the House Letting and Rating (Scotland) Acts, 1911 and 1920 (1920 Act, ss. 2 (1) (b) and 18 (1) (a) and (b); 1939 Act, Sched. I).

Repairs Increase. One-half of the rent recoverable immediately before August 30, 1954, and as so long as the house is in good and tenantable

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32 1920 Act, s. 12 (2) (i); 1923 Act, s. 10 (1); 1939 Act, s. 3 (2) (b); and see Palser v. Grinling [1948] A.C. 291; affg. [1946] K.B. 631, and Property Holding Co., Ltd. v. Mischeff [1948] A.C. 291; affg. [1946] K.B. 645.
33 1949 Act, s. 1.
34 12, 13 & 14 Geo. 6, c. 40.
35 10 & 11 Eliz. 2, c. 28.
36 1 & 2 Geo. 5, c. 58.
36 10 & 11 Geo. 5, c. 8.
repair and fit for human habitation and provided the landlord has satisfied an expenditure test by carrying out work of repair to a value of not less than three fifths of the 1954 rent during the twelve months immediately before service of the notice of increase. If the landlord is responsible for part only of the repairs to the house, the amount of the repairs increase and the expenditure test limit are reduced proportionately (1954 Act, ss. 16 and 23 and Sched. I; 1957 Act, s. 9 (1)).

Both the repairs increase, and the 1957 Act increase referred to below, are recoverable notwithstanding anything in the terms of the tenancy or statutory tenancy or any enactment (1954 Act, s. 16 (1); 1957 Act, s. 7 (1)), and accordingly they may be claimed during the currency of an existing tenancy without the necessity of terminating that tenancy.

1957 Act Increase. One-quarter of the rent recoverable immediately before August 30, 1954, if and so long as the house is in good and tenantable repair and fit for human habitation. If the landlord is responsible for part only of the repairs to the house, the increase is proportionately reduced. The 1957 Act increase is an alternative to the repairs increase and cannot be charged at the same time as that increase (1957 Act, ss. 7 and 8 (2)).

Increase in Cost of Services. An increase may be claimed to cover the rise between September 1939 and August 1954 in the cost of services provided by the landlord of a controlled house the standard rent of which is the rent under a letting which began on or before September 1, 1939 (1954 Act, s. 31). While the standard rent must be fixed with reference to a pre-war letting, the present tenancy need not be the same letting.

Increases under the 1920 Act. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, allowed increases of 15 per cent. and 25 per cent., 40 per cent. in all, of the net rent (that is, the standard rent less any rates paid by the landlord at the date by reference to which the standard rent was fixed) to be added to the rents of old control houses, subject to a proportionate reduction of the 25 per cent. if the landlord was responsible for part only of the repairs (1920 Act, s. 2 (1) (c) and (d)).

Certificate of Disrepair

Where the tenant of a controlled house in respect of which the repairs increase or the 1957 Act increase has been charged considers that the house is not in good and tenantable repair or is in some other respect unfit for human habitation, he can apply to the local authority for a certificate of disrepair. If the certificate is granted, the tenant can withhold payment of the increase until the necessary work of repair is carried out and the certificate is revoked by the local authority (1954 Act, s. 18; 1957 Act, s. 8). The common law remedy of retention of rent is not available to a statutory tenant of a house which the landlord has failed to keep wind- and watertight.38

Rent Book

The landlord of a controlled house is not required to provide a rent book except where the rent is payable weekly, but if a rent book (or other similar document) is in fact provided, it must contain a prescribed

37 See p. 895.
form of notice (1933 Act, s. 14; S.I. 1957/1044 (and see 1920 Act, s. 14 (2); 1933 Act, s. 8 (2); and 1938 Act, Sched. II)). Where the rent is payable weekly, it is an offence for the landlord not to provide a rent book (1938 Act, s. 6).

**Premiums**

Subject to certain exceptions, no person may as a condition of the grant, renewal, continuance or assignation of a controlled tenancy require the payment of any premium in addition to the rent, or the making of any loan (whether secured or unsecured) (Landlord and Tenant (Rent Control) Act, 1949, s. 2; 1954 Act, ss. 29 and 30; 1957 Act, s. 14; and see 1920 Act, s. 15 (2)). Where the purchase of any furniture, fittings or other articles has similarly been required as a condition of the grant, etc., of a controlled tenancy and the price exceeds the reasonable price of the articles, the excess is treated as if it were a premium (1949 Act, s. 3; and see Landlord and Tenant (Furniture and Fittings) Act, 1959 40).

**Recovery of Possession by Landlord**

So long as a contract of tenancy exists, the landlord can obtain a decree of removal only if he is entitled to possession under the contract and under the Acts. When the contractual tenancy is terminated, the tenant may retain possession of the house as a "statutory tenant" by virtue of the provisions of the Acts. But protection is given only to a tenant who occupies the house as his residence or, if temporarily absent, intends to return to reside in the house within a reasonable period.41

As it is not possible to contract out of the Acts, any undertaking by the tenant to remove on the termination of his tenancy cannot be enforced by the landlord. The tenant can only be deprived of his rights by actually giving up possession of the house or by a decree or removal granted by the court.

Under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1933 Act, s. 3 (1)), the court may not grant a decree of removal unless it considers it reasonable to do so and either (a) suitable alternative accommodation is or will be available for the tenant, or (b) the case falls within one of the grounds referred to in the following paragraph. The court must consider in every case whether it would be reasonable to grant decree.

The grounds upon which a decree of removal may be granted by the court without proof of alternative accommodation are set out in the First Schedule to the Act of 1933. They include, for example, non-payment of rent or other breach of the conditions of tenancy; nuisance to adjoining occupiers; sub-letting of the whole house without consent of the landlord; and that the house is reasonably required by the landlord (unless he became landlord by purchasing the house after November 7, 1956 (see 1957 Act, Sched. VI, para. 21)) for occupation as a residence for himself or his son or daughter over eighteen years of age or his father or mother.

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39 1 & 2 Geo. 6, c. 26.
40 7 & 8 Eliz. 2, c. 64.
41 1920 Act, s. 15 (1); Skinner v. Geary [1931] 2 K.B. 546; Menzies v. Mackay, 1938 S.C. 74.
Decree will not be granted on the last ground if the court is satisfied that greater hardship would be caused by granting decree than by refusing it (1933 Act, Sched. I, para. (h)), but the onus of proving greater hardship is on the tenant.42

General

Succession on death of tenant

On the death of a tenant, his widow, if residing with him at the time of his death, becomes the tenant and enjoys the protection of the Acts. If the tenant leaves no such widow, or was a woman, a member of the family who was residing with the tenant for not less than six months immediately before the death may, if he or she so desires, become the new tenant (1920 Act, s. 12 (1) (g); 1933 Act, s. 13; 1935 Act,46 s. 1; 1954 Act, s. 33). "Members of the family" has been held to include, for example, a husband, brother and sister, grandchild, stepchild and adopted child but does not include servants or lodgers.

This provision operates once only and, accordingly, on the death of a person who has succeeded to the tenancy in this way the tenancy comes to an end and does not pass to any other person residing in the house.44

Position of a Sub-tenant

The sub-tenant of part of a controlled house which is lawfully sub-let unfurnished as a separate dwelling is entitled to the protection of the Acts (1920 Act, ss. 5 (5) and 15 (3); 1923 Act,49 s. 7; 1933 Act, s. 4 and Sched. I, para. (d); 1938 Act, Sched. II; 1954 Act, s. 32), and where the principal tenancy is determined the sub-tenant is deemed to become the direct tenant of the landlord. The Acts do not, however, entitle a tenant to sub-let in breach of his tenancy agreement and if the sub-let was not lawful the sub-tenant, while he may be protected against the principal tenant, is not protected against the landlord.

Notice to Quit

The Rent Act, 1957, provides that no notice by a landlord or a tenant to quit any premises let as a dwelling shall be valid unless it is given not less than four weeks before the date on which it is to take effect (1957 Act, s. 16). This provision is not limited to houses controlled by the Rent Acts. It applies to all lettings, furnished or unfurnished, which are terminable by notice to quit and to council houses as well as to those privately owned.

Heritable Securities

As the landlord of a controlled house is restricted in the rent which he can charge, so he in his turn is protected to some extent against a heritable creditor. The Rent Acts apply to heritable securities over one or more dwelling-houses falling within the Acts, whether or not the whole of

43 25 Geo. 5, c. 13.
45 13 & 14 Geo. 5, c. 13.
the bonded property is within the Acts, except (1) where the security includes other land, and the rateable value of the dwelling-houses is less than one-tenth of the rateable value of the whole land comprised in the security, and (2) where the security is over old control houses and was created after July 2, 1920. Securities over new control houses are within the Acts whatever the date of the security (1920 Act, ss. 12 (1) (f), (4) and (5) and 18 (1) (a); 1939 Act, Sched. I).

The creditor is restricted both as regards the rate of interest chargeable (1920 Act, ss. 4 and 12 (1) (b) and (f); 1939 Act, Sched. I) and as regards his powers to call in the security or sell or take other steps to enforce the security (1920 Act, s. 7; 1939 Act, Sched. I).

Duration of the Rent Acts

The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, are to continue in force until six months after the date which Her Majesty by Order in Council declares to be the end of the emergency which occasioned the passing of the Act of 1939 (1939 Act, s. 1). No order has yet been made.

2

RENTS OF FURNISHED HOUSES

The Rent Restrictions Acts apply in the main only to unfurnished houses, the Acts of 1920 and 1923 expressly excluding any dwelling-house bona fide let with attendance or the use of furniture where the amount of the rent fairly attributable to the attendance or use of furniture forms a substantial portion of the whole rent.46 Control of the rents of furnished accommodation is exercised in Scotland almost wholly under the Rent of Furnished Houses Control (Scotland) Act, 1943,47 as amended by the Landlord and Tenant (Rent Control) Act, 1949, and the Rent Act, 1957.

Rent Tribunals

Under the Act of 1943, the Secretary of State has set up for all areas in Scotland rent tribunals (1943 Act, s. 1 and Sched.), each consisting of a chairman and two other members, whose chief function is to fix, on application, reasonable rents for (a) houses or rooms let with the use of furniture, whether or not any services are provided; or (b) houses or rooms let unfurnished with services (1943 Act, s. 2 (1)); or (c) rooms let to a tenant who in addition shares the use of a kitchen or other living accommodation with the landlord, even although no furniture or services are provided (1949 Act, s. 7). “Services” includes attendance, heating or lighting, hot water, and other privilege or facility connected with the occupancy (1943 Act, s. 9 (1)). Lettings with board are excluded if the value of the board forms a substantial proportion of the whole rent (1943 Act, s. 9 (3)). Before the commencement of the Rent Act, 1957, there was no limit of rent or rateable value for application to the rent tribunal, but that Act (1957 Act, s. 12) now limits the tribunal’s jurisdiction to lettings of dwellings which are within the rateable value limit for the time being for control under the Rent Restrictions Acts, that is, at present, houses or rooms of which the rateable value on November 7, 1956, was £40 or less (1957 Act, s. 11 (1)).

46 See note 32, supra.
47 6 & 7 Geo. 6, c. 44.
Rents

Application can be made to the tribunal by the lessee or lessor or by the local authority of the area in which the premises are situated (1943 Act, s. 2 (1)). After giving each party an opportunity of being heard or in his option of making written representations, the tribunal can approve the rent payable or reduce it to such sum as they consider reasonable or, if they think fit, dismiss the application (1943 Act, s. 2 (2)). The Act of 1943 contains no guidance to the tribunals on what is a "reasonable rent."

Where the amount of furniture or services provided by the lessor and the rateable value of the house bring a tenancy within the Act of 1943, but the proportion of the rent attributable to the use of furniture and to any attendance included in the services is not sufficiently "substantial" to exclude the application of the Rent Restrictions Acts to the premises, the tenancy may fall within both systems of rent control. In such a case, the rent tribunal cannot reduce the rent so as to make it less than the recoverable rent under the Rent Acts.48

After a rent has been fixed by the tribunal and entered in their register the lessor cannot charge a higher rent for the premises (1943 Act, ss. 3 and 7) even if there is a change of tenant, but if there is a change of circumstances (e.g., an increase or reduction in rates or in the cost of providing services or in the amount of furniture provided) application can be made to the tribunal by either party or the local authority for reconsideration of the rent previously fixed (1943 Act, s. 2 (3)).

The sheriff has jurisdiction to decide any question as to the application of the Act of 1943 (1957 Act, s. 19 (2)) and there is an appeal on a point of law from the decision of a rent tribunal to the Court of Session (Tribunals and Inquiries Act,49 1958, ss. 9 and 16).

Security of Tenure

The Act of 1943 gave no protection to applicants threatened with eviction because they had applied to the tribunal, but the Landlord and Tenant (Rent Control) Act, 1949, now provides for temporary security of tenure. Where an application to fix or reconsider a rent has been made to the tribunal by the lessee or the local authority, a notice to quit served on the lessee after the application does not have effect before the expiry of three months after the tribunal's decision unless the tribunal substitutes a shorter period for the three months (1949 Act, s. 17 (6)). If the tribunal have not substituted a shorter period for the initial three months, the lessee can apply to the tribunal for extensions of the period of security of tenure, and the tribunal can grant successive extensions of not more than three months at a time (1949 Act, ss. 11 and 17). There is no limit to the number of extensions that may be granted.

Rent Book

Where rent is payable weekly under any letting to which the Act of 1943 applies the landlord must provide a rent book (or other similar document) containing particulars of the rent and of the other terms and

48 1943 Act, s. 5; 1957 Act, Sched. VIII, Pt. II; and see R. v. Paddington, etc., Rent Tribunal, ex p. Bedrock Investments Ltd. [1948] 2 K.B. 413.
49 6 & 7 Eliz. 2, c. 66.
conditions of the letting (1957 Act, s. 12 (6) and (7); S.I. 1957/1044). This requirement applies whether or not the letting has actually been the subject of a reference to the rent tribunal.

Duration of Act

The Act of 1943 is at present kept in force from year to year under the annual Expiring Laws Continuance Act.

3

TENANCY OF SHOPS (SCOTLAND) ACT, 1949

The purpose of this Act is to enable the tenant of a shop who has been given notice of termination of his tenancy and who is unable to obtain a renewal on terms satisfactory to him, to apply to the sheriff for a continuance of his tenancy. The application to the sheriff must be made within twenty-one days after the service of the notice to quit and before the notice takes effect (1949 Act, s. 1 (1)). Applications are conducted and disposed of under the Small Debt Acts procedure, and the decision of the sheriff is final and not subject to review (1949 Act, s. 1 (7)).

Renewal of Tenancy

The sheriff may determine that the tenancy shall be renewed for such period not exceeding one year, at such rent and on such conditions as he thinks reasonable and, in cases where such renewal is granted, the tenant can apply to the sheriff for further renewals as if the tenancy had been renewed by agreement between the landlord and tenant (1949 Act, s. 1 (2) and (4)).

Grounds for Refusing Renewal

The sheriff may, if he thinks it reasonable, dismiss any application and he is not to renew a tenancy where he is satisfied—(a) that the tenant is in breach of a material condition of his tenancy; (b) that the tenant is notour bankrupt or, being a company, is unable to pay its debts; (c) that the landlord has offered to sell the premises to the tenant at a price to be fixed, failing agreement, by a single arbiter agreed on by the parties or appointed by the sheriff; (d) that the landlord has offered the tenant suitable alternative accommodation on reasonable terms; (e) that the tenant has given notice to quit and the landlord has in consequence sold or let the premises or taken other steps as a result of which he would be seriously prejudiced if he could not obtain possession; or (f) that greater hardship would be caused by renewing the tenancy than by refusing to renew it (1949 Act, s. 1 (3)).

Duration of Act

The Act is being continued from year to year under the annual Expiring Laws Continuance Act.

50 12, 13 & 14 Geo. 6, c. 45.
The Housing Acts contain various provisions affecting the landlord’s obligations for the repair of houses let under short leases.

Houses Let at £26 or Less

The Housing (Scotland) Act, 1950, provides that in any letting of a house for human habitation at a rent not exceeding £26 there is to be implied, notwithstanding any stipulation to the contrary, a condition that the house is, at the commencement of the tenancy, and will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation. This condition does not apply, however, if the house is let for a period of not less than three years on the terms that it will be put by the tenant into a habitable condition (1950 Act, s. 3).

Leases for Less than Seven Years

A more far-reaching implied repairs provision, and one without any rent limit, is now contained in Part VI of the Housing (Scotland) Act, 1962. It is there provided that in any lease of a house granted after June 1962 for a period of less than seven years (1962 Act, s. 26), there is to be implied a provision that the landlord will keep in repair the structure and exterior of the house and maintain in proper working order the internal installations (i) for the supply of water, gas and electricity, and for sanitation; and (ii) for space heating or heating water (1962 Act, s. 25 (1)). The standard of repair is to be determined by reference to the age, character, locality and prospective life of the house but the tenant is not relieved of his common law duty to use the premises in a proper manner and the landlord’s implied obligation does not require him to reinstate the premises in the event of damage by fire or natural disaster or to maintain anything which the tenant is entitled to remove from the house (1962 Act, s. 25 (2) and (3)). The new repairs provision does not apply to a new lease which is, in effect, a renewal of an existing lease for at least seven years of the same house to the same tenant, or to a tenancy of an agricultural holding within the meaning of the Agricultural Holdings (Scotland) Act, 1949 (1962 Act, s. 26 (3) and (4)).

The sheriff, on an application made to him under the Small Debt Acts procedure, may authorise the inclusion of provisions in a lease excluding or modifying the new repairs provision if it appears to him reasonable to do so and if both parties to the lease agree (1962 Act, s. 27).
APPENDIX D

ABRIDGED BIBLIOGRAPHY

General Comment on the Literature and Written Sources of Scots Law
The present bibliography aims to set out the standard works used by the legal profession in Scotland. It does not pretend to catalogue what a fully equipped library would contain. Volume 5 of Sweet and Maxwell's Legal Bibliography (1937) contains over a hundred pages devoted to Scots law, much of the material being of historical interest. Cumulative supplements to this publication are issued from time to time. The present bibliography is concerned with modern Scots law and not with Scottish legal history—as to which most of the relevant authorities are mentioned in the Legal Bibliography of Sweet and Maxwell, in the first volume of the Stair Society Publications entitled The Sources and Literature of the Law of Scotland, and in subsequent volumes of the same series. Volume 20 of the series was published in the year 1958. All books referred to are published in Edinburgh unless otherwise stated.

STATUTES

Statutes Revised, 3rd edition. Published in London by Her Majesty's Stationery Office.
(This is a United Kingdom revision comprising Scottish Statutes from 1707–1948.)

(A number of these statutes are still important in practice, but they were not revised as were the English pre-Union Statutes in the 3rd edition of Statutes Revised.) (Secondhand only.)


Scottish Current Law Statutes—issued in parts periodically through the year—Green, Edinburgh.
(Note: The Scottish Statutes have not been published in the Scots Law Times after 1948.)


Edinburgh Gazette—twice weekly.

Acts of Sederunt.
(Regulating adjective law in the Court of Session.) Codified H.M.S.O. 1913, and since superseded quoad Rules of Court by Rules enacted in Act of Sederunt (Rules of Court) Consolidation and Amendment Act, 1948. These consolidated Rules of Court are published by H.M.S.O. 1948 and in the Parliament House Book, published annually by Green, Edinburgh.

Acts of Adjournal.
(Regulating criminal procedure.) See Parliament House Book.
CASE REPORTS

(Decisions by the Scottish Courts on Election Cases, Income Tax, Pensions Appeals, Development Cases, etc., which are concerned with United Kingdom legislation will be found in the special series of the reports dealing with these questions. Scottish Appeals to the House of Lords which are deemed to be of general interest are published in the Appeal Cases series, published by the Incorporated Council of Law Reporting in England as well as in the Scottish Reports. Not all Scottish Appeals to the House of Lords are, however, published in this series. An article upon the printed Law Reports 1540–1935 with tabular statement of all the reports is contained in Vol. 1, Stair Society Publications at p. 42.)

Session Cases—Published monthly—Oliver and Boyd, Edinburgh.

A volume of Session Cases comprises decisions of the Court of Session, the Lands Valuation Appeal Court, the Court of Justiciary, and the House of Lords. Occasionally the Justiciary Reports are bound separately. Citation—S.C., J.C., S.C. (H.L.). Session Cases were in the hands of private reporters until 1907, and from 1907 the citation is, e.g., 1907 S.C. 15. The earlier Session Cases consist of five series, referred to by the initial letter of the editor’s or reporter’s name. These series are:

Shaw—16 volumes, 1821–38. (Cited, e.g., (1831) 10 S. 2).
Dunlop—24 volumes, 1838–62.
Macpherson—11 volumes, 1862–73.
Rettie—25 volumes, 1873–98.
Fraser—8 volumes, 1898–1906.

The reports of decisions of the House of Lords in Scottish cases appear at the beginning of the Session Cases, and are cited thus: (1872) 10 M. (H.L.) 1; 1907 S.C. (H.L.) 5. The older House of Lords cases are to be found in private reports. These are:

Robertson’s Reports—1 volume, 1707–27.
Paton’s Reports—6 volumes, 1726–1821.
Dow’s Reports—6 volumes, 1813–18.
Bligh’s Reports—4 volumes, 1819–21.
Shaw’s Reports—2 volumes, 1821–24.
Wilson and Shaw’s Reports—7 volumes, 1825–34.
Shaw and M’Lean’s Reports—3 volumes, 1835–38.
M’Lean and Robinson’s Reports—1 volume, 1839.
Robinson’s Reports—2 volumes, 1840–41.
Bell’s Reports—7 volumes, 1842–50.
Macqueen’s Reports—4 volumes, 1851–65.
Paterson’s Reports—2 volumes, 1851–73.

Separate series of Criminal Reports appeared from 1819–1917, and the various series are referred to by the name of the reporter. From 1874 Justiciary Cases were also included in the volumes of Session Cases and since 1917 the series issued by individual reporters have gone into abeyance.

Criminal (Justiciary) Cases are reported in the Justiciary Reports, Shaw—1 volume, 1819–31.
Swinton—2 volumes, 1835–41.
Broun—2 volumes, 1842–45.
J. Shaw—1 volume, 1848–52.
Irvine—5 volumes, 1851–67.
Couper—5 volumes, 1868–85.
White—3 volumes, 1885–93.
Adam—7 volumes, 1893–1916.

The older Scottish cases are reported in:
Morison’s Dictionary—22 volumes, 1540–1808. (Citation, e.g., (1703) M. 1062.) There are five supplementary volumes known as Brown’s Supplement.
The Faculty Collection—19 volumes and 1 part, 1752–1825. (Cited thus—January 10, 1812, F.C.)
Murray—Jury Court Cases, 5 volumes, 1815–30.

There are also other collections of cases, such as:
Elchies’ Decisions (2 volumes, 1733–54).
Hume’s Decisions (1 volume, 1781–1822).
Bell’s Octavo and Folio Cases (2 volumes, 1790–95).
Pitcairn—Criminal Trials 1488–1624 (3 volumes).
McLaurin—Criminal Cases, 1774.
Arnot—Criminal Trials 1536–1784.

Session Notes. Monthly. Publication discontinued in 1947, the ground covered by this series being already adequately covered by Notes on Recent Decisions in the Scots Law Times. (Cited, e.g., 1936 S.N. 17).

Scots Law Times Reports. Weekly. Green and Son, Edinburgh. These include House of Lords, Court of Session, Justiciary, Lands Valuation Appeal Court, and Teind Court decisions in one series, and also Notes of Recent Decisions and Sheriff Court and Lyon Court Reports, all of which are bound together. The method of citation is, e.g., 1949 S.L.T. 8; 1949 S.L.T. (Notes) 12; 1949 S.L.T. (Sh.Ct.Rep.) 15; 1949 S.L.T. (Lyon Ct.). (Series began 1893).


Scottish Jurist (Sc.Jur.)—1829–73.
Scottish Current Law—Monthly digest and Year Book of legislation and case law.
Scots Digest published by Scots Law Times Reports. 1800 to date.
Faculty Digest published by Session Cases Reports. 1868 to date.
INSTITUTIONAL WRITERS (1600-1826)

Professor George Joseph Bell:


Sir George Mackenzie, *The Institutions of the Law of Scotland*, 1684 and eight editions to 1758.

Viscount Stair, *The Institutions of the Law of Scotland* (1681, 1693, 1759; and 2 vols. 1826 and 1832—1832 edition with More's Notes is normally used).

Criminal Law


ENCYCLOPAEDIAS, DICTIONARIES AND GENERAL TEXTBOOKS

These books may be consulted as an introduction to all specific topics mentioned below. In addition the reports of the Law Reform Committee for Scotland now (1962) eleven in number.

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* So far as possible references are given both to the 1681 Edition (Glendook’s Acts, folio) and to the Record Edition (A.P.S.). Dual references after 1681 refer to Sessional publications of Acts posterior to Glendook’s Acts and to the Record Edition. Though the Record Edition is more authoritative, Glendook’s Acts have been frequently quoted in court and in legal treatises, and it has been thought often more convenient in the actual text of the book to use Glendook’s enumeration of Chapters rather than that of the Record Edition. This comparative table may assist research.

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